A TREATISE

ON

THE LAW OF WAIVER

BY

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TO
MY WIFE
FOR LOVING ASSISTANCE
AND TO MY MOTHER FOR KIND EN-
COURAGEMENT, AND THUS TO THE TWO
MOST DEAR IN ALL THE WORLD, AS A
MEMENTO OF APPRECIATION, THIS
WORK IS AFFECTIONATELY
INSCRIBED
R. D. B.

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PREFACE.

The only excuse requisite to be advanced on the part of a writer of a book on any subject of the law is a belief that the work will assist the members of a busy profession in sifting the golden grains from the masses of foreign material in which they are embedded, and render lighter and speedier the task of fitting to the facts of any particular case the principles of law by which they are to be governed. Without offering it as an excuse therefor, I submit this reason as a basis for presenting this volume to the profession.

The law of Waiver has been consigned to a haphazard growth, the principles of which have in some measure or to some extent insinuated themselves into every subject of the law but have received no recognition as a separate and distinct subject in themselves. Yet no subject deserves more and receives less consideration. Its principles are far-reaching. The instances of its application are multitudinous. And the fact that no work is extant dealing with the subject and exemplifying its ramifications of the law is remarkable when we note the tomes and tomes at large dealing with nearly every other individual subject of the law.

The plan I have sought to follow has been to present a distinct arrangement of subjects, giving to each a chapter, with the object of attaining a method of ready reference. For each principle announced, I have sought to submit authorities bearing directly upon the facts as given, with authorities touching in some manner the general principle in-

volved. Needless to say, I have despaired of citing every decided case on the law of Waiver, although some five thousand are noted in this volume.

Where inharmony exists among the courts as to any question discussed, I have endeavored to present the several holdings showing the conflicting views, together with my own views as to the better rules and the reasons inducing same. In some instances I have ventured to disagree with principles that are firmly established by judicial decision, recognizing the fact, however, that such opinion carries only the effect of inducing the practitioner to pause and deliberate as to whether such established principles are, in fact, well founded.

I have gone to considerable labor in referring the citations to the various publications in which the cases are reported that time and work to the practitioner may be economized. That errors—perhaps many of them—have crept in, it would be vain to deny, but nothwithstanding imperfections, it is hoped that some assistance may be received from these pages; and upon such considerations, the work is consigned to the mercies of an ever-charitable profession.

Roswell, New Mexico, R. D. B.
January 15, 1914.

CHAPTER 1.

PRELIMINARY.

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1. DEFINITION: Sec. 1. Waiver is the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit. The right abandoned or surrendered may be one arising from contract, or it may be conferred by operation of law; and, whether the one or the other, if the person possessing such right so express himself by agreement or so conduct himself in relation to the right as to manifest an intention to forego its benefits, he will be held to have waived the right and cannot later insist upon it. Or, as it has been said, Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, a party would have enjoyed. It may be proved by express declarations; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce the belief that it was his intention and purpose to waive.[1]

1. Farrow v. Ellis, 15 Gray 229. (Mass.)

Sec. 2. It may thus be seen that there are four components of a complete and valid waiver, namely: A Person, *sui juris;* an Existing Right; Knowledge on the part of the Person of the Existing Right; and an Intention of the Person having such Knowledge to surrender the Right. A waiver need not be the express avowal of an intention to surrender a right; the essence of the act being voluntary choice, it may be shown by conduct fairly and justly leading another to believe that a right has been relinquished, or by the doing or forbearing to do something inconsistent with the existence of a right or an intention to rely upon it. The intention, therefore, though being a necessary ingredient, may be inferred from conduct or from the negligence of the party to whom it is imputed. Still, a secret purpose is not enough to create a waiver, nor is the mere silence of one who is under no duty to speak; there must in every instance be either language duly expressing the intent, or conduct clearly and reasonably exemplifying it.

Sec. 3. While it is the general rule that in order for the acts or words of a person to be binding upon him as a waiver he must have acted or spoken with full knowledge of the existence of facts and circumstances attending the creation and continuance of the right he is alleged to have waived, still any action, though taken in real ignorance of a right, will be held a waiver where knowledge is presumed or imputed to the party from the circumstances of the case, or by virtue of law, or where it is his duty to inform himself and he has failed to do so.

Sec. 4. The doctrine of Waiver has in every case one of three principles for its foundation—the

concurrence of the wills of the parties; a contractual relation created by law; or estoppel induced by conduct. In either of these methods of creating a waiver, no consideration is essential to its completeness or validity, unless, indeed, it be said that the causing another to alter his position or to do something by reason of such waiver that he would not otherwise have done is a consideration therefor. But in some cases an executory promise to waive a stipulation for a party's benefit is a mere license which, unless some consideration be given therefor, may be withdrawn at any time before it is acted upon.

2. WHO MAY WAIVE RIGHTS.

A. AGENTS:—Sec. 5. The general principles governing the law of agency are applicable to matters involving the law of waiver, and it is the rule here that a waiver that may be made by a person may be made by his agent, except in certain classes of matters involving personal privileges or rights which can be waived only by the person entitled to assert them, and always on the condition that the agent attempting to waive a right belonging to his principal shall have been duly authorized thereunto. The instances in which the question of waiver by an agent most frequently arises will be found in a consideration of insurance contracts which will be hereinafter treated at length under the title Insurance.

B. ATTORNEYS:—Sec. 6. The power of attorneys to waive rights of their clients depends altogether upon the scope and condition of their employment. An attorney once employed in a case has full authority to deal with matters of practice

and procedure in the action, and may waive any right of his client therein and such waiver will be as effectual as if made by the client in person.[2] But the general rules of agency and the special rules governing attorneys will not permit the latter to dispense with matters or forego benefits to their clients which do not legitimately fall within the circumference of their employment. Thus, to illustrate, a party anticipating that suit may be brought against him, consults an attorney and employs him to defend the suit when brought. This employment, being simply as a representative in court after the parties have been lawfully and regularly brought there, would not confer upon the attorney authority to waive issuance and service of process upon his client and to enter an appearance in the case as if the process had been properly issued and served. To have power to make such a waiver, the attorney must have special employment for that purpose. And what is true of an employment such as mentioned is true of every other matter in which an attorney may act or be retained.

C. INFANTS:—Sec. 7. The ability of an infant to waive rights belonging to him depends upon the general principles governing his power to contract or to exercise other privileges given by law to persons of lawful age. And the law being that all contracts of an infant, except certain reserved classes, are, if not void, at least voidable, it follows that as far as the law of waiver is concerned it has to do with only his voidable contracts and such

2. No. Cent. Ry. Co. *v.* Rider, 45 Md. 24.

civil rights as arise out of these, together with his rights in any criminal proceeding against him which he possess similarly with those of legal age.

Sec. 8. It is the general rule that the contracts of an infant are not binding upon him, that he has the right to disaffirm them if he desires to do so, and may disaffirm before he comes to legal age or within a reasonable time thereafter, the time in some cases being fixed by statute. Like any other voidable contract, that of an infant, if not illegal, is binding upon him until disaffirmed in some appropriate manner. What acts will and what will not amount to a disaffirmance is a question concerning which courts are not quite in harmony, and it is a question with which we are not to deal here. The point with which we are concerned is that the principle upon which an infant, in whatever manner, elects to treat his contract as valid and binding is one of waiver, for thereby he waives the right to later avoid the contract and he must abide by its terms. But it is said that there can be no ratification during minority, and it, therefore, follows that a waiver of the right to avoid a contract on account of infancy is, in fact, a waiver by a person *sui juris* and not by an infant. Other questions of waiver by an infant, not arising from contractual relations, must be determined from a consideration of the power of a guardian to waive rights belonging to his ward; although it is incumbent upon the infant, in some instances, to take measures himself to protect his rights or they will be held waived. Thus, in the case of a judgment by default against an infant, rendered after personal service of summons upon him, while the judgment is voidable without the ap-

pointment of a guardian *ad litem,* the infant must take steps to avoid it within a reasonable time after attaining his majority or by his acquiescence he will be held to have waived the right to avoid it.[3]

Sec. 9. It may be stated as a general rule that a guardian cannot waive any right belonging to his ward to the detriment of the latter, or without a consideration. Thus, he cannot make a voluntary release of a debt due his ward[4], nor waive the security for such debt[5], nor an award favorable to his ward[6]; and he cannot waive the bar of the statute of limitations which has already run[7], nor release a claim of his ward to an inheritance[8], nor waive notice of proceedings in the settlement of an estate[9], nor, in the trial of a case, can he waive the ward's right to exclude an incompetent witness[10].

Sec. 10. Further, a guardian has no power to waive jurisdictional process for his ward and enter an appearance for him without legal service of such

3. 10 Am. & Eng. Enc. L., 692-697.
Beckley *v.* Newcomb, 24 N. H. 359.
Eisenmenger *v.* Murphy, 43 N. W. 784. (Minn.)
In re Becker, 28 Hun 207.
Blake *v.* Douglass, 27 Ind. 416.
Sharp *v.* Robertson, 76 Ala. 343.
Brown, Jur., 113.
2 Freeman, Judgments, Art. 487.
4. Horine *v.* Horine, 11 Mo. 649.
Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263; 27 S. W. 151.
5. Blanvelt *v.* Van Winkle, 29 N. J. Eq. 111.
Dibrell *v.* Smith, 40 Tex. 447.
6. Williams *v.* Mosely, 2 Fla. 304.
7. Clement *v.* Sigur, 29 La. Ann. 798.
8. Naeglin *v.* De Cordoba, 171 U. S. 638; 19 Sup. Ct. R. 35.
9. Wade *v.* Bridewell, 38 Miss. 420.
10. Hulnig *v.* Hulnig, 32 Ill. App. 519.

process upon his ward[11]. The contrary of this has been held in a case where there was no personal service of summons upon the infant defendants but their general guardian appeared and answered for them. The court held this a sufficient appearance to give jurisdiction over the persons of the infants[12], in effect saying that a general guardian has power to waive service of process upon his ward. But we doubt the safety of such doctrine, and find that the preponderance of authorities and the weight of judicial thinking is to the contrary[13].

Sec. 11. Whatever the disagreement of the courts as to the power of a guardian to waive personal service of summons upon an infant, they all agree that an attorney has no such power[14]. And it is held that an attorney cannot enter the appearance of a minor who has not been brought into court by proper process[15]. But after the infant has been

11. Hawes on Jurisdiction, Sec. 231.
Ingersoll *v.* Mangam, 84 N. Y. 622.
Greenman *v.* Harvey, 53 Ill. 386.
12. Smith *v.* McDonald, 42 Cal. 484.
And See: Simpson *v.* Belvin, 37 Tex. 674.
Wrisley *v.* Kenyon, 28 Vt. 6
13. Chambers *v.* Jones, 72 Ill. 275.
Abdil *v.* Abdil, 26 Ind. 287.
Young *v.* Young, 91 N. Car. 359.
Cormier *v.* De Valcourt, 33 La. Ann. 1168.
Frazier *v.* Pankey, 31 Tenn. 75.
Above cases of appearance by guardian *ad litem.*
Haley *v.* Taylor, 39 Ark. 104.
Kans. City Etc. Ry. Co. *v.* Campbell, 62 Mo. 585.
Winston *v.* McLendon, 42 Miss. 254.
Good *v.* Morley, 28 Ia. 188.
Genobles *v.* West, 23 S. Car. 154.
Shaefer *v.* Gates, 2 B. Mon. 453 (Ky.); 38 A. D. 164.
14. Evans *v.* Davies, 39 Ark. 235.
15. Bonnell *v.* Holt, 89 Ill. 71.
De La Hunt *v.* Holderbaugh, 58 Ind. 285.
Gamache *v.* Prevost, 71 Mo. 84.
Somers *v.* Rogers, 26 Vt. 585.
Valentine *v.* Cooley, Meigs 613 (Tenn.); 33 A. D. 166.

properly brought into court, a guardian *ad litem* appointed, and an attorney employed to represent the interests of the infant, it is thought that an attorney has the same power to waive matters of practice and procedure that he would have were he representing an adult; with always the condition circumscribing the acts of anyone dealing with and representing an infant—that such waiver shall be fairly and in good faith made.

CHAPTER 2.

CONTRACTS.

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1. WAIVER OF THE MANNER OF PERFORMANCE.

A. BY ACCEPTANCE AFTER BREACH:—

Sec. 12. It is a general rule that one who is entitled to full performance of a contract by the other party to it, by accepting the part performance offered, or by accepting the article delivered as a compliance with the contract, waives the right to object to a deficiency in the performance or in the quality of the article delivered. This general rule is subject to several exceptions to be presently noted.

Acceptance, to constitute a waiver, must be with full knowledge of the defects in performance or in the article delivered, or the defects must be discov-

erable upon inspection, or there must be such circumstances as will impute knowledge of the defects or the imperfect performance. One cannot, however, close his eyes and refuse to see defects and then defend, after an acceptance or user, against an improper performance. He must use reasonable diligence to discover defects, and if he fails to do so, his acceptance will be held a waiver of them.

Sec. 13. The question of whether an acceptance constitutes a waiver of defects or defective performance depends, to a vast extent, upon the subject-matter of the contract. One is practically always at liberty to refuse an article of personal property if specifications of a contract in regard to it have not been lived up to. But it is not so if the contract concern realty. The owner of the latter must either accept the premises with the defective work upon them—it matters not how flagrant the violations of the contract may have been by the other party—or he must abandon the use and enjoyment of his estate. And for this reason, user or occupancy of premises, if deemed and held an acceptance, do not necessarily waive improper performance of work upon them.

Sec. 14. And the necessities of the case may be such that a party is bound to accept imperfect performance for the reason that he has no alternative. In such case, acceptance cannot be held a waiver. The reason of this is clear, and it applies as well to buildings, ditches, wells and other structures on realty as to articles of personal property the acceptance of which is in the nature of things compulsory. A primary ingredient of waiver is Intent. Without it—or its substitute, misleading conduct—

there can be no waiver. And in the class of cases under consideration, where a party has no option, no course but one to pursue, he cannot be held on account of mere passive use or occupancy to have intended to forego the right to object to a defective performance. And this is true whether the acceptor knew of the defects or not. It is especially true, as an exception to the general rule, that latent defects in a work, those that are not open to inspection, are not waived by an acceptance.

Sec. 15. The authorities are not harmonious concerning the principles above outlined, but the weight of authority is in support of those announced.

Thus, in the absence of a warranty intended to survive acceptance, a vendee of personal property who, after an opportunity to inspect it, accepts it, waives the right to object on account of visible defects therein[16]. This is equally true in an executory contract for the manufacture and sale of an article of personalty[17]. But where defective machinery, made under a contract for a first class outfit, is constructed on the premises, the owner does not waive a claim for damages by accepting it and making the best of the situation[18]. An owner of realty, who en-

16. Day *v.* Mapes-Reeve Co., 174 Mass. 412; 54 N. E. 878.
Talbot Pvg. Co. *v.* Gorman, 103 Mich. 403; 61 N. W. 655; 27 L. R. A. 96.
Reed *v.* Randall, 29 N. Y. 358; 86 A. D. 305.
Pierson *v.* Crooks, 115 N. Y. 539; 22 N. E. 349; 12 A. S. R. 831.
Waeber *v.* Talbot, 167 N. Y. 48; 60 N. E. 288; 82 A. S. R. 712.
17. Studer *v.* Bleistein, 115 N. Y. 316; 22 N. E. 243; 5 L. R. A. 702.
Harris Co. *v.* Campbell, 68 Tex. 22; 3 S. W. 243.
Norton *v.* Dreyfuss, 7 Cent. Rep. 106 N. Y. 90; 12 N. E. 428.
Black River Lbr. Co. *v.* Warner, 93 Mo. 374.
18. Payne *v.* Amos Kent B. Co., 110 La. 750; 34 So. 763.
Manitowoc S. B. Works *v.* Glue Co., 120 Wis. 1; 97 N. W. 515.

ters into possession, use and enjoyment of a building constructed thereon, does not ordinarily waive a full compliance by the contractor with his contract to erect the building[19]. This has been held on the theory that the owner has no choice but to accept, and the acceptance thereby becomes in its nature involuntary[20], and on the further theory that the owner does not accept possession as he has never been out of possession[21].

Latent defects, especially, are not waived by an acceptance of the work, nor by payment of the contract price, nor by occupancy of a building built under the contract involved[22]. And even if such payment had been made, or such acceptance or occupancy occurred, the owner could recover damages for the defects subsequently discovered[23].

Sec. 16. The foregoing principles have been by a great many authorities modified or rendered less arbitrary by what has been termed "the more modern rule"[24]. This rule is only an intensive applica-

19. Monford *v.* Martin, 22 Ky. 609; 17 A. D. 168.
Kilbourne *v.* Jennings, 40 Ia. 473.
Mitchell *v.* Wiscotta Land Co., 3 Ia. 209.
Faulkner *v.* Cornell, 80 N. Y. Supp. 526.
Stewart *v.* Fulton, 31 Mo. 59.
Feeney *v.* Bardsley, 66 N. J. L. 239; 49 Atl. 443.
Yeates *v.* Ballentine, 56 Mo. 530.
Anderson *v.* Todd, 8 N. Dak. 158; 77 N. W. 599.
Hartupee *v.* Pittsburg, 97 Pa. 107.
20. Bozarth *v.* Dudley, 44 N. J. L. 304; 43 A. R. 373.
21. Smith *v.* Brady, 17 N. Y. 173; 72 A. D. 442.
Franklin *v.* Schultz, 23 Mont. 165; 57 Pac. 1037.
22. Korf *v.* Lull, 70 Ill. 420.
Ekstrand *v.* Barth, 41 Wash. 321; 83 Pac. 305.
23. Ludlow *v.* Kuhling, 119 Ky. 251; 83 S. W. 634; 115 A. S. R. 254.
Flannery *v.* Rohrmayer, 46 Conn. 558; 33 A. R. 36.
24. McDonough *v.* Marble Co., 112 Fed. 634; 50 C. C. A. 403.

tion of the doctrine of Substantial Performance, to be presently discussed. By the strict rule of the common law, one promising to deliver articles of personal property, or to perform services, or making the performance by him of any other contract a condition precedent to payment or performance by the other party, thus making the contract entire, must show a complete and full performance before he can hold the other party liable. A partial performance entitled him to nothing. He was held to the very letter of his engagement. But for many years a tendency has been manifested to soften the harshness of this doctrine, and to instill into its application principles of equity and justice that, on the one hand, will prevent you from being exempt from payment for services which I render you, and, on the other hand, will give to me only the just and reasonable compensation which those services have been worth to you.

Sec. 17. Some courts have gone very far in the application of this last-named principle. One of the first, and perhaps one of the leading cases showing an abrupt and radical departure from the strictness of the common-law rule is from the New Hampshire Supreme Court[25], and since the decision in that case, difficulty in finding and applying the true rule has increased. It has been determined by those courts that have gone farthest in their departure from the common-law rule that, even under a willful abandonment of a contract or a refusal of performance without a justifiable excuse, a party may recover what

25. Britton *v.* Turner, 6 N. H. 481.

his services or materials accepted or retained by the other party were reasonably worth, subject only to the latter's claim for damages by reason of the incomplete performance[26]. Following this line of authorities, recovery may be had for the reasonable value of work under a contract which the employe has abandoned prior to the expiration of his term of employment[27]. Thus, recovery may be had for a number of articles of personal property delivered, a greater number having been contracted to be delivered[28]; for 400 bushels of corn, 1,000 having been contracted for[29]; and for a building not completed in substantial compliance with the contract, but taken possession of by the owner[30]. The doctrine of these authorities is based on an acceptance by the promisee and a resulting benefit to him from the partial or imperfect performance by the contractor; and the acceptance is held to amount to a waiver of the defective performance.

26. McDonough *v.* Marble Co., 112 Fed. 634; 50 C. C. A. 403.
Wolf *v.* Gerr, 43 Ia. 339.
McClay *v.* Hedge, 18 Ia. 66.
Pixler *v.* Nichols, 8 Ia. 106; 74 A. D. 298.
Barnwell *v.* Kempton, 22 Kans. 99.
Hayward *v.* Leonard, 7 Pick. 181; 19 A. D. 268.
Parcell *v.* McComber, 11 Neb. 209; 7 N. W. 529; 35 A. R. 476.
Bedow *v.* Tonkin, 5 S. Dak. 432; 59 N. W. 222.
Hillyard *v.* Crabtree, 11 Tex. 264; 62 A. D. 475.
27. Britton *v.* Turner, 6 N. H. 481.
Lamb *v.* Brolaski, 38 Mo. 51.
Pixler *v.* Nichols, 8 Ia. 106; 74 A. D. 298.
McKinney *v.* Springer, 3 Ind. 59; 54 A. D. 470.
Duncan *v.* Baker, 21 Kans. 99.
Riggs *v.* Horde, 25 Tex. Sup. 456; 78 A. D. 584.
Hollis *v.* Chapman, 36 Tex. 1.
28. Saunders *v.* Short, 86 Fed. 225; 30 C. C. A. 462.
Watson *v.* Kirby, 112 Ala. 436; 20 So. 624.
29. Bowker *v.* Hoyt, 18 Pick. 555.
30. Lyon Dist. *v.* Lund, 51 Kans. 731; 33 Pac. 595.
Davis *v.* Badders, 95 Ala. 348; 10 So. 442.

Sec. 18. There is yet, however, a great array of authorities standing on the opposite extreme and holding in conformity with the old rule that where a contract is entire, strict performance is a condition precedent to the payment of the contract price, and that mere acceptance or use of the contractor's labor or its products will not constitute a waiver of full performance[31]. The reasoning on which this rule is based is well stated by the Massachusetts court, speaking through Norton, J.: "The plaintiff cannot recover on his express contract, because he has not executed it on his part, and the performance is a condition precedent to the payment. He cannot recover on a *quantum meruit* for the labor he has performed, because an express contract always excludes an implied one in relation to the same matter"[32].

Sec. 19. But between these two extremes is a better rule which has come to be recognized by most of the states, either applied in its entirety or by close approaches. Where a contractor, without fraud, or willful and inexcusable abandonment of his contract, does the work in good faith, but not in exact accord with the terms of the contract, and the departure from its terms is technical or inconsequential, the owner, by using or accepting the work or receiving benefits from it, will be deemed to have waived strict compliance and will be liable for the reasonable value of the services or materials, less any damage he may have suffered by reason of a

31. Brown *v.* Fitch, 33 N. J. L. 418.
Haslock *v.* Mayers, 2 Dutcher 284 (N. J.).
Monford *v.* Mastin, 17 A. D. 168 (Ky.).
32. Olmstead *v.* Beale, 19 Pick. 538.

failure of performance[33]. This, too, is based on the condition that the contractee has retained the work or its proceeds, and that he has received from them benefits in excess of the damage caused him by the departure from the terms of the contract[34], and on the further condition that the non-compliance with the contract was not fraudulent[35], nor willful and unjustifiable on the part of the contractor.[36]

33. Moffit *v.* Glass, 117 N. Car. 142; 23 S. E. 104.
Dutro *v.* Walker, 31 Mo. 516.
Goldsmith *v.* Hand, 26 Oh. St. 101.
Bell *v.* Teague, 85 Ala. 211; 3 So. 861.
Estop *v.* Fulton, 66 Ill. 467.
McClure *v.* Secrist, 5 Ind. 31.
Blakeslee *v.* Holt, 42 Conn. 226.
White *v.* Oliver, 36 Me. 92.
Eaton *v.* Gladwell, 121 Mich. 444; 80 N. W. 292.
Schaefer *v.* Gildea, 3 Colo. 15.
Harris Co. *v.* Campbell, 68 Tex. 22; 3 S. W. 243; 2 A. S. R. 467.
Gallagher *v.* Sharpless, 134 Pa. 134; 9 Atl. 491.
Meincke *v.* Talk, 61 Wis. 623; 21 N. W. 785; 50 A. R. 157.
Smith *v.* Packard, 94 Va. 730; 27 S. E. 586.
Fitzgerald *v.* La Pate, 64 Ark. 34; 40 S. W. 261.
Hill *v.* McKay, 94 Cal. 5; 29 Pac. 406.
Aetna, etc., Co. *v.* Kossuth Co., 79 Ia. 40; 44 N. W. 215.
Hattin *v.* Chase, 88 Me. 237; 33 Atl. 989.
Leeds *v.* Little, 42 Minn. 414; 44 N. W. 309.
Croucl. *v.* Guttmann, 134 N. Y. 45; 31 N. E. 271; 30 A. S. R. 608.
Dermott *v.* Jones, 69 U. S. 1 (2 Wall.); 17 L. Ed. 762.
Elizabeth *v.* Fitzgerald, 114 Fed. 547; 52 C. C. A. 321.

34. Broughton *v.* Smith, 142 N. Y. 674; 37 N. E. 470.
Genni *v.* Hahn, 82 Wis. 90; 51 N. W. 1096.
Remy *v.* Olds, 88 Cal. 537; 26 Pac. 355; 21 L. R. A. 645.
Peacock *v.* Gleason, 117 Ia. 291; 90 N. W. 610.

35. Schmidt *v.* No. Yakima, 12 Wash. 121; 40 Pac. 790.
Veazie *v.* Bangor, 53 Me. 51.

36. Coburn *v* Hartford, 38 Conn. 290.
Thrift *v.* Payne, 71 Ill. 408.
Escott *v.* White, 10 Bush (Ky.) 169.
Thayer *v.* Wadsworth, 19 Pick. 349 (Mass.).
Scheible *v.* Klein, 89 Mich. 376; 50 N. W. 857.
Elliott *v* Caldwell, 43 Minn. 357; 45 N. W. 845; 9 L. R. A. 52.
Posey *v.* Carth, 7 Mo. 94; 37 A. D. 183.
Ginther *v.* Schultz, 40 Oh. St. 104.
Van Clief *v.* Van Vetchen, 130 N. Y. 571; 20 N. E. 1017.

Sec. 20. The cases following the rule first above mentioned are diametrically opposed to this holding as to the breach of the contract's being willful and unjustifiable. But the last-named rule seems to cover all points of justice between man and man, saying to the contractor, as it does, "you must use every honest effort to discharge the terms of your obligation with strictness and correctness, and if, after such efforts, you have not abandoned the contract willfully, but your work under it is a substantial compliance with its conditions and of benefit to the owner, then he shall pay you as much as it is reasonably worth to him"; and, on the other hand, saying to the owner, "you shall not insist upon enjoying the garner of another's gleaning without paying for his labor, but he shall answer to you for any damage you have suffered by reason of the incompleteness or imperfection of his gleaning, and you to him only for the benefits you have received therefrom." It will be observed that the discussion herein applies only to entire contracts. If the contract be severable, of course the accepting of any portion as performance progresses renders the acceptor liable as if that portion constituted the whole contract.

Sec. 21. The acceptance or retention of benefits after the non-performance or imperfect performance of a contract is a waiver of any right to consider such

Harris *v.* Sharpless, 202 Pa. St. 243; 51 Atl. 965; 58 L. R. A. 214.
Marshall *v.* Jones, 11 Me. 54; 25 A. D. 260.
Fairfax Co. *v.* Chambers, 75 Md. 604; 23 Atl. 1024.
Steamboat Co. *v.* Wilkins, 8 Vt. 54.
Steeples *v.* Newton, 7 Or. 110; 33 A. R. 705.
Feeney *v.* Bardsley, 66 N. J. L. 239; 49 Atl. 443.
Vicksburg Co. *v.* Gorman, 70 Miss. 360; 11 So. 680.
Marchant *v.* Hayes, 117 Cal. 669; 49 Pac. 840.

breach a discharge or release from the contract[37]. But the acceptor does not thereby waive his claim for damages on account of such breach[38]. This is justly so for the reasons hereinabove adverted to, that very often one in no-wise in default may be compelled by the exigences of the case to content himself with what is offered by the other party. And in such case, in making the best of a bad situation, he should not be robbed of a remedy that would permit him to measure accounts with his adversary and thereby strike the true balance. This is especially true of contracts for the sale of chattels with either express[39] or implied[40] warranty. And though in this class of cases much difference of opinion has been expressed as to whether the vendee can accept and retain the chattels with knowledge of their defects or an opportunity to inspect them, and yet recoup his damages against the purchase price, the weight of authority is decidedly to the effect that that he does not thereby waive his right to damages on account of such defects[41]. And, whether the chattels are warranted or not, a claim for damages is not waived where, at the time of delivery, the purchaser

37. Brady *v.* Cassidy, 145 N. Y. 171; 39 N. E. 814.
38. Cannon *v.* Hunt, 116 Ga. 452; 42 S. E. 734.
Underwood *v.* Wolf, 113 Ill. 425, 23 N. E. 598; 19 A. S. R. 40.
Flannery *v.* Rohrmayer, 46 Conn. 558; 33 Atl. 36.
Bucklin *v.* Davidson, 155 Pa. St. 362; 26 Atl. 643.
Garfield Co. *v.* Ry., 166 Mass. 119; 44 N. E. 119.
Payne *v.* Lumber Co., 110 La. 750; 34 So. 763.
39. Morse *v.* Moore, 83 Me. 473; 22 Atl. 362; 23 A. S. R. 783; 13 L. R. A. 224.
40. Frith *v.* Hollan, 133 Ala. 583; 32 So. 494; 91 A. S. R. 54.
41. English *v.* Spokane Co., 57 Fed. 451.
N. W. Cordage Co. *v.* Rice, 5 N. Dak. 432; 67 N. W. 298; 57 A. S. R. 563.
Tacoma Co. *v.* Bradley, 2 Wash. 600; 26 Pac. 454; 26 A. S. R. 890.
Woodruff *v.* Graddy, 91 Ga. 333; 17 S. E. 264; 44 A. S. R. 33.

objects to the defects and stipulates that the receipt shall not be deemed an acceptance[42].

B. BY PROCEEDING UNDER THE CONTRACT AFTER A BREACH:—Sec. 22. Although one party to a contract may be in default in complying with his part of the obligation, yet if the other treat the contract as still in force and proceed under it, he will be held to have waived the default in performance[43]. And if a person having work done is at hand with fair opportunities to inspect the work as it progresses, and does make such inspection, but makes no objection to defects in the work, and accepts is as full compliance, he waives all right to thereafter claim damages for such defects as a careful inspection would have disclosed[44].

Sec. 23. But it is not every act of proceeding under a contract that will constitute a waiver of defaults theretofore made by the other party. To have this effect, the proceeding must be with knowledge that the breach exists, and the words or acts relied on as a waiver must be inconsistent with any other intention. And under this doctrine it has been held that the taking possession of a building in which defective finishing material has been put does not waive the owner's right to damages on account of such defects if an inspection would not have brought

42. Blackwood *v.* Cutting Co., 76 Cal. 212; 18 Pac. 248; 9 A. S. R. 199.
43. McCord *v.* Ry. Co., 3 La. Ann. 285.
Eyester *v.* Parrott, 83 Ill. 517.
Smith *v.* Alker, 102 N. Y. 87; 5 N. E. 791.
Murray *v.* Farthing, 6 Mo. 251.
44. U. S. *v.* Walsh, 198 Fed. 502.
Hinshorn *v.* Stewart, 49 Ia. 418.
Pierson *v.* Crooks, 115 N. Y. 316; 22 N. E. 349; 12 A. S. R. 83.

them to light until after the wood had seasoned[45]. So, delivering several loads of materials without requiring pay for same, where the contract provided for payment for each load as delivered, is not a waiver of the provision; and under the same rule, acceptance of fifty out of a hundred fish stands contracted to be delivered and refusal of the other fifty on account of defects therein cannot be held a waiver of such defects[46]. And a waiver of the right to damages for defective machinery does not occur by reason of payment of the purchase price before completion of the machinery[47]. Nor does occupancy of a building waive a right to damages for defects in the plastering thereof which only time will show and by reason of which the plastering finally falls off[48]. Nor would such be a waiver of any other defects that were not discoverable at the time possession was taken by the owner[49]. This is only another application of the rule hereinbefore mentioned that acceptance of work does not waive latent defects, or those not known to the owner and not discoverable upon inspection[50].

Sec. 24. The question of the waiver of a default in the performance of a contract in this, as in nearly all other connections, is a question of intent to be gathered from either the acts or words of the parties. And in the case of any breach as, for instance, not

45. Utah Lbr. Co. *v.* James, 25 Utah 434; 71 Pac. 986.
46. Gardner *v.* Clark, 21 N. Y. 399.
Freeman *v.* Skinner, 31 N. Car. 32.
47. Industrial Works *v.* Mitchell, 114 Mich. 29; 72 N. W. 25.
48. Monahan *v.* Fitzgerald, 164 Ill. 525; 45 N. E. 1013.
49. Spink *v.* Mueller, 77 Mo. App. 85.
50. Korf *v.* Lull, 70 Ill. 422.
Van Buskirk *v* Murden, 22 Ill. 446; 74 A. D. 163.

completing the contract within the time specified, if the contractee, with knowledge of the breach, permit the other party to continue, thereby recognizing the contract as still in force, he waives the default[51].

C. BY PREVENTING THE OTHER PARTY FROM PERFORMING:—Sec. 25. One party to a contract who, by his conduct, prevents the other party from following strictly the letter of his obligation cannot be heard to complain that the other is in default in performance, for by such preventing of full performance he waives the right to demand it[52]. And he cannot recover damages on account of such non-performance[53]. But, on the other hand, such prevention operates as a waiver or discharge of the contract[54], and if the contractor has suffered damages by reason thereof, he may recover them of the contractee[55]. And in

51. Sinclair *v.* Tallmadge, 35 Barb. 602.
Foster *v.* Worthington, 58 Vt. 65; 4 Atl. 565.
Phil. Con. Co. *v.* Seymour, 91 U. S. 646; 23 L. Ed. 341.
52. White *v.* School Dist., 159 Pa. St. 201; 28 Atl. 136.
U. S. *v.* Peck, 102 U. S. 64.
Day *v.* Jeffords, 102 Ga. 714; 29 S. E. 591.
Blodgett *v.* Company, 120 Fed. 893.
U. S. *v.* Jack, 124 Mich. 210; 82 N. W. 1049.
Laybourne *v.* Seymour, 53 Minn. 105; 54 N. W. 941; 39 A. S. R. 579.
53. Dls. of Col. *v.* Iron Works, 181 U. S. 453.
Maher *v.* Lbr. Co., 86 Wis. 530; 57 N. W. 357.
Wyandotte Ry. *v.* Brdg. Co., 100 Fed. 197; 40 C. C. A. 325.
Blymer Co. *v.* McDonald, 48 La. Ann. 439; 19 So. 459.
Davis *v.* Light Co., 57 Minn. 402; 59 N. W. 482; 47 A. S. R. 622.
Murphy *v.* Orul, 185 Pa. St. 250; 39 Atl. 959.
Antonelle *v.* Lbr. Co., 140 Cal. 309; 73 Pac. 966.
54. Stark *v.* Duvall, 7 Okla. 213; 54 Pac. 453.
Lovell *v.* Ins. Co., 11 U. S 264.
Eames *v.* Savage, 14 Mass. 425.
Mooney *v.* Iron Co., 82 Mich. 263; 46 N. W. 376.
Meyser *v.* Rehberg, 16 Mont. 331; 41 Pac. 74.
55. Langford *v.* U. S, 95 Fed. 933.
Atl. Ry. Co. *v.* Const. Co., 98 Va. 503; 37 S. E. 13.

such case, too, the contractor may recover for what he has done without showing a full performance of the contract on his part[56]. Thus, a seller of chattels who is prevented from delivering a part of the goods contracted for by the act of the vendee is released from further performance, and he may recover from the vendee the full price of the goods already delivered[57]. And where the payee of a debt was to receive in payment a certain amount of sawing annually, it was held that by his failure to furnish the logs necessary for sawing he prevented the other party from performing his part of the contract, thereby waived such performance, and could not later recover the debt[58]. Though a contract to make brick does not provide that the employer shall furnish supplies to the employe, but he understands that it will be necessary for him to do so, and he does so furnish them for a time, a discontinuance to do so will operate as a prevention of performance by the employe and release him from any further obligation under the contract[59]. Where a vendee of logs has prevented and thereby waived full performance by the vendor, the latter is still bound by a scale and measurement agreed upon as to the logs already delivered[60]. An attorney accepted a note to defend one charged with

56. North *v.* Mallory, 94 Md. 305; 51 Atl. 89.
Parker *v.* McComber, 17 R. I. 674; 24 Atl. 464; 16 L. R. A. 858.
East Granite Co. *v.* Helm, 89 Ia. 698; 57 N. W. 437.
Teakle *v.* Moore, 131 Mich. 427; 91 N. W. 636.
Newhal Co. *v.* Daly, 116 Wis. 256; 93 N. W. 12.
57. Hartlove *v.* Durham, 86 Md. 689; 39 Atl. 617.
58. Fredenburg *v.* Turner, 37 Mich. 402.
Stinson *v.* Freeman, 38 Mich. 314.
59. Rioux *v.* Ryegate Brick Co., 72 Vt. 148; 47 Atl. 406.
60. Eakright *v.* Torrent, 105 Mich. 294; 63 N. W. 293.

crime; before trial the latter committed suicide; it was held that the attorney, having been prevented by the other party from performing, could recover on the note, and that a plea of failure of consideration could not be entertained[61].

Sec. 26. A waiver of performance being attributed to the one who prevents performance by the other party, it has been held that the latter has three means of redress, any one of which he may pursue: 1. He may sue immediately for special damages; 2. He may await the expiration of the contract period and sue for full compensation; or, 3. He may sue at once on a *quantum meruit*[62]. And even in a contract void under the statute of frauds, if one party has partly performed and the other repudiates the contract, the latter cannot escape liability for such part performance[63], and he is liable even to the extent of refunding payments already received by him under the contract[64]. If in a contract to sell a mare she is to come up to certain tests, a purchaser cannot escape liability by failing or refusing to make the tests[65]. Under a contract for the sale of a heating plant in which the vendor is to have a year in which to cure any defects, the vendor may recover the contract price if the plant be removed within the year[66].

Sec. 27. The rule is very frequently applied in cases of building contracts, and in these, as in other

61. Mitcherson *v.* Dozier, 22 A. D. 116 (Ky.).
62. Beck *v.* Spice Co., 108 Ga. 242; 3 S. E. 894.
63. Lockwood *v.* Barnes, 3 Hill 128; 38 A. D. 620.
64. Moody *v.* Smith, 70 N. Y. 600.
65. Deyo *v.* Hammond, 102 Mich. 122; 60 N. W. 455; 25 L. R. A. 719.
66. Lehman *v.* Webster, 209 Ill. 264; 70 N. E. 600.

contracts, it is held that one cannot cause the other to default in his obligation and yet hold him liable for non-performance nor escape liability for such interference[67]. Thus, if repairs and alterations become necessary by reason of defective plans furnished by the owner, the contractor is not liable for damages caused thereby[68]. Where a party agreed to deliver coal for a year at a stated price, and did so during the season that the market price was above the contract price, the purchaser could not abandon the contract and refuse to take the coal during the season that the market price was below the contract price; and on his refusal to take the coal the seller could recover the difference between the market price and the contract price[69].

Sec. 28. The voluntarily making it impossible to perform a contract is equivalent to prevention; and the one so creating the impossibility imposes upon himself the liabilities above outlined as attending a prevention[70]. As where the vendee of personal property agrees to measure it in a certain way before payment, and by his act makes such measurement impossible, the vendor may recover the contract price of whatever amount he may have delivered[71].

67. Adams *v.* Burbank, 103 Cal. 646; 37 Pac. 640.
Newhal Eng. Co. *v.* Daly, 110 Wis. 256; 93 N. W. 12.
68. Coon *v.* Water Co., 152 Pa. St. 644; 25 Atl. 505.
69. Wellston Co. *v.* Franklin Co., 57 Oh. St. 182; 48 N. E. 888.
70. Blodgett *v.* Zinc Co., 120 Fed. 893.
Brewer *v.* McCain, 21 Colo. 382; 41 Pac. 822.
Christopher Co. *v.* Yeager, 202 Ill. 486; 67 N. E. 166.
Shirk *v.* Lingeman, 26 Ind. App. 630; 59 N. E. 941.
Loftus *v.* Riled, 83 Ia. 503; 50 N. W. 17.
Howard *v.* Mfg. Co., 162 N. Y. 347; 56 N. E. 980.
Vanderhoof *v.* Shell, 42 Or. 578; 72 Pac. 126.
Bishop *v.* Averhill, 17 Wash. 209; 50 Pac. 1024.
71. Harper *v.* Sterling, 84 Ill. App. 62.

Sec. 29. And if one demands performance in an illegal way, it is the same, and bears the same results as making it impossible to comply with the contract; as where an employer demands that an employe work on Sunday, in such a case it was held that the employe could quit the service and recover for his labor already performed[72]. And the same result follows if a party disables himself from performing his part of the contract[73].

Sec. 30. So, if a party refuses to treat the contract as still subsisting and binding upon him, or by his acts and conduct shows that he has abandoned it, this, in legal effect, amounts to prevention and bears with it the same rights and liabilities as if there had been an absolute physical prevention[74]. Thus, where a party ordered an engine to be made and the other party proceeded to make it, but before delivery received a countermand of the order, he was held to have been prevented from performing his part of the contract[75]. The doctrine was first promulgated by the English courts in the case of Hochster *v.* De La Tour[76], and was followed in the case of Frost *v.* Knight[77], which have ever since been held

72. Hunt *v.* Adams, 81 Me. 356; 17 Atl. 298; 3 L. R. A. 608.
73. Simmons *v.* Pomeroy, 3 Mackey 213 (D. C.)
Numerous authorities cited in 9 Cyc. 639.
74. Lake Shore Ry. *v.* Richards, 152 Ill. 59; 38 N. E. 773; 30 L. R. A. 1.
Derby *v.* Johnson, 21 Vt. 21.
Haines *v.* Tucker, 50 N. H. 311.
Smith *v.* Lewis, 24 Conn. 624; 63 A. D. 180.
Collins *v.* Delaporte, 115 Mass. 162.
2 Smith's Leading Cases, Am. Ed. 22-23.
Clark *v.* Marsiglia, 1 Denio, 43 A. D. 670.
75. Hosner *v.* Wilson, 7 Mich. 304; 74 A. D. 716.
76. L. J. Q. B., 455.
77. L. R., 7 Ex. 111.

leading cases on the subject. In this country the doctrine has been pretty generally adopted, although a contrary rule has been invoked in some instances.

It has been applied to a case of a promise of marriage where one party married another person before time for performance of the promise, and it was held that he thereby prevented performance by the other party to the contract, in legal effect waived it, and threw wide the doors of the courts for an immediate action for the breach[78].

Sec. 31. But it is said that the refusal to perform must be absolute and unequivocal[79]; and that it must be acted on by the other party, for mere assertion that a party will be unable or unwilling to perform his contract is not sufficient to constitute a waiver of performance by the other party[80].

D. CONDITION FOR PAYMENT FOR GOODS ON DELIVERY:—Sec. 32. A seller of goods to be paid for on delivery has the right to reclaim the goods if the condition as to payment be not complied with. This is the rule whether the sale be an absolute one or conditional on title not passing until the purchase price be paid. But the seller is the only one who can take advantage of this condition, and if he see fit to deliver the goods without exacting payment for them at the time, the sale will be a complete one, and the buyer cannot complain that the condition as to payment has not been complied with. If, however, the seller make an absolute

78. Burtis *v.* Thompson, 42 N. Y. 246.
See, also: 32 Ia. 409.
79. Benjamin on Sales, Art. 568.
Smott *v.* U. S., 15 Wall. 36.
80. Benjamin on Sales, Art. 568 and cases cited.

delivery of the goods sold without exacting a compliance with the condition as to payment at the time of delivery, he thereby waives the breach of the condition, the title to the property passes from him, and he will not thereafter be entitled nor permitted to reclaim the goods[81]. It is the seller's duty to demand payment in some appropriate manner, and unless he do this his delivery will be held a waiver of his right to reclaim the goods on account of the nonpayment of the purchase price at the time stipulated for[82].

Sec. 33. But waiver here, as in most other cases, is a question of intention, and there may be facts and circumstances surrounding and attending the delivery of goods that indicate that the seller did not intend, by a delivery without collecting therefor, to waive this condition, in which event a waiver will not be imputed to him, and he may reclaim and retake the goods so delivered[83]. This is especially the case where there is either an express or implied understanding that the title to the goods shall not pass from the vendor until the payment is made.

81. Scharff *v.* Meyer, 133 Mo. 428; 34 S. W. 858.
Pinkham *v.* Appleton, 82 Me. 574; 20 Atl. 237.
Witte Mfg. Co. *v.* Reilly, 11 N. Dak. 203; 91 N. W. 42.
Kingsley *v.* McGrew, 48 Neb. 813; 67 N. W. 787.
Freeport Stone Co. *v.* Carey, 42 W. Va. 276; 26 S. E. 183.
Foley *v.* Mason, 6 Md. 37.

82. Mackaness *v.* Long, 85 Pa. St. 158.
Martin *v.* Wirts, 11 Ill. App. 567.
Freeman *v.* Nichols, 116 Mass. 309.
Leavitt *v.* Rosenthal, 84 N. Y. Supp. 530.

83. Ewing *v.* Sylvester, 94 S. W. 405; (Tex. Civ. App.).
Shines *v.* Stiner, 76 Ala. 458.
Hodgson *v.* Barrett, 33 Oh. St. 63.
Hart *v.* Boston, etc. Ry., 72 N. H. 410; 56 Atl. 920.
Stone *v.* Perry, 60 Me. 48.
Dows *v.* Kidder, 84 N. Y. 121.

And while it is the presumption that where goods were delivered without requiring payment, the intention was to waive the condition as to payments being concurrent with delivery, and such is *prima facie* proof of waiver, still the presumption may be rebutted by showing a contrary understanding[84].

Sec. 34. But even where the seller demands payment at the time of the delivery of the goods, he must stand by his demand if he would exercise his right to reclaim or retake the goods. For if he vary from the terms of the agreement himself, as by extending credit to the buyer, taking security for the purchase price, or granting an additional time for payment without expressly reserving to himself title to the property, he will be held to have waived the condition as to payment and cannot later retake or reclaim the goods[85]. And his diligence in taking measures to maintain his title to the goods must be as great as is commensurate with the facts and circumstances or the nature of the case will permit, for his laches, or failure to exercise reasonable promptitude in reclaiming the goods for default in payment will be construed as a waiver of his right to reclaim them[86].

84. Fishbeck *v.* Van Dusen, 33 Minn. 111; 22 N. W. 244.
Anderson, etc. *v.* Carr-Curran Co., 58 N. J. Eq. 59; 43 Atl. 428.
Young *v.* Kans. Mfg. Co., 23 Fla. 394; 2 So. 817.
Osborn *v.* Gantz, 60 N. Y. 540.

85. Thompson *v.* Wedge, 50 Wis. 642; 7 N. W. 560.
Mich. Cent. Ry. *v.* Phillips, 60 Ill. 190.

86. Paulson *v.* Lyon, 26 Utah 438; 73 Pac. 510.
Hirsch *v.* Leatherbee Co., 60 N. J. L. 509; 55 Atl. 645.
Strother *v.* McMullen Lbr. Co., 200 Mo. 647; 98 S. W. 34.
Drake *v.* Scott, 136 Ala. 261; 33 So. 873.
Starnes *v.* Roberts, 128 Ga. 718; 58 S. E. 348.
Carter *v.* C. of W. Co., 73 Minn. 315; 76 N. W. 55.
Duagherty *v.* Fowler, 44 Kans. 628; 25 Pac. 40.

Sec. 35. When, however, default in payment is made by the buyer, the seller has two remedies, either of which he may adopt: He may disaffirm the sale and retake the goods, or he may deliver the goods absolutely and rely upon the personal responsibility of the buyer. But by electing to do one of the two, he waives the right to follow the other and must abide the result of such election and waiver[87].

2. WAIVER OF TIME FIXED FOR PERFORMANCE.

Sec. 36. In cases arising on agreements that have been broken by one party, it frequently becomes necessary to determine whether by its terms time has been made one of the important elements upon which the contract depends; in other words, whether time is of the essence of the contract. Upon this point liability or non-liability often hinges. By saying that time is of the essence of the contract is meant that the provision as to time in which an obligation must be discharged is one of the essential conditions, and one of the requirements of which are mandatory and to be disregarded at the peril of him whose duty it is to fulfill those requirements. By the overwhelming weight of authority the general rule is held to be that time is of the essence of the contract at law unless it appears from the agreement that the parties did not so regard it[88]. But in equity,

Wing *v.* Thompson, 78 Wis. 256; 47 N. W. 606.
Sprague Co. *v.* Fuller, 158 Fed. 588.

87. Marston *v.* Baldwin, 17 Mass. 606.
Heller *v.* Elliott, 44 N. J. L. 467.
Fuller *v.* Eames, 108 Ala. 464; 19 So. 366.

88. Garrison *v.* Cook, 96 Tex. 228; 72 S. W. 54; 97 A. S. R. 906; 61 L. R. A. 342.
Underwood *v.* Wolf, 13 Ill. 425; 23 N. E. 598; 19 A. S. R. 40.
Slater *v.* Emerson, 19 How. 224 (U. S.).
Shinn *v.* Roberts, 1 Spencer (N. J.) 435; 43 A. D. 636.

on the contrary, courts do not ordinarily regard time as of the essence of the contract, although if it is expressly made so the agreement will be carried out[89].

Sec. 37. It has been said, however, that ordinarily time is not of the essence of a contract. But it is when it appears from the contract that at the time of its execution the parties contemplated that a failure of the promisor to perform at the time stipulated for would subject the promissor to damages. And to make time of the essence of the contract it must appear that the parties made it essential to the contract and intended it so to be, or, otherwise said, the question is one wholly of the intention of the parties[90], and the words of the contract must clearly show this intention[91].

In treating of time, the law of waiver has to do only with contracts in which time is made of their essence; for it is elementary that where the contract fixes no time the law imposes a requirement that the performance shall be within a reasonable time[92], the reasonableness of which depends upon the facts and circumstances of each particular case[93].

Sec. 38. The consequences arising from a breach of a contract where time is of the essence, are more severe than where it is not; for, in the former, a failure to perform in the stipulated time

89. 3 Pomeroy's Eq. Jur. Sec. 1408.
Tate *v.* Pensacola Co., 37 Fla. 439; 20 So. 542; 53 A. S. R. 251.
Sanford *v.* Weeks, 38 Kans. 319; 16 Pac. 465; 5 A. S. R. 748.
Glock *v.* Howard Co., 123 Cal. 1; 55 Pac. 713; 69 A. S. R. 17.
90. Secomb *v.* Steel, 61 U. S. 20 How. 94; 15 L. Ed. 833.
Wells *v.* Smith, 7 Paige 32; 31 A. D. 274.
Miller *v.* Cox, 96 Cal. 339; 31 Pac. 161.
91. Taylor *v.* Baldwin, 27 Ga. 438; 73 A. D. 736.
92. 9 Cyc., 611 and cases cited in note 48.
93. 9 Cyc., 613, note 65.

gives the party not in default the option to consider himself discharged under the contract and to recover his damages for such breach[94]; but in the latter, he cannot consider the contract as discharged but must give the promissor a reasonable time in which to perform [95].

Sec. 39. But even if time is of the essence of the contract, and one party has bound himself, at all hazards, to perform by a certain time, this is an obligation the fulfillment of which may be waived by the party for whose benefit it was made. And if, after knowledge that the obligation has not been discharged within the time stipulated for, he should commit any act evidencing a disposition inconsistent with an intention to insist upon the provision, he will be held to have waived the default in performance. The waiver may be by express words, it may be by conduct leading the opposite party to believe that the provision as to time will not be urged, by proceeding under the contract after knowledge of the default, by otherwise recognizing the contract as existing after breach by the other party as to time, or it may be shown by a vast number of acts which an examination of the cases will disclose.

Sec. 40. If a party permit work to continue under a contract after the time-limit has expired, he waives the default for failure to complete the

94. Owen *v.* Henderson, 16 Wash. 39; 47 Pac. 215; 58 A. S. R. 17.
Staley *v.* Thomas, 68 Md. 439; 13 Atl. 53.
Sanborn *v.* Murphy, 86 Tex. 437; 25 S. W. 610.
Slater *v.* Emerson, 19 How. 224 (U. S.).

95. 2 Page, Contracts, Sec. 1159, citing.
Armstrong *v.* Breen, 101 Ia. 9; 69 N. W. 1125.
Usher *v.* Hollister, 58 Kans. 431; 49 Pac. 525.

work in time[96]. It is a waiver of a breach of a condition as to time of performance for an owner to make part payment and to urge a builder to continue after he has knowledge that the builder has failed to complete his contract within the time specified[97]. If parties to a contract treat it as in force after the time fixed for its completion, any right to complain because it has not been completed in time is waived[98]. A party notifying the other, or giving him to understand that the provision of a contract as to the time of performance would not be insisted upon, cannot be heard to say that the contract was not completed in time[99]. Continuing work under a contract after certain payments are due, and accepting part of such sums so in arrears constitute a waiver of the condition as to time of payment[100]. If payment is due at a certain time under penalty of a certain forfeiture, the forfeiture is waived by an acceptance of payment after such time[1]. And a vendor has the right to rescind the contract on account of non-payment of the purchase-price notes; he waives the right, however, by accepting payment after maturity[2].

Sec. 41. A waiver of the right to insist on a forfeiture in a contract may be implied from the con-

96. Sinclair *v.* Talmadge, 35 Barb. 602.
Foster *v.* Worthington, 58 Atl. 65.
97. Phil. Const. Co. *v.* Seymour, 91 U. S. 646; 23 L. Ed. 341.
98. Andrews *v.* Tucker, 127 Ala. 602; 29 So. 34.
99. Prentiss *v.* Lyons, 105 La. 382; 29 So. 944.
100. Bean *v.* Bunker, 68 Vt. 72; 33 Atl. 1068.
1. Stewart *v.* Cross, 66 Ala. 22.
Stow *v.* Russell, 36 Ill. 18.
Conkling *v.* King, 10 Barb. 372.
2. Phillips *v.* Hernden, 78 Tex. 378; 14 S. W. 857; 22 A. S. R. 59.
Moore *v.* Giesecke, 76 Tex. 548; 13 S. W. 290.

duct of the parties; and such waiver does appear where the parties treat the contract as still subsisting after its time-limit has expired[3]. Under a lease contract to ripen into a sale upon payment of ten annual payments of rent, even if time is of the essence of the contract, if the land owner received payment after the time stipulated for, he waives the breach and must comply with his part of the contract[4].

Sec. 42. It is the duty of the contractee to make complaint at the time of the breach of a contract that is to be completed by a certain time, and to permit the contractor to proceed and finish the work after such breach is a waiver of the right to object on that ground[5]. Accepting work after the stipulated time for completion is a waiver of the breach as to time, and the measure of recovery is the reasonable worth of the work—this being the contract price—less the actual damages to the owner by reason of the delay[6]. In a contract for erecting five houses by October 1st, which was modified in September by reducing the number to three, by acquiescing in the work and contemplating that it might take till Spring to complete it, the owner shows that he has waived the right to consider time of the essence of the contract[7]. Where the time of performance has been twice extended, and the parties treat the contract as still subsisting, the original time limit is shown to have been

3. Andrews *v.* Tucker, 127 Ala. 602; 29 So. 34.
Lapsley *v.* Howard, 119 Mo. 489; 24 S. W. 1020.
4. Davis *v.* Roberts, 89 Ala. 402; 8 So. 114; 18 A. S. R. 126.
Lessel *v.* Goodman, 97 Ia. 68; 66 N. W. 917; 59 A. S. R. 432.
Mack *v.* Dailey, 67 Vt. 90; 30 Atl. 686.
5. Jewell *v.* Schroeppel, 4 Cow. 567.
6. Orem *v.* Keetley, 85 Md. 337; 36 Atl. 1030.
7. Barnard *v.* McLeod, 72 N. W. 24 (Mich.).

waived[8]. A failure to accept an offer of arbitration provided for in an agreement as a condition precedent to bringing suit, is a waiver of the right to arbitrate[9]. Where a reasonable time is given a party in which to cut and remove timber, a delay of thirteen years waives his rights under the contract[10].

A. PERFORMANCE PREVENTED BY THE PROMISEE:—Sec. 43. If the contractor is prevented from performing his contract in the time stipulated for by some act of the promisee, such prevention amounts to a waiver by the latter of the former's failure. Thus, where a vendor has told his vendee that he would not insist upon a forfeiture in a contract if the payments were not made in time, such was held a waiver of default in the payment[11]. If one party hinder the other in his performance, it is a legal excuse for not performing in time[12]. A contractor is not liable for liquidated damages for failure to complete a building in time if the owner was in any manner to blame for the delay[13]. And this is true of contracts other than for building[14].

A policy of insurance provided that action thereon should be commenced within a year from the death of the insured. This provision was waived

8. Moore's Estate, 191 Pa. St. 600; 43 Atl. 474.
9. Jones *v.* Brown, 171 Mass. 318; 50 N. E. 648.
   Hutchinson *v.* Insurance Co., 153 Mass. 143; 26 N. E. 439.
10. Mfg. Co. *v.* Hobbs, 128 N. Car. 46; 28 S. E. 26; 83 A. S. R. 661.
11. Blair *v.* Blair, 48 Ia. 393.
12. Van Buren *v.* Diggs, 52 U. S. 11; 11 How. 461; 13 L. Ed. 771.
13. Weeks *v* Little, 89 N. Y. 566.
    Lilly *v.* Person, 168 Pa. St. 219; 32 Atl. 23.
    Tex. Ry. *v.* Rust, 19 Fed. 239.
14. Vanderhoof *v.* Shell, 42 Or. 578; 72 Pac. 126.
    Ashley *v.* Telephone Co., 25 Mont. 286; 64 Pac. 765.

where longer delay was caused by acts and representations of the insurer[15]. Where a city delays erecting piers on which a contractor is to erect a bridge, there can be no reduction of the contract price for delay in completing the bridge even though the contract provide a penalty for such delay[16].

Sec. 44. If delay in carrying out a contract was caused by failure of the contractee in carrying out or performing his part of it, he cannot recover damages from the contractor for not completing in the time stipulated; the failure of the contractee being a waiver and the waiver precluding a claim for damages[17]. Where a party recognizes a contract as still in force after the time has expired for its completion, or directs changes making a longer time necessary, he waives any breach as to time[18], and this is true whether time is expressly made of the essence of the contract or not[19].

B. TIME HELD NOT WAIVED:—Sec. 45. But the question of whether the time for the performance of a contract has been waived resolves itself into a determination of whether the party in whose favor the stipulation was made intended to forego the benefits conferred upon him by such stipulation. He need not expressly manifest such intention. It may be, and frequently is the case, that

15. Hall *v.* Union Cent. Co., 23 Wash. 610; 63 Pac. 505; 83 A. S. R. 844.
16. King Mfg. Co. *v.* St. Louis, 43 Fed. 768; 10 L. R. A. 826.
17. Williams *v.* Shields, 30 N. Y. S. R. 556.
18. Amoskeag Co. *v.* U. S., 17 Wall. 592; 21 L. Ed. 715.
Pickney *v.* Dambmann, 72 Md. 173; 19 Atl. 450.
Cornish *v.* Suydam, 99 Ala. 620; 13 So. 118.
19. Dannat *v.* Fuller, 120 N. Y. 554; 24 N. E. 815.
Ward *v.* Mathews, 73 Cal. 13; 14 Pac. 604.

the law will say to a party: "It is not known what your secret intention may have been; but your conduct has led your adversary to believe that the full letter of his obligation would not be demanded of him, and such conduct precludes you from complaining of his failure of strict performance." But it is often the case that a party is forced to pursue a course of conduct that ordinarily would release the other party from a literal discharge of his contract; and if such element of compulsion exists, he will not be held to have waived a breach of the condition inserted for his benefit. Thus, the acceptance of buildings by the defendant as they had been completed by plaintiff did not relieve the plaintiff from his obligation to have them completed by a certain time[20]. So, receiving machinery after the time specified in the contract is not a waiver of defects nor of the right to damages for its non-delivery in time[21]. And accepting payment of over-due installments, while a waiver of any forfeiture for failure to pay them in time, is not a waiver as to any future installments[22].

3. WAIVER OF TENDER OF PERFORMANCE.

A. GENERAL RULES:—Sec. 46. Tender is an offer to comply with the terms of a contract or obligation. It may be to pay money or to deliver other articles, or to perform services. Unless there has been a waiver, the debtor must comply strictly with the terms of his engagement and follow to the

20. Dermott *v.* Jones, 64 U. S. 23 How. 220; 16 L. Ed. 442.
21. Van Winkle Co. *v.* Wilkins, 81 Ga. 93; 7 S. E. 644; 12 A. S. R. 299.
22. Phelps *v.* Ill. Cent. Ry., 11 Neb. 201.

letter what the law has prescribed as the rules governing the making of a tender. The tender can be made only by the debtor or his legal representatives, and only to the creditor, his agent or legal representative. It must be of the articles provided for in the agreement, and if payment in money is called for, it must be in money that is legal tender by law. And it is not sufficient to be able and willing to pay, but the money must be actually produced, and it must be a sufficient amount to fully discharge the indebtedness. If more than enough is tendered, it must be with the intention that the creditor shall keep all, and it must not be in such condition that the creditor is required to make change. If a place be specified in the agreement, tender must be made there; and if no place be specified, it is the duty of the debtor to find the creditor and make tender to him, as no duty rests upon the creditor to make demand upon the debtor. The party making a tender may couple with it any condition provided for by law, but none other, and if he attempts to do so the tender will be insufficient.

Sec. 47. But the foregoing duties imposed by law upon a debtor may be waived or rendered unnecessary by some act of the creditor. And in waiving a tender, a party comes more nearly to doing so without intending it than in waiving any other privilege or right which the law gives him. Like the waiver of any other right, that of tender may be by express avowal or by conduct leading the debtor to believe that it would not be insisted upon. And it is often waived by implication, following the maxim, *Expressio unius est exclusio alterius;* as if you say to me that you have come to pay me what you owe

me, and I reply that it will be unnecessary to show any money as I am not bound by the contract; I will not later be heard to say that formalities of the tender had not been complied with. This is under the principle of the law of waiver hereinbefore discussed, that I have, in a legal sense, actually prevented you from performing your part of the contract and have, therefore, waived or dispensed with such performance. Likewise, refusal to accept a sum because insufficient in amount waives any formalities in the tender[23]. If at the time of tender, objection is made upon one ground, any other objection the party might have made will be considered as waived[24]. A refusal to accept a check for the only reason that it is insufficient in amount is a waiver of the objection that the offer of payment was not in legal tender[25]. Or, if the party fail to object that the tender was not made in time, such objection will be held waived[26]. And, while a valid tender can be made only in legalized currency, this requirement may be waived, and it is waived if objection be placed solely on other grounds[27]. A tender of a cer-

23. Whelan *v.* Reilley, 61 Mo. 565.
Jennings *v.* Mendenhall, 7 Oh. St. 257.
Haskell *v.* Brewer, 11 Me. 258.
24. Moynahan *v.* Moore, 9 Mich. 9; 77 A. D. 468.
Carman *v.* Pultz, 21 N. Y. 547.
Bradshaw *v.* Davis, 12 Tex. 336.
Nelson *v.* Robson, 17 Minn. 284.
Ricker *v.* Blanchard, 45 N. H. 39.
Keller *v.* Fisher, 7 Ind. 718.
25. Larson *v.* Breene, 12 Colo. 480; 21 Pac. 498.
26. Adams *v.* Helms, 55 Mo. 468.
27. Ward *v.* Smith, 7 Wall. 447 (U. S.).
Williams *v.* Rorer, 7 Mo. 556.
Fosdick *v.* Van Husom, 21 Mich. 567.
Wheeler *v.* Knaggs, 8 Oh. 169.
Lowell *v.* Henry, 6 Ala. 226.

tain sum was made by check; the payee refused to receive it on the sole ground that the contract had been ended; he thereby precluded himself from objecting to the medium of tender[28].

Sec. 48. If no objection be made as to the terms of an instrument when presented defects therein cannot afterward be insisted upon[29]. In fact, if there be any language or conduct indicating that payment or performance will be refused if offered, such offer need not be made, for the law never requires one to do a vain thing[30]. So, the refusal of an offer of payment dispenses with any further tender[31]. And where a payee declares that he will not receive money if produced, or uses equivalent language, the production of the money is thereby waived[32]. In a contract for the sale of a boat it was held unnecessary for a party to tender a conveyance stipulated for when the buyer had signified his unwillingness to accept it[33]. Where the debtor holds the money in his hands and tells the creditor that he has come to pay, but the latter replies that it would be altogether unnecessary to produce the money, there need be no

28. McGrath *v.* Gegner, 79 Md. 331; 26 Atl. 502; 39 A. S. R. 415.
29. Gilbert *v.* Mosher, 11 Ia. 498.
30. Sonia Co. *v.* Red River, 106 La. 42; 30 So. 303; 87 A. S. R. 293.
Chinn *v.* Bretcher, 42 Kans. 316; 22 Pac. 426.
31. O'Conor *v.* Morse, 112 Cal. 31; 44 Pac. 305; 33 A. S. R. 155.
McCally *v.* Otey, 99 Ala. 584; 12 So. 406; 42 A. S. R. 87.
32. Berthold *v.* Reyburn, 61 Mo. 595.
Stephenson *v.* Kilpatrick, 166 Mo. 262; 65 S. W. 773.
Guthman *v.* Kearn, 8 Neb. 507.
Ashburn *v.* Poulter, 35 Conn. 553.
Berry *v.* Nall, 54 Ala. 451.
Hall *v.* Ins. Co., 57 Conn. 105; 17 Atl. 356.
Rogers *v.* Tindall, 99 Tenn. 356; 42 S. W. 86.
Hazard *v.* Loring, 10 Cush. 267.
33. Lynch *v.* Postlethwaite, 7 Martin (La.) 69; 12 A. D. 495.

further formalities of the offer to pay[34]. A release from damages for personal injuries was alleged to have been obtained by fraud; no objection, by pleading or otherwise, was made to plaintiff's case for his failure to tender a return of the fruits of the release, and the validity of the release was insisted upon; defendant was held to have waived the necessity of a tender[35].

Sec. 49. The foregoing cases involved a waiver at the time of tender. But it is not absolutely necessary that the waiver should occur at the time of tender in order for it to be valid. It may be before or after as well as at the time of tender; as where a creditor announces in advance that a tender will not be accepted, it is thereby waived[36]. If one party to a contract notifies the other that he will no longer be bound by it, he waives the making of a tender of any sum due him under the contract[37]. In a suit for specific performance, where the defendant insists that he is not bound, no tender of the purchase price need be made before bringing suit[38].

Sec. 50. And, again, some act of the creditor may prevent an actual tender; as in a case where a party should have delivered a deed on a certain day,

34. Westmoreland *v.* De Witt, 130 Pa. St. 235; 18 Atl. 724; 5 L. R. A. 731.
Thorne *v.* Mosher, 20 N. J. Eq. 257.
35. Girard *v.* St. Louis Car Co., 123 Mo. 358; 27 S. W. 648; 45 A. S. R. 556; 25 L. R. A. 514.
36. Duffy *v.* Patton, 74 Me. 396.
Hampton *v.* Speckenagle, 1 Ad. 704 (Penn.).
Dorsey *v.* Barbee, 12 A. D. 296 (Ky.).
Hoyt *v.* Sprague, 61 Barb. 497.
37. McPherson *v.* Fargo, 10 S. Dak. 611; 74 N. W. 1057; 66 A. S. R. 723.
Potter *v.* Taggart, 54 Wis. 401; 11 N. W. 678.
38. Wright *v.* Young, 6 Wis. 127; 70 A. D. 453.

and the party to have received it willfully evaded him so that it could not be tendered, the facts were held equivalent to a tender[39]. And where one party is at the proper place at the proper time to make an offer of performance and the other party intentionally evades tender, it is thereby waived[40]. And a waiver also occurs where the creditor refuses to stay in the room long enough for the money to be counted out to him[41]. And a waiver may occur after the time when the tender should have been made. Thus, a tender of cattle under a contract within the specified time is waived by an acceptance of them afterward[42].

B. ACTS HELD NOT A WAIVER:—Sec. 51. But the bare refusal to receive the amount due under the contract, coupled with a demand for a larger amount, have been held not to amount to a waiver of a tender of proper performance[43]. And where one refers another offering him a tender to his attorney, but does not refuse to accept and makes no objection, and does not intimate that the tender would not be required, such facts were held not to amount to a waiver[44]. A refusal of a tender, but accompanied by a demand for the production of the money does not excuse a tender[45]. And a tender is not waived where there is merely an uncommuni-

39. Borden *v.* Borden, 5 Mass. 67; 4 A. D. 32.
40. Noyes *v.* Clark, 7 Paige 179; 32 A. D. 620.
Sharp *v.* Todd, 38 N. J. Eq. 329.
Southworth *v.* Smith, 7 Cush. 391.
Gilmore *v.* Holt, 4 Pick. 258.
41. Schayer *v.* Loan Co., 166 Mass. 322; 39 N. E. 1110.
42. Emery *v.* Langley, 1 Idaho 694.
43. Dunham *v.* Jackson, 6 Wend. 22.
44. Strong *v.* Blake, 46 Barb. 227.
45. Neiderhauser *v.* Ry. Co., 131 Mich. 550; 91 N. W. 1028.

cated intention of the creditor not to accept the offer[46].

4. WAIVER OF FORFEITURES.

A. GENERAL RULES:—Sec. 52. The law winks at forfeitures; equity closes its eyes upon them. And the disfavor in which they are held is so great that if, by any construction, they can be denied without making new contracts for parties, that course will usually be pursued. A forfeiture is a financial punishment provided for the benefit of one party at the expense of the other for his dereliction in the performance of some duty enjoined upon him. And while the one upon whom such obligation rests must see to it that the conditions he has agreed to perform are complied with, if he would escape the penalty provided for his failure to so perform, it is not in every instance of his default that his adversary shall be permitted to invoke the forfeiture. For the latter may have so conducted himself as to be the direct cause of a contractor's dereliction, and in such event he cannot take advantage of a state of facts that his own conduct has induced. If it is the fault of the party for whose benefit a forfeiture has been provided that some condition has not been complied with, such party will not be permitted to profit by his own wrong, and the forfeiture will be denied him[47]. This is only another way of saying that a party may waive the benefit of a forfeiture provided for his advantage. And, like other waivers, those in this connection may occur by expression of the

46. Bluntzer *v.* Dewees, 79 Tex. 272; 15 S. W. 29.
47. Dement *v.* Bonham, 26 Ill. 158.

party himself, by acts signifying an intention to forego the benefit of the provision, or by conduct misleading to the other party and inducing an honest belief in the existence of such intent. And, as forfeitures are not looked upon with favor, if once waived they will not be assisted by the courts.

Sec. 53. Slight acts are sufficient to show a waiver, as, for instance, a landlord's acceptance of rent after his right to a forfeiture for non-payment has accrued[48]. And where a railroad company induced a shipper to go to the expense and trouble of making out a claim for damages as suggested by its agent, it was held to have waived the right to a forfeiture inserted in the contract for its benefit[49]. A forfeiture will be deemed waived by any agreement, declaration or course of conduct on the part of him who is benefitted by such forfeiture which leads the other party honestly to believe that by conforming thereto the forfeiture will not be incurred.

Sec. 54. A party may cause the inference of a waiver of his right to a forfeiture by his silence when it is his duty to speak; as where a lessee in arrears for rent told his landlord that he would credit the amount of the rent on a note owed him by the landlord, but the latter made no reply, any right to a forfeiture existing at that time was waived[50]. And a right to a forfeiture may be waived in advance of its accrual; for if a party should state to his con-

48. Garnhart *v.* Finney, 4 Mo. App. 449; 93 A. D. 303.
Williams *v.* Vanderbilt, 145 Ill. 238; 34 N. E. 476; 36 A. S. R. 486.
49. Hudson *v.* No. Pac., 92 Ia. 231; 60 N. W. 608; 54 A. S. R. 550.
50. Johnson *v* Douglas, 73 Mo. 168.

tractor that a forfeiture provided for the former's benefit would not be insisted upon, he would not later be heard to demand the forfeiture, especially if the statement had been acted upon by the other party[51].

Sec. 55. A waiver may also be shown where a party entitled to a forfeiture proceeds under the contract after the accrual of such right. Thus, a plaintiff had conveyed certain property to the defendant in consideration of his future support. He left the premises for eleven weeks because of alleged breach of condition, but afterward returned and stayed a year and a half. By proceeding under the terms of the conveyance and accepting further support, it was held that he waived his claim to a forfeiture for any breach prior to his departure[52]. And a party entitled to a forfeiture must proceed to assert his right, for usually delay or other slight circumstances will be treated as a waiver[53]. The following pertinent quotation is from an insurance case: "It may be broadly asserted that if, in any negotiations or transaction with the insured, after a knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the assured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived."[54]

B. IN DEEDS AND LAND CONTRACTS:—

Sec. 56. Courts are frequently called upon to construe and enforce contracts for the sale of land in

51. Blair *v.* Blair, 48 Ia. 393.
52. Dunklee *v.* Hooper, 37 Ill. 225.
53. Allen *v.* Dent, 4 Lea 676.
Catlin *v.* Wright, 13 Neb. 558; 14 N. W. 530.
54. Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410.

which a forfeiture is provided for the non performance of certain conditions. It is perfectly legitimate and proper for parties to provide for such penalties, and, in the absence of fraud, circumvention, waiver or some other act affording a legal excuse for the breach of the condition, courts will uphold and enforce such terms as the parties have agreed upon. But here, as in the case of any other right, a forfeiture may be waived by the party entitled to it, and the general rules hereinbefore announced apply in this class of contracts. Accordingly, it has been held that a party waives his right to a forfeiture for a default of his vendee if he takes no steps toward a rescission till the time when the contract was to have been completed[55]. And in a case where a payee agreed to an extension of time for payment, he was held to have precluded himself from insisting upon a forfeiture for failure of payment at maturity unless he had first demanded payment[56]. The right to declare a forfeiture is waived where a vendor continues to act under the contract after default, even where time is of the essence of the contract[57]. And if, after the accrual of his right to a forfeiture, he brings an action asking for the specific performance of the contract, he thereby loses his right to the forfeiture[58]. A forfeiture provided in a land-sale contract on default in payment of the purchase price is waived by the subsequent execution of a deed to the

55. Steele *v.* Branch, 40 Cal. 13.
56. Thayer *v.* Meeker, 86 Ill. 470.
57. Baker *v.* Bishop, etc., 45 Ill. 264.
Smith *v.* Mohn, 87 Cal. 183; 25 Pac. 644.
58. Daniels *v.* McCagg, 32 Ill. 429.

purchaser or his assignee by the original vendor[59]. If a vendee is to pay the purchase price by a time certain but makes default, a later acceptance of payment by the vendor is a waiver of his right to a forfeiture[60].

Sec. 57. Circumstances and the acts of the party for whose benefit a forfeiture has been provided may be sufficient from which to imply that his right to the forfeiture has been waived. Thus, one holding several notes for the purchase price of land, who is entitled to a forfeiture for the non-payment of any one of them, waives his right to such forfeiture if, after default, he transfers any of the subsequent notes to a *bona fide* purchaser[61]. Even if time is of the essence of a contract for the sale of land and there has been quite a delay in offering payment after the right to a forfeiture accrues, a vendor who accounts with his vendee and allows the latter to make expensive improvements and pay taxes is precluded from declaring a forfeiture after such offer of payment[62]. Delay in giving notice after default will not, of itself, constitute a waiver of a right to a forfeiture, nor will lapse of time after default alone be sufficient[63].

Sec. 58. Conditions subsequent are frequently inserted in deeds, and a forfeiture of the estate or some other forfeiture provided in case of a breach

59. Alexander *v.* Jackson, 92 Cal. 514; 28 Pac. 593; 27 A. S. R. 158.
60. Stow *v.* Russell, 36 Ill. 18.
Grigg *v.* Landis, 21 N. J. Eq. 494.
Hutchings *v.* Munger, 41 N. Y. 158.
61. Iglehart *v.* Gibson, 56 Ill. 81.
62. Allen *v.* Woodrull, 96 Ill. 11.
63. Kerns *v.* McKean, 65 Cal. 411; 4 Pac. 404.

of such a condition. A breach of these conditions, also, may be waived by the party entitled to their performance. A party does waive his right to such a forfeiture by treating the contract and the condition as still subsisting after a breach[64]. And the condition once dispensed with, or its breach waived, is gone forever and cannot later be insisted upon[65]. Where there is a condition subsequent in a deed, the grantor may waive a right to a forfeiture and he will be held to have done so unless he enters for condition broken or brings ejectment[66].

Sec. 59. Where a grantee agreed, under the penalty of a forfeiture of the estate, to build a house in a certain time, but failed to do so, the grantor still being in possession, no positive act was necessary on the part of the latter in order to claim the forfeiture, and he did not waive his right thereto by failing to do some formal act[67]. "The right of entry for the breach of a condition subsequent may be waived or lost by laches. Therefore, where land was granted on the condition that it should be used as a burying ground, and that the grantees should build and keep a good fence around it, and it was used as a burying ground for more than forty-five years, but no fence was ever erected around it, and no complaint was ever made of the absence of such fence, it is then too late for the successor in interest of the grantor

64. Hubbard *v.* Hubbard, 97 Mass. 188.
65. Sharon Co. *v.* Erie, 41 Pa. St. 341.
Barrie *v.* Smith, 47 Mich. 130; 10 N. W. 168.
Dakin *v.* Williams, 22 Wend. 201.
66. Ellis *v.* Kyger, 90 Mo. 606.
67. O'Brien *v.* Wagner, 94 Mo. 93; 4 A. S. R. 360.

to enter for condition broken''[68]. Where a deed contained a provision that there should be no saloon on the premises under penalty of forfeiture of the estate, the grantor was held to have waived such restriction by subsequently conveying an adjoining tract without such condition[69]. If a conveyance contain a prohibition against the sale of liquor on the premises, it is no waiver of the condition if a single glass of liquor is sold thereon in the presence of the grantor[70].

C. IN LEASES:—Sec. 60. Waivers of rights to forfeitures occur perhaps more frequently in agreements between landlord and tenant than in any other species of contracts unless it be those of insurance. Most leases provide some condition subsequent, such as payment of rent by a certain time, a prohibition against sub-letting, or for making certain repairs and improvements, which the tenant must comply with upon pain of a forfeiture for his failure. But it is the general rule that ''any act done by the landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture''[71]. In order for a landlord to enforce a forfeiture provided for in a lease he must take active measures upon breach of the conditions. He must do some unequivocal act that would signify to the lessee in a decisive manner his election to determine the lease[72]. But unless the facts are such

68. Scovill *v.* McMahon, 62 Conn. 378; 26 Atl. 479; 36 A. S. R. 350.
69. Jenks *v.* Palowski, 98 Mich. 110; 56 N. W. 1105; 39 A. S. R. 522.
70. Plumb *v.* Tubbs, 41 N. Y. 442.
71. Webster *v.* Nichols, 104 Ill. 160.
72. Read *v.* Tuttle, 35 Conn. 25; 95 A. D. 216.
Bowman *v.* Foot, 29 Conn. 331.

as to show the creation of a new term, merely permitting the tenant to hold over without notice to quit is not a waiver of a forfeiture provided for in the lease under which the tenant entered[73].

Sec. 61. The provision in a lease for a forfeiture is for the benefit of the lessor, and a breach of the condition does not *ipso facto* render the lease void, but voidable at the option of the lessor, which option must be exercised at once if at all. "Where a lease is thus voidable, the landlord's option to avoid it should be exercised at the proper time and place"[74]. "By the terms of the lease, the term is not void by reason of a violation of the covenants *ipso facto*, but is voidable only at the option of the lessor. He may, or not, insist upon a forfeiture, and until he exercises the option reserved to declare or claim a forfeiture, the term continues. It is by his own act, and not that of the lessee, that the lease is terminated, and it is, of course, by his own omission to insist upon a forfeiture immediately upon violation of the covenant, or as soon as he has knowledge of it, that he is placed in a situation in which he may waive a forfeiture"[75]. And if the landlord, having a right to declare a forfeiture on account of some breach of condition by his lessee, chooses to waive the breach and continue the lease, the lessee cannot set up his own default as a cause of forfeiture, nor urge it as a defense to an action to affirm the lease[76].

73. Calderwood *v.* Brooks, 28 Cal. 151.
74. Bowman *v.* Foot, 29 Conn. 331.
75. Walker *v.* Engle, 30 Mo. 131.
76. Clark *v.* Jones, 1 Denio 516; 43 A. D. 706.
Wills *v.* Mfg. Co., 130 Pa. St. 222; 18 Atl. 721.
Ray *v.* Gas Co., 138 Pa. St. 576; 20 Atl. 1065; 21 A. S. R. 922.
Bowyer *v.* Seymour, 13 W. Va. 12.
Smith *v.* Miller, 49 N. J. L. 521; 13 Atl. 39.

The granting of a lease of premises to a second lessee after default in performance of conditions by the first lessee is not a waiver of a forfeiture for such default, but, on the other hand, is a manifestation of an intention to insist upon the forfeiture[77].

Sec. 62. Probably the most frequent occurrence of the waiver of forfeiture by a landlord is the acceptance by him of payment of rent after the accrual of his right to declare a forfeiture. And it is the general rule that if a landlord, after condition broken by his tenant, accept payment of rent after knowledge of such breach has been brought home to him, he waives the right to a forfeiture[78]. And the acceptance by the landlord of rent accruing after breach of a condition is a waiver of his right to a forfeiture on account of such breach[79]. Receiving or distraining for rent after the accrual of the right to a forfeiture, with knowledge of such right, is a waiver of it[80]. Receiving payment of rent in advance, knowing of a breach of condition by the tenant sufficient to work a forfeiture, is a waiver of all past breaches and operates to extend the lease for the period paid for[81]. If a delay in paying rent has been acquiesced

77. Guffy *v.* Hukill, 34 W. Va. 49; 11 S. E. 754; 26 A. S. R. 901.
All. Oil Co. *v.* Brad. Oil Co., 21 Hun 26; 86 N. Y. 638.
Munroe *v.* Armstrong, 96 Pa. St. 307.
78. Little Rock Co. *v.* Shall, 59 Ark. 405; 27 S. W. 562.
Dahm *v.* Barlow, 93 Ala. 120; 9 So. 598.
McGlynn *v.* Moore, 25 Cal. 384.
79. Gomber *v.* Hackett, 6 Wis. 323; 70 A. D. 467, citing 2 Platt on Leases, 468.
Taylor, Landlord & Tenant, Sec. 497.
Jackson *v.* Allen, 3 Cow. 229.
Bleecher *v.* Smith, 13 Wend. 530.
Collins *v.* Canty, 6 Cush. 415.
80. Camp *v.* Scott, 47 Conn. 370.
81. Brooks *v.* Rogers, 99 Ala. 433; 12 So. 61.

in by the landlord, and the tenant has thereby been induced to believe that forfeiture for non-payment in time would not be insisted upon, equity will not enforce the forfeiture[82].

Sec. 63. But a right to a forfeiture is not waived by the landlord's receiving rent from an assignee in bankruptcy, the assignment being a breach of the condition of the lease[83]. If both parties have habitually disregarded the provisions of a lease as to payment of rent, default in such payment cannot be urged as a forfeiture[84]. But a lessor does not waive his right to a forfeiture by accepting payment after notice to quit and applying it on installments due prior to the one for the payment of which the forfeiture is claimed[85]. And conditions of a continuing nature are waived only as to the past breaches where the landlord accepts payment of rent, and he does not waive his right to a forfeiture for future breaches[86]. But it has been held that a right of reentry and forfeiture must be exercised during the term, and that failure to so exercise it is a waiver of it[87]. If, after non-payment of taxes, that being imposed upon the tenant by the terms of the lease, the landlord accept payment of the rent, he thereby waives his right to a forfeiture, and a continued failure to pay the taxes does not amount to a revival of the right to declare a forfeiture[88].

82. Thropp *v.* Field, 26 N. J. Eq. 82.
83. Med. Co. *v.* Currey, 162 Ill. 441; 44 N. E. 839; 53 A. S. R. 320.
84. West. Etc. Co. *v.* De Witt, 130 Pa. St. 235; 18 Atl. 724; 5 L. R. A. 731.
85. Carraher *v.* Bell, 7 Wash. 81; 34 Pac. 469.
86. Gluck *v.* Elkan, 36 Minn. 80; 30 N. W. 446.
87. Cheatham *v.* Blinke, 1 Tenn. Ch. 575.
88. Conger *v.* Durgee, 90 N. Y. 594.

Sec. 64. Many leases give the landlord the right to declare a forfeiture if the tenant sub-lets the premises. This right may be waived, and it is waived if, after its accrual, the landlord accepts or distrains for rent accruing after the right to a forfeiture has become fixed[89]. And he waives a breach of the condition against sub-letting by accepting payment from the sub-lessee, knowing the facts as to the sub-letting[90]. But it is not waived by accepting the rent from an assignee in ignorance of the sub-letting[91]. But if he knew of the sub-letting and attempted to provide against it at the time, the waiver will still be held against him[92].

5. WAIVER OF THE RIGHT TO RESCIND.

Sec. 65. Waiver is the counter-part of election. To waive a right or course of conduct is to elect to forego the benefits of that right or to pursue another course. And it is well settled in law that a party having the privilege of following either of two inconsistent remedies who makes an election of one, commences his action thereon and prosecutes it to final judgment or receives anything of value thereunder waives the right to thereafter pursue the other inconsistent remedy[93]. And it is also the rule that

89. McKildoe *v.* Darracott, 12 Gratt. 278.
Ireland *v.* Nichols, 46 N. Y. 413.
90. Traverman *v.* Lippincott, 38 Mo. App. 478.
91. Kew *v.* Trainor, 50 Ill. App. 629: 150 Ill. 150.
92. Crouch *v.* Wabash Ry., 22 Mo. App. 315.
Gulf Ry. *v.* Settegast, 79 Tex. 256; 15 S. W. 228.
93. Fields *v.* Bland, 81 N. Y. 239.
Carter *v.* Smith, 23 Wis. 497.
Manser *v.* Jacob, 98 Mo. 331; 3 A. S. R. 531.
Ewing *v.* Cook, 85 Tenn. 332; 3 S. W. 507; 4 A. S. R. 765.
Wheeler *v.* Dunn, 13 Colo. 428; 22 Pac. 827.

he cannot abandon the remedy chosen and follow the other one[94]. The matter has been thus expressed: A man may not take two contradictory positions, and where he has the right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his settled and deliberate choice of one with knowledge or means of knowledge of such facts as would authorize a resort to either, will preclude him thereafter from going back and electing again[95].

Sec. 66. These considerations apply with great force in the rescission of contracts, and especially those induced by fraud. But in such cases it is essential to constitute a valid waiver of the right of rescission the party should have full knowledge or means of knowledge of the material facts, that he should intend to affirm the contract and abandon all right to recover for loss resulting from the fraud[96]. And the defrauded party, after discovery of the fraud has two remedies: He may rescind the contract, if he can restore what he has received under it, and sue for the consideration he has paid, or if he has not paid anything, he can repudiate the contract and rely on the fraud as a defense to an action for the consideration; or he may retain what he has

Bradley *v.* Brigham, 149 Mass. 141; 21 N. E. 301.
Thomas *v.* Joslin, 36 Minn. 1; 29 N. W. 344; 1 A. S. R. 624.
Farwell *v.* Myers, 59 Mich. 179; 26 N. W. 328.

94. Crompton *v.* Beach, 62 Conn. 25; 25 Atl. 446; 36 A. S. R. 328.
Lehman *v.* Van Winkle, 92 Ala. 443; 8 So. 870.
Bauman *v.* Jaffray, 6 Tex. Civ. App. 489; 26 S. W. 260.
O'Donald *v.* Constant, 82 Ind. 212.

95. Thompson *v.* Howard, 31 Mich. 312.

96. Cooley on Torts, 505.

received and sue for damages for the fraud, in which case he affirms the contract but does not waive his right to damages for the fraud[97]. But it has been held that if a defrauded party, after full knowledge of the fraud, refuses to repudiate the contract but expressly ratifies it, he waives his right to sue for damages[98]. It is otherwise if he has not full knowledge of the fraud, for then his ratification does not waive his right to damages[99]. And it has been said that a party to a fraudulent contract, who is not at fault, may waive his right to rescind and can then sue for the damages he has sustained; by such waiver he does not lose his right to recover for his injury[100].

Sec. 67. A party loses his right to rescind a contract induced by fraud if he bring an action to enforce it after knowing that he has such right[1], or if he discover the fraud during the progress of the action and continue the case thereafter[2]. And if a vendor, knowing of fraud in the contract, recover

97. Wilson *v.* Hundley, 96 Va. 96; 30 S. E. 492; 70 A. S. R. 837.
Baird *v.* Howard, 51 Oh. St. 57; 36 N. E. 732; 46 A. S. R. 550.
Bowen *v.* Mandeville, 95 N. Y. 237.
Cottrill *v.* Krum, 100 Mo. 397; 13 S. W. 753; 18 A. S. R. 549.

98. Nounnan *v.* Sutter Land Co., 81 Cal. 1; 22 Pac. 515.
St. John *v.* Hendrickson, 85 Ind. 350.

99. Johnson *v.* Culver, 116 Ind. 278; 19 N. E. 129.
Kraus *v.* Thompson, 30 Minn. 64; 14 N. W. 266; 44 A. R. 182.

100. Tiffnay, Sales, 119.
Matlock *v.* Reppy, 47 Ark. 148; 14 S. W. 546.
Peck *v.* Brewer, 48 Ill. 55.
Robinson *v.* Siple, 129 Mo. 208; 31 S. W. 788.
Herrin *v.* Libbey, 36 Me. 357.
Pearsoll *v.* Chapin, 44 Pa. St. 9.

1. Acer *v.* Hotchkiss, 97 N. Y. 395.
Nelson *v.* Carrington, 4 Munf. 332; 6 A. D. 519.
Pettus *v.* Smith, 4 Rich. Eq. 197.

2. Sanger *v.* Wood, 3 Johns. Ch. 416.

judgment against the vendee, he cannot follow the goods either in the hands of the vendee or a purchaser from him; nor can he claim the property if he sue for the purchase price[3]; and, conversely, payment of the purchase price after knowledge of fraud in the sale is a waiver of the right to rescind[4].

Sec. 68. There is some difference among the authorities as to whether a defrauded vendor of goods, by attaching the goods, waives his right to rescind the contract of sale. On the one hand, it is said that such attachment is a complete waiver of the right to rescind[5]. In the last case cited in the above note it is said that "as the plaintiff had an election between inconsistent remedies, as where one action is founded on an affirmance of a voidable contract, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the right of the parties once and for all; and that the institution of the attachment suit by plaintiff was such a decisive act." And it is again expressed thus: "The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance was commenced. The

3. Beloit Bank *v.* Beale, 34 N. Y. 475.
Carter *v.* Smith, 23 Wis. 499.
Morris *v.* Rexford, 18 N. Y. 552.
Lloyd *v.* Brewster, 4 Paige 537; 27 A. D. 88.
O'Donald *v.* Constant, 82 Ind. 212.
Bulkley *v.* Morgan, 46 Conn. 393.
4. Dennis *v.* Jones, 44 N. J. Eq. 513; 14 Atl. 913; 6 A. S. R. 899.
Knuckolls *v.* Lea, 10 Hump. 577.
5. Bulkley *v.* Morgan, 46 Conn. 393.
Acer *v.* Hotchkiss, 97 N. Y. 395.
O'Donald *v.* Constant, 82 Ind. 212.
Conrow *v.* Little, 115 N. Y. 387; 22 N. E. 340; 5 L. R. A. 693.

two remedies are inconsistent—by one the whole estate of the debtor is pursued in a summary manner, and the payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of contract; the other can be maintainable only by showing that there was no contract. After choosing between these two modes of proceeding, the plaintiffs no longer had an option. By bringing the first action after knowledge of the fraud practiced, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election"[6].

On the other hand it is maintained that the bringing of an attachment suit is not necessarily, nor even *prima facie* an affirmance of the contract nor a waiver of the right to rescind; and that the levy of an attachment on property as that of the defendant is not a waiver of the right of the plaintiff to seize the property as his own[7]. The courts supporting the latter doctrine, however, seem to do so with some qualification. They seem to indicate that if the attachment suit were prosecuted to final judgment the right of plaintiff to change positions and bring an inconsistent action would be gone, but that he could bring such action at any time before judgment. It has been said thus: "A creditor having elected simply to pursue one of two inconsistent

6. Conrow *v.* Little, *supra.*
7. Johnson *v.* Frew, 33 Hun 193.
Equitable Foundry Co. *v.* Hersee, 33 Hun 169.
Anchor Milling Co *v.* Walsh, 20 Mo. App. 107.
Lapp *v.* Ryan, 23 Mo. App. 136.
Johnson-B. Co. *v.* Cent. Bank, 116 Mo. 558; 22 S. W. 813; 38 A. S. R. 615.

remedies is not bound thereby but may subsequently dismiss and abandon before final judgment the one first chosen, and then pursue the other in the absence of intervening rights, injury or benefit"[8].

Sec. 69. It is difficult to concur in the reasoning of the cases holding to the latter doctrine. We think that a party, in possession of all the material facts should know his own mind, that he should be able to determine what remedy he desires to pursue, that if he be competent to contract he should be competent to say which of two remedies it is to his advantage to follow, and once having determined thereon, he should be required to abide the result of his own judgment, and not be permitted to play fast and loose either during the pendency of the action or after the final judgment therein. For by an attachment he says that the property is that of the defendant. The proceeding is re-enforced by the solemnity of an affidavit, and it is hardly in keeping with the requirements of good faith to permit him later to retract his declaration thus solemnized. And, in fact, under such doctrine there is nothing to prevent him from dismissing even his second action if he should, after filing it, conclude it not to be to his best interests, and again resort to his first action or even enter a new form of suit. The spirit of fair play demands the application of the well-settled rule that a defrauded party has but one election to rescind or affirm the contract; and his election, once made, is final and conclusive[9].

8. Johnson-B. Co. *v.* Mo. Pac. Ry., 126 Mo. 344; 28 S. W. 870; 47 A. S. R. 675.
9. Grymes *v.* Sanders, 93 U. S. 55.

Sec. 70. The authorities are agreed, however, that there cannot be an election of remedies, or a waiver of fraud or the right to rescind a contract induced by fraud unless the party had full knowledge or means of knowledge of all the material facts in the case[10]. This is under the rule applicable to all waivers that knowledge of a right is an absolute prerequisite to an abandonment of the right. But after knowledge of the fraud is brought home to a party, he must exercise his right to rescind the contract within a reasonable time thereafter or the right will be forever lost to him[11]. Or, as it has been said, a party must exercise his right promptly or it will be denied him[12]. And if he waits a considerable length of time, he will be held to have waived the right by acquiescence[13]. What is a reasonable time depends

Bigelow on Fraud, 436.
Hart *v.* Miller, 95 Va. 321; 27 S. E. 831.
Wilson *v.* Hundley, 96 Va. 96; 30 S. E. 492; 70 A. S. R. 837.
Bigelow on Estoppel, 5th Ed. 573.
Herman on Estoppel, (1886) 1177.
Thweatt *v.* McLeod, 56 Ala. 375.
Evans *v.* Montgomery, 50 Ia. 235.
Bassett *v.* Brown, 105 Mass. 551.

10. Sanger *v.* Wood, 3 Johns. Ch. 421.
Connihan *v.* Thompson, 11 Mass. 270.
Terry *v.* Munger, 121 N. Y 161; 24 N. E. 272; 18 A. S. R. 803.
Bulkley *v.* Morgan, 46 Conn. 393.

11. Bank *v.* Hiatt, 58 Cal. 234.
Whitcomb *v.* Denio. 52 Vt. 382.
Wilbur *v.* Flood, 16 Mich. 40.
Morgan *v.* McKee, 77 Pa. St. 228.
Neblett *v.* McFarland, 92 U. S. 101.
Cookingham *v.* Dusa, 41 Kans. 229; 21 Pac. 95.
Gatling *v.* Newell, 9 Ind. 572.
Taylor *v.* Short, 107 Mo. 384; 17 S. W. 970.

12. Hall *v.* Fullerton, 67 Ill. 450.
White *v.* Dodds, 42 Barb. 565.

13. 2 Pomeroy Eq. Jur. 499 and 817.
Bassett *v* Salisbury Mfg. Co., 47 N. H. 426.
Tash *v.* Adams, 10 Cush. 252 (Mass.).
Cobb *v.* Hatfield, 46 N. Y. 533.

on the facts and circumstances of each particular case. Delays for one and one-half[14], three[15], and eight years[16] have been held fatal to the right to rescind.

Sec. 71. It is further the rule that one desiring to be relieved from a contract induced by fraud must not only act promptly in repudiating the contract, but he must not do any act evidencing an intention to be bound by it. Such act will constitute a waiver of the right to rescind. For instance, remaining in possession of the subject-matter of the contract[17], making payments[18], and asking extensions of time[19] have been held sufficient to evidence a ratification, and, therefore, to constitute a waiver of the right to rescind. And the same result follows the continuing to deal with the property after knowledge of fraud in its sale as if the contract still subsisted[20]. But it is said that mere possession for a considerable time will not of itself amount to a waiver of the right to rescind[21]. And neither does a sale of part of the property amount to a waiver if the proceeds are accounted for[22]. So, receiving part of chattels under a

14. Hammond *v.* Wallace, 85 Cal. 522; 24 Pac. 837; 20 A. S. R. 234.
15. Blackman *v.* Wright, 96 Ia. 541; 65 N. W. 843.
16. Boyer *v.* East, 161 N. Y. 580; 56 N. E. 114; 76 A. S. R. 290.
17. Dennis *v.* Jones, 44 N. J. Eq. 513; 14 Atl. 913; 6 A. S. R. 899.
Knuckolls *v.* Lea, 10 Hump. 577.
18. Ruhl *v.* Mott, 120 Cal. 668; 53 Pac. 304.
Delano *v.* Jacoby, 96 Cal. 275; 31 Pac. 290; 31 A. S. R. 201.
19. Delano *v.* Jacoby, 96 Cal. 275; 31 Pac. 290; 31 A. S. R. 201.
20. Bassett *v.* Brown, 105 Mass. 551.
1 Story's Eq. Jur. (13th), p. 227.
Schubber *v.* Dietz, 83 N. Y. 300.
McClean *v.* Clapp, 141 U. S. 429.
Marshall *v.* Gilman, 47 Minn. 131; 49 N. W. 688.
21. Neblett *v.* McFarland, 92 U. S. 101.
Goodrich *v.* Lathrop, 94 Cal. 56; 29 Pac. 329; 28 A. S. R. 91.
22. Tarkington *v.* Purvin, 128 Ind. 182; 25 N. E. 879; 9 L. R. A. 607.

fraudulent contract is not a waiver of the right to damages[23]. But retaining the benefits of a fraudulent contract amounts to a waiver of the right to rescind[24]. And if a party waive his right to rescind, he at the same time loses his right of *stoppage in transitu*[25]. If a party continue to carry goods to a certain place after discovering the owner has misrepresented the distance, he waives the right to rescind his contract to carry the goods[26].

A party desiring to rescind a contract cannot hold on to such part of what he has received under it as is desirable to him and avoid the residue; and the rule is that he must return what he has received or he waives the right to rescind[27].

23. Mallory *v.* Leach, 35 Vt. 156; 82 A. D. 625.
Haven *v.* Neal, 43 Minn. 315; 45 N. W. 612.
24. Bowman *v.* Ayers, 2 Idaho 305; 13 Pac. 346; and 2 Idaho 465; 21 Pac. 405.
25. Kearney, etc., Co. *v.* Union Pac., 97 Ia. 719; 66 N. W. 1099; 59 A. S. R. 434.
26. S. & S. Ry. Co. *v.* Row, 24 Wend. 74; 35 A. D. 598.
27. Bowman *v.* Ayers, *supra.*

CHAPTER 3.

BILLS AND NOTES.

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1. IN GENERAL:—Sec. 72. As far as it is applicable to commercial paper, the law of waiver has to do almost solely with its presentment for payment, protest and notice. And it follows that a considera-

tion of the subject involves a dealing chiefly with the parties secondarily liable on the paper. Such parties have an absolute right to the formalities required by law to render their liability fixed, and, unless excused by some act of their own, these formalities must be complied with or the parties will be released from the paper. But the holder of such paper is in many instances and under many circumstances absolved from his duty in fixing liability upon the parties secondarily liable, and the liability of the latter may become absolute even in the absence of presentment, protest and notice. Prompt presentment, protest and notice are requirements of the law existing solely for the benefit of a drawer or indorser of a bill or note. It is wholly in their province to determine whether they will insist upon the fulfillment of these requirements. They may dispense with such formalities by express agreement, or by language or conduct clearly and reasonably disclosing an intention not to insist upon them. In either of such events it becomes unnecessary for the holder of a commercial instrument to take the steps otherwise required, for by the agreement or conduct of the one entitled to requir these steps they have been waived, and it would be a fraud upon the holder to permit him to suffer through the inconsistent language or conduct of the drawer or indorser.

Sec. 73. A waiver of presentment, protest and notice may be made by him who is entitled to require it either orally or in writing; and whether the one or the other, the waiver may be expressed in direct and positive terms, or it may result from an understanding between the parties from which it is reasonably to be inferred that a waiver was intended,

or it may be shown by custom[28], or implied from conduct indicating that these steps would not be required. Where statutory provisions exist governing the taking of these formal steps, of course these prevail[29]. And where a waiver has occurred, proof thereof is equivalent in every way to the taking of the steps[30]. But it is essential to every waiver of presentment, protest and notice that at the time thereof the party against whom the waiver is sought to be established must have knowledge of the facts discharging him from liability, or at least means whereby he could acquire such knowledge. Without being aware of the facts, no waiver can be imputed to him[31]. But it is not requisite that he should have knowledge of the legal effect, for he will be bound by his waiver whether he had knowledge of the law or not[32], although such has been denied by a great number of courts under a holding that the one against whom the waiver is sought to be invoked must, at the time of the alleged waiver, know the law as well as the facts[33]. The weight of judicial think-

28. Quaintance *v.* Goodrow, 16 Mont. 376; 41 Pac. 76.
Glidden *v.* Chamberlin, 167 Mass. 468; 46 N. E. 103; 57 A. S. R. 479.
Annville Bank *v.* Kettering, 106 Pa. St. 531; 51 A. R. 536.
Hyde *v.* Stone, 61 U. S. 20 How. 17; 15 L. Ed. 874.

29. Thomas *v.* Mayo, 56 Me. 40.

30. Pugh *v.* McCormick, 81 U. S., 14 Wall. 361; 20 L. Ed. 789.
Perry *v.* Rhodes, 2 Cranch C. C. 37.

31. Norris *v.* Ward, 59 N. H. 487.
Tickner *v.* Roberts, 11 La. 14; 30 A. D. 706.
Lilly *v.* Petteway, 73 N. Car. 358.
Low *v.* Howard, 11 Cush. 268 (Mass.).
Baskervill *v.* Harris, 41 Miss. 535.

32. Hughes *v.* Bowen, 15 Ia. 446.
Morgan *v.* Peet, 41 Ill. 347.
Third Bank *v.* Ashworth, 105 Mass. 503.

33. Spurlock *v.* Union Bank, 4 Hump. 336 (Tenn.).
Freeman *v.* O'Brien, 38 Ia. 407.

ing is in favor of the rule that knowledge of the law is not essential to a valid waiver, and, in fact, no good reasons exist for making here an exception to the rule that ignorance of the law is no excuse. The greater number of cases are to the contrary.

2. WAIVER CONTAINED IN THE INSTRUMENT.

A. ON FACE OF INSTRUMENT:—Sec. 74. An express waiver of presentment, protest or notice is frequently embodied in a bill or note, and in case this is done the waiver is effectual against an indorser in blank who is also the payee[34]. For by his indorsement he makes the contract on the face of the instrument his own and adopts its terms. And the same result follows whatever the provision on the face of the instrument may be, provided the words used fairly show an intention that either presentment, protest or notice shall be dispensed with, as where on the face of the instrument such expressions are used as "presentation and protest waived," "demand, protest and notice of protest waived," "the makers, indorsers and guarantors severally waive presentment for payment, notice of non-payment, protest and notice of protest." Such provisions are valid waivers as against drawers and indorsers, as they assume the liabilities attaching to the instruments by so becoming parties thereto[35]. And while this is especially true if the waiver ex-

34. Phillips *v.* Dippo, 93 Ia. 35; 61 N. W. 216; 57 A. S. R. 254.

35. Citz. Bank *v.* Millet, 103 Ky. 1; 44 S. W. 366; 82 A. S. R. 546.
State, etc., *v.* Hughes, et al., 19 Ind. App. 266; 49 N. E. 393.
Woodward *v.* Lowry, 74 Ga. 148.
Smith *v.* Lockbridge, 8 Bush. 423 (Ky.).

pressly include the drawer or indorser[36], it is yet true without this, for an indorsement implies a knowledge of all the instrument contains and precludes any defense based on matters shown on its face[37].

B. WAIVER IN INDORSEMENT:—Sec. 75. It is said that that which is written on the back of an instrument, as well as that written on the face, if relating to the contract, becomes a part of it, and a construction must be given the whole instrument in order to determine liability[38]. So, where, on the back of a note were printed the words "The indorsers waive presentment, protest and notice of dishonor", and the payee indorsed his name in another place entirely disconnected with the memorandum, and the note was transferred, it was held that the memorandum was a part of his contract and that he was bound by the waiver[39]. Somewhat contrary to this, however, it has been held that an indorsement is a contract separate and distinct from the instrument itself, although embodying its terms, and that each indorsement is independent of all others and speaks only for itself[40]. Under this latter doctrine each indorser is liable only for such indorsement as he himself makes, independent of the indorsements that have preceded his; so that if one indorser fol-

36. Loveday *v.* Anderson, 18 Wash. 322; 51 Pac. 463.
Iowa Bank *v.* Sigstad, 96 Ia. 491; 65 N. W. 407, citing 2 Daniel Negot. Inst., Art. 1092.
37. Durant *v.* Pierson, 124 N. Y. 444; 26 N. E. 1095; 12 L. R. A. 145.
38. Farmers Bank *v.* Ewing, 78 Ky. 264; 39 A. R. 231.
39. Farmers Bank *v.* Ewing, *supra.*
Polo Mfg. Co. *v.* Parr, 8 Neb. 379; 30 A. R. 830.
40. Woodman *v.* Thurston, 8 Cush. 157.

low his signature with such statement as "Presentment waived," "waiving demand and notice," "I waive demand," or any such expression intended as a waiver, subsequent indorsers do not make themselves subject to the waiver unless their indorsement specially declares so[41]. But in our opinion the rule should be turned the other way, and an indorser who writes his name, even with nothing added, under the indorsement preceding his, should be held to the contract binding the previous indorser which he has, by becoming an indorser, adopted. If a subsequent indorser desires to relieve himself from the burdens of such a previous indorsement, he should attach to his signature some form of words manifesting an intention to require the legal formalities of presentment, protest and notice to be complied with[42]. As was seen above, an indorser makes the contract contained in the face of the instrument his own. The first indorser takes up the contract of the maker in case of default. The second stands behind the first, the third behind the second, and thus through the entire line of indorsements. And to say that one indorser can assume part of the contract of his immediate predecessor and not be bound by the rest of it without a special expression to that effect, is, in our opinion, limiting the proper scope of the waiver of these formalities.

3. ORAL WAIVER.

A. CONCURRENTLY WITH INDORSEMENT:—Sec. 76. The courts are hopelessly di-

41. Jackson Bank *v.* Irons, 18 R. I. 718; 30 Atl. 420.
42. Parshley *v.* Heath, 69 Me. 90.
See: Johnson *v.* Parker, 86 Mo. App. 660.

vided in their opinions as to whether an oral waiver of presentment, protest and notice can be made by an indorser at the time of his indorsement. On the one side, it is contended that permitting evidence of an oral waiver contemporaneous with indorsement, is a violation of the rule forbidding a written instrument to be varied or contradicted by parol; and a violation of the requirement that the written instrument shall contain the entire agreement of the parties at the time of its execution. And, as has been said, the law requires that the paper shall tell its own story[43]. The courts holding to these theories deny the power of an indorser to make an oral waiver at the time of indorsement of his right to require the presentment, protest and notice otherwise demanded by law[44]. On the other side, however, it is said that evidence of an oral waiver at the time of indorsement is not a variation from the terms of a written instrument; that the written contract is merely a promise to pay the debt after the exercise of due diligence against the maker; that by such oral waiver the measure of diligence to be required of the indorsee has been settled; and if, at the time of the indorsement, the indorser promises to pay the

43. Rodney *v.* Wilson, 67 Mo. 123.

44. Farwell *v.* St. Paul Trust Co., 45 Minn. 495; 48 N. W. 326; 22 A. S. R. 742; citing:
Bank of U. S. *v.* Dunn, 6 Pet. 51 (U. S.).
Renner *v.* Bank, 9 Wheat. 581.
Dale *v.* Gear, 38 Conn. 15; 9 A. R. 353.
Bartlett *v.* Lee, 33 Ga. 491.
Barry *v.* Morse, 3 N. H. 132.
Charles *v.* Denis, 42 Wis. 56; 24 A. R. 383.
Bank *v.* Smith, 27 Barb. 489.
Campbell *v.* Robbins, 29 Ind. 271.
To same effect, see: Torbert *v.* Montague, 38 Colo. 325; 87 Pac. 1145.

note absolutely, or to pay it if the maker does not, or if any other such understanding exists, the holder will be excused from the necessity of making demand or protest or of giving notice.

Sec. 77. While there are reasons not to be passed over lightly in the doctrine first announced, and while it is sustained by a weighty line of authorities[45], still the other line of cases seem to us to be more in accordance with the reasoning and principles governing the waiver of these formalities in other connections and by other means, and we believe the greater number of courts have followed this doctrine[46].

B. SUBSEQUENT TO INDORSEMENT, BUT PRIOR TO MATURITY:—Sec. 78. An oral waiver of presentment, protest or notice may be made after the indorsement of the paper, either by an express agreement to that effect or by language from which that effect is to be adduced[47].

45. Foley *v.* Emerald Co., 61 N. J. L. 430; 39 Atl. 650.
Barry *v.* Morse, 3 N. H. 132.
Beeler *v.* Frost, 70 Mo. 186.
Kern *v.* Van Phul, 7 Minn. 74.
Johnson *v.* Ramsey, 14 Vroom 279; 39 A. S. R. 580.
Wright *v.* Liesenfeld, 93 Cal. 90; 28 Pac. 849.

46. Hazard *v.* White, 26 Ark. 174.
Sloan *v.* Gibbes, 56 S. Car. 480; 35 S. E. 408; 76 A. S. R. 559; citing: 2 Daniel Negot. Inst. 1093.
1 Parsons, Notes & Bills, 584.
Story on Bills, Art. 317.
Qiaintance *v.* Goodrow, 16 Mont. 376; 41 Pac. 76.
Cummings *v.* Kent, 44 Oh. St. 96; 4 N. E. 710.
Annville Bank *v.* Kettering, 106 Pa. St. 531; 51 A. R. 536.
Lane *v.* Steward, 20 Me. 98.
Schmeid *v.* Frank, 86 Ind. 255.
McMonigal *v.* Brown, 45 Oh. St. 499; 15 N. E. 860.

47. Hibbard *v.* Russell, 16 N. H. 410; 41 A. D. 733.
Free *v.* Kierstead, 16 Ind. 91.

The form of the expression is immaterial, the essential matter being the appearance of an intention to dispense with these steps. Thus, where the drawer of a bill told the holder to hold it without presentment for an indefinite time, it was held that such was a waiver of presentment[48]; also where the drawer or indorser knows that payment will not be made at maturity of the instrument and so informs the holder[49]; also a request by an indorser for more time, with knowledge that the maker had absconded and would not pay[50]; and a request to let a note run, together with a statement by the indorser that he would pay it when called for[51]; and where indorsers of a note tell the holder, prior to its maturity, not to do anything with it and they will pay it[52]; where instructions were given eighteen months before maturity of an instrument not to protest it, with an assurance that it would be paid when due[53]; have each been held sufficient to amount to a waiver of these steps. An indorsee of a note told his immediate indorser that he had no confidence in the other parties to the note and should look wholly to him. The latter replied that he would take it up when due if it was not paid by any other party. This was held a waiver of the right to notice of dishonor of the

48. Sheldon *v.* Chapman, 31 N. Y. 644.
49. Minturn *v.* Fisher, 7 Cal. 573.
Hunter *v.* Hoom, 64 Barb. 468.
50. Leffingwell *v.* White, 1 Johns. Ch. 99.
51. Hale *v.* Danforth, 46 Wis. 555; 1 N. W. 284.
52. Markland *v.* McDaniel, 51 Kans. 350; 32 Pac. 1114; 20 L. R. A. 96.
53. Sigerson *v.* Mathews, 20 How. 496 (U. S.).
See: Cady *v.* Bradshaw, 116 N. Y. 191; 22 N. E. 371.
Isham *v.* McClure, 58 Ia. 515.

note[54]. But where it was understood between the indorser and indorsee of a note that if the latter could not collect it from the maker he would come back to the indorser, such was held not to show a waiver of notice of non-payment[55]. And the maker and holder of commercial paper cannot by any arrangement between themselves affect the rights of the indorser[56]. The indorser or drawer has the matter within his own hands to say what degree of diligence shall be exercised by the holder in fixing liability in case of the default of the maker or acceptor. If he desire to consider as sufficient less diligence than that required by law, this is a matter of which he has full control and may circumscribe the legal requirements or dispense with them altogether by an oral waiver made between the time he attaches his name to the instrument and the maturity thereof.

C. AT MATURITY:—Sec. 79. On the day payment is due by the terms of a commercial instrument, the indorser or drawer may orally waive or render unnecessary the formalities of presentment, protest or notice as effectually as he could have done previously thereto. The same facts which would amount to a waiver prior to maturity will constitute a waiver by occurring on the day of maturity. Thus, where an indorser informed the holder that it would be useless to call upon the maker, demand and notice were held thereby waived as to such in-

54. Boyd et al. *v.* Cleveland, 4 Pick. 525 (Mass.). Lane *v.* Steward, 20 Me. 98.
55. Wright *v.* Leisenfeld, 93 Cal. 90; 28 Pac. 849.
56. Story on Notes, 291.

dorser[57]. And where an indorser admits his liability at maturity of the note and offers to "arrange the matter," and afterward by his conduct shows that he considers himself bound, such acts amount to a waiver of demand and notice[58]. So, one who, on indorsing a note, tells the indorsee to look to him alone for payment, and on the last day of grace and subsequently promises to pay the note and asks not to be pressed, waives demand and notice of non-payment by the maker[59]. A request on the day of maturity that the instrument be not protested, is, of course, a waiver of such protest and, therefore, necessarily of the other formal steps in fixing liability[60].

D. AFTER MATURITY:—Sec. 80. A waiver of presentment, protest or notice may be made orally after maturity of commercial paper as well as before[61], and any recognition of liability or evidence of an intention to pay will be sufficient to constitute a waiver whether it be by special agreement or by conduct from which continued liability is to be inferred. The most frequent occurrence of an oral waiver after maturity, however, is that produced by a special promise to pay, and on account of the importance of such promises, they will be treated separately in the succeeding sub-division.

57. Barker *v.* Barker, 6 Pick. 80 (Mass.).
58. Byles on Bills, 237.
Moyer's Appeal, 87 Pa. St. 129.
59. Sheldon *v.* Horton, 53 Barb. 23.
Qialntance *v.* Goodrow, 16 Mont. 376; 41 Pac. 76.
Markland *v.* McDaniel, 51 Kans. 350; 32 Pac. 1114; 20 L. R. A. 96.
60. Scott *v.* Greer, 10 Pa. St. 103.
61. Yeager *v.* Farwell, 80 U. S., 13 Wall. 6; 20 L. Ed. 476.
Ringe *v.* Kinball, 124 Mass. 209.

4. WAIVER AFTER DEFAULT.

A. BY PROMISE TO PAY:—(1) SUFFICIENCY OF THE PROMISE:—Sec. 81. The consideration of the cases involving facts dispensing with the legal formalities of presentation, protest and notice and fixing liability, in their absence, upon him who, otherwise, would be entitled to insist upon them presents two distinct doctrines upon which liability still exists despite the lack of compliance with these required formalities. One is that a legal presumption arises from the conduct of an indorser or drawer that these steps have been taken; the other is that by his conduct he has waived the taking of such steps. The doctrines of presumption and waiver rest upon entirely different grounds, although in many adjudications the distinction between them has not been clearly drawn nor adverted to. The former rests upon our common experience that men will not promise to do what they are under no obligation to do and what they receive no consideration for doing, and therefore a promise after laches of the holder in regard to such legal steps is presumptive evidence that the indorser knows that all things have been rightly done to hold him. Waiver is the opposite of this. The indorser is held on the ground that he expressly waives the defense which he might have set up. But no one can waive anything, of the existence of which he has no notice, and, therefore, he must be conscious at the time of a new promise of all the facts which are in law essential to discharge him from liability[62]. If the doc-

62. Glassford *v.* Davis, 36 N. J. L. 348.

trine of presumption prevails, its only effect is to shift the burden of proof. The plaintiff may rest upon the new promise and thus throw upon the indorser the double burden of showing laches and his want of knowledge thereof[63].

Sec. 82. But we are concerned here with waivers only. Presentment, protest and notice thereof may be waived by him entitled to have these steps taken as effectually after maturity of the paper on which he is holden as before its maturity, and when once waived, his liability becomes absolutely determined and he cannot urge the lack of demand, protest or notice as a defense.

Sec. 83. The most frequent occurrence of waiver after maturity of the paper and default of the holder in complying with these requirements is in the case of a new promise to pay made by the indorser or drawer. But to amount to such a waiver and to entitle the holder to recover notwithstanding the requisite formalities have not been complied with, the promise to pay must be unequivocal and unconditional, or, if conditional, it must be accepted on the conditions which it involves[64]. But the promise need not be express; it is sufficient if by reasonable intendment the lan-

63. Hazard *v.* White, 26 Ark. 280.
Lewis *v.* Brehme, 33 Md. 412.
Dickerson *v.* Turner, 12 Ind. 223.

64. Isbell *v.* Lewis, 98 Ala. 550; 13 So. 335.
Lary *v.* Young, 13 Ark. 401; 58 A. D. 332.
State Bank *v.* Bartle, 114 Mo. 276; 21 S. W. 816.
Schley *v.* Merritt, 37 Md. 352.
Torbert *v.* Montague, 38 Colo. 325; 87 Pac. 1145.

guage imports or implies a promise to pay[65]. Thus, where an indorser was called upon to pay a note and stated that in a few days he would arrange it, this was held an unconditional promise to pay and, therefore, a waiver of the laches of the holder[66]. So, a statement by the indorser that he expects he will have to pay the note, coupled with a request of the holder that he try to collect it from the maker, will operate as a waiver[67]. And the same effect was held to have resulted where the indorser procured a third person to purchase the note, concealing the fact of a discharge by the laches of the holder[68]. A waiver was also held where the indorser requested a few days time, at which date he would pay[69], and where a promise was made to arrange so that a draft could be paid[70], and a statement by the indorser that he would pay when it was in his power[71], and promising to send funds with which to take up a bill[72]. And a waiver was deduced from the action of an indorser in telling the holder that he was collecting money for the maker and not to be uneasy about the note as he would see that it was paid[73]. Likewise, where he agreed to pay the note if the holder would let it run past maturity[74].

65. Reynolds *v.* Douglass, 37 U. S., 12 Pet. 497; 9 L. Ed. 1171.
Zacharie *v.* Kirk, 14 La. Ann. 436.
66. Sigerson *v.* Mathews, 61 U. S., 20 How. 496; 15 L. Ed. 989.
67. Parsons *v.* Dickinson, 23 Mich. 56.
68. Libbey *v.* Pierce, 47 N. H. 309.
69. Hopkins *v.* Liswell, 12 Mass. 52.
70. Bryam *v.* Hunter, 36 Me. 207.
71. Donaldson *v.* Means, 4 Dall. 109.
72. Read *v.* Wilkinson, 2 Wash. C. C. 514.
73. Bryant *v.* Wilcox, 49 Cal. 47.
Jones *v.* Roberts, 191 Pa. St. 152; 43 Atl. 123.
74. Hale *v.* Danforth, 46 Wis. 554; 1 N. W. 284.
And see: Souther *v.* Kenna Bros., 20 R. I. 645; 40 Atl. 736.

Sec. 84. Where the indorser asks for an extension of time this is in effect a recognition of his liability and an implied promise to pay, and it has been held sufficient to amount to a waiver of presentment and notice[75]. It is decidedly so where the request is coupled with a promise to pay if the request is granted[76]. And the same is true of a promise that if the holder would wait a few days the note would be fixed up[77], or notifying the indorsee at the time of transfer that the time of payment had been extended by agreement, and requesting delay in presentment[78], or asking that suit be delayed till the maker could see the holder[79]; and an agreement between the parties for an extension of time has the effect of waiving or dispensing with these steps[80].

(2) CONDITIONAL PROMISES:—Sec. 85. Where, after the laches of the holder of a bill or note has discharged a drawer or indorser, the latter promises to pay, to which promise is attached some condition, the promise does not amount to a waiver of the requirements of presentment, protest and notice unless the condition be accepted; but upon acceptance of the condition the promise becomes ab-

Leonard *v.* Gary, 10 Wend. 504.
Taunton Bank *v.* Richardson, 5 Pick. 436 (Mass.).

75. Cady *v.* Bradshaw, 116 N. Y. 188; 22 N. E. 371; 5 L. R. A. 557.
Sheldon *v.* Horton, 43 N. Y. 93; 3 A. R. 669.
Walker *v.* Graham, 21 La. Ann. 209.
Amoskeag Bank *v.* Moore. 37 N. H. 539; 75 A. D. 156.

76. Hunter *v.* Hook, 64 Barb. 468.

77. Bush *v.* Gilmore, 45 App. Div. 89; 61 N. Y. Supp. 682.

78. Glaze *v.* Ferguson, 48 Kans. 157; 29 Pac. 396.

79. Gove *v.* Vining, 7 Met. 212; 39 A. D. 770.

80. Ross *v.* Hurd, 71 N. Y. 14.
Sebree Bank *v.* Moreland, 96 Ky. 150; 28 S. W. 153; 29 L. R. A. 305.
Ala. Bank *v.* Rivers, 116 Ala. 1; 22 So. 58; 67 A. S. R. 95.

solute and amounts to a waiver of these steps. Thus, where there was an offer of payment of part of a note, which offer was not accepted, it was held insufficient to constitute a waiver[81]. The same was held of an offer to give a new note[82], to pay in confederate money[83], or in depreciated currency[84]; and any other condition attached to a promise will have the same effect[85].

(3) INSUFFICIENT PROMISES:—Sec. 86. The promise of an indorser or drawer of an instrument, made after its maturity and after default of the holder regarding presentment, protest and notice, must be positive, unequivocal and unconditional (unless the conditions are accepted), or it will not be a waiver of the default of the holder. Thus, the mere statement of the party that he would rather pay the note than be sued will not be sufficient to constitute a promise to pay a note from which he has been discharged by the laches of the holder[86]. And a mere admission that the note would have to be paid could not be construed as a waiver of the laches[87], nor could a statement that the note must be paid[88], nor a remark to a third person that the indorser would see the note paid[89]. Nor, is an offer to give collateral security for the promissor's lia-

81. Long *v.* Dismer, 71 Mo. 452.
82. Agan *v.* M'Manus, 11 Johns. 180.
83. Tardy *v.* Boyd, 26 Gratt. 631.
84. Newberry *v.* Trowbridge, 13 Mich. 275.
85. Isbell Co. *v.* Lewis Co., 98 Ala. 550; 13 So. 335.
Ross *v.* Hurd, 71 N. Y. 14.
86. Keyes *v.* Fenstermaker, 24 Cal. 329.
87. Rosson *v.* Carrol, 90 Tenn. 90; 16 S. W. 66; 12 L. R. A. 727.
88. Creamer *v.* Perry, 17 Pick. 332; 28 A. D. 297.
89. Glidden *v.* Chamberline, 167 Mass. 486; 46 N. E. 103; 57 A. S. R. 479.
Miller *v.* Hackley, 5 Johns. 375; 4 A. D. 372.

bility as indorser sufficient[90]; nor a mere request not to press the maker of the note[91]. So, a statement that the indorser had been very unfortunate in indorsing the note, that the estate of the maker owed him money and that he had no means of paying the note but from that source, was held insufficient to constitute a new promise to pay where he had previously been discharged through the holder's laches[92]. And a letter giving an account of the writer's circumstances and containing a statement that under such circumstances he could not give a bill for the amount, was held insufficient as a waiver[93]. So, the assurance of the indorser that he would stand good for payment[94], or his parol representation that he would treat the matter as his own and see that it was paid at maturity[95], have been held insufficient as promises constituting a waiver.

Sec. 87. It has been held, too, that an agreement to permit an extension of time for payment did not amount to a waiver[96], nor was any waiver implied from the indorser's requesting the indorsee not to bring suit against him during his absence from home if the maker failed to pay the note, as such request itself implied that the indorser expected the holder to take the proper steps against the maker of the note[97].

90. Carter *v.* Burley, 9 N. H. 558.
91. Whittier *v.* Collins, 15 R. I. 90; 23 Atl. 39 and 47.
Prentiss *v.* Danielson, 5 Conn. 175; 13 A. D. 52.
92. Vance *v.* Depass, 2 La. Ann. 16.
93. Sherrod *v.* Rhodes, 5 Ala. 683.
94. Freeman *v.* O'Brien, 38 Ia. 406.
95. Bird *v.* Kay, 40 App. Div. 533; 58 N. Y. Supp. 170.
96. Norton *v.* Lewis, 2 Conn. 478.
Michand *v.* Lagardw, 4 Minn. 43.
97. Dutton *v.* Bratt, (Ark.); 11 S. W. 821.

Where an indorser before maturity of the note is informed by the holder that the maker denied liability and had told him they would not pay it, and the indorser stated that he did not have the money to pay the note but that he was liable and that if the holder would sue the maker, and should fail to recover from him, that he would pay it himself, the indorser was held not to have thereby waived presentment and notice[98].

B. KNOWLEDGE OF DEFAULT ESSENTIAL TO PROMISE:—Sec. 88. It is the unanimous opinion of the courts that a promise of an indorser or drawer to pay a note or bill after its maturity must be made with full knowledge that presentment and protest have not been made or notice given, and that after knowledge of the material facts affecting hns liability he still manifests in some way, deducible into a promise, his willingness to be bound. For it is said that a promise to pay made in ignorance of the promissor's rights is of no effect as a waiver[99]. This must necessarily be apparent in considering what was said in the beginning of this volume, that in order to waive a right a knowledge of

98. Worley *v.* Johnson, 60 Fla. 294; 58 So. 543; 33 L. R. A. (N. S.) 639.

99. Turnbull *v.* Maddux, 68 Md. 579; 13 Atl. 334.
Hudson *v.* Wolcott, 39 Oh. St. 623.
Bank *v.* Farnsworth, 7 N. Dak. 6; 72 N. W. 901.
Blum *v.* Bidwell, 20 La. Ann. 43.
Glaser *v.* Rounds, 16 R. I 237; 14 Atl. 863.
Salisbury *v.* Rennick, 44 Mo. 454.
Schierl *v.* Baumel, 75 Wis. 75; 43 N. W. 724.
Hunt *v.* Wadleigh, 26 Me. 271; 45 A. D. 108.
Low *v.* Howard, 11 Cush. 268 (Mass.).
Lilly *v.* Petteway, 73 N. Car. 358.
Norris *v.* Ward, 59 N. H. 487.

such right must actually exist in the mind of him against whom the waiver is alleged, or there must be such facts and circumstances as will attribute knowledge to him. And since such knowledge must be brought home to an indorser, it follows that when it is shown that an indorser or drawer promised to pay an instrument after its maturity when no demand had been made or notice given, it must also be shown that the holder's failure in these respects was known to the indorser or drawer[100], or that knowledge was imputed to him, as held by some cases hereinafter discussed. And it is said that it matters not how clear the proof of the promise or in how strong terms it may be couched, this knowledge of facts must appear[1]. It is said that knowledge of the holder's default is an indispensable part of the promise, for without it, it cannot be inferred that the indorser intended to admit the right of the holder to resort to him if, in point of fact, the holder had been guilty of such laches as would discharge the indorser in point of law[2].

Sec. 89. It being the rule that an indorser must have full knowledge of the holder's laches and of all the material facts in order that his promise to pay may be binding upon him as a waiver[3], it has been

100. 1 Parsons, Notes & Bills, 601.
Story on Bills, 320.
Cloz et al. *v.* Miracle, 103 Ia. 198; 72 N. W. 502.
Walker *v.* Rogers, 39 Ill. 279.
Baskerville *v.* Harris, 41 Miss. 535.

1. Farrington *v.* Brown, 7 N. H. 271.

2. Thornton *v.* Wynn, 12 Wheat. 183 (U. S.); 6 L. Ed. 595.
Workingmen's Bkg. Co. *v.* Beell, 57 Mo. App. 410.

3. O'Rourke *v.* Hanchett, 35 N. Y. Supp. 328; 69 N. Y. St. R. 717.
Parks *v.* Smith, 155 Mass. 26; 28 N. E. 1044.
Walker *v.* Rogers, 40 Ill. 278; 89 A. D. 348.
Martin *v.* Winslow, Fed. Cas. No. 9172.

held that a request of an indorser for a renewal of the note, accompanied by part payment, are not such acts as constitute a waiver unless at the time he has knowledge of the facts by which he has been released[4]; and the same is true of any other facts which can be construed as a promise to pay made after default of the holder. The rule, therefore, announced and universally adhered to is thus stated: A promise by the indorser of a promissory note to pay it, with full knowledge of the laches of the holder in regard to presentment, protest or notice, is a waiver of the laches of the holder and renders the indorser liable on the note[5].

(1) WHETHER PROMISE PRESUMES KNOWELDGE:—Sec. 90. When it is conceded or proved that there was laches of the holder in respect to demand, protest or notice, the promise to pay after maturity should be regarded as *prima facie* evidence that the party making it knew of such laches, whenever such knowledge is deemed necessary to constitute a waiver. It is a promise against interest. The drawer or indorser should

U S. Bank *v.* Southard, 17 N. J. L. 473; 35 A. D. 521.
City Bank *v.* Clinton Bank, 49 Oh. St. 351; 30 N. E. 958; 27 Oh. L. J. 325; 6 Bkg. L. J. 515.

4. Carnegie Steel Co. *v.* Const. Co. (Tenn. Ch.); 38 S. W. 102.

5. Smith *v.* Lonsdale, 6 Oreg. 78.
Amor *v.* Stoeckele, 76 Minn. 180; 78 N. W. 1046.
Curtis *v.* Sprague, 51 Cal. 239.
Shaw *v.* McNeill, 95 N. Car. 535.
Oxnard *v.* Varnum, 111 Pa. St. 193; 2 Atl. 224; 56 A. R. 255.
Stone *v.* Smith, 30 Tex. 138; 94 A. D. 299.
Tardy *v.* Boyd, 26 Gratt. (Va.) 637.
Bogart *v.* McClung, 11 Heisk. (Tenn.) 105; 27 A. R. 737.
Parsons *v.* Dickinson, 23 Mich. 56.
Rosson *v.* Carroll, 90 Tenn. 90; 16 S. W. 66; 43 Alb. L. J. 493.
Schwartz *v.* Wilmer, 90 Md. 136; 44 Atl. 1059.
Farrington *v.* Brown, 7 N. H. 271.

know when the instrument to which he was a party fell due. His promise to pay presumes it to be overdue and unpaid. And if he has not received notice, he has every reason to suppose that it was not given, and that the steps which should precede it were not taken[6]; and it is otherwise said that evidence of a promise to pay is admissible as tending to show that due notice had actually been received[7]; and that a promise to pay furnishes presumptive evidence that the proper steps were taken to bind the one making the promise[8].

Sec. 91. Mr. Daniel in his work on Negotiable Instruments not only states as above quoted that a promise by an indorser to pay an instrument after its maturity should be regarded as *prima facie* evidence that the indorser knew at the time of the promise of the laches of the holder in respect to presentment, protest and notice, but he further says that there is certainly strong ground for contending that upon principles of estoppel proof of a distinct promise to pay after maturity (no question of fraud or deceit arising) should in itself close all controversy as to demand, protest and notice. The drawer may not only waive the fact that demand, protest or notice were not duly made or given, he may also

6. 2 Daniel, Negot. Inst. (5th Ed.) 1152, and cases cited.
7. Myers *v.* Standart, 11 Oh. St. 29.
8. Stix *v.* Mathews, 63 Mo. 371.
Brennan *v.* Lowry, 4 Daly 253 (N. Y.).
Walker *v.* Walker, 7 Ark. 552.
Frost *v.* Harrison, 8 La. Ann. 123.
Hazard *v.* White, 26 Ark. 155.
Cardwell *v.* Allen, 33 Gratt. (Va.) 160.
Davis *v.* Miller, 88 Ia. 114; 55 N. W. 89.
Sherman *v.* Clark, 3 McLean 91; Fed. Cas. No. 12,763.
Breed *v.* Hillhouse, 7 Conn. 523.

waive proof that they were made or given. And when he promises to pay the bill or note, such promise imports an unconditional assumption of it, and a dispensation with whatever preliminary evidence might be necessary to charge him with its payment. The holder is thereby advised that the party raises no question as to his liability, and to permit him when sued to require other proof of what he has recognized might enable him to practice a fraud by lulling the holder to quiet reliance on his promise, and then springing the defense upon him unawares, and good faith would seem to suggest that if the party deliberately promises to pay, he shall not afterward go behind that promise and deny facts which it presupposes and is impliedly based upon[9].

Sec. 92. But excellent as the above reasoning is, and supported as it is by some authorities[10], it is not the doctrine sustained by the weight of authority. The majority of the courts do not, as perhaps a few do[11], go to the extent of holding that a holder of a commercial paper has the burden of showing that his laches in regard to presentment, protest and notice was known to the indorser at the time of a promise by the latter to pay, made after maturity of the instrument. The tendency has been, as suggested by Mr. Daniel[12], to strike an intermediate at-

9. 2 Daniel, Negot. Inst. (5th Ed.) 1149.
10. See following cases, cited by Daniel, *supra*:
Debuys *v.* Mollere, 15 Mart. 318.
Bogart *v.* M'Clurg, 11 Heisk. 105 (Tenn.).
First N. Bank *v.* Weston, 25 App. Div. 414; 49 N. Y. Supp. 542.
Porter *v.* Thom, 30 App. Div. 363; 51 N. Y. Supp. 974.
11. Good *v.* Sprigg, 2 Cranch C. C. 172; 10 Fed. Cas. No. 5532.
Hunt *v.* Wadleigh, 26 Me. 271; 45 A. D. 108.
12. 2 Daniel, Negot. Inst. 1150.

titude and rest the decisions upon the doctrine that in case of a promise by an indorser or drawer after maturity of an instrument to pay same, such indorser or drawer has the burden of proving the laches of the holder in regard to presentment, protest and notice, and must rebut the presumption arising from his promise that he had knowledge of the holder's laches[13]. But the cases are by no means harmonious as to this doctrine, and a state of flat contradiction may be said to exist among the courts.

Sec. 93. A few cases may illustrate the doctrines discussed in the preceding section. The burden of showing that the new promise was with knowledge of all the facts is on the party seeking to charge the indorser[14]. If laches appears, there must be clear proof that the defendant knew of it at the time he made the promise[15]. The plaintiff must show knowledge by the indorser that at the time he made the promise no notice had been given him, in order to establish a waiver[16]. The plaintiff must show that at the time the promise was made the promisor had notice that he was discharged[17]. The burden is on the plaintiff to show that the promise was made with full knowledge of the laches[18].

13. Loose *v.* Loose, 36 Pa. St. 538.
Smith *v.* Janes, 20 Wend. 192; 32 A. D. 527.
Veazie *v.* Howland, 53 Me. 38.
14. Walker *v.* Rogers, 40 Ill. 278; 89 A. D. 348.
15. Glaser *v.* Rounds, 16 R. I. 235; 14 Atl. 863.
16. Glassford *v.* Davis, 46 N. J. L. 348.
17. Harris *v.* Allnut, 12 La. 465.
18. Vanwickle *v.* Downing, 19 La. Ann. 83.
Spurlock *v.* Bank, 4 Hump. 336.
U. S. Bank *v.* Southard, 17 N. J. L. 473; 35 A. D. 521.
La. Bank *v.* Buhler, 22 La. Ann. 83.

Contrary to the above, it is said that a promise to pay, made after maturity of a bill or note, throws upon the promisor the double burden of showing laches and that he was ignorant thereof[19]. Knowledge of the facts may be inferred from circumstances[20] and in the absence of evidence to the contrary a promise to pay will be presumed to have been made with full knowledge of all the facts[21]. The jury may presume knowledge from the circumstances[22].

(2) KNOWLEDGE OF LEGAL EFFECT OF HOLDER'S DEFAULT:—Sec. 94. It being a maxim of the law that ignorance of the law excuses no one, its application to a promise of payment by an indorser with knowledge of the facts constituting his discharge leads to the inevitable rule that his ignorance of the legal effect of such facts in constituting a waiver of presentment, protest and notice will not release him from the obligation of the waiver[23]. A contrary view has been taken[24], but the doctrine almost universally adhered to at the present

19. Oxnard *v.* Varnum, 111 Pa. St. 193; 2 Atl. 224; 56 A. R. 255.
Commercial Bank *v.* Clark, 28 Vt. 325.
Schmidt *v.* Radcliffe, 4 Strobh. L. 296; 53 A. D. 678.
20. Givens *v.* Mer. Bank, 85 Ill. 442.
Hughes *v.* Bowen, 15 Ia. 446.
21. Davis *v.* Miller, 88 Ia. 114; 55 N. W. 89.
22. Hopkins *v.* Liswell, 12 Mass. 52.
See: Seldner *v.* Bank, 66 Md. 488; 8 Atl. 262.
23. Toole *v.* Crafts, 193 Mass. 110; 78 N. E. 775.
Morgan *v.* Peet, 41 Ill. 347.
Matthews *v.* Allen, 16 Gray 594; 77 A. D. 430.
Cheshire *v.* Taylor, 29 Ia. 492.
Story on Bills, 320.
24. Ballin *v.* Betcke, 11 Ia. 204.
Fleming *v.* McClure, 1 Brev. 428; 2 A. D. 671.
Seay *v.* Ferguson, 1 Tenn. Ch. 293.
Warder *v.* Tucker, 7 Mass. 449.

time is that his ignorance of such legal effect is not a bar to the waiver[25].

C. PAYMENT OR PART PAYMENT AS WAIVER:—Sec. 95. The rules obtaining in cases where a drawer or indorser makes a promise to pay a bill or note after knowledge of the dereliction of the holder in regard to presentment, protest or notice, are equally applicable to cases where the same default exists and the drawer or indorser has made payment or part payment thereof. And, consequently, it is the rule that if, with full knowledge of the fact that the holder is in default in regard to these formalities, the drawer or indorser make payment or part payment, he will be held to have waived the dereliction of the holder and cannot urge it as a defense to an action on the paper[26], but on the other hand, it will bind him to full liability[27]. And, even as a promise to pay, the actual payment or part payment is *prima facie* evidence that he who paid had been duly charged by the required steps of presentment, protest and notice, or at least is sufficient from which to presume that he had knowledge of the default of the holder in taking these steps. But if it be shown that the indorser or drawer, at the time of making payment, knew the facts, it is settled that he waived the default[28].

25. Sebree Bank *v.* Moreland, 96 Ky. 150; 28 S. W. 153; 29 L. R. A. 305.
Glidden *v.* Chamberline, 167 Mass. 486; 46 N. E. 103; 57 A. S. R. 479.
26. Evans *v.* Gale, 17 N. H. 573; 43 A. D. 614.
27. Knapp *v.* Runals, 37 Wis. 135.
28. Harvey *v.* Troupe, 23 Miss. 538.
Whitaker *v.* Morrison, 1 Fla. 29; 44 A. D. 627.
Read *v.* Wilkinson, 2 Wash. C. C. 514.

Sec. 96. Thus, it has been held that payment of the interest in arrears upon the note by an indorser will revive liability, although at the time of paying same he protested that he was not liable, and the payment was made under threats of suits on other claims against him in case he did not pay such interest[29]. And payment or part payment of the amount by one of two indorsers where the other has received notice, is a waiver of the want of notice to himself[30]. And payment of interest on a note after its maturity ordinarily has the same effect[31]. A partial payment is *prima facie* evidence that the necessary legal steps have been taken to fasten liability[32]; but it is said that such a *prima facie* case may be rebutted by the drawer or indorser making such part payment by showing that the holder was in default in making demand or giving notice[33]; and this rebuttal evidence may be overcome by the holder by showing that at the time of the payment the drawer or indorser was aware of the default and made the payment despite the holder's dereliction, in which event the drawer or indorser will be held to have waived the default and will be liable to pay the whole debt[34].

29. Greeley *v.* Whitehead, 35 Fla. 523; 17 So. 643; 48 A. S. R. 258.
Curtis *v.* Sprague, 51 Cal. 239.
Sigourney *v.* Wetherell, 6 Met. 555.
Salisbury *v.* Renick, 44 Mo. 554.
Smith *v.* Curlee, 59 Ill. 221.

30. Sherer *v.* Easton Bank, 33 Pa. St. 134.

31. Greeley *v.* Whitehead, 35 Fla. 523; 17 So. 643; 48 A. S. R. 258; 28 L. R. A. 286.

32. Chitty, Bills, 564.

33. Porter *v.* Thom, 30 App. Div. 363; 51 N. Y. Supp. 974.

34. Williams *v.* Robinson, 13 La. 419.

D. RECEIPT BY INDORSER OF MONEY, PROPERTY OR OTHER SECURITY:—Sec. 97. Where an indorser or drawer receives from the one primarily liable on a commercial instrument, money or other property with the understanding that the debt shall be paid therefrom, such indorser or drawer renders himself liable as the principal debtor, and as to him presentment, protest or notice are unnecessary[35]. And it is held in many cases without qualification that the taking by an indorser of an assignment of all of a maker's property as security against his liability constitutes a waiver of the indorser's right to require demand, protest and notice[36]; and further that this constitutes such waiver whether or not the property is amply sufficient to protect the indorser[37]. So the taking of a confession of judgment covering all the estate of the maker of a note has been held a waiver of demand and notice[38].

Sec. 98. But these doctrines are now not generally sustained, and it is said that the taking of an assignment of all the property of the maker is not necessarily or even presumptively a waiver of the requisite legal steps to bind the indorser[39]. The cri-

35. Story, Notes, Sec. 281.
Bond *v.* Farnham, 5 Mass. 170.
Ray *v.* Smith, 17 Wall. 418 (U. S.).
Wright *v.* Andrews, 70 Me. 86.
2 Daniel, Negot. Inst. 1128.
36. Edwards on Bills, 637.
1 Parsons, Notes & Bills, 560.
May *v.* Boissean, 8 Leigh 213.
Bond *v.* Farnham, *supra.*
37. Watkins *v.* Crouch, 5 Leigh 522.
38. Bank *v.* Myers, 1 Bailey 412 (S. Car.).
39. Creamer *v.* Perry, 17 Pick. 332.
1 Parsons, Notes & Bills, 560.
Haskell *v.* Boardman, 8 Allen 39.

terion seems to be whether the indorser of the instrument received the money or property from the maker with the express agreement that it was to be used to pay the note, or whether it was to be held only as security against liability. If the former, then demand, protest and notice are unquestionably waived[40]. So, where an indorser took an assignment of a maker's property to sell it and pay all the maker's debts, but to first pay the note signed by the indorser, demand and notice were thereby waived as the indorser became the principal[41].

Sec. 99. The question of whether the security taken is ample to protect the indorser, has often been the deciding point as to whether or not the taking of security is a waiver by the indorser of demand, protest and notice. Many authorities hold that the security, if ample to protect the indorser, will constitute a waiver[42]. And, on the other hand, they hold that if the security is insufficient to fully protect the indorser, there is no waiver[43]. But the better reasoning, and that which has the most support among

40. Wilson *v.* Senier, 14 Wis. 380.
Spencer *v.* Harvey, 17 Wend. 489.
Woodman *v.* Eastman, 10 N. H. 367.
Ray *v.* Smith, 17 Wall. 416.
Moses *v.* Ela, 43 N. H. 560.

41. Mech. Bank *v.* Griswold, 7 Wend. 165.
Clift *v.* Rogers, 25 Hun 41.

42. 3 Kent. Com. 113.
Develing *v.* Ferris, 18 Oh. 170.
Beard *v.* Westerman, 32 Oh. St. 29.
Marshall *v.* Mitchell, 35 Me. 221.
Durham *v.* Price, 5 Yerg. 300.
Smith *v.* Lonsdale, 6 Oreg. 157.
Story on Notes, 281.

43. Watkins *v.* Crouch, 5 Leigh 522.
Second Nat. Bank *v.* McGuire, 33 Oh. St. 295.
Spencer *v.* Harvey, 17 Wend. 489.

the authorities, is that stated by Mr. Daniel: "It seems to us a total misconception of the obligation of an indorser to place his liability at all upon any question involving the question of the pecuniary circumstances of his principal, or security to himself, unless in taking the security he has stepped into his principal's shoes"[44].

Sec. 100. So, while there is a divergence of opinion as to whether an acceptance of an assignment by the maker of his property to the indorser operates as a waiver of demand, protest and notice, it is generally conceded that unless the assignment is of all the maker's property, or the security affords ample protection to the indorser, there is no such waiver[45]. And, where an assignment was to indemnify the indorser to the extent of one-fourth of the note, it was held no waiver[46]. It has been held that where the security taken was not amply sufficient to protect the indorser, there might be a waiver of notice but not of demand. But it has been observed that there are no good reasons to support such hair-splitting distinctions.

Sec. 101. If the security or assignment be taken by the indorser at the time of indorsement, its acceptance could not operate as a waiver of any rights given the indorser by law; for he could only forego

44. 2 Daniel, Negot. Inst. 1134.
Parsons, Notes & Bills, 571.
Taylor *v.* French, 4 E. D. Smith, 458 (N. Y.).
Smith *v.* Ojerholm, 18 Tex. Civ. App. 111; 44 S. W. 41.
Holland *v.* Turner, 10 Conn.

45. Brandt *v.* Mickler, 28 Md. 436.
Burrows *v.* Hanegan, 1 McClean, 309.
Holman *v.* Whiting, 19 Ala. 708.
1 Parsons, Notes & Bills, 567-70.

46. Watkins *v.* Crouch, 5 Leigh 522.

those rights by assuming the burdens of his principal by an original promise as a maker or co-maker to pay the note, and this is precluded by the fact that he signs as an indorser only, or he would make an express waiver over his indorsement. Of course, proof of an agreement between the parties that the bill or note should be paid out of the property assigned or that the indorser should be re-imbursed therefrom, would dispense with any demand or notice.

If the security be given or assignment made between the time of indorsement and the maturity of the instrument, there is no change in the rights or liabilities of the indorser in the absence of proof of special circumstances or of an agreement that the indorser shall pay the debt. The standing of the indorser toward the holder is unchanged; and, indeed, the holder may never know of the transaction between the indorser and the principal, and it would be folly to say that a party could take advantage of a condition that he knew nothing of. And, besides, unless it appear that the indorser agreed to discharge the instrument, the assignment made or security given by the principal is clearly only for the protection of the indorser and can in no way inure to the benefit of the holder or in any manner enlarge his rights or excuse his duties.

Sec. 102. If security or assignment of property of the principal is taken by an indorser after maturity and non-payment of an instrument, this is not a waiver of the holder's default as to demand and notice; for it cannot properly be said that simply by taking security the indorser intended to render himself absolutely liable to pay the debt; but on the

other hand it must be inferred that he was only protecting himself against the possibility of his future compulsory payment[47]. But if the indorser knew when he took the security or assignment that there had been no notice or demand, such circumstances might be considered on the question of waiver by the indorser of the default of the holder. Parsons says: "There is ground to contend that if an indorser takes security after maturity, this is evidence of demand and notice; for why should a person take these steps to secure himself unless his liability actually exist?"[48] It is thought, however, that such doctrine should be applied with caution. And it should be fully proved that when taking such security the indorser was well aware of his legal rights and liabilities in the matter[49].

Sec. 103. It may readily be seen from the foregoing that there is considerable conflict among the courts as to the effect to be given the taking of security by an indorser from the maker as a waiver of presentment and notice. In some cases the property is taken for the express purpose of enabling the indorser to pay the note when due, and in other cases it is taken to secure the indorser as an indemnity. In the former case, the indorser is held to take the place of the maker, and the necessity of present-

47. Tower *v.* Durrell, 9 Mass. 332.
Creamer *v.* Perry, 17 Pick. 332.
Otsego Bank *v.* Warren, 18 Barb. 290.
May *v.* Boisseau, 8 Leigh 164.
First Nat. B. *v.* Hartman, 110 Pa. St. 196; 1 Atl. 271.
First Nat. B. *v.* Shriner, 110 Pa. St. 188; 20 Atl. 718.

48. 1 Parsons, Notes & Bills, 619.

49. See: Saunderson *v.* Saunderson, 20 Fla. 307.
Walters *v.* Munroe, 17 Md. 154.

ment and notice is thereby waived; but in the latter, no waiver should be implied. The giving of notice to an indorser is for the purpose of enabling him to take steps against the maker to protect himself, and when he is amply secured the reason and the necessity of giving the notice are obviated. But on the other hand the indorser agrees to become liable only in the event of default in payment by the maker, and his taking security is held to be as an indemnity against his conditional liability. It has been held that if the security given the indorser be all that the maker has, such will constitute a waiver for the reason that the maker having nothing left, the indorser would have recourse only on the security in his hands. But on all these points the courts are in hopeless conflict, and it is impossible to deduce from them any uniform rules[50].

E. WAIVER BY CONDUCT:—Sec. 104. In addition to the waivers of, and agreements to waive presentment, protest and notice hereinbefore discussed, it may be said generally, that any conduct of an indorser calculated to put the holder, when acting with reasonable prudence, off his guard, and to induce him not to insist upon his rights and to omit these formalities, will be sufficient to constitute a waiver of these steps[51]. And the same is true

50. Jordan *v.* Reed, 77 N. J. L. 584; 71 Atl. 280.
Selby *v.* Brinkley, (Tenn.); 17 S. W. 479.
Whittier *v.* Collins, 15 R. I. 44; 23 Atl. 39.
Woodbury *v.* Crum, 1 Biss. 284; Fed. Cas. No. 17,969.
Cruger *v.* Lindheim, 4 Tex. App. Civ. Cas. 142; 16 S. W. 420.
Beard *v.* Westerman, 32 Oh. St. 29.
Mead *v.* Small, 2 Me 207; 11 A. D. 62.

51. Boyd *v.* Bank, 32 Oh. St. 526; 30 A. R. 624.
Selden *v.* Bank, 66 Md. 488; 8 Atl. 62; 6 Cent. R. 478.

where the act of the indorser has misled the holder to the latter's injury[52], and of any language which is intended to and does induce the holder not to take these steps[53].

5. CONSIDERATION FOR WAIVER:—Sec. 105. When a waiver of presentment, protest and notice appears on the face of a commercial paper, or is on the paper at any place prior to indorsement, no question as to the necessity of a consideration for such waiver can be raised; for in such event the indorsement, being subsequent to the waiver, the latter becomes a part of the indorser's contract as much as his promise to pay in the event of the default of the maker, and, being an integral part of the contract, the waiver is based on the same consideration as the other obligations of the indorsement.

Sec. 106. But in case of a waiver after indorsement, the courts have not been harmonious as to the necessity of a new consideration for the waiver in cases where the question has been raised. It is noticeable, however, that the matter of consideration has seldom been brought before the courts in this connection. In case after case the courts have held an indorser, who has been released by the laches of the holder, to resumption of liability by his voluntary act subsequent to his release, without anything to show that there was a new consideration, and without any intimation from the courts that they thought a consideration necessary or that the liability of the indorser was effected by its absence.

52. Robinson *v.* Barnett, 19 Fla. 670; 45 A. R. 24.
53. Souther *v.* McKenna, 20 R. I. 645; 40 Atl. 736.

Sec. 107. But it is necessary to notice the cases in which the question has been passed upon. Thus, it has been said that a subsequent promise to pay, unless supported by a consideration, is not binding upon an indorser who has been released by the laches of the holder[54]. But the decided weight of authority is to the contrary of this, and it is said that no consideration is necessary to make a waiver binding[55], and that whether upon the ground of waiver or of a moral obligation that forms a consideration, the consequence is undeniable that a new promise will sustain an action upon the note[56].

Sec. 108. This question of consideration was fully discussed in a Pennsylvania case[57] and the references therein made, and all sides of the matter looked into. It is said: "The indorser may waive protest after the date of maturity of the note with like effect as if done prior to that date[58]. In Barclay *v.* Weaver, this court said, 'It seems, therefore, that

54. Sebree Bank *v.* Moreland, 96 Ky. 150; 28 S. W. 153; 29 L. R. A. 305.
See: Peabody *v.* Harvey, 4 Conn. 119; 10 A. D. 103.
Merrimack Bank *v.* Brown, 12 N. H. 320.
White *v.* Keith, 97 Ala. 668; 12 So. 611.

55. Delsman *v.* Friedlander, 40 Oreg. 33; 66 Pac. 297.
Matthews *v.* Allen, 16 Gray 594; 77 A. D. 430.
Morgan *v.* Peet, 32 Ill. 281.
Lockwood *v.* Bock, 50 Minn. 142; 52 N. W. 391.
Woodman *v.* Eastman, 10 N. H. 359.
Ross *v.* Hurd, 71 N. Y. 14; 27 A. R. 1.
Tate *v.* Sullivan, 30 Md. 472; 96 A. D. 597.
Porter *v.* Hodenpuyl, 9 Mich. 11.

56. Brooklyn Bank *v.* Waring, 2 Sandf. Ch. 1; 7 L. Ed. 483.
U. S. Bank *v.* Southard, 17 N. J. L. 473; 35 A. D. 521.
Harrison *v.* Bailey, 99 Mass. 620; 97 A. D. 63.
Uhler *v.* Farmers Bank, 64 Pa. St. 406.

57. Burgettstown Bank *v.* Nill, 213 Pa. St. 456; 63 Atl. 186.
Cited in Joyce on Def. to Com. Paper, 538.

58. Barclay *v.* Weaver, 19 Pa. St. 396; 57 A. D. 661.

the duty of demand and notice, in order to hold an indorser, is not a part of the contract but a step in the legal remedy that may be waived at any time in accordance with the maxim *Quilibet potest renunciare juri pro se introducto.'* In some jurisdictions it is held that the waiver, when made after maturity of the note, must be made with full knowledge of the holder's laches and that it requires a new consideration. But it is settled by numerous American authorities that a waiver of protest need not be supported by a new consideration[59]. We know of no decision in this court holding that such waiver must be supported by a new consideration. The contrary rule, however, is distinctly recognized in Barclay *v.* Weaver, *supra.* In that case Mr. Justice Lowrie, in construing the contract of an indorser of negotiable paper, says: 'The most, therefore, that can be said of an indorsement of negotiable paper is that from it there is implied a contract to pay on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. But it may well be questioned whether the condition of demand and notice is truly part of the contract or only a step in the legal remedy upon it. If it is a part of the contract, how can it be effectually dispensed with without a new contract for a sufficient consideration,

59. Neal *v.* Wood, 23 Ind. 523.
Hughes *v.* Bowen, 15 Ia. 446.
Cheshire *v.* Taylor, 29 Ia. 492.
Sheldon *v.* Hornton, (N. Y.); 3 A. R. 669.
Tebbetts *v.* Dowd, 23 Wend. 379.
Wall *v.* Bry, 1 La. Ann. 312.
Lane *v.* Steward, 20 Me. 98.

especially after maturity of the note? Yet, there are decisions without number that a waiver of it during the currency or after the maturity of the note will save from the consequences of its omission. This could not be if it was a condition of the contract for then the omission of it would discharge the indorser both morally and legally; and no new promise afterwards, even with full knowledge of the facts, could be of any validity. If, however, an indorsement without any other circumstances be regarded as an implied promise to pay provided the holder use such diligence that the indorser loses nothing by his negligence or indulgence, then it accords with all these decisions. Then the law and not the contract declares the usual demand and notice to be in all cases conclusive and in some cases necessary evidence of such diligence * * * * *. It (the law), therefore, is perfectly consistent in declaring that an indorser is bound by a new promise, after he knows of the omission of demand and notice, for this is an admission that he was not entitled to it, or has not suffered for want of it. It declares demand and notice necessary in some cases to save the indorser from loss, and it declares that his own admissions may be submitted for them.' It is manifest, therefore, that from the nature of the indorser's contract, a new consideration is not required to support a waiver of protest before or after maturity of the paper."

6. WHETHER WAIVER IS WITHIN STATUTE OF FRAUDS:—Sec. 109. In some cases the question has arisen as to whether an agreement to waive presentment, protest and notice, and a promise to pay after knowledge of the laches of the holder in

regard to these legal steps amounting to a waiver are not promises to answer for the debt or default of another, and, therefore, within the statute of frauds. The better opinion is that the statute of frauds does not enter into the waiver and that it or the promise constituting it is valid though not in writing[60]. Different reasons are given for this. In one instance it was said that the indorser does not make a new promise within the statute of frauds when he promises to pay after laches on the part of the holder, because the debt is his own as well as that of the maker[61]. And, again, it is said that a waiver of demand and notice made by an indorser is not a new contract but only a waiver absolutely or in part of a condition precedent to his liability[62].

7. EXTENT OF WAIVER:—Sec. 110. A waiver of presentment is a waiver of notice, as the notice, being subsequent and dependent upon presentment, must, by such waiver, necessarily be dispensed with[63]. And a waiver of protest is a waiver of presentment and notice of dishonor[64]. So, it is said that a waiver of presentment is a waiver of all legal steps otherwise required to charge an indorser[65].

60. U. S. Bank *v.* Southard, 17 N. J. L. 473; 35 A. D. 521.
Harrison *v.* Bailey, 99 Mass. 620; 97 A. D. 63.

61. Uhler *v.* Farmers Bank, 64 Pa. St. 406.

62. Worden *v.* Mitchell, 7 Wis. 161.

63. Furth *v.* Baxter, 24 Wash. 608; 64 Pac. 798.

64. Baker *v.* Scott, 29 Kans. 136; 44 A. R. 628.
San Diego Bank *v.* Falkenham, 94 Cal. 141; 29 Pac. 866.
Bradley *v.* Asher, 65 Mo. App. 589.
Timberlake *v.* Thayer, 76 Miss. 76; 23 So. 767.

65. Hammet *v.* Trueworthy, 51 Mo. App. 281.

Sec. 111. Where an indorser signs a note under a waiver written on the back thereof, he makes the waiver his, and is bound thereby[66]. And the same is true of all subsequent indorsers[67]; although it has been said that a waiver of notice written above an indorser's signature binds him only[68], and that where an indorser has written a waiver over his signature, no other party to the instrument is bound by it unless he expressly adopts it as his own[69].

66. Farmers Bank *v.* Mining Co., 129 Cal. 263; 61 Pac. 1077.
Parshley *v.* Heath, 69 Me. 90; 31 A. R. 246.
67. Id.
68. Joyce, Defenses to Commercial Paper, 573.
69. Halley *v.* Jackson, 48 Md. 254.
Jackson Bank *v.* Irons, 18 R. I. 718; 30 Atl. 420.
Woodman *v.* Thurston, 8 Cush. 157.

CHAPTER 4.

MORTGAGES.

1. CHATTEL MORTGAGES—

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1. CHATTEL MORTGAGES.

A. WAIVER OF THE LIEN BY ATTACHMENT:—Sec. 112. The weight of authority is to the effect that a mortgagee of personal property who attaches the mortgaged property in an action for the debt which is secured thereby waives the lien of his mortgage[70]. The reason is that when an attachment is issued a lien is created which is entirely inconsist-

70. Evans *v.* Warren, 122 Mass. 303.
Jones, Chat. Mortg. Sec. 565.
Cochrane *v.* Rich, 142 Mass. 15; 6 N. E. 781.

ent with and different from the lien of the mortgage, and that by electing to pursue one lien the other is waived. Further, the mortgagor has no attachable interest in the property so long as the mortgage exists, as the legal title is in the mortgagee subject to the equity of redemption still remaining to the mortgagor, which is not attachable except under statutory provision therefor[71].

Sec. 113. And this rule holds good whether or not the attaching plaintiff knew that the property attached was the same as that covered by the mortgage and where he persisted to judgment with the attachment[72]. So, where a creditor brings suit against his debtor and sues out a writ of attachment, but before levying the same learns that the debtor's property is covered by a chattel mortgage, and upon receiving such information buys the mortgage debt and has the mortgage assigned to himself, and thereafter causes such property to be seized under the attachment, he thereby waives his lien under the chattel mortgage; and in case the attachment is discharged the creditor cannot maintain replevin to recover possession of the property so as to foreclose his mortgage, for the reason that the mortgage lien is waived by the attachment of the property covered thereby[73].

71. Evans *v.* Warren, *supra.*
Cox *v.* Harris, 64 Ark. 213; 41 S. W. 426; 62 A. S. R. 187.
Whitney *v.* Farrar, 51 Me. 418.
Dyckman *v.* Sevatson, 39 Minn. 132; 39 N. W. 73.
Jennings *v.* McElroy, 42 Ark. 236; 48 A. R. 61.

72. Cox *v.* Harris, *supra.*

73. Dix *v.* Smith, 9 Okla. 124; 60 Pac. 303; 50 L. R. A. 714.

Sec. 114. The effect of the attachment by the mortgagee is the same whether the attachment is for the debt secured by the mortgage, or for an entirely different one; for the like reasoning applies in that the two liens are inconsistent and cannot be pursued at the same time[74]. For it has been said that by levying the writ of attachment the mortgagee puts the property into the custody of the law, and it would be inequitable to permit him to set up his mortgage to defeat the custody of the law after another creditor has procured a subsequent attachment against the same property[75]. So, if the mortgagee give a receipt to the attaching officer[76], or accept the trust as keeper of the property after it has been attached by another creditor[77], he cannot avoid liability by showing that his claim exceeds the value of the property, or that the attachment lien was lost by any act of his.

Sec. 115. Some cases, however, hold opposite to the foregoing and declare the mortgage lien not waived by an attachment as in the cases hereinbefore referred to[78]. But the better reasoning is in support of the other doctrine.

B. BY EXECUTION:—Sec. 116. Where a mortgagee obtained a judgment against the mortgagor for the mortgage debt and caused execution to

74. Haynes *v.* Sanborn, 45 N. H. 429.
Dix *v.* Smith, *supra.*
75. Cobbey, Chat. Mortg. Sec. 746.
76. Drew *v.* Livermore, 40 Me. 266.
77. Moresi *v.* Swift, 15 Nev. 215, cited in Cobbey, Chat. Mortg. Sec. 746.
78. Bryam *v.* Stout, 127 Ind. 195; 26 N. E. 687.
Webster, etc. Co. *v.* Losey, 103 Ia. 687; 73 N. W. 75.

be levied on the property covered, the mortgagor brought an action of trespass against the mortgagee and the officer who sold the property under execution, and the court held that the lien of the mortgage had been waived by the execution and that the mortgage was no defense to the action of trespass[79]. This doctrine, too, is based upon the proposition that title to the mortgaged property is in the mortgagee and that by the levy of execution he forbears to exercise his right created by such title and reinvests title in the mortgagor so as to defeat the lien of the mortgage[80]. But if a portion of the property has been set off to the debtor as exempt, it has been held that the levy of execution does not waive the mortgage lien on that portion so set aside as exempt[81].

But no such waiver occurs by levy of execution where the levy is abandoned and the goods returned to the mortgagor; and the doctrine of waiver of the mortgage lien by issuance and levy of execution and sale of the mortgaged property thereunder has been denied entirely[82].

C. BY OTHER ACTS OF THE MORTGAGEE:—Sec. 117. If a mortgagee of chattels authorizes his agent to sell the mortgaged property and deposit the proceeds in a bank to be applied on the mortgage debt, and a sale is made under such authorization, the lien of the mortgage does not attach

79. Kimball *v.* Marshall, 8 N. H. 291.
80. Thurber *v.* Jewett, 3 Mich. 295.
Exline *v.* Lowery, 46 Ia. 556.
Woolner *v.* Levy, 48 Mo. App. 469.
81. Barchard *v.* Kohn, 157 Ill. App. 579; 41 N. E. 902; 29 L. R. A. 803.
82. Conway *v.* Wilson, 44 N. J. Eq. 457; 11 Atl. 734.

to the proceeds and they are subject to attachment by other creditors of the mortgagor[83]; or if one holding a chattel mortgage authorize the mortgagor to sell the property at private sale, and a sale is made, such facts operate as an implied waiver of the mortgage lien whereby the mortgage is defeated[84]. And if the mortgagee authorize a sale of part of the mortgaged property, his lien is waived as to the part sold, but not as to the other[85].

But it has been held that the mortgagee does not waive his lien under the mortgage by remaining silent when informed that part of the property had been disposed of by the mortgagor[86], nor even by failing to speak when the transfer was executed and read in his presence[87]; as in such case he must expressly authorize such transfer or his lien is not waived. So, the receipt by a mortgagee of part of a mortgage debt from a decedent's estate is not a waiver of the mortgage lien as to the balance, even though the whole debt was proved against the estate[88].

83. Maier *v.* Freeman, 112 Cal. 8; 44 Pac. 357; 53 A. S. R. 151.
84. Peterson *v.* St. Anthony Co., 9 N. Dak. 55; 81 N. W. 59; 81 A. S. R. 528, citing:
Hogan *v.* Atl. Elev. Co., 66 Minn. 344; 69 N. W. 1.
Roberts *v.* Crawford, 54 N. H. 532.
85. Barnet *v.* Fergus, 51 Ill. 352; 99 A. D. 547.
Ogden *v.* Stewart, 29 Ill. 124.
Patterson *v.* Taylor, 15 Fla. 336.
86. Patterson *v.* Taylor, *supra.*
87. Riley *v.* Conner, 79 Mich. 497; 44 N. W. 1040.
88. Schuelenburg *v.* Martin, 11 McCrary, 548; 2 Fed. 747.

2. REAL ESTATE MORTGAGES.

A. WAIVER OF THE LIEN—

(1) BY SUIT OR JUDGMENT ON NOTE:—

Sec. 118. In dealing with waivers of the lien of a mortgage on realty, it is well to remember that the mortgage does not secure a note or bond, but that it secures an indebtedness of which the note or bond is evidence; and that the lien of the mortgage is not discharged or lessened by any change or modification of the form of the indebtedness or in the time of its payment, but continues till the debt is paid or expressly discharged or the security abandoned in one of the modes to be pointed out in the succeeding pages.

Sec. 119. A mortgagee of realty has several remedies which he may pursue at his election for collection of the debt secured, and subject to a few exceptional instances, he may attempt one method, and if that fail he will not thereby be barred from his right to proceed according to another. Thus, he may recover a judgment upon the secured debt at law, and such will not constitute a waiver of his mortgage lien, and if he fail to realize on his judgment he may maintain foreclosure proceedings on the mortgage[89].

89. Jones, Mortg. Sec. 924.
Cullum *v.* Bank, 23 Ala. 797; 37 A. D. 725.
Oliphant *v.* Eckerly, 36 Ark. 69.
Bolles *v.* Chauncey, 8 Conn. 389.
Citizens Bank *v.* Dayton 116 Ill. 257; 4 N. E. 492.
Pouder *v.* Ritzinger, 102 Ind 571; 1 N. E. 44.
Helvely *v.* Matteson, 54 Ia. 505; 6 N. W. 732.
Parkhurst *v.* Cummings, 56 Me. 155.
Sledge *v.* Obenchain, 58 Miss. 670.
Bank of Utica *v.* Finch, 3 Barb. 293; 49 A. D. 175.
Nightingale *v.* Chaffee, 11 R. I. 609.
Stimpson *v.* Bishop, 82 Va. 190.
Taber *v.* Hamlin, 97 Mass. 489; 93 A. D. 113.
Bunker *v.* Barron, 79 Me. 62; 8 Atl. 253; 1 A. S. R. 282.

Such actions are, of course, different, as one is a personal and the other a real action, but they are not so inconsistent as to make an election to proceed with one a waiver of the other[90]. And if an execution be issued upon the judgment, the lien of the mortgage continues till the execution is satisfied. The same is true where the judgment is for only a part of the secured debt or for only a part of the secured notes[91].

(2) LEVY OF EXECUTION ON MORTGAGED PREMISES TO SATISFY MORTGAGE DEBT:—Sec. 120. It has been seen from the above that the mortgagee may secure a judgment on the mortgage debt without reference to the mortgage. But there is a decided contrariety of opinion among the courts as to the right of a mortgagee to levy execution upon the mortgaged premises and sell same for the mortgage debt, and the effect to be given such sale if made.

Sec. 121. On the one hand, it is said that a mortgagee cannot upon a judgment recovered for the mortgage debt levy an execution therefor upon the mortgaged premises[92]. It is well to be remembered

90. Priest *v.* Wheelock, 58 Ill. 114.
Darst *v.* Bates, 51 Ill. 439.
Jenkinson *v.* Ewing, 17 Ind. 505.
Thornton *v.* Pigg, 24 Mo. 249.
Lalane *v.* Payne, 42 La. Ann. 152; 7 So. 481.
Torrey *v.* Cook, 116 Mass. 163.
Shearer *v.* Mills, 35 Ia. 499.
Flanagan *v.* Westcott, 11 N. J. Eq. 264.
Cissna *v.* Haines, 18 Ind. 496.

91. Applegate *v.* Mason, 13 Ind. 75.
Brumagin *v.* Chew, 37 Ala. 354.
Kempner *v.* Comer, 73 Tex. 196; 11 S. W. 194.

92. Powell *v.* Williams, 14 Ala. 476; 48 A. D. 105.
Barker *v.* Bell, 37 Ala. 354.
Young *v.* Ruth, 55 Mo. 515.
Carpenter *v.* Bowen, 42 Miss. 28.
Washburn *v.* Goodwin, 17 Pick. 137.

in this connection that there is a distinction between a levy of execution upon the mortgaged premises, and a levy upon the mortgagor's interest or equity of redemption therein. In some states such sale of the equity of redemption is prohibited by statute[93]. And in California it is provided that an action to foreclose the mortgage is the only method allowed for the recovery of the mortgage debt. So there the question does not arise. It may readily be seen that the courts have no high regard for the proposition of selling the redeeming interest of the mortgagor for the mortgage debt; and even where such sale is sanctioned at all the greatest safe-guard possible is thrown around the mortgagor to prevent the working of injustice[94]. But it was said in an early New York case that "the creditor who takes a mortgage to secure an indebtedness by bond or otherwise has three remedies, either of which he may pursue or all of which he may pursue until his debt is satisfied. He may bring an action of debt upon the bond, or he may put himself in possession of the rents and profits of the land mortgaged, or he may foreclose the equity of redemption and sell the land to satisfy the debt. In this case the creditor sues on the bond and obtains judgment and execution, and the execution strictly reaches only to the remaining interest of the mortgagor in the land. It reaches only to the equity of redemption"[95]. This doctrine was later

93. Deleplaine *v.* Hitchcock, 6 Hill 14 (N. Y.).
Preston *v.* Ryan, 45 Mich. 174.
Mitchell *v.* Ringle, 151 Ind. 16; 50 N. E. 30; 68 A. S. R. 212.
94. Simpson *v.* Simpson, 93 N. Car. 373.
Baldwin *v.* Jenkins, 23 Miss. 206.
Bonnell *v.* Henry, 13 How. Pr. 142.
Preston *v.* Ryan, 45 Mich. 174.
95. Jackson *v.* Hull, 10 Johns. 481 (N. Y.).

criticised in the same state[96], and thereafter a statute enacted prohibiting such sales[97]. And many other authorities hold that the equity of redemption of the mortgagor cannot be sold on execution issued upon a judgment for the mortgage debt[98].

Sec. 122. But there is a rule better than either of those above adverted to, producing justice equally to the mortgagor and the mortgagee. The rule is that a mortgagee may sue the mortgagor at law for the mortgage debt, procure judgment therefor, obtain execution, levy same upon the mortgaged premises and conduct the proceedings to sale as in other cases under execution. But in such action the mortgagee waives the lien of his mortgage and is barred by his own act from further proceeding under it. The reasons for this rule have been clearly stated: "The debt is the principal thing. The mortgage is designed to secure the ultimate payment of it to the creditor. But if he pleases to waive that security and proceed to collect the debt in the ordinary process of the law, it is not for the debtor to complain. He is subjected to no illegal burden. The accepting a mortgage does not impose upon the creditor the necessity of giving credit for the term of three years beyond that stipulated for in the principal contract. The relation of the parties is changed by the levy. The levying creditor can no longer be considered en-

96. Tice *v.* Annin, 2 Johns. Ch. 125.

97. N. Y Code Civ. Proc. 1877, Sec. 1432.

98. Myrover *v.* French, 73 N. Car. 609.
McNair *v.* O'Fallon, 8 Mo. 188.
Davis *v.* Hamilton, 50 Miss. 213.
Funk *v.* McReynold, 33 Ill. 496.
Crane *v.* March, 4 Pick. 131.

titled under his mortgage. He is to be considered as holding under his levy, and his title must depend upon the regularity of his proceedings. He can claim no priority over other attaching creditors or intervening incumbrancers by reason of his mortgage''[99].

Sec. 123. This doctrine has been regarded as providing another method of foreclosing the mortgage with the same rights of redemption as in ordinary foreclosures[100]. But it is not a summary method of foreclosure. The lien of the mortgage is a right existing to the mortgagee the same as any other contractual right, and this he has the right of insisting upon or waiving as he may choose. Pursuing a course of conduct inconsistent with an intention to rely upon the lien is a waiver of it. So that causing the mortgaged property to be levied upon and sold under execution on a judgment for the mortgage debt is a voluntary abandonment of the mortgage lien or a waiver thereof, and will *ipso facto* discharge the mortgage, and the purchaser takes the premises freed from the mortgage lien[1]. To deny the mortgagee the right to so waive his mortgage lien would be to deny him the privilege of foregoing a benefit inuring solely to himself, a restriction unknown to any other class of contracts[2].

99. Crooker *v.* Frazier, 52 Me. 405.
100. Cottingham *v.* Springer, 88 Ill. 90.
Sharts *v.* Awalt, 73 Ind. 304.
1. Freeby *v.* Tupper, 15 Oh. 467.
Pierce *v.* Potter, 7 Watts 475.
Fosdick *v.* Risk, 15 Oh. 84; 45 A. D. 562.
Lord *v.* Crowell, 75 Me. 399.
2. Fithian *v.* Corwin, 17 Oh. St. 118.
McLure *v.* Wheeler, 6 Rich. Eq. 343.

Sec. 124. Even in those states denying a mortgagee the right to levy upon and sell the mortgaged premises upon an execution issued on a judgment for the mortgage debt, it said that the mortgagor's equity of redemption may be levied upon and sold for another debt in favor of the mortgagee other than the mortgage debt[3]. It is hard to understand why the levy and sale should be allowed without affecting the mortgage lien if the mortgagee is not to be permitted to waive the mortgage lien and proceed against the premises the same as any other creditor.

And it is held in those states where statutory provisions prohibit a sale of the equity of redemption on execution for the mortgage debt, that such execution may be levied upon any other property of the mortgagor[4], in effect a holding that the mortgagee may abandon his lien for the purpose of proceeding against other property of the mortgagor, but prohibiting his waiver of the lien in order to proceed otherwise against the particular property mortgaged.

(3) TAKING OTHER SECURITY, ATTACHING MORTGAGED PROPERTY, ETC.:—Sec. 125. It has herein been seen that no indulgence of the mortgagor by the mortgagee in the way of changing the time or mode of payment or the form of the debt is to be construed as a waiver of the mortgage lien. It remains the same lien as to third

3. Cushing *v.* Hurd, 4 Pick. 253; 16 A. D. 335.
See: Andrews *v.* Fiske, 101 Mass. 422.
4. Roosevelt *v.* Carpenter, 28 Barb. 426.
Simmons Hdw. Co. *v.* Brokaw, 7 Neb. 405.
Tucker *v.* McDonald, 105 Mass. 423.

parties as well as to the mortgagor through any such changes, so that even the taking of a new mortgage does not affect it where the rights of the original mortgagee are expressly reserved[5]. And the taking of a second mortgage for the same debt is not a waiver of the lien of the first[6], nor is the accepting of personal security[7]. So where the mortgagor conveyed the legal title in trust to pay a prior mortgage, the mortgagee did not waive his lien under the mortgage by accepting interest from the trustee[8]. And, unless there exist facts amounting to an equitable estoppel[9], the lien will not be waived by the taking of additional security of whatever character[10].

Sec. 126. But the above doctrine must not be carried too far, for the effect to be given to such transaction will be governed largely by the intent of the parties as gathered from all the circumstances surrounding their dealings. Thus, it is said that in the absence of fraud, accident or mistake the release of a first mortgage and the acceptance of a second in its stead is a waiver of the lien of the first mort-

5. Ames *v.* New Orleans Co., Fed. Cas. No. 329.
6. Burdett *v.* Clay, 47 Ky. 287 (8 B. Mon.).
Helvely *v.* Matteson, 54 Ia. 505; 6 N. W. 732.
Fruick *v.* Branch, 16 Conn. 260.
Walter *v.* Walters, 73 Ind. 425.
Brinkerhoff *v.* Lansing, 4 Johns. Ch. 65; 8 A. D. 538.
Geib *v.* Reynolds, 35 Minn. 331; 28 N. W. 923.
7. Id.
8. Nelson *v.* Radliff, 72 Miss. 656; 18 So. 487.
9. Kans. City Assoc. *v.* Mastin, 61 Mo. 435.
10. Birrell *v.* Schie, 9 Cal. 104.
Bank *v.* Tarleton, 23 Miss. 173.
Byers *v.* Fowler, 14 Ark. 86.
Cissna *v.* Haines, 18 Ind. 496.
Fireman's Co. *v.* Wilkinson, 35 N. J. Eq. 160.
Flower *v.* Elwood, 66 Ill. 438.
N. H. Bank *v.* Willard, 10 N. H. 210.

gage and extinguishes it forever as to intervening claimants[11]. And of course an express understanding that the taking of a new mortgage for the same debt shall have the effect of a complete discharge of the first mortgage will be carried out according to the intention of the parties and the prior lien will be held discharged or abandoned[12]. It is true that the effect of the transaction here being considered is not so much to produce a waiver of the mortgage lien as it is to constitute a full and complete payment of the mortgage debt, and consequently, a discharge and satisfaction of the mortgage securing it; and yet all of the elements of a waiver are present: It is the voluntary relinquishment of a known right with an intention that it shall not be further acted upon. There is nothing to compel a mortgagee to forego the benefit of his prior lien. And where he does so in order to accept a second or renewal mortgage for the same debt, he should be held strictly to his rights under such second mortgage and not be permitted to tie the second mortgage's string to the first mortgage's kite. To carry such a doctrine to its possible limit would be to produce a condition undesirable to say the least; for if one renewal or second mortgage may be taken by the mortgagee without his waiving or abandoning the lien of his first mortgage, even though the latter be discharged from record, there is no reason why a third may not be given, nor a fourth nor any other number, all relating back to and

11. Dingman *v.* Randall, 13 Cal. 513.
Miller *v.* Hicken, 92 Cal. 229; 28 Pac. 339.
Richards *v.* Griffith, 92 Cal. 493; 28 Pac. 484.
Anglade *v.* St. Avit, 67 Mo. 434.
New Eng. Co. *v.* Hirsch, 96 Ala. 232; 11 So. 63.
12. Boston Iron Co. *v.* King, 2 Cush. 400.

continuing the lien of the first mortgage; and in the absence of fraud or mistake this could not be permitted[13].

Sec. 127. In the absence of statutory regulation, the mortgagee has several remedies any one or all of which he may pursue, the only condition being that he shall have but one satisfaction for the debt. And so the lien of the mortgage is not lost or waived by first bringing suit on the note without reference to the mortgage. But it is otherwise if in an action on the particular indebtedness the mortgagee attach the mortgaged premises. For in such event another lien is established different from and inconsistent with the mortgage lien which it has supplanted. We are aware that a different doctrine has been presented[14], where it is said that the issuing of an attachment by the mortgagee against the mortgagor on the mortgage debt and the obtaining of a judgment thereunder is not *per se* a waiver of the mortgage lien. The contrary has been held, although under statutory provision limiting the mortgagee to one action for collection of his mortgage debt[15]. It occurs to us that the latter is the better doctrine whether provided for by statute or not; for the mort-

13. Gardenville *v.* Walker, 52 Md. 455.
Woolen's Ex'rs. *v.* Hillen's Ex'rs., 9 Gill 185; 52 A. D. 690.
Wash. Co. *v.* Slaughter, 54 Ia. 265; 6 N. W. 291.
Barnes *v.* Mott, 64 N. Y. 397; 21 A. R. 625.
Joyner *v.* Stancill, 108 N. Car. 153; 12 S. E. 912.
Stearns *v.* Godfrey, 16 Me. 158.
Trust Co. *v.* Farrar, 53 Vt. 542.
14. Lanahan *v.* Lawton, 50 N. J. Eq. 276; 23 Atl. 476.
Lydecker *v.* Bogert, 38 N. J. Eq. 136.
U. S. Trust Co. *v.* Lanahan, 50 N. J. Eq. 796; 27 Atl. 1032.
15. Bacon *v.* Raybould, 4 Utah 357; 10 Pac. 481; (Aff. 11 Pac. 570).
Ladd *v.* Ruggles, 23 Cal. 232.

gagee should be put to his election whether he will rely upon the lien of his mortgage or the lien of an attachment, and when one method is chosen the other should be held waived.

Sec. 128. Where a mortgagee permits the mortgaged property to be levied upon in another action without asserting his claim thereto, it has been held that he waives his lien as to the purchaser[16]. This doctrine, however, we are not at liberty to accede to. It is the rule, however, that a mortgagee may lose or waive his lien by such an unreasonable delay in availing himself of the security as to produce the belief that he has abandoned it or as to make it inequitable to permit him to enforce it[17]. But any delay short of a time when payment is to be presumed will not be sufficient to bar the right to assert the lien[18], nor, it has been said, will any delay short of the period provided by the statute of limitation be sufficient as a bar or waiver[19].

(4) WAIVER OF PRIORITY:—Sec. 129. As hereinbefore shown, the release of a first mortgage and acceptance of a second in its stead will, in the absence of fraud or mistake, operate as a waiver of the lien of the original mortgage, and the lien of the

16. Grace *v.* Mercer, 49 Ky. 157.
17. Bettis *v.* Allen, 73 Ky. 40.
Hawkins *v.* Chapman, 36 Md. 83.
Thompson *v.* Jarvis, 39 Mich. 242; 10 N. W. 469.
Brown *v.* Becknall, 58 N. Car. 423.
18. Gibson *v.* Green's Adm'r., 89 Va. 524; 16 S. E. 661; 37 A. S. R. 888.
Blair *v.* St. Louis Co., 22 Fed. 471.
19. Murto *v.* Lemon, 19 Colo. App. 314; 75 Pac. 160.
Dick *v.* Balch, 54 Barb. 455.
Mason *v.* Philbrook, 69 Me. 57.

second will run only from its execution and recording in like manner as if no prior mortgage had existed[20]. The effect of this is to give priority to another mortgage executed subsequently to the old mortgage but prior to the new, or, in other words, to give priority to an intervening incumbrance[21].

Of course, a prior mortgagee may, if he choose, waive the priority of his lien in favor of a junior incumbrancer[22], and he may do so without destroying his mortgage[23]. And a waiver of priority may be produced by a course of conduct on the part of the mortgagee inducing the belief that such priority would not be insisted upon by him, or prejudicing the rights of a junior incumbrancer in such a manner that it would be unconscionable to give effect to the priority. Or fraud, concealment, or misrepresentation on the part of the senior mortgagee may have the same effect. Thus, if he permits a second mortgagee to procure a lien on the same property,

20. Frazee *v.* Inslee, 2 N. J. Eq. 239.
Dingman *v.* Randall, 13 Cal. 513.
Richards *v.* Griffith, 92 Cal. 493; 28 Pac. 484.
Holt *v.* Baker, 58 N. H. 276.
Anglade *v.* St. Avit, 67 Mo. 434.
Daws *v.* Craig, 62 Ia. 515; 17 N. W. 778.

21. New Eng. Co. *v.* Hirsch, 96 Ala. 232; 11 So. 63.
Stears *v.* Godfrey, 16 Me. 158.
Wash. Co. *v.* Slaughter, 54 Ia. 265; 6 N. W. 291.
Trust Co. *v.* Farrar, 53 Vt. 542.

22. Frost *v.* Yonkers Bank, 70 N. Y. 553; 26 A. R. 627.
Bank *v.* Moore, 94 N. Car. 734.
Mut. Co. *v.* Sturgis, 33 N. J. Eq. 328.
Clason *v.* Shephers, 6 Wis. 369.
Darst *v.* Bates, 95 Ill. 493.
Loland *v.* Ry. Co., 52 Vt. 144.

23. Loucks *v.* Union Bank, 2 La. Ann. 617.
Rigler *v.* Light, 90 Pa. St. 235.
Lehman *v.* Godberry, 40 La. Ann. —; 4 So. 316.
N. Y. Chem. Co. *v.* Peck, 6 N. J. Eq. 37.

concealing his interests, he thereby waives the priority of his mortgage[24]. And it is the duty of one holding a mortgage in the form of a deed to disclose the true nature of his security, if same be inquired about, and any false statement concerning same, or concealment of material facts will have the effect of waiving the priority of such mortgage lien[25]. So, if the mortgagee, when interrogated, states that his mortgage has been paid, the same result is produced[26]. And if the mortgagee represents to a third person that the debt secured by his mortgage has been paid, and such person thereupon releases an attachment upon the goods of the mortgagor and accepts a mortgage on the same land in lieu of such attachment, the first mortgagee, on account of his misrepresentation as to his mortgage, will be subordinated to the lien of the second mortgage[27].

It is also said that where a mortgagee holding a first lien on premises releases the mortgagor from personal liability on the mortgage debt, he thereby subordinates his lien to that of a junior incumbrancer[28]. The reason given being that such release is an impairment of the security of the later incumbrance. But we cannot agree with the reasoning nor the results. The right to hold the mortgagor per-

24. Chester *v.* Greer, 24 Tenn. 26.
Green *v.* Price, 1 Munf. (Va.) 449.
Chapman *v.* Hamilton, 19 Ala. 121.
Tucker *v.* Jackson, 60 N. H. 214.
25. Geary *v.* Porter, 17 Oreg. 465; 21 Pac. 442.
26. Lasselle *v.* Barnett, 1 Blackf. 150; 12 A. D. 217.
Newman *v.* Mueller, 16 Neb. 523; 20 N. W. 843.
27. Platt *v.* Squire, 53 Mass. 494.
Freeman *v.* Brown, 96 Ala. 301; 11 So. 249.
28. Sexton *v.* Puckett, 24 Wis. 346.
Armitage *v.* Wickliffe, 12 B. Mon. 488 (Ky.).

sonally for the debt is one which may be waived with no other effect than to limit the mortgagee to the mortgaged property for the collection of his debt[29].

Sec. 130. But a prior incumbrancer who was present at the execution and delivery of a subsequent mortgage and failed to disclose his interest does not waive the priority of his mortgage if the subsequent mortgagee had actual or constructive notice of its existence[30]; nor will the fact that he witnessed such subsequent mortgage produce such waiver where there was no fraud or deceptive silence[31]. Nor will an agreement for an extension of time for payment of the debt affect his priority[32]. And, generally speaking, to constitute a waiver of his priority, the first mortgagee must be guilty of fraud or bad faith or gross disregard for the interests of third parties, and his mere carelessness or silence will not produce such result[33].

B. WAIVER IN FORECLOSURES.

(1) BREACH OF MORTGAGE CONDITIONS:—Sec. 131. Nearly all mortgages contain conditions a breach of which subjects the entire debt to maturity and the mortgage to foreclosure at the option of the mortgagee. It is permissible for parties to contract as they please in this regard and such agreement will be given effect. The usual provisions

29. Baldwin *v.* Norton, 2 Conn. 161.
30. Carter *v.* Champion, 8 Conn. 549; 21 A. D. 695.
31. Claybaugh *v.* Byerly, 7 Gill (Md.) 354; 48 A. D. 575.
Brinkerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 65; 8 A. D. 538.
32. Whittacre *v.* Fulker, 5 Minn. 508.
Farmers Bank *v.* Mut. Soc., 4 Leigh 69 (Va.).
33. Berry *v.* Mut. Ins. Co., 2 Johns. Ch. 603.
Martin *v.* Cent. Co., 78 Ia. 504; 43 N. W. 301.

are that the mortgagor shall promptly pay the interest, taxes, insurance or installments of the principal as they become due, and in default of any such payment the mortgage may be foreclosed for the whole debt secured. But it is not compulsory that the mortgagee avail himself of his right to foreclose. It is a provision solely for his benefit, and if he choose he may agree to waive any such breach of the conditions of the mortgage, or he may so conduct himself as to mislead the mortgagor into an honest belief that this right is not to be insisted upon, in which event a waiver of the default will be imputed to the mortgagee.

(a) NON-PAYMENT OF INTEREST:—Sec. 132. Any act will be sufficient to constitute a waiver of default in non-payment of interest which is inconsistent with a claim of forfeiture[34]. Thus, an agreement for an extension of time in which to pay the interest, even by parol, is sufficient to waive any right to a forfeiture which might have been incurred thereby[35]. But an acceptance of part of the interest already due does not have such effect as a waiver[36]. A waiver of forfeiture was declared where the condition of a subsequent mortgage was that interest on the prior mortgage was to be punctually paid, and

34. Sire *v.* Wightman, 25 N. J. Eq. 102.

35. Manning *v.* Tuthill, 30 N. J. Eq. 29.
Lawson *v.* Barron, 18 Hun 414.
Ala. Co. *v.* Robinson, 56 Fed. 690.
Moore *v.* Sargent, 112 Ind. 484; 14 N. E. 466.
Smalley v. Ranken, 85 Ia. 612; 52 N. W. 507.
See: Mason *v.* Luce, 116 Cal. 232; 48 Pac. 72.
Jacobs *v.* Swift, 8 Kans. App. 857; 56 Pac. 1127.
Fulkner *v.* Brockenbrough, 4 Rand. 245 (Va.).

36. Smith *v.* Hooton, 3 Pa. Dist. 250.

the mortgagee accepted payment of over-due interest before foreclosure proceedings were started[37].

Sec. 133. The acceptance of over-due interest, however, does not waive the right to declare a forfeiture for non-payment of an installment of the principal[38]. And where payment of several installments of the interest was accepted by the mortgagee after their maturity, it was held that such did not constitute a waiver of the right to declare the whole debt due upon failure to promptly pay the interest subsequently falling due[39]; but such a holding is questionable to say the least, for by his conduct the mortgagee has induced in the mind of the mortgagor a belief that the strict letter of the provision is not to be insisted upon, and when the latter has been lulled into a feeling of security in this behalf, the former should not be permitted to reap such a benefit as the result of his own misleading conduct.

Sec. 134. An acceptance of payment of a part of the principal is not a waiver of the default in non-payment of interest[40]; nor would an acceptance of a second installment of interest waive a default as to the first after foreclosure proceedings had been started[41]; although it is apprehended that if a mortgagee should waive several such defaults the mortgagor might safely presume that the forfeiture provided for would not be taken advantage of in a summary manner but that he would have a reasonable

37. Sire *v.* Wightman, 25 N. J. Eq. 102.
38. Northwestern Co. *v.* Butler, 57 Neb. 198; 77 N. W. 667.
39. Penn. Hos. Co. *v.* Gibson, 2 Miles (Pa.) 324.
40. Moore *v.* Sargent, 112 Ind. 484; 14 N. E. 466.
41. Curran *v.* Houston, 201 Ill. 442; 66 N. E. 228.

time after maturity to pay, as he had on former occasions, even where a waiver does not occur as to subsequent installments of interest if one default has already been waived[42]. Simply notifying a mortgagor that an installment of interest is about due is not a waiver of default in payment thereof[43]. A mortgagor requested a few days additional after maturity of interest in which to pay same; the mortgagee waited three months before exercising his option to foreclose; such delay was held no waiver of the default in prompt payment of the interest at its maturity[44].

(b) NON-PAYMENT OF TAXES, INSURANCE, OR INSTALLMENTS OF PRINCIPAL:—Sec. 135. Where the mortgage gives the mortgagee the right to declare the debt due and to foreclose the mortgage upon non-payment of taxes on the mortgaged premises, or insurance thereon, the mortgagee waives the right to declare a forfeiture therefor unless he avails himself of the default before it is cured. For if the mortgagor pay the taxes or insurance before foreclosure proceedings are started, the right to foreclose on account of prompt payment is lost to the mortgagee[45]. In such event it is not the payment that produces the waiver, as such could be induced only by some act of the mortgagee, but it is the laches of the mortgagee in taking advantage of this provision of the mortgage. But the mere fact that the mortgagee pays the taxes or insurance him-

42. Baldwin Inv. Co. *v.* Bailey, 45 Neb. 580; 63 N. W. 847.
Post *v.* Industrial Co., 34 Atl. 137 (N. J.).
43. Parker v. Olliver, 106 Ala. 549; 18 So. 40.
44. Hewett v. Dean, 25 Pac. 753.
45. Smalley *v.* Ranken, 85 Ia. 612; 52 N. W. 507.
Parker *v.* Olliver, 106 Ala. 549; 18 So. 40.

self will be no bar to his right to foreclose[46]; and it is held though he fails to take advantage of this provision on the first default this will not constitute a waiver for any subsequent defaults of a similar character[47].

Sec. 136. So where the instrument gives the mortgagee the right to foreclose upon failure of the mortgagor to pay an installment of the principal at a designated time, he waives the right to a foreclosure by an unconditional acceptance of payment thereof after the time limited. But it was held, contrary to the above, that acceptance of payment of one of two notes three days after its maturity was no waiver by the mortgagee of a provision giving him the option to declare both due upon non-payment of either at maturity[48].

(2) WAIVER OF ENTRY TO FORECLOSE:—Sec. 137. An entry to foreclose a mortgage may be made by the mortgagee, and such waiver may be by the express agreement of the parties, or it may be induced by any conduct or facts from which an agreement may be inferred or which would make it inequitable to give effect to the entry, or which evidence an intention on the part of the mortgagee not to insist on the entry and complete the foreclosure in that way. Thus, receipt of payment of the mortgage debt is such a waiver[49], and it has

46. Brickell *v.* Batchelder, 62 Cal. 623.
See: Rasmussen *v.* Levin, 28 Colo. 448; 65 Pac. 94.
47. Parker *v.* Olliver, *supra.*
48. Moore *v.* Sargent, 112 Ind. 484; 14 N. E. 466.
See: Brown *v.* Thompson, 29 Mich. 72.
Faulkner's Adm'x. *v.* Brockenbrough, 4 Rand. 245 (Va.).
49. Bachelder *v.* Robinson, 6 N. H. 12.

been held that accepting payment of a part of the debt would have the same effect[50], although it seems to us that better reasoning supports an opposite holding[51], or at least that the intention of the parties should be ascertained and that such intention should govern. Of course if the understanding is that receipt of payment shall open foreclosure, that is conclusive of the matter[52], as are also facts and circumstances from which such understanding may be inferred[53]; but if such intention remains doubtful, the foreclosure will not be waived[54].

Sec. 138. Where a mortgagee enters into possession of the premises under a foreclosure judgment, he does not waive the entry of foreclosure by releasing the judgment and retaining possession, for the continued actual possession is a complete foreclosure in itself[55]. But if the mortgagee bring action on the secured debt upon the theory that the land is not worth the debt, and recovers judgment for part of such debt, the foreclosure is thereby waived by virtue of statutory provision in some states[56].

Sec. 139. If the mortgagee give bond to the mortgagor conditioned to discharge the mortgage upon payment of same at a future day, this has the effect of waiving the prior entry or opening the foreclos-

50. Dow *v.* Moor, 59 Me. 118.
Deming *v.* Comings, 11 N. H. 483.
Ross *v.* Leavitt, 70 N. H. 602; 50 Atl. 110.
51. Tompson *v.* Tappan, 139 Mass. 506; 1 N. E. 924.
52. Dow *v.* Moor, 59 Me. 376.
54. Lawrence *v.* Fletcher, 8 Met. (Mass.) 153.
55. Couch *v.* Stevens, 37 N. H. 169.
56. Jones on Mortgages, Art. 1274.

ure, as such bond is consistent only with the continued existence of the mortgage[57]. And the same result is produced by an agreement to abandon the foreclosure if the debt be paid by a designated time[58], although the waiver will not be effective unless payment is actually made within the time limited[59]. So, an extension of time for payment beyond the time allowed by law to redeem will amount to a waiver[60], as will an agreement to re-convey the premises[61], whenever the debt should be paid from the rents and profits. And if the mortgagee commence action of foreclosure of his mortgage, a prior entry is thereby waived, for such action is an admission that the entry is a nullity and is inconsistent with an intention to rely upon it[62]. But an action of trespass for waste against the mortgagor is not a waiver of the entry, for such action is an affirmance of the entry[63], as is also an action for possession against a tenant at will of the mortgagor[64]. So, if the mortgagee, after entry, accept a new security for the whole debt, the entry is thereby waived, as the continued existence of the mortgage is still recognized[65].

Sec. 140. The waiver, to be effective, must be produced by the agreement or conduct of the holder

57. Joslin *v.* Wyman, 9 Gray 63.
58. McNeil *v.* Call, 19 N. H. 403; 51 A. D. 188.
59. Clark *v.* Crosby, 101 Mass. 184.
Danforth *v.* Roberts, 20 Me. 307.
60. Chase *v.* McClellan, 49 Me. 495.
61. Quint v. Little, 4 Me. 495.
62. Smith *v.* Kelley, 27 Me. 237; 46 A. D. 595.
Fay *v.* Valentine, 5 Pick. 418.
But see: Blavin *v.* Gove, 102 Mass. 298.
Dorrell *v.* Johnson, 17 Pick. 263.
63. Page *v.* Robinson, 10 Cush. 99.
64. Fletcher *v.* Cary, 103 Mass. 475.
65. Trow *v.* Berry, 113 Mass. 139.

of the mortgage[66]. And when the mortgage is assigned, the assignee has full control and charge over it and all rights pertaining thereto, to all intents and purposes the same as the mortgagee had, and he has the right to waive an entry made either by himself or the original mortgagee[67]; and the same acts will amount to a waiver as if done by the original mortgagee.

(3) WAIVER OF FORECLOSURE SALE:—Sec. 141. Where a sale of mortgaged premises is had by foreclosure, the parties may agree to disregard or set aside the sale and restore the title to its former condition, and such agreement will be given effect in the absence of rights of third parties which would be contravened thereby[68]. And any other facts or conduct of the mortgagee may be construed as a waiver which manifests an intention not to stand upon the sale. Thus, agreeing to extend the time for payment of the mortgage debt beyond the period allowed by law for redemption will operate as a waiver of a previous sale[69]. But if it is the agreement that the whole debt is to be paid within the time allowed for redemption, and part payment is received within such time, such facts do not constitute a waiver of the sale[70], although it is said that accepting part payment of the mortgage debt after

66. Fisher *v.* Shaw, 42 Me. 32.
67. Cutts *v.* York Mfg. Co., 14 Me. 326.
Hill *v.* Moore, 40 Me. 515.
Hurd *v.* Coleman, 42 Me. 182.
Jones, Mortgages, Art. 1266.
68. Dodge *v.* Brewer, 31 Mich. 227.
69. Lockwood *v.* Mitchell, 7 Oh. St. 387; 70 A. D. 78.
70. Cameron *v.* Adams, 31 Mich. 426.

a foreclosure sale is a waiver of the foreclosure[71]. The mortgagee, however, cannot always simply by his own volition, waive the sale and render it a nullity. For if such a waiver would operate as a fraud upon the mortgagor he may insist upon the sale's remaining intact. Thus, it is said that if the mortgagee of land purchase the premises on foreclosure for a sum equal to the mortgage debt, he thereby satisfies the debt, and he cannot later abandon the sale and sue on the debt[72].

Sec. 142. A mortgagee who has become the purchaser of the premises at a foreclosure sale, and by his purchasing renders the sale voidable, does not waive the sale by later entering into possession as provided by statute for foreclosure[73]. Nor is a foreclosure sale for one installment of the debt waived by a suit for a second installment[74]; nor is such a result produced by the remark of a purchaser at a foreclosure sale that he wished only the payment of the debt, and if that should be paid he would re-convey to the mortgagor[75]. But if in any such understanding fraud should be exercised upon the mortgagor by the mortgagee, the effect of the sale will be held waived and the mortgagor permitted to redeem from it[76].

(4) WAIVER OF RIGHT TO SET ASIDE SALE. (a) BY LACHES OR DELAY:—Sec. 143.

71. Scott *v.* Childs, 64 N. H. 566; 15 Atl. 216.
72. Hood *v.* Adams, 124 Mass. 481; 26 A. R. 687.
73. Learned *v.* Foster, 117 Mass. 365.
74. Wilson *v.* Wilson, 4 Ia. 309.
75. Mansur *v.* Willard, 57 Mo. 347.
Medsker *v.* Swaney, 45 Mo. 273.
76. Stinson *v.* Pepper, 47 Fed. 676.

A voidable sale of mortgaged premises under foreclosure may be set aside at the instance of the mortgagor, provided he act with sufficient promptness after knowledge of the voidability of the sale, or if he has not been guilty of laches, or has not otherwise so conducted himself as to bar his rights. But the presumptions are always in favor of the regularity of the sale, and it will not be vacated except upon a strict showing that the irregularities have been taken advantage of in a reasonable time and before rights of innocent parties have attached[77]. Courts will not interfere after a reasonable time has expired before the mortgagor takes action; and, of course, if he wait until the statutory time for redemption has expired, his right to set aside the sale, if it ever existed, will be deemed waived[78]. And a delay of four years was held a waiver of the right where the mortgagor saw the property sold and made no attempt to redeem it or to take any other action until the property had greatly increased in value[79]. And a delay of seven or eight years has been held to amount to a waiver[80].

Sec. 144. But in order that laches of the mortgagor may be sufficient to amount to a waiver of his right to vacate an irregular or voidable sale, he must have either actual or imputed knowledge of the facts constituting the irregularity upon which he could reasonably have been expected to have based a choice

77. Harwood *v.* Ry. Co., 17 Wall. 78 (U. S.).
Terbell *v.* Lee, 40 Fed. 40.
78. Depew *v.* Depew, 46 How. Pr. 441.
79. Bryam *v.* Pinney, 3 Ariz. 27; 20 Pac. 311.
80. Roberts *v.* Fleming, 53 Ill. 196.
And see: Ex-Miss. Land Co. *v.* Flash, 97 Cal. 610; 32 Pac. 600.
Meier *v.* Meier, 105 Mo. 411; 16 S. W. 223.

to avoid the sale or abide by it[81]. Thus, it was held that the right to set aside a sale was not waived where the mortgagor paid no taxes on the property for five years, and took no steps to ascertain whether the mortgage had been foreclosed, if he had no notice of the foreclosure and the mortgage provided that the taxes might be paid by the mortgagee and recovered as a part of the mortgage debt[82].

(b) EFFECT OF REDEMPTION:—Sec. 145. A mortgagor cannot insist that a foreclosure sale is subject to being set aside and at the same time so conduct himself as to recognize its validity. He must be consistent in his demands and in his conduct. And so, one who claims the right to redeem from the sale or attempts to exercise such right, thereby affirms the validity of the sale and will be held to have waived the defective elements thereof and also his right to vacate the sale[83]. And where the mortgagor made an agreement with the purchaser under which the former was to remain in possession of the premises and have the right to redeem, he was held to have waived any right he may have had to vacate the sale after he had broken his agreement to redeem, as such agreement was inconsistent with an intention to regard the sale as voidable and was in affirmance of it[84].

81. Bausman *v.* Kelley, 38 Minn. 197; 56 N. W. 333; 8 A. S. R. 661.
2 Pomeroy's Eq. Jur. Secs. 809, 817 and 965.
Union Dime Inst. *v.* Clark, 59 How. Pr. 342.
82. McEachern *v.* Brackett, 8 Wash. 652; 36 Pac. 690; 40 A. S. R. 923.
83. Miller *v.* Ayres, 59 Ia. 424; 13 N. W. 436.
Dailey *v.* Abbott, 40 Ark. 275.
84. Toll *v.* Hiller, 11 Paige (N. Y.) 228.
Maxwell *v.* Newton, 65 Wis. 261; 27 N. W. 31.
Randall *v.* Howard, 2 Black. 585.

(c) OTHER CONDUCT CONSTITUTING WAIVER:—Sec. 146. If a mortgagor accept the surplus from a foreclosure sale of his premises over and above the mortgage debt, he affirms the validity of the sale as much as if he had claimed the right to redeem, and will not thereafter be heard to say that the sale was irregular or voidable. But at the time of accepting such surplus he must have knowledge of the facts rendering the sale voidable or such waiver will not be held against him. It is the inconsistency, with knowledge of the facts, that constitutes the waiver, as it cannot occur when a party is ignorant of his rights, if he has not been negligent in ascertaining them[85].

But it has been said that the receipt of such surplus money arising from the foreclosure sale is not of itself a waiver of irregularities in the sale, but merely evidence from which such waiver might be inferred[86]. But such we think is not the better rule. The matter is to be determined according to the intention of the party having the right to avoid the sale; and this intention, in the absence of an agreement between the parties, can best be ascertained from the conduct of the mortgagor himself. And if he consider the sale voidable on account of irregularities, he must promptly take advantage thereof and be consistent in his intention to vacate the sale. The receipt of parts of the fruits of a sale, with knowledge of the facts, can be construed only as an intention to abide by the sale.

85. France *v.* Haynes, 67 Ia. 139; 25 N. W. 98.
Colton *v.* Rupert, 60 Mich. 318; 27 N. W. 520.
Meriwether *v.* Craig, 118 Ind. 301; 20 N. E. 769.
86. Candee *v.* Burke, 1 Hun 546 (N. Y.).

Sec. 147. If a party have an opportunity to avail himself of the right to object to a foreclosure sale, he must take advantage of such opportunity or it will later be denied him. He must not mislead others into a belief that he is satisfied with the manner in which the sale has been made, and then attempt to interpose objections after such other parties have been induced by his conduct to act to their prejudice. Thus, where a mortgagor has notice that, in pursuance of a statute, the sheriff will acknowledge in open court a deed to the purchaser of mortgaged premises, he waives defects in the sale by failing to appear and object thereto at the time set[87].

And the voidability of the sale is also waived where with knowledge of defects the mortgagor makes a payment on the amount remaining unpaid after sale of the property[88]; or if he resists an execution for the deficiency judgment[89]. So, a purchaser cannot object to the regularity of a sale after participating in it and accepting the fruits thereof[90]; nor can a party who has been negligent in making inquiry[91], or claimed a part of the proceeds of the sale[92], or agreed that the property might be sold for a certain price[93].

87. Gibson *v.* Lyon, 115 U. S. 439; 6 Sup. Ct. R. 129; 29 L. Ed. 440.
88. Zable *v.* Bank, 16 S. W. 588 (Ky.).
89. Wallace *v.* Field, 56 Mich. 3; 22 N. W. 91.
90. Routh *v.* Citz. Bank, 28 La. Ann. 569.
Howe *v.* Whited, 21 La. Ann. 495.
91. Francis *v.* Church, 1 Clarke Ch. 475.
92. City of Baltimore *v.* Parlange, 25 La. Ann. 335.
93. Smith *v.* Briscoe, 65 Md. 561; 5 Atl. 334.

CHAPTER 5.

LIENS.

Section

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1. POSSESSORY LIENS:—Sec. 148. There are many liens that, as a condition of their validity, require that the lien-claimant retain possession of the property upon which the lien is asserted. In fact all common-law liens have possession as their basic element, and this element once lost, the lien is of no more force or effect. This is true of the lien of a carrier, an inn-keeper, a liveryman, an agister or a warehouseman. And in any of such cases there is one rule to be applied that will determine the status of the lien—if possession of the property be voluntarily surrendered, any right to a lien thereon is thereby waived[94].

94. Egan *v.* Spruce, 41 Fed. 830.
Ferriss *v.* Schreiner, 43 Minn. 48; 44 N. W. 1083.
Hale *v.* Barrett, 26 Ill. 195; 79 A. D. 367.
Gregg *v.* Ill. Cent. Ry., 147 Ill. 550; 35 N. E. 343; 37 A. S. R. 238.

A. CARRIERS:—Sec. 149. A common carrier labors under the obligation to receive and transport any goods that may be offered, and, with certain reservations, is liable for their safety until their delivery. By accepting the obligations and duties of a carrier, such carrier is not invested with any property rights in the goods transported; such property rights necessarily rest some other place. But the carrier is given the right of control over the goods till it is paid a reasonable compensation for its services, and the right of control—or right of possession—is the lien with which the carrier is endowed by law, the right to retain the goods till carriage charges thereon are paid. It matters not who consigns the property or who is responsible for the freight, the right to the lien runs against the true owner unless he has been defrauded in the shipment[95].

Sec. 150. But in order to avail himself of the lien, a carrier must retain actual possession of the goods; for the lien is its security for payment of the carriage charges, and by destroying the foundation of the lien in relinquishing possession of the property, it is deemed to have elected to look to the personal responsibility of the owner or consignee and in such election to have abandoned the security given it by law. In other words, the lien of a carrier of goods is waived by a voluntary relinquishment of possession without requiring payment of carriage charges[96]. But it is evident that the relinquishment

95. Robinson *v.* Baker, 5 Cush. 137; 51 A. D. 54.
96. Gring *v.* Lumber, 38 Fed. 528.
Wingard *v.* Banning, 39 Cal. 543.
Bigelow *v.* Heaton, 4 Denio 496.

of possession must be voluntary, for if it be obtained through subterfuge or by fraudulent means, the lien will be held not waived—waiver in this as in other cases being induced by an intentional act or by conduct so inconsistent with any other intention as to cause an intended surrender to be implied[97]. And it will be seen that the surrender of possession must be with the intention that the carrier will part with his interest in the goods delivered, and it has therefore been held that where possession was relinquished under the belief that the carriage charges would be paid at the time the lien was not lost[98]. And the carrier may make any kind of agreement with the owner of goods as to conditions to be annexed to a surrender of possession, or that such surrender shall not operate as a waiver, and any such agreement will be given effect by the courts and the lien sustained[99]. But if the delivery be voluntary and unconditional, the lien will be waived no matter what motives induced the surrender of possession[100].

Sec. 151. While a carrier's lien depends upon possession for its validity, it does not follow that the mere surrendering of possession is the only means through which a waiver of the lien occurs. Such waiver will be implied if the carrier attach for freight

Reineman *v.* Ry. Co., 51 Ia. 338; 1 N. W. 619.
Gregg *v.* Ill. Cent. Ry., 147 Ill. 550; 35 N. E. 343.
Lake Shore Ry. *v.* Ellsley, 85 Pa. St. 283.
Bailey *v.* Quint, 22 Vt. 474.

97. Geneva, etc. Ry. *v.* Sage, 35 Hun 95 (N. Y.).
Bigelow *v.* Heaton, *supra.*

98. 151 Tons Coal, 4 Blatchf. 368.

99. The Eddy, 5 Wall. 481 (U. S.).

100. Sears *v.* Wills, 4 Allen 212.

charges the property upon which the lien is claimed[1], or levy an execution upon it, or put its refusal to deliver upon the ground that the goods are not in its possession at the place where demand is made[2], or negligently damage the goods in an amount in excess of the charges[3]; and the lien is waived where, between the carrier and the consignor, there is a stipulation for payment of freight at a place different from that at which the goods were to be delivered, for such an agreement must necessarily present the inference that payment was not intended to be demanded as a condition precedent to delivery[4].

Sec. 152. And a waiver occurs if the time arranged for payment of transportation charges be inconsistent with the existing of a lien depending, as that of a carrier does, upon possession for its validity. Thus, if credit for freight be given to a period subsequent to the time when the goods are to be delivered, the lien is thereby displaced[5]; and the same result follows the taking of notes or other security payable after the time arranged for the delivery of the goods transported[6]. But the taking of notes for the charges is not a waiver of the right to a lien if the notes mature prior to the time for delivery of the goods carried.

1. Wingard *v.* Banning, 39 Cal. 543.
2. Adams Ex. Co. *v.* Harris, 120 Ind. 307; 16 A. S. R. 315.
3. Dyer *v.* Grand Trunk Ry., 42 Vt. 441; 1 A. R. 350.
4. Raymond *v.* Tyson, 17 How. 53 (U. S.).
5. Pinney *v.* Wells, 10 Conn. 104.
   Chandler *v.* Belden, 18 Johns. 157; 9 A. D. 193.
   Pickman *v.* Woods, 6 Pick. 248.
6. Bird of Paradise, 5 Wall. 545 (U. S.).

B. INN-KEEPERS:—Sec. 153. A lien is reserved by law in favor of inn-keepers and boarding-house keepers upon the property of their guests turned over to them, for charges of entertainment. But this lien depends for its validity upon the keeper's retaining possession of the property till the charges are paid, for his loss of possession is the loss of his lien unless the goods were taken from him through the fraud of the guest, in which event the lien is not lost nor released[7]. It is of no moment whether the charges be paid or not, the question whether such a lien has been released or waived must depend upon the proposition whether or not the keeper has voluntarily relinquished the goods without first demanding payment of the charges. If this proposition be shown in the affirmative, then the lien is waived. But a waiver may also occur by the keeper's taking security for his charges inconsistent with the continued existence of the lien. And it may also be shown by an agreement for payment at a future time which in itself is preclusive of an intention that the lien shall continue.

C. LIVERYMEN AND AGISTERS:—Sec. 154. The rules announced are equally applicable where the lien is that of a liveryman or agister upon an animal cared for. But more difficulty is encountered in applying the rules; for, while the voluntary surrender of possession of the animal constitutes a waiver of the lien, it is not always easy to declare what is such a surrender of possession as will constitute waiver. Thus, the keeper of a horse may per-

7. Manning v. Hollenbeck, 27 Wis. 202.

mit the owner to take the horse for a temporary use with the implied understanding that it will be returned, and in such event the lien will be held not waived, for the necessary intention, either express or implied, is lacking[8]. But the effect is otherwise if possession be delivered to the owner for more than a temporary use or without an understanding that the animal is to be returned to the keeper[9].

2. ATTORNEYS' LIENS:—Sec. 155. In some states an attorney has a lien against a judgment procured for his client for his fees earned in the case. The lien cannot be divested except by some act of the attorney himself or of some one with his knowledge and approval. But, like any other lien, it may be lost or waived, and a waiver will be construed from any act of the attorney indicating an intention not to rely upon or enforce the lien. It may be waived by any transaction or arrangement for payment by which the attorney looks to other security or mode of payment. But the intention that the lien shall no longer exist should be made to clearly appear or a waiver should not be inferred[10]. The lien is not waived by a delay of several years to collect the demand if there is no negligence on the part of the attorney, and the debtor has notice of the lien[11]; nor will the fact that the judgment has become dormant

8. Wall *v.* Long, 2 Ind. App. 202; 28 N. E. 101.
Young *v.* Kimbell, 23 Pa. St. 193.
Caldwell *v.* Tutt, 10 Lea 258; 43 A. R. 317.
9. Seebaum *v.* Handy, 46 Oh. St. 560; 22 N. E. 869.
Ferris *v.* Schreiner, 43 Minn. 48; 44 N. W. 1083.
Papineaw *v.* Wentworth, 136 Mass. 543.
Estey *v.* Cooke, 12 Nev. 276.
10. Renick *v.* Ludington, 16 W. Va. 378.
11. Stone *v.* Hyde, 22 Me. 318.

and has been revived by other attorneys deprive an attorney of his lien upon the judgment[12]; nor does an attorney waive his lien by taking the note of his client for his fee[13].

Sec. 156. But a lien upon a specific fund is waived where an attorney accepts an assignment of the fund itself[14]. And the lien is lost to him who procures a satisfaction of the judgment upon which the lien exists[15], or releases property from the operation of the judgment[16]. And it has even been held that the recovering of a judgment for his services against his client is a waiver of the attorney's lien[17]; but to the writer's mind this holding is of questionable propriety, especially if the judgment against the client be uncollectible.

3. MECHANICS' LIENS.

A. IN GENERAL:—Sec. 157. The right to a mechanic's lien, like any other legal right or benefit, may be relinquished or waived by him who is entitled to it; and such waiver may arise either from an express or implied consent or from a course of conduct calculated from its nature, to inspire a belief that the right would not be asserted. No difficulty, of course, arises where an express waiver has been made; but much confusion has been met in cases where an implied consent to such waiver has been alleged, or where conduct is such that an intention

12. Jenkins *v.* Stephens, 60 Ga. 216.
13. Davis *v.* Jackson, 80 Ga. 138.
14. Fulton *v.* Harrington, 7 Houst. 182.
15. Cowen *v.* Boone, 48 Ia. 350.
16. Wishard *v.* Biddle, 64 Ia. 526; 21 N. W. 15.
17. Clark *v.* Dickerman, 95 Mich. 289.

to waive is sought to be deduced from it. The authorities are not uniform in their statements as to what facts are sufficient to constitute a waiver of the right to such a lien. But after much sifting of reasons, the cases have converged to a point of comparative uniformity in their annunciation of principles governing the waiver of the lien, the main point of difficulty now being the application of these principles to the facts of each particular case. And it will be seen from an examination of recent cases that the question of waiver or non-waiver of a mechanic's lien or the right thereto resolves itself into merely a question of what intention can be implied from a party's conduct, the waiver in all cases being one of intent. Many different states of fact have been alleged in attempts to show that the lien or the right thereto has been waived; and in the following sections will be shown what have and what have not been held to constitute a waiver.

B. BY TAKING DEBTOR'S NOTE:—Sec. 158. The taking of a note for the amount due one entitled to a mechanic's lien may or may not constitute a waiver of the right to the lien according to the intent with which it is received. Ordinarily a note is not a payment of a debt, but only a promise to pay, or an item of evidence showing an indebtedness. And so it is said: "A note, unless it is taken in payment absolutely, will not discharge a mechanic's lien. It serves but to liquidate the demand, and leaves the party to seek his satisfaction upon the original contract"[18]. The right to a lien is not lost

18. Phillips, Mech. Liens, 3d Ed. 276.

by the taking of a note maturing within the time allowed by law for foreclosing the lien[19]; and this is true even though the date of maturity is after the time limited by law for filing the lien[20]. In fact, no acceptance of a note is sufficient to waive the right to a lien unless there is at the same time a positive agreement for such waiver[21]. And it makes no difference that a receipt is given at the same time the notes are received stating that they are in payment

19. Schmidt *v.* Gilson, 14 Wis. 517.
Bailey *v.* Hull, 11 Wis. 289; 78 A. D. 706.
Charlotte *v.* Hammond, 9 Mo. 58; 43 A. D. 536.
Doane *v.* Clinton, 2 Utah 421.

20. McMurray *v.* Taylor, 30 Mo. 264; 77 A. D. 611.
Ashdown *v.* Woods, 31 Mo. 465.
Miller *v.* Moore, 1 E. D. Smith 739.
Kilpatrick *v.* K. C. Etc. Ry., 38 Neb. 620; 57 N. W. 664; 41 A. S. R. 761.

21. Logan *v.* Attex, 7 Ia. 77.
Brady *v.* Anderson, 24 Ill. 110.
Milwain *v.* Sanford, 3 Minn. 147.
Doane *v.* Clinton, 2 Utah 417.
Edwards *v.* Derrickson, 28 N. J. 39.
Gere *v.* Cushing, 5 Bush 304.
Leftwich Lbr. Co. *v.* Florence Assoc., 104 Ala. 584; 18 So. 48.
Paddock *v.* Stout, 121 Ill. 571; 13 N. E. 182.
Dawson *v.* Black, 148 Ill. 484; 36 N. E. 413.
Millikin *v.* Armstrong, 17 Ind. 456.
Bashor *v.* Nordyke Co., 25 Kans. 222.
Pope *v.* Graham, 44 Tex. 196.
McDonald *v.* Ry. Co., 93 Tenn. 281; 24 S. W. 252.
Wheeler *v.* Schroeder, 4 R. I. 383.
Allis *v.* Distilling Co., 67 Wis. 16; 29 N. W. 543.
Fisher *v.* Rush, 71 Pa. St. 40.
Trullinger *v.* Kofoed, 7 Oreg. 228.
Bernsdorf *v.* Hardway, 7 Oh. Cir. Ct. R. 378.
Barnocle *v.* Hendrickson, 42 Neb. 169; 60 N. W. 382.
O'Brien *v.* Hanson, 9 Mo. App. 545.
Md. Brick Co. *v.* Spilman, 76 Md. 337; 25 Atl. 297.
McKeen *v.* Haseltine, 46 Minn. 426; 49 N. W. 195.
Smith, Etc. Co. *v.* Butts, 72 Miss. 269; 16 So. 242.
Wis. Tr. Co. *v.* Robinson Co., 68 Fed. 778; 15 C. C. A. 668.
Meek *v.* Parker, 63 Ark. 367; 38 S. W. 900; 58 A. S. R. 119.

of the indebtedness[22], for a receipt is always open to explanation[23] in the matter of a lien the same as in other cases[24].

Sec. 159. Whether or not a note accepted by a lien claimant constitutes a payment sufficient to debar a right to a lien is a question of fact[25], although contrary to the doctrine mentioned above, it has been held that the acceptance of a note is as a matter of law at least *prima facie* evidence of payment and, consequently, a waiver of the lien[26]; but the weight of authority denies the soundness of this principle[27], some cases even holding that where it is expressly agreed that the note shall be received in payment, yet the agreement is conditional, contingent on the note's being paid at maturity and in default of such payment the original cause of action revives[28]. The fact that the note given by the debtor draws interest does not interfere with the application of the foregoing principles, for it is not a waiver of the right to a lien[29].

22. Hoagland *v.* Lusk, 33 Neb. 376; 50 N. W. 162; 29 A. S. R. 485.
McMurray *v.* Taylor, 30 Mo. 263; 77 A. D. 611.
Shaw *v.* Pres. Church, 39 Pa. St. 226.
Wheeler *v.* Schroeder, 4 R. I. 385.
Goble *v.* Gale, 7 Blackf. 218; 41 A. D. 219.
23. McMurray *v.* Taylor, *supra.*
Peter *v.* Beverly, 10 Pet. 568 (U. S.).
See: Jones *v.* White, 72 Tex. 316; 12 S. W. 179.
24. Glenn *v.* Smith, 2 Gil. & J. 493; 20 A. D. 452.
Tobey *v.* Barber, 5 Johns. 68; 4 A. D. 326.
25. Casey *v.* Weaver, 141 Mass. 280; 6 N. E. 372.
26. Mehan *v.* Thompson, 71 Me. 492.
Teal *v.* Spangle, 72 Ind. 380.
27. Whitla *v.* Taylor, 6 La. Ann. 480.
Sweet *v.* James, 2 R. I. 270.
28. Crary *v.* Bowers, 20 Cal. 88.
Crawford *v.* Roberts, 50 Cal. 236.
29. Schmidt *v.* Gilson, 14 Wis. 514.
Brady *v.* Anderson, 24 Ill. 110.

Sec. 160. But there are circumstances under which the taking of a note may prohibit the enforcing of a lien. If the note cover items other than those in the lien claim, it will operate as a waiver[30]. And also a waiver will occur if the note is intended and accepted as a full payment and discharge of the indebtedness[31]. Of course a waiver follows an agreement therefor[32], and even where a third party guarantees payment of the note[33]. But the acceptance of the note of a third person who afterwards becomes insolvent, in part payment for the construction of a building, although without the knowledge of the surety on the contractor's bond, does not constitute such a change in the contract as to release the surety, the contractor, in the absence of a prohibition, having the right to waive payment in money[34].

Sec. 161. A distinction sometimes arises in the case of the negotiation of a note taken on account for a mechanic's lien. In this connection it has been held that the discounting of a note at a bank is not a waiver of a lien if the note can be surrendered at the trial on the lien, and the payee may prosecute the suit to the use of his assignee[35]. In a South Dakota case it is said: "We are unable to discover

30. Blakely *v.* Moshier, 94 Mich. 299; 54 N. W. 54.
Schulenburg *v.* Robison, 5 Mo. App. 561.
31. Coburn *v.* Kerswell, 35 Me. 126.
McCoy *v.* Quick, 30 Wis. 521.
Teal *v.* Spangler, 72 Ind. 380.
Vason *v.* Bell, 53 Ga. 416.
Crooks *v.* Finney, 39 Oh. St. 57.
32. Dutton *v.* Ins. Co., 29 N. H. 153.
33. Kankakee Coal Co. *v.* Crane Co., 138 Ill. 207; 27 N. E. 935.
34. Foster *v.* Gaston, 123 Wis. 96.
35. Morrison *v.* Laura, 40 Mo. 260.
Hill *v.* Alliance Co., 6 S. Dak. 160; 60 N. W. 752; 55 A. S. R. 819.

a valid reason for holding that the assignment of a debt by a person who is entitled to a mechanic's lien as security therefor is alone sufficient to constitute a waiver of such lien; and the fact that a note was taken, not in payment of the debt, but for the accommodation of the debtor * * * * * has no tendency to create a waiver or discharge of the lien while the debt remains unpaid, and the lien may be enforced by the assignee"[36]. And further: "The negotiation of the note neither defeated nor suspended the right of the claimants and payees therein named in case they had been called upon to take up the note"[37]. The weight of authority sustains these principles[38].

Sec. 162. It has been held, however, that negotiation of the note bars the lien[39], although it is said in the same state that a mere attempt at negotiation

36. Hill *v.* Alliance Co., *supra,* citing:
Kerr *v.* Moore, 54 Miss. 286.
Skyrme *v.* Occ'd. Etc. Co., 8 Nev. 219.
Rankin *v.* Thompson, 7 Colo. 381.
Sweet *v.* James, 2 R. I. 270.
Smith *v.* Johnson, 2 McAr. 481.
Aiken *v.* Fannie Barker, 40 Mo. 257.
Tuttle *v.* Howe, 14 Minn. 145; 100 A. D. 205.
Phillips, Mech. Liens, Secs. 275-7.

37. Hill *v.* Alliance Co., *supra,* citing:
German Bank *v.* Schloth, 59 Ia. 316; 13 N. W. 314.
Miller *v.* Moore, 1 E. D. Smith, 739.
Teaz *v.* Chrystie, 2 Abb. Pr. 109.
Clement *v.* Newton, 78 Ill. 427.
Sweet *v.* James, 2 R. I. 270.
15 A. & E. Enc. Law, 106.
Phillips, Mech. Liens, Sec. 278.

38. Trust Co. *v.* Robinson Co., 68 Fed. 778; 15 C. C. A. 668; 32 U. S. App. 435.
Beers *v.* Knapp, Fed. Cas. No. 1232.

39. Scott *v.* Ward, 4 G. Greene 112 (Ia.).
See also: East *v.* Ferguson, 59 Ind. 169.
Schneider *v.* Kolthoff, 59 Ind. 568.

will not produce such consequences[41]. And further in the same state that transferring the note will bar the right to a lien while the note is in the hands of a stranger to the original contract, but that if the note be dishonored and the payee take it up he may still enforce the lien[41]. So, where the note, after indorsement, was indorsed back to the original payee, the right to a lien was held intact[42]. But an action brought to foreclose a mechanic's lien was dismissed where plaintiff had taken notes for the claim and it appeared that these were not under his control[43]. It will be seen from an examination of the cases that the right to assert a lien will usually be allowed although notes have been given covering the claim, if the notes are surrendered at trial for cancellation. This principle is just to both parties, as it gives the mechanic all the rights he had in the first place, and is of no injury to the claim-debtor since he usually has the benefit of an extension of time by reason of the giving of the notes. Thus, a workman who negotiated a note taken for his labor but took it up prior to filing his claim, and surrendered it in court, was not denied enforcement of his lien[44]. But a decree will not be ganted on a lien until the plaintiff is in control of the note given for the amount and offers to surrender it[45], unless it has already been

40. Hawley *v.* Warde, 4 G. Greene 36 (Ia.).
41. German Bank *v.* Schloth, 59 Ia. 316; 13 N. W. 314.
Edwards *v.* Derrickson, 28 N. J. L. 39.
Graham *v.* Holt, 43 Ky. 61.
42. Bashor *v.* N. & M. Co., 25 Kans. 222.
43. McDuffee *v.* Rea, 13 Pa. Co. Ct. R. 261.
44. Davis *v.* Parsons, 157 Mass. 584; 32 N. E. 1117.
45. Bayard *v.* McGraw, 1 Ill. App. 134.
Clement *v.* Newton, 78 Ill. 427.

given up; for if it were still out, payment of its face value could be enforced by an innocent holder for value, and the debtor thus compelled to answer twice for the debt[46].

C. BY DRAWING DRAFT:—Sec. 163. The drawing of a draft on the lien debtor which is accepted is held not to be a waiver of the right to a lien[47]. And, of course, an unaccepted draft could not constitute a waiver[48].

D. BY TAKING MORTGAGE:—Sec. 164. The statutes of some states provide that the taking of collateral security is a waiver of the right to a mechanic's lien. But it is said that the taking of a mortgage on the property on which one is entitled to a lien is not taking collateral security and, therefore, such statute is not applicable[49]. Irrespective of any such statute, however, the cases present a condition of irreconcilable division as to whether the taking of a mortgage on property constitutes a waiver of the right to a lien on the same property for the same debt. And here, as in the case of taking a note, the criterion has been held to be the intention with which the mortgage is accepted. For it was said by a Federal court that the taking of security on the same property is not a waiver of the

46. Morrison *v.* The Laura, 40 Mo. 260.
Balkcom *v.* Lbr. Co., 91 Ga. 651; 17 S. E. 1020.
Rush *v.* Fisher, 8 Phila. 44.
47. Jones *v.* White, 72 Tex. 316; 12 S. W. 179.
Gere *v.* Cushing, 5 Bush 304.
Meeks *v.* Simms, 84 Ill. 422.
Bodley *v.* Denmead, 1 W. Va. 249.
Mehan *v.* Thompson, 71 Me. 492.
48. Palmer *v.* Mining Co., 70 Cal. 614; 11 Pac. 666.
49. Gilchrist *v.* Gottschalk, 39 Ia. 311.

right to a mechanic's lien unless it appears affirmatively that it was the intention of the holder of the claim to look to such security and not to the lien[50]. And this proposition is sustained in other cases[51].

Some courts hold without any equivocation that a mechanic's lien on real property is waived by the taking of a mortgage on the property to secure the lien-claim[52]. And some go so far as to say that even an agreement for the acceptance of a mortgage constitutes a waiver of the lien, the two securities being inconsistent[53]. In support of these views, it is said by an Oregon court: "The rule seems to be well settled that where a mechanic takes a mortgage, either on the same property to which the lien attaches or on other property, he thereby waives his lien, and the reason is, as observed in many of the cases cited, that subsequent lien-holders and purchasers have a right to rely on the record, and should be protected against secret liens. In this case it is true that the lien was filed at the same time the mortgage was given, but if the general doctrine be established that the taking of a mortgage on the property is not a waiver of the mechanic's lien, a mechanic may hold a mortgage on

50. Hale *v.* Burlington Ry., 13 Fed. 203; 2 McCreary 558.

51. Henry & Co. *v.* Bond, 37 Neb. 207; 55 N. W. 643.
Chapman *v.* Brewer, 43 Neb. 890; 62 N. W. 320; 47 A. S. R. 779.
Boyle *v.* Robbins, 71 N. Car. 130.
Hall *v.* Pettigrove, 10 Hun 609.
Roberts *v.* Wilcoxon, 36 Ark. 355.

52. Trullinger *v.* Kofoed, 7 Oreg. 228; 33 A. R. 708.
Gardner *v.* Hall, 29 Ill. 277.

53. Barrows *v.* Baughman, 9 Mich. 213.
Gorman *v.* Sagner, 22 Mo. 137.
Weaver *v.* Demuth, 40 N. J. L. 238.
Willison *v.* Douglass, 66 Md. 99; 6 Atl. 530.

the property and afterward, at any time allowed by the statute, file his lien.''[54].

Sec. 165. Other cases are just as positive in support of the contrary view and say that under such facts no waiver takes place [55]. The better reasoning would seem to support the view that whether the taking of a mortgage is a waiver of the right to a lien on the mortgaged property is a question of intention to be deduced from the facts of each particular case, but that innocent third parties, relying on the record, shoud not be caused to suffer on account of such reliance.

E. BY TAKING COLLATERAL SECURITY:—Sec. 166. As has been above noted, the statutes of some states provide that the taking of collateral security is an abandonment of the right to a mechanic's lien[56]. In the absence of such a statute, there is as to this proposition, also, a hopeless conflict among the authorities. But here, too, it is thought that the matter should be determined according to the intent of the parties. So, a Nebraska court has said that the taking of collatera security for an account for materials furnished is not a waiver of the right to assert a lien unless such was the intention of both parties[57]. And the Minnesota court holds the

54. Trullinger *v.* Kofoed, *supra.*
55. Kingsland Co. *v.* Massey, 69 Miss. 296; 13 So. 269.
Parberry *v.* Johnson, 51 Miss. 291.
Hall *v.* Pettigrove, 10 Hun 609.
56. Kentucky.
Georgia.
Iowa.
New Mexico.
North Dakota.
South Dakota.
57. Union Bank *v.* Baker, 42 Neb. 880; 61 N. W. 91.

same way by saying somewhat conversely that the taking of other security is not a waiver if it appears that such was not the intention of the parties[58]. And the Iowa courts, being bound by a statute declaring that the taking of collateral security waives the lien, yet say that in order to produce this consequence the contract, promise or property taken must be taken and accepted as collateral security[59]. And in that state it is held that the statute does not apply to a case where the claimaint abandons the security and relies on the lien[60]. A contractor assigned to a material-man all his rights under his contract with the owner of the building as security for the price of materials furnished, and the acceptance of this security was held no waiver of the right to a lien on the building and premises[61]; and neither is the accepting a bond or warrant of attorney[62]. The agreement for security, it is said, must be inconsistent with the enforcement or existence of the lien[63]. And in possibly a majority of the states it is held that in the absence of statutory provision the taking of collateral security is not necessarily inconsistent with an intention to preserve the lien[64]. A respectable line of

58. McKeen *v.* Haseltine, 46 Minn. 426; 49 N. W. 195.
Kilpatrick *v.* Kans. City Co., 38 Neb. 620; 57 N. W. 664; 41 A. S. R. 741.
59. Merwin *v.* Sherman, 9 Ia. 331.
60. Getchell *v.* Musgrove, 54 Ia. 744; 7 N. W. 154.
61. Taliaferro *v.* Stevenson, 58 N. J. L. 165; 33 Atl. 383.
62. In re Thompson, 2 Browne 297 (Pa.).
63. Md. Brick Co. *v.* Spilman, 76 Md. 337; 25 Atl. 297; 35 A. S. R. 431.
64. Joslyn *v.* Smith, 2 N. Dak. 53; 49 N. W. 382.
Peck *v.* Bridwell, 10 Mo. App. 524.
Howe *v.* Kindred, 42 Minn. 433; 44 N. W. 311.
Ford *v.* Wilson, 85 Ga. 109; 11 S. E. 559.
Montandon *v.* Deas, 14 Ala. 46.
Smith, Etc. Co. *v.* Butts, 72 Miss. 269; 16 So. 242.

authorities, however, hold to the proposition that the acceptance of such security is an implied waiver of the right to a lien[65].

Sec. 167. A difficulty sometimes arises as to what is and what is not collateral security. Thus, the promise of a subsequent purchaser of the land to pay the lien-claim is not collateral security[66]. And a husband's contract as agent for his wife for materials to be used in a building on her land and his personal promise to pay therefor is not collateral security[67]; neither is the taking of a partnership note indorsed by one of the partners individually[68]; nor the giving of the individual note of the president of a corporation for the company's debt[69]. On the other hand, the taking of a firm note for the individual debt of one of the partners for which debt a material-man is entitled to a lien, is such collateral security as waives the lien[70]. And a cash deposit to insure performance of the contract is collateral security[71]. But the taking of a note with personal indorsements is not a waiver[72], although taking the note of a third person in payment is[73]. In Nebraska it is held that the taking of a chattel mortgage for the lien claim is

65. Grant *v.* Strong, 18 Wall. 623 (U. S.).
Clark *v.* Moore, 64 Ill. 279.
Ehler *v.* Elder, 51 Miss. 499.
Willison *v.* Douglas, 66 Md. 99; 6 Atl. 530.
Bailey *v.* Adams, 14 Wend. 201 (N. Y.).
66. Mervin *v.* Sherman, 9 Ia. 331.
67. Bissell *v.* Lewis, 56 Ia. 231; 9 N. W. 177.
68. Millikin *v.* Armstrong, 17 Ind. 456.
69. Allis *v.* Meadow, etc., 67 Wis. 16; 29 N. W. 543; and 30 N. W. 300.
70. Croskey *v.* Corey, 48 Ill. 442.
71. Harrison Co. *v.* Council Bluffs Co., 25 Fed. 170.
Shickle Co. *v.* Council Bluffs Co., 33 Fed. 18.
72. Smith, Etc. Co. *v.* Butts, 72 Miss. 269; 16 So. 242.
73. Dutton *v.* Ins. Co., 29 N. H. 153.

collateral security, but that the taking of such security is not a waiver of the lien[74]; but in Illinois the taking of a chattel mortgage is held a waiver[75]. The better reasoning is with the authorities holding that the taking of collateral security for the lien claim is a waiver of the right to the lien; for undoubtedly such security is inconsistent with an intention to preserve and rely upon the lien.

F. BY PERSONAL JUDGMENT, ATTACHMENT OR EXECUTION:—Sec. 168. Obtaining a personal judgment against a lien-debtor is not a waiver of the lien[76]. This was held true where the parties agreed that the judgment should be a lien against the property, although the agreement was invalid[77]. And an action on a note taken as collateral security has been held no waiver of the lien[78], although there can be but one satisfaction. The fact, however, that there is a suit pending on the debt is no bar to an action to enforce the lien[79]. An action in assumpsit is not a waiver of the right to enforce a lien[80]. Mr. Boisot cites several cases in support of the proposition that an action at law on

74. Hoagland *v.* Lusk, 33 Neb. 376; 50 N. W. 162; 29 A. S. R. 485; citing:
Ford *v.* Wilson, 85 Ga. 109; 11 S. E. 559.
Howe *v.* Kindred, 42 Minn. 433; 44 N. W. 311.
Hinchman *v.* Lyband, 14 Serg. & R. 32 (Pa.).
Montandon *v.* Deas, 14 Ala. 33; 48 A. D. 84.
75. Kinzey *v.* Thomas, 28 Ill. 505.
76. German, Etc. Assoc. *v.* Wagner, 61 Cal. 349.
Marean *v.* Stanley, 5 Colo. App 335; 38 Pac. 395.
Vandyne's Ex'rs. *v.* Vanness, 5 N. J. Eq. 485.
U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698; 21 S. E. 769.
77. Kirkwood *v.* Hoxie, 95 Mich. 62; 54 N. W. 720; 35 A. S. R. 549.
78. Gambling *v.* Haight, 59 N. Y. 354.
Dickson *v.* Corbet, 11 Nev. 277.
79. Parmlee *v.* Tenn., Etc. Co., 81 Tenn. 600.
80. Spence *v.* Etter, 8 Ark. 69.

the lien debt and a personal judgment therein are not a waiver of the lien, and the lien does not become merged in the judgment[81]. It is held, however, that the right to a lien is a special privilege and that by joining the lien claim with other demands the lien is lost or waived[82]. The above propositions, however, have apparently been contradicted in Missouri[83].

Sec. 169. So it is held that the procuring an attachment is not a waiver of the right to assert a lien. It is said that the lien is not waived nor forfeited by causing an attachment to be issued and levied upon the property of the debtor to secure the same demand, as the remedies are cumulative and may be pursued at the same time. In case, however, of an attempt to pursue them in separate actions, the party might be put to his election, but it is no defense to an action to enforce the lien that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, especially where such suit was dismissed and nothing realized by the attachment[84].

81. Bolsot, Mech. Liens, Sec. 709:
Cheshire Ins. Co. *v.* Stone, 52 N. H. 365.
Anderson *v.* Huff, 49 N. J. Eq. 349; 23 Atl. 654.
Fisher *v.* Rush, 71 Pa. St. 40.
Crean *v.* McFee, 2 Miles 214 (Pa.).
Fox *v.* Seal, 22 Wall. 424 (U. S.).

82. Bickwell *v.* Trickey, 34 Me. 273; followed in:
McCrillis *v.* Wilson, 34 Me. 286; 56 A. D. 655.
Perkins *v.* Pike, 42 Me. 141; 66 A. D. 267.
Union Slate Co. *v.* Tilton, 73 Me. 212.

83. Hayden Slate Co. *v.* Nat'l., Etc. Co., 62 Mo. App. 569.

84. Brenan *v.* Swasey, 16 Cal. 140; 76 A. D. 507, cited in:
Salt Lake Co. *v.* Ibex Co., 15 Utah 440; 49 Pac. 768; 62 A. S. R. 944, citing also:
West *v.* Fleming, 18 Ill. 248; 68 A. D. 539.
Germania Assoc. *v.* Wagner, 61 Cal. 349.

It has been held that the issuance of a general execution is a waiver of the right to enforce a mechanic's lien[85], for thereby the creditor manifests an intention to abandon the lien on specific property and rely wholly on the personal responsibilty of the debtor.

G. MISCELLANEOUS WAIVERS:—Sec. 170. An agreement of a material-man to look solely to the contractor for payment for lumber going into a building has been held to waive the right to assert a mechanic's lien for the material so furnished[86]. An agreement not to file a lien on a building for work done thereon is a complete waiver even though the owner fail to make payment as provided in the contract[87]. It is said that a provision that no liens shall be filed by any sub-contractor or any other person is not a waiver of the right to a lien accruing to the contractor[88]; although in the same state it is said that a contractor waives his own right to a lien when he agrees that he will not permit any liens to be filed against the building for six months[89]. Submission of the matter in dispute to arbitration is a waiver of the right to a lien[90]. But an agreement to take a mortgage is no waiver, especially if the agree-

85. Kirk *v.* Taliaferro, 16 Miss. 754.

86. Sodini *v.* Winter, 32 Md. 130.
Murray *v.* Earle, 13 S. Car. 871.
Isenman *v.* Fugate, 36 Mo. App. 66.
Shropshire *v.* Duncan, 25 Neb. 485; 41 N. W. 403.

87. Mathews *v.* Young, 16 Misc. Rep. 525; 40 N. Y. Supp. 26.
Brzezinski *v.* Neeves, 93 Wis. 567; 67 N. W. 1125.

88. Commonwealth, Etc. Co. *v.* Ellis, 5 Pa. Dist. R. 33.

89. Scheid *v.* Rapp, 121 Pa. St. 593; 15 Atl. 652.

90. N. Y., Etc. Co. *v.* Schneider, 15 Daly 15; 1 N. Y. Supp. 441; 15 Civ. Proc. R. 30.

ment is never executed[91], and the same is true where notes are to be given[92]. An agreement to extend the time for payment beyond the period within which suit must be brought to enforce the lien, is a waiver of the lien[93]. But the rule is otherwise if the extension be within such period[94]. Releasing part of property subject to a lien is not a waiver as to that not released[95]. If one having a lien on property join in a conveyance of the property, he waives his lien[96]. So, if the owner promise to pay a sub-contractor and the latter fail to file a lien, he thereby waives it[97]. But an agreement to take property in payment is not a waiver[98]. Retaining title for the purchase price of machinery is not a waiver of a lien on the land on which it is placed[99]. Neglecting to perfect a lien or to file suit on it in time is a waiver of the lien[100]. Proving the debt in bankruptcy and

91. Barnard Co. *v.* Galloway, 5 S. Dak. 205; 58 N. W. 565.
Gardner *v.* Hall, 29 Ill. 277.
92. Globe Co. *v.* Doud, 47 Mo. App. 439.
Van Stone *v.* Stillwell Co., 142 U. S. 128; 12 Sup. Ct. 181; 35 L. Ed. 961.
93. Hardin *v.* Marble, 13 Bush 58.
Green *v.* Fox, 7 Allen 85 (Mass.).
Scudder *v.* Balkam, 40 Me. 291.
94. Paddock *v.* Stout, 121 Ill. 571; 13 N. E. 182.
Schmidt *v.* Gilson, 14 Wis. 514.
Ashdown *v.* Woods, 31 Mo. 465.
Bodley *v.* Denmead, 1 W. Va. 249.
Montandon *v.* Deas, 14 Ala. 46.
95. Reilly v. Williams, 47 Minn. 590; 50 N. W. 826.
Carr *v.* Hooper, 48 Kans. 253; 29 Pac. 398.
96. Alexander *v.* Slavens, 7 B. Mon. 356 (Ky.).
97. Andre *v.* Bodman, 13 Md. 255.
98. Pierce *v.* Marple, 148 Pa. St. 69; 23 Atl. 1008.
99. Case Co. *v.* Smith, et al., 40 Fed. 339; 5 L. R. A. 231.
Great West. Co. *v.* Hunter, 15 Neb. 32; 16 N. W. 759.
Cooper *v.* Cleghorn, 50 Wis. 113; 6 N. W. 491.
Chicago Co. *v.* Union Co., 109 U. S. 719; 27 L. Ed. 1088.
100. Hughes *v.* Lansing, 34 Oreg. 118; 55 Pac. 95; 75 A. S. R. 574.

receiving a dividend thereon do not constitute a waiver of the lien[1]. Merely accounting and adjusting the amount due cannot be construed as a waiver of the right to a lien for such amount[2].

Sec. 171. A mechanic's lien may be waived by an agent[3]. And a waiver by a contractor has been held a bar to the right of a sub-contractor to enforce a lien, the former having contracted with the owner that no liens should be placed on the building[4]. For it is said "It is the plain and obvious duty of one who deals with an alleged contractor to know the relation he bears to the owner; failing in this, he furnishes labor and material at his peril"[5].

4. VENDORS' LIENS:—Sec. 172. Many years ago Mr. Washburn had this to say about the waiver of a vendor's lien: "This lien will be defeated if the vendor do any act manifesting an intention not to reply on the land as security. What act is to be deemed to work a waiver of a vendor's lien it may not be easy to define. But it has been held that the taking of the vendee's note or bond for the purchase-money is not such an act, nor his check which is not presented or paid, nor a renewal of the vendee's note. It can only be waived by taking collateral security, or by an express agreement to that effect. But the acceptance of a distinct and separate se-

1. Streeper *v.* McKee, 86 Pa. St. 188.
   In re Hope Min. Co., Fed. Cas. No. 6681.
2. Dennis *v.* Smith, 38 Minn. 494; 38 N. W. 695.
3. Hughes *v.* Lansing, 34 Oreg. 118; 55 Pac. 95: 75 A. S. R. 574.
4. Nice *v.* Walker, 153 Pa. St. 123; 25 Atl. 1065; 34 A. S. R. 688.
   Caswell, Etc. *v.* O'Brien, 156 Pa. St. 172; 27 Atl. 131; 36 A. S. R. 30.
   Waters *v.* Wolf, 162 Pa. St. 153; 29 Atl. 646: 42 A. S. R. 815.
5. Schroeder *v.* Galland, 34 Pa. St. 277; 19 Atl. 632; 19 A. S. R. 691.

curity for the purchase-money is a waiver, as, for instance, a mortgage or other property, or a bond or note with a surety or indorser, or a deposit of stock. So where the vendor took notes for the purchase-money and sold these, and the purchaser took new notes from the maker; and the taking of notes from a third party for the purchase-money is a waiver of the lien, although it be the note of the husband when the wife is the purchaser, provided, in these cases, the presumption of a waiver is not rebutted by satisfactory evidence that it was intended that the vendor should retain the lien"[6].

Sec. 173. The right of a vendor to a lien for the purchase-money exists only in a part of the states. And in those states recognizing the right it is said that they are not to be much encouraged or extended in their application beyond the requirements of settled principles of equity[7]. And the question of the waiver of such a lien is one of intention to be drawn from the acts or language of the party entitled to the lien. The lien is not such an interest in land as to require an instrument in writing to waive it[8]. It is a mere incident of the contract of sale implied by law, and it may be waived or abandoned by any suitable act or oral declaration showing an intention to do so on the part of one competent to contract[9]. The principles announced by

6. 2 Washburn, Real Property, 507.
7. Cowl *v.* Varnum, 37 Ill. 181.
8. Anderson *v.* Donnell, 66 Ind. 150.
   Hightower *v.* Rigsby, 56 Ala. 126.
   Stuart *v.* Harrison, 52 Ia. 511.
9. Woodall *v.* Kelley, 85 Ala. 368; 5 So. 164.
   Ramage *v.* Towles, 85 Ala. 588; 5 So. 342.
   Neal *v.* Speigle, 33 Ark. 63.

Mr. Washburn as noted above have been modified, and different rules have been announced in some cases, but in the main they have been affirmed. Thus, it is said that the taking of the individual note, bond or other covenant of the grantee will not indicate a waiver of the lien[10]. But the lien is waived by the taking of collateral security[11], mortgage[12], or other property[13], liability[14], or note[15] of a third person whether collectible or not[16], and also by the negotia-

Stevens *v.* Rainwater, 4 Mo. App. 292.
Coles *v.* Withers, 33 Grat. 186 (Va.).
Selna *v.* Selna, 125 Cal. 357; 58 Pac. 16; 73 A. S. R. 47.
Wilson *v.* Lyon, 51 Ill. 166.
Parker *v.* Lowell, 24 Tex. 238.
Carrico *v.* Bank, 33 Md. 242.
Buntin *v.* French, 16 N. H. 592.
Redford *v.* Gibson, 12 Leigh 332 (Va.).
Selby *v.* Stanley, 4 Minn. 65.
Griffin *v.* Blanchard, 17 Cal. 70.

10. Winn *v.* Lippincott, 125 Mo. 528; 28 S. W. 998.
Maroney *v.* Boyle, 141 N. Y. 462; 36 N. E. 511; 38 A. S. R. 821.
Dowdy *v.* Blake, 50 Ark. 205; 6 S. W. 897.
Conlee *v.* Conlee, 87 Ind. 249.
Baum *v.* Grigsby, 21 Cal. 172; 81 A. D. 159.
Fish *v.* Howland, 1 Paige 30; 2 L. Ed. 549.
Mansfield *v.* Dameron, 42 W. Va. 794; 26 S. E. 527; 57 A. S. R. 884.

11. Dodge *v.* Evans, 43 Miss. 570.
Mayham *v.* Coombs, 14 Oh. 428.
Brown *v.* Gilman, 4 Wheat. 255 (U. S.).
Durette *v.* Briggs, 47 Me. 356.
Shelby *v.* Perrin, 18 Tex. 515.

12. Pease *v.* Kelley, 3 Oreg. 417.
Lagow *v.* Badolett, 1 Blackf. 416; 12 A. D. 258.
Houck on Liens, Sec. 202.
Avery *v.* Clark, 87 Cal. 619; 25 Pac. 919; 22 A. S. R. 272.
Briscoe *v.* Callahan, 77 Mo. 134.

13. Manly *v.* Slason, 21 Vt. 277.
Ortman *v.* Plummer, 52 Mich. 76.
Hummer *v.* Schott, 21 Md. 311.
Chic. Land Co. *v.* Peck, 112 Ill. 408.

14. Fonda *v.* Jones, 42 Miss. 792.
Porter *v.* Dubuque, 20 Ia. 440.

15. Cresap *v.* Minor, 63 Tex. 485.

16. Kendrick *v.* Eggleston, 56 Ia. 128; 8 N. W. 786.

tion of the individual note of the purchaser[17], although the majority of courts modify this last rule to the extent of saying that the lien is not extinguished by such transfer if the liability of the transferer as indorser yet remain[18], and if the indorser be compelled to take the note up at maturity, the lien revives in his favor[19]. Failing to enforce the lien for a reasonable time is presumptively a waiver[20].

Sec. 174. Procuring a judgment for the unpaid purchase-price of land is a waiver of the right to a vendor's lien[21], although it is said that this is not the principle held by a majority of courts[22]. Good reason seems to demand that such a judgment be held a waiver of the lien, not on account of the relations between the vendor and vendee so much as on account of the rights of third parties who might be led to believe by reason of such judgment that the vendor would not assert the lien. This is especially true where execution has been issued on the judgment[23]. But it has been held that the filing of a claim

17. Richards *v.* Leaming, 27 Ill. 431; 81 A. D. 240.
Elder *v.* Jones, 85 Ill. 384.
Moshier *v.* Meek, 80 Ill. 79.
18. Richards *v.* Leaming, 27 Ill. 431; 81 A. D. 240.
Baum *v.* Grigsby, 21 Cal. 172; 81 A. D. 154.
19. Rogers *v.* James, 33 Ark. 77.
Kelley *v.* Payne, 18 Ala. 371.
Cotton *v.* McGehee, 54 Miss. 510.
Lindsey *v.* Bates, 42 Miss. 357.
White *v.* Williams, 1 Paige 502; 2 L. Ed. 721.
Bush *v.* Kinsley, 14 Oh. 20.
20. Trustees *v.* Wright, 11 Ill. 603.
21. Craus *v.* Co. Com., 87 Ind. 162.
22. Chapman *v.* Lee, 64 Ala. 483.
Palmer *v.* Harris, 100 Ill. 276.
Dowdy *v.* Blake, 50 Ark. 205; 6 N. W. 897; 7 A. S. R. 88.
23. Yelter *v.* Fitts, 113 Ind. 34; 14 N. E. 707.
Clark *v.* Stilson, 36 Mich. 482.
Dickason *v.* Eby, 73 Mo. 133.
Dickason *v.* Fisher, 137 Mo. 342; 37 S. W. 1114.

for unpaid purchase-money against a decedent's estate is not a waiver of a vendor's lien[24]. And the issuing of an attachment on land for a debt for which the plaintiff has a right to a vendor's lien on the same land is not a waiver of the right to the lien[25].

In California a vendor took a mortgage back on the land sold but the mortgage was defective and unavailing. He then sought to foreclose his vendor's lien. In holding the lien waived, the court said: The question in this case is directly presented whether in this state a vendor's lien exists when a mortgage security is taken for the purchase-money. Decisions of the various courts have been numerous on this branch of jurisprudence, and are not harmonious. The better rule, supported by the weight and number of authorities, is to hold the silent lien of the vendor extinguished whenever the vendor manifests an intention to abandon or not to look to it; and it is held that he does this whenever he takes other and independent security upon the same land, or a portion of the same land, or other land. When he looks to other security he loses his tacit lien"[26].

When a waiver of a vendor's lien is asserted, the burden is upon the purchaser to prove it[27].

24. Selna *v.* Selna, 125 Cal. 357; 58 Pac. 16; 73 A. S. R. 47.
Hays *v.* Horine, 12 Ia. 61; 79 A. D. 518.
25. Taylor *v.* Fryar, 18 Tex. Civ. App. 266; 44 S. W. 183.
26. Hunt *v.* Waterman, 12 Cal. 301.
Baum *v.* Grigsby, 21 Cal. 172; 81 A. D. 153.
Woodall *v.* Kelley, 85 Ala. 368; 5 So. 164; 7 A. S. R. 57.
27. Hays *v.* Horine, 12 Ia. 61; 79 A. D. 518.
Crampton *v.* Prince, 83 Ala. 246; 3 So. 519; 3 A. S. R. 718.

CHAPTER 6.

STATUTE OF FRAUDS.

Section
1. IN GENERAL. 175
2. HOW WAIVER OF THE STATUTE MAY OCCUR 177
3. EFFECT OF WAIVING THE STATUTE. 181

1. IN GENERAL:—Sec. 175. The commonly accepted and professional use of the term Statute of Frauds embody sections 1, 2, 3, 4 and 17 of the English Statute 29 Car. II, Cap. 3, enacted in 1677. Under this statute the following contracts, to be valid, must be in writing and signed by the party to be charged or by his legally authorized agent: (1) Those creating or conveying estates in land, both legal and equitable, except leases for a period not exceeding three years where the rent reserved to the landlord amounts to two-thirds the value of the estate leased; (2) the assigning, granting or surrendering of any such interests in real estate; (3) an administrator or executor contracting to pay damages out of his own estate; (4) a contract to answer for the debt, default or miscarriage of another person; (5) an agreement made upon the consideration of marriage; (6) a contract that is not to be performed within a year from the making thereof; (7) contracts for the sale of goods, wares and merchandise for more than ten pounds sterling. These provisions, or at least their substance, have been enacted as the law of nearly every state in the union, with additions here and there, following the same policy and purpose as the English Statute.

Sec. 176. The statute is a complete defense to an action on a parol contract required by it to be in

writing. But to constitute such defense the statute must be used properly and at the proper time. For, like many other defenses, it is not self-operative or automatic, and like a shield is efficacious only when put in the front. A party entitled to the benefit of the statute may, if he see fit, forego its benefits. And he may by his conduct and without any apparent intention to so do, waive those benefits—such intention, however, being imputed to him from his conduct. And when once waived, the statute as to him becomes powerless ever after.

2. HOW WAIVER OF THE STATUTE MAY OCCUR:—Sec. 177. In an action on a contract required by the statute to be written, it is not necessary for the plaintiff's pleadings to show that the contract was a written one[28]. This is a matter of proof and a matter to be invoked only by the defendant, for it is a personal right belonging to the latter to rely on the protection of the statute, and if he so

28. Strouse *v.* Etting, 110 Ala. 132; 20 So. 123.
McMenomy *v.* Talbot, 84 Cal. 279; 23 Pac. 1099.
Ruth *v.* Smith, 29 Colo. 154; 68 Pac. 278.
Cannon *v.* Windsor, 1 Hust. 143 (Del.).
Anderson *v.* Hilton, 121 Ga. 688.
Speyer *v.* Desjardinis, 144 Ill. 641; 32 N. E. 283.
Hamilton *v.* Thirston, 93 Md. 213; 48 Atl. 709.
Kroll *v.* Diamond M. Co., 106 Mich. 127; 63 N. W. 983.
Schurtz *v.* Lieber, 79 Miss. 257; 30 So. 649.
Phillips *v.* Hardenburg, 181 Mo. 463; 80 S. W. 891.
Schmid *v.* Schmid, 37 Neb. 629; 56 N. W. 207.
Walker *v.* Richards, 41 N. H. 388.
Whitehead *v.* Burgess, 61 N. J. L. 75; 38 Atl. 802.
Etting *v.* Vanderlyn, 4 Johns. 237.
Groce *v.* Jenkins, 28 S. Car. 172; 5 S. E. 352.
Townsend *v.* Sharp, 2 Tenn. 192.
Gonzales *v.* Chartier, 63 Tex. 36.
Nat'l. Bank *v.* Kinner, 1 Utah 100.
Hotchkiss *v.* Lodd, 36 Vt. 593.
Skinker *v.* Armstrong, 86 Va. 1011; 11 S. E. 977.

desire he may remain silent as to the statute, in which event he will be held to have waived it. The law presumes that its requirements have been fulfilled by parties in making their contracts, and a plaintiff is not forced to do more than to simply declare upon his contract; but it is incumbent upon the defendant to plead and prove that his contract with the plaintiff was not in accordance with the requirements of the statute[29], unless the pleadings of the plaintiff do in fact show on their face that the contract does not fulfill the requirements, in which event the defendant may defeat the action by demurrer[30].

Sec. 178. Where the contract sued on does not appear from the face of the complaint to be within the statute of frauds, the defendant can take advantage of the statute only by asserting it in his answer, and unless he specially plead it he will be deemed to have waived its protection[31] . In an action

29. Osborn *v.* Endicott, 6 Cal. 149.
Broder *v.* Conklin, 77 Cal. 33; 19 Pac. 513.
Burt *v.* Williams, 28 Cal. 632.

30. Beadle *v.* Seat, 102 Ala. 532; 5 So. 243.
Barr *v.* O'Donnell, 76 Cal. 469; 18 Pac. 429.
Tynon *v.* Despain, 22 Colo. 240; 43 Pac. 1039.
Goldstein *v.* Nathan, 57 Ill. App. 289.
Wiseman *v.* Thompson (Ia.); 103 N. W. 346.
Smith *v.* Theobald, 86 Ky. 141; 9 Ky. L. R. 449; 5 S. W. 394.
Lawrence *v.* Chase, 54 Me. 196.
Roth *v.* George, 118 Mo. 556; 24 S. W. 176.
Garnner *v.* Stubblefield, 5 Tex. 552.
Dry Goods Co. *v.* Box, 13 Utah 494; 45 Pac. 629.

31. Tynon *v.* Despain, 22 Colo. 240; 43 Pac. 1039.
Seymour *v.* Mitchell, 2 Root 145 (Conn.).
Johnson *v.* Latimer, 71 Ga. 470.
Tift *v.* Wright, 113 Ga. 681; 39 S. E. 503.
Bowman *v.* Ainslee, 1 Idaho 644.
Hogan *v.* Easterday, 58 Ill. App. 45.
Bragg *v.* Olson, 128 Ill. 540; 21 N. E. 519.

on a contract required by the statute to be in writing, however, it is incumbent upon plaintiff to prove the contract by written evidence unless the defendant has in some way waived it [33]. The defense of the statute is waived unless positively set up and relied upon, but it has been said that it may be taken advantage of under the general issue[34].

Sec. 179. The defense of the statute of frauds is a personal one to the promissor, and he may take advantage of its protection or not, the choice resting solely with him[35]. He may admit the making of the contract sued on and yet not forego his right to object to it as failing to comply with the statute[36]. But where the defendant admits the making of the oral contract sued on, he must plead the statute or

Miller *v.* Wilson, 146 Ill. 523; 34 N. E. 1111.
Maybee *v.* Moore, 90 Mo. 340; 2 S. W. 471.
Farrar *v.* Patton, 20 Mo. 81.
Fee *v.* Sharkey, 59 N. J. Eq. 284; 44 Atl. 673.
Barrett *v.* Johnson, 77 Hun 527; 60 N. Y. St. 271.
Mathews *v.* Mathews, 154 N. Y. 288; 48 N. E. 531.
Woods *v.* Dille, 11 Oh. 455.
Watson *v.* Erb, 33 Oh. St. 35.
Houser *v.* Lamont, 55 Pa. 311.
Barnes *v.* Coal Co., 101 Tenn. 354; 47 S. W. 498.
League *v.* Davis, 53 Tex. 9.
Adams *v.* Patrick, 30 Vt. 516.
Liversey *v.* Liversey, 30 Ind. 398.
Lawrence *v.* Chase, 54 Me. 196.
Livinstone *v.* Murphy, 187 Mass. 315.

32. Eaves *v.* Vial, 98 Va. 135; 34 S. E. 978.
Guynn *v.* McCauley, 32 Ark. 97.

33. Wynn *v.* Garland, 19 Ark. 34.
Douglass *v.* Snow, 77 Me. 91.

34. Young *v.* Ledford, 99 Mo. App. 565; 74 S. W. 443.
Beckmann *v.* Mepham, 97 Mo. App. 161; 70 S. W. 1094.

35. Tregea *v.* Mills, 11 Wyo. 438; 72 Pac. 578; and 73 Pac. 209.
Armour & Co. *v.* Ross, 110 Ga. 413; 35 S. E. 787.
McCoy *v.* Williams, 1 Gilm. (Ill.) 584.

36. Crockett *v.* Green, 3 Del. Ch. 466.
Hollingshead *v.* McKenzie, 8 Ga. 457.
Douglas *v.* Bunn, 110 Ga. 159; 35 S. E. 339.

he will not be allowed to avail himself of its benefits or to question the proceeding on that ground[37]. On the other hand, if the agreement itself be denied, the statute may be insisted upon as a bar without specially pleading it[38]. Such denial brings in issue the making of the contract, and under the issue thus made it devolves upon the plaintiff to show not only the making of a contract but he must further show the contract to be legal in every respect or his action must fail. The action will not thus fall of its own weight, however. The defendant must be diligent in compassing its downfall. He must make his objections at the proper time; for while it is held that a denial of the making of the contract without saying anything about the statute of frauds is not a waiver of the benefit of the statute[39], yet objections to the contract must be made at the time it is offered in evidence, and it is held that a motion later to strike it out is of no avail[40]. And as a failure of the defendant to object to obnoxious evidence is a waiver of the statute[41], the oral contract cannot be called into question for the first time in a request

37. Abba *v.* Smyth, 21 Utah 109; 59 Pac. 756.
Wilson *v.* Sullivan, 17 Utah 341; 53 Pac. 994.
Christiansen *v.* Aldrich, 30 Mont. 446; 76 Pac. 1007.
Dean *v.* Dean, 9 N. J. Eq. 425.
2 Story's Eq. Jur. 753, 757.

38. Ontario Bank *v.* Root, Paige 478.
Battell *v.* Matot, 5 Atl. 479 (Vt.).
Holt *v.* Brown, 19 N. W. 235 (Ia.).
Gordon *v.* Reynolds, 114 Ill. 118; 28 N. E. 455.
Randolph *v.* Frick, 5 Mo. App. 279.
Tift *v.* Wight, 113 Ga. 681; 39 S. E. 503.

39. Feeney *v.* Howard, 79 Cal. 525; 21 Pac. 984.
Hackett *v.* Watts, 138 Mo. 552; 40 S. W. 113.
Dunn *v.* McClintock, 64 Mo. App. 193.

40. Livermore, et al. *v.* Stine, 43 Cal. 274.

41. Sartwell *v.* Sowles, 72 Vt. 270; 48 Atl. 11.
Holt *v.* Howard, 77 Vt. 49.

for findings[42]. A decree *pro confesso* prevents the operation of the statute[43]; and failure to call the court's attention to pleas in reliance on the statute until after verdict is a waiver of any right to insist upon it[44]. As the benefit of the statute is waived where parol evidence of the contract is admitted without objection[45], and as the statute is an optional defense, a defendant relying upon it must either plead the same or object to the introduction of testimony as to the contract; and he cannot permit the introduction of such evidence without objection and at its close demur thereto on the ground of the statute[46]. These principles are true even where the statute is specially pleaded but evidence of the oral contract is admitted without objection[47]. And it is again said that unless the statute is in some way set up as a defense or called to the attention of the court it is deemed to have been waived[48]. If a defendant attempt to show by his evidence that no such contract exists as alleged by the plaintiff, he cannot raise the question of the statute of frauds for the first time by asking instructions[49]. But it is said in Nebraska that "The failure to object on a trial to the introduction of evidence of a parol agreement

42. Porter *v.* Wormser, et al., 94 N. Y. 431.
43. Angel *v.* Simpson, 85 Ala. 53; 5 So. 758.
44. Neider *v.* Fredrich, 69 Ill. App. 623.
45. Nunez *v.* Morgan, 19 Pac. 753 (Cal.).
Simis *v.* Wissel, 10 App. Div. 323; 41 N. Y. Supp. 1024.
Brown *v.* Mfg. Co., 46 S. Car. 415; 24 S. E. 191.
Cosand *v.* Bunker, 2 S. Dak. 294; 50 N. W. 84.
46. Nenvirth *v.* Engler, 83 Mo. App. 420.
Van Idom *v.* Nelson, 60 Mo. App. 523.
47. Miller *v.* Harper, 63 Mo. App. 293.
Pike *v.* Pike, 69 Vt. 535.
48. League, et al. *v.* Davis, 53 Tex. 9.
49. Royal Co. *v.* G. Grocer Co., 90 Mo. App. 53.

to re-convey real estate will not amount, under the practice of this state, to a waiver of the right to invoke the statute of frauds as to such an agreement when the statute has been properly pleaded as a defense''[50]. And the statute is not waived by an admission of the making of the contract and an allegation that it was verbal and void under the statute[51]. So, too, it is not a waiver for the defendant to fail to object to evidence of the contract prior to evidence that the contract is within the exception of the statute[52].

Sec. 180. A party cannot seek to avoid liability on one ground and then switch positions. And where it was admitted in an action that the contract sued on was made, but a defense other than failure to comply with the statute of frauds was relied on, the benefit of the statute or the right to assert it was thereby waived[53]. So, after a plea of the statute had been overruled and an answer was thereupon filed, the defense of the statute was held to have been waived[54]. Where the defendant in his answer admits substantially the contract set out in the petition, but alleges that the plaintiff has violated its provisions, and there is no plea of the statute, it will be held waived[55]. In an action for commissions for sale of real estate, defendant based his refusal to pay on the fact that he had withdrawn his property from the market; he was not permitted to after-

50. Thomas *v.* Thomas, et al., 67 N. W. 182 (Neb.).
51. Jamison *v.* Hyde, 141 Cal. 109; 74 Pac. 695.
52. Benedict *v.* Bird, 103 Ia. 612; 72 N. W. 768.
53. Christiansen *v.* Aldrich, et al., 30 Mont. 446; 76 Pac. 1007.
54. Keatts *v.* Rector, 1 Ark. 391.
55. Connor *v.* Hingston, 19 Neb. 472; 27 N. W. 443.
Davis, et al. *v.* Greenwood, et al., 96 N. W. 526 (Neb.).

ward change positions and allege that the contract of employment was void for non-compliance with the statute[56]. In a suit for the specific performance of a contract for the sale of land, the defendant will be held to have waived the defense of the statute of frauds unless he denies the sale or pleads the statute[57]. An oral agreement for the sale of land should be enforced where it is shown to be not materially different from that alleged and that the statute is not relied on[58]. The protection of the statute is waived where it might have been set up in a previous suit between the same parties but was not[59]. But it cannot be waived by any act of an administrator or executor to the detriment of the heirs or devisees[60].

3. EFFECT OF WAIVING THE STATUTE:—Sec. 181. The failure to claim the benefit of the statute of frauds is permanent, and an opportunity to claim its protection once gone, returns no more. So, a party having failed to claim its benefit in an original suit, cannot set up the statute on a cross-bill[61]. It is too late to raise the question of the statute of frauds for the first time in a motion for a new trial, or on error or appeal. Unless raised at the time of trial, it is waived[62]. When

56. Mooney *v.* Elder, 56 N. Y. 238.
57. Talbot *v.* Bowen, 1 A. K. Marshall 436; 10 A. D. 747.
Esway *v.* Gorton, 18 Ill. 483.
58. Baker *v.* Hollobaugh, 15 Ark. 322.
59. Foulke *v.* Thallmessinger, 1 App. Div. 598; 73 N. Y. St. R. 194.
60. Matter of O'Rourke, 12 Misc. 248; 68 N. Y. St. R. 1.
61. Battell *v.* Matot, 58 Vt. 271; 5 Atl. 479.
62. Hogan *v.* Easterday, 58 Ill. App. 45.
Finucan *v.* Kendig, 109 Ill. 198.
Gordon *v.* Reynolds, 114 Ill. 118; 28 N. E. 455.

parol evidence of a contract within the statute of frauds is introduced without objection, it cannot afterwards be objected to on appeal[63], and the same is true where the statute is waived in any manner in the trial court whether by failure to plead or otherwise[64]. So, where a defendant waived the protection of the statute at the trial, it was not permitted him to assert it at a second trial when the case had been remanded by the Supreme Court[65].

So strict are the rules of practice requiring a defendant to take proper steps to avail himself of the benefit of the statute or holding him to a waiver of it, that it is said that it matters not how obnoxious to the statute a contract may be, it will be enforced if the statute has been waived[66].

63. Marr *v.* Ry. Co., 121 Ia. 117; 96 N. W. 716.
64. Boston *v.* Nichols, 47 Ill. 353.
Neagle *v.* Kelly, 146 Ill. 460; 34 N. E. 947.
Neuvirth *v.* Angler, 83 Mo. App. 420.
Hawley *v.* Dawson, 16 Oreg. 347; 18 Pac. 592.
Prior *v.* Sanborn Co., 12 S. Dak. 86; 80 N. W. 169.
Holt *v.* Brown Co., 63 Ia. 319; 19 N. W. 239.
65. Barrett *v.* McAllister, 35 W. Va. 103; 12 S. E. 1106.
66. Espalla *v.* Wilson, 86 Ala. 487; 5 So. 867.
Talbot *v.* Bowen, 1 A. K. Marshall 436 (Ky.).
Newton *v.* Swazey, 8 N. H. 13.
Woods *v.* Dille, 11 Oh. St. 455.
Albert *v.* Winn, 5 Md. 66.
Small *v.* Owings, 1 Md. Ch. 363.

CHAPTER 7.

EXEMPTIONS.

Section
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1. WAIVER IN GENERAL:—Sec. 182. Certain considerations have made it questionable whether the right to exemptions can be waived. The statutes providing for exemptions, while giving them to the head of a family, really contemplate the creation of a trust in which he is to hold the property so protected for the support of his family, for the benefit of those depending upon him more than for his own good. And there are instances in which the power to waive the right to exemptions is denied without the concurrence of those for whose real protection the exemption exists[67]. Generally, however, it may be said that the right to exemptions is one which may be waived[68], unless, of course, the state constitution or some statute prevent this. As the husband, being the head of the family, is entitled to manage the property, he also has the right to waive the benefit of exemption laws passed for the protection of his family[69]; in fact he is generally the only one who has the right to waive exemptions, although in Alabama the constitution denies him the right unless he is joined in such waiver by his wife if the exemption relate to realty. There are certain principles in the

67. Hess v. Beates, 78 Pa. St. 429.
68. Marchildon v. O'Hara, 52 Mo. App. 523.
69. Betz v. Brenner, 106 Mich. 87; 63 N. W. 970.

adjudications that would seem to be at variance with the above outlines, and a distinction exists between cases where a waiver is attempted by concurrent agreement and those where a waiver is sought to be induced from conduct subsequent to the agreement.

2. BY CONCURRENT AGREEMENT:—Sec. 183. The general rule is that one entitled to statutory exemptions cannot waive the benefit of exemption laws by an agreement contemporaneous with the creation of his debt[70]. This is based upon considerations of public policy and is an attempt by law to protect a debtor, and more especially those depending upon him, against the exigencies of untoward circumstances and the results of his own improvidence. Our common experience demonstrates that men are usually sanguine in creating a debt, and most debtors are provident to have planned out in advance the channels of revenue from which funds are to be drawn to meet the debt at its maturity; a few disregard the approach of pay-day and think only of the immediate benefits to be derived as a result of the debt. But the judgments of men are fallible, plans many times remain unexecuted, and untoward events frequently bring misfortune to the door of the provident as well as the shiftless, and however willing one may be, either through intention or through carelessness, to relinquish his rights to his creditor in order to assure him of an intention

70. Mills *v.* Bennett, 94 Tenn. 652; 30 S. W. 748; 45 A. S. R. 763.
Phelps *v.* Phelps, 72 Ill. 545; 22 A. R. 149.
Carter *v.* Carter, 20 Fla. 558; 51 A. R. 618.
Moran *v.* Clark, 30 W. Va. 358; 4 S. E. 303; 8 A. S. R. 66.
Kneettle *v.* Newcomb, 22 N. Y. 249; 78 A. D. 186.
Burke *v.* Finley, 50 Kans. 424; 31 Pac. 1065; 34 A. S. R. 132.
Wallingsford *v.* Bennett, 1 Mackey 303.

to pay, the law often must protect him from the rapaciousness of a too-greedy or too-exacting creditor. It is for such reasons that courts hold prospective agreements to waive the benefit of exemption laws against public policy and, therefore, void.

Sec. 184. These principles, however, should not obtain unless the debtor be the head of a family or have some one depending upon his labors for support. A single man, capable of contracting, should have the privilege of foregoing the benefit of exemption laws if he so desires, since his act can effect no one but himself[71], although such power has been denied him[72]. But the rule should not be extended farther than that. The law intends to protect the poor and needy, the innocent and helpless, and as has been noted above and declared by a Kentucky court, "The legislature certainly intended by the enactment of such laws to provide more for the dependent family of the debtor than for the debtor himself"[73]. And in speaking of such prospective waivers, a North Carolina court said, "There is no description of property, no agreement to sell or make title to anything, so that specific performance is out of the question. The agreement is to waive a right in contravention of state policy, which agreement this court cannot undertake to enforce"[74]. The provision of a note is void which expressly waives "the benefit of all laws exempting real or personal property from levy and sale"[75]. A waiver

71. Powell *v.* Dailey, 163 Ill. 646; 45 N. E. 414.
72. Mills *v.* Bennett, 94 Tenn. 652; 30 S. W. 748; 45 A. S. R. 763.
73. Moxley *v.* Ragan, 10 Bush 158.
74. Branch *v.* Tomlinson, 77 N. Car. 388.
75. Recht *v.* Kelly, 82 Ill. 147; 25 A. R. 301.

of exemptions contained in a confession of judgment is also void[76]. But an agreement, concurrent with the creation of a debt, to pay the debt out of the proceeds of life insurance which is made exempt by statute, has been held a waiver of the right to such exemptions[77].

An opposing doctrine to the above has been held. In Pennsylvania it has been held that such agreements may be enforced and that the waiver is valid[78]. But this is not in accord with the trend of judicial thinking nor the weight of authority.

3. BY SUBSEQUENT CONDUCT:—Sec 185. While the law throws about a debtor as complete a blanket of protection of his exempt property as is consistent with its duties and obligations to others, he cannot always be shielded from the results of his own inconsistent conduct. He may so conduct himself after the maturity of his debt as to persuade his creditor that a right to claim exemptions will not be taken advantage of. Thus, if personal property by law made exempt from execution is not claimed within a reasonable time after it has been seized, the right to hold it as exempt is waived[79]. And a pledge of personal property is an implied waiver of a right to claim it as exempt[80]. So, a fail-

Maxwell *v.* Reed, 7 Wis. 583.
Fejavary *v.* Broesch, 52 Ia. 89; 2 N. W. 963.
Crawford *v.* Lockwood, 9 How. Pr. 547.
Troutman *v.* Gowing, 16 Ia. 415.

76. Rutt *v.* Howell, 50 Ia. 537.
77. Murdy *v.* Skyles, 101 Ia. 549; 70 N. W. 714; 63 A. S. R. 411.
78. Shelley's Appeal, 36 Pa. St. 373.
Case *v.* Dunmore, 23 Pa. St. 93.
Johnston's Appeal, 25 Pa. St. 116.
79. Stanton *v.* French, 83 Cal. 194; 23 Pac. 355.
80. Hawley *v.* Hampton, 160 Pa. St. 18; 28 Atl. 477.

ure to file a schedule of exemptions as provided by statute is a waiver of the exemption[81]. The abandonment of a business is a waiver of a statutory right to exemptions to one who conducts a business[82]. Where a levy is made on exempt property and a claim for exemptions is not made before sale, the exemption is lost whether or not the debtor knew of the sale[83]. An execution debtor voluntarily surrendering property levied upon, without claiming his right to exemptions, waives the right to such claim[84]. And it is also a waiver to convey the exempt property to another, especially with fraudulent intent[85], although the opposite of this is maintained[86]. So the intermingling of the proceeds of the sale of property some of which is exempt and some not, is a waiver of the right to claim an exemption[87]. And it is a waiver to fail to appear at the time and place fixed for setting apart property claimed to be exempt[88]. And on removing property to an auction room to be sold, a party waives the right to claim such property as exempt[89]. Whenever a statute prescribes a mode to be followed in asserting a claim to exemptions, this mode must be pursued or the

81. Chambers *v.* Perry, 47 Ark. 400; 1 S. W. 700.
82. Betz *v.* Brenner, 106 Mich. 87; 63 N. W. 970.
83. Bell *v.* Davis, 42 Ala. 46.
84. Richards *v.* Haines, 30 Ia. 574.
85. Wyman *v.* Gay, 60 A. S. R. 238 (Me.).
Mandlove *v.* Burton, 1 Ind. 39.
Bohn *v.* Weeks, 50 Ill. App. 236.
86. King *v.* Harter, 70 Tex. 579; 8 S. W. 308.
Narnburg *v.* Hyatt, 24 Fed. 898.
Duvall *v.* Rollins, 71 N. Car. 218.
87. Rasco *v.* Sheet, 8 Ky. L. R. 703.
88. Butt *v.* Green, 29 Oh. St. 667.
89. Kennedy *v.* Baker, 4 Chand. 19 (Wis.).

right will be deemed waived[90]. A claim to exemptions may be lost by laches, as where a debtor delayed four months after levy before making a claim[91]. And entering into an agreement for the sale of exempt property taken under an attachment is a waiver of the exemption[92]. So if the debtor, at the time of the levy on his property, disclaims owning it, his right to claim it as exempt is lost[93], although this has been denied[94]. Where partners deliver property into the hands of contractors who are to do work upon it, they thereby waive their right to claim their individual exemptions[95].

Sec. 186. But as exemption laws are always to be construed as favorably as possible to the debtor, it is not every act of his in dealing with exempt property that will warrant courts in holding him to have waived his right to claim his exemptions. Thus, failure to assert a claim until an attempt to sell the property is not a waiver of the right to the claim[96]. Nor is it necessary to make the claim before the levy of the process[97]. And after the levy the giving of a re-delivery or forth-coming bond will not take away the right to claim the property as exempt[98]. This

90. State *v.* Boulden, 57 Md. 314.
Wagner *v.* Barden, 13 Ind. App. 571; 41 N. E. 1067.
Stanton *v.* French, 83 Cal. 194; 23 Pac. 355.
Hammersmith *v.* Avery, 18 Nev. 225; 2 Pac. 55.
Behymer *v.* Cook, 5 Colo. 395.
Buzzell *v.* Handy, 58 N. H. 331.
91. Borland *v.* O'Neal, 22 Cal. 504.
92. Dow *v.* Cheney, 103 Mass. 181.
93. Gilleland *v.* Rhoads, 34 Pa. St. 187.
Miles *v.* State, 73 Md. 398; 21 Atl. 51.
94. State *v.* Carson, 27 Neb. 501; 43 N. W. 361; 20 A. S. R. 681.
95. Rogers *v.* Raynor, 102 Mich. 473; 60 N. W. 980.
96. McMichael *v.* Grady, 34 Fla. 219; 15 So. 765.
97. Alley *v.* Daniel, 75 Ala. 403.
98. Atkinson *v.* Gatcher, 23 Ark. 101.
Desmond *v.* State, 15 Neb. 438; 19 N. W. 644.

is true because, for one reason, it is the rule that the claim may be made at any time before the sale[99]; and it has been held that the right does not cease even at the time of sale. A debtor who retains property as bailee for the sheriff who has levied upon it, or who directly or indirectly buys it at execution sale, does not, in either case, waive the right to claim the same property as exempt[100]. And though a party entitled to exemptions is present at the time of sale of exempt property and receives the surplus from the sheriff, he does not thereby waive his right to exemptions[1]. So where a debtor fails to elect as to what property he will claim, he does not thereby lose his right to exemptions[2]. And the giving up of property to the sheriff is not a waiver[3], although it has been held otherwise if the debtor directs the levy to be made on specific property[4]. To first traverse an attachment on other grounds than for exemptions is no waiver of a claim of the same[5]. And where partners traverse an attachment of partnership goods it is not a waiver of their individual exemptions in such goods[6]. Merely receipting an officer for goods levied upon does not preclude the right to claim them as exempt[7]. And an agreement to turn over exempt property to a creditor in payment of a debt was held no waiver of the right[8].

99. Daniels *v.* Hamilton, 52 Ala. 105.
100. Parham *v.* McMurray, 32 Ark. 261.
1. Phillips *v.* Taber, 83 Ga. 565.
2. Colson *v.* Wilson, 58 Me. 416.
3. Eltzroth *v.* Webster, 15 Ind. 21; 77 A. D. 78.
4. People *v.* Johnson, 4 Ill. App. 346.
5. Bassett *v.* Inman, 7 Colo. 270; 3 Pac. 383.
6. Ladewig *v.* Williams, 87 Wis. 615; 58 N. W. 1103.
7. Vanderhorst *v.* Bacon, 38 Mich. 669; 31 A. R. 328.
8. Washburn *v.* Goodhead, 88 Ill. 229.

4. HOMESTEAD EXEMPTIONS:—Sec. 187. An owner does not waive his homestead exemption by failing to take any step or to assert his right; he need not make any claim[9], or demand[10] for it. This must, of course, be dependent upon whether a statute affects the subject of not; thus, under the Missouri statute it was held to be immaterial whether the homesteader made any claim[11]. And the right is not lost by neglecting to have the homestead set over to the debtor by the officer levying the execution[12]. But there are instances to the contrary. Thus, in Nebraska it is said that the homestead right is a purely personal one which the owner may at any time waive or renounce; and it may be lost if the owner does not, at the time a levy is made upon it, notify the officer of what he regards as his homestead[13].

Sec. 188. But the considerations that obtain as to exemptions of personal property are more forcible in the case of a homestead. While running directly in favor of the head of a family, the reservation the law makes of a homestead is for the benefit of those dependent upon him. It is meant that they shall have a haven into which the tempests of adversity or improvidence or ill-advised speculation may not penetrate, that they shall have a safeguard against the power of the husband or father to de-

9. Wiggins *v.* Chance, 54 Ill. 175.
Imhoff *v.* Lipe, 162 Ill. 282; 44 N. E. 493.
10. Gray *v.* Putnam, 51 S. Car. 97; 28 S. E. 149.
11. Vogler *v.* Montgomery, 54 Mo. 584.
12. Barney *v.* Leeds, 51 N. H. 253.
See: Wright *v.* Grabfelder, 74 Ala. 460.
Livermore *v.* Boutelle, 11 Gray 217.
13. Rector *v.* Rotton, 3 Neb. 171.

prive them of this shelter, this protection from being forced from under their roof by a too-grasping creditor who might be given such authority through the over-eagerness of the debtor to create the obligation. And if the head of the family have the power to waive or renounce such right of exemptions, the protection sought to be thrown around helpless ones is most incomplete. In some states, however, where the right may be waived, the wife may assert it if the husband fail to do so[14].

Sec. 189. Most states provide by statute a means of disposing of the homestead and renouncing the benefit of it as an exemption; and these provisions must be followed to the letter or creditors obtain no rights therein. For, as has been repeatedly said here and elsewhere, the homestead right is for the benefit of the wife and children, a right "of which she and they cannot be deprived in any other way than that prescribed in the act itself. A proceeding by ejectment to be followed by a writ of possession accomplishes what the act designs shall not be accomplished by a levy and forced sale; and the injury to her is equally as great, and the object of the act completely defeated. The separate property of the wife which she may own in fee cannot be taken away from her without her free consent to be manifested as the statute directs; nor can she be deprived of dower in her husband's estate except by her own consent. No judgment or decree of court, no deed to which she is not a willing party can deprive her of this right; and this right of homestead is equally inviolate in spite of creditors or husband. Nor does

14. Goldman v. Clark, 1 Nev. 607.

the law require her or her husband to do any act to secure this right. They are both passive while the law silently, but effectively throws around them its protecting shield''[15]. Many other courts sustain these arguments and principles[16].

15. Pardee *v.* Lindley, 31 Ill. 174; 83 A. D. 219.
Citing: Patterson *v.* Kreig, 29 Ill. 518.

16. Cummings *v.* Long, 16 Ia. 41; 85 A. D. 502.
Ring *v.* Burt, 17 Mich. 465.
Abbott *v.* Cromartie, 72 N. Car. 292; 21 A. R. 457.
Ferguson *v.* Kumber, 25 Minn. 183.
Wing *v.* Hayden, 10 Bush 276.
Morris *v.* Ward, 5 Kans. 239.
Myers *v.* Ford, 22 Wis. 139.
McCracken *v.* Adler, 98 N. Car. 400; 4 S. E. 138; 2 A. S. R. 340.
Watts *v.* Gallagher, 97 Cal. 47; 31 Pac. 626.
Rodgers v. Baker, 96 Ga. 800; 22 S. E. 585.
Ratliff *v.* Graves, 132 Mo. 76; 33 S. W. 450.

CHAPTER 8.

PRIVILEGED COMMUNICATIONS.

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1. IN GENERAL:—Sec. 190. The law has placed a blanket of exclusion about certain classes of evidence which public policy does not permit to be removed without the consent of him who is entitled to its protection. This apparent contravention of other rules of evidence that require all the facts pertaining to a case to be disclosed is founded on the proposition that more harm and less justice would result from a disclosure of what is termed a privileged communication than from withholding it. It is not proposed here to enter into a discussion of what is a privileged communication, but to show that the right to have the seal of the law remain on such matters is a personal right which may be waived by him who is entitled to assert it, and to ascertain what will be sufficient to constitute such waiver.

2. ATTORNEY AND CLIENT:—Sec 191. By the common law, all matters communicated to and received by an attorney, counsellor or solicitor in his professional capacity are privileged and may not be

disclosed by him without the consent of his client[17]. This has been embodied in statutory provisions in most states. But the privilege of secrecy as to such matters is that belonging to the client and he may waive it if he choose[18], although the attorney cannot. The privilege once being waived by the client, however, the attorney is thereby made a competent witness and may be compelled to testify[19]. A waiver may also be made by personal representative, executor or administrator of the client[20], but not by his assignee[21], nor his successor in a representative capacity[22]; but if two or more are entitled to the same privilege, the consent of each is necessary before the matter can be testified to[23], and one partner cannot waive the privilege for the firm[24]. At all events, the waiver must distinctly appear either by

17. Higbee *v.* Dresser, 103 Mass. 523.
McClellan *v.* Longfellow, 32 Me. 494; 54 A. D. 599.
Andrews *v.* Simms, 33 Ark. 771.
Maxham *v.* Place, 46 Vt. 434.
Root *v.* Wright, 84 N. Y. 72; 38 A. R. 495.
Gallagher *v.* Williamson, 23 Cal. 331; 83 A. D. 114.

18. Passmore *v.* Passmore's Est., 50 Mich. 626; 16 N. W. 170. 45 A. S.R.
Hunt *v.* Blackburn, 128 U. S. 464.
Sleeper *v.* Abbott, 60 N. H. 162.
Rowland *v.* Plummer, 50 Ala. 182.
Tays *v.* Carr, 37 Kans. 141; 14 Pac. 456.

19. Benjamin *v.* Coventry, 19 Wend. 353.
Chase's Case, 1 Bland 206; 17 A. D. 277.

20. Brooks *v.* Holden, 175 Mass. 137; 55 N. E. 802.
Ex parte, Gfeller, 178 Mo. 248; 77 S. W. 552.

21. Bowman *v.* Norton, 5 Car. & P. 177; 24 E. C. L. 265.

22. Herman *v.* Schlesinger, 114 Wis. 382; 90 N. W. 460; 91 A. S. R. 922.

23. Michael *v.* Foil, 100 N. Car. 178; 6 S. E. 264; 6 A. S. R. 577.
Herman *v.* Schlesinger, 114 Wis. 382; 90 N. W. 460; 91 A. S. R. 922.
Bank of Utica *v.* Merserean, 3 Barb. Ch. 528; 49 A. D. 189.
Seip's Est., 163 Pa. St. 423; 30 Atl. 226; 43 A. S. R. 803.

24. People *v.* Barker, 56 Ill. 299.

express provision or expression of the client, or by necessary implication from his conduct[25], and a court has no power to supply a waiver of the privilege of one who died without making it[26].

Sec. 192. Many different acts and words have been held to constitute a waiver of this privilege, and the circumstances under which it is waived are various. The waiver may be by express words of the client or it may be implied from his conduct. An express waiver is made where the party states in person or by his attorney that he does not claim the privilege[27], although if made by the attorney, the client must consent thereto. There can, of course, be no controversy about this. But more difficulty has arisen in determining what constitutes an implied waiver. It is said that the bar is lifted when the client requests the attorney to subscribe as a witness to an instrument which he has caused the attorney to prepare, such as a will[28], mortgage[29] or agreement[30], and that the attorney may be compelled to testify as to facts concerning the execution of the instrument, it being said, however, that the testi-

25. State *v.* James, 34 S. Car. 58; 12 S. E. 657.
Tate *v.* Tate's Ex'rs., 75 Va. 533.
26. Morris *v.* Caine's Ex., 39 La. Ann. 726; 2 So. 418.
Clay *v.* Williams, 2 Munf. 105; 5 A. D. 453.
27. Britton *v.* Lorenz, 3 Daly 23 (N. Y.).
28. In re Coleman, 111 N Y. 220; 19 N. E. 71.
Blackburn *v.* Crawford's Lessee, 3 Wall. 175 (U. S.).
McMaster *v.* Scriven, 85 Wis. 162; 55 N. W. 149; 39 A. S. R. 828.
Doherty *v.* O'Callaghan, 157 Mass. 90; 31 N. E. 726; 34 A. S. R. 258; 17 L. R. A. 188.
Denning *v.* Butcher, 91 Ia. 434; 59 N. W. 69.
Pence *v.* Waugh, 135 Ind. 143; 34 N. E. 860.
29. Monaghan Co. *v.* Dickson, 39 S. Car. 146; 17 N. E. 696; 39 A. S. R. 704.
30. Herman *v.* Schlesinger, 114 Wis. 382; 90 N. W. 460; 91 A. S. R. 922.

mony must be limited to matters concerning the execution of the instrument and not relate to those occurring during the course of its preparation. But this latter is not the universal holding. For instance, it is announced that even where a testator requests that matters communicated to his attorney during the preparation of the former's will be held confidential, this privilege is waived by his requesting the attorney to subscribe the will as a witness[31]; and it is said further that a client signing his will in the presence of witnesses waives the privilege as to his attorney's testimony concerning the execution and contents of the will[32]. The better rule undoubtedly is that a party calling his attorney as a subscribing witness to his will or other instrument prepared by the attorney at the client's request, waives no right to insist on his privilege as to communications made during the preparation of the instrument, and in the presence of objection from the client, the attorney can testify to only such matters as any other subscribing witness might testify to[33].

Sec. 193. The nature of the communication may create an implied waiver of the privilege[34]. Thus, where a deceased client had delivered to her attorney a deed to be by him delivered to the grantee, all objections to proof of such facts by the attorney

31. In re Lumb's Will, 18 N. Y. Supp. 173.
32. Fayerweather *v.* Ritch, 90 Fed. 13.
33. Herman *v.* Schlesinger, 114 Wis. 382; 90 N. W. 460; 91 A. S. R. 922.
McMaster *v.* Scriven, 85 Wis. 168; 55 N. W. 149; 39 A. S. R. 828.
In re Coleman's Will, 111 N. Y. 226; 19 N. E. 71.
34. Scott *v.* Harris, 113 Ill. 455.
White *v.* State, 86 Ala. 69; 5 So. 674.
Burnside *v.* Terry, 51 Ga. 186.

were waived[35]. And a client directing his attorney to communicate the contents of a letter to another lawyer, waives his privilege as to the contents of the letter[36]. The same is true where the communication is oral[37]. A client empowering his attorney to enter into negotiations with his adversary or into an agreement with another party, waives the right to prevent his attorney from testifying as to such matters and as to his authority therein[38]. By employing one attorney, two or more clients waive their privilege in an action between themselves[39].

Sec. 194. By making disclosure of the communication[40], pleading it or offering testimony supporting such pleading[41], failing to object to questions designed to bring out such communication[42], omitting to move to strike out such testimony[43], or testifying thereto himself[44], constitute an implied waiver

35. Rosseau *v.* Blean, 131 N. Y. 177; 30 N. E. 52; 27 A. S. R. 578.
36. Loflin *v.* Herrington, 1 Black 326 (U. S.).
37. White *v.* State, 86 Ala. 69; 5 So. 674.
38. Bartlett *v.* Bunn, 10 N. Y. Supp. 210; 56 Hun 507.
Nave *v.* Baird, 12 Ind. 318.
Mitchell *v.* Bromberger, 2 Nev. 345; 90 A. D. 550.
Waldo *v.* Beckwith, 1 N. Mex. 182.
Hager *v.* Shindler, 29 Cal. 63.
Henderson *v.* Terry, 62 Tex. 281.
Snow *v.* Gould, 74 Me. 540; 43 A. R. 605.
Weeks, Attorneys, Secs. 151-2.
39. Parish *v.* Gates, 29 Ala. 254.
40. In re Burnette, 85 Pac. 575.
41. Cole *v.* Andrews, 74 Minn. 93; 76 N. W. 962.
42. Chase's Case, 1 Bland Ch. 206; 17 A. D. 277.
Shelton *v.* N. Tex. Co., 32 Tex. Civ. App. 507; 75 S. W. 338.
Sleeper *v.* Abbott, 60 N. H. 162.
43. Kitz *v.* Buckmaster, 45 App. Div. 283; 61 N. Y. Supp. 64.
44. Brand *v.* Brand, 39 How. Pr. 193 and 282.
People *v.* Patrick, 182 N. Y. 131; 74 N. E. 843.
Knight *v.* People, 192 Ill. 170; 61 N. E. 371.
Shelton *v.* N. Tex. Co., 32 Tex. Civ. App. 507; 75 S. W. 338.
Hunt *v.* Blackburn, 128 U. S. 464.
Oliver *v.* Pate, 43 Ind. 132.
Becker *v.* Shaw, 120 Ga. 1003; 48 S. E. 408.

by the client of his privilege. And the same is true if the client testifies on cross-examination without objection[45], interrogates the attorney concerning the communication[46], or asks him if certain matters were not privileged[47]; but the attorney cannot disclose the matter on cross-examination unless asked about it on direct [48].

Sec. 195. There is some difference among the courts as to whether a client waives his privilege by becoming a witness in his own behalf. On the one hand, it is said that such constitutes a waiver and that both client and attorney may then be compelled to testify fully[49]; and, on the other hand, it is maintained that such is not a waiver[50]. But the best rule is that merely becoming a witness is no waiver unless the privileged matter be referred to on the direct examination of the client[51], and that referring on cross-examination to an interview or stating the general nature of the conversation with his attorney is not a waiver[52]. Introducing in evidence letters or portions of correspondence from his attorney is a waiver of their privileged character[53].

45. Oliver *v.* Cameron, McArthur & M. 237 (D. C.).
46. Brooks *v.* Holden, 175 Mass. 137; 55 N. E. 802.
Jones *v.* N. M. & T. Co., 137 N. Car. 237; 49 S. E. 94.
Smith *v.* Wilson, 1 Tex. Civ. App. 115; 20 S. W. 1119.
Crittenden *v.* Strother, 2 Cranch C. C. 464.
47. Scates *v.* Henderson, 44 S. Car. 548; 22 S. E. 724.
48. Blount *v.* Kimpton, 155 Mass. 378; 29 N. E. 590; 31 A. S. R. 554.
49. Woburn *v.* Henshaw, 101 Mass. 193; 3 A. R. 333.
Eldridge *v.* State, 126 Ala. 63; 28 So. 580.
50. Duttonhofer *v.* State, 34 Oh. St. 91; 32 A. R. 362.
Jones *v.* State, 65 Miss. 179; 3 So. 379.
Tate *v.* Tate's Ex., 75 Va. 531.
Bigler *v.* Reyher, 43 Ind. 112.
51. Kaufman *v.* Rosenshine, 97 App. Div. 514; 90 N. Y. Supp. 205; Affirmed, 76 N. E. 1098.
52. White *v.* Thacker, 78 Fed. 862; 24 C. C. A. 374.
53. West. Union *v.* Tel. Co., 26 Fed. 55.

3. PHYSICIAN AND PATIENT.

A. WHO MAY WAIVE PRIVILEGE:—Sec. 196. Privileged communications between a patient and his physician may be waived by the patient[54], or by his attorney[55], personal representative[56], though not by an executor in an action to revoke a will[57], heir-at-law[58], this however, being denied under a statute prohibiting a physician from testifying without the consent of his patient[59], assignee of an insurance policy[60], beneficiary[61], guardian of a minor[62], parents of a child treated by the physician[63]; but not, however, by the husband of the patient[64], and it is even held that only the patient can waive the privilege[65].

B. WHAT AMOUNTS TO A WAIVER:—Sec. 197. The privileged character of communications to a physician may be waived expressly or by implication. And express waiver arises from the use

54. Davenport *v.* Hannibal, 108 Mo. 471; 18 S. W. 1122.
Thompson *v.* Ish, 99 Mo. 160; 12 S. W. 510; 17 A. S. R. 552.
Grand Rapids Co. *v.* Martin, 41 Mich. 667; 3 N. W. 173.
Andrews *v.* Mut. Assoc., 34 Fed. 870.
Denning *v.* Butcher, 91 Ia. 425; 59 N. W. 69.
55. Alberti *v.* Ry. Co., 118 N. Y. 77; 23 N. E. 35; 6 L. R. A. 765.
56. Fraser *v.* Jennison, 42 Mich. 206; 3 N. W. 882.
Morris *v.* Morris, 119 Ind. 341; 21 N. E. 918.
57. Heaston *v.* Kreig, 77 N. E. 805 (Ind.).
58. Staunton *v.* Parker, 19 Hun 55.
Roche *v.* Nason, 77 N. E. 1007 (N. Y.).
59. Flint's Estate, 100 Cal. 391; 34 Pac. 863.
60. Edington *v.* Ins. Co., 67 N. Y. 196.
61. Penn. Mut. Co. *v.* Wiler, 100 Ind. 92; 50 A. R. 679.
62. Corey *v.* Bolton, 63 N. Y. Supp. 915.
63. State *v.* Depositer, 21 Nev. 107; 25 Pac. 1000.
64. Cramer *v.* Hurt, 154 Mo. 112; 55 S. W. 258; 77 A. S. R. 752.
65. Hunt's Will, 122 Wis. 460; 100 N. W. 874.
Grattan *v.* Met. Ins. Co., 80 N. Y. 281; 36 A. R. 617.
Westover *v.* Aetna Co., 99 N. Y. 56; 1 N. E. 104; 52 A. R. 1.
Harrison *v.* Sutter Co., 116 Cal. 167; 47 Pac. 1019.

of any words showing the necessary intention[66], and also it is an express waiver to call the physician as a witness to testify as to such communications[67]. But it is more difficult to determine what is an implied waiver. Failing to object when the privileged matter is inquired about has been held a waiver[68], although this has been denied[69]. By testifying himself as to the communications, a patient waives his privilege[70], but not by stating the condition of his health[71], or nature of his injuries[72], nor by answering on cross-examination when the communication has not been testified about on direct[73], nor referred to by the patient[74], it being said that such testimony is not voluntary so as to constitute a waiver. By stating in an application for insurance that a certain

66. Foley *v.* Royal Arcanum, 151 N. Y. 196; 45 N. E. 456; 56 A. S. R. 121.
Andreveno *v.* Mut. Assoc., 34 Fed. 870.
Trull *v.* M. W. of A., 85 Pac. 1081 (Idaho).
Fuller *v.* K. of P., 129 N. Car. 318; 40 S. E. 65; 85 A. S. R. 744.

67. Holcomb *v.* Harris, 166 N. Y. 263; 59 N. E. 820.
Alberti *v.* Ry. Co., 118 N. Y. 77; 23 N. E. 35; 6 L. R. A. 765.
Carrington *v.* St. Louis, 89 Mo. 216; 1 S. W. 240; 58 A. R. 108.
Morris *v.* N. Y., Etc. Ry. Co., 148 N. Y. 88; 42 N. E. 410; 51 A. S. R. 675.

68. Lincoln *v.* Detroit, 101 Mich. 245; 59 N. W. 617.
Lissak *v.* Crocker Est. Co., 119 Cal. 442; 51 Pac. 688.

69. Penn. Ry. Co. *v.* Durkee, 147 Fed. 99.

70. Lane *v.* Bonicourt, 128 Ind. 420; 27 N. E. 1111; 25 A. S. R. 442.
Highfill *v.* Mo. Pac. Ry., 93 Mo. App. 219.
Holloway *v.* Kans. City, etc., 184 Mo. 19; 82 S. W. 89.

71. McConnell *v.* Osage, 80 Ia. 293; 45 N. W. 550; 8 L. R. A. 778.
May *v.* No. Pac. Ry., 32 Mont. 522; 81 Pac. 328; 70 L. R. A. 111.

72. Ind., Etc. Co. *v.* Hall, 165 Ind. 557; 76 N. E. 242.
Fox *v.* Union Co., 69 N. Y. Supp. 551.

73. State *v.* White, 19 Kans. 445; 27 A. R. 137.
Hemenway *v.* Smith, 28 Vt. 701.
Burgess *v.* Simms Drug Co., 114 Ia. 275; 86 N. W. 307; 89 A. S. R. 359; 54 L. R. A. 364.

74. Butler *v.* Manhattan Co., 30 Abb. N. C. 78; 23 N. Y. Supp. 163.

physician had treated him for a certain disease is a waiver by the patient of the disability of the physician to testify concerning the disease[75], although it would have been different if the disease had not been named[76]. Exhibiting a prescription to a druggist who fills it is a waiver as to its contents[77]; and introducing in evidence records of a hospital is a waiver of the privileged character of the records[78]. Introducing proofs of death furnished an insurance company which contain an affidavit or certificate of the attending physician, is a waiver by the beneficiary of the privileged character of the testimony of the physician[79]. A waiver of the privilege as to one physician is not a waiver as to another who treated the patient at another time[80], and this has been held true even where the patient was treated by two physicians at the same time[81], although such doctrine has been denied[82].

While one in full possession of knowledge of his rights as to allowing communications to his physician to be disclosed should be held to an election once fairly made, the courts are not reconciled as to

75. Brown *v.* Met. Ins. Co., 65 Mich. 306; 32 N. W. 610; 8 A. S. R. 894.
76. Jones *v.* Assur. Co., 120 Mich. 211; 79 N. W. 204.
77. Deutschman *v.* Ry. Co., 84 N. Y. Supp. 887.
78. Kemp *v.* Met. Ry., 88 N. Y. Supp. 1.
79. Helwig *v.* Mut. Ins. Co., 132 N. Y. 331; 30 N. E. 834; 28 A. S. R. 578.
80. Green *v.* Nebagamain, 113 Wis. 508; 89 N. W. 520.
Webb *v.* Met. Ry. Co., 89 Mo. App. 604.
81. Mellor *v.* Mo. Pac. Ry., 105 Mo. 455; 10 L .R. A. 36.
82. Morris *v.* N. Y., Etc. Ry., 148 N. Y. 88; 42 N. E. 410; 51 A. S. R. 675.

whether a waiver of the privilege once made is revocable[83], or irrevocable[84].

4. HUSBAND AND WIFE:—Sec. 198. Whether the privileged character of communications between husband and wife can be waived depends upon statutory provisions, and often upon the particular wording of the statute. The privilege cannot be waived under a statute providing that "Neither spouse shall be permitted to disclose any communication made to him or her during their marriage"[85]. But in the absence of statutory prohibition, it would seem that one entitled to insist on the privilege should be allowed to waive it. It has been held, however, that the concurrence of both spouses is essential to constitute a waiver[86]. But the better rule is that the one making the communication should be entitled to waive its privileged character[87], although the waiver cannot be made by a personal representative. If on cross-examination one spouse voluntarily state part of a conversation with the other, he can be compelled to disclose all of it[88]; and he waives his privilege by failing to object when the communication is inquired about[89], by in-

83. McKinney *v.* Grand St. Ry., 104 N. Y. 352; 10 N. E. 544.
Grattan *v.* Met. Ins. Co., 92 N. Y. 274; 44 A. R. 372.
84. Burgess *v.* Sims Drug Co., 114 Ia. 275; 86 N. W. 307; 89 A. S. R. 359; 54 L. R. A. 364.
Breisenmeister *v.* K. of P., 81 Mich. 525; 45 N. W. 977.
85. Robinson *v.* Robinson, 22 R. I. 121; 46 Atl. 455; 84 A. S. R. 832.
86. Derham *v.* Derham, 125 Mich. 109; 83 N. W. 1005.
87. Stickney *v.* Stickney, 131 M. S. 227.
88. State *v.* Turner, 36 S. Car. 534; 15 S. E. 602.
89. Norris *v.* Stewart's Heirs, 105 N. Car. 455; 10 S. E. 912; 18 A. S. R. 917.
German *v.* German, 7 Coldw. 180 (Tenn.).
Parkhurst *v.* Berdell, 110 N. Y. 386; 18 N. E. 123; 6 A. S. R. 384.

terrogating his spouse concerning it[90], or by testifying about it himself[91]. But if he does not refer to it on direct he cannot be asked about it on cross-examination[92]. And where the husband or wife either makes the communication public by giving it to another, the privilege is lost[93], as if one voluntarily gives to a third person letters received from the other spouse, the privilege is waived[94].

90. Columbia, Etc. Ry. *v.* Hawthorne, 3 Wash. 353; 19 Pac. 25.
Dickerman *v.* Graves, 6 Cush. 308; 53 A. D. 41.
91. Id.
92. Williams *v.* State, 40 Tex. Crim. 570; 51 S. W. 224.
People *v.* Garner, 72 N. Y. Supp. 66.
People *v.* Mullings, 83 Cal. 138; 23 Pac. 229; 17 A. S. R. 223.
93. State *v.* Hoyt, 47 Conn. 540; 36 A. R. 89.
State *v.* Buffington, 20 Kans. 599; 27 A. R. 193.
94. People *v.* Hayes, 140 N. Y. 484; 35 N. E. 951; 37 A. S. R. 572.
See: Lloyd *v.* Pennie, 50 Fed. 4.
Com. *v.* Sapp, 90 Ky. 580; 14 S. W. 834; 29 A. S. R. 405 and note.

CHAPTER 9.

REDEMPTION.

Section

1. UNDER MORTGAGES—
   - A. By Concurrent Agreement—
     - (1) In mortgage.....199
     - (2) By separate instrument.....202
   - B. By Subsequent Agreement.....205
   - C. By Laches.....210
   - D. By other conduct.....213

A. BY CONCURRENT AGREEMENT—

(1) IN MORTGAGE:—Sec. 199. At common law a failure on the part of a mortgagor in strict fulfillment of the conditions of his mortgage resulted in the loss forever of his whole estate. To prevent the hardships and injustice that arose from the enforcement of such a drastic rule, courts of equity created and impliedly reserved to every mortgagor an equity of redemption, an estate separate and distinct from the rights vested in the mortgagee and indefinite in its duration, under which he was given the right to regain his whole estate within a reasonable time by paying the debt and all proper charges thereon. However, it is now usual for statutes to provide a time within which the right to redeem must be exercised, and when such is provided it is conclusive as to the time.

Sec. 200. The protection afforded the mortgagor is of still further extent. It is practically the universal holding that he cannot, by any statement or provision in the mortgage itself, bar himself from the right to have and exercise this equity of redemption; and that no agreement at the time the mortgage is executed that in default of the mortgagor the pur-

chaser shall become absolute owner of the premises shall be permitted to bar the right to redeem if it once existed[95]. The reasons actuating courts in promulgating and applying such a rule are identical with those influencing them in refusing to permit a debtor to waive in advance the exemptions allowed to him by law for the benefit of himself and those depending upon him. Were the rule different, dire necessity would frequently compel debtors to enter into such inequitable agreements; but by reason of the beneficent cloak of protection thrown around them by the courts and by statutory provisions, it matters not how clearly expressed may be the intention of the parties to waive or release the equity of redemption through provisions in the mortgage, this intent is contrary to all principles of equity and will not be given effect[96].

Sec. 201. And it makes no difference that the instrument containing a waiver of the right to redeem is not in the form of a mortgage. It may be a deed otherwise absolute on its face, or it may assume any other form. The criterion by which the transaction is to be guaged is whether or not the instrument is security for a debt; if it be, then the right of redemption becomes so inseparably a part of it that it

95. Gillis *v.* Martin, 2 Dev. Eq. 470 (N. Car.); 25 A. D. 729.
Peugh *v.* Davis, 96 U. S. 322; 24 L. Ed. 775.
Clark *v.* Condit, 18 N. J. Eq. 358.
Wilson *v.* Drumrite, 21 Mo. 325.
Quartermous *v.* Kennedy, 29 Ark. 544.
Lousbury *v.* Norton, 59 Conn. 170.
Turpie *v.* Lowe, 114 Ind. 37; 15 N. E. 834.
Shank *v.* Groff, 43 W. Va. 337; 27 S. E. 340.
Batty *v.* Snook, 5 Mich. 231.

96. Bayley *v.* Bailey, 5 Gray 505 (Mass.); 71 Mass. 505.
Jackson *v.* Lynch, 129 Ill. 72; 22 N. E. 246.

cannot be waived or released by any declaration or provision therein[97]. So, an absolute conveyance coupled with an agreement that it shall be void if a certain debt due the grantee is paid within a year is, in equity, a mortgage, and the grantor has the right to redeem by paying the debt[98]. The want of a covenant for the repayment of the mortgage money is no bar to redemption, for every mortgage implies a loan, and every loan and every debt is a promise to pay[99].

2. BY SEPARATE INSTRUMENT:—Sec. 202. The principles above announced hold good if the waiver or release be contained in a separate instrument executed concurrently with the mortgage or other conveyance. Thus, a grantor executed and delivered a deed absolute in form; the grantee, in turn, executed and delivered to the grantor an instrument providing that if the debt should be paid within a year then the deed should be void; the grantee subsequently through misrepresentations induced the grantor to surrender the latter instrument and at once took possession under the deed; the grantor brought action to set aside the deed and for other relief. The court held, among other things, that if an instrument is once a mortgage it is always a mortgage, the effect of which is to protect borrowers from being forced by their necessities into unequal and

97. Plato *v.* Roe, 14 Wis. 543.
Jackson *v.* Lynch, *supra.*
Linnell *v.* Lyford, 72 Me. 280.
Fields *v.* Helms, 82 Ala. 449; 3 So. 106.
Lender *v.* Caldwell, 4 Kans. 339.

98. Youle *v.* Richards, 1 Saxt. Ch. 534 (N. J.); 23 A. D. 722.

99. Critcher *v.* Walker, 1 Murph. 488 (N. Car.); 4 A. D. 576.

oppressive bargains; that if the conveyance is a mortgage in the beginning, the right of redemption is an independent incident and cannot be restrained or clogged by agreements[100].

Sec. 203. And it is the general rule, almost universally applied, that where an absolute conveyance is accompanied by another instrument of defeasance providing that the property shall be reconveyed upon payment of a debt or the performance of some other condition secured by such conveyance, the two instruments together are a mortgage and the right of redemption is a necessary ingredient of the transaction[1]; and such instrument, separate from the conveyance proper, can no more cut off, restrain, waive or release the equity of redemption than the conveyance itself might. And in such a case the grantor's right to redeem is not affected by receipts and accounts given him reciting and recognizing the deed as an absolute conveyance[3]. Nor is the right to redeem affected by the fact that the grantor, holding the separate instrument of defeasance, withheld same from the public records for the purpose of misleading and delaying his creditors[3].

Sec. 204. One case in Colorado seems at variance with the foregoing, for it is said that the parties may stipulate in a trust deed that no right of re-

100. Youle *v.* Richards, *supra.*
Henry *v.* Davis, 7 Johns. Ch. 42.
1. Dubuque Bank *v.* Weed, 57 Fed. 513.
Bunker *v.* Barron, 79 Me. 62; 8 Atl. 253; 1 A. S. R. 282.
Halsey *v.* Martin, 22 Cal. 645.
Freeman *v.* Wilson, 51 Miss. 329.
Lanahan *v.* Sears, 102 U. S. 318; 26 L. Ed. 180.
2. Bayley *v.* Bailey, 5 Gray 505 (Mass.); 71 Mass. 505.
3. Clark *v.* Condit, 18 N. J. Eq. 358.

demption shall remain to the grantor and that such stipulation shall be given effect[4]. But the decided preponderance of authority supports the doctrine that irrespective of the intention of the parties, a mortgagor has the right to redeem his estate, a right which he cannot waive or release either by a provision to that effect in the mortgage or other conveyance as security, or by a separate instrument executed and delivered concurrently with the conveyance[5].

B. BY SUBSEQUENT AGREEMENT:—Sec. 205. As has been above noted, equity will narrowly scan transactions wherein one party is in a position to exercise undue pressure upon the other, and it is for such reason that a mortgagor is not permitted to alienate his right of redemption at the time of making the loan. At such time the exigences of his condition may be such that an unscrupulous lender would prey upon his necessities for the purpose of exacting a grossly inequitable bargain; and the securing instrument, while showing on its face a straight and voluntary transaction, would in effect be an expression of the straights to which the grantor had been driven by untoward circumstances.

Sec. 206. But these conditions do not exist after the making of the original agreement. The mortgagor has relieved himself temporarily by means of the transaction and is in a better position to combat any exacting designs that might be attempted by the

4. Nippel *v.* Hammond, 4 Colo. 211.

5. Boyd *v.* Roane, 49 Ark. 397; 5 S. W. 704.
Shields *v.* Russell, 66 Hun 220; 20 N. Y. Supp. 909.
Affirmed: 142 N. Y. 290; 36 N. E. 1061.

mortgagee. And while it is said that an agreement subsequent to the mortgage by which the entire estate of the mortgagor is to become absolute in the mortgagee if the debt be not paid by the specified date will be viewed suspiciously and watched narrowly[6], yet it is the general rule, subject to a few exceptions, that the mortgagor may, subsequent to the execution of the mortgage, release or waive his equity of redemption; but such release or waiver must be voluntarily given for a sufficient consideration and without fraud or undue influence on the part of the mortgagee[7].

Sec. 207. The mode of evidencing such waiver is immaterial. It may be made by a separate instrument expressly releasing the equity of redemption, or the owner of the equity may convey the premises to the mortgagee and thus waive or cut off his right to redeem[8]. But it is said that such a conveyance is not a waiver or extinguishment of the right to redeem unless it was accepted as a full payment of the debt[9], and, again, if the mortgagee use the power of his mortgage to procure the equity of redemption for less than its value, equity will yet permit the

6. Hyndman *v.* Hyndman, 19 Vt. 9; 46 A. D. 171.
Linnell *v.* Lyford, 72 Me. 280.
7. Wilson *v.* Vanstone, 112 Mo. 315; 20 S. W. 612.
Villa *v.* Rodriguez, 12 Wall. 323 (U. S.).
Moeller *v.* Moore, 80 Wis. 434; 50 N. W. 396.
Watson *v.* Edwards, 105 Cal. 70; 38 Pac. 527.
Vennum *v.* Babcock, 13 Ia. 194.
Seymour *v.* Mackay, 126 Ill. 341; 18 N. E. 552.
Hoover *v.* Johnson, 47 Minn. 434; 50 N. W. 475.
Shaw *v.* Walbridge, 33 Oh. St. 1.
4 Kent, Com. Art. 143.
Marshall *v.* Stewart, 17 Oh. 356.
8. Braun *v.* Vollmer, 85 N. Y. Supp. 319; 89 App. Div. 43.
9. Robertson *v.* Wheeler, 162 Ill. 566; 44 N. E. 870.

mortgagor to redeem[10]. In another case it was held that if a mortgagor convey the premises to the mortgagee for no other consideration than the satisfaction of the debt, the burden is on the latter, if the transaction be attacked for fraud, to show that it was fair and that the conveyance of the equity of redemption was voluntarily and intelligently given upon a contract of sale entirely disconnected from the mortgage contract[11].

Sec. 208. But there is no good reason why a mortgagee may not purchase from and deal with the mortgagor as freely as any third person might. The subsequent release or waiver of the equity of redemption by the mortgagor to the mortgagee is a matter of common occurrence, and there is nothing in the policy of the law that forbids such transfer. But as the mortgagee, particularly if in possession, may exercise an undue and improper influence over the mortgagor, especially if the latter be in needy circumstances, the transaction will always be closely scrutinized so as to prevent any oppression of the debtor; and it seems that only constructive fraud or an unconscientious advantage which ought not to be retained need be shown to avoid such a purchase. If the sale be made for a fair price and upon a full consideration, or under circumstances where the mortgagor could exercise an unembarrassed will, the relationship of the parties would, of course, form no objection; yet courts view all transactions between mortgagor and mortgagee with considerable

10. Noble *v.* Graham, 140 Ala. 413; 37 So. 230.
11. Hall *v.* Hall, 41 S. Car. 163; 44 A. S. R. 696, citing:
Russell *v.* Southard, 12 How. 139 (U. S.).
Jones on Mortgages, Sec. 711.

jealousy and will set aside such sales whenever, by the influence of his incumbrance, the mortgagee has purchased for a consideration grossly inadequate or for less than others would have given[12].

Sec. 209. The release or waiver of the equity of redemption may be made by a parol agreement, according to the decided cases. And it is said that the grantor will not be permitted to invoke the statute of frauds where he has executed an absolute deed which in fact was but security for a debt but subsequently he has by a parol agreement waived or released his equity[13]. But this ruling appears to us of questionable propriety, to say the least. The equity of redemption is an estate in lands reserved to the mortgagor by law if not by the instrument itself. The opportunities for fraud or undue influence are equal to if not greater than those in any other classes of land transactions. And in the waiver of this right not only should there be a sufficient consideration, but the transaction should be evidenced by an instrument of writing according to the requirements of the statute of frauds. The fact

12. II Warvelle on Vendors, citing:
Russell *v.* Southard, 12 How. 139.
Pugh *v.* Davis, 96 U. S. 337.
Holdridge *v.* Gillespie, 2 Johns. Ch. 34 (N. Y.).
Oliver *v.* Cunningham, 7 Fed. 689.
See, also: 2 Washburn, Real Property, Secs. 23-24.
Ten Eyck *v.* Craig, 62 N. Y. 406; 2 Hun 452.
Dennis *v.* Tomlinson, 49 Ark. 568; 6 S. W. 11.
Phelan *v.* De Martin, 85 Cal. 365; 24 Pac. 725.
Hinkley *v.* Wheelwright, 29 Md. 341.
Clark *v.* Clough, 65 N. H. 43; 23 Atl. 526.
Bagler *v.* Stabler, 91 Ala. 308; 9 So. 157.

13. Bazemore *v.* Mullins, 52 Ark. 207; 12 S. W. 474.
McMillan *v.* Jewett, 85 Ala. 476; 5 So. 145.
Shaw *v.* Walbridge, 33 Oh. St. 1.
Phelps *v.* Seely, 22 Gratt. 573 (Va.).

that the mortgage is in the form of a deed absolute should make no difference. If once a mortgage, it can have no further effect than as a mortgage, and where fraud could enter so easily the doors should not be opened by permitting the nature of the instrument to be changed by a parol agreement of the parties[14].

C. BY LACHES:—Sec. 210. The right of redemption is an equitable right. And in equity it is the rule that when the court is asked to lend its aid in the enforcement of a demand that has become stale, there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence of the party seeking relief are the elements that call a court of equity into action. In the absence of those elements the court becomes passive and refuses to extend its relief or aid[15]. Therefore, he who is entitled to redeem from a mortgage must be reasonably diligent in the exercise of that right and must assert it within a reasonable time and before the situation of the parties has changed or the rights of innocent third parties have intervened. For to sit idly by and permit any of these conditions to arise with knowledge of his right to redeem would amount to a waiver of the equity. In other words, the laches of the owner of the right of redemption in asserting it is a bar to that right[16].

14. See: Keller *v.* Kirby, 34 Tex. Civ. App. 404; 79 S. W. 82.
15. McDearmon *v.* Burnham, 158 Ill. 62; 41 N. E. 1094.
16. Bergen *v.* Bennett, 1 Cal. Cas. 1 (N. Y.); 2 A. D. 281.
Hall *v.* Westcott, 15 R. I. 375; 5 Atl. 629.
McAdee *v.* Harrison, 50 S. Car. 39; 27 S. E. 539.
Askew *v.* Sanders, 84 Ala. 356; 4 So. 167.

Sec. 211. Many states have by legislative enactments provided a time within which the right to redeem must be exercised. Of course, where there is such a provision, it is conclusive as to time, and a lapse of the specified time without redemption waives the right absolutely. But in the absence of such a statute, as above noted, acquiescing for more than a reasonable time, is a bar also; and here, as in all other cases, what is a reasonable time is to be determined by all the facts surrounding any particular transaction.

Sec. 212. Thus, in one case it was said that four years after he has knowledge of the sale and proceedings, during which time he has remained inactive and acquiesced, is too late to redeem and he is barred of his right[17]. In another it was held that the equity of redemption from a mortgage foreclosure cannot be enforced when all parties have supposed that the foreclosure was good and the holder of the equity has abandoned the premises and all claim to them, never paying any taxes or offering to redeem until after a series of years when the property has passed through several hands and become valuable[18]. So, a delay of sixteen years has been held fatal[19], and five years[20], and the lapse of any period of time evidencing in the particular case an election by the mortgagor to permit the sale to stand. A grantor in an absolute deed acquiesced in the transaction for a period of six years, paid no

17. Hamilton *v.* Lubukee, 51 Ill. 415; 99 A. D. 562.
Ryan *v.* Kales, 20 Pac. 311 (Ariz.).
18. Walker *v.* Warner, 179 Ill. 16; 53 N. E. 549; 70 A. S. R. 85.
19. Bergen *v.* Bennett, 1 Cai. Cas. 1 (N. Y.); 2 A. D. 281.
20. Danforth *v.* Roberts, 20 Me. 307.

taxes on the property, and made no objection while the grantee made valuable and expensive improvements, and it was held that he could not then claim that the conveyance was only a mortgage given to secure a debt after he had thus slept on his rights and induced others to act on the belief that he had abandoned them[21]. And the same decision was reached in another case where the delay was for nineteen years[22]; and fourteen years[23]; and nine years and ten months[24]; and seven years[25]; and even three years[26]; all of which have, under a variety of facts and circumstances, been held sufficient delay to constitute laches in asserting the right to redeem and, consequently, a waiver of such right which cannot then be taken advantage of[27].

D. BY OTHER CONDUCT:—Sec. 213. A mortgagor may bar himself of his right to redeem in a variety of methods not hereinbefore mentioned. It is sufficient if his conduct evince that intention, provided a sufficient consideration has passed, which may be a benefit to himself or a detriment to the mortgagee. A waiver was held to have been produced by the conduct of the mortgagor in encouraging another to buy the property by promising not to

21. Schradski *v.* Albright, 93 Mo. 42; 5 S. W. 807.
22. Ketchum *v.* Johnson's Ex'rs., 4 N. J. Eq. 370.
23. McDearmon *v.* Burnham, 158 Ill. 55; 41 N. E. 1094.
24. Askew *v.* Sanders, 84 Ala. 356; 3 So. 167.
25. Munn *v.* Burges, 70 Ill. 604.
26. Kline *v.* Vogel, 90 Mo. 239; 1 S. W. 733 and 2 S. W. 403.
27. Tetrault *v.* Fournier, 187 Mass. 58; 72 N. E. 351.
Mann *v.* Jobusch, 70 Ill. App. 440.
Baker *v.* Bailey, 204 Pa. St. 524; 53 Atl. 868.
MacGregor *v.* Pierce, 17 S. Dak. 51; 95 N. W. 281.
Snipes *v.* Kelleher, 31 Wash. 386; 72 Pac. 67.

redeem[28]; also where the mortgagor agreed during foreclosure that the property might be sold in fee simple free of all conditions, limitations or restrictions[29]. Or if he remains inactive during the whole redemption period and acquiesces in the delivery of a sheriff's deed to one who does redeem[30], or accepts a deed to a portion of the mortgaged premises in satisfaction of his claim of the right to redeem[31], or if he agrees that the grantee of a deed absolute, given as security, shall convey the premises to another[32], or where he joined with the mortgagee in making a sale of the mortgaged premises, agreed to give warranted title and possession, received a part of the purchase-money and permitted the purchaser to enter into possession[33]—in each of these cases the mortgagor was refused the right to redeem.

Sec. 214. But at the time of the alleged waiver of the right to redeem, the one having the right must have knowledge of it. Thus, it was held that one ignorant of his right to redeem did not debar himself from the privilege by agreeing to give possession of the premises prior to the expiration of the period allowed for redemption, even where a purchaser was induced by such agreement to buy the property and make improvements thereon[34].

28. Southard *v.* Sutton, 68 Me. 575.
Fay *v.* Valentine, 12 Pick. 40; 22 A. D. 397.
Woods *v.* McGarock, 18 Tenn. 133.
29. King *v.* King, 215 Ill. 100; 74 N. E. 89.
30. MacGregor *v.* Pierce, 17 S. Dak. 51; 95 N. W. 281.
31. Bedford *v.* Moore, 54 Mo. 448.
32. Noxon *v.* Glen, 2 N. Y. St. R. 661.
33. Wright *v.* Whitehead, 14 Vt. 268.
34. Wood *v.* Holland, 64 Ark. 104; 40 S. W. 704.

CHAPTER 10.

STATUTE OF LIMITATIONS.

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1. PRELIMINARY:—Sec. 215. Statutes of limitation are statutes of repose to be liberally construed with reference to the attainment of the object and purpose of their existence. The statutes affect the remedy and not the right or defense itself nor the moral obligation of one person to discharge a duty owing by him to another. The right to rely upon and take advantage of a statute of limitation is a personal right belonging to the debtor in any particular case, and is a right strictly within his province to invoke or disregard as he may elect. No one can compel him to take advantage of it, and neither can he be coerced into relinquishing its advantages[35]. So, at the trial of an action a debtor may, even over the protest and objection of his attorney, refuse to avail himself of the benefit of the statute[36]; and, on the other hand, he may invoke its protection despite the attempts of his counsel to surrender it[37], unless the attorney was expressly authorized in that behalf.

35. Allen *v.* Smith, 129 U. S. 470.
Sheppard's Estate, 180 Pa. St. 57; 36 Atl. 422.
Kennedy *v.* Powell, 34 Kans. 23; 7 Pac. 606.
36. Lewis *v.* Buckley, 73 Miss. 58; 19 So. 197.
37. Spreckels *v.* Ord, 72 Cal. 86; 13 Pac. 158.

Sec. 216. In taking advantage or failing to take advantage of the statute of limitations, two principles are involved—that of election and that of waiver. The consideration of one necessarily includes the other, for in this connection a waiver either expressly or inferentially means that the debtor elects to forego a right that he might avail himself of. Therefore, it follows that a waiver may be produced by one of two means—by an agreement to that effect and by conduct inconsistent with an intention to invoke the statute. Where the waiver relied on is one produced by agreement, no special form of language is essential to its validity. The necessary ingredient is that the plain intent and purport of the words used, are to waive the benefit of the statute[38]. And it is not required that such agreement shall be in writing, even where the statute requires a written promise to pay or acknowledgment of the debt[39].

Sec. 217. Whether or not a consideration is requisite to a valid agreement to waive the statute depends somewhat upon the time when the agreement is made, although other than from theoretical considerations the question has but little to do with the waiver. For if the agreement be made prior to the bar of the statute, the forbearance to sue,

38. Burton *v.* Stevens, 24 Vt. 131; 58 A. D. 153.
Jordan *v.* Jordan, 85 Tenn. 563; 3 S. W. 896.
In re King, 94 Mich. 411; 54 N. W. 178.
Bridges *v.* Stephens, 132 Mo. 524; 34 S. W. 555.

39. Lewis *v.* Buckley, 73 Miss. 60; 19 So. 197.
San Antonio, Etc. *v.* Stewart, 94 Tex. 441; 61 S. W. 386.
Joyner *v.* Massey, 97 N. Car. 148; 1 S. E. 702.
Warren *v.* Walker, 23 Me. 453.

either express or implied, is a consideration[40], and if it be made after the lapse of the period limited by the statute, the existence of the debt and the moral obligation created thereby are a sufficient consideration[41].

Sec. 218. The effects of a waiver of the statute of limitations can in no sense be extended to a permanent removal of its operation. The logical result is that such waiver creates a new period, starting the statute afresh and extending the same length of time as originally applying, unless the agreement is for a waiver for a limited time, in which event suit must be brought within a reasonable time or the bar may again be invoked[42].

2. ACKNOWLEDGMENT OF DEBT:—Sec. 219. Whether acknowledgment of the debt after lapse of the statutory period will waive the bar of the statute depends upon the character of the acknowledgment, for it is not every acknowledgment that will in itself be held a waiver. Thus, the mere acknowledgment that the debt is unpaid is held by most courts to be insufficient to amount to a waiver of the statute[43]. The contrary, however, has been held under statutory provision[44], and it is said

40. Benson *v.* Phipps, 87 Tex. 578; 29 S. W. 1061; 47 A. S. R. 128.
Gay *v.* Hassom, 64 Vt. 495; 24 Atl. 715.
Burton *v.* Stevens, 24 Vt. 131; 58 A. D. 153.
41. Pittman *v.* Elder, 76 Ga. 371.
Jordan *v.* Jordan, 85 Tenn. 563; 3 S. W. 896.
42. Kellog *v.* Dickinson, 147 Mass. 432; 18 N. E. 223.
Trask *v.* Weeks, 81 Me. 325; 17 Atl. 162.
Joyner *v.* Massey, 97 N. Car. 148; 1 S. E. 702.
Wells, Fargo *v.* Enright, 127 Cal. 669; 60 Pac. 439.
43. McLean *v.* Thorp, 4 Mo. 256.
Prescott *v.* Vershire, 63 Vt. 517; 22 Atl. 665.
Levistone *v.* Marigny, 13 La. Ann. 353.
44. Stewart *v.* McFarland, 84 Ia. 55; 50 N. W. 221.
Reymond *v.* Newcomb, 10 N. Mex. 151; 61 Pac. 205.

that an unqualified acknowledgment of an indebtedness is sufficient to lift the bar of the statute[45]; and some courts have gone a greater distance in holding an acknowledgment of a debt to be a waiver of the right to invoke the protection of the statute[46].

Sec. 220. But we can scarcely reconcile our views to the proposition that a mere admission of indebtedness should be sufficient to deprive him for whose benefit a statute has been made of its force and protection. The very object of the creation of such a statute was to create a bar to all claims not sued on within a certain time, and to say that by a mere acknowledgment that the debt has not been paid the effect of the statute is to be held waived is, in our opinion, going farther than sound reason or a proper interpretation of the intent of the statute will permit the proper doctrine should be that the acknowledgment, in order to constitute a waiver of the statute, must indicate, either expressly or impliedly, a recognition by the debtor of a present indebtedness and an intention to pay it[47]. Or, as it has been said, an acknowledgment sufficient to remove the bar of the statute must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, and an express or implied promise to pay it[48]; or, again, there must be a clear, distinct and unequivocal promise to pay as distin-

45. Cole *v.* Putnam, 62 N. H. 616.
Gartrell *v.* Linn, 79 Ga. 701; 4 S. E. 918.
Krueger *v.* Krueger, 76 Tex. 178; 12 S. W. 1004.
Yost *v.* Grim, 116 Pa. St. 527; 8 Atl. 925.
46. Custy *v.* Dolan, 159 Mass. 245; 34 N. E. 360; 38 A. S. R. 419.
47. Manchester *v.* Braedner, 107 N. Y. 346; 14 N. E. 405; 1 A. S. R. 829.
48. Ward *v.* Jack, 172 Pa. St. 416; 33 Atl. 577; 51 A. S. R. 744.

guished from a promise implied from an acknowledgment of the justness or existence thereof, and a mere expression of an intention to pay the debt is insufficient[49]. The Supreme Court of the United States has from an early day held to the principal that an acknowledgment of a debt must, in order to be held a waiver of the statute, be something more than an admission consistent with the implication of a promise to pay. It must be such as to indicate a present liability and a willingness to pay[50].

Sec. 221. A different proposition is presented where the debtor acknowledges and admits that the debt is a present and subsisting liability; for from such an acknowledgment necessarily arises the presumption that the debtor will pay his obligations and from this must be the implication of a promise to pay; especially if the admission contain nothing negativing an intention to pay[51]. But such an admis-

49. Shockey *v.* Mills, 71 Ind. 288; 36 A. R. 196.

50. Clementson *v.* Williams, 8 Cranch 72.
Bell *v.* Morrison, 1 Pet. 352.
Shepherd *v.* Thompson, 122 U. S. 231.
Bullion Bank *v.* Hegler, 93 Fed. 890.
To the same effect, see: Ensign *v.* Batterson, 68 Conn. 298; 36 Atl. 51.
Taylor *v.* Foster, 132 Mass. 30.
Switzer *v.* Noffsinger, 82 Va. 518.
Shown *v.* Hawkins, 85 Tenn. 214; 2 S. W. 34.
Belles *v.* Belles, 12 N. J. L. 339.
Drake *v.* Sigafoos, 39 Minn. 367; 40 N. W. 257.

51. Lang *v.* Gage, 66 N. H. 624; 32 Atl. 155.
Tenn. Br'g. Co. *v.* Hendricks, 77 Miss. 491; 27 So. 526.
Kirby *v.* Mills, 78 N. Car. 124; 24 A. R. 460.
Gardenhire *v.* Rogers, 60 S. W. 616 (Tenn.).
Clark *v.* King, 54 Kans. 222; 38 S. W. 281.
Philips *v.* Peters, 21 Barb. 351 (N. Y).
Honn *v.* Pinnell, 61 Ill. App. 137.
Hunter *v.* Kittridge, 41 Vt. 359.
Olvey *v.* Jackson, 106 Ind. 286; 4 N. E. 149.

sion must not be confounded with an acknowledgment of an original indebtedness. For the latter is by no means an admission of a binding character.

3. NEW PROMISE TO PAY:—Sec. 222. The question above considered, as to what acknowledgment or admission will be sufficient to constitute a waiver of the statute of limitations must, in fact, be resolved into a question of whether under the circumstances or form of the acknowledgment a new promise to pay arises. For, resolved to its ultimate analysis, a waiver of the statute may be said never to occur unless there is either express or implied a new promise to pay the debt against which the statute may be sought to be invoked. Where there is an express new promise to pay the old debt, there can be no question, unless under the statutory regulation, that the effect of the statute is waived and it will be started afresh, whether the new promise is made before or after the original indebtedness has become barred[52].

Sec. 223. In a majority of the states statutory provision has been made to the effect that no acknowledgment or new promise shall be sufficient to waive the bar of the statute of limitations unless the same shall be in writing and signed by the debtor or under his authorization. It is essential that all of the elements of a complete new promise appear in the writing, although no special form is necessary, and it will be sufficient if from the writing a liability of the debtor to pay the specified debt may be im-

52. Damon *v.* Leque, 17 Wash. 573; 50 Pac. 485; 61 A. S. R. 927. Malone *v.* Searight, 8 Lea 94 (Tenn.).
See: Warren *v.* Cleveland, 111 Tenn. 174; 76 S. W. 910; 102 A. S. R. 749, and splendid note thereto.

plied[53]. Thus, it has been held that letters written by the debtor, sufficient in other respects, are sufficient in form to amount to a waiver in the form of a new promise[54]; also, giving written orders on a third person[55], giving checks[56], although this latter would be held a waiver at any rate on account of being part payment; and giving notes with security has the same effect[57]. The courts are not agreed as to the giving of security by the debtor upon an indebtedness barred by the statute. Some courts hold that the giving of security does not revive the debt, if barred, nor start the statute anew only in so far as the security will discharge the debt[58]. Others hold that the giving of security is a payment *pro tanto* and, therefore, a waiver of the statute[59]. But others, with perfectly good reasoning, hold that the giving of security for an old indebtedness is the best evidence that the debtor recognizes the debt as a subsisting obligation and a manifestation of a willingness to pay[60]. No other deduction can be logic-

53. Richards v. Hayden, 8 Kans. App. 816; 57 Pac. 978.
Manchester *v.* Braedner, 107 N. Y. 346; 14 N. E. 405; 1 A. S. R. 829.
54. Burnett *v.* Munger, 23 Tex. Civ. App. 278; 56 S. W. 103.
Osment *v.* McElrath, 68 Cal. 466; 9 Pac. 731; 58 A. R. 17.
Miller *v.* Beardsley, 81 Ia. 720; 45 N. W. 756.
55. Manchester *v.* Braedner, 107 N. Y. 346; 14 N. E. 405; 1 A. S. R. 829.
56. McGinty *v.* Henderson, 41 La. Ann. 382; 6 So. 658.
57. Blair *v.* Carpenter, 75 Mich. 167; 42 N. W. 790.
58. Shepherd *v.* Thompson, 122 U. S. 231.
59. Campbell *v.* Baldwin, 130 Mass. 199.
Pracht *v.* McNee, 40 Kans. 1; 18 Pac. 925.
Wolford *v.* Cook, 71 Minn. 77; 73 N. W. 706.
Creighton *v.* Vincent, 10 Oreg. 56.
Smith *v.* Ryan, 66 N. Y. 352; 23 A. R. 60.
60. Taylor *v.* Hunt, 118 N. Car. 168; 24 S. E. 359.
Hamption *v.* France, 17 Ky. L. R. 980; 32 S. W. 950.
Osborne *v.* Heuer, 62 Minn. 507; 64 N. W. 1151.

ally drawn from the act, nor could a more concise illustration of an implied promise be cited.

A. PART PAYMENT:—Sec. 224. Part payment of a debt barred by the statute of limitations is a common form of acknowledgment of an indebtedness sufficient to waive the statute if the part payment be made under circumstances involving an admission of the whole[61]. But there must be an express or implied promise to pay the remainder of the debt. For if at the time of the part payment the debtor declares that he will not pay the balance, the part payment is insufficient to amount to a waiver[62]. And the part payment, to have such effect, must be voluntary; for it is said that the entire efficiency of a payment to avert the effect of the statute as a bar rests in the conscious and voluntary act of the debtor, explainable only as a recognition and confession of an existing liability[63]. The payment of interest is equally efficacious to toll the statute or to start it anew, and amounts to an acknowledgment of the principal debt from which a new promise to pay will be implied[64].

61. Cucullu *v.* Hernandez, 103 U. S. 105.
Hale *v.* Morse, 49 Conn. 481.
Engmann *v.* Immel, 59 Wis. 249; 18 N. W. 182.
Buxton *v.* Edwards, 134 Mass. 567.
Walker *v.* Walt, 50 Vt. 668.
Glick *v.* Crist, 37 Oh. St. 388.
Kuhn *v.* McKay, 7 Wyo. 42; 49 Pac. 473; 51 Pac. 205.

62. Lester *v.* Thompson, 91 Mich. 245; 51 N. W. 893.

63. 19 Am. & Eng. Enc. L. 326, citing:
Lang *v.* Gage, 65 N. H. 173; 18 Atl. 795.
See: Thomas *v.* Brewer, 55 Ia. 227; 7 N. W. 571.

64. Topeka Capital *v.* Merriam, 60 Kans. 397; 56 Pac. 757.
Bennett *v.* Baird, 67 Ill. App. 442.
Blair *v.* Carpenter, 75 Mich. 167; 42 N. W. 790.
Dickson *v.* Gourdin, 26 S. Car. 391; 2 S. E. 303.

In some jurisdictions where statutory provisions require an acknowledgment to be in writing in order to affect the limitation, it is held that part payment is not a waiver as it is not a compliance with the statute[65], although in others, even where such provision exists, the part payment is given effect as a waiver[66].

4. FAILURE TO PLEAD:

A. IN CIVIL ACTIONS:—Sec. 225. Where a defendant is sued upon an indebtedness against which the statute of limitations has run the statute is an absolute bar to the action by way of defense and is ground for the discharge of the defendant. But the statute is an affirmative defense, and the right to take advantage of it is a personal one belonging solely to the defendant, which he may take advantage of or waive as he may desire. When action is brought on a debt so barred, the defendant must set up the statute and his right to rely upon it in some appropriate pleading, or his privilege will be waived and a judgment against him for the debt so barred will be binding[67]; for it is said that "The

65. Hale *v.* Wilson, 70 Ia. 311; 30 N. W. 739.
Perry *v.* Ellis, 62 Miss. 718.
Wilcox *v.* Williams, 5 Nev. 206.

66. Kirk *v.* Williams, 24 Fed. 448.
Kelly *v.* Leachman, 3 Idaho 629; 33 Pac. 46.
Brude *v.* Treutman, 16 Ind. App. 512; 44 N. E. 932.

67. Christie *v.* Bridgman, 51 N. J. Eq. 331; 25 Atl. 930; 30 Atl. 429.
Orr *v.* Rode, 101 Mo. 387; 13 S. W. 1066.
Jennings *v.* Rickard, 10 Colo. 395; 15 Pac. 677.
Nicodemus *v.* Young, 90 Ia. 423; 57 N. W. 906.
Small *v.* Cohen, 102 Ga. 248; 29 S. E. 430.
Davis *v.* Davis, 20 Oreg. 78; 25 Pac. 140.
Tex., Etc., Ry. *v.* Comstock, 83 Tex. 537; 18 S. W. 946.
Lockhart *v.* Fessenich, 58 Wis. 588; 17 N. W. 302.
Barstow *v.* McLachlan, 99 Ill. 641.
And see numerous cases from practically every state cited in 13 Am. & Eng. Enc. P. & P. 181.

Statute of Limitations, unless pleaded, like the prayers of the wicked, availeth not"[68]. In some states it is held that if it is apparent on the face of the complaint that the debt is barred by the statute, an objection to the evidence will be effective, but if it does not appear on the face of the complaint, it must be specially pleaded[69]. But the general rule requires the question in either event to be presented through the pleadings[70]; it cannot be taken advantage of under the general issue or a general denial[71], nor for the first time at the trial[72], nor on arrest of judgment[73], nor at any time after judgment[74].

B. IN CRIMINAL CASES:—Sec. 226. A plea of not guilty in a criminal action puts everything in issue[75]. Therefore, the rule obtaining in civil actions that the statute of limitations, to be available as a defense, must be specially pleaded, does not apply. And while the defendant, if the indictment shows the prosecution to be barred by limitation, may raise the question of the statute by

68. Per Judge Neill in P. & O. Tex. Ry. *v.* Crews, 139 S. W. 1049, Tex. Civ. App.; mentioned in West Pub. Co.'s "Docket," December, 1911, p. 596.
69. Mitchell *v.* Ripley, 5 Kans. App. 818; 49 Pac. 153.
Zane *v.* Zane, 5 Kans. 134.
70. State v. Spencer, 79 Mo. 314.
Thompson *v.* Parker, 68 Ala. 300.
Whitworth *v.* Pelton, 81 Mich. 98; 45 N. W. 500.
Vore *v.* Woodford, 29 Oh. St. 245.
71. Retzer *v.* Wood, 109 U. S. 185.
Bell *v.* Clark, 30 Mo. App. 224.
Williams *v.* Barnett, 52 Tex. 130.
Bullett *v.* Stewart, 3 B. Mon. 115 (Ky.).
72. Frantz *v.* Company, 5 Idaho 71; 46 Pac. 1026.
73. Cooksey *v.* Ry., 17 Mo. App. 132.
Sawyer *v.* Boston, 144 Mass. 470; 11 N. E. 711.
Allen *v.* Word, 6 Humph. 284 (Tenn.).
74. Clinton *v.* Eddy, 54 Barb. 54.
75. Thompson *v.* State, 54 Miss. 740.

special plea, advantage may also be taken of this defense under the general issue[76]. But if the bar of the statute be not taken advantage of at the trial before verdict, it will be waived and the sentence cannot be called in question on that ground on *habeas corpus* or on appeal[77].

76. U. S. *v.* Cook, 17 Wall. 168 (U. S.).
State *v.* Gill, 33 Ark. 129.
Hatwood *v.* State, 18 Ind. 492.
Com. *v.* Ruffner, 28 Pa. St. 260.
77. Johnson *v.* U. S., 3 McClean 89 (U. S.).

CHAPTER 11.

CORPORATIONS.

Section

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1. CONDITIONS AND IRREGULARITIES IN SUBSCRIPTIONS:

A. Conditional Subscriptions—

(1) IN GENERAL:—Sec. 227. On the organization of a corporation a subscriber may agree to take shares therein upon conditions to be performed by the corporation. And where there are conditions, the agreement does not become effective until they are performed. When they are conditions precedent, upon failure to comply therewith, or, rather,

until compliance therewith, no liability attaches to the subscriber. In fact the subscription is but a proposal to take a number of shares thereafter if certain facts exist, and is not an absolute promise to pay therefor. The corporation cannot levy an assessment upon such shares before the conditions are removed. It has been said that a conditional subscription involves two contracts, one on the part of the corporation to do some specified act, and the other on the part of the subscriber to pay for his shares when such act is performed; and that the conditional subscription is a continuing offer which becomes effective only upon acceptance by the corporation, which is evidenced by the performance. But after such acceptance the offer cannot be revoked.

Sec. 228. But performance of the condition of a subscription for stock is not always requisite to render the contract enforceable. The subscriber is not bound to insist upon it. He has the right to do so but may waive the right, or, in other words, may forego its benefits. But in order that a valid waiver of performance of conditions may occur, the subscriber must have knowledge of his rights and must forego them voluntarily, or the circumstances surrounding his dealings and his conduct in the premises must be such that an intent not to insist upon the rights may be inferred, as a waiver may be either express or implied; and even silence may constitute a waiver if a duty rests upon the subscriber to speak, or if his silence misleads others to their prejudice.

(2) THAT ALL STOCK BE SUBSCRIBED:—

Sec. 229. A common condition inserted in the agreement of subscription upon the organization of a corporation is that there shall be a certain number of

shares of the capital stock and that a designated sum shall be paid for each share. And in other instances statutory provisions require a definite number of shares to be subscribed and a certain part of the capital stock to be paid in. In either event, the stipulation or requirement must be fulfilled or the subscription does not become effectual so that payment thereof can be enforced.

Sec. 230. But these provisions or conditions are solely for the benefit of the subscriber and he has the right to take advantage of them or not as he may desire. He may rely upon them as a defense in an action upon the subscription, or he may so declare or conduct himself as to preclude such defense. In other words, he may waive the performance of such conditions and in such event will be held to payment of the amount subscribed[78]. A variety of facts and circumstances have been held to amount to a waiver of the conditions under consideration. Thus, if a subscriber to stock in a corporation subscribed prior to incorporation, he waives the defense that the capital stock of the corporation has not been subscribed as provided for in his contract by acquiescing in the mode of incorporation with knowledge of all the facts[79]. Or, if he know that the whole amount of the capital stock has not been subscribed, yet participate in a corporate meeting, the condition is waived and the subscription rendered absolute[80].

78. MacFarland *v.* West. Assoc., 56 Neb. 277; 76 N. W. 584.
79. Cal. Hotel Co. *v.* Callender, 94 Cal. 120; 29 Pac. 859; 28 A. S. R. 99, citing:
Cook on Stocks & Stockholders, Secs. 181-198.
Taylor, Private Corporations, Sec. 519.
N. H. Ry. Co. *v.* Johnson, 30 N. H. 390; 64 A. D. 300.
80. Inter. Assoc. *v.* Walker, 97 Mich. 159; 56 N. W. 344.

And the same effect results where he acts as a director of the corporation or as a member of its committees[81]; and likewise if he attend meetings, vote for expenditures, or for making contracts, and do other acts which could be consistent only with an intention to proceed with his subscription and shares as if all the conditions had been complied with, a waiver will be imputed to him[82]. And it is the same where he pays calls on shares[83]. The assisting in prosecuting the enterprises for which the corporation was formed and in the incurring of liabilities, knowing that the required amount has not been subscribed, is a waiver by the subscriber of the condition[84]. So, the making of payments, promising to pay, giving his note or other obligation as payment will have the same result[85]. And if, at the time of the subscription, the corporation has already commenced business, the subscriber will be held to have waived the conditions as to all stock's being taken if he knew at the time that it had not been[86]. In general it has been said that any acts done by the subscriber, either as a corporator or as a director, which evince a willingness on his part that the cor-

81. Auburn Assoc. *v.* Hill, 32 Pac. 587 (Cal.).
Richfield Co. *v.* Reynolds, 46 Conn. 375.
82. Hager *v.* Cleveland, 36 Md. 476.
Cabot, etc. Bridge *v.* Chapin, 6 Cush. 53.
See: N. H. Ry. Co. *v.* Johnson, 30 N. H. 390; 64 A. D. 300.
Lane *v.* Brainerd, 30 Conn. 565.
Morrow *v.* Nashville Co., 87 Tenn. 262; 10 S. W. 495; 3 L. R. A. 37.
83. Cal. Hotel Co. *v.* Callender, 94 Cal. 120; 29 Pac. 859; 28 A. S. R. 99.
84. Hutchins *v.* Smith, 46 Barb. 235.
Reformed Church *v.* Brown, 17 How. Pr. 287.
85. Chamberlain *v.* Painesville, 15 Oh. St. 225.
86. Musgrave *v.* Morrison, 54 Md. 161.

poration should enter upon its business with no more stock than already subscribed, will amount to a waiver of the condition that payment of his subscription cannot be required until the whole capital stock is subscribed[87].

Sec. 231. It has been held, however, that payment of part of a subscription is not a waiver of performance of this condition[88]; but this conclusion cannot be reasonably maintained if at the time of such payment the subscriber knows how much of the stock has been taken[89]. And it has been said that if a subscriber consent to and waive notice of a stockholders' meetings, and vote at special meetings, such conduct does not amount to a waiver of compliance with the condition, if he is ignorant of existing facts[90].

(3) MISCELLANEOUS CONDITIONS:—Sec. 232. The charter of a corporation required that at the time of subscription the subscriber should pay a certain sum on each share. It was held that he

87. 1 Thompson, Corporations, Art. 1242, citing:
Masonic Temple As. *v.* Channell, 43 Minn. 353; 45 N. W. 716.
See: Detroit Club *v.* Fitzgerald, 109 Mich. 670; 67 N. W. 899.

88. Gettysburg Bank *v.* Brown, 95 Md. 367; 62 Atl. 975; 93 A. S. R. 339.
Schloss *v.* Montgomery Co., 87 Ala. 411; 6 So. 360; 13 A. S. R. 51.
Pittsburgh Ry. *v.* Stewart, 41 Pa. St. 54.
But, see: Klein *v.* Alton, etc. Ry., 13 Ill. 514.

89. Johnson *v.* Schar, 9 S. Dak. 536; 70 N. W. 838.

90. Fairview Co. *v.* Spillman, 23 Oreg. 587; 32 Pac. 688.
But it is otherwise if, with knowledge of the facts, he acts as an officer of the corporation, pays the whole subscription, or gives an absolute promissory note therefor; See:
Lane *v.* Brainerd, 30 Conn. 565.
Parks *v.* Evansville Ry., 23 Ind. 567.
Slipher *v.* Earhart, 83 Ind. 173.
Chamberlain *v.* Painesville Ry., 15 Oh. St. 225.

could not take advantage of the failure to require the actual payment of his part if he subsequently made payment thereon before any calls for installments were made[91]. And the same result was held against him where he paid a judgment rendered for the amount of the required payment[92]. And it is a rule generally applicable that any condition attached to a subscription for shares which is precedent to a right of the corporation to require payment for such shares is a defense to an action for the recovery thereof prior to performance of such condition. But, whatever the condition, it may be waived by him who is entitled to insist upon it; and any declaration or conduct will amount to a waiver if it be inconsistent with a reliance upon the condition. And when the subscriber so conducts himself or declares as to waive performance of the conditions upon which his subscription was made, he will be compelled to pay for the agreed shares the same as if no condition had ever been attached.

B. IRREGULARITIES IN SUBSCRIPTIONS—

(1) IN GENERAL:—Sec. 233. Frequently cases arise of irregularities in the issuance of shares of stock to a subscriber which, in the absence of any further facts of excuse or of an exonerating nature, are insufficient to render the subscription nugatory and to release the subscriber from liability therefor; or it may be that no subscription for shares has been

91. Barrington *v.* Miss. Co., 32 Miss. 370.
92. Hall *v.* Selma Ry. Co., 6 Ala. 741.
See: Pittsburg Ry. Co. *v.* Applegate, 21 W. Va. 172.
Klein *v.* Alton Ry. Co., 13 Ill. 514.
Blair *v.* Rutherford, 31 Tex. 465.
Beach *v.* Smith, 28 Barb. 254.

made at all, and yet an attempt made to hold a party to the duties and liabilities of a regular shareholder. In either event the one upon whom liability is sought to be fixed has the right to rely upon the irregularity or the absence of any formal subscription to release him from any ostensible liability.

Sec. 234. But a party cannot rely upon such right of exemption from the responsibilities of a shareholder and at the same time occupy a position with reference to the corporation or so conduct himself as to mislead others into an honest belief that he is regularly a shareholder. Such position or conduct will have the effect of waiving any irregularities as to the subscription, and will place the burdens as well as the rights squarely upon his shoulders.

Sec. 235. Thus, a subscription should be in writing, but the fact that it is not may be waived by conduct fairly inducing the belief that it is regular[93]. The serving as a director in the corporation is such conduct as will produce this result[94]. And where the rights of creditors are concerned, this is especially true, for as between shareholders in the same concern, each is presumed to know the standing of the others and the methods by which they came into the corporation, but strangers to the concern, or those who deal with it other than as members, are entitled to rely upon the conduct of a party or his ostensible relations with the corporation, or, in other words, upon appearances produced by his own conduct or

93. Kans. City Hotel Co. *v.* Hunt, 57 Mo. 126.
Upton *v.* Tribilcock, 91 U. S. 45.
Phoenix Co. *v.* Badger, 67 N. Y. 294; 6 Hun 293.
94. Lane *v.* Brainerd, 30 Conn. 565.

acquiescence, as to whether he is a shareholder or not; and if his conduct is misleading, even though his subscription be irregular, the irregularity will be held waived[95]. And more especially is it true that serving as a director in a corporation is a waiver of irregularities in subscriptions if the by-laws require that only shareholders may be directors; and the same is true if he holds any other office in the corporation[96].

Sec. 236. Where the charter required the first installment of stock subscribed for to be paid at the time of subscription, it was held that by subsequently acting in the organization of the company a subscriber waived the irregularity that the installment was paid by note instead of in cash as required by the charter[97]. So, failure to make a required cash deposit is held waived by an acceptance of shares of stock and a subsequent sale or transfer of them[98]; for such is an affirmance of the subscription contract rather than a disavowal of it. It will thus be seen from an examination of the cases that any act of the subscriber will be sufficient to waive an irregularity in his subscription if it evidence an intention on his part to treat the contract as binding, or at least show his willingness to abide by it with all the duties and

95. Ruggles *v.* Brock, 6 Hun 164 (N. Y.).
Rutz *v.* Esler Mfg. Co., 8 Ill. App. 88.

96. Haynes *v.* Brown, 36 N. H. 545.
Convith *v.* Culver, 69 Ill. 502.
Young *v.* Vough, 23 N. J. Eq. 325.
Hays *v.* Pittsburgh Ry., 38 Pa. St. 81.

97. Greenville Ry. *v.* Woodsides, 5 Rich. Law (S. C.) 145; 55 A. D. 708.

98. Everhart *v.* Westchester Ry., 28 Pa. St. 339.

liabilities it imposes[99]. Therefore, such waiver is inferred where the subscriber pays for one of the shares irregularly issued[100], or pays calls on all his shares[1], receives dividends[2], attends and votes, either in person or by proxy, at corporate meetings[3], and accepts and holds certificates of stock issued pursuant to such subscriptions[4]. And the same result follows where he helps to frame the by-laws under which assessments are levied[5]. And it was held that by voting for managers the subscriber waived an omission of the payment of five dollars per share at the time of subscription, which payment was required by the act of incorporation[6].

(2) FRAUD AND MISREPRESENTATION:—Sec. 237. The effect of fraud or misrepresentation practiced upon a subscriber for shares in a corporation is the same as that inducing any other contract. It renders the contract not void but voidable; and until it is rescinded by the subscriber in some appropriate manner it remains binding upon him. Not only this, he must be

99. Rice *v.* Rock Island Co., 21 Ill. 93.
City Bank *v.* Bartlett, 71 Ga. 797.
McCully *v.* Pittsburgh Ry., 32 Pa. St. 25.
Chaffin *v.* Cummings, 37 Me. 76.
Chubb *v.* Upton, 95 U. S. 665.
Hunt *v.* Kans. Co., 11 Kans. 412.
Meadow *v.* Gray, 30 Me. 547.

100. Bell's Appeal, 115 Pa. St. 88; 8 Atl. 177.

1. Inter-Mountain Co. *v.* Jack, 5 Mont. 568; 6 Pac. 20.
Maltby *v.* Ry. Co., 16 Md. 422.

2. Duffield *v.* Barnum Co., 64 Mich. 293; 31 N. W. 310.

3. Rockville Co. *v.* Van Ness, 2 Cranch C. C. 449.
Buffalo Ry. Co. *v.* Gifford, 87 N. Y. 294.

4. Clarke *v.* Continental Co., 57 Ind. 135.
McLoughlin *v.* Detroit Co., 8 Mich. 100.

5. Williamette Fr't'g. Co. *v.* Stannus, 4 Oreg. 261.

6. Clark *v.* Navigation Co., 10 Watts. 364 (Penn.).

diligent in discovering the fraud, and must thereupon act promptly in repudiating the subscription, or by his acquiescence he will be held to have elected to ratify the contract or to have waived the fraud or misrepresentation, and thereupon he will be bound as if the contract had never been tainted.

Sec. 238. In the subject under consideration any act of ratification of the contract of subscription is the same thing as a waiver of fraud or misrepresentation in its inducement. And if the subscriber, with full knowledge of the matter, act in a manner inconsistent with an intention to disaffirm the contract, he will thereafter be precluded from escaping his obligations thereunder, and must abide by its terms[7]. Thus, if he act as a shareholder after discovering the fraud[8], he will not be heard to question the binding effect of the contract; nor will he if he interpose no objections while the corporation is being organized[9]; nor where he pays assessments, acts as an officer, votes for expenditures, accepts dividends, or does any other act recognizing the continuing validity of the contract[10], such as participating in a meeting of stockholders, selling part of his shares, or authorizing his broker to sell them[11].

7. Berthold *v.* Goldsmith, 24 How. 536 (U. S.).
Winship *v.* Bank of U. S., 5 Pet. 562 (U. S.).
8. City Bank *v.* Bartlett, 71 Ga. 797.
9. Beck *v.* Henderson, 76 Ga. 360.
10. Hays *v.* Pittsburgh Ry., 38 Pa. St. 81.
Frost *v.* Walker, 60 Me. 468.
Miss. Ry. Co. *v.* Harris, 36 Miss. 17.
Phila. Ry. Co. *v.* Cowell, 28 Pa. St. 329; 70 A. D. 128.
Schaeffer *v.* Mo. Home Ins. Co., 46 Mo. 248.
Chubb *v.* Upton, 95 U. S. 667.
City Bank *v.* Bartlett, 71 Ga. 76.
11. Chaffin v. Cummings, 37 Me. 76.

2. BY-LAWS AND CORPORATE MEETINGS:

A. BY-LAWS:—Sec. 239. A by-law is a rule of conduct adopted for the regulation of the internal affairs of a corporation; in other words, it is a private statute or law by which the shareholders have agreed to be governed. But it does not necessarily follow that an act done contrary to the by-laws is void. The by-laws may be waived by the assent of the shareholders[12]. But it has been said that the officers of a mutual company have no authority to waive by-laws adopted by the members unless power to do so has been expressly given them, as the by-laws are, in effect, a contract among the members[13]. But, on the contrary, it has been held that mutual insurance companies have power to waive provisions of their by-laws which have been introduced for their benefit and protection[14]. And it has been said that a by-law is not a limitation and restriction of the power which is lodged by the charter of a corporation in the board of directors, and can have no higher effect in this respect than instructions or a general regulation adopted by the directors themselves as a convenient guide as in ordinary cases[15].

Sec. 240. It will be seen that questions of waivers of by-laws occur more frequently in in-

12. Supreme Tent *v.* Volkert, 25 Ind. App. 627; 57 N. E. 203.
Wiberg *v.* Minn. Etc. Co., 73 Minn. 297; 76 N. W. 37.
Underhill *v.* Santa Barbara Co., 93 Cal. 300; 28 Pac. 1049.
Currier *v.* Continental Co., 53 N. H. 538.

13. Evans *v.* Tri-Mountain Co., 9 Allen 329 (Mass.).
Behler *v.* German Ins. Co., 68 Ind. 347.
Westchester Co. *v.* Earle, 33 Mich. 143.

14. Union Mut. Co. *v.* Keyser, 32 N. H. 313; 64 A. D. 375, citing:
Angell on Insurance, Sec. 242.
Heath *v.* Franklin Ins. Co., 1 Cush. 257 (Mass.).

15. Campbell *v.* Merchants Co., 37 N. H. 35; 72 A. D. 324.

surance cases than in any other. And in such cases the general rule is that as between the insurer and the insured a by-law is for the benefit of the former and may be waived by it; and any conduct inconsistent with a reliance upon it may amount to such waiver. Thus, where certain insurance was prohibited by the by-laws of a mutual insurance company, the issuance of such a policy was held a waiver of the by-laws[16]; likewise, where there was an acceptance of payment in a manner different from that provided for[17]; and, again, where the company failed to furnish proper blanks for proofs of death upon receipt of notice thereof, the requirement of proof was thereby waived[18]. And an insurer waives the benefit of a by-law providing for the authorizing and commissioning of an agent if it directs the agent to deliver a policy and receive the premium[19]. The policy is not void even though it may have been issued contrary to a by-law; for the very fact of its having been issued in violation of such by-law is a waiver of it[20].

B. CORPORATE MEETINGS:—Sec. 241. The by-laws of a corporation provide the manner in which its members or directors shall be assembled for the transaction of corporate business; and under such provision the assemblage must be in the manner designated. It matters not that a majority were

16. Welling v. Eastern Assoc., 56 S. Car. 280; 34 S. E. 409.
17. National Lodge v. Jung, 65 Ill. App. 318.
18. Order Friends v. Austerlitz, 75 Ill. App. 74.
19. Susquehana Co. v. Elkins, 124 Pa. St. 484; 17 Atl. 24; 10 A. S. R. 608.
20. Campbell v. Merchants Co., 37 N. H. 35; 72 A. D. 324.
Fitzgerald v. Equit. Assoc., 3 N. Y. Supp. 214.
International v. Abbott, 85 Tex. 320; 20 S. W. 118.

present at an irregular meeting and joined in the transaction of business, for, as has been said, a minority has the right to have a meeting properly and lawfully assembled, to be present at it and take part in all business of the corporation, and to have an opportunity to convince the majority, if possible, to their position; and unless they have the procedure regularly followed, they have the right to avoid any action taken at such meeting.

Sec. 242. But the irregularity of the meeting may be waived, although it requires concerted action of all the members to accomplish this result. Thus, where a meeting is held without the required notice, the want of such notice is waived if the stockholders appear without such notice and take part or acquiesce in the action taken at such meeting[21]. The principle here involved is analagous to that of service of process in a civil suit where, if the defendant enter a general appearance therein under a defective summons or service thereof, or even without any process at all, he is bound to the same extent as if legally served with such process[22]. And in the case of members or stockholders of a corporation, it is said that by attendance at meetings they admit due notice[23]. And the same is true of strict statutory requirements of notice, for this is for the benefit of the

21. Kenton Co. *v.* McAlpine, 5 Fed. 737.
Jones *v.* Milton Co., 7 Ind. 547.
Richardson *v.* Vermont Co., 44 Vt. 613.
Bryant *v.* Goodnow, 5 Pick. 228 (Mass.).
Union Pac. Co. *v.* Chicago, Etc. Co., 51 Fed. 309.
Nelson *v.* Hubbard, 96 Ala. 238; 11 So. 248.
Bucksport, Etc. Co. *v.* Buck, 68 Me. 81.
Handley *v.* Stultz, 139 U. S. 417; 11 Sup. Ct. R. 530.
22. Judah *v.* Am. Ins. Co., 4 Ind. 333.
23. People *v.* Peck, 11 Wend. 604; 27 A. D. 104.

stockholders and may be waived by them by attendance and participation in the meetings and acquiescence in the things done; and even if some did not attend and take part in a meeting, they waived the want of proper notice by subsequent acts of ratification of the things done[24]. It must be noted, however, that to constitute a waiver of irregularities in the calling of a meeting of directors or stockholders, it is essential that they meet together and act as a body if participation in the things done is to be relied upon as a waiver. Their consent to a course of procedure, obtained at different times and places, will not dispense with the necessity of calling the meeting properly. Such is only the acts of individuals and not that of the body[25]. The irregularity of a call is also waived if no objection is made for an unreasonable time, for silence in such case is a ratification of the action taken[26].

Sec. 243. But contrary to the foregoing doctrine, it has been held that any action taken by a quorum of the directors of a corporation is binding upon the corporation whether the other members were notified or not and whether the meeting was for the transaction of general or special business[27]. And it

24. Benbow *v.* Cook, 115 N. Car. 324; 20 S. E. 453; 44 A. S. R. 454, citing:
1 Cook on Stock & Stockholders, Sec. 599.
Stultz *v.* Handley, 41 Fed. 531.
Campbell *v.* Hubbard, 96 Ala. 238; 11 So. 428.
25. Duke *v.* Markham, 105 N. Car. 131; 10 S. E. 1017; 18 A. S. R. 889.
Cited in Benbow *v.* Cook, 115 N. Car. 324; 20 S. E. 453; 44 A. S. R. 454.
Baldwin *v.* Canfield, 26 Minn. 43 and 65; 1 N. W. 261 and 585.
Pierce *v.* N. O. Bldg. Co., 9 La. 397; 29 A. D. 448.
26. Weinburgh *v.* Union Co., 55 N. J. Eq. 640; 37 Atl. 1026.
27. Edgerly *v.* Emerson, 23 N. H. 555; 55 A. D. 206.

is said that by virtue of the provisions of the statutes in the New England states, especially relating to town meetings, that the courts of those states require a faithful observance of the requirement as to the notice of meetings; and that the notice is not waived or dispensed with by the voluntary attendance and participation in the business of the meeting[28].

Sec. 244. But the better reason, and the majority of courts, support the theory that a waiver of notice or irregularities in the meetings occurs where the directors all meet together and either join in the action taken, or assent thereto, or subsequently by their acts or acquiescence ratify the action taken[29]. And the same doctrine obtains if the meeting is of the stockholders.

3. ASSESSMENTS AND FORFEITURES OF SHARES:

A. WAIVER AS APPLIED TO ASSESSMENTS:—Sec. 245. An Assessment, as applied to corporations, differs from a Call only in being a broader term in that while a Call is the resolution of the board of directors declaring payable all or a portion of the unpaid subscriptions, an Assess-

28. Hayward *v.* School Dist., 2 Cush. 419.
Moor *v.* Newfield, 4 Me. 44.
Bethany *v.* Sperry, 10 Conn. 200.
Bloomfield *v.* Bank, 121 U. S. 121.
Jordan *v.* School Dist., 31 N. H. 304.
All cited in 1 Thompson on Corporations, Art. 718.

29. Mut. Ins. Co. *v.* Farquhar, 86 Md. 668; 39 Atl. 527.
Sampson *v.* Steam Mill, 36 Me. 78.
Atl. Mut. Co. *v.* Sanders, 36 N. H. 252.
State *v.* Conklin, 34 Wis. 21.
Warner *v.* Mower, 11 Vt. 385.
Stobo *v.* Davis Co., 55 Ill. App. 440.
Minneapolis Co. *v.* Nimrocks, 53 Minn. 381; 55 N. W. 546.

ment may mean also a demand for payment above the par value of shares in order to meet the obligations of the corporation[30]. And the irregularity of an assessment, as between the corporation and a shareholder, is sufficient to release the latter from payment unless he has by his conduct precluded himself from setting up the irregularity. Such irregularity may be waived by him, and it will be held to apply if, by his conduct, he shows an intention not to rely upon it. This intention may be inferred if the shareholder participate in a meeting called for organization, accepts a directorship, assists in framing the by-laws under which the assessment is levied, or votes for its adoption, provided, of course, he knows at the time of the irregularity[31]. And the same is true if the conduct relied upon as a waiver be in effect a ratification of the irregular act[32].

But it has been held that where a city voted to pay a call, such vote did not waive irregularities in the call[33], and that where part of a subscription was paid such payment did not waive the right to require proper calls to be made for the remainder of the subscription[34].

B. FORFEITURE OF SHARES:—Sec. 246. The authority of a corporation to declare stock forfeited for non-payment of calls or assessments and to sell same for such payment does not exist as a

30. 1 Purdy's Beach on Private Corporations, Art. 303.
31. Willamette Co. *v.* Stannus, 4 Oreg. 261.
Bucksport Co. *v.* Buck, 68 Me. 81.
Clark *v.* Navig. Co., 10 Watts. 364 (Pa.).
32. Grabner *v.* Post, 96 N. W. 783 (Wis.).
33. Pike v. Bangor Ry. Co., 68 Me. 445.
34. Groose Co. *v.* I'Anson, 43 N. J. L. 442.

common-law method, but is conferred only by statute. And when the power is given, the statutory provision must be strictly complied with. And it must further be exercised without unreasonable delay; for if before the forfeiture should be declared the stockholder tender the amount due, the default will be cured. And it has been held in at least one case[35] that where the power to sell for non-payment is given it must be exercised as each call is made, and that failure to sell for each call will be a waiver of the right to take advantage of the statute at all. But this is contrary to good reason and to all principles upon which the doctrine of waiver is based, and the opposite has been held[36].

Sec. 247. And where the statutory forfeiture exists, the corporation must elect between that mode of enforcing payment and the right to sue the stockholder directly for the amount due. For under the law regulating the election of remedies, proceeding under one method is a waiver of the other[37]. But of course either remedy may be pursued, and the corporation may waive the statutory right to declare the shares forfeited and sue in assumpsit[38]. And the waiver is entire as to each remedy, for the corporation cannot sell the shares under the forfeiture stat-

35. Stokes *v.* Lebanon Co., 6 Humph. 241, cited in:
Purdy's Beach, Priv. Corp. 323(C).

36. Brockenbrough *v.* James R. Co., 1 Patt. & H. 94 (Va.).

37. Macon Ry. Co. *v.* Vason, 57 Ga. 314.
Kennebec Ry. Co. *v.* Kendall, 31 Me. 470.
Rutland Ry. Co. *v.* Thrall, 35 Vt. 536.
Macauley *v.* Robinson, 18 La. Ann. 619.
Mills *v.* Stewart, 41 N. Y. 384.

38. Alkali Co. *v.* Campbell, 113 Fed. 398.
Campbell *v.* American Co., 125 Fed. 207.

ute, and then sue the shareholder in an action for the unpaid balance[39].

Sec. 248. But as has been noted, the method prescribed by statute must be strictly followed where shares of stock are to be forfeited and sold for non-payment of calls or assessments; and in case of irregularities in pursuit of such method, the shareholder has the right to enjoin the sale or he may have it set aside after it is made. In such event the forfeiture and consequent sale are not void but voidable; and both the shareholder and the corporation may by their conduct waive the irregularities and validate the proceeding. Thus, it has been held that acquiescence in what has been done may constitute such waiver[40]. And this is especially true if the acquiescence continue for a long or unreasonable time after knowledge of the irregularity or particular facts rendering the forfeiture voidable. To say this is but a reiteration of the well-established principle that a party must take prompt action to maintain his rights in a matter wherein his non-action might mislead innocent parties into actions which they otherwise might not pursue, or might cause them to act to their disadvantage.

4. TRANSFER OF STOCK AND LIEN ON SHARES:

A. TRANSFER OF STOCK:—Sec. 249. The usual requirement as to transfer of a stockholder's interest in a corporation is that the transfer shall

39. Mechanic's Co. *v.* Hall, 121 Mass. 272.
Allen *v.* Montgomery Ry. Co., 11 Ala. 437.
Small *v.* Herkimer Co., 2 N. Y. 330.
Athol Ry. Co. *v.* Prescott, 110 Mass. 213.

40. Kennebec Ry. Co. *v.* Kendall, 31 Me. 470.

not be valid or effective until it is made on the books of the corporation. This is usually provided by statute or the charter or is one of the by-laws of the concern. The provision is for the benefit of the corporation, and, more particularly, for the protection of third parties or creditors, and it does not mean that a transfer or sale of shares without a transfer thereof on the books is absolutely illegal. The shares are property and the rights of property are vested in the owner so that he may, as an incident of the right of property, transfer them the same as any other property; and as between him and his transferee, all of his rights may be divested without the formal transfer of the shares on the books of the company[41] and the transaction have all the effect and validity of a strict compliance with formalities. It has been held that a corporation has the right to regard a transferee of stock as the legal owner thereof[42]. And there is also a rule that a corporation, acting in good faith and without notice of the rights of others, may treat registered shareholders as the actual owners of shares standing in their names. But it has been said that this latter rule is applicable to only such transactions as are within the express or implied powers conferred upon the corporation or its shareholders. Corporate powers, common to all stockholders, may usually be exercised by a reg-

41. Lund *v.* Wheaton Co., 50 Minn. 36; 52 N. W. 268; 36 A. S. R. 623.
Boston Assoc. *v.* Cary, 129 Mass. 435.
Hoppin *v.* Buffum, 9 R. I. 513; 11 A. R. 291.
Johnston *v.* Loflin, 103 U. S. 800.
And numerous cases cited in 2 Thomp. Corp., Sec. 2389.

42. Supply Ditch Co. *v.* Elliott, 10 Colo. 327; 15 Pac. 691; 3 A. S. R. 586.

istered shareholder though he has assigned all his shares, and his action will bind his assignee holding under an unregistered transfer, and all others. Purchasers are bound to know that such powers may be exercised by their assignors until the stock is registered in their names. But the assignee of shares, having possession of the certificates, though holding under an unregistered transfer, is not bound by contracts between the registered shareholder, the corporation and all other shareholders which are not within the express or implied powers of corporations or of their shareholders[43].

Sec. 250. But, while the corporation has the right to regard and treat him as the owner of shares whose name appears as such on its books, yet it is not compelled to do so, and may, despite irregularities or defects in the transfer, or non-compliance with requirements as to transfer, so deal with the transferee or recognize him as to render him a shareholder for all purposes. In such event the irregularities or informalities are deemed to have been waived by the corporation[44]. And if such recognition and treatment of the transferee by the corporation amount to a waiver by it, the same effect will be imputed to the transferee if he assent thereto with knowledge of the facts[45]. And while some courts do not apply this principle in all its breadth[46], no good reason occurs to us why informalities and irregular-

43. Campbell *v.* Am. Zylonite Co., 122 N. Y. 455; 34 N. Y. St. R. 38; 25 N. E. 853; 11 L. R. A. 596.
44. Am. Nat. Bank *v.* Oriental Mills, 17 R. I. 551; 23 Atl. 795.
45. Upton *v.* Burnham, 3 Biss (U. S.) 431; and second hearing thereof, Id. 520.
46. Vale Mills *v.* Spalding, 62 N. H. 605.
Cormac *v.* Western Co., 77 Ia. 32; 41 N. W. 480.

ities in the transfer may not be waived by those having a right to insist upon a strict compliance with requirements, and thereby render the transferee entitled to recognition and to receive dividends as a shareholder and at the same time to make him directly liable for future calls or assessments[47].

Sec. 251. Thus, in a well-considered New York case discussing whether the legal or equitable title, or both passed by an assignment of certificates of shares without formal transfer on the books of the corporation, it was said to be settled by repeated adjudications that, as between the parties, delivery of the certificates and assignment passed the entire title, legal and equitable, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on the books; that such provisions are intended solely for the benefit and protection of the corporation, and can be waived or asserted at its pleasure[48]. And when such waiver has been made by the corporation, the holder of the certificate becomes a shareholder as to the corporation as well as to creditors[49].

Sec. 252. Frequently a charter or by-law requires that a transfer shall not be valid unless the consent of the directors thereto be obtained. But

47. Bell's Appeal, 115 Pa. St. 88; 2 A. S. R. 532.
48. McNeil *v.* Bank, 46 N. Y. 325; 7 A. R. 341, citing:
8th Ed. Angell & Ames, Corporations, Art. 354.
Gilbert *v.* Manchester Co., 11 Wend. 627.
N. Y. Ry. Co. *v.* Schuyler, 34 N. Y. 80.
And see: Black *v.* Zacharie, 3 How. 513 (U. S.).
But see: Union Bank *v.* Laird, 2 Wheat. 390 (U. S.).
Shipman *v.* Aetna Co., 29 Conn. 245.
Naglee *v.* Pac. Co., 20 Cal. 529.
49. Laing *v.* Burley, 101 Ill. 591.

this consent need not be obtained in a formal manner or at a formal meeting as it will be sufficient that a majority of the directors assent to the transfer[50]. And the requirement may be waived altogether, and it is waived if the conduct of the corporation has been sufficient in such matters to establish a custom to admit assignees without action by the board; and in such cases a transfer without the sanction of the board will be valid[51].

B. WAIVER OF LIEN ON SHARES:—Sec. 253. The statutes of many states give to a corporation a lien on the shares of its members for any amount in which the members may be indebted to it. And where there is no such statute the lien may be created by a by-law of the corporation, or an agreement among the shareholders, or even by a course of dealing establishing a custom[52]. But the lien must be created in one of these manners, as it does not exist at common law. The effect where such lien is given is that the shares cannot be transferred till the owner has satisfied his indebtedness to the corporation, or if they be transferred, the vendee takes them subject to such lien.

Sec. 254. But when a custom, agreement or by-law is relied upon as creating a lien, positive action is necessary to render it effective, for if the rights of the corporation be not asserted in such cases, the lien will be considered abandoned or waived and a purchaser in such event will take the shares freed from such lien. It is held, however, that mere ig-

50. Ellison *v.* Schneider, 25 La. Ann. 435.
51. Chambersburg Co. *v.* Smith, 11 Pa. St. 120.
52. 2 Purdy's Beach on Priv. Corp., Sec. 488.

norance of the vendee of the fact that a lien exists on the shares has no effect as it could under no construction be said to be a waiver by the corporation[53]. And failure to assert a statutory lien is not a waiver of it where notice of such lien appears on the certificate[54]. Nor is a waiver produced by the taking of a mortgage on other property to secure the indebtedness unless it clearly appears that such was the intention of the parties[55]. Of course, the lien may be waived by looking solely to the personal credit of the shareholder for payment of the indebtedness or relying exclusively upon other security, but it must clearly appear that payment was anticipated from some source without reference to the shares of stock or no waiver will be inferred[56]. And where the certificate recited that the holder was entitled to a certain number of shares transferable only upon surrender of the certificate, it was held that such provision was no waiver of the lien given the corporation on the shares for any indebtedness of the original holder of it[57].

Sec. 255. But a different condition exists where the shares recite that they are fully paid up, and the corporation as against a *bona fide* transferee attempts to assert a lien thereon for an unpaid balance.

53. Hammond *v.* Hastings, 134 U. S. 401; 10 Sup. Ct. R. 727; 33 L. Ed. 960.
54. First N. Bank *v.* Hartford Co., 45 Conn. 22.
National Bank *v.* Watsontown Bank, 105 U. S. 217.
55. Union Bank *v.* Laird, 2 Wheat. 396 (U. S.).
Kenton Ins. Co. *v.* Bowman, 84 Ky. 430; 1 S. W. 717.
56. Jennings *v.* Bank, 79 Cal. 323; 25 Pac. 852; 12 A. S. R. 145.
57. Reese *v.* Bank, 14 Md. 271; 74 A. D. 536.
See: Cecil N. Bank *v.* Watsontown Bank, 105 U. S. 217.
Bishop *v.* Globe Co., 135 Mass. 132.
Kenton Ins. Co. *v.* Bowman, 84 Ky. 430.

Here the purchaser of such shares buys them as fully paid for and without notice that they are not paid for, and no implication of an agreement arises to pay anything to the corporation for them, as there are no facts from which such an implication can arise. The recital on the face of the certificate is a representation by the corporation or its officers that a condition exists which they will not later be heard to gainsay to the injury of an innocent holder[58]. In other words, the right of the corporation to the lien on shares for any indebtedness of the original holder is waived by such representation. The same result is produced by a statement on the certificate that it is transferable[59].

Sec. 256. And it has even been said that it is the duty of the corporation to make the certificate of shares show the exact claims it may have against the shares for any unpaid balance from the original holder, and especially if it claim a lien thereon by reason of a by-law to that effect the certificate must, as against an innocent purchaser, disclose this secret lien or it will not be held effective. It is said that the general policy of the law is against such secret liens; and the corporation owes a duty to the public to make known such a lien by printing a notice thereof on its certificate or by other appropriate means[60]. Unless some such notice be given, the cor-

58. West Nashville Co. *v.* Bank, 86 Tenn. 252; 6 S. W. 340; 6 A. S. R. 835.
Morawetz on Corporations, Sec. 161.
Cook on Stocks, Secs. 50, 257, 418.
59. Fitzhugh *v.* Bank, 3 T. B. Mon. 126; 16 A. D. 90.
60. 2 Thompson, Corporations, Arts. 2334 and 1680, citing:
Foreman *v.* Bigelow, 4 Cliff. 508 (U. S.).
Brant *v.* Ehler, 59 Md. 1.
Phelan *v.* Hazard, 5 Dill. 45 (U. S.).

poration cannot hold a *bona fide* purchaser for value for any unpaid balance on the shares[61]; nor will he be liable to creditors therefor, it even being said that it does not matter if the certificates are silent as to whether or not the shares are paid for[62]. But Thompson, in his work on corporations, states that the qualification that there is nothing on the books of the corporation to apprise one that the shares are not paid for is very necessary to vindicate these holdings; for he says that otherwise all that a subscriber who might become sick of his bargain would have to do in order to pay for his shares would be to sell them[63]. But we cannot agree with the learned author where the certificates recite that the shares are fully paid for. Such recital, as before noted, amounts to a representation to the truth of which the corporation should be held. And while in the face of such a recital the corporation may assert its lien as against the original holder for a balance due on the shares, to go farther and say that it may treat an innocent transferee the same way, occurs to us as calculated to produce gross injustice. It may be true, as the author above mentioned says, that all that a subscriber who might become sick of his bargain would have to do to pay for his shares would be to sell them. But it must be remembered that such a condition is produced by the voluntary act of the corporation in making the false statement as to such shares being paid for, and for such act and representation the corporation should suffer rather than an innocent purchaser of the shares.

61. Keystone Co. *v.* McCluney, 8 Mo. App. 496.
Sprainka *v.* Allen, 76 Mo. 384.
62. Keystone Co. *v.* McCluney, *supra.*
63. 2 Thompson, Corporations, Art. 681.

Sec. 257. If the governing statute provide that no transfer of shares shall be made while the holder is indebted to the corporation, the provision is waived and the right surrendered if the corporation permit registration of the shares in the name of a transferee without requiring payment of such indebtedness[64]. And the giving of further credit to a shareholder with knowledge of a conflicting lien, is, as to such other lien, a waiver by the corporation of the lien allowed it by law[65].

5. RIGHT OF STATE TO CANCEL CHARTER:—Sec. 258. The existence or non-existence, as the case may be, of many facts or conditions will give to a state the right to declare forfeited or to cancel and annul the charter of a corporation organized under its laws. But this right belongs exclusively to the state, and with it individuals have nothing to do. Any breach of a condition upon which the charter was granted, however, may be waived by the state and the corporation continue under the charter the same as if no breach occurred, and thereafter the cause for forfeiture cannot be insisted upon by the state[66]. This principle will be applied where the corporation has been allowed or compelled, by those chiefly interested, to proceed at great expense under the franchise sought to be annulled, for a considerable period of time while the

64. Cecil Bank *v.* Watsontown Bank, 105 U. S. 217.
Hill *v.* Pine Bank, 45 N. H. 300.
Hodges *v.* Bank, 7 Gill. 306 (Md.).

65. Nesmith *v.* Wash. Bank, 6 Pick. 324.

66. People *v.* Ulster Co., 128 N. Y. 240; 28 N. E. 635.
People *v.* Manhattan Co., 9 Wend. 361 (N. Y.).
Foster *v.* Joliet, 27 Fed. 899.

ground relied upon for a forfeiture was well known[67]. And long delay in taking advantage of a ground for forfeiture has been held sufficient to constitute a waiver[68]. The question of waiver in this, as in most other instances is one of intention which may be evidenced by an act of the state legislature expressly remitting the penalty or recognizing the corporation after knowledge of the cause for forfeiture, or by laches of the state in enforcing the forfeiture. But it is said that mere good behavior of a corporation after the existence of grounds of forfeiture is not a legal atonement[69].

Sec. 259. A charter required a certain sum to be paid in within two years. The payment was not made and the corporation operated its business for seven years and it was held that by such delay and acquiescence the state could not declare the forfeiture of the charter on account of such non-payment[70]. But the soundness of this doctrine has been denied[71]. Another charter made it the duty of the corporation to lay before the legislature at the end of every six years after setting up any toll-gate, an account of the expenditures and profits of the road under the penalty of forfeiting the privileges of the act in the future. But where the accounts were accepted by the legislature after the time limited, it was held that the right to declare a forfeiture of the charter was waived[72]. And in the same case it was held that

67. State *v.* Janesville Co., 92 Wis. 496; 66 N. W. 512; 32 L. R. A. 391.
68. People *v.* Oakland Bank, 1 Dougl. 282 (Mich.).
69. People *v.* Fishkill Co., 27 Barb. 445.
70. People *v.* Oakland Bank, 1 Dougl. 282 (Mich.).
71. State *v.* Pawtuxet Co., 8 R. I. 521; 94 A. D. 123.
72. State *v.* Fourth Turnpike, 15 N. H. 162; 41 A. D. 690.

the neglect to render the accounts was waived by a subsequent act of the legislature authorizing the corporation to change the route of its road. So, the right to a forfeiture is waived where the legislature, subsequent to the accrual of the right to a forfeiture, declares in distinct terms that the corporation shall continue, or where it thereafter authorizes the corporation to perform certain corporate functions, or otherwise clearly signifies its intention that the corporation shall continue to exist[73]. And the state waives the right to a forfeiture of corporate rights by an act of the legislature extending the time for the commencement of certain work when the corporation has already failed to commence operations in the time prescribed by the act of incorporation[74].

Sec. 269. Where the charter of a turnpike road company was conditioned that its road should be built in a specified manner before tolls should be levied, a breach of this condition was held waived by a supplementary act of the legislature giving authority to the company to take tolls in a manner inconsistent with that first prescribed[75]. And in the case of a corporation chartered for the purpose of taking tolls for the navigation of an artificial channel, an act of the legislature declaring that if the company should permit the channel to become so ob-

73. State *v.* Bank of Charleston, 2 McMull. Law, 439; 39 A. D. 135.
74. Milford Co. *v.* Brush, 10 Oh. 111; 36 A. D. 78.
75. State *v.* Goodwinsville Co., 44 N. J. 496.
See: Mechanics Society, 31 La. Ann. 627.
Basshor *v.* Dressel, 34 Md. 503.
People *v.* Ottowa Co., 115 Ill. 281; 5 N. E. 413.
Central Co. *v.* People, 5 Colo. 39.
State *v.* Vincennes University, 5 Ind. 77.
Baltimore Co. *v.* Marshall Co., 3 W. Va. 319.

structed as to impede navigation the collection of tolls should be suspended till the obstruction was removed, was held a waiver of the right to have the charter forfeited for such cause[76]. And, again, where a deposit of a certain sum in cash with the state Treasurer was required as a condition precedent to the beginning of operations by the corporation, this requirement was held waived by the acceptance of United States Bonds in lieu of the cash deposit[77].

Sec. 261. But it is said that the doctrine of waiver of the right to declare a forfeiture of a charter by subsequent legislative acts does not apply where, by the terms of the charter, the franchise absolutely terminates upon failure to perform certain conditions[78]. In such case no action is necessary to be performed by the state, as the failure to perform the condition *ipso facto* works a forfeiture. But unless the charter contain some such provision, it must be annulled by the state through some appropriate action, if the state would take advantage of its right accruing by reason of the breach of condition; for otherwise the corporation will continue notwithstanding the breach of condition.

76. State *v.* Morris, 73 Tex. 435; 11 S. W. 392.
77. Briggs *v.* Cape Cod Co., 137 Mass. 71.
See: Rice *v.* National Bank, 126 Mass. 300.
78. State *v.* Fourth Turnpike, 15 N. H. 162; 41 A. D. 690.

CHAPTER 12.

INSURANCE.

Section

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1. RELATION BETWEEN INSURER AND ITS AGENTS.

A. IN GENERAL:—Sec. 262. The business of insurance is carried on almost exclusively by corporations, due to the vastness of the field covered and to the large amount of capital necessary for its operations and a compliance with the statutes all states have enacted for safe-guarding the public. These corporations, being impersonal, must necessarily act by officers and agents. And the field has become fertile with endeavors to limit the liability of the insurer to the insured, especially by attempts to pro-

vide restrictions on the manner in which the business may be carried on, and more especially through stipulations contrived to circumscribe the powers of the agents, and to limit their acts and prescribe an exclusive manner in which such acts shall be shown. Such stipulations and attempted restrictions have given rise to endless litigation, the reported cases thereon being so numerous and covering the application of law to such a variety of facts, that an apparent discord among the courts is presented as to the enunciation of principles, which is, however, more apparent than real; for, underlying nearly all of the cases, is a recognition of certain principles which have gradually been evolved for the protection of the public and at the same time for the giving scope to all powers necessary for the performance of the functions of an insurer.

Sec. 263. The question most frequently presented to the courts for solution is based on attempts by the insurer to prescribe the extent to which the acts of its agents may be binding upon it, and how those acts shall be manifested. There is no good reason why a corporation may not limit the acts of its agents and prescribe the way they shall perform their duties, the same as an individual. A different rule would place them at the mercy of unscrupulous agents, and prove disastrous to the insurance business. And for such reasons, the general rules of agency applicable to individuals should be and are equally applicable to insurance companies. The extent of the power of such companies, however, to limit or restrict the power or authority of their agents will not permit fraud to be legalized nor the corpora-

tion to be deprived of powers given it by organic law.

Sec. 264. Contracts of insurance nearly always contain conditions upon the existence or non-existence of which, as the case may be, depends the validity of the contract. The facts constituting the condition may exist prior to, at or subsequent to the issuance of the policy, and the provision always is that such named facts shall render the contract of insurance void unless consented to or waived by the insurer, acting by its proper agent in a designated manner, usually by memorandum of writing indorsed on the policy itself. And such policy usually contains a clause to the effect that no agent has power or authority to waive any condition appearing in the policy. And under such clause, it is held that the delivery of the policy to the insured is sufficient to put him on notice that the company would not be bound by an agent's waiver[79]. But such clause in the policy forbidding a waiver of conditions or stipulations or requiring certain acts to be done in a desig-

79. Thornton *v.* Travelers' Ins. Co., 116 Ga. 121; 42 S. E. 287; 94 A. S. R. 99.
Cleaver *v.* Traders' Ins. Co., 65 Mich. 527; 32 N. W. 660; 8 A. S. R. 908.
Lamberton *v.* Conn. Fire Ins. Co., 39 Minn. 129; 39 N. W. 76; 1 L. R. A. 272.
Clevenger *v.* Mut. Ins. Co., 2 N. Dak. 114; 3 N. W. 313.
Dryer *v.* Security Ins. Co., 94 Ia. 471; 62 N. W. 798.
Sprague *v.* West Ins. Co., 49 Mo. App. 423.
Catoir *v.* Am. L. Ins. Co., 33 N. J. L. 487.
Quinlan *v.* Prov-Wash. Ins. Co., 133 N. Y. 356; 31 N. E. 31; 28 A. S. R. 645.
Union Cent. Co. *v.* Hook, 62 Oh. St. 256; 56 N. E. 906.
Hartford Co. *v.* Small 66 Fed. 490; 14 C. C. A. 33; 30 U. S. App. 337.
Smith *v.* Niagara Ins. Co., 60 Vt. 682; 15 Atl. 353; 6 A. S. R. 144; 1 L. R. A. 216.

nated manner or by a designated agent is not conclusive and by no means final, although it is material and controlling in the absence of other evidence.

Sec. 265. Any condition or stipulation named in a policy, however material it may be, may be waived by the insurer by whomsoever it chooses to act and in any manner it may desire, even in direct contravention of the terms of the policy. A different rule would work hardships in many instances, for it would prevent a modification of contracts, it would prevent the insurer from changing its views and line of conduct, and preclude it from enlarging the authority conferred upon its agents. And, as hereinafter stated, the provision in a policy that neither the insurer nor its agents will waive any stipulation, condition or forfeiture, or that it will act only in a certain manner or by only certain designated agents, cannot be held as limiting the power of the insurer or its agents to act in whatever manner they see fit in the discharge of the business of an insurer. So, the ultimate matter to determine is not whether the policy contained such limitations or restrictions, but whether the subsequent acts of the insurer or its agents amounted to a waiver of them; and if so, the waiver is as effective as if it had been written into the policy itself[80].

80. Ruthven *v.* Am. Ins. Co., 102 Ia. 550; 71 N. W. 574.
Mut. Assoc. *v.* Mills, 82 Fed. 508; 27 C. C. A. 212.
Aetna Co. *v.* Frierson, 114 Fed. 56; 51 C. C. A. 424.
Knickerbocker Co. *v.* Norton, 96 U. S. 234; 24 L. Ed. 689.
Phoenix Co. *v.* Doster, 106 U. S. 34; 1 Sup. Ct. R. 18; 27 L. Ed. 65.
Wilson *v.* Com. Union Co., 51 S. Car. 540; 29 S. E. 245; 64 A. S. R. 700.
Keeler *v.* Niagara Co., 16 Wis. 523; 84 A. D. 714.
Dick *v.* Eq. F. Ins. Co., 92 Wis. 46; 65 N. W. 742.

Sec. 266. Proceeding on the theory that conditions, restrictions, stipulations, forfeitures or warranties in insurance contracts may be waived, it becomes material to determine who are agents of an insurer capable of causing such waiver. The usual classification of insurance agents as local and general is not sufficient in the matter under consideration; for the power of an agent in this regard does not depend on the extent of the territory over which he may have dominion. But the authority of an agent must depend on the nature of the business intrusted to him, and must be sufficient to fulfill its requirements. The criterion is not what powers an agent actually had, but what powers the insurer held him out to the public as possessing[81]. His authority cannot be limited by private instructions never brought to the attention of the insured[82]; and if he have pow-

Coursin *v.* Penn. Co., 46 Pa. St. 323.
Schmurr *v.* State Co., 30 Oreg. 19; 46 Pac. 363.
Ala. St. Co. *v.* Long, etc., 123 Ala. 667; 26 So. 655.
Carrugi *v.* Atl. Co., 40 Ga. 135; 2 A. R. 567.
Lutz *v.* Anchor Co., 120 Ia. 136; 94 N. W. 274; 98 A. S. R. 349.
Am., Etc. Co. *v.* McLanathan, 11 Kans. 533.
German Co. *v.* Gray, 43 Kans. 497; 23 Pac. 637; 19 A. S. R. 150; 8 L. R. A. 70.
German-Am. Co. *v.* Yellow, etc. Co., 27 Ky. L. R. 57; 67 S. W. 19; 68 S. W. 1081.
German-Am. Co. *v.* Humphrey, 62 Ark. 348; 35 S. W. 428; 54 A. S. R. 297.
Tillis *v.* Liverpool Co., 46 Fla. 268; 35 So. 171.
Excelsior Co. *v.* Riddle, 91 Ind. 84.
Hanover Co. *v.* Dole, 20 Ind. App. 333; 50 N. E. 772.
Citz. Co. *v.* Stoddard, 197 Ill. 330; 99 Ill. App. 469; 64 N. E. 355.
Bouton *v.* Am. Mut. Co., 25 Conn. 542.
Hale *v.* Mechanics Co., 6 Gray 169; 66 A. D. 410.
Burdick *v.* Sec. L. Co., 77 Mo. App. 629.
Steen *v.* Niagara Co., 89 N. Y. 315; 42 A. R. 297.
Phoenix Co. *v.* Lodge, 41 Neb. 21; 59 N. W. 752.
Liverpool Co. *v.* Sheffy, 71 Miss. 919; 16 So. 307.

81. Eclectic Ins. Co. *v.* Fahrenburg, 68 Ill. 463.
82. So. Life Ins. Co. *v.* McCain, 96 U. S. 84.
Breckenridge *v.* Am. Cent. Co., 87 Mo. 62.

er to issue policies he may bind his principal by his waivers or other acts done in the furtherance or conduct of his business[83]. And knowledge brought to the attention of the agent is imputed to the principal[84], and his mistakes are attributed to the insurer[85], as are misstatements or inaccuracies in the application. These propositions are true even where the application provides that the insured shall be responsible for the acts of the insurer's agent[86], and even though it provides that statements therein shall be deemed warranties[87]. Frequently ingenious attempts have been made by insurers by provisions in their applications for insurance to make the party forwarding the application the agent of the insured and thus escape liability for the mistakes, fraud or misstatements of such agent and be relieved from the binding effect of the acts. Such provisions should not and do not receive countenance from the later and better adjudications. As was well said in one case, "The ordinary instructions of companies to their agents, and their dealings with them, are too well known for us to shut our eyes to the manner in which their work is carried on. This is but a form of words to attempt to create on paper an agency which in fact never existed. It is an attempt of the

83. Phoenix Co. *v.* Spiers, 87 Ky. 286; 8 S. W. 453.
Ins. Co. *v.* Hogue, 41 Kans. 524; 21 Pac. 641.
84. Campbell *v.* Mer. & F. Co., 37 N. H. 35.
85. Meadowcraft *v.* Standard Co., 61 Pa. 91.
Continental Co. *v.* Munns, 120 Ind. 30; 22 N. E. 78.
86. Hodgkins *v.* Mont. Co. Ins. Co., 34 Barb. 213.
Kelly *v.* Troy Co., 3 Wis. 254.
Winans *v.* Allemania Co., 38 Wis. 342.
Roth *v.* City Co., 6 McLean 324 (U. S.).
87. Continental Co. *v.* Pearce, 39 Kans. 396; 18 Pac. 291; 7 A. S. R. 557.

companies, not to restrict the powers of their own agents, but an effort to do away with that relation altogether by mere words, and to make him, in the same manner, the agent of the insured when, in fact, that relation never existed. We do not believe that the entire nature and order of this well established relation can be so easily subverted by this ingenious device of words. The real fact as it existed cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority."[88] And the case further says that after receiving the premiums and benefits from an insurance contract, the company should not escape liability by questioning the acts or statements of its own agent[89].

88. Continental Co. *v.* Pearce, 39 Kans. 396; 18 Pac. 291; 7 A. S. R. 557. Citing: Sullivan *v.* Phenix Co., 34 Kans. 170; 8 Pac. 112.
Kausal *v.* Minn. Co., 31 Minn. 17; 16 N. W. 430; 47 A. S. R. 776.
Ins. Co. *v.* Wilkinson, 13 Wall. 222 (U. S.).
Prot. Ins. Co. *v.* Harmer, 2 Oh. St. 452; 59 A. D. 684.
Sprague *v.* Holland Co., 69 N. Y. 128.
Boetcher *v.* Hawkeye Co., 47 Ia. 253.
Gans *v.* St. Paul Co., 43 Wis. 108; 28 A. R. 535.
Iron Works *v.* Phoenix Co., 25 Conn. 465.
Clark *v.* Union Mut. Co., 40 N. H. 333; 77 A. D. 721.
2 Wood, Fire Ins. Sec. 385-8.
May, Insurance, Sec. 140.

89. Id., citing:
Lynchburg Co. *v.* West, 76 Va. 575; 44 A. R. 177.
Higgins *v.* Phoenix Co., 74 N. Y. 6.
Eggleston *v.* Council Bluffs Co., 65 Ia. 308; 21 N. W. 652.
Guardian Co. *v.* Hogan, 80 Ill. 35; 22 A. R. 180.
Sherman *v.* Madison Co., 39 Wis. 104.
Patten *v.* Merchants Co., 40 N. H. 375.
Breckenridge *v.* Am. Cent. Co., 87 Mo. 62.
Am. Co. *v.* Mahone, 56 Miss. 180.
Mass. Ins. Co. *v.* Robinson, 98 Ill. 324.
Thomas *v.* Hartford Co., 20 Mo. App. 150.
Home Ins. Co. *v.* Lewis, 48 Tex. 622.

Sec. 267. These views are concurred in by the Supreme Court of the United States. It is there said that insurance companies holding out to the public certain parties as their agents, furnishing them blanks and advertising matter, permitting them to countersign and deliver policies, urging them on to increased activities, and paying them large commissions, should not be released from responsibility to the parties with whom they transacted business for the acts and declarations of the agent within the scope of his employment. "It is yet true that reports of judicial decisions are filled with efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit the responsibility of these agents to the simple receipt of the premium and delivery of the policy; the argument being that as to all other acts of the agent he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek insurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a delusion and a snare, leading, as it has done in numerous instances, to the grossest frauds of which the insurance companies receive the benefit, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the

person with whom he deals."[90] An apparent leaning away from the emphatic statements of this case was manifested by the same court in a later decision. But it does not appear that the court abandoned its earlier position, for in the later case the case rested on the point that the assured had signed an application, without reading it and it subsequently occurred that it contained false statements unknown to the applicant. And the court held, in accordance with established rules of evidence, that parol evidence could not be admitted to vary or contradict the terms of the written application, and more particularly rested the case on the fact that the power of the agent was limited by a statement in the application which was brought to the knowledge of the insured[91]. The great mass of authority is as above stated, and the same principle is set forth by Judge Cooley as follows: "It cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate the contract on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void * * * When an agent, who at the time and place is the sole representative of the principal, assumes to know what the principal requires, and after being fur-

90. Union Mut. Co. *v.* Wilkinson, 80 U. S. 13 Wall. 222; 20 L. Ed. 617.
Followed in Baker *v.* Home Co., 64 N. Y. 650.
Kausal *v.* Minn. Co., 31 Minn. 17; 16 N. W. 430; 47 A. S. R. 776.
Planters Co. *v.* Myers, 55 Miss. 504; 30 A. R. 526.
Rissler *v.* Am. Cent. Co., 150 Mo. 375; 51 S. W. 757.
Johnson *v.* Dakota Co., 1 N. Dak. 179; 45 N. W. 803.
Kister *v.* Lebanon Co., 128 Pa. St. 553; 18 Atl. 450; 15 A. S. R. 699; 5 L. R. A. 648.

91. N. Y. Life Co. *v.* Fletcher, 117 U. S. 529; 29 L. Ed. 934.

nished all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness or fraud."[92]

Sec. 268. So, from the adjudications this principle is deduced: The agent taking applications for insurance, using the company's blanks, forwarding the applications, delivering policies and receiving premiums is the agent of the insurer and not of the insured, and the insurer is, therefore, liable for the acts of its agent in the apparent scope of his employment, and he may bind it by his acts, representations or waivers.

B. WHO ARE AGENTS WHO MAY WAIVE RIGHTS—Sec. 269. The extent to which an agent is permitted to act is usually the test by which to determine whether he can bind his principal by a waiver of conditions, forfeitures or restrictions. If he is permitted by the insurer to solicit insurance, fill in and forward applications, receive and deliver, or countersign and deliver policies and collect premi-

92. Aetna Co. *v.* Olmstead, 21 Mich. 251; 4 A. R. 483.
Pac. Mut. Co. *v.* Snowden, 58 Fed. 342.
N. J. Mut. *v.* Baker, 94 U. S. 610; 24 L. Ed. 268.
Eames *v.* Home Co., 94 U. S. 621; 24 L. Ed. 298.
Continental Co. *v.* Chamberlain, 132 U. S. 304; 33 L. Ed. 341.
Knickerbocker Co. *v.* Trefz, 104 U. S. 197; 26 L. Ed. 708.
American Co. *v.* Mahone, 88 U. S. 21; 21 Wall. 152; 22 L. Ed. 593.
Equitable Co. *v.* Hazlewood, 75 Tex. 338; 12 S. W. 621; 7 L. R. A. 217.
Flynn *v.* Equitable Co., 78 N. Y. 568; 34 A. R. 561.

ums therefor, and thus attend to the business of his employer, such employer is bound by his waivers to the same extent as if the principal were acting. The tendency of modern authorities is against making restrictions in the policy upon an agent's authority conclusive upon the assured, and that the company or any agent with general or unlimited powers, clothed with an actual or apparent authorization, may either orally or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions, and many cases apply this rule, even though the policy provides that a distinct, specific agreement shall be endorsed thereon, or otherwise prescribes a particular mode of waiver or that only certain persons may waive, and there would be no valid reason why, if the agent could waive the restrictions in the first case, he may not in the latter; for such restrictions are declared to be ineffectual to limit the legal capacity of the company to bind itself by waiving conditions of a policy through an agent acting within the real or apparent scope of his employment[93].

Sec. 270. Attempts have frequently been made by the courts to create a distinction between the powers of a general and a local agent in applying the principles under consideration. But the difficulty arising in such case is to arrive at a proper definition of the terms general and local. It is customary to speak of a local agent as one whose district of operations is circumscribed, and a general agent as one who has a wider field or territory under his supervision. And yet, an agent may be restricted to

93. I Joyce, Insurance, 439.

work in only one small town, and his powers still be as great as if he covered the whole state. And one usually denominated a general agent may be absolutely denied the power to waive conditions, stipulations or forfeitures, while he who is called a local agent may have such power absolutely. And the mere fact of having a high title in an insurance company should not and has been held not to make any difference where the prohibition in a policy was against waivers by all agents[94]. This, however, has been decided differently, in other states, perhaps under facts which were not altogether similar, where it was held that the president, vice-president and secretary[95], the assistant-secretary, superintendent and general manager[96], were not to be included in the same category as other agents, and that they could bind the company by their acts irrespective of the provisions of the policy. No forceful reason presents itself for such a classification and differentiation of agents. The classification should be based on the character of the duties performed by the agent whose acts are in question. The highest official in an insurance company may never have performed a single act in the real transaction of the company's business; and it would be absurd to say that he could step in in a particular case and authorize acts in direct contravention of the terms of the policy, when the public knew that it was not customary for him to exercise

94. O'Leary *v.* Mer. M. Co., 100 Ia. 173; 69 N. W. 420; 62 A. S. R. 555.
Taylor *v.* State Co., 98 Ia. 521; 67 N. W. 577; 60 A. S. R. 210.
95. Hastings *v.* Brooklyn Ins. Co., 138 N. Y. 473; 34 N. E. 289.
96. Bankers Assoc. *v.* Stapp, 77 Tex. 517; 14 S. W. 168; 19 A. S. R. 772.
Piedmont Co. *v.* McLean, 31 Gratt. 517 (Va.).

such powers, and the company had never actually or impliedly given him authority therefor. And on the other hand, an agent restricted to a small district may have been so held out by the company, and it may have so ratified his acts as to have endowed him with implied power to waive any provision or to transmute the very terms of the policy itself. It is true that great inharmony as to this subject is prevalent among the authorities. But the true rule to be deduced from a consideration of the cases is this: If an agent has authority to take applications, countersign and deliver policies, collect premiums, and to act generally for the insured in making contracts, and his acts and waivers have been ratified and acquiesced in by the insurer, his waivers of conditions and stipulations will be effective and may be made orally notwithstanding an express provision in the policy that no waiver should be made unless endorsed on the policy[97]; or, as has been said, the

97. Grubbs *v.* N. Car. Co., 108 N. Car. 472; 13 S. E. 236; 23 A. S. R. 62.
Wood on Fire Insurance, Sec. 391.
Fishbeck *v.* Phoenix Co., 54 Cal. 422.
Miner *v.* Phoenix Co., 27 Wis. 693; 9 A. R. 479.
Phoenix Co. *v.* Spiers, 87 Ky. 285; 8 S. W. 453.
Kitchen *v.* Hartford Co., 57 Mich. 135; 23 N. W. 616; 58 A. R. 344.
Shearman *v.* Niagara Co., 46 N. Y. 526; 7 A. R. 380.
McFarland *v.* Kittaning Co., 134 Pa. St. 590; 19 Atl. 796; 19 A. S. R. 723.
Phenix Co. *v.* Bowdre, 67 Miss. 620; 7 So. 596; 19 A. S. R. 326.
State Co. *v.* Latourette, 71 Ark. 242; 74 S. W. 300; 100 A. S. R. 63.
Life Ins. Co. *v.* Fallow, 110 Tenn. 720; 77 S. W. 937.
Woolper *v.* Franklin Co., 42 W. Va. 647; 26 S. E. 521.
Standard Co. *v.* Friedenthal, 1 Colo. App. 5; 27 Pac. 88.
Continental Co. *v.* Ruckman, 127 Ill. 364; 20 N. E. 77; 11 A. S. R. 121.
National Co. *v.* Barnes, 41 Kans. 161; 21 Pac. 165.
Springfield Laundry *v.* Traders Co., 151 Mo. 90; 52 S. W. 238; 74 A. S. R. 521.

powers of an agent are *prima facie* co-extensive with the apparent authority given him, and persons dealing with him may judge of their extent from the nature of the business intrusted to his care[98].

Sec. 271. Of course it must be at all times understood that insurance companies have the right to limit the acts which may be done by their agents the same as other principals have, and that such limitations, when brought to the actual knowledge of the insured, are binding upon him, provided the general powers generally exercised by such agent were not inconsistent with such limitation and the fact was known by the insurer or, if not known, its ignorance was the result only of fraud or gross inattention to business[99]. But actual notice of limitations of an agent's authority must in all cases be given to the assured in time, for a person contemplating insurance is entitled in dealing with an agent to assume that he has full powers respecting the matters in which he is acting in the steps preliminary to the insurance and in issuing the policy, and if the authority which the agent is otherwise deemed to possess has in fact been limited, the limitation must be brought home to the insured[100].

98. Wood, Fire Insurance, 500.
Beal *v.* Park Ins. Co., 16 Wis. 241; 82 A. D. 719.

99. Parker *v.* Rochester Co., 162 Mass. 479; 39 N. E. 179.
Hunt *v.* State Co., 66 Neb. 121; 92 N. W. 921.
Russell *v.* Prudential Co., 176 N. Y. 178; 68 N. E. 252; 98 A. S. R. 656.
No. As. Co. *v.* Bld'g. Assoc., 183 U. S. 308; 22 Sup. Ct. R. 133; 46 L. Ed. 213.

100. Farnham *v.* Phoenix Co., 83 Cal. 246; 23 Pac. 869; 17 A. S. R. 233.
Hoge *v.* Dwelling H. Co., 138 Pa. St. 66; 20 Atl. 939.
Howard Co. *v.* Owen's Adm., 14 Ky. L. R. 881; 21 S. W. 1037.
Hahn *v.* Guardian Co., 23 Oreg. 576; 32 Pac. 683; 37 A. S. R. 709.

C. CLERKS:—Sec. 272. According to the ordinary course of business, insurance agents frequently employ clerks to assist them. In many cases they could not transact their business if obliged to attend to all details in person. And these clerks can bind their principals in any of the business they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment for premiums in cash or securities, and to give credit for premiums or to demand cash; and the act of the clerk is in all such cases the act of the agent, and binds the company just as effectually as if it had been done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case[1]. So, a clerk may waive conditions and provisions in an insurance policy to the same extent as the agent, his employer, could do[2]. Soliciting insurance and bringing the applications to the agents who finally pass upon them and determine whether or not to issue a policy, makes the solicitor the clerk of the agents and not an insurance broker; therefore, oral notice to such clerk of additional insurance contrary to the terms of a policy was notice to the company[3].

Liverpool Co. *v.* Richardson, 11 Okla. 585; 69 Pac. 938.
Royal Neighbors *v.* Bowman, 75 Ill. App. 566.
Cal. Co. *v.* Gracey, 15 Colo. 70; 24 Pac. 577; 22 A. S. R. 376.

1. Bodine *v.* Exchange Co., 51 N. Y. 117; 10 A. R. 566, citing:
Story on Agency, Sec. 14.
Deitz *v.* Providence Co., 33 W. Va. 526; 11 S. E. 50; 25 A. S. R. 908.
May on Insurance, 3d Ed. Secs. 154, 154A.
2 Wood on Insurance, 2d Ed. Sec. 433.

2. Eclectic Co. *v.* Fahrenburg, 68 Ill. 463.
Lingenfelter *v.* Phoenix Co., 19 Mo. App. 252.
Arff *v.* Star Co., 125 N. Y. 57; 25 N. E. 1073; 21 A. S. R. 721; 10 L. R. A. 609.

3. McEven *v.* Montgomery Mut., 5 Hill 101.
Wilson *v.* Genesee Co., 14 N. Y. 421.

And the principles applying to clerks are equally applicable to sub-agents, and the acts of the latter are the acts of the agent and, therefore, the acts of the company[4]. So, if a sub-agent, who has been correctly informed, makes a mistake in filling in an application, the company will be bound[5]. And it is said that a company is liable for the acts of a sub-agent whether it knew of his employment or not if it received the benefits of his labor[6]. And even where a sub-agent countersigns a policy for the agent, the company is bound if, after a knowledge of all the facts, the agent ratifies the act of the sub-agent by delivering the policy[7].

Sec. 273. The courts are not wholly harmonious as to the above principles. In one case it was held that a clerk employed by an insurance agent, without the knowledge of the company, and authorized by the agent to fill out and issue policies, sign the agent's name, and indorse the rate of insurance on policies, was not the agent of the company, and though the agent had power to waive any forfeiture of the policy for additional insurance, effected without the consent of the company, he could not delegate his authority to his clerk, and hence that a waiver by such clerk could not be imputed to the company[8]. And several other courts lean toward this reasoning on the well-established principle of agency that

4. Grubbs *v.* N. Car. Co., 108 N. Car. 472; 13 S. E. 236; 23 A. S. R. 62.
5. Langdon *v.* Union Co., 14 Fed. 272.
6. Continental Co. *v.* Ruckman, 127 Ill. 364; 20 N. E. 77; 11 A. S. R. 121.
7. Grady *v.* Am. Cent. Co., 60 Mo. 123.
8. Waldman *v.* No. British Co., 91 Ala. 170; 8 So. 666; 24 A. S. R. 883.

an agent cannot delegate his authority to another.

But the decided weight of authority is on the side of the doctrine first above announced. And familiarity with the methods in which the insurance business is carried on will suggest the good sense and reason of the doctrine. Insurance agents usually solicit and transact insurance business through clerks, sub-agents and assistants, and the more capable the agent is, and the greater the volume of his business, the greater will be his need of clerical assistance and sub-agents; and in case of his employment of such, promotion of the insurance business and its most convenient dispatch, as well as justice and good faith with those dealing with insurance companies through such agencies, demand that the insurers be held liable for the acts of the clerks and assistants[9].

2. WHAT MAY BE WAIVED; AND WHAT AMOUNTS TO A WAIVER:

A. ACTS PROHIBITED BY CHARTER:—Sec. 274. The act of incorporation of an insurance company is an enabling act; it gives the corporation all the power it possesses; it enables it to contract, and when it prescribes to it a form of contracting it must observe that mode or the instrument will no more create a contract than if the body had never

9. Bennett *v.* Council Bluffs Co., 70 Ia. 600; 31 N. W. 948.
Fitzgerald *v.* Hartford Co., 56 Conn. 116; 13 Atl. 673; 17 Atl. 411; 7 A. S. R. 288.
Steele *v.* German Co., 93 Mich. 81; 53 N. W. 514; 18 L. R. A. 85.
Eq. Soc. *v.* Brobst, 18 Neb. 526; 26 N. W. 204.
Heath *v.* Springfield Co., 58 N. H. 414.
Carpenter *v.* Ger-Am. Co., 135 N. Y. 298; 31 N. E. 1015.
Hartford Co. *v.* Josey, 6 Tex. Civ. App. 290; 25 S. W. 685.
Goode *v.* Ga. Home Co., 92 Va. 392; 23 S. E. 744; 53 A. S. R. 817; 30 L. R. A. 842.

been incorporated[10]. Under such authority it has been held that prohibitions in a charter or the by-laws of an insurance company cannot be waived by its officers or agents[11], the cases going on the theory that provisions in such charters or by-laws are semi-public in that they are designed for the prevention of over-insurance and other evils to which the public might be subjected as well as for the protection of the insurer itself[12]. But no good reason presents itself for permitting its officers and agents to forego other rights and benefits pertaining to the business and yet denying their power to waive any of the provisions of its charter or by-laws where the interests of an innocent individual are involved.

Sec. 275. Such officers and agents know the extent of their powers and the limitations of authority given by the charter and by-laws of the company, and this is not true of one per cent. of those who are insured by such comany and pay their premiums to it. And to say that while holding this knowledge exclusively such insurer can deliberately act contrary to the terms of its charter or by-laws while assuming to act in accordance with them or at least inducing those dealing with it to believe that its rights so disregarded would not be insisted upon and then after action brought against it, to hide behind a cloak of immunity from liability theretofore unknown to the insured, occurs to us to be legalizing fraud and unfair dealing. And it has been held that

10. Head *v.* Providence Co., 2 Cranch 127 (U. S.).
11. Hale *v.* Mech. Co., 6 Gray 169; 66 A. D. 410.
Lolhner *v.* Home Co., 17 Mo. 247.
Stark County Co *v.* Hurd, 19 Oh. 149.
12. Couch *v.* City Co., 38 Conn. 181; 9 A. R. 375.

the violation of its charter is a matter to be settled between the insurer and those who gave it its charter, but it cannot set up its own misconduct or dereliction in defense against the claim of the insured for indemnity, as by showing that in insuring to the stipulated amount it has infringed one of its own by-laws[13]. So, an estimate of the valuation made by the agent of the insurer or by him and the insured together is controlling, regardless of any contrary provision of the by-laws of the company[14].

Sec. 276. And a policy of insurance is not void because the risk was taken in violation of a by-law providing that certain risks should not be taken unless approved by a special committee, the policy having been issued by a duly-appointed agent of the company upon full knowledge of all the facts material to the risk[15]. Another case was a suit on a premium note. The defense was that the note and policy were void because the risk had been taken in violation of the company's by-laws; but it was held that this did not render void the policy nor the note given in consideration of it[16]. And the court of another state said: The first objection made by the defendants to the plaintiff's right to recover is that the plaintiff did not give notice of the loss in the manner and within the time required by the by-laws of the company. The defendants were, in fact, notified of the loss the day after the fire and in the manner stat-

13. Hoxsie *v.* Providence Co., 6 R. I. 517.
Fuller *v.* Boston Co., 4 Met. 206 (Mass.).
Cumberland *v.* Schnell, 29 Pa. St. 31.
14. Wilbur *v.* N. Eng. Co., 31 Me. 219.
15. Merchants Co. *v.* Curran, 45 Mo. 142; 100 A. D. 361.
16. Union Co. *v.* Keyser, 32 N. H. 313; 64 A. D. 375.

ed in the report. Almost a week after this notice the president of the defendants came to Fairhaven and New Bedford and went to the ruins. The object of this visit of the president, no doubt, was to make himself fully acquainted with all the facts and circumstances of the case. After the president had thus been to the ruins, it would seem, as the case finds, that the defendants declined to pay the loss altogether. The president, without doubt, obtained all the information he desired; and further notice to the defendants, therefore, would have been wholly unimportant and useless to them. The refusal to pay the loss was not put upon the ground of any defect or insufficiency in the notice. No objection was taken at that time to the form of the notice; no further or more particular notice was requested; but the defendants declined to pay the loss altogether; and within thirty days after the loss, and of course before the expiration of the time allowed to the plaintiff to give the notice. This conduct on the part of the defendants, upon any sound and just principle of fair dealing, must be regarded as a waiver of any further or different notice. The principle of waiver is a recognized and well-settled principle, and applies with much force to the present case[17].

B. CONDITIONS:

1. BREACH OF CONDITION PRIOR TO DELIVERY OF POLICY. Sec. 277. The issuance of a policy by an insurance company with full knowledge of all the facts affecting its validity, is tantamount to an assertion that the policy is valid at the

17. Clark *v.* N. E. Mut. Co., 6 Cush. 342 (Mass.); 53 A. D. 44.

time of its delivery and is a waiver of any known ground of invalidity. From such conduct the insured might fairly infer, and he has a right to infer that he is protected. If he did not so infer, it is reasonable to suppose that he would protect himself by procuring other insurance. It would not be consistent with fair dealing and honesty for the company to undertake to avoid its policy under such circumstances when the assured has rested in the belief that he was protected, until his property was destroyed, and when that belief was the result of its conduct[18]. It is not easy to perceive why an insurance company, by reason of the formal words and clauses inserted in its policy, intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract and are so known to the company as well as to the insured. And to allow the company to take the premium without assuming the risk would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that the warranty of the soundness of a horse is a warranty that he has four legs when one of them has been cut off[19].

Sec. 278. An examination of the authorities discloses greater harmony on this branch of the law of waiver as applied to insurance contracts than any

18. Dwelling-House Co *v.* Brodie, 52 Ark. 11; 11 S. W. 1016; 4 L. R. A. 458.
19. Birdwell *v.* Northwestern Co., 24 N. Y. 302.

other phase. And, indeed, there should be no variety of opinion among the courts on the matter under discussion. Only the simple and elementary principles of waiver are involved, being the voluntary surrender or foregoing of a right fully known to him possessing it. And, once shown that an insurer had a right to insist upon some condition, warranty or stipulation at the time of delivering its policy, but with full knowledge of the facts remained silent or by any sort of conduct failed to claim such right, then it will be held to have voluntarily relinquished, abandoned or waived it and cannot be heard later to complain[20].

(a) CONDITION AS TO TITLE:—Sec. 279. Remembering that the common rules of agency are applicable to insurance companies and those employed by them to solicit and perfect contracts of insurance, it follows that knowledge of the agent of facts

20. Anderson *v.* Manchester Co., 59 Minn. 182; 63 N. W. 241; 50 A. S. R. 400; 28 L. R. A. 609.
Imp. M. Co. *v.* Mich. Co., 122 Mich. 256; 80 N. W. 1088.
Triple Link *v.* Williams, 121 Ala. 138; 26 So. 19; 77 A. S. R. 34.
Bebee *v.* Hartford Co., 25 Conn. 51; 65 A. D. 553.
Davis *v.* Phoenix Co., 11 Cal. 409; 43 Pac. 1115.
Comba *v.* Hannibal Co., 43 Mo. 148.
Phoenix Co. *v.* Raddin, 120 U. S. 196; 30 L. Ed. 648.
Wood *v.* American Co., 149 N. Y. 382; 78 Hun 109; 29 N. Y. Supp. 250; 44 N. E. 80; 52 A. S. R. 733.
Patten *v.* Merchants Co., 40 N. H. 375.
Hadley *v.* N. H. Co., 55 N. H. 110.
Gans *v.* St. Paul., 43 Wis. 108; 28 A. R. 535.
Eggleston v. Council Bluffs Co., 65 Ia. 308; 21 N. W. 652.
Georgia Home Co. *v.* Kinnier, 28 Gratt. 88 (Va.).
Niagara Co. *v.* Johnson, 4 Kans. App. 16; 45 Pac. 789.
Commonwealth *v.* Huntzinger, 98 Pa. St. 41.
Worachek *v.* New Denmark Co., 102 Wis. 88; 78 N. W. 165.
No. Assur. Co. *v.* Grand View Assoc. 101 Fed. 77; 41 C. C. A. 207.
Security Co. *v.* Tarpey, 182 Ill. 52; 54 N. E. 1041.
Hartford Co. *v.* Post. 25 Tex. Civ. App. 428; 62 S. W. 140.
Aetna Co. *v.* Olmstead, 21 Mich. 246; 4 A. R. 483.

existing at the time of the issuance of a policy of insurance which would render it void is knowledge of the company. Therefore, even though there is a stipulation in the policy prohibiting a waiver of conditions therein other than by a written endorsement on such policy, if an agent delivers the policy and receives the premium therefor with knowledge of a breach of a condition in the policy respecting the sole and unconditional ownership of the property, such condition, or the breach thereof is thereby waived. And this is true notwithstanding there is a provision in the policy prohibiting an agent from waiving any of its conditions in any manner other than by writing indorsed thereon[21]. So, the defense that the insured was not the sole and unconditional owner of the property cannot be made where it appears that the agent of the insurer was informed that the true ownership of the property was in another than the insured[22]. Notice to the insurance agent that the insured had only a bond for title is notice to the insurer of the condition of the title, and the subsequent delivery by him of a policy to the insured is a waiver of any breach of condition in such policy as to title[23]. And if the insured states in his application that he holds title by "deed", such statement is suf-

21. Santa Clara etc. *v.* N. W. Nat. Co., 98 Wis. 257; 73 N. W. 767; 67 A. S. R. 805.
McMurray *v.* Capital Co., 87 Ia. 453; 54 N. W. 354.
Breedlove *v.* Norwich Soc. 124 Cal. 164; 56 Pac. 770.
Bateman *v.* Lumbermen's Co., 189 Pa. St. 465; 42 Atl. 184.
Dupuy *v.* Del Co., 63 Fed. 680.

22. Graham *v.* Fire Ins. Co., 48 S. Car. 195; 26 S. E. 323; 59 A. S. R. 707.
State Mut. Co. *v.* La Tourette, 71 Ark. 242; 74 S. W. 300; 100 A. S. R. 63.

23. Germania Co. *v.* Ashby, 112 Ky. 303; 65 S. W. 611; 99 A. S. R. 295.

ficient to put the insurer upon inquiry and it cannot defend an action on the policy where the insured did not have title in fee as required by the policy[24].

Sec. 280. Where the insured told the agent of the insurer that he owned the building insured but that it was standing on leased land yet the agent issued and delivered the policy, such was held a waiver of the condition in the policy that it should be void if the insured did not own a fee simple title to the land upon which the building was standing[25]. So, the mere failure or neglect of the insured to make known, without inquiry, facts relating to the title which the insurer might deem material, is not a breach of a condition of the policy relating to the title or liens on same, because the assured is entitled to assume that the insurer will make proper inquiry about all matters it deems material to the risk, and that it waives knowledge as to all other matters, except, possibly, in reference to extraordinary or unusual circumstances within the knowledge of the assured; but of which there is nothing to put the insurer upon inquiry[26]. This proposition, however, has been denied[27].

24. Clawson *v.* Citizens Co., 121 Mich. 591; 80 N. W. 573; 80 A. S. R. 538.
25. Johnson *v.* Aetna Co., 123 Ga. 404; 51 S. E. 339; 107 A. S. R. 92, overruling Thorton *v.* Travelers Co., 116 Ga. 122; 42 S. E. 287; 94 A. S. R. 99; Mech. Ins Co. *v.* Mut. Assoc., 98 Ga. 262; 25 S. E. 457.
26. Richards on Insurance, Sec. 136.
Sanford *v.* Royal Co., 11 Wash. 653; 40 Pac. 609.
Short *v.* Home Co., 90 N. Y. 16; 48 A. R. 138.
Morrison *v.* Tennessee, 18 Mo. 262; 59 A. D. 299.
Koshland *v.* Hartford Co., 31 Oreg. 402; 49 Pac. 866.
Trade Ins. Co. *v.* Barracliff, 45 N. J. 543.
Guest *v.* Ins. Co., 66 Mich. 98; 33 N. W. 31.
27. Pope *v.* Glens Falls Co., 136 Ala. 670; 34 So. 29.

Sec. 281. So, therefore, the principle applicable to the matter under discussion may be stated thus: The application for insurance usually contains a representation that the insured is the absolute owner of the property insured; the policy contains a clause to the effect that unless the condition of the title is truly stated in the application, or the insured is the unconditional owner, or if the building stands on leased ground, the policy shall be void; it is the duty of the agent of the insurer to make proper inquiry as to the title, and if he fail to make such inquiry, or if he know at the time of the delivery of the policy or if he have knowledge of sufficient facts to put him on inquiry as to the true state of the title of the property insured, his knowledge and acts are imputable to his principal and the policy will be held valid even though the condition as to the title has been broken[28].

28. Parsons *v.* Knoxville Co., 132 Mo. App. 583; 34 S. W. 476.
Born *v.* Home Ins. Co., 120 Ia. 299; 94 N. W. 849.
Allen *v.* Home Co., 133 Cal. 29; 65 Pac. 138.
Germania Co. *v.* Hick, 23 Ill. App. 381; 125 Ill. 361; 17 N. E. 792; 8 A. S. R. 384.
Mutual Co. *v.* Hammond, 106 Ky. 386; 50 S. W. 545.
Forward *v.* Continental Co., 142 N. Y. 382; 37 N. E. 615; 25 L. R. A. 637.
Arthur *v.* Palatine Co., 35 Oreg. 27; 57 Pac. 62; 76 A. S. R. 450.
West *v.* Norwich Co., 10 Utah, 442; 37 Pac. 685.
Goss *v.* Agr. Co., 92 Wis. 233; 65 N. W. 1036.
Cowell *v.* Phoenix Co., 126 N. Car. 684; 36 S. E. 184.
Leach *v.* Republic Co., 58 N H. 245.
Home Co. *v.* Gibson, 72 Miss. 58; 17 So. 13.
Wagner *v.* Westchester Co., 92 Tex. 549; 50 S. W. 569.
Medley *v.* German Alliance Co., 55 W. Va. 342; 47 S. E. 101.
Home Co. *v.* Duke, 84 Ind. 253.
Schaeffner *v.* Farmers Co., 80 Md. 563; 31 Atl. 317.
Parsons *v.* Knoxville Co., 132 Mo. 583; 31 S. W. 117.
Cowart *v.* Capital City Co., 114 Ala. 356; 22 So. 574.

(b) CONDITION AS TO ENCUMBRANCES:—Sec. 282. The foregoing remarks anent conditions as to TITLE are equally applicable to provisions that the undisclosed existence of *encumbrances* at the time of application for insurance shall render the policy subsequently issued void. If an application for fire insurance is oral and no inquiry is made by the agent of the insurer as to the condition of the title to the property and the insured says nothing about the existence of a mortgage thereon, but does not keep silent through any sinister motive or with the intention to mislead or deceive the insurer, then the fact that when the policy issued there was a mortgage upon the insured property will not invalidate the policy notwithstanding the fact that the policy provides that it shall be void if there exists an encumbrance by mortgage or otherwise upon the insured property[29]. For an applicant for insurance is not required to show the exact condition of his property or its title unless he is requested to do so; and failure of the insurer to make such request or inquiry respecting the title is a waiver of the right to avoid the policy in case encumbrances exist contrary to the terms of the policy[30]. The reason for this is that applicants for insurance are not

29. Hanover Co. *v.* Bohn, 48 Neb. 743; 67 N. W. 774; 58 A. S. R. 719.
Ins. Co. *v.* Bachelder, 44 Neb. 549; 62 N. W. 911.
Sproul *v.* West. Co., 33 Oreg. 98; 54 Pac. 180.
Wright *v.* London Co., 12 Mont. 474; 31 Pac. 87.
Aetna Co. *v.* Holcomb, 89 Tex. 404; 34 S. W. 915.
German Co. *v.* Nelwedde, 11 Ind. App. 624; 39 N. E. 534.

30. Western Co. *v.* Home Co., 145 Pa. St. 346; 22 Atl. 665; 27 A. S. R. 703.
Hall *v.* Niagara Co., 93 Mich. 184; 53 N. W. 727; 32 A. S. R. 497.

generally aware of the necessity of disclosures which long experience in the business of insurance has shown to underwriters to be necessary, or what disclosures it is important to make; while insurance companies cannot only protect themselves by making inquiries in regard to such things as they may deem material, but as is well known, are in the habit of doing so. If an insurance company elects to issue its policy without any application or representation in regard to the title to the property upon which the insurance is effected, the company cannot complain after a loss has ensued, that the interest of the assured was not correctly stated in the policy, or that an existing encumbrance was not disclosed[31]. *A fortiori,* where the insured informs the agent of the insurer of the amount of the encumbrances against the property the condition is not violated if the amount never exceeds the amount stated[32], and the condition is waived if the agent fails to make mention of the encumbrances. And it doesn't matter whether the agent was acting for the insurer or not at the time he acquired knowledge of the encumbrances; if he retained a recollection of the fact and had it in mind when he effected the insurance, that is sufficient to bind his principal and an issuance of a policy thereafter is a waiver of a breach of condition against encumbrances[33]. And where it appeared that an ap-

31. Morotock Co. *v.* Rodefer, 92 Va. 747; 24 S. E. 393; 53 A. S. R. 846.
Wood, Fire Insurance, Sec. 233.

32. Gould *v.* Dwelling House Co., 134 Pa. St. 570; 19 Atl. 793; 19 A. S. R. 712.

33. Wilson *v.* Minnesota Co., 36 Minn. 112; 30 N. W. 401; 1 A. S. R. 659.
Wade on Notice, Sec. 687.

plication falsely stated that there were no encumbrances on the property, but such false answer was inserted on the advice of the company's agent, the issuance of a policy thereon was held a waiver of the breach of condition against encumbrances. The court used this language: "The insurers are chargeable with knowledge possessed by their agent, and that consequently it was a fraud on their part to receive the premium moneys and deliver the policies without intending it should have effect under such circumstances. Such a fraud the law will not permit to be consummated; but on the contrary it will hold that when they delivered the policy it was with the intention that it should take effect, and that the insured should have the benefit from it for which he paid his money; and if there was any error or ambiguity in the application which their agent prepared, they must be held, under the circumstances here appearing, to have waived it"[34]. And where the insured stated to the agent that there was an encumbrance on the property, such fact may be proved by parol although the policy stated that there was no encumbrance[35].

Sec. 283. The cases are not altogether uniform in this particular; for it has been held that if the policy prohibits a waiver by the agent the insured is bound by the provisions against encumbrances, and an attempted waiver may not be shown[36]. And it is said that if the insured knew at the time that the answers to interrogatories in the application were

34. Aetna Co. *v.* Olmstead, 21 Mich. 246; 4 A. R. 483.
35. Boetcher *v.* Hawkeye Co., 47 Ia. 243.
36. Hawkins *v.* Rockford Ins. Co., 70 Wis. 1; 35 N. W. 34.

false he could not enforce the policy even though he had correctly stated the matter to the agent[37]. But such doctrine prevails mainly in those courts where it is held that statements in an application made by an agent of the insurer are not to be imputed to the insurer[38], or where the charter of the company prohibits a waiver[39].

Sec. 284. But the overwhelming weight of authority is in favor of the principle that if an agent of the insurer fail to state truly in the application the facts given him by the insured, or if when making the application the agent have knowledge of existing encumbrances, his knowledge is that of his principal and a subsequent issuance of a policy is a waiver of a breach of condition against encumbrances[40].

37. Blooming Grove Co. *v.* McAnerney, 102 Pa. St. 355; 48 A. R. 209.
38. Lowell *v.* Middlesex Co., 8 Cush. 127 (Mass.).
Richardson *v.* Maine Co., 46 Me. 394; 74 A. D. 459.
39. Leonard *v.* American Co., 97 Ind. 299.
40. Continental Co. *v.* Chamberlain, 132 U. S. 304; 10 Sup. Ct. R. 87; 33 L. Ed. 341.
London Co. *v.* Fischer, 92 Fed. 500; 34 C. C. A. 503.
McElroy *v.* Brit.-Amer. Co., 94 Fed. 990; 36 C. C. A. 615.
Beebe *v.* Ohio, etc., Co., 94 Mich. 514; 53 N. W. 818; 32 A. S. R. 519; 18 L. R. A. 481.
Hartford Co. *v.* McCarthy, 69 Kans. 555; 57 Pac. 90.
Breedlove *v.* Norwich Co., 124 Cal. 164; 56 Pac. 770.
German-Am. Co. *v.* Yeagley, 163 Ind. 651; 71 N. E. 897.
Phoenix Co. *v.* La Pointe, 17 Ill. App. 248; 118 Ill. 384; 8 N. E. 353.
German Co. *v.* Hayden, 21 Colo. 127; 40 Pac. 453; 52 A. S. R. 206.
Breckenridge *v.* American Co., 87 Mo. 62.
Vesey *v.* Commercial Co., 101 N. W. 1074 (S. Dak.).
Bobkirk *v.* Phoenix Co., 102 Wis. 13; 78 N. W. 160.
Ring *v.* Windsor Co., 51 Vt. 563.
Robbins *v.* Springfield Co., 149 N. Y. 477; 44 N. E. 59.
German Co. *v.* Gray, 43 Kans. 497; 23 Pac. 637; 19 A. S. R. 150; 8 L. R. A. 70.
Hornthal *v.* Western Co., 88 N. Car. 71.
German Co. *v.* Everett, 18 Tex. Civ. App. 514; 46 S. W. 95.
Hartford Co. *v.* Harmer, 2 Oh. St. 452; 57 A. D. 684.

(c) CONDITION AS TO VACANCY:—Sec. 285. Whether the fact that a house is vacant when insured will render effective a provision in the policy that it shall be void if the house is vacant, depends on the knowledge or lack of knowledge by the insurer or its agent of such vacancy. If an insurer issue a policy on property with actual knowledge of itself or its agent that the premises are vacant, he is estopped to allege such defense to an action to recover for a loss under the policy[41]. And the provision in a policy that if at any time during the continuance of the policy the insured property should become vacant the insurer should become absolved from all liability is held to have no application to buildings that were vacant at the time the policy was issued, the insurer having notice of the fact[42]. The cases are rather uniform on this phase of the law except in those jurisdictions where knowledge of the agent is not imputable to the insurer[43]. But the issuance of such policy with knowledge of the vacancy is not a waiver of the continuance of the vacancy beyond a specified time[44].

41. Rochester Co. *v.* Liberty Ins. Co., 44 Neb. 537; 62 N. W. 877; 48 A. S. R. 745.

42. Aurora Co. *v.* Kranich, 36 Mich. 289.
Short *v.* Home Ins. Co., 90 N. Y. 16; 43 A. R. 138.

43. Prendergast *v.* Dwelling H. Co., 67 Mo. App. 426.
Blass *v.* Agr. Ins. Co., 46 N. Y. Supp. 392; 18 App. Div. 481.
Carr *v.* Roger Williams Co., 60 N. H. 513.
Liverpool Co. *v.* McGuire, 52 Miss. 227.
Devine *v.* Home Co., 32 Wis. 471.
Queen Co. *v.* Straughan, 70 Kans. 186; 78 Pac. 447.
Jordan *v.* State Ins. Co., 64 Ia. 216; 19 N. W. 917.
Lamberton *v.* Conn. F. Ins. Co., 39 Minn. 130; 39 N. W. 76.

44. Conn. F. Co. *v.* Tilley, 88 Va. 1024; 14 S. E. 851; 29 A. S. R. 770.

(d) CONDITION AS TO USE OF PREMISES:—Sec. 286. Most policies of fire insurance provide that the premises shall not be used for specified purposes or that designated articles or property usually deemed hazardous shall not be kept thereon. The uses forbidden are those which render the risk greater, and the articles forbidden to be kept are usually such as gasoline or other inflamable substances, gunpowder, dynamite, or other explosives. Such use of the premises or the keeping of the forbidden articles thereon renders the condition of the policy broken and the insured cannot recover thereon after a loss. This rule, however, is subject to the qualification that the insurer must not have known before or at the time of delivery of the policy that such use was being made of the premises or that such forbidden articles were being kept thereon. If the insurer had such notice, yet went on and delivered the policy, and accepted the premium money, the condition will be held to have been waived. And in this connection again, knowledge of the agent is imputed to the principal and will be given binding effect[45].

(e) CONDITION AS TO PRIOR INSURANCE:—Sec. 287. Where policies provide that the existence of other insurance at the time of their issue shall avoid the policies, such provisions are con-

45 Hartley *v.* Penn. Co., 91 Minn. 382; 98 N. W. 198; 103 A. S. R 512.
Kruger *v.* Western Co., 72 Cal. 91; 13 Pac. 156; 1 A. S. R. 42.
Steers *v.* Home Co., 38 La. Ann. 952.
Farmers Co. *v.* Nixon, 2 Colo. App. 265; 30 Pac. 42.
State Co. *v.* Taylor, 14 Colo. 499; 24 Pac. 333; 20 A. S. R. 281.
Imperial Co. *v.* Shimer, 96 Ill. 580.
Kenton Ins. Co. *v.* Downs, 90 Ky. 236; 13 S. W. 882.
Rivara *v.* Queens Ins. Co., 62 Miss. 720.
Peoria Co. *v.* Hall, 12 Mich. 202.

ditions precedent, and if prior insurance exists at that time, it renders the policies voidable. But this, too, is a condition that may be waived, and the waiver may be an express one or evidenced by acts and conduct sufficient to induce the insured to believe that the condition would not be insisted upon. And in this connection, knowledge of facts brought to the attention of its agent is imputed to the insurer and binding upon it. Therefore, if at the time of the issuance of a policy the agent knew of the existence of prior insurance contrary to the condition of the policy, and with such knowledge he delivered the policy and received the premium money, the condition is waived and the insurer bound[46]. The knowledge of the agent who had effected the prior insurance is sufficient[47]. So, waiver occurs where the insured stated to the agent that there was other insurance, but signed an application prepared by the agent stating that there was no previous insurance[48]. And a failure by the insured to give notice of other insurance is not fatal to the validity of the policy where such other insurance is already known to the insurer, as the issue of the subsequent policy is a waiver of the condition against pre-existing insurance[49], as is also the accepting of a renewal pre-

46. Putnam *v.* Commonwealth, 4 Fed. 753.
Lockwood *v.* Middlesex Co., 47 Conn. 553.
No. Brit. Co. *v.* Steiger, 124 Ill. 81; 16 N. E. 95.
Lycoming Co. *v.* Barringer, 73 Ill. 230.

47. Richmond *v.* Niagara Co., 79 N. Y. 230.

48. Am. Ins. Co. *v.* Luttrell, 89 Ill. 314.
England *v.* Westchester Co., 81 Wis. 583; 51 N. W. 954; 29 A. S. R. 917.

49. Rowley *v.* Empire Co., 36 N. Y. 550.
Wash. Ins. Co. *v.* Davison, 30 Md. 91.
Webster *v.* Phoenix Co., 36 Wis. 67.
May, Insurance, Sec. 375, citing above authorities.

mium[50]. And neglect of the insurer to avoid the policy for an unreasonable time after knowledge of its right to do so is a waiver of such cause of forfeiture[51]. It has been held that where a policy contained a provision that it should be void if other insurance should not be endorsed on it, that the existence of other insurance not so endorsed did not make the policy absolutely void but voidable and capable of being made valid by the acts or acquiescence of the insurer amounting to a waiver[52]; and want of indorsement of other insurance upon a policy at the time of its issuance cannot invalidate it where such other insurance was already known to the insurer[53].

Sec. 288. The rules above announced are not without dissent. It has been said that the requirement that other insurance be endorsed on the policy is a condition precedent to the right of recovery, and that mere notice to the agent or verbal communication to the insurer is not a compliance with this requirement and does not validate the policy[54]. An apparent concurrence in this last-named doctrine may be noticed in a New York case[55]; and in its favor the Supreme Court of the United States has

50. Carrol *v.* Charter Oak Co., 1 Abb. Ct. of App. Dec. 316.
51. Fishbeck *v.* Phoenix Co., 54 Cal. 422.
City Ins. Co. *v.* Carrugi, 41 Ga. 660.
Pitney *v.* Glens Falls Co., 65 N. Y. 6.
52. Atl. Ins. Co. *v.* Goodhull, 35 N. H. 328.
53. National Co. *v.* Crane, 16 Md. 260.
Kenton Ins. Co. *v.* Shea, et al., 6 Bush 174; 99 A. D. 676.
54. Hutchinson *v.* Western Co., 21 Mo. 97; 64 A. D. 218.
Barrett *v.* Union Mut. Co., 7 Cush. 175.
Dietz *v.* Mound City Co., 38 Mo. 85.
Bennett *v.* St. Paul Co., 55 N. J. L. 377; 27 Atl. 641.
55. Sanders *v.* Cooper, 115 N. Y. 279; 22 N. E. 212; 12 A. S. R. 801.

lent the weight of its authority[56]. But in Missouri and New York courts a change has been made from their former views and the first-named doctrine has been adopted[57]. In fact the greater number of authorities and the weightier ones are in favor of the principle which sound sense and fair dealing demand, that if an insurer deliver its policy and collect premiums from the insured, knowing at the time, by itself or its agent, of the existence of other insurance contrary to the terms of the policy, compliance with the condition is waived and the policy is valid without an indorsement of the other insurance upon the policy[58].

(f) CONDITION AS TO "IRON-SAFE" PROVISION:—Sec. 289. Fire insurance policies frequently contain what is known as an "Iron-safe clause" applicable to insurance on stocks of merchandise. This clause requires the insured to keep the books and last inventories of his business securely locked in a fire-proof safe at night and at all times when the building containing the goods is not actually open for business, or to keep such books and inventories in some place not exposed to a fire which would destroy the building[59]. This condition is one intended to relate not only to the time of executing

56. Carpenter *v.* Providence Co., 16 Pet. 512.
No. Assur. Co. *v.* Grand View Assoc., 183 U. S. 308; 22 Sup. Ct. 133.
57. Hayward *v.* National Co., 52 Mo. 181.
Polkington *v.* National Co., 55 Mo. 172.
Goldwater *v.* Liverpool Co., 109 N. Y. 618; 15 N. E. 895; 39 Hun 176.
Stage *v.* Home Co., 78 N. Y. Supp. 555; 76 App. Div. 509.
58. Horwitz *v.* Equitable Co., 40 Mo. 557; 93 A. D. 321.
59. Phoenix Co. *v.* Schwartz, 115 Ga. 113; 41 S. E. 240; 90 A. S. R. 98.

the policy but also to the whole period during which it is in existence. Many cases hold that this condition, like many others hereinbefore discussed, may be waived either expressly or by a course of conduct inconsistent with any intention to rely upon it. And these cases hold that if at the time the agent delivered the policy the books and inventories were not being kept by the insured in the manner specified in the policy, and the agent knew such fact but delivered the policy notwithstanding, such conduct amounts to a waiver of the condition as the knowledge of the agent is imputed to the principal. The failure to keep the safe, or the books therein, or out of the building will not avoid the policy when the agent of the company soliciting the insurance knew that there was no such safe; the reason for this rule is that such clauses are conditions subsequent that operate as a forfeiture of the right to compensation for loss sustained, and the courts will never declare a forfeiture of a right when there is any reason for an equitable estoppel from such plea[60].

American Co. *v.* Felder, 44 S. Car. 478; 22 S. E. 598.
Gandy *v.* Orient Co., 52 S. Car. 224; 29 S. E. 655.
Mesterman *v.* Home Co., 5 Wash. 524; 32 Pac. 458; 34 A. S. R. 877.
Anderson *v.* Manchester Co., 59 Minn. 182; 60 N. W. 1095; 63 N. W. 241; 50 A. S. R. 400.
Miller *v.* Hartford Co., 70 Ia. 704; 29 N. W. 411.
Western Co. *v.* Phelps, 77 Miss. 625; 27 So. 745.
Reid *v.* Equitable Co., 17 R. I. 785; 24 Atl. 833; 18 L. R. A. 496.
Roberts *v.* Continental Co., 41 Wis. 321.
Johnson *v.* Farmers Co., 126 Ia. 565; 102 N. W. 502.
Koshland *v.* Home Co., 31 Oreg. 321; 50 Pac. 567.
Germania Co. *v.* Heflin, 22 Ky. L. R. 1212; 60 S. W. 393.
Niagara Co. *v.* Johnson, 4 Kans. App. 16; 45 Pac. 789.
Spalding *v.* N. H. Fire Co., 71 N. H. 441; 52 Atl. 858.
Osborne *v.* Phenix Co., 23 Utah 428; 64 Pac. 1103.
Fishback *v.* Phoenix Co., 54 Cal. 422.
Germania Co. *v.* Heflin, 22 Ky. L. R. 1212; 60 393.
Citizens Co. *v.* Crist, 22 Ky. L. R. 47; 56 S. W. 658.

60. Germania Co. *v.* Ashby, 112 Ky. 303; 65 S. W. 611; 99 A. S. R. 295

Sec. 290. An insurance company cannot ostensibly contract for keeping an inventory and books of account in an iron safe, and yet with full knowledge that the insured had not intended to have such safe, and with full knowledge that such inventory and books of account had been kept and would be continued to be kept at the store, to receive the insured's premiums as for a valid policy, the company intending to deny its validity if a loss should occur. To sanction such would be to sanction fraud[61]. The reasons for holding the company to a waiver in such case, appeal to us less forcibly than for the waiver of other conditions in insurance policies. The condition attaches to the policy at the time of its delivery and continues during the life of the policy, and if the insured has been in the habit of keeping his books and inventories in a manner other than that provided in the contract of insurance, the acceptance of the policy with its condition is notice to him to change his manner of keeping them, and if he fails to do this, it occurs to us that such is a plain violation of the conditions of his contract for which the insurer should not suffer. Some courts lean in this direction[62], but the majority favor the doctrine that acquiescence by the insured in the breach of the condition is a waiver of it.

61. Mitchell *v.* Miss. Home Co., 72 Miss. 53; 18 So. 86; 48 A. S. R. 535.
Rivara *v.* Queen's Co., 62 Miss. 720.
Sprott *v.* N. Orleans Co., 53 Ark. 215; 13 S. W. 799.
Niagara Co. *v.* Brown, 123 Ill. 356; 24 Ill. App. 224; 15 N. E. 166.
Phoenix Co. *v.* Randle, 81 Miss. 720; 33 So. 500.

62. Morris *v.* Imperial Co., 106 Ga. 461; 32 S. E. 595.
Bowers *v.* Mut. Co., 113 Ia. 551; 85 N. W. 763.
Gillum *v.* Fire Assoc., 106 Mo. App. 673; 80 S. W. 283.
Roberts Co. *v.* Sun Co., 13 Tex. Civ. App. 64; 35 S. W. 955.
Maupin *v.* Scottish Co., 53 W. Va. 557; 45 S. E. 1003.

(2). BREACH OF CONDITION SUBSEQUENT TO DELIVERY OF POLICY.

(a) CHANGE IN TITLE:—Sec. 291. For the purpose of influencing the assured to retain the proper motive to be vigilant in the care of his property, most policies insuring property against loss by fire provide that an alienation of the property or a change in ownership shall render them void, unless the insurer consent to such alienation, such consent to be endorsed on the policy. Such provision is valid and binding on the assured as he will be conclusively presumed to have knowledge of the conditions in the policy which he holds. But the provision is inserted for the benefit of the insurer, and like all other rights it has, the right to insist on this provision may be waived by it either expressly or by any course of conduct calculated to induce the assured to believe that a forfeiture on account of the alienation of the property would not be invoked. But mere notice of a transfer is not sufficient to constitute a waiver, nor is the insurer bound to expressly disapprove it[63]. It is otherwise, if after such notice the insurer receive and retain premiums due on the policy[64]. In this, as in other cases of waiver, an agent of the insurer may assent to a transfer, and his act will bind his principal[65], although it is thought that such would not be true where the agent had only the authority to solicit the insurance and not to collect premiums and otherwise attend to the company's business. Also the company is bound where its agent knows of a transfer and assents to it but fails to indorse such assent on the policy[66]. So,

63. Girard F. & M. Co. *v.* Hebard, 95 Pa. St. 45.
64. Millis *v.* Scottish Co., 92 Mo. App. 211; 68 S. W. 1066.
65. Fire Ins. Co. *v.* Bldg. Assoc., 43 N. J. 652.
66. Fire Ins. Assoc. *v.* Miller, 2 Tex. Civ. Cases, 333.

a waiver occurs where the agent assents to a corresponding assignment of the policy, and failure of the company for more than a year after notice of such assignment to object to the act of the agent in agreeing to the assignment is a ratification of his act[67]. And where the agent forwarded a policy to the insurer for its approval, with knowledge of an alienation by the assured, agreeing that the policy should remain good until he could procure the assent of the insurer to the assignment, a forfeiture on account of the alienation was held waived[68]. And where a policy is forfeited by a change in the title of the insured property and the agent of the insurer informs the person for whose benefit the policy was issued that the policy will be allowed to stand, the insurer cannot after a loss declare the policy void[69]. As was said above, the same principles governing waivers of conditions in insurance policies generally are applicable to the condition under discussion; and mere knowledge by the agent issuing the policy or renewing it and receiving the premium, of facts constituting a breach of the condition, without a prompt declaration of a forfeiture, is a waiver by him and by his principal of the breach of the condition so known to be broken. This is put upon the ground that notice to the agent is notice to the principal, that what the agent knows the company must be regarded as knowing; and that as it would be a gross fraud for the company knowingly to receive the premium for issuing a policy on which it did not intend

67. Benninghoff *v.* Agr. Ins. Co., 93 N. Y. 495.
68. Ill. Mut. Co. *v.* Stanton, 57 Ill. 354.
69. Pratt *v.* N. Y. Cent. Co., 55 N. Y. 505; 14 A. R. 304.

to be liable and which it intended to treat as void in case of a loss, so it is equally a fraud and its fraud for its agent to do so[70].

Sec. 292. If the general agent of an insurance company applies to an insured to renew his policy and is informed by the latter that he has contracted to sell the insured property, has put the purchaser in possession and received part of the purchase-money, giving a full statement of the condition of the title, and such agent, without written application, executes and delivers a new policy on the property, which he states is sufficient to meet the situation, and receives the premium, the insurer cannot set up a forfeiture on account of the condition of the title contrary to the terms of the policy[71].

(b) VACANCY:—Sec. 293. It has been held that when an agent delivers a policy of insurance constituting a complete contract, his authority over it or the subject-matter ceases; that he has no authority to modify its provisions nor to waive its terms; that after delivery of the policy, any knowledge of a breach of its conditions coming to him is not imputable to his principal and not binding upon it. Courts go very far in applying this principle to the case of a vacancy of the insured premises occurring after the delivery of the policy where there is a provision that such vacancy shall render the

70. Peoria M. Co. *v.* Hall, 12 Mich. 214.
Campbell *v.* Merchants Co., 37 N. H. 48.

71. Virginia etc. Co. *v.* Richmond Co., 102 Va. 429; 46 S. E. 462; 102 A. S. R. 846.
See: Moffit *v.* Phenix Co., 11 Ind. App. 233; 38 N. E. 835.
Shuggart *v.* Lycoming Co., 55 Cal. 408.

policy void[72]. And further, if an agent has only authority to solicit insurance and consummate the same, or to issue the policy, with no authority to change or waive any of its terms or conditions, any attempted change or waiver by him after the policy has been delivered is generally void; and in the absence of any showing to the contrary, it will generally be presumed that the assured had knowledge of the terms and conditions of the policy. Hence, if the policy provides that the policy shall be void if the property becomes vacant, without the consent of an officer of the company indorsed on the policy, a waiver by the local agent of this condition after the insurance is effected is unauthorized and renders the policy void[73].

Sec. 294. But while a respectable array of authorities hold to the principles above announced, it is difficult to see why an agent clothed with authority to collect premiums falling due, or to assent to a change in the ownership of the insured property, or to waive any other condition after the taking effect of the policy, may not, for the insurer, forego the benefit of the vacancy clause. Better reasoning, and many authorities support the doctrine that he may. Of course, to constitute a waiver, the company must either itself, or by some act of its agent having apparent or real authority, do or say something that induces the insured to do or forbear to do something whereby he is prejudiced[74]. It is no waiver for the

72. Hartford Co. *v.* Davenport., 37 Mich. 609.
Harrison *v.* City Ins. Co., 9 Allen, 231; 85 A. D. 751.
73. Burlington Co. *v.* Gibbons, 43 Kans. 15; 22 Pac. 1010; 19 A. S. R. 118.
74. Weidert *v.* State Ins. Co., 19 Oreg. 261; 24 Pac. 242; 20 A. S. R. 809.

agent to tell the assured that the vacancy will invalidate the policy or where, knowing of the vacancy subsequent to delivery of the policy, the agent merely remains silent[75]. Still, knowledge of the agent is knowledge of the insurer, and if the agent knows a house is vacant at the time of delivering the policy insuring it, the vacancy clause is waived[76]; and an agent may indorse on a policy consent for the premises to be vacant or he may waive such indorsement[77], even though the policy provide that no agent has power to waive any of its terms.

(c) ENCUMBRANCES:—Sec. 295. Policies may lawfully provide that no encumbrances shall be placed on the insured property subsequent to delivery of the policy, and in such case, a violation of the provision avoids the policy. But the effect of such circumstance may be waived by the insurer, expressly or impliedly, by itself or its agent. And it is said that an insurance agent furnished by his principal with blank applications and policies duly signed by the company's officers, and who has been authorized to take risks, to issue policies by simply signing his name, to collect premiums and cancel policies without consulting his principal, is empowered to waive conditions of forfeiture in such policies for encumbrances placed upon the insured property. He may waive such forfeiture by parol, notwithstanding the limitation upon his power contained in the policy[78].

75. May, Insurance, Sec. 249 H.
76. Sentell *v.* Oswego Co., 16 Hun 518.
Jordan *v.* State Co., 64 Ia. 216.
Vanderhoff *v.* Agr. Ins. Co., 46 Hun 328.
77. Davey *v.* Glens Falls Co., 9 Ins. L. J. 499 (Minn.); Fed. Cas. No. 3590.
78. German-Am. Co. *v.* Humphrey, 62 Ark. 349; 35 S. W. 428; 54 A. S. R. 297.

An assent by the company to a mortgage on the insured property is, of course, a waiver of the clause in the policy against subsequent encumbrances. So, where the insurer had notice of a sale of the property and assented thereto and its agent had notice of a mortgage executed as a part of the purchase-price, the company was held to have assented to the mortgage and could not declare a forfeiture on account of a breach of the condition against encumbrances[79].

Sec. 296. Where the point has been raised, the courts have generally held that where the agent assents to the encumbrance or does any act leading the assured to believe that the policy will not be cancelled for a violation of the condition against encumbrances, the breach is waived[80].

(d) MISUSE OF PREMISES:—Sec. 297. A majority of the courts hold directly that a local agent of an insurance company authorized, as most of them are, to solicit insurance, deliver policies and collect premiums, has no authority to waive a condition prohibiting the use of the premises for designated purposes. A Federal court has said: "The fact that a local agent obtained knowledge, after the execution of the policy, that gasoline was being used on the premises, contrary to an express promissory warranty, and his mere silence on the subject do

79. German Ins. Co. *v.* York, 48 Kans. 488; 29 Pac. 486; 30 A. S. R. 313.
Farmers Ins. Co. *v.* Ashton, 31 Oh. St. 477.

80. Bushnell *v.* Farmers Co., 110 Mo. App. 223; 85 S. W. 103.
Hardwick *v.* State Co., 23 Oreg. 290; 31 Pac. 656.
Renier *v.* Dwelling H. Co., 74 Wis. 89; 42 N. W. 208.

not operate as a waiver of such condition, where the policy provides that he shall have no authority to change or modify any of its terms. And the fact that the insurer has the right to cancel the policy for any unauthorized acts on the part of the insured raises no obligation to formally cancel the same; and its failure to do so is no waiver of its right to rely on the breach[81]. This is extending the doctrine to a considerable length, and it is thought that it conflicts somewhat with the law to be mentioned in a succeeding section relating to forfeitures. But a forfeiture created by a breach of a condition in a policy prohibiting the use of gasoline in the building is not waived because the company's agent, whose authority was limited to soliciting insurance, delivering policies and receiving premiums, consented that the building might be used as a restaurant which included the use of a gasoline stove[82].

Sec. 298. But a Kansas court has leaned to the doctrine that a breach of the condition under discussion may be waived by an agent. But it has said that to constitute a waiver of conditions as to the future use of insured premises, there must be something more shown than mere knowledge of such use on the part of the agent. The language and conduct of the agent must be such as to reasonably imply an intention on his part to waive such condition or to consent to such use[83]. But it has been held that the company is not bound, even where the agent expressly consented to the prohibited use of the premises[84].

81. West End Hotel *v.* American Co., 74 Fed. 114.
82. Garretson *v.* Merchants Co., 81 Ia. 727; 45 N. W. 1047.
83. Concordia Co. *v.* Johnson, 4 Kans. App. 7; 45 Pac. 722.
84. Western Co. *v.* Rector, 85 Ky. 294; 3 S. W. 415.

(e) ADDITIONAL INSURANCE:—Sec. 299. The view is taken by many courts that an agent vested only with authority to solicit insurance and deliver policies has no authority to agree that the assured may procure other insurance on the same property, and that an express oral assent of such agent to the procuring of other insurance is not binding on the company, being contrary to the terms of the written policy[85]. Such an agent, it is held, has no power, after issuing a policy, to violate a condition therein by agreeing with the assured without the knowledge of the insurer for additional insurance in another company; notice of additional insurance to such agent is not notice to his principal, and it is not bound thereby nor by such oral agreement of the agent[86]. "An agent who is only authorized to solicit and take applications for insurance, receive the premiums and deliver the policy after having been signed by the proper officers, has no authority, express or implied, to waive a breach of the policy relating to additional insurance." But it is said in the same case that conditions in a policy of insurance limiting or avoiding liability are strictly construed against the insurer and in favor of the insured. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to

85. Union Natl. Bank *v.* German Ins. Co., 34 U. S. 397; 71 Fed. 473; 18 C. C. A. 203.

86. Taylor *v.* State Ins. Co., 98 Ia. 521; 67 N. W. 577; 60 A. S. R. 210.

German Ins. Co. *v.* Helduk, 30 Neb. 288; 46 N. W. 481; 27 A. S. R. 402.
Gray *v.* German Co., 155 N. Y. 180; 49 N. E. 675.
Bourgeois *v.* Mutual Co., 86 Wis. 402; 58 N. W. 38.
Robinson *v.* Fire Assoc., 63 Mich. 90; 29 N. W. 521.
Hale *v.* Mech. Co., 6 Gray 169; 66 A. D. 410.
Allemania Co. *v.* Hurd, 37 Mich. 11; 26 A. R. 491.

waive the forfeiture. A waiver may be created by acts, conduct or declarations insufficient to create a technical estoppel. If the company, with knowledge of the breach, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, or induces the assured to incur expense or trouble, it will be regarded as having waived the right to a forfeiture[87].

Sec. 300. A policy in a Michigan case provided that the agent of the insurer had no authority to waive, modify or strike from the policy any of the printed conditions, and procuring additional insurance rendered the policy void unless the consent of the company was written on the policy. The insured obtained further insurance upon the statement of the company's agent that it would make no difference in his policy. The court held the act of the agent no waiver of the condition, saying that he had no right to contract with the assured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein, either by parol or in writing; and the holder of the policy is estopped by accepting it from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy[88]. The hold-

87. Queen Ins. Co. *v.* Young, 86 Ala. 424; 5 So. 116; 1 A. S. R. 55, citing.
Titus *v.* Glens Falls Co., 81 N. Y. 410.
Bartholomew *v.* Merchants Co., 25 Ia. 507.
Hamilton *v.* Aurora Co., 15 Mo. App. 59.
Liverpool Co. *v.* Sorsby, 60 Miss. 302.

88. Cleaver *v.* Traders Co., 65 Mich. 527; 32 N. W. 660; 8 A. S. R. 908, citing:
Merseran *v.* Phoenix Co, 66 N. Y. 274.
Catoir *v.* American Co., 33 N. J. L. 487.
But see this case cited *infra* this subdivision.

ings of the courts upon this subject, however, are far from uniform. But an examination of the cases will disclose that the difference between the two lines of authorities turns more upon the construction of the clause restricting the authority of an agent and upon determining how far his acts shall be binding upon the company, since it is usually his acts that are involved, than it does upon establishing a principle of waiver by the insurer. However, a less reconcilable position is taken by the courts on the effect of a failure to endorse on the policy a consent to additional insurance where the policy requires such indorsement to make the consent binding on the insurer.

Sec. 301. We think that the better and more reasonable rule, and the one sustained by the weight of authority is that an agent authorized to solicit insurance, countersign and deliver policies and collect premiums, may consent to the procuring of additional insurance and that such consent amounts to a waiver of a clause in the policy prohibiting the procuring of further insurance and that such waiver is binding on the insurer whether indorsed on the policy or not[89]. As is said in May on Insurance, Art. 370: While the old rule required the consent to be in writing and endorsed on the policy, it is the decided tendency of the modern cases to hold that if notice of the additional insurance be duly given to the company or its agent, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy because their consent thereto was not indorsed as literally required by the stipulation. Knowledge of other subsequent insurance and conduct in-

89. Crescent Ins. Co. *v.* Griffin, 59 Tex. 509.

ducing the insured to believe that the first policy is still valid, constitute a waiver of the clause against additional insurance[90]. So, if no objection is made for a reasonable time after knowledge of the additional insurance comes to the company or its agent, the clause is waived[91], as silence is deemed a waiver[92], and such a delay for three months has been held sufficient[93]. A statement by an agent to the insured after knowledge of additional insurance that the former policy is all right, is a waiver of the forfeiture clause[94].

Sec. 302. Speaking on the subject under discussion, a Texas court has well expressed the principles herein announced. "Subsequent insurance did not *ipso facto* annul the policy, but the company might elect to give it that effect, or might waive it. Having knowledge of the facts, it was the duty of the company to manifest its intention as to this promptly, and having failed to do so, it ought to be held to have waived the right to treat the policy as null, when it knew that by the act of its own agent the insured had been led to believe that the policy was in full force. It is not so much by the force of the fact that the agent gave a verbal consent to the subsequent insurance that the appellee should be held bound, as because the company itself must be held, having knowledge of what he had done, to have ratified the consent given by him, though it may not have been given in the manner prescribed by the policy. If the policy limited the power of the agent, it implied no limitation of

90. Martin *v.* Jersey City Co., 44 N. J. 273.
91. Crescent Co. *v.* Griffin, *supra.*
92. Phoenix Co. *v.* Spiers, 87 Ky. 285.
93. Planters Co. *v.* Lyons, 38 Tex. 253.
94. Combs *v.* Shrewsbury Co., 34 N. J. Eq. 403.

the power of the company itself, and, as said by the supreme court of Michigan, in considering a condition in a policy similar to those found in the policy before us: 'The condition, literally applied, would prevent any unindorsed consent by the company itself, by instructions of its board, or by act of its officers, as effectually as by any one else. And the case seems to settle down to the simple question whether a person, who has agreed that he will only contract by writing in a certain way, precludes himself from making a parol bargain to change it. The answer is manifest. A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in any agreement in writing not to agree by parol than a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it' ''[95]. When the company remains passive after knowledge of additional insurance, the insured rests in security that he is protected and is deprived of an opportunity of fully protecting himself by obtaining insurance elsewhere. To permit a forfeiture after such passiveness is to legalize fraud and unfair dealing[96]. The insured must show that the agent has done some act or made some representation or remained silent when he ought to have spoken, and thereby misled the insured and induced him to rely on the policy. But when such facts are shown they amount to a waiver[97]. If the indorsement is not made upon

95. Morrison *v.* Insurance Co., 69 Tex. 353; 6 S. W. 605; 5 A. S. R. 63, citing:
Westchester Co. *v.* Earle, 33 Mich. 143.
American Co. *v.* McCrea, 8 Lea 513; 41 A. R. 647.
96. Swedish Co. *v.* Knutson, 67 Kans. 71; 72 Pac. 526; 100 A. S. R. 382.
97. Westchester Co. *v.* Earle, 33 Mich. 143.

notice duly given of subsequent insurance, a waiver will be presumed in the absence of any dissent.

Sec. 303. If a party by his silence directly leads another to act to his injury, he will not be permitted, after the injury has happened, to then allege anything to the contrary, for he who will not speak when he should will not be allowed to speak when he would[98]. In an extremely carefully considered case in Wyoming, it is held that if a general insurance agent who issues the policy in suit has knowledge of, and consents to additional insurance, but fails to indorse such consent on the policy, and through neglect fails to notify his company thereof, and its adjuster, after a loss and with knowledge of such additional insurance, and without objection thereto seeks to adjust the loss, the company is estopped to insist on a forfeiture by reason of such additional insurance[99]. And failure of an insurer to cancel its policy after receiving notice of a breach of the condition against additional insurance is evidence from which a waiver of the right of forfeiture may be inferred, especially when an attempted cancellation of the policy is based upon another ground of forfeiture[100]. So, collecting premiums after knowledge of such a breach is a waiver[1]. Upon a second appeal of the

98. Pelkington *v.* National Co., 55 Mo. 176.
Horwitz *v.* Equitable Co., 40 Mo. 557; 93 A. D. 321.
Gans *v.* St. Paul Co., 43 Wis. 111; 28 A. R. 535.

99. Kahn *v.* Traders Ins. Co., 4 Wyo. 419; 34 Pac. 1059; 62 A. S. R. 47.
2 May, Insurance 370.
Carrugi *v.* Atlantic Co., 40 Ga. 140; 2 A. S. R. 567.
Weed *v.* London Co., 116 N. Y. 106; 22 N. E. 229.

100. Phoenix Ins. Co. *v.* Holcomb, 57 Neb. 622; 78 N. W. 300; 73 A. S. R. 532.
Slobdisky *v.* Phoenix Co., 52 Neb. 395; 72 N. W. 483.

1. Lutz *v.* Anchor Co., 120 Ia. 136; 94 N. W. 274; 98 A. S. R. 349, citing:
Ruthven *v.* American Co., 102 Ia. 550; 7 N. W. 574.

case of Cleaver *v.* Trader's Ins. Co., cited in section 300 hereof, it is held that the insurer waives a breach of this condition when, after notice, it fails to notify the insured of its intention to insist upon a forfeiture[2]. Such, we think, is the better rule[3].

C. PAYMENT OF PREMIUM—

(1) BEFORE DELIVERY OF POLICY—

(a) IN GENERAL:—Sec. 304. It is customary among insurance companies to authorize their agents who solicit insurance and deliver policies, to collect the premiums due therefor. The usual form of policy so delivered provides that it shall not take effect until the actual payment of such premium, or that it shall be void in case payment shall not be made as it provides. Such provisions are solely for the benefit of the insurer and are valid and such as it has a right to insist upon. The insured is bound to take notice of this condition, and in the absence of any extenuating circumstances he fails to comply with it at his peril. But like any other similar right belonging to the insurer, prepayment of the premium may be waived by it, and here, too, a waiver may be shown by evidence of any

2. Cleaver *v.* Traders Ins. Co., 71 Mich. 414; 39 N. W. 571; 15 A. S. R. 275.

3. Grubbs *v.* N. Car. Home Co., 108 N. Car. 472; 13 S. E. 236; 23 A. S. R. 62.
Oshkosh *v.* Germania Co., 71 Wis. 545; 37 N. W. 819; 5 A. S. R. 233.
Fishbeck *v.* Phoenix Co., 54 Cal. 422.
Penn F. Co. *v.* Kittle, 39 Mich. 51.
Mut. Co. *v.* Ward, 95 Va. 231; 28 S. E. 209.
Bigelow *v.* Granite Co., 94 Me. 39; 46 Atl. 808.
Rathbone *v.* City Co., 31 Conn. 193.
Thompson *v.* Traders Co., 169 Mo. 12; 68 S. W. 889.
West *v.* Norwich Co., 10 Utah 442; 37 Pac. 685.
Schomer *v.* Hekla Co., 50 Wis. 575; 7 N. W. 544.
Henschel *v.* Oregon Co., 4 Wash. 476; 31 Pac. 332, 765.
Phoenix Co. *v.* Johnston, 143 Ill. 106; 32 N. E. 429.

words or acts manifesting an intention not to insist on such payment, or misleading the insured into a belief that his policy is valid and subsisting even though it is not paid for according to its provisions. And such waiver may be made either orally or in writing by a regular agent of the company authorized to collect premiums, notwithstanding a statement in the policy that no agent shall waive any condition unless such waiver be indorsed on the policy.

Sec. 305. An express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid is waived by an unconditional delivery of the policy to the assured as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium and in such case the company is liable for a loss which may occur during the period of the credit[4]. And the assured is not bound to take notice of conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed on the policy when the policy is executed and delivered to him as a valid and completed contract by an agent having authority to countersign, and who, before or at the time of delivery of it has given the assured credit by parol; and if a loss occurs before the credit expires, the company is bound not-

4. Farnum *v.* Phoenix Co., 83 Cal. 246; 23 Pac. 869; 17 A. S. R. 233, citing:
Boehen *v.* Williamsburg Co., 35 N. Y. 131; 90 A. D. 787.
Church *v.* Lafayette Co., 66 N. Y. 222.
Latoix *v.* Germania Co., 27 La. Ann. 113.
Miss. Val. Co. *v.* Neyland, 9 Bush 439.
Heaton *v.* Manhattan Co., 7 R. I. 506.
Eagan *v.* Aetna Co., 10 W. Va. 583.
O'Brien *v.* Union Mut. Co., 22 Fed. 586.
Knickerbocker Co. *v.* Norton, 96 U. S. 234.

withstanding the agreement for credit was not indorsed on the policy[5]. It will be seen, however, that in such cases it is the act of delivering the policy evidencing an intention that it shall take effect as a contract of insurance which constitutes the waiver, for in the absence of such delivery and intent there can be no waiver. Up to the time of such delivery the agreement for credit is merely a personal one between the agent and the assured which the former may cancel at any time before consummation of the contract by delivery of the policy[6].

Sec. 306. And the delivery of a policy without condition and without exacting payment of the premium in cash raises a presumption that credit was given[7]. It is said that a contract of insurance is complete when the assured makes application for insurance, the application is accepted, the policy filled out in duplicate, and the applicant's name entered on the books of the company as being insured; and if he is not required at that time to pay the premium, or notified of a stipulation in the policy requiring such payment as a condition precedent to its binding force upon the company, the latter will be deemed to have waived such condition[8], and the practice or general usage of the company not to require payment at the time of delivery may be shown

5. Id.
Young *v.* Hartford Co., 45 Ia. 377; 24 A. R. 784.
Wright *v.* Hartford Co., 36 Wis. 522.
Sheldon *v.* Conn. Mut. Co., 25 Conn. 207.
Griffith *v.* N. Y. Life, 101 Cal. 627; 36 Pac. 113; 40 A. S. R. 96.
6. Griffith *v.* N. Y. Life, *supra.*
7. Am. Emp. Co. *v.* Fordyce, 62 Ark. 562; 36 S. W. 1051; 54 A. S. R. 305.
Boehen *v.* Williamsburg Co., 35 N. Y. 121; 90 A. D. 787, citing:
Behler *v.* German Mut. Co., 68 Ind. 347.
Miller *v.* Life Ins. Co., 12 Wall. 303.
Little *v.* Ins. Co., 38 Oh. St. 110.
8. Pino *v.* Merchants Mut. Co., 19 La. Ann. 214; 92 A. D. 529.

to establish such waiver[9]; but the rule permitting proof of waiver by showing a general custom to deliver policies without pre-payment of the premium has been denied[10]. Where it is the custom of insurance companies to give their agents time to pay over premiums on policies, and the agent to credit the insured therefor, the insured becoming indebted to the agent and the agent in turn to the company, a payment according to such custom, even after a loss, will be valid, and the condition declaring the policy void for non-payment of the premium will be held waived[11].

Sec. 307. The views herein expressed are not without dissent. A comparatively late case in New York has held to the contrary, but the turning point in the case appears to be the fact that the condition making payment of the premium precedent to the taking effect of the policy and limiting the authority of agents was contained in the application of the insured which was signed by him, and thus brought to his notice at the very inception of his dealing with the insurer[12]. But insurance, as well as anything else, may be sold on credit[13], and the great preponderance of authority supports the proposi-

9. Id.
Helme *v.* Phila. L. Co., 61 Pa. St. 107.
Gerard *v.* Mut. Co., 86 Pa. St. 236.
Baxter *v.* Massoit Ins. Co., 13 Allen, 320.
Union Cent. Co. *v.* Pottker, 33 Oh. St. 459.
Mayer *v.* Mut. Co., 38 Ia. 344.

10. Busby *v.* N. A. Ins. Co., 40 Md. 572.
Candee *v.* Citizens Co., 4 Fed. 143.
Mandego *v.* Cent. Ins. Co., 64 Ia. 134; 17 N. W. 656; 19 N. W. 877.

11. Lebanon Mut. Co. *v.* Hoover, 113 Pa. St. 591; 8 Atl. 163; 57 A. R. 511.

12. Russell *v.* Prudential Co., 176 N. Y. 178; 68 N. E. 252; 98 A. S. R. 657.

13. Wood on Insurance, Sec. 28.
May on Insurance, Sec. 360 D.
Insurance Co. *v.* Colt, 20 Wall. 560.

tion first stated, that the condition in a policy of insurance that the policy shall not become effective till the premium is paid and denying to agents the authority to waive any of its conditions other than by written endorsement on such policy, may be waived by the agent of the company and that such waiver occurs when the policy is delivered to the insured without exacting payment of the premium[14].

(2) AFTER DELIVERY OF POLICY—

(a) THEORY THAT PAYMENT AT MATURITY MAY BE WAIVED:—Sec. 308. While there is some dissent from the proposition, the decided weight of authority is to the effect that where a policy has been in existence as a binding contract of insurance, payment of the premium, or an installment thereof falling due thereafter, may be waived by the company or its authorized agents, even in the face of a provision in the policy that failure to make payment at its maturity shall render the policy void. When such waiver occurs, the insurance remains in force, and a variety of facts and circumstances have been held sufficient to produce this result. Thus, where an insurer issued a circular to the effect that it would not insist on a forfeiture for non-payment of interest on a premium, such notice

14. Washoe Mfg. Co. *v.* Hibernia Co., 66 N. Y. 613; 7 Hun. 74.
Universal Co. *v.* Block, 109 Pa. St. 535.
Equitable Co. *v.* McCrea, 6 Lea 541 (Tenn.).
Carson *v.* German Co., 62 Ia. 433; 17 N. W. 650.
Tenant *v.* Traveler's Co., 31 Fed. 322 (Col).
East Tex. *v.* Mims, 1 Tex. Civ. Cas., Art. 1323.
Gosch *v.* State Mutual, 44 Ill. App. 263.
Kerlin *v.* Natl. Assoc., 8 Ind. App. 628; 36 N. E. 156.
Stepp *v.* Nat'l. Assoc., 37 S. C. 417; 16 S. E. 134.
Wytheville Co. *v.* Feiger, 90 Va. 277; 18 S. E. 195.
Ball Co. *v.* Aurora Co., 20 Fed. 232.
Jones *v.* Aetna Co., Fed. Cas. 7453.
Potter *v.* Phoenix Co., 63 Fed. 382.
Daft *v.* Drew, 40 Ill. App. 266.

constituted a waiver of any right to a forfeiture for failure to make such payment[15]. So, consent of the insurer to an extension of time to make payment is a waiver[16], as is an acceptance of payment of part of an over-due premium[17]. And any act or conduct on the part of the insurer leading the insured to believe that the strict letter of the condition in the policy as to payment of the premium is not to be insisted upon is sufficient to constitute a waiver of prompt payment[18]. In determining whether a waiver has occurred, the test is whether an insurer, by his course of dealing with the assured, or by the acts or declarations of his authorized agents, has produced in the mind of the assured an honest belief that the terms and conditions of the policy declaring a forfeiture in the event of non-payment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day or in a different manner; and where there is such belief, and the assured has acted upon it, the insurer will be estopped from insisting upon a forfeiture[19]. So, the issue of a certificate after an assessment is in default is a waiver of the right to a forfeiture for its non-payment[20]. An acceptance of

15. Robinson *v.* St. Louis Mut. Co., 7 Rep. 358 (Mo.).
16. Homer *v.* Guardian Co., 67 N. Y. 478.
17. Hodson *v.* Guardian Co., 97 Mass. 144; 93 A. D. 73.
    Spitz *v.* Mutual Co., 25 N. Y. Supp. 469.
18. So. Ins. Co. *v.* McCain, 96 U. S. 84.
    Appleton *v.* Phoenix Co., 59 N. H. 541.
    Hastings *v.* Brooklyn Co., 138 N. Y. 473; 31 N. E. 289.
    Steele *v.* Ins. Co., 3 Mo. App. 207.
    Protection Co. *v.* Foote, 79 Ill. 361.
    Insurance Co. *v.* Tullidge, 39 Oh. St. 240.
    Insurance Co. *v.* Eggleston, 96 U. S. 572.
    Phoenix Co. *v.* Doster, 106 U. S. 30; 1 Sup. Ct. R. 18; 27 L. Ed. 65.
    Cotton States Co. *v.* Lester, 62 Ga. 247.
    Home Prot. Co. *v.* Avery, 85 Ala. 348; 5 So. 143.
19. Bacon: Benevolent Soc. Etc., Art. 433 and cases cited.
20. Id.
    Roswell *v.* Equitable, 13 Fed. 840.

a past-due payment is, of course, a waiver of any breach of condition as to payment known by the insurer at the time[21]; although such acceptance is not a waiver where the breach is unknown to the insurer at the time[22].

Sec. 309. An ingenious attempt has been made in some policies to avoid a waiver of non-payment of a premium on account of acceptance of past-due premiums by a statement in the policy that such acceptance shall be considered as an act of grace or courtesy on the part of the insurer and not binding as to future payments. This ingenuity has fallen short of its mark, and courts still hold the insurer to a waiver[23].

Sec. 310. A harder question to determine, however, is whether the agent had authority to waive the time of payment of the premium. For it is said that the fact that the agent solicited the insurance, delivered the policy and collected the original premium does not impliedly give him power to waive a forfeiture for non-payment, even if he had authority to collect the subsequent premiums[24]. This principle was declared in an Iowa case[25]. But there a

21. Mershon *v.* National, 34 Ia. 87.
Phoenix Co. *v.* Lansing, 15 Neb. 494; 20 N. W. 22.
Pomeroy *v.* Rocky Mt. Co., 9 Colo. 295; 12 Pac. 153.
McGurk *v.* Met. Co., 56 Conn. 528; 16 Atl. 263.
Rice *v.* N. Eng. Soc., 146 Mass. 248; 15 N. E. 624.
Painter *v.* Ind. Assoc., 131 Ind. 68; 30 N. E. 878.
Met. Co. *v.* Windover, 137 Ill. 417; 27 N. E. 538.
Froelich *v.* Atlas Co., 47 Mo. 406.

22. Gilbert *v.* N. Am. Co., 23 Wend. 43.
Robertson *v.* Met. Co., 88 N. Y. 541.
McDonald *v.* Sup. Council, 78 Cal. 49; 20 Pac. 41.

23. American Co. *v.* Green, 57 Ga. 469.
Thompson *v.* St. Louis Co., 52 Mo. 469.

24. Met. Co. *v.* McGrath, 52 N. J. L. 318; 19 Atl. 386.
Union Co. *v.* McMullen, 24 Oh. St. 67.
Lewis *v.* Phoenix Co., 44 Conn. 72.
Maryland *v.* Royal Co., 71 Pa. St. 393.

25. Critchett *v.* Am. Ins. Co., 53 Ia. 404; 5 N. W. 543; 36 A. S. R. 230.

dissenting opinion was entered by Beck, J., wherein better reasons were given, in the writer's opinion, than those held to by a majority of the court. In the dissenting opinion it was said: "The agent was authorized to collect the premiums. It cannot be doubted that if the plaintiff had paid to the agent the premium after default, the policy would have again attached. The agent could have enforced the payment under the terms of the policy. Thus far he was clothed with authority upon the exercise of which, at his discretion, depended the binding force of the policy. His authority to collect the premium could be exercised in such a manner and at such times as the interest of the defendant, determined by the agent, required. Surely the authority to collect the premium was not so limited that it could not have been exercised after a default by the plaintiff."

Sec. 311. The rule is general among the courts, however, that if an agent collect a premium after it is due and forward it to the company which accepts it with knowledge that it is over-due and that a forfeiture for that reason might be invoked, such act of the agent is a waiver of the delay in payment, and the acceptance by the company is a ratification of the waiver. And in such case it is of no consequence whether or not the agent had power to waive the condition in the first instance[26].

(b) BY CUSTOM:—Sec. 312. The decisions are inharmonious as to whether evidence of a custom or practice among insurance companies to receive payment of premiums after their maturity

26. Walls *v.* Home Ins. Co., 114 Ky. 611; 71 S. W. 650.
Piedmont Co. *v.* Lester, 59 Ga. 812.
Cronin *v.* Fire Assoc., 119 Mich. 74; 77 N. W. 648.
Chicago Co. *v.* Ford, 104 Tenn. 533; 58 S. W. 239.

may be shown to establish a waiver of a breach of the condition as to such payment. It is thought, however, that one of the main ingredients which permeates the whole field and phase of the law of Waiver is applicable here: That any conduct of one party calculated to lull the other into a feeling of security and belief that a right of the former would not be insisted upon may be shown to establish a waiver of that right. So, if the practice of the company and its course of dealings with the assured and others known to the assured have been such as to induce a belief that so much of the conduct as provided for a forfeiture in the event of non-payment of the premium will not be insisted upon, the company cannot urge a forfeiture for such non-payment[27]. This is especially true if the company has been in the habit of accepting and retaining belated payment of premiums[28], although it is held otherwise if such acceptance is conditional[29].

Sec. 313. There are a few cases holding contrary to the foregoing principles[30], but the weight

27. 2 May, Insurance, 361.
Lebanon Mut. Co. *v.* Hoover, 113 Pa. St. 591; 8 Atl. 163.
Frankle *v.* Pa. Fire Co., 12 Ins. L. J. 614 (Col.).
28. Stylow *v.* Wisconsin Co., 69 Wis. 224; 34 N. W. 151.
Longbridge *v.* Ia. Mut., 84 Ia. 141; 50 N. W. 568.
Crossman *v.* Mass. B. A., 143 Mass. 435; 9 N. E. 753.
Spoeri *v.* Mass. B. A., 39 Fed. 752.
McCorkle *v.* Tex. Ben. A., 71 Tex. 149; 8 S. W. 516.
Odd. F. Assoc. *v.* Swetzer, 117 Ind. 97; 19 N. E. 722.
Brooklyn Co. *v.* Bledstone, 25 Ala. 538.
Appleton *v.* Phoenix Co., 59 N. H. 541.
Ala. Gold Co. *v.* Garmany, 74 Ga. 51.
Helme *v.* Ins. Co., 61 Pa. St. 107.
Mound City Co. *v.* Twining, 19 Kans. 349.
Hartford Co. *v.* Nussell, 144 U. S. 439; 12 Supt. Ct. R. 617; 36 L. Ed. 496.
29. Lewis *v.* Phoenix Co., 44 Conn. 73.
30. Mandego *v.* Centen. Co., 64 Ia. 134; 17 N. W. 656; 19 N. W. 877.
Brown *v.* Mass. Mut., 59 N. H. 298.
Ormond *v.* Ins. Co., 96 N. Car. 158; 1 S. E. 796.
Hambleton *v.* Home Co., 6 Biss. 94 (U. S.).

of authority is so decided that it is not deemed advisable to take further note of these.

(3) WAIVER OF CASH PAYMENT:—Sec. 314. A general agent of an insurance company, whose business it is to solicit applications for insurance and receive first premiums, has the right to waive the condition requiring payment in money, and to accept the promissory note of the applicant or of a third party in lieu thereof, or to undertake to make payment to the company himself; and when the cash payment is actually waived in either of these modes, the contract binds the company notwithstanding the recital in the policy that it is not binding until the first premium is paid in cash[31]. And an agent authorized to collect premiums may exercise his discretion in such collection and accept a check or note in lieu of money and thereby the company will be bound even in the face of a contrary provision in the policy[32]. There is no good reason why insurance may not be sold on credit the same as any other property. And where a policy is delivered without exacting payment, the assumption is that credit is extended and the policy is valid[33], even contrary to the express provision in the policy[34].

31. Valley Life Co. *v.* Neyland, 9 Bush 430.
Insurance Co. *v.* Colt, 20 Wall. 560.
Bragdon *v.* Ins. Co., 42 Me. 262.
Wood *v.* Poughkeepsie Co., 32 N. Y. 619.

32. Taylor *v.* Merchants Co., 9 How. 390 (U. S.).

33. Latoix *v.* Germania Co., 27 La. Ann. 113.
Miller *v.* Insurance Co., 12 Wall. 285.
Insurance Co. *v.* Colt, 20 Wall. 560 (U. S.).

34. Home Co. *v.* Gilman, 112 Ind. 7; 32 N. E. 118.
Mut. Ben. Co. *v.* French, 30 Oh. St. 240.
Pitt *v.* Berkshire Co., 100 Mass. 500.
Mowry *v.* Home Co., 9 R. I. 346.

3. FORFEITURES—

A. IN GENERAL:—Sec. 315. The conditions inserted in an insurance policy and hereinbefore considered are for the benefit of the insurer and may be insisted upon by it and performance to their strict letter exacted. Any default in compliance with such conditions renders the policy void—not *ipso facto* void but according to the better view, the insurer has the right to declare it no longer in force. Forfeitures are odious to the law and will never be enforced unless there is the clearest evidence that such was the intention of the parties. And if an insurance company, after knowledge of any default for which it might terminate the contract of insurance, enters into negotiations or transactions with the assured which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived[35]. So, the majority of the courts hold that it is the duty of the insurer to take action when a cause for forfeiture comes to its knowledge, and that it must use reasonable diligence in manifesting an intention to rely on the forfeiture. And if it fails to notify the insured that it elects to hold him to the forfeiture, its lack of such action may rightfully be taken by the insured as conclusive of the fact that the forfeiture is not to be insisted upon. So, if a company accept payment of premiums after knowledge of its right to declare a forfeiture, the

35. Conigland *v.* N. Car. Co., Phill. Eq. 341; 98 A. D. 89.
Murray *v.* Home Ben. As., 90 Cal. 402; 27 Pac. 309; 25 A. S. R. 133, citing:
Viele *v.* Germania Co., 26 Ia. 9; 96 A. D. 83.
Queen Ins. Co. *v.* Young, 86 Ala. 424; 11 A. S. R. 51; 5 So. 116.
Titus *v.* Glens Falls Co., 81 N. Y. 419.

forfeiture is thereby waived[36]. This effect also follows a failure to cancel a policy for a reasonable time after knowledge of a cause for forfeiture has been brought home to the insurer[37].

Sec. 316. It has been held, however, that a breach of any of the conditions of a policy by the insured *ipso facto* annulled the insurance in the absence of any affirmative action of the insurer to revive it[38]. But such doctrine is not well reasoned nor well supported. In this connection, as in the waiver of any condition as before considered, knowledge of a cause for declaring a forfeiture brought home to an agent is imputed to his principal, and is binding upon it[39].

B. INDORSEMENT OF WAIVER ON POLICY:—Sec. 317. Policies of insurance provide that no waiver shall be binding upon the insurer unless by indorsement of same on the policy. Much difficulty has been experienced by the courts in determining whether a cause for forfeiture may be waived in any other manner in the face of this provision. It was early held in California that it could

36. Ins. Co. *v.* Norton, 96 U. S. 234.
Nat'l. Assoc. *v.* Jones, 84 Ky. 110.
Germania Co. *v.* Hick, 125 Ill. 351; 17 N. E. 792; 8 A. S. R. 384.
Bankers Assoc. *v.* Stapp, 77 Tex. 517; 14 S. W. 168; 19 A. S. R. 772.
Millard *v.* Sup. Council, 81 Cal. 340; 22 Pac. 864.
Tobin *v.* West. Aid Soc., 72 Ia. 261; 33 N. W. 663.
American Soc. *v.* Helburn, 85 Ky. 1; 2 S. W. 495; 7 A. S. R. 571.
Rice *v.* N. Eng. Soc., 146 Mass. 249; 15 N. E. 624.
Rindge *v.* N. Eng. Soc., 146 Mass. 286; 15 N. E. 628.

37. Hanover Co. *v.* Dole, 20 Ind. App. 333; 50 N. E. 429.
Nedrow *v.* Farmer's Co., 43 Ia. 24.
Phoenix Co. *v.* Coomes, 14 Ky. L. R. 603; 20 S. W. 900.

38. Johnson *v.* American Co., 41 Minn. 396; 43 N. W. 59.
West End Co. *v.* American Co., 74 Fed. 114.

39. Norris *v.* Hartford Co., 57 S. Car. 358; 35 S. E. 572.
Anthony *v.* Ger.-Am. Co., 48 Mo. App. 65.
Eagle Co. *v.* Globe Co., 44 Neb. 380; 62 N. W. 895.
Phoenix Co. *v.* Coffman, 10 Tex. Civ. App. 631; 32 S. W. 810.

not[40]; although the reverse doctrine is now adhered to[41]. And several states have held in effect that even if the agent had power to waive conditions in a policy, no notice given to him or agreement made by him as to a forfeiture can have any binding effect unless the waiver is indorsed on the policy[42].

Sec. 318. But the weight of authority is in support of a contrary doctrine. The agent effecting the insurance, delivering the policies and collecting the premiums is the representative of the company. He gets his pay in commissions from it. And as in all other classes of agencies, his knowledge is that of his principal, and his acts are binding upon it if performed while in the discharge or furtherance of the business intrusted to him. Usually he is the only one in the community to whom those insured may look in transactions relating to the insurance. In fact, as far as the insured is concerned, he is the company, with full power to deal in insurance. So, therefore, where the insured gives all necessary information to the agent and makes known to him any cause for which the policy might be forfeited, a waiver by the agent is binding on the insurer

40. Enos *v.* Sun Co., 67 Cal. 621; 8 Pac. 379.
41. Wheaton *v.* N. Brit. Co., 76 Cal. 415; 18 Pac. 758; 9 A. S. R. 216.
42. Meigs *v.* London Co., 126 Fed. 781.
Liverpool Co. *v.* Richardson, 11 Okla. 585; 69 Pac. 938.
Moore *v.* Hanover Co., 141 N. Y. 219; 36 N. E. 191.
Manchester *v.* Guardian Co., 151 N. Y. 88; 45 N. E. 381; 56 A. S. R. 600.
Pendar *v.* American Co., 12 Cush. 469.
Egan *v.* Westchester Co., 28 Oreg. 289; 42 Pac. 611.

whether the agent indorsed such waiver on the policy or failed and neglected to do so[43].

4. NOTICE OF LOSS:—Sec. 319. Insurance policies contain provisions that after a loss notice thereof must be given to the insurer within a specified time and in a designated manner. The giving of such notice is a condition precedent to the right of recovery, and a failure to perform the condition in the specified time or manner defeats all right to recover on the policy. The condition may also be contained in the charter of the company with like effect. But it is said that where such notice is required, failure to give it in the designated time or manner is not a cause for forfeiture unless specifically so provided[44].

A. SILENCE OF INSURER, OR FAILURE TO OBJECT NOT A WAIVER:—Sec. 320. Frequently the question arises as to what effect is to be given to the conduct of an insurer in remaining silent or raising no objection to the delinquency of the insured in serving upon the insurer, within the specified time, notice of a loss under the policy. It is said that no duty to speak devolves upon the insurer when the insured is in default in the performance of this condition, either by his failure to give the notice in time or to give it at all. "Whether the company is silent or makes objection cannot alter

43. Morrison *v.* Ins. Co., 69 Tex. 353; 6 S. W. 605; 5 A. S. R. 63.
Hartford Co. *v.* Landfare, 63 Neb. 559; 88 N. W. 779.
Morgan *v.* Illinois Co., 130 Mich. 427; 90 N. W. 40.
Maryland Co. *v.* Gusdorf, 43 Md. 506.
Liquid Mfg. Co. *v.* Phoenix Co., 126 Ia. 225; 101 N. W. 749.
Barnard *v.* National Co., 38 Mo. App. 106.
Mentz *v.* Lancaster Co., 79 Pa. St. 475.
Phoenix Co. *v.* Hart, 149 Ill. 515; 39 Ill. App. 517; 36 N. E. 990.
Refstrake *v.* Cumberland Co., 44 N. J. L. 294.
Penn. Co. *v.* Faires, 13 Tex. Civ. App. 111; 35 S. W. 55.

44. Coventry Co. *v.* Evans, 102 Pa. St. 281.

the right of the parties. If the notice is too late, there is an end to the matter. The want of such a notice cannot be supplied. Of what avail to the assured to be told that the notice was insufficient? that it was too late? How could the silence of the insurance company be construed as an admission that the notice was in time? It was not the duty of the insurance company to make any objection to the want of notice. It was made the duty of the assured to give the notice, and neither silence on the part of the company nor positive objections would alter its character or sufficiency"[45]. Under a written provision of a policy that written notice of a loss should be given within twenty days after its occurrence, an oral notice to the company's agent within the time, followed by a written notice to the company after the time, was held not to be a compliance with the condition, and a neglect of the company to object did not waive its right to defend on account of such non-compliance with the condition[46]. So, the remark of the president of the company, made seventeen months after a loss, that the company would be disposed to do what was right, and that they knew at the time of the fire that it was their loss and were surprised that they were not notified, was held not a waiver of the condition requiring notice of loss within thirty days[47]. Nor does a waiver occur where the insurer, after receiving a belated notice of a loss, gives to the insured directions about making out a statement of his loss, and has its agent make an investigation as to the same[48].

45. St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; 49 A. D. 74. Knickerbocker Co. *v.* Gould, 80 Ill. 388.
46. Cornell *v.* Milwaukee Co., 18 Wis. 393.
47. Smith *v.* Haverhill Mut. Co., 1 Allen 297; 79 A. D. 733.
48. Trask *v.* State F. & M. Co., 29 Pa. St. 198; 72 A. D. 622.

And it is said that a waiver of this condition does not occur where the agent of the insurer, having knowledge of a loss, informs the insured that the company is attending to it and that it can be collected, if the policy declares that no agent shall have power to waive a breach of this condition[49].

Sec. 321. This is in line with those authorities holding that agents for the purpose of soliciting insurance, delivering policies and collecting premiums are not agents for the purpose of receiving notice or adjusting losses, such cases holding that notice to the agent of a loss is not notice to the insurer[50]. After the insured had failed and neglected to forward notice of a loss within the required time, he sent proofs of the loss to the general manager of the company who retained the proofs but notified the insured that the company denied all liability under the policy, and this was held no waiver of the failure of the insured to give the notice within the required time[51]. So, a vote of the directors of the company to indefinitely postpone consideration of a loss is no waiver of a breach of the condition[52].

B. CONTRARY VIEW:—Sec. 322. But a great contrariety of opinion exists as to the subject here being considered, and the authorities are rather equally divided. As opposed to the views hereinbefore expressed, it is said that the insertion of the condition in the contract requiring notice of

49. Quinlan *v.* Providence Co., 133 N. Y. 356; 31 N. E. 31; 28 A. S. R. 645.
Titus *v.* Glens Falls Co., 81 N. Y. 411.
50. Bowlin *v.* Hekla Ins. Co., 36 Minn. 433; 31 N. W. 859.
Shapiro *v.* Western Co., 51 Minn. 239; 53 N. W. 463.
Shapiro *v.* St. Paul Co., 63 N. W. 614 (Minn.).
51. Ermentrout *v.* Girard Co., 63 Minn. 305; 65 N. W. 635; 30 L. R. A. 346.
52. Patrick *v.* Farmers Co., 43 N. H. 621; 80 A. D. 197.

a loss in a certain time is for the advantage of the insurer and may be insisted upon by it or waived at its option; and that a waiver will be inferred from any conduct of the insurer manifesting an intention not to insist upon the forfeiture on account of the absence of such notice. Thus, after a failure to transmit notice as required by the policy, proofs were sent to the insurer which were received by it and others called for, such conduct being consistent only with an intention to consider the contract as still in force, the breach of condition as to notice was held waived[53]. Also, it was waived where the company furnished blanks upon which to make the proofs[54], accepted the proofs of loss[55], or required further proofs or information[56], or paid part of the amount due under the policy[57], made an examination and a schedule of the burned property[58], sent an agent to adjust the loss[59]. And it is said that it makes no difference whether the notice is required by statute, charter or by the policy, the provision is still for the benefit of the insurer and may be waived by it[60]. Such waivers, it is said, may be made by an adjusting agent, even though the policy provide that no act or statement of an agent shall be binding upon the insurer[61].

53. Trippe *v.* Provident Soc., 140 N. Y. 23; 35 N. E. 316; 28 L. R. A. 432.
54. Traveler's Co. *v.* Edwards, 122 U. S. 457; 30 L. Ed. 1178.
55. Nuthank *v.* Traveler's Co., 4 Biss. 357.
Jones *v.* Howard Ins. Co., 117 N. Y. 103; 22 N. E. 578.
56. Titus *v.* Glens Falls Co., 81 N. Y. 410.
Armstrong *v.* Agr. Co., 130 N. Y. 560; 29 N. E. 991.
57. Westlake *v.* St. Lawrence Co., 14 Barb. 206.
58. Badger *v.* Glens Falls Co., 49 Wis. 389; 5 N. W. 845.
Beatty *v.* Lycoming, 66 Pa. St. 9.
59. Home Ins. Co. *v.* Myer, 93 Ill. 271.
60. Lewis *v.* Monmouth Co., 52 Me. 492.
61. Stevens *v.* Citizens Co., 69 Ia. 658; 29 N. W. 769.

C. DISTINCTION BETWEEN NOTICE OUT OF TIME AND NOTICE DEFECTIVE IN FORM:—Sec. 323. It is asserted that failing to give the required notice, or giving it out of time, stands on a different footing from the giving of notice in a different form from that required by the policy; and while there is a difference of opinion as to waiving the requirements as to the time of giving notice the authorities are quite distinct that if the notice given is defective or erroneous, and the company put its refusal to pay on other grounds, such is a waiver of the condition as to notice[62], and that an objection on account of error in the notice, not made till the trial, was held to be waived[63]. The Patrick case above cited is comparatively an early case involving this subject, but its reasoning is sound. The opinion states: "A defect in the time of notice stands on different ground from a defect in its matter; while the last, upon notice, may be remedied, it is otherwise with the former, which is necessarily irremediable if the insurer chooses to insist upon it. It may be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of mere defect in form. The silence of an insurance company, upon a defect in form of the notice, might be very injurious to the insured, but it is not at once seen how the assured

62. Patrick *v.* Farmers Co., 43 N. H. 621; 80 A. D. 197, citing:
Bumstead *v.* Dividend Co., 12 N. Y. 81.
Schenk *v.* Mercer Co., 24 N. J. L. 447.
Bilbrough *v.* Met. Co., 5 Duer, 587.

63. Id.
Kernochan *v.* N. Y. Bowery Co., 17 N. Y. 428.
Clark *v.* N. Eng. Ins. Co., 6 Cush. 342; 53 A. D. 44.
Peoria M. Co. *v.* Lewis, 18 Ill. 553.
Underhill *v.* Agawam Co., 6 Cush. 495.
Noyes *v.* Washington Co., 30 Vt. 659.

could be benefitted by notice that he had failed to give information of his loss within the stipulated time, or how he could be prejudiced by the omission."[64].

5. PROOFS OF LOSS:

A. FAILURE TO FILE ANY PROOFS—

(1) IN GENERAL:—Sec. 324. Nearly all policies of insurance, whether of property or of life, require that proof of loss under the policy shall be made within a designated time, with the proviso that if same be not made in the required time no liability shall attach to the insurer. This provision is permissible under the law and when accepted by the insured is binding upon him. But it is a condition imposed for the sole benefit of the insurer, and it has the option of insisting upon the requirement or waiving it as it sees fit. And when a loss has occurred, and there is such conduct on the part of the insurer or its authorized agent as induces the assured reasonably to believe that proofs of loss were not to be demanded, and he, acting under such belief, fails to furnish such proof or to furnish it in the required time, his default or delinquency is waived by the insurer[65]. Whatever difference may exist among the courts as to a waiver of the provision requiring the assured to give notice of a loss, nearly all the authorities agree that the condition as to furnishing proofs of loss may be waived either expressly or by acts and conduct of the insurer or its agent, and that such waiver may be inferred from any acts or conduct

64. Patrick *v.* Farmers Ins. Co., *supra.*
65. Hartford Co. *v.* Keating, 86 Md. 130; 38 Atl. 29; 63 A. S. R. 499.

inconsistent with an intention to insist on a strict compliance with the condition[66].

(2) BY DENIAL OF LIABILITY:—Sec. 325. It is a general rule, subject to but few exceptions, that if the insurer, prior to the time limited for submitting proofs of loss by the insured, denies any liability under the policy, such denial constitutes a waiver of the requirement of the policy as to submitting such proof[67]. Thus, where an insurer, with knowledge of a loss under a policy, refuses to pay the loss under a contention that the policy was not in force at the time of the loss, the necessity of furnishing proofs of the loss is dispensed with[68]. And where the agent of the insurer examined at the place of the loss the facts connected with it and told the assured that he could not recommend payment of the loss for certain reasons, this was held a denial of liability and a waiver of the proofs of loss[69]; and a denial of liability on account of the presence of benzine on the premises has the same effect[70]. So, a denial of liability on the

66. Rokes *v.* Amazon Co., 51 Md. 512; 34 A. R. 323.
67. German-Am. Co. *v.* Norris, 100 Ky. 29; 37 S. W. 267; 66 A. S. R. 324.
Wilson *v.* Com. Union Co., 51 S. Car. 540; 29 S. E. 245; 64 A. S. R. 700.
Commercial Co. *v.* State, 113 Ind. 331; 15 N. E. 518.
Savage *v.* Phoenix Co., 12 Mont. 458; 31 Pac. 66; 33 A. S. R. 591.
Phoenix Co. *v.* Bachelder, 32 Neb. 490; 62 N. W. 911; 29 A. S. R. 443.
Stepp *v.* Nat'l. Assoc., 37 S. Car. 444; 16 S. E. 134.
68. Rochester Loan Co. *v.* Liberty Ins. Co., 44 Neb. 537; 62 N. W. 877; 48 A. S. R. 745.
Faust *v.* American Co., 91 Wis. 158; 64 N. W. 883; 51 A. S. R. 876; 30 L. R. A. 783.
Roe *v.* Dwelling H. Co., 149 Pa. St. 94; 23 Atl. 718; 34 A. S. R. 595.
69. McBride *v.* Republic Co., 30 Wis. 562.
70. Faust *v.* American Co., 91 Wis. 158; 64 N. W. 883; 51 A. S. R. 876; 30 L. R. A. 783, citing among others;
Boyd *v.* Cedar Rapids Co., 70 Ia. 325; 30 N. W. 585.
O'Brien *v.* Ohio Co., 52 Mich. 131; 17 N. W. 726.

ground that no contract ever existed between the parties is a waiver of proofs of loss[71].

(3) REFUSAL TO PAY ON OTHER GROUNDS:—Sec. 326. A refusal of an insurer to pay a loss under its policy on other grounds than the failure of the insured to furnish the required proofs of loss, is a waiver of such proofs[72]. And the same effect results from a notification by the insurer that it would not pay the loss[73]. So, a refusal on the part of an insurance company to pay a claim for accident insurance on the ground that death was caused by poison and the loss not covered by the policy, is a waiver of the requirement that proofs shall be furnished[74]. And an objection, after a loss, that the insured had no title or interest in the property insured, is a waiver of the proofs of loss stipulated for[75]; or that the property lost was not covered by the policy[76], or that through fraud the insured had lost his right to recover[77].

71. Stokes *v.* Mackay, 147 N. Y. 223; 41 N. E. 496.
Knickerbocker Co. *v.* Pendleton, 112 U. S. 696; 5 Sup. Ct. R. 314; 28 L. Ed. 866.
72. Shepherd's Adm. *v.* Peabody Co., 21 W. Va. 368.
Dietz *v.* Providence Co., 33 W. Va. 526; 11 S. E. 50; 25 A. S. R. 908.
Martin *v.* Fishing Co., 20 Pick. 389; 32 A. D. 220.
Ocean Co. *v.* Francis, 2 Wend. 64; 19 A. D. 549.
Carson *v.* German Co., 62 Ia. 433; 17 N. W. 650.
Marston *v.* Mass. Co., 59 N. H. 92.
Tayloe *v.* Merchants Co., 9 How. 390.
Thwing *v.* Great West. Co., 111 Mass. 93.
West. Rock. Co. *v.* Sheets, 26 Gratt. 854.
Aetna Co. *v.* Shryer, 85 Ind. 362.
Merchants Co. *v.* Vining, 68 Ga. 197.
73. Phoenix Co. *v.* Spiers, 87 Ky. 285; 8 S. W. 453.
Sun Co. *v.* Mattingly, 77 Tex. 162; 13 S. W. 1016.
74. Met. Assoc. *v.* Frolland, 161 Ill. 30; 43 N. E. 766; 52 A. S. R. 359.
75. Grange Mills Co. *v.* Western Co., 118 Ill. 396; 9 N. E. 274.
German Co. *v.* Gueck, 130 Ill. 345; 23 N. E. 112; 6 L. R. A. 835.
76. Franklin Co. *v.* Coates, 14 Md. 285.
77. Peoria Co. *v.* Whitehill, 25 Ill. 466.

(4) BY OTHER ACTS OR CONDUCT:—Sec. 327. It has been stated that any conduct on the part of the insurer or its agent that induces the insured to reasonably believe that proofs of loss were not to be demanded, and he, acting under such belief, fails to furnish such proofs in the time required by the policy, renders them thereby waived[78]. Thus, if the insurer make a demand for an arbitration, such demand is a waiver of proofs of loss[79]. Likewise, an agreement to settle on the basis of the figures of a third party[80], or participation in an arbitration[81]. So, if an insurer investigates the cause of a fire injuring property covered by its policy, and thereby obtains sufficient information to enable it to determine the amount of its liability expressly recognized by it, and prepares proofs of loss from information thus obtained, but the insured refuses to sign it because it contains a stipulation for a settlement, the furnishing of formal proof by the insured is thereby waived[82], as the conduct of the insurer was misleading to the insured[83].

78. Hartford Co. *v.* Keating, 86 Md. 130; 38 Atl. 29; 63 A. S. R. 499.
79. Home Co. *v.* Bean, 42 Neb. 537; 60 N. W. 907; 47 A. S. R. 711.
Pretzfelder *v.* Merchants Co., 123 N. Car. 164; 31 S. E. 470; 44 L. R. A. 424.
80. Wholley *v.* Western Co., 174 Mass. 263; 54 N. E. 548; 75 A. S. R. 314.
Graves *v.* Merchants Co., 82 Ia. 637; 49 N. W. 65; 31 A. S. R. 507.
Davidson *v.* Guardian Co., 176 Pa. St. 525; 35 Atl. 220.
Perry *v.* Dwelling H. Co., 67 N. H. 291; 33 Atl. 731; 68 A. S. R. 668.
McCollum *v.* Liverpool Co., 67 Mo. App. 66.
Perry *v.* Faneuil Hall Co., 11 Fed. 482.
McPike *v.* Western Co., 61 Miss. 37.
81. Carroll *v.* Girard Co., 72 Cal. 297; 13 Pac. 863.
82. Larkin *v.* Glens Fall Co., 80 Minn. 527; 83 N. W. 409; 81 A. S. R. 286.
83. 13 Am. & Eng. Enc. L., 345, *et seq.*
Home Co. *v.* Baltimore Co., 93 U. S. 527.
Helvetia Co. *v.* Allis Co., 11 Colo. App. 264; 53 Pac. 242.
Aetna Co. *v.* Simmons, 49 Neb. 811; 69 N. W. 125.

Sec. 328. But where notice of a loss is received by the company, failure to demand further proof is not waived[84], as mere silence of the insurer cannot amount to a waiver of proof[85], it not being its duty to notify the insured to comply with his contract[86].

B. DEFECTIVE PROOFS WITHIN TIME REQUIRED—

(1) NO OBJECTION BY INSURER:—Sec. 329. As has been heretofore noted, the condition in a policy of insurance requiring proofs of loss to be furnished by the insured as a condition precedent to his right to recover must be complied with by him. And the compliance must be within the required time and in the designated manner. But a distinction exists between the failure to furnish the required proof within the time limited and the filing of proofs which are in some way defective or insufficient. In the former case, no duty is upon the insurer to take any steps whatever for the failure of timely proof is a release, as it were, *ipso facto* from liability without any action by the company; but in the latter, it is the duty of the insurer, if it receive, within the time limited, defective or insufficient proofs of loss, to return them to the insured within a reasonable time, designating the particulars in which they are objectionable, and failure of the insurer to do this amounts to a waiver by it of the deficiency of the proofs and no defense can later be predicated thereon.

84. O'Reilley *v.* Guardian Co., 60 N. Y. 169; 19 A. R. 151.
Desilver *v.* State Mut. Co., 38 Pa. St. 130.
85. Mueller *v.* South Side Co., 87 Pa. St. 399.
86. Ayers *v.* Hartford Co., 17 Ia. 176.
Andraveno *v.* Mut. Co., 38 Fed. 806.

Sec. 330. Or, as it has been differently stated, if the insured in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of the policy, good faith equally requires that the company notify him promptly of its objections so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of a waiver by estoppel[87]. And even if the company return the proofs after receiving them, its duty does not end there; it must state its objections or the defects will be held waived[88]. So, a return of the proofs with a statement that they do not correspond with printed instructions, is not a performance of the duty resting upon the insurer, and defects in the proofs cannot later be set up by it as a defense to an action upon the policy[89]. And retaining the books of the insured, furnished at the request of the insurer, till after expiration of the time limited, is a waiver of the defects in the proofs[90].

Sec. 331. An apparent departure from the general rule is noted in an Iowa case[91], where it is said that mere silence of the insurer will not amount to a waiver of defects in the proofs of loss. But in

87. Moyer *v.* Sun Ins. Co., 176 Pa. St. 579; 35 Atl. 221; 53 A. S. R. 690.
Gould *v.* Dwelling H. Co., 134 Pa. St. 588; 19 Atl. 793; 19 A. S. R. 717.

88. Vangindertaelen *v.* Phoenix Co., 82 Wis. 112; 51 N. W. 1122; 33 A. S. R. 29.
Welsh *v.* London Corp., 151 Pa. St. 607; 25 Atl. 142; 31 A. S. R. 786.

89. Universal Co. *v.* Block, 109 Pa. St. 535.

90. Bonnert *v.* Penn. Co., 129 Pa. St. 558; 18 Atl. 552; 15 A. S. R. 739.

91. Ayres *v.* Hartford Co., 17 Ia. 176; 85 A. D. 553.
Affirmed on second appeal, 21 Ia. 193.

the next clause of the opinion the court approves the general rule by saying that an objection to the proofs upon one specific ground and silence as to another in which was the real defect, operate as a waiver of the latter. And it will be found that almost an unbroken line of authorities support the doctrine that defects in proofs filed within the required time are waived unless they be promptly pointed out to the insured so that he may have an opportunity to correct them[92].

(2) OBJECTION ON OTHER GROUNDS:—Sec. 332. The rule applicable to cases where the insurer fails to object to the proofs or point out their defects obtains likewise where objections are made but put upon grounds other than the particular defect in the proofs. Or, as it has been said, where proofs of loss are served and retained by the insurance company without objection to the defects, and the company refuses to pay the loss, placing

92. Cayon *v.* Dwelling H. Co., 68 Wis. 510; 32 N. W. 540.
Farnum *v.* Phoenix Co., 83 Cal. 246; 2 Pac. 869; 17 A. S. R. 233.
Jones *v.* Mech. Co., 36 N. J. Eq. 29; 13 A. R. 405.
Insurance Co. *v.* McDowell, 50 Ill. 120; 99 A. D. 497.
Weed *v.* Hamburg Co., 133 N. Y. 394; 31 N. E. 231.
Davis Shoe Co. *v.* Kittanning Co., 138 Pa. St. 73; 20 Atl. 838; 21 A. S. R. 904.
German Co. *v.* Gray, 43 Kans. 497; 23 Pac. 637; 19 A. S. R. 150; 8 L. R. A. 70.
Blake *v.* Exchange Co., 12 Gray 265 (Mass.).
Travis *v.* Continental Co., 32 Mo. App. 198.
Fire Ins. Co. *v.* Felrath, 77 Ala. 194.
Breckenridge *v.* American Co., 87 Mo. 62.
Works *v.* Farmers Co., 57 Me. 281.
Myers *v.* Council Bluffs Co., 72 Ia. 176; 33 N. W. 453.
Swan *v.* Liverpool Co., 52 Miss. 704.
Butterworth *v.* Western Co., 132 Mass. 492.
Little *v.* Phoenix Co., 123 Mass. 380; 25 A. R. 96.
Sun Co. *v.* Dudley, 65 Ark. 240; 45 S. W. 539.
Alston *v.* Phoenix Co., 100 Ga. 287; 27 S. E. 981.
Angier *v.* Western Co., 10 S. Dak. 82; 71 N. W. 761; 66 A. S. R. 685.
1st Nat'l. Bank *v.* American Co., 58 Minn. 492; 60 N. W. 345.
Western Co. *v.* Richardson, 40 Neb. 1; 58 N. W. 597.

its refusal on some ground other than defects in the proofs, any further performance in relation to the proofs is waived and the company is estopped when sued on its policy for the loss to make any formal objections to the proofs[93]. This doctrine is universally adhered to and is founded on the proposition that both parties must conduct themselves fairly and in good faith, and, therefore, that fair dealing entitles the insured to be apprised of the defects or insufficiency in the proofs in order that he may remedy the matter before it is too late[94]. The principle is well stated in the statute of South Dakota: "All defects in preliminary proof which the insured might remedy, and which the insurer omits to specify to him without unnecessary delay, as grounds of objection, are waived"[95].

C. NOT FILED IN TIME:—Sec. 333. The provision in an insurance policy that proofs of loss shall be submitted to the insurer within a specified time is binding upon the insured, and his failure to comply therewith is a bar to his recovery on the

93. Continental Co. *v.* Ruckman, 127 Ill. 364; 20 N. E. 77; 11 A. S. R. 121.
Phoenix Co. *v.* Tucker, 92 Ill. 64; 34 A. R. 106.
Scammon *v.* Conn. Ins. Co., 20 Ill. App. 500.

94. Central Co. *v.* Oates, 86 Ala. 558; 6 So. 83; 11 A. S. R. 67.
Fireman's Co. *v.* Floss, 67 Md. 403; 10 Atl. 139; 1 A. S. R. 398.
May, Insurance, 469B (4th Ed.).
Tayloe *v.* Mer. Co., 9 How. 390.
Hartford Co. *v.* Harmer, 2 Oh. St. 452.
Ayres *v.* Hartford Co., 17 Ia. 176; (21 Ia. 193); 85 A. D. 553.
2 Wood, Insurance, Sec. 452.
Martin *v.* Fishing Co., 20 Pick. 389; 2 A. D. 220.
Ocean Co. *v.* Francis, 2 Wend. 64; 19 A. D. 549.
McBryde *v.* S. Car. Co., 55 S. Car. 589; 33 S. E. 729; 74 A. S. R. 769.
Nurney *v.* Fireman's Co., 63 Mich. 633; 30 N. W. 350; 6 A. S. R. 338.
Phoenix Co. *v.* Badger, 53 Wis. 284; 10 N. W. 504.
Western Co. *v.* Putnam, 20 Neb. 331; 30 N. W. 246.

95. See: Enos *v.* St. Paul Co., 4 S. Dak. 639; 57 N. W. 919; 46 A. S. R. 796.

policy. And it is his duty to make such proofs without any request or demand therefor from the insurer, for the policy which he accepts is notice to him of its requirements. And, unlike receiving and retaining defective proofs without specifying objections thereto, the mere receipt after the time limited of proofs of loss and their retention in silence is not and should not be a waiver by the insurer of the failure to file the proofs in time[96]. But caution should be used in applying this doctrine in order to bring about an exercise of good faith and fair dealing on the part of the insurer. And it must be remembered that a distinction exists between those cases where the insurer receives belated reports and says or does nothing, and those other cases where the insurer by its conduct induces delay or renders the production of proofs useless or unavailing or induces in the mind of the insured an honest belief that no proofs will be required. In the former cases the insured must suffer for his own laches; but in the latter, his default is deemed waived on account of the conduct of the insurer in lulling him into a false feeling of security[97].

Sec. 334. Thus, where the company received the proofs after the time limited, referred them to its adjuster and retained them without objection or complaint for five months, the court said that if the company acted upon the proofs as having been re-

96. Andaveno *v.* Mutual, 38 Fed. 806.
Daniels *v.* Equitable, 50 Conn. 551.
Cent. City *v.* Oates, 86 Ala. 558; 6 So. 83; 11 A. S. R. 67.
Ayres *v.* Hartford Co., 17 Ia. 176; 21 Ia. 193; 85 A. D. 555.
Bell *v.* Lycoming Co., 19 Hun 238.

97. Kenton Co. *v.* Wigginton, 89 Ky. 330; 12 S. W. 668; 7 L. R. A. 80.
Martinson *v.* N. B. Co., 64 Mich. 372; 31 N. W. 291.
German Co. *v.* Grunert, 112 Ill. 69.
Gane *v.* St. Paul Co., 43 Wis. 109.

ceived in time, and made no objections whatever until the trial, it would be presumed to have waived the objection that the proofs were not filed in time[98]. And by its action in sending to the insured a blank form for proof of loss after the expiration of the time designated for furnishing same, and receiving the proof without objection when made, it waived a default in making such proof within the required time[99]. After a belated proof had been received by the insurer, it called upon the insured for further information in the procurement of which the insured was put to further expense and trouble. The insurer, in an action on the policy, set up the defense that the proofs were not served in time. The court said that it is well settled that such defenses are waived when the company, with full knowledge of the facts, requires the insured, by virtue of the contract, to do some act or incur some expense or trouble inconsistent with the claim that the contract had become inoperative[100]. So, requiring further proofs is a waiver of prior defaults[1], or demanding the certificate of a notary as to the loss[2]. And a failure to furnish proof of death within the time limited by a life insurance policy is waived when the company makes a proposal to settle, or abso-

98. Commercial Co. *v.* Hocking, 115 Pa. St. 407; 8 Atl. 589; 2 A. S. R. 562.
Lycoming Co. *v.* Schreffer, 42 Pa. St. 188; 82 A. D. 501.
99. Traveler's Co. *v.* Edwards, 122 U. S. 457; 30 L. Ed. 1178.
Burlington Co. *v.* Lowery, 61 Ark. 108; 32 S. W. 383; 54 A. S. R. 196.
Insurance Co. *v.* Eggleston, 96 U. S. 572.
100. Trippe *v.* Provident Soc., 140 N. Y. 23; 35 N. E. 316; 22 L. R. A. 432.
1. Armstrong *v.* Agr. Co., 130 N. Y. 560.
Bliss: Life Insurance, 268.
Coke: Life Insurance, 118.
2. Merchants Co. *v.* Gibbs, 56 N. J. L. 679; 29 Atl. 485; 44 A. S. R. 413.
Martin *v.* State Co., 44 N. J. L. 485; 43 A. R. 397.

lutely refuses to pay, or denies all liability, or asks for additional proofs without making objection that proof was not made in time[3].

D. WHO MAY WAIVE PROOFS:—Sec. 335. As will have been noted in previous pages, perhaps no greater difficulty will be found in the law of insurance than in an attempt to harmonize the adjudications on the question as to who, or, as is more frequently to determine, what agents may waive conditions in policies of insurance. But in the waiver of proofs of loss, many courts which deny to an agent the power to waive conditions breached prior to a loss when the policy prohibits such waiver, uphold such power in him for the waiver of proofs of loss, saying that the condition of the policy prohibiting agents from exercising such authority applies only to those provisions which relate to the formation and continuance of the contract and are essential to its binding force while it is running and does not apply to those conditions which are to be performed after a loss has occurred, such as furnishing preliminary proof[4]. Other courts state clearly and decisively the proposition that one who is appointed by an insurer to make contracts of insurance, issue policies and collect premiums is the general agent of the insurer and as such is authorized to waive proofs of loss either

3. McElroy *v.* Hancock, 88 Md. 137; 41 Atl. 112; 71 A. S. R. 400.
Hartford Co. *v.* Keating, 86 Md. 130; 63 A. S. R. 499.

4. Wheaton *v.* N. B. Co., 76 Cal. 417; 18 Pac. 758; 9 A. S. R. 216.
N. O. Assoc. *v.* Matthews, 65 Miss. 301; 4 So. 62.
O'Brien *v.* Ohio Co., 52 Mich. 131; 17 N. W. 726.
Franklin *v.* Chi. Ice Co., 36 Md. 102; 11 A. R. 469.
Blake *v.* Ex. Co., 12 Gray 265.
Carson *v.* Jersey Co., 43 N. J. L. 300; 39 A. R. 584.
Indiana Co. *v.* Capehart, 108 Ind. 270; 8 N. E. 285.
Dibbrell *v.* Georgia Co., 110 N. Car. 193; 14 S. E. 783; 28 A. S. R. 678.

expressly or by his conduct[5]; others saying that a waiver may be made by an authorized agent[6], the determination of whether an agent is authorized or not being the difficult point.

Sec. 336. It occurs to the writer that no question should be raised as to the power of an adjuster to waive proofs of loss and that any act or expression of his calculated to induce, or having the effect of inducing a belief in the mind of the assured that such proof would not be insisted upon or, if defective, that no objection would be made should be held a waiver; and it is thought that the cases quite generally declare this doctrine[7]. It must be shown, of course, that the adjuster had authority to represent the company in adjusting the loss[8], or in settling it[9]. But some cases go farther than this and say that an agent having authority to solicit insurance, countersign policies, collect premiums and deliver the policies is presumed to have power to waive proofs of loss[10]; and, again, this doctrine is denied, and a diametrically opposite position

5. Phoenix Co. *v.* Bowdre, 67 Miss. 620; 7 So. 596; 19 A. S. R. 326.
Rivara *v.* Queen's Ins. Co., 62 Miss. 728.
6. Perry *v.* Mech. Co., 11 Fed. 478.
7. Aetna Co. *v.* Shryer, 85 Ind. 362.
Indiana Co. *v.* Copehart, 108 Ind. 270; 8 N. E. 285.
Western Co. *v.* McCarty, 18 Ind. App. 449.
David *v.* Oakland Co., 11 Wash. 181; 39 Pac. 443.
Dwelling H. Co. *v.* Osborn, 1 Kans. App. 197; 40 Pac. 1099.
Dick *v.* Equitable Co., 92 Wis. 46; 65 N. W. 742.
Wright *v.* Fire Assoc., 12 Mont. 474; 31 Pac. 87; 19 L. R. A. 211.
Dibbrell *v.* Georgia Co., 110 N. Car. 193; 28 A. S. R. 678.
Hahan *v.* Guardian Co., 23 Oreg. 576; 32 Pac. 683; 37 A. S. R. 709.
8. Germania Co., *v.* Davis, 40 Neb. 700; 59 N. W. 698.
Kirkman *v.* Farmers Co., 90 Ia. 457; 57 N. W. 952; 48 A. S. R. 454.
9. Kahn *v.* Trader's Co., 4 Wyo. 419; 34 Pac. 1059; 62 A. S. R. 47.
10. Mickell *v.* Phoenix Co., 144 Mo. 420; 46 S. W. 435.
Snyder *v.* Dwelling H. Co., 59 N. J. L. 544; 37 Atl. 1022; 59 A. S. R. 625.
Hartford Co. *v.* Keating, 86 Md. 130; 38 Atl. 29; 63 A. S. R. 499.

taken[11]. We think that the correct basis for determination of the matter is this: If the agent be clothed with authority, or apparent authority to adjust or settle losses, or if he has been accustomed, with the acquiescence of the company, to receive proofs of loss and determine in any manner their sufficiency, then he should be held to have authority to waive proofs of loss or defects therein[12].

E. WHETHER PROOFS MAY BE WAIVED ORALLY—

(1) IN THE NEGATIVE:—Sec. 337. One provision found in nearly all policies is that no agent shall have authority to change or waive any of its conditions or provisions except by writing indorsed on the policy. This applies equally to provisions requiring proofs of loss as to other conditions. And it has been said that in prescribing such a term or condition, the insurer has prescribed only a reasonable rule to guard against the uncertainties of parol evidence[13], and the possibility of fraud and collusion[14]; and that the provision becomes binding as a part of the contract, and acceptance of the policy is notice to the insured of this condition in the performance of which he defaults at his peril[15].

(2) IN THE AFFIRMATIVE:—Sec. 338. But the current of authority undoubtedly flows in

11. Kirkman *v.* Farmers Co., *supra.*
Lohnes *v.* Ins. Co., 121 Mass. 439.
Harrison *v.* Hartford Co., 59 Fed. 732.
Smith *v.* Niagara Co., 60 Vt. 682; 15 Atl. 353; 6 A. S. R. 144.
12. Graves *v.* Merchants Co., 82 Ia. 637; 49 N. W. 65; 31 A. S. R. 507.
Harnden *v.* Milwaukee Co., 164 Mass. 382; 41 N. E. 658.
13. Kyte *v.* Commercial Co., 144 Mass. 43; 10 N. E. 318.
14. Walsh *v.* Hartford Co., 73 N. Y. 5.
15. Wheaton *v.* N. B. Co., 76 Cal. 415; 18 Pac. 758; 9 A. S. R. 216.
See: Insurance Co. *v.* Wilkinson, 13 Wall. 222.

the opposite direction. The better rule is that although the policy specially provides that the preliminary proof of loss shall be made in a particular mode and within a limited time, yet the company may, even through its agent, waive the benefit of the provision, and a waiver may be implied from the manner in which the company or its agent has dealt with the policy-holder subsequent to the loss[16]. And there is no good reason why the condition requiring proofs of loss may not be waived by parol in the face of the provision that it shall not be effective unless written on the policy. Insurers are subject to the same laws controlling other contracting parties, and any written contract, not required by the statute of frauds to be in writing, may be modified by a subsequent oral agreement between the parties thereto, or its conditions may be abrogated by a course of conduct inconsistent with its terms. And here, again, it is said that this stipulation against waiver of conditions except by writing on the policy applies only to those conditions which relate to the formation and continuance of the contract and are essential to its binding force, while it is running, and does not apply to conditions which are to be performed after a loss has occurred; and it is, therefore, held that preliminary proofs may be waived by parol contrary to the terms of the policy[17].

6. ARBITRATION:—Sec. 339. The usual provision as to arbitration in policies of insurance is that in case of difference between the insurer and

16. Wood: Fire Insurance, 447.

17. Phoenix Co. *v.* Bowdre, 67 Miss. 620; 7 So. 596; 19 A. S. R. 326.
Insurance Co. *v.* Eggleston, 96 U. S. 572.
Burlington Co. *v.* Kennerly, 60 Ark. 532; 31 S. W. 155.
Carson *v.* Jersey City Co., 43 N. J. L. 300; 39 A. R. 584.
Traveler's Co. *v.* Harney, 82 Va. 949.
German Co. *v.* Gray, 43 Kans. 497; 23 Pac. 637; 19 A. S. R. 150.

the insured as to the amount of a loss, the matter shall be referred to a board of appraisers who shall determine the amount, and that such determination shall be a condition precedent to a right of action by the assured, some policies attempting to make the amount so determined conclusive. This condition is for the benefit of the insurer and may be waived or insisted upon by it at its option. A waiver of the provision may be express or it may be inferred from conduct inconsistent with an intention to insist upon it.

Sec. 340. Thus, where the insurer refuses to pay any amount at all, the clause is waived[18]. And where the company took possession of the damaged property and proceeded to repair it, it could not later defend an action on the ground of no appraisal[19]. In one case, after a fire and within the time prescribed by the policy the plaintiffs furnished the defendant the required proofs of loss, and thereupon, without questioning or making objection to the amount of the loss claimed or to the proofs thereof, the company, for other reasons, not only denied its liability but denied the existence of the policy, claiming that it had been cancelled two months before the loss. This was held to be sufficient evidence that the insurer acquiesced in the amount of the loss claimed, and thereby waived its right to have it determined by arbitration[20]. And even where such arbitration is a condition precedent to the right to maintain an action on the policy, the assured, after his prof-

18. Western Co. *v.* Putnam, 20 Neb. 331; 30 N. W. 246.
19. Cobb *v.* N. E. Co., 6 Gray, 192 (Mass.).
20. Farnum *v.* Phoenix Co., 83 Cal. 246; 23 Pac. 869; 17 A. S. R. 233.
Lasher *v.* N. W. Co., 18 Hun 98; 35 How. Pr. 318.
Mentz *v.* Armenia Co., 79 Pa. St. 478; 21 A. R. 86.
Phoenix Co. *v.* Badger, 53 Wis. 284; 10 N. W. 504.

fered proofs of loss have been rejected by the insurer without demand for an appraisal or objection to the amount of the loss as shown by such proofs, may sue for the loss without first showing an appraisal[21]. And a waiver likewise occurs where the assured, after a loss, demands an arbitration which is refused by the insurer[22]. So it is said that arbitration becomes imperative only after a written request for one has been made. The request is optional with either party, and if neither of them takes advantage of the right to arbitrate, it must be deemed to have been waived by both[23]. And an absolute denial of liability is a waiver of the arbitration clause[24], although this has been differently decided[25].

7. LIMITATION OF TIME TO SUE:

A. WHAT CONSTITUTES A WAIVER:—Sec. 341. Another clause common to policies is that providing that all right of action shall be barred unless exercised within a certain time after a loss or after proofs of loss have been furnished. This condition is valid and binds the insured if insisted upon by the insurer or unless something is done by

21. Randall *v.* American Co., 10 Mont. 340; 25 Pac. 953; 24 A. S. R. 50.
22. Continental Co. *v.* Wilson, 45 Kans. 250; 25 Pac. 629; 23 A. S. R. 720.
Vangindertaelen *v.* Phoenix Co., 82 Wis. 112; 51 N. W. 1122; 33 A. S. R. 29.
23. Nurney *v.* Fireman's Co., 63 Mich. 633; 30 N. W. 350; 6 A. S. R. 338.
Gere *v.* Council Bluffs Co., 67 Ia. 272; 23 N. W. 137; 25 N. W. 159.
Wright *v.* Susquehanna Co., 110 Pa. St. 29; 20 Atl. 716.
24. Wainer *v.* Nulford Co., 153 Mass. 235; 26 N. E. 877; 11 L. R. A. 598.
Hutchinson *v.* Liverpool Co., 153 Mass. 143; 26 N. E. 439; 10 L. R. A. 558.
German Co. *v.* Etherton, 25 Neb. 505; 41 N. W. 406.
25. Pioneer Co. *v.* Phoenix Co., 106 N. Car. 28; 10 S. E. 1059.

it manifesting an intention or inclination not to enforce the provision. The condition is a stringent one and oftentimes oppressive upon the insured, and the inclination of the courts is to hold slight evidence sufficient to show that the insurer has elected to forego its rights thereunder. And if the course of conduct pursued by the insurer is such as to induce the insured to believe that the loss will be paid or adjusted without suit, and for this reason suit is not brought within the time prescribed in the policy, then suit may be brought after such time, for the conduct of the insurer constitutes a waiver of the limitation[26]. So, part payment of the loss produces the same result[27], as does fraud of the insurer in holding out reasonable hopes of a settlement[28], or misconduct of its agent misleading to the assured[29]. And if the acts of the insurer are such as to induce a reasonably prudent man to believe it unnecessary to bring suit, the limitation is waived[30], as it is if the insurer promises to pay after the suit is brought[31], or flatly refuses to pay at all[32], or rec-

26. St. Paul Co. *v.* McGregor, 63 Tex. 404.
Smith *v.* Glens Falls Co., 62 N. Y. 86.
Farmers Co. *v.* Chestnut, 50 Ill. 115; 99 A. D. 492.
Peoria Co. *v.* Hall, 12 Mich. 202.
Grant *v.* Lexington Co., 5 Ind. 23; 61 A. D. 74.
Killips *v.* Putnam Co., 28 Wis. 472; 9 A. R. 506.
McFarland *v.* Peabody Co., 6 W. Va. 425.
27. Kentucky Mut. Co. *v.* Turner (Ky.); 13 S. W. 104.
28. Mickey *v.* Burlington Co., 35 Ia. 174; 14 A. R. 494.
Coorheis *v.* People's Soc., 91 Mich. 469; 51 N. W. 1109.
Little *v.* Phoenix Co., 123 Mass. 389; 25 A. R. 96.
Martin *v.* Slate Co., 44 N. J. 485; 43 A. R. 397.
29. Jennings *v.* Met. Co., 148 Mass. 61; 18 N. E. 601.
30. Bish *v.* Hawkeye Co., 69 Ia. 184; 28 N. W. 553.
Black *v.* Winnesheik Co., 31 Wis. 74.
Derrick *v.* Lamar Co., 74 Ill. 404.
31. Home Co. *v.* Meyer, 93 Ill. 272.
Ames *v.* N. Y. Co., 14 N. Y. 253.
32. Georgia Home Co. *v.* Jacobs, 56 Tex. 366.
State Co. *v.* Maackens, 38 N. J. L. 564.
Commercial Co. *v.* Allen, 80 Ala. 571.
Aetna Co. *v.* Maguire, 51 Ill. 342.

ognizes any liability[33]. The limitation is waived where the insurer, within the time limited, made an assignment for the benefit of creditors[34], or sent a letter to the insured requesting him to let the matter rest till the adjuster could see the attorney of the insured[35]; or refused to permit a beneficiary in an accident policy to inspect its by-laws and misstated the time within which action should be brought[36], or retained the books and papers of the assured till after the expiration of the prescribed time[37]. And this condition may be waived orally as well as in writing, notwithstanding a provision to the contrary in the policy[38].

B. ACTS NOT A WAIVER:—Sec. 342. But the clause is not waived by the failure and neglect of the insurer to adjust the loss[39], nor by mere negotiations[40], nor by a promise to pay, which promise is withdrawn four months prior to the expiration of the time limited[41], nor is silence such a waiver[42], nor indefinite conversations about an adjustment[43], nor where the insurer declines to enter into any negotiations[44].

33. Horst *v.* Insurance Co., 73 Tex. 67; 11 S. W. 148.
34. In re St. Paul Co., 58 Minn. 163; 59 N. W. 996; 49 A. S. R. 497.
35. Turner *v.* Fidelity Co., 112 Mich. 425; 70 N. W. 898; 67 A. S. R. 428; 38 L. R. A. 529.
36. Met. Assoc. *v.* Froiland, 161 Ill. 30; 43 N. E. 766; 52 A. S. R. 359.
37. Bonnert *v.* Penn. Co., 129 Pa. St. 553; 18 Atl. 552; 15 A. S. R. 739.
38. Dwelling H. Co. *v.* Brodie, 52 Ark. 11; 11 S. W. 1016; 4 L. R. A. 458.
Gladding *v.* California Co., 66 Cal. 6; 4 Pac. 764.
Blake *v.* Exchange Co., 12 Gray 271.
Franklin Co. *v.* Chi. Ice Co., 36 Md. 102; 11 A. R. 469.
Wood, Fire Insurance, (2d Ed.) Art. 525.
39. Dutton *v.* Vermont Co., 17 Vt. 369.
40. Allemania Co. *v.* Little, 20 Bradw. 431.
41. Garretson *v.* Hawkeye Co., 65 Ia. 468; 21 N. W. 781.
42. Schroeder *v.* Keystone Co., 2 Phila. 286.
43. Ripley *v.* Aetna Ins. Co., 30 N. Y. 136; 86 A. D. 362.
44. Id.

CHAPTER 13.

TORTS.

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1. IN GENERAL:—Sec. 343. If a party have a right under the law to sue either in tort or on an implied contract under the same line of facts, he will be held to have waived one by proceeding on the other. But no waiver can take place unless the party have full knowledge of all the facts and of all his rights thereunder[45]. A party may waive an action of tort and sue in *assumpsit* for the money which he paid on the contract or which the defendant has received under it; but where part of the consideration was land and claims against other persons, a recovery for them cannot be had under a count for money had and received unless so far as the defendant may have converted them into money. If more than mere rescission is sought, the plaintiff must sue for damages[46]. A party cannot waive a tort and bring an action in *assumpsit* against the tort-feasor except where the property has been converted into money or its equivalent[47].

Sec. 344. If one has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and

45. Silvey *v.* Tift, 123 Ga. 804; 51 S. E. 748; 1 L. R. A. (N. S.) 386.
46. Pearsoll *v.* Chapin, 44 Pa. St. 9.
47. Emerson *v.* McNamara, 41 Me. 565.
Androscoggin Co. *v.* Metcalf, 65 Me. 40.
Quimby *v.* Lowell, 89 Me. 547; 36 Atl. 902.

treat him as a wrong-doer and sue him for a trespass or for a conversion of the property, or he may affirm his acts and treat him as his agent and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as his agent, he cannot afterward treat him as a wrong-doer, nor can he affirm his acts in part and void them as to the rest[48]. So, if property has been disposed of by him who tortiously obtains possession of it, the tort may be waived and *assumpsit* maintained[49], even though there is no positive proof as to the amount received for the property[50]. And if a passenger is injured through the negligence of a carrier, while traveling under a contract, he may waive the contract and sue in tort, or *vice-versa*[51].

2. FRAUD AND FRAUDULENT REPRESENTATIONS:—Sec. 345. Courts look with disfavor upon alleged waivers of fraud or fraudulent representations inducing contracts. While it is true that such fraud may be ignored by the party entitled to complain of it, yet in order to show a complete waiver, it must clearly appear that at the time of such alleged waiver there was full knowledge of all the facts, and the acts or language of the party against whom the waiver is alleged must be absolutely inconsistent with any intention to take advantage of his rights after such knowledge[52]. The confirmation of the act tainted with fraud must be deliberate and unequivocal.

48. Addison on Torts, 33.
49. Miller *v.* King, 67 Ala. 575.
Doon *v.* Ravey, 49 Vt. 293.
50. Smith, et al. *v.* Jernigan, 83 Ala. 256; 3 So. 515.
51. L. S. & M. S. Ry. Co. *v.* Teeters, 166 Ind. 335; 77 N. E. 599; 5 L. R. A. (N. S.) 425.
52. Cumberland Coal Co. *v.* Sherman, 20 Md. 117.

The decisions are somewhat inharmonious as to what facts and circumstances will be sufficient to amount to a waiver of fraud in the inducement of a contract. Where a defrauded vendee of property retains it after discovery of fraudulent representations regarding it, he is said neither to have waived the fraud nor a right to sue for damages[53]. And merely offering the property for sale after ascertaining the true facts is not a waiver[54]; nor recovering an uncollectable judgment for the purchase-price[55]; although selling it amounts to a waiver of the right to rescind and to sue for damages[56]. And one knowing of fraud who subsequently confirms the original contract by making new agreements regarding it or doing any other act manifesting an intention to treat it as a valid and subsisting agreement, waives the fraud and forfeits any equitable relief he might have had thereon[57]. But it is not a waiver to accept part payment of a purchase-price note, the vendor stating at the time that he did not waive his claim for damages on account of the de-

53. Murray *v.* Jennings, 42 Conn. 9.
Sells *v.* Miss. River L. Co., 88 Wis. 581; 60 N. W. 1065.
Matlock *v.* Reppy, 47 Ark. 148; 14 S. W. 546.
54. Pierce *v.* Wilson, 34 Ala. 596.
Cottrill *v.* Krum, 100 Mo. 397; 13 S. W. 753.
55. Standard S. M. Co. *v.* Owings, 140 N. Car. 503; 53 S. E. 345; 8 L. R. A. (N. S.) 582.
56. Baker *v.* Maxwell, 99 Ala. 558; 14 So. 468.
57. Thompson *v.* Libby, 36 Minn. 287; 31 N. W. 52.
John *v.* Hendrickson, 81 Ind. 350.
Werner *v.* Pen Argyl Co., 133 Pa. St. 457; 19 Atl. 417.
Rogers *v.* Higgins, 57 Ill. 244.
Gilchrist *v.* Manning, 54 Mich. 210; 19 N. W. 959.
Masson *v.* Bovet, 1 Denio 69.
Grymes *v.* Sanders, 93 U. S. 55.
Vernol *v.* Vernol, 63 N. Y. 45.
Bower *v.* Metz, 54 Ia. 394; 6 N. W. 551.
Seavy *v.* Potter, 121 Mass. 297.
Hunt *v.* Hardwick, 68 Ga. 100.
Brown *v.* Waters, 7 Neb. 424.
Barman *v.* Woods, 38 Ark. 351.

ceit[58]; and false representations that a mortgage is a prior lien are not waived by retaining the mortgage[59].

Sec. 346. The principles here set out have been well commented on by a Federal court as follows: "The contract, being against conscience because of the fraud, is not obligatory upon him if he shall so elect; but if, when fully informed of the fraud, he voluntarily confirms, ratifies and performs and exacts performance of the contract, he condones the fraud, and such ratification, like the unauthorized act of an agent, relates to the time of the contract, confirming it from its date and purging it of fraud. With respect to an executory contract, one may not, with knowledge of the fraud, continue to carry it out, exacting performance from the other party to it, receive its benefits, and still pursue an action for deceit; and this because continued execution with knowledge of the fraud signifies the ratification of a contract voidable for fraud, and condones the fraud. For example, if one by the imposition of fraudulent practices, has been induced to purchase goods, and after their receipt discovers the fraud, he may rescind, or may affirm and have his action for the deceit. But if, before delivery of the goods, he has discovered the fraud, he may not then accept the goods and still have an action for the deceit. He had sustained no injury prior to the discovery of the fraud. He was under no legal obligation to execute a contract imposed upon him through fraud. Fraud without damage, fallen or inevitable, is not actionable. The loss arises from his acceptance of the goods. This being done with knowledge of the

58. Cain *v.* Dickinson, 60 N. H. 371.
59. Childs *v.* Merrill, 63 Vt. 463; 22 Atl. 626; 14 L. R. A. 264.

fraud, he has voluntarily brought upon himself the injury. *Volenti non fit injuria.* With respect to an executory contract voidable by reason of fraud, the defrauded party, with knowledge of the deceit practiced upon him, may not play fast and loose. He cannot approbate and reprobate. He must deal with the contract and with the wrong-doer at arm's length. He may not, with knowledge of the fraud, speculate upon the advantages or disadvantages of the contract, receiving its benefits and at the same time repudiating its obligations"[60].

Sec. 347. But if the contract be not wholly executory, different principles obtain. For if the party complaining of the fraud has partly performed his part of the contract before learning of the deceit practiced upon him, he may maintain an action for the fraud even though he proceed to full performance of his contract[61]. In line herewith, it has been further said: "As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in any given case. He may select and adopt one as better adapted to work out his purpose than the others, but his choice is not compulsory or final, and if not satisfied therewith, he may commence

60. Kingman & Co. *v.* Stoddard, 85 Fed. 940; 29 C. C. A. 413; 57 U. S. App. 379.
Simon *v.* Goodyear Co., 105 Fed. 573; 44 C. C. A. 612; 52 L. R. A. 745.
Saratoga Co. *v.* Row, 24 Wend. 74; 35 A. D. 598.
Gilmer *v.* Ware, 19 Ala. 252.
Minn. Thresher Co. *v.* Gruben, 6 Kans. App. 665; 50 Pac. 67.
Grindrod *v.* Ango-Am. Bond Co., 85 Pac. 891.
Brown *v.* Waters, 7 Neb. 424.
Males *v.* Lowenstein, 10 Oh. St. 512.
Downer *v.* Smith, 32 Vt. 1; 36 A. D. 148.

61. Haven *v.* Neal, 43 Minn. 315; 45 N. W. 612.
Whitney *v.* Allaire, 4 Denio 554; see, 1 N. Y. 305.
Mallory *v.* Leach, 35 Vt. 156; 82 A. D. 625.
Nauman *v.* Oberle, 90 Mo. 666; 3 S. W. 380.

and carry through the prosecution of another. Thus, where a sale of chattels is induced by the fraud of the vendee, the vendor may prosecute the vendee for the price of the articles in one action, and in another for damages on account of the fraud; both proceeding on the theory of ratifying the sale. But he cannot maintain either if he has rescinded the sale, or if, on the theory of rescission, he has resorted to replevin to recover the property. No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts"[62].

3. CONVERSION:—Sec. 348. That the owner of property wrongfully obtained by another may waive his right of action for the wrong and sue for the value of the property is a principle upon which all the courts agree, with the proviso that the property has been changed into money or its equivalent by the wrong-doer[63]. But on this proviso there is a hopeless division of opinion. It was in an early day universally held that unless the property had been so converted into money or its equivalent that the action must be *ex delicto* and could not be upon an implied agreement to compensate the owner for the value of the property[64]; and this has been held even

62. 7 Enc. Pl. & Pr., 362.
63. White *v.* Brooks, 43 N. H. 402.
Staat *v.* Evans, 35 Ill. 455.
Crow *v.* Boyd, 17 Ala. 51.
Halleck *v.* Mixer, 16 Cal. 574.
Shaw *v.* Coffin, 58 Me. 254.
64. Jones *v.* Hoar, 5 Pick. 289.
Watson *v.* Stever, 25 Mich. 386.
Moses *v.* Arnold, 43 Ia. 187.
Pike *v.* Wright, 29 Ala. 332.
Mann *v.* Locke, 11 N. H. 246.
Randolph *v.* Elliott, 34 N. J. L. 184.
Center Turnpike Co. *v.* Smith, 12 Vt. 212.
Webster *v.* Drinkwater, 5 Greenl. 319; 17 A. D. 288.
Stears *v.* Dillingham, 22 Vt. 624; 54 A. D. 88.

where the property had been exchanged for other property[65], the court saying that a sale and an exchange were entirely different matters. And it was held that the action was not brought to recover the reasonable value of the property, but that the owner was limited in the amount of his recovery to the amount received for it by the tort-feasor[66].

Sec. 349. But the above doctrines have not received unanimous concurrence by the modern courts, and a more liberal policy has been announced. Good reason would seem to dictate that the wrong-doer should be subject to either form of action that the owner might elect to invoke; for the action is the result of his own conduct and arises from his own voluntary act. The owner should be permitted to waive the tort and sue upon an implied contract or agreement to pay the reasonable value of the property whether converted into cash or not. Such action does not impair the rights of the tort-feasor, for therein he has the right of set-off which would be denied him were the owner not allowed to elect such remedy, he could clearly not be subjected to the hazard of a second action for the same matter, and the owner would be restricted in his recovery to the simple value of the property, while in an action *ex delicto* the plaintiff might obtain a judgment in excess of such value. As was said in an early case announcing this doctrine: "No party is bound to sue in tort, where by converting the action into an action on contract he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be

65. Fuller *v.* Duren, 36 Ala. 73.
66. Rand *v.* Nesmith, 61 Me. 111.
Pearsoll *v.* Chapin, 44 Pa. St. 9.

sued in contract, because that form of action lets in a set-off and enables him to pay the money into court''[67]. And in accordance with such principles, it has been said that the tort-feasor shall not be allowed to set up his own wrongful intent in disapproval of the implied promise which the law would otherwise raise against him[68]. The matter has been well put as follows: "In some of the states it has been denied, and such denial placed upon the ground that the property remained in the hands of the wrong-doer, and, therefore, no money having been received by him in fact, an implied promise to pay over the money had and received by the defendant to the plaintiff's use did not and could not arise. Such was the case of Jones *v.* Hoar, 5 Pick. 285. But the great weight of authority in this country is in favor of the right to waive the tort even in such case. If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrong-doer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrong-doer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property

67. Young *v.* Marshall, 8 Bing. 43; (21 E. C. L. 215).
68. Butts *v.* Collins, 13 Wend. 153.
Ford *v.* Caldwell, 3 Hill (S. Car.) 248.
See Article by Cooley, 3 Alb. L. J. 141.
Halleck *v.* Mixer, 16 Cal. 574.
Barker *v.* Cory, 15 Oh. 9.

passes to the wrong-doer when the owner elects so to treat it"[69].

Sec. 350. So, it is said that the doctrine that in cases where property has been severed from real estate by a wrong-doer, carried from the freehold and converted to his own use, the rightful owner may sue and recover its value as on an implied contract, is well established[70]. And where one had torn down the fence of another and turned his cattle on the latter's pasture, a bill for pasturage was allowed as a counter-claim in an action brought by the former[71]. Where plaintiff raised a crop on shares on defendant's land, and the latter wrongfully took possession of the entire crop, the plaintiff was permitted to sue for the value of his part of the crop[72]. A person receiving money from another for a particular purpose, to which he does not apply it, may be sued either for money had and received or for a breach of trust[73]. A bank paying a deposit to the wrong person may be sued by the one entitled to it as a debtor for the deposit, or the person receiving the money may be sued for money had and received; but by electing to bring one action, the owner waives the other[74]. This is upon the

69. Terry *v.* Munger, 121 N. Y. 161; 24 N. E. 272; 18 A. S. R. 803; 8 L. R. A. 216.
Pomeroy, Remedies 2d Ed. 567-9.
Abbott *v.* Blossom, 66 Barb. 353.
May *v.* Le Claiare, 11 Wall. 217; 20 L. Ed. 507.
Hill *v.* Davis, 31 N. H. 384.
Allen *v.* U. S., 17 Wall. 207; 21 L. Ed. 553.
70. Downs *v.* Finnegan, 58 Minn. 113; 59 N. W. 981; 49 A. S. R. 488.
22 Am. & Eng. Enc. L. 389.
71. Norden *v.* Jones, 33 Wis. 600; 14 A. R. 782.
72. Fiquet *v.* Allison, 12 Mich. 328; 86 A. D. 54.
McLaughlin *v.* Salley, 46 Mich. 219.
73. Taylor *v.* Benham, 5 How. 233; 12 L. Ed. 130.
74. Fowler *v.* Bowery Savings Bank, 113 N. Y. 450; 21 N. E. 172; 10 A. S. R. 479; 4 L. R. A. 145.

principle governing the election of remedies that where they are not concurrent a choice between them once made is conclusive and precludes the right to go back and choose again[75].

4. EFFECT OF WAIVER:—Sec. 351. The election of remedies between the rights arising *ex delicto* and *ex contractu,* which election results necessarily in the waiver of one, can be indicated only by the theory of the pleadings which the plaintiff adopts. Nothing can be ascertained from the form of the pleadings under the code, for there is but one form of action, and the election or character of the action is to be determined from the general scope and tenor of the pleadings[76]. The results of electing between such remedies may be far reaching, as defenses may be made to one action which could not be made to another; as where an infant is sued in contract instead of in tort, the plea of infancy might release him from liability while it would not if the remedy in tort had been chosen[77]. And a right of set-off may exist in an action *ex contractu* which could not avail in an action *ex delicto*[78]. And an action on contract might let in a plea of the

75. Bigelow, Estoppel, 578.
Herman, Estoppel, 461.
Pomeroy, Remedies, 570.
Sumner *v.* Rogers, 90 Mo. 324; 2 S. W. 476.
Hughes *v.* Vt. Cop. Min. Co., 72 N. Y. 209.
Becker *v.* Walsworth, 45 Oh. St. 169; 12 N. E. 1; 10 West. Rep. 431.
Thompson *v.* Howard, 31 Mich. 309.
Agnew *v.* McElroy, 10 Smedes & M. 552; 48 A. D. 772.
Walsh *v.* Chesapeake, etc. Co., 59 Md. 423.
76. Neidefer *v.* Chastain, 71 Ind. 363; 36 A. R. 198.
77. Walker *v.* Davis, 1 Gray, 506.
Vasse *v.* Smith, 6 Cranch 225.
Elwell *v.* Martin, 32 Vt. 217.
Studwell *v.* Shapter, 54 N. Y. 249.
Carpenter *v.* Carpenter, 45 Ind. 142.
78. Chambers *v.* Lewis, 11 Abb. Pr. 206.
Allen *v.* Randolph, 48 Ind. 496.

statute of limitations not available in an action in tort[79]. And a judgment in an action on contract might be defeated by a plea of exemptions which could not be invoked in an action in tort[80].

While the results of a waiver of the right to sue in tort consequent upon an election to proceed on contract are permanent and irrevocable, a plaintiff is not always precluded from choosing a second time where his defeat in the first choice was solely because he did not pursue the proper remedy[81].

79. Huffman *v.* Hughlett, 11 Lea 549 (Tenn.).
Lane *v.* Boicourt, 128 Ind. 420.
80. Warner *v.* Cammack, 37 Ia. 642.
Schouton *v.* McIntosh, 89 Ind. 593.
Davis *v.* Henson, 29 Ga. 345.
81. Farwell *v.* Myers, 59 Mich. 179.
Bulkley *v.* Morgan, 46 Conn. 393.
Baley *v.* Hervey, 135 Mass. 172.
Strong *v.* Strong, 102 N. Y. 69.

CHAPTER 14.
PLEADING.

1. WAIVER BY APPEARANCE:

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1. WAIVER BY APPEARANCE—

A. DEFECTS IN PROCESS:—Sec. 352. It is not always essential to the validity or binding effect of a proceeding against a defendant that summons should have been either regularly issued or served upon him. In fact, various codes provide that after the filing of a complaint the defendant may appear, answer or demur, and in any such event the issuance and service of summons shall be deemed to have been waived. The function of a summons is to get the defendant before the court, a method of bringing him in involuntarily. And if

he see fit to forego his right to have the action proceed formally, to submit his side of the controversy voluntarily to the court, his action in so doing will have the same effect as if the matter had proceeded with strict formality. In other words, the issuance or service of summons may be waived by the defendant, and such waiver will be inferred from his general appearance in the case. And by such waiver the defendant invokes the judgment of the court and submits himself to its jurisdiction, after which he cannot be heard to say that it has not power to bind him[82]. Even informalities in the commencing of an action may be waived together with the waiver of process, as where a proceeding was commenced by a motion and the parties went to trial without the issuance and service of process, an objection that the proceeding was by motion and notice instead of action and summons was overruled[83].

Sec. 353. The same matters that waive issuance and service of process are equally available as a waiver of defects or irregularities in the issuance, service or return thereof[84], for such is equivalent to personal service[85]. And while a defendant has the

82. Sealy *v.* Cal. Lbr. Co., 19 Oreg. 94; 24 Pac. 197.
Boulder Sanitorium *v.* Vanston, 14 N. Mex. 436; 94 Pac. 945.
83. Hawkins *v.* Taylor, 56 Ark. 45; 19 S. W. 105; 35 A. S. R. 82.
84. Tex. Ry. Co. *v.* Cox, 145 U. S. 593; 12 Sup. Ct. R. 905.
Yaeger *v.* City, 39 Ill. App. 21.
Mason, etc. *v.* Griffin, 134 Ill. 330; 25 N. E. 995.
Hall *v.* Craig, 125 Ind. 523; 25 N. E. 538.
Rose *v.* Richmond Co., 17 Nev. 25; 27 Pac. 1105.
Orear *v.* Clough, 52 Mo. 55.
German Bank *v.* Ins. Co., 83 Ia. 491; 50 N. W. 53; 32 A. S. R. 316.
Barbour *v.* Newkirk, 83 Ky. 529.
Hazard *v.* Wason, 152 Mass. 268; 25 N. E. 465.
Haussman *v.* Burnham, 59 Conn. 117; 22 Atl. 1065.
Kaw Assoc. *v.* Lemke, 40 Kans. 142; 19 Pac. 337.
85. Naye *v.* Noezel, 50 N. J. L. 523; 14 Atl. 750.
Dikeman *v.* Struck, 76 Wis. 332; 45 N. W. 118.
Stamphill *v.* Franklin Co., 86 Ala. 392; 5 So. 487.

right to require summons to be issued and served upon him before the court can exercise its power over him or his property, and also the right to demand that such issuance and service of process shall be regular in all details and in strict compliance with legal requirements, still the latter right, as well as the former, he may forego or waive, and any act of his will be sufficient to constitute such waiver if it evince an intention, or support the inference that the defect or irregularity will not be taken advantage of. Therefore, if he desire to utilize the defect as a means of escape, he must himself proceed properly. If he claim that the court has acquired no jurisdiction over his person by reason of defects or irregularities in the process or service thereof, his remedy is by special appearance and objection to the jurisdiction, and if he go further and enter a general appearance, or invoke the powers of the court for any other purpose than quashing the pretended process or service thereof, the defects are thereby waived[86]. And when he makes such special appearance, he must stand by his guns or surrender his advantage; for, though he may attempt by motion and then by plea to quash the summons or service of same, he waives the defects therein by answering to the merits after the motion and plea have been determined adversely to him[87].

Sec. 354. It being the universal rule that a gen-

86. Baker *v.* Bank, 63 Neb. 801; 89 N. W. 269; 93 A. S. R. 484.
Omaha Bank *v.* Knight, 50 Neb. 342; 69 N. W. 933.
Ley *v.* Pilger, 59 Neb. 561; 81 N. W. 507.

87. Union Pac. Co. *v.* De Busk, 12 Colo. 294; 20 Pac. 752; 13 A. S. R. 221.
Ruby Co. *v.* Gurley, 17 Colo. 199; 29 Pac. 668.
Sears *v.* Starbird, 78 Cal. 225; 20 Pac. 547.
Campbell Co *v.* Marsh, 20 Colo. 22; 36 Pac. 799.

eral appearance of a defendant constitutes a waiver of the issuance of process or of defects and irregularities therein, it is necessary to notice what is a sufficient appearance to produce such effect. His appearance is evidenced by his filing in the action his answer, demurrer or a notice to the plaintiff that he appears in the case[88]. And in such cases as those under consideration it is immaterial that the defendant was ignorant of the irregularities that would have rendered the proceeding void, until after he had made his appearance. In one case where only this question was involved, the court said: "Without saying whether this writ is absolutely void, we are clear that it cannot be set aside at this stage of the cause. The defendant has taken a step by which he is regularly in court, whether there be any process or not. We will not interfere merely because the party acted in ignorance that the process was void"[89].

Sec. 355. The particular facts which may render a summons or the service thereof defective are matters with which we are not here concerned. The process may be irregular in form or defective in substance; and the service may be defective either because made by an incompetent person, or upon a person not authorized to receive it, or at a time or place where the service was unauthorized, or because some act prescribed by law has been omitted. And in any of such events the proceeding will be

88. Walla Walla Pub. Co. *v.* Budd, 2 Wash. Ter. 336; 5 Pac. 602.
McCoy *v.* Bell, 1 Wash. St. 504; 20 Pac. 595.
Steinbach *v.* Leese, 27 Cal. 297.
Wyatt *v.* Freeman, 4 Colo. 14.
Smith *v.* Arapahoe Co. Ct., 4 Colo. 235.

89. Pixley *v.* Winchell, 7 Cowen 366; 17 A. D. 525; followed in:
Gardner *v.* Teller, 2 How. Pr. 241.
Hubbell *v.* Dana, 9 How. Pr. 425.
Coppernoll *v.* Ketcham, 56 Barb. 113.

vacated upon motion interposed before final judgment unless the defendant has entered his general appearance in the action, or has by other conduct voluntarily waived the irregularity[90].

Sec. 356. But it is necessary, in order that a waiver may be deduced from the conduct of a defendant, that he should make an actual appearance in the case, or do something equivalent thereto. A recital in the record of the clerk that the defendant had appeared at a previous term is not sufficient[91]. Nor will a motion to set aside a default entered against several defendants who were served be held such an appearance as will waive the failure to serve other defendants[92]. But the question whether an alleged appearance is to be held a waiver in such cases does not resolve itself into a mere determination of the intention of the defendant[93]; for the appearance for the purpose of contesting the merits of the cause, whether by motion or by formal pleading, is a waiver of all objection to the jurisdiction of the court over the person of the defendant, whether he intended such waiver or not[94]. And the same is true if he in any manner invokes the aid of the court without questioning its jurisdiction over his person[95]. This is upon the well-established principle that he who has the right to object to such

90. Falvey *v.* Jones, 80 Ga. 130; 4 S. E. 264.
91. Kimball *v.* Merrick, 20 Ark. 12.
92. Klemm *v.* Dewes, 28 Ill. 317.
93. Wabash Ry. Co. *v.* Brow, 164 U. S. 271; 17 Sup. Ct. R. 126.
94. Handy *v.* Ins. Co., 37 Oh. St. 366.
Sentenis *v.* Ladew, 140 N. Y. 463; 35 N. E. 650.
Meixell *v.* Kirkpatrick, 29 Kans. 679.
Shafer *v.* Hockheimer, 36 Oh. St. 215.
95. Mason *v.* Alexander, 44 Oh. St. 318; 7 N. E. 435.
Davis *v.* Wood, 7 Mo. 162.
Murat *v.* Hutchinson, 1 Harr 46 (N. J.).
Reeder *v.* Murray, 3 Ark. 450.
Cartwright *v.* Chabert, 3 Tex. 261; 49 A. D. 742.

defects or irregularities must do so promptly and at the first opportunity before the party committing the error has taken any further steps in the cause or been misled into a reasonable belief that the objection is not to be urged[96].

Sec. 357. Thus, a waiver of such objections occurs where the defendant moves to vacate a judgment for want of jurisdiction over his person, and then consents to a dismissal of the motion[97]; or files a motion to strike from the files all the papers in the case for defects and irregularities[98]; or moves to dismiss for want of jurisdiction over the subject-matter, his motion being overruled[99], or causes to be given a bond to stay execution[100]; each of such acts constitutes a general appearance of the defendant. A voluntary appearance being equivalent to service of summons gives the court jurisdiction over the defendant, even though the answer constituting the appearance expressly reserves the right to object to the jurisdiction of the court[1]. And if he appears specially and obtains an order setting aside service of the summons, he will be held to have waived further process by submitting the cause on a demurrer to the bill[2]. And if a defendant against whom a default judgment has been rendered asks to have the decree set aside for the reason that the court had no jurisdiction over his person and for the further reason that fraud and deceit had been practiced upon him and that there was no evidence to support the decree, such appearance is

96. Beall *v.* Blake, 13 Ga. 217; 58 A. D. 513.
97. Marsden *v.* Soper, 11 Oh. St. 503.
98. Maholm *v.* Marshall, 29 Oh. St. 611.
99. Elliott *v.* Lawhead, 43 Oh. St. 171.
100. Shafer *v.* Hockheimer, 36 Oh. St. 215.
1. Mahaney *v.* Penman, 4 Duer 603.
2. Leute *v.* Clark, 22 Fla. 515; 1 So. 149.

general and is a waiver of any defects in the service of process[3].

Sec. 358. A holding above adverted to was to the effect that a defendant appearing and putting in an answer and proceeding to a trial on the merits waives defective service of process and gives the court jurisdiction over his person, notwithstanding his appearance in the first instance was for the special purpose of objecting to the jurisdiction of the court and the subsequent proceedings on his part were accompanied by a protest against jurisdiction[4]. But this holding is not adhered to by a majority of the courts, and in fact a contrary doctrine is announced by most courts and is supported by the better reason. When the defendant has made the record show a proper objection, he has done all he can do, and should not be compelled, after the overruling of his objection, to desert the case and leave the opposite party to take judgment by default[5]. It will be seen from the above citation that the Supreme Court of the United States lends the weight of its authority to the principle that a party not properly served with process so as to give the court jurisdiction over his person, does not waive the objection or confer jurisdiction by an-

3. Yorke *v.* Yorke, 2 N. Dak. 343; 55 N. W. 1095.

4. Union Pac. Co. *v.* De Busk, 12 Colo. 294; 20 Pac. 752; 1 A. S. R. 221.
See, also: Baker *v.* Bank, 63 Neb. 801; 89 N. W. 269; 93 A. S. R. 484.

5. Steamship Co. *v.* Tugman, 106 U. S. 118.
Jones *v.* Jones, 108 N. Y. 415; 15 N. E. 707.
Dickerson *v.* Burlington Co., 43 Kans. 702; 23 Pac. 936.
Lyman *v.* Milton, 44 Cal. 630.

swering over and going to trial on the merits after he has ineffectually objected to the jurisdiction[6].

Sec. 359. But without reserving properly such objections, a waiver of issuance or service of, or defects in process is waived if the defendant file a demurrer to the complaint[7], and answer[8], agreement for a continuance[9], taking a stay of the order of sale in a foreclosure case[10], or filing exceptions to a Commissioner's report[11]. And of course such waiver may be produced by the written acknowledgment of service and a consent by the defendant that the cause may proceed as if summons had been regularly issued and served[12], although the contrary has been held by a court[13], which later attempted to explain its holding[14]. And a waiver may occur even after judgment, for if a defendant

6. Harkness *v.* Hyde, 98 U. S. 476.
Dewey *v.* Greene, 4 Denio 94.
Willing *v.* Beers, 120 Mass. 548.
Warren *v.* Crane, 50 Mich. 301; 15 N. W. 465.
Avery *v.* Slack, 17 Wend. 85.
Reinstadler *v.* Reeves, 33 Fed. 308.
Wabash Ry. Co. *v.* Brow, 164 U. S. 271; 17 Sup. Ct. R. 126.
Ward *v.* George, 1 Bush 357.
7. Willman *v.* Friedman, 4 Idaho 209; 38 Pac. 937; 95 A. S. R. 59.
Hollinger *v.* Reeme, 138 Ind. 262; 36 N. E. 1114; 46 A. S. R. 402.
8. Young *v.* Ross, 31 N. H. 205.
German Bank *v.* Ins. Co., 83 Ia. 491; 50 N. W. 53; 32 A. S. R. 316.
Macon Ry. Co. *v.* Gibson, 85 Ga. 1; 11 S. E. 442; 21 A. S. R. 135.
9. Baisley *v.* Baisley, 113 Mo. 544; 21 S. W. 29; 35 A. S. R. 726.
10. Franse *v.* Armbuster, 28 Neb. 467; 44 N. W. 481; 26 A. S. R. 345.
11. Newman *v.* Moore, 94 Ky. 147; 21 S. W. 759; 42 A. S. R. 343.
12. Laramore *v.* Chastain, 25 Ga. 592.
Vermont Co. *v.* Marble, 20 Fed. 117.
Dunn *v.* Dunn, 4 Paige, 430.
Cheney *v.* Harding, 21 Neb. 65; 31 N. W. 255.
Ex Parte, Schollenberger, 96 U. S. 369.
Shaw *v.* National Bank, 49 Ia. 179.
Allured *v.* Voller, 107 Mich. 476; 65 N. W. 285.
13. Weatherbee *v.* Weatherbee, 20 Wis. 499.
14. Keeler *v.* Keeler, 24 Wis. 522.

join in an appeal from a judgment rendered in the lower court, he cannot object that no summons was there served upon him[15].

Sec. 360. The cases and principles above adverted to are equally applicable to a case of misnomer, that is, where a defendant is sued by the wrong name. A Mississippi case succinctly states this rule: "There are cases which hold that one sued and served by a wrong name may disregard the summons. All agree that one summoned by a name not his own, and who appears and does not plead misnomer, waives it and is bound by the judgment in the wrong name. There is no sound reason for a distinction in the two classes of cases. The true view is, that one summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, not availing of his opportunity to appear and object, should be precluded from afterwards objecting. Having remained silent when he might and should have spoken, he must ever afterward be silent as to this matter"[16].

Sec. 361. But where an attorney appeared for a defendant and obtained an order extending the

15. Harmison *v.* Lewistown, 153 Ill. 313; 46 A. S. R. 893.
Thorn *v.* Thorn, 47 W. Va. 4; 34 S. E. 759.

16. Alabama Ry. Co. *v.* Bolding, 65 Miss. 255; 13 So. 846; 30 A. S. R. 541.
1 Black, Judgments, Sec. 213.
Welsh *v.* Kirkpatrick, 30 Cal. 202; 89 A. D. 85.
Lafayette Ins. Co. *v.* French, 18 How. 404.
First Nat'l. Bank *v.* Jaggers, 31 Md. 38; 100 A. D. 53.
Hoffield *v.* Board, 33 Kans. 644; 7 Pac. 216.
Waldrop *v.* Leonard, 22 S. Car. 118.
Medway Co. *v.* Adams, 10 Mass. 360.
Guinard *v.* Heysinger, 15 Ill. 288.
Parry *v.* Woodson, 33 Mo. 347; 84 A. D. 51.
Waterbury *v.* Mather, 16 Wend. 611.
See also: Johnston *v.* Union, 75 Cal. 134; 16 Pac. 753; 7 A. S. R. 129.

time to file a plea, such appearance cannot be regarded as a general appearance sufficient to constitute a waiver of defects in the service of summons[17]. Such appearance bears no relation to the merits of the action, and cannot mislead the plaintiff into a belief that no objection to the defective service is to be raised. The same was held true where a defendant appeared in court and asked for a stay of one day, and on the following day appeared and objected to irregularities in the proceedings[18].

(1) SPECIAL APPEARANCE:—Sec. 362. Whatever position the various courts may assume respecting waiver, by a general appearance, of summons or defects in the issuance or service thereof, no doubt is expressed among them that a defendant may appear for the special purpose of objecting to the jurisdiction of the court over his person and not thereby confer jurisdiction where none existed before. A different holding would be fraught with dangers to the whole system of judicial procedure, for on the one hand it would encourage a loose and careless performance of official duties in the issuance and service of summons which would constantly increase; and, on the other hand, it would require of a defendant that he either submit himself to the power of the court under process defectively, irreg-

17. Mulhearn *v.* Press Co., 53 N. J. L. 150.
18. Nelson *v.* Campbell, 1 Wash. 261; 24 Pac. 539.
See Generally: Toland *v.* Sprague, 12 Pet. 300 (U. S.).
Payne *v.* Bank, 29 Conn. 415.
Cristal *v.* Kelley, 88 N. Y. 285.
Reynolds *v.* Lyon, 20 Ga. 225.
Louisville Co. *v.* Nicholson, 60 Ind. 158.
Anderson *v.* Morris, 12 Wis. 689.
Lane *v.* Leech, 44 Mich. 163; 6 N. W. 228.
Fulbright *v.* Cannefox, 30 Mo. 425.
Harris *v.* Guin, 18 Miss. 563.

ularly or perhaps illegally issued or served, or that he remain silent and subsequently incur the expense and trouble of bringing a direct proceeding to set aside a voidable judgment.

Sec. 363. But the contemplation of disasters that might accrue to individuals by reason of a different rule becomes unnecessary when we examine the cases bearing upon the point under discussion; for their practically uniform holding is that where the summons is defectively or irregularly issued or served, the defendant may appear specially in the case to have the summons or service set aside[19]; and by such appearance he will not be held to have waived such defect or irregularity nor voluntarily submitted himself to the jurisdiction of the court[20]. In one case the defendant set up in a special answer that the service of process was unlawful and disclosed the facts constituting such illegality. The court held that he did not waive his objection by merely setting up the facts upon which it was based[21]. And the special appearance of a non-resident defendant for the purpose of moving to set aside a judgment rendered against him by default

19. Kinkade *v.* Myers, 17 Oreg. 470; 21 Pac. 557.

20. Smith *v.* Hoover, 39 Oh. St. 249.
Reed *v.* Chilson, 142 N. Y. 152; 36 N. E. 884.
Chubbuck *v.* Cleveland, 37 Minn. 466; 35 N. W. 362; 5 A. S. R. 864.
Shaw *v.* Quincy Co., 145 U. S. 444; 12 Sup. Ct. R. 935.
Brown *v.* Rice, 30 Neb. 236; 46 N. W. 489.
Dalley *v.* Kennedy, 64 Mich. 208; 31 N. W. 125.
Baily *v.* Schrader, 34 Ind. 260.
Chesapeake Co. *v.* Heath, 87 Ky. 651; 9 S. W. 832.
Simcock *v.* Bank, 14 Kans. 529.
Law *v.* Nelson, 14 Colo. 409; 24 Pac. 2.
Allen *v.* Lee, 6 Wis. 478.
Nye *v.* Liscombe, 21 Pick. 263 (Mass.).

21. Chubbuck *v.* Cleveland, 37 Minn. 466; 35 N. W. 362; 5 A. S. R. 864.

is not a waiver of any jurisdictional rights[22], nor is an appearance for the purpose of having the action dismissed for the want of service, a waiver[23]. So, a defendant specially appearing for the purpose of moving to strike out an amended complaint and asking for an extension of time in which to move or plead until the determination of the motion, does not make an appearance sufficient to waive service of the summons and the amended complaint[24]. And it has been said that the appearance of a party after judgment merely to give notice of an appeal is not such an appearance as will by itself give jurisdiction[25]. And it is also said that if a party appear to prosecute a writ of error, he must, upon reversal of the judgment, appear and answer the same as if he had been originally served with process[26].

Sec. 364. Where defendants appeared specially and objected to the jurisdiction of the court on the ground that the service of summons was not sufficient to confer jurisdiction, and after the court had overruled this objection they appeared, generally, and answered, it was held that such appearance was not voluntary and did not waive the objection to jurisdiction; nor was such objection waived or any jurisdiction conferred by an appeal for the sole purpose of reviewing the question of the sufficiency of the summons[27]. It was later said in the same state that if a special appearance to object to jurisdic-

22. Paxton *v.* Daniell, 1 Wash. St. 19; 23 Pac. 441.
Wright *v.* Boynton, 37 N. H. 9; 72 A. D. 319.
23. Merrill *v.* Houghton, 51 N. H. 61.
March *v.* East. Ry. Co., 40 N. H. 583.
24. Powers *v.* Braly, 75 Cal. 237; 17 Pac. 197.
25. McKinney *v.* Jones, 7 Tex. 598; 58 A. D. 83.
De Witt *v.* Monroe, 20 Tex. 293.
26. Woolford *v.* Dugan, 2 Ark. 131; 35 A. D. 52.
See, also: Holden *v.* Haserodt, 2 S. Dak. 220; 49 N. W. 97.
27. Miner *v.* Francis, 3 N. Dak. 549; 38 N. W. 343.

tion is, after the objection is overruled, followed by a general appearance, the question of jurisdiction is not open to collateral attack[28]; the conclusion deducible therefrom being that the jurisdiction would be subject to direct attack. An appearance of the defendant under protest at a time to which an adjournment of a cause had been improperly had, cannot have the effect of reviving process which has failed from the non-appearance of the plaintiff at the time named in the writ[29].

Sec. 365. Of course a party may appear either generally or specially by attorney the same as personally, and such appearance is equally binding upon him. And it is said that in a suit against an infant where the summons is not served upon him, his guardian may appear and answer for him and the court will thereby obtain jurisdiction over their persons[30]. But this doctrine is more properly denied[31].

28. Parsons *v.* Venzke, 4 N. Dak. 452; 61 N. W. 1036; 50 A. S. R. 669.
29. Martin *v.* Fales, 18 Me. 23: 36 A. D. 693.
See Generally: Green *v.* Green, 42 Kans. 654; 22 Pac. 730.
Chahoon *v.* Hollenback, 16 Serg. & R. 425; 16 A. D. 587.
Dailey *v.* Kennedy, 64 Mich. 208; 31 N. W. 125.
Chesapeake Ry. Co. *v.* Heath, 87 Ky. 651; 9 S. W. 382.
Ames *v.* Winsor, 19 Pick. 207.
Allen *v.* Lee, 6 Wis. 478.
Standley *v.* Arrow, 13 Fla. 361.
Campbell *v.* Swasey, 12 Ind. 70.
30. Redmond *v.* Peterson, 102 Cal. 599; 36 Pac. 923; 41 A. S. R. 206.
Hopper *v.* Fisher, 2 Head 253 (Tenn.).
See, also: Childs *v.* Lauterman, 103 Cal. 387; 37 Pac. 382; 42 A. S. R. 121, where it is said that an appearance for an infant may be by an attorney.
31. Bonnell *v.* Holt, 89 Ill. 71.
Carver *v.* Carver, 64 Ind. 194.
Sullivan *v.* Blackwell, 28 Miss. 737.
Helms *v.* Colbourne, 45 Wis. 60.
Whiteside *v.* Barber, 24 S. Car. 373.
Hawes on Jurisdiction, Sec. 231.
Ingersoll *v.* Mangam, 84 N. Y. 622.

(2) EXEMPTION FROM SERVICE:—Sec. 366. The law exempts certain persons from the service of civil process, and renders voidable any attempted service in contravention of such exemption. In this discussion it is not our purpose to show what persons are entitled to this privilege, nor the time, place nor proceedings to which the exemption extends. But the privilege is a personal one and may be waived by him who is entitled to assert it, and courts are not bound to judicially notice the right or privilege nor to grant it without a claim[32]. The service is an irregularity of which the defendant must avail himself promptly, and if he permit judgment to be rendered against him during the existence of his privilege, and fail to seek during the progress of the proceedings to either abate or suspend them, he thereby waives his right of exemption and the judgment against him is valid[33]. As the privilege must be claimed by plea or motion made in the particular case at the proper time[34], it follows that after entering a general appearance in the case it is then too late to object to service, for such objection is thereby waived, even though the exemption be claimed in the answer[35]. But the facts giving a right of exemption may be set forth in the answer in the nature of a plea to the jurisdiction, and the want of valid service is not thereby

32. Geyer's Lessee *v.* Irwin, 4 Dall. 107.

33. Thornton *v.* American Co., 83 Ga. 288; 9 S. E. 679; 20 A. S. R. 320.
Prentis *v.* Commonwealth, 5 Rand. 697; 16 A. D. 782.

34. Larned *v.* Griffin, 12 Fed. 590.
Peters *v.* League, 13 Md. 58; 71 A. D. 622.
King *v.* Phillips, 70 Ga. 409.
Palmer *v.* Rowan, 21 Neb. 452; 32 N. W. 210; 59 A. S. R. 844.

35. Williams *v.* McGrade, 13 Minn. 174.
Gracie *v.* Palmer, 8 Wheat. 699.

waived[36]. And it has been held that an answer to the merits, joined with a plea to the jurisdiction, does not amount to a waiver of the privilege[37]. The matter has been well stated thus: "The courts may not *ex officio* take notice of the existence of the privilege. It results from its nature and character that it may be waived, and, therefore, ought to be claimed whenever relied on. The judicial history of the question does not furnish an example of the allowance of the privilege but upon plea or upon motion tendered or made at the period proper for the consideration by the court whose proceedings are sought to be abated or suspended. The proof of the facts upon which it rests are easy of attainment, because they are few, and may be adduced as well in the absence as in the presence of the party"[38].

B. JURISDICTION—

(1) SUBJECT-MATTER:—Sec. 367. In the foregoing discussion we have confined ourselves to the consideration of those matters, chiefly relating to process, which bear upon the exercise by the courts of jurisdiction over the persons of defendants. Though perhaps not dealt with by as great a number of cases, the question of the jurisdiction of courts over the subject-matter of an action is equally important. And doubtless the reason that the question has not arisen so frequently is because the principles involved have been from the first so clearly outlined and so consistently followed that no diversity of opinion has been manifested insofar as the matter is affected by the subject of our trea-

36. Byler *v.* Jones, 79 Mo. 261.
37. Christian *v.* Williams, 35 Mo. App. 298; 111 Mo. 429; 20 S. W. 96.
38. Prentis *v.* Commonwealth, 5 Rand. 697; 16 A. D. 782.

tise. For, unlike other legal rights accruing to a party, a defendant has the right to require the plaintiff to bring his action in a court having cognizance of the subject-matter of the action as established by legal principles, which right he cannot waive. Its benefit he must accept whether he will or not. He cannot consent so as to give to a court, not already possessing it by law, the right to adjudicate any cause, and it is an inflexible rule that any judgment rendered by a court outside the vale of its jurisdiction is null and void, incapable of ratification and subject to collateral impeachment[39]. And the rule has been succinctly stated thus: Where the judicial tribunal has not general jurisdiction of the subject-matter under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction[40]. The power of the court may be conferred in a number of ways, but however conferred, the rule is the same. And if a defendant cannot con-

39. Webb. *v.* Carr, 78 Ind. 455.
Eaton *v.* Badger, 33 N. H. 228.
Lyles *v.* Bolles, 8 S. Car. 258.
Wamsley *v.* Robinson, 28 La. Ann. 793.
Peabody *v.* Thatcher, 3 Colo. 275.
Dicks *v.* Hatch, 10 Ia. 280.
Santom *v.* Ballard, 133 Mass. 465.
Fleischman *v.* Walker, 91 Ill. 318.
Moore *v.* Ellis, 18 Mich. 77.
Damp *v.* Dane, 29 Wis. 419.

40. Bumstead *v.* Read, 31 Barb. 669.
Cooper *v.* Reynolds, 10 Wall. 308.
Mex. Ry. *v.* Davidson, 157 U. S. 201.
Watts *v.* Boom, etc., 47 Mich. 540; 11 N. W. 377.
Gilliland *v.* Sellers, 2 Oh. St. 223.
To the same effect, see: Doctor *v.* Hartman, 74 Ind. 221.
Jacks *v.* Moore, 33 Ark. 31.
Schuylkill Co. *v.* Boyer, 125 Pa. St. 226; 17 Atl. 339.
Fields *v.* Walker, 23 Ala. 155.
Moore *v.* O'Barr, 87 Ga. 205; 13 S. E. 464.
Payne *v.* Bank, 29 Conn. 415.
Plano Co. *v.* Rasey, 69 Wis. 246; 34 N. W. 85.
Smith *v.* Myers, 109 Ind. 1; 9 N. E. 692.

sent that a court shall assume jurisdiction to determine a cause, he can no more, by any conduct of his, waive the question of non-jurisdiction; and any answer, demurrer or general appearance of his is ineffectual to constitute such waiver.

Sec. 368. Jurisdiction, however, may be limited by statute or the constitution insofar as it affects certain persons; and in such cases it is held that the defendant, when sued, may waive his exemption and confer jurisdiction[41]. Thus, it has been held that a judgment against a Consul of a foreign nation upon default is valid; it being said that his not appearing and pleading to the jurisdiction of the court is a waiver of the want of jurisdiction over him[42]. However, the court said that when sued, the Consul, if he would avail himself of his privilege, must make it appear that he is a Consul, unless the other party shows it as by naming him as a Consul.

Sec. 369. It being the rule that parties cannot by their consent give to courts jurisdiction over subjects which the law says they shall not take cognizance of, it is equally true that when the jurisdiction of courts once attaches to a subject, the parties cannot by their agreement divest the courts of their jurisdiction. This question has arisen more frequently in actions on policies of insurance than in any other, a provision usually being inserted in the policies that the amount of a loss or other differences between the insurer and the insured shall be referred to a board of arbitrators before suit on the policy shall be commenced. But this clause, even

41. Bates *v.* Gage, 40 Cal. 183.
42. Hall *v.* Young, 3 Pick. 80; 15 A. D. 180.
Springfield Co. *v.* West, 1 Cush. 389.

though assented to by both parties, cannot oust the courts of their jurisdiction[43]. But while such agreements which attempt to oust the courts of their jurisdiction will not be supported either at law or in equity, it is said that those which do not go to the root of the action, but are only preliminary thereto or in aid thereof, such as settling the amount of damage or the time of paying it, or the like, will be sustained[44]. So, where parties stipulated not to appeal, the stipulation was ignored, the court saying that the parties cannot by their agreement divest courts of law or equity of their proper jurisdiction[45].

2. DEFECTS IN COMPLAINT—

A. IN GENERAL:—Sec. 370. Defects in a complaint, both in substance and in form, are matters of which the courts do not take notice, and to be of any avail to a defendant, must be relied upon by him by a proper objection; and it is a general rule that if a cause be tried without objection to the complaint by demurrer, either general or special, as the particular case may require, the defects will be waived if they do not affect the substantial rights of the parties. By such failure to object, the defendant admits that the complaint is sufficient. Or, otherwise stated, all technical or formal objections to a complaint must be raised by motion or de-

43. May on Insurance, Sec. 492.
And see: Chapter 12, this volume; sub-division "Arbitration."
2 Story's Eq. Jur. 1457.
Hill *v.* Moore, 40 Me. 515.

44. Wood *v.* Humphrey, 114 Mass. 185.
Pearl *v.* Harris, 121 Mass. 390.
Ins. Co. *v.* Morse, 20 Wall. 445.
Liverpool Co. *v.* Creighton, 51 Ga. 95.
Mentz *v.* Ins. Co., 79 Pa. St. 478.

45. Muldrow *v.* Norris, 2 Cal. 74; 56 A. D. 313.
Allegre *v.* Ins. Co., 6 Harr. & J. 408 (Md.); 14 A. D. 289.

murrer before trial, and if not so raised, they will be held waived. A practice which would permit such objections to be made at the trial might be the means of causing needless expense to litigants as well as subjecting the court, witnesses and jurors to unnecessary annoyance, a practice not to be encouraged since cases in court are to be conducted with the least possible expense to litigants and annoyance to the court consistent with the proper administration of justice[46]. And, applying this rule, unless the demurrer or objection be made in the trial court, it cannot be raised on appeal[47], for joining issue upon a defective statement is a waiver thereof[48]. And where a demurrer is proper, it must be pertinent, for when a special demurrer is required, the filing of a general one is a waiver of the objection which the special one would have reached[49]. And if a complaint fail to state a cause of action, a demurrer thereto, if interposed, will be sustained, but if the defendant fail to demur, and file an answer in which are stated facts which supply the omission of the complaint, the objection, which might have been taken advantage of by demurrer, is thereby waived and the defect cured[50]. And the same result follows where evidence is introduced without objection in support of the defective state-

46. Orman *v.* Mannix, 17 Colo. 564; 30 Pac. 1037; 31 A. S. R. 340. Dennison *v.* Chapman, 105 Cal. 447; 39 Pac. 61.

47. Seligman *v.* Armando, 94 Cal. 314; 29 Pac. 710.

48. Davis *v.* Wait, 12 Oreg. 425; 8 Pac. 356.

49. Daggett *v.* Gray, 110 Cal. 169; 42 Pac. 568.

50. Robinson Co. *v.* Johnson, 13 Colo. 258; 22 Pac. 459; 5 L. R. A. 769.
Hamilton *v.* Ry. Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.
Shively *v.* Semi-Tropic Co., 99 Cal. 259; 33 Pac. 848.
Ferera *v.* Parke, 19 Oreg. 141; 23 Pac. 883.

ment[51], or if the omission be supplied in an answer to a cross-complaint[52].

Sec. 371. But it is not a waiver of an objection that might have been raised by demurrer to demand a bill of particulars[53]. Nor can the ground of a general demurrer be waived by a failure to demur, nor, according to some courts, by a consent that the demurrer be overruled, although this latter holding occurs to be somewhat of an anomaly, since the consent that a demurrer may be overruled may be an acknowledgment that it is not well founded and may be construed as evidencing an intention to abandon the demurrer. The submission of a demurrer without argument, however, is not such a waiver[54]. And it is said that the objection that a complaint or petition does not state facts sufficient to constitute a cause of action cannot be waived[55]. But if a defendant pleads to the merits, he waives mere formal defects, and cannot object that the petition does not state a cause of action; such objection can be interposed only when the complaint fails altogether to state a cause of action, and not when it is defectively stated[57].

Sec. 372. Where a demurrer is filed, it must be presented to the court either by argument or by

51. Reynolds *v.* Dickson, 48 Wash. 407; 93 Pac. 910.
52. Cohen *v.* Knox, 90 Cal. 266; 27 Pac. 215; 13 L. R. A. 711.
53. Mulvey *v.* Staab, 4 N. Mex. 50; 12 Pac. 699.
54. Richard *v.* Ins. Co., 80 Cal. 505; 22 Pac. 939.
55. Marks, etc. Co. *v.* Watson, 168 Mo. 133; 67 N. W. 391; 90 A. S. R. 440.
56. Shreffler *v.* Nadelhoffer, 133 Ill. 536; 25 N. E. 630; 23 A. S. R. 626.
57. Johnson *v.* Ry. Co., 96 Mo. 340; 9 A. S. R. 351.

an express submission without argument[58]. For if the defendant file a demurrer, yet enter upon and proceed with the trial upon the merits without calling the court's attention to the demurrer or demanding a ruling upon it, he thereby waives the objection[59]. So, if he demurs, and afterwards answers, but withdraws his answer before trial and allows a judgment to be entered, he is presumed to have waived the demurrer[60].

B. BY ANSWERING:—Sec. 373. Whether filing an answer after the overruling of a demurrer is a waiver of the right to object to the complaint may depend upon statutory provision, and when such provision is made it must control. But it is held that if a party plead over after demurrer overruled, the demurrer is thereby waived and the ruling thereon cannot be assigned as error[61], for it was said that it is not permissible to plead and demur at the same time[62]. And if the demurrer is based on several grounds, among which is that the complaint fails to state facts sufficient to constitute

58. The same principles governing demurrers to complaints are applicable when the objection is to an answer or reply; so, the failure of plaintiff to demur waives objection to the answer; see:
Ritchie *v.* Davis, 5 Cal. 453.
Macdougal *v.* Maguire, 35 Cal. 274; 95 A. D. 98.
U. S. *v.* Boyd, 5 How. 29.
Silcox *v.* Lang, 78 Cal. 118; 20 Pac. 297.

59. Wright *v.* Sherman, 3 S. Dak. 290; 52 N. W. 1093; 17 A. S. R. 792.
Spanish City *v.* Hopper, 7 Utah 235; 26 Pac. 293.
Olds *v.* Cary, 13 Oreg. 362; 10 Pac. 786.
Guthrie *v.* Phelan, 2 Idaho 95; 6 Pac. 107.
Danielson *v.* Gude, 11 Colo. 87; 17 Pac. 283.
Francisco *v.* Benepe, 6 Mont. 243; 11 Pac. 637.
Mayor *v.* Houston Ry. Co., 83 Tex. 548; 19 S. W. 127; 29 A. S. R. 679.

60. Evans *v.* Jones, 10 Utah 182; 37 Pac. 262.

61. Ambler *v.* Whipple, 139 Ill. 311; 28 N. E. 841; 32 A. S. R. 202.
Cooke *v.* England, 27 Md. 14; 92 A. D. 618.

62. People *v.* Telephone Co., 192 Ill. 307; 61 N. E. 428; 85 A. S. R. 338.

a cause of action, all grounds except this are waived if the defendant answer after the overruling of the demurrer[63]. But if the court grant leave to file an answer after the overruling of a demurrer, it is said that the latter is not waived by the filing of such answer[64]; and an application for such leave is addressed to the discretion of the court below[65], and unless grossly abused will not be disturbed[66]. Without such leave, however, the filing of the answer is a waiver of irregularities[67], or defects set up by the demurrer, and even of the demurrer itself or the right to rely upon it[68]. The waiver, though, extends only to the objections to the ruling of the court with reference to the form of the pleading[69], for if the complaint fail to state facts sufficient to constitute a cause of action the objection may be taken advantage of even after all the evidence is in.

Sec. 374. While there are many decisions supporting the rules announced in the preceding section—and a majority of them do—[70], we cannot but agree with the fewer cases supporting a contrary doctrine. There is no inherent justice in hold-

63. Thalheimer *v.* Crow, 13 Colo. 397; 22 Pac. 779.
64. Curtiss *v.* Bachman, 84 Cal. 216; 24 Pac. 379.
65. Powell *v.* Ry. Co., 14 Oreg. 22; 12 Pac. 83.
66. Corson *v.* Neatheny, 9 Colo. 212; 11 Pac. 82.
67. Bell *v.* Ry. Co., 4 Wall. 598; 18 L. Ed. 338.
68. Irwin *v.* Henderson, 2 Cranch C. C. 167; Fed. Cas. No. 7084.
Madden *v.* Occidental Co., 86 Cal. 445; 25 Pac. 5.
Barth *v.* Denel, 11 Colo. 494; 19 Pac. 471.
Young *v.* Martin, 3 Utah, 484; 24 Pac. 909.
Loukey *v.* Wells, 16 Nev. 271.
69. Anderson *v.* No. Pac. Lbr. Co., 21 Oreg. 281; 28 Pac. 5.
70. Lynch *v.* Bechtel, 19 Mont. 548; 48 Pac. 1112.
Finney *v.* Randolph, 68 Mo. App. 557.
Elliott *v.* Field, 21 Colo. 378; 41 Pac. 504.
Geiser Co. *v.* Krogman, 111 Ia. 503; 82 N. W. 938.
Baker *v.* Fawcett, 69 Ill. App. 300.
Bertholdt *v.* O'Hara, 121 Mo. 88; 25 S. W. 845.
Car Co. *v.* League, 25 Colo. 129; 54 Pac. 642.
Hammersmith *v.* Avery, 18 Nev. 225; 2 Pac. 55.

ing a party to have waived error by pleading over after a demurrer interposed by him has been overruled. If the objection be to merely formal defects, no real harm could come to a party by holding him strictly to his election, but as to those matters affecting his substantial rights, just reasoning demands that he be not required to place an estimate of infallibility upon his judgment; and under the strict rule above announced, a party demurring may with just reason hesitate to rest upon his overruled demurrer lest an error of judgment on his part imperil his case and shut him out of a meritorious defense. But under the rule, he must so wager his rights against his judgment and if he lose, be forever precluded from any defense at all[71]. Every lawyer who has had experience at the bar can recall with what trepidation he has staked the interests of his client on his own judgment that error has been committed by the trial court in the overruling of a demurrer; or with what regret and feeling of injustice he has been compelled to file an answer, fearing to stake so much on his judgment, yet feeling certain that error has been committed. And to know that a rule permitting an exception to the overruling of the demurrer, and a subsequent answer without waiving the exception would prejudice neither party is stronger persuasion in favor of the rule.

C. MIS-JOINDER—

(1) OF PARTIES:—Sec. 375. Defect or mis-joinder of parties appearing on the face of a complaint is ground for demurrer, and when not ap-

71. Hurley *v.* Ryan, 119 Cal. 71; 51 Pac. 20.
Pence *v.* Durbin, 1 Idaho, 550.
Seaboard Co. *v.* Woodson, 94 Ala. 143; 10 So. 87.

pearing on the face of the complaint, objection thereto may be taken by answer. If no such objection be taken, either by answer or demurrer, it is waived[72]. Therefore, defect of parties defendant cannot be questioned for the first time in the appellate court when it appears that the persons who ought to have been made defendants are not indispensable parties and that a decree can be entered between the parties to the action without them[73]. But the rule is not applicable if the omitted party be indispensable to a complete determination of the action[74]. Nor will the filing of an answer after the overruling of a demurrer for such cause be a waiver of the defect[75]. And it is said that a general demurrer admits the sufficiency of the parties, but the defect may afterwards be raised by answer[76], but that it cannot be raised by an objection to the introduction of evidence[77].

(2) OF CAUSES OF ACTION:—Sec. 376. The codes usually make mis-joinder of causes of action a ground of demurrer. But whatever the mode prescribed to be taken, the objection must be made in the trial court or it will be deemed to have

72. Mather *v.* Dunn, 11 S. Dak. 196; 76 N. W. 922; 74 A. S. R. 788.
Summers *v.* Heard, 66 Ark. 550; 50 S. W. 78; 51 S. W. 1057.
Swartzel *v.* Karnes, 2 Kans. App. 782; 44 Pac. 41.
Franke *v.* St. Louis, 110 Mo. 516; 19 S. W. 938.
Stephens *v.* Harding, 48 Neb. 659; 67 N. W. 746.
Passumpsic Bank *v.* Buck, 71 Vt. 190; 44 Atl. 93.

73. Great West. Co. *v.* Woodmas Co., 12 Colo. 46; 20 Pac. 771; 13 A. S. R. 204.
Conklin *v.* Barton, 43 Barb. 435.
Soeding *v.* Bartlett, 35 Mo. 90.

74. Peck *v.* Peck, 33 Colo. 421; 80 Pac. 1063.

75. Town *v.* Long, 144 Cal. 362; 77 Pac. 987.

76. Johnson *v.* Bott, 18 Colo. App. 469; 72 Pac. 612.
Grisson *v.* Hoflus, 39 Wash. 51; 80 Pac. 1002.

77. Dickerson *v.* Spokane, 26 Wash. 292; 66 Pac. 381.

been waived[78]. The objection must be taken by a special demurrer, for a general demurrer is a waiver of the objection[79], and the same result follows from pleading over[80]. Some statutes, however, provide that a demurrer and answer may be filed together, in which event the demurrer is not waived by the answer[81].

D. INCAPACITY OF PLAINTIFF:—Sec. 377. The states which have adopted the code system make the objection that plaintiff has not legal capacity to sue a ground of special demurrer if the defect appears on the face of the complaint or petition, and if it does not so appear the defect must be set up and relied upon in the answer. And the failure to so take advantage of it prior to the trial is a waiver of it[82]. A general demurrer is not sufficient to reach the objection, for the facts showing the capacity of the plaintiff to sue are not facts constituting the cause of action[83]. Thus, if plaintiff be a foreign executor and, therefore, not qualified to sue, the objection must be made by demurrer if

78. Maisenbacker *v.* Society, 71 Conn. 369; 42 Atl. 67; 71 A. S. R. 213.
McKune *v.* Mill Co., 110 Cal. 480; 42 Pac. 980.
Porter *v.* Banking Co., 36 Neb. 271; 54 N. W. 424.
Jones *v.* Hughes, 16 Wis. 683.
Henney Co. *v.* Higham, 7 N. Dak. 45; 72 N. W. 911.
Barlow *v.* Leavitt, 12 Cush. 483.
Corbett *v.* Wrenn, 25 Oreg. 305; 35 Pac. 658.
Youngs *v.* Leely, 12 How. Pr. 395.
White *v.* Delschneider, 1 Oreg. 254.
Fuhn *v.* Weber, 38 Cal. 636.
79. Ruhling *v.* Hackett, 1 Nev. 360.
Daggett *v.* Gray, 110 Cal. 169; 42 Pac. 568.
80. Shoelkoff *v.* Leonard, 8 Colo. 159; 6 Pac. 209.
81. State *v.* Edwards, 33 Utah, 243; 93 Pac. 720.
82. Meyer *v.* Barth, 97 Wis. 352; 72 N. W. 748; 65 A. S. R. 124.
Palmer *v.* Davis, 28 N. Y. 242.
Miller *v.* Luco, 80 Cal. 257; 22 Pac. 195.
83. Bank *v.* Edwards, 11 How. Pr. 216.
Myers *v.* Machado, 6 Abb. Pr. 198.

the complaint disclose the incapacity, or by answer if it do not, for otherwise, objection at the trial would be overruled[84].

E. WAIVER OF ERROR IN OVERRULING DEMURRER:—Sec. 378. Where a demurrer is filed to a pleading and is sustained by the court, any error in the order sustaining the demurrer is waived by filing an amended pleading covering the points raised by the demurrer[85], and the same is true if the pleading is an amendment of an amendment[86]; and even in a case where the court refused to permit the amended pleading to be filed, the offer to file it was held a waiver[87].

F. OBJECTIONS TO VENUE:—Sec. 379. The county in which an action shall be tried may be agreed upon by the parties. Or if the county in which the action is brought is not the proper one for the trial thereof, the action may nevertheless be tried therein unless the defendant by proper objection demand that it be tried in the county prescribed by law. But the objection must be raised prior to trial or it will be deemed waived. And any conduct on the part of the defendant manifesting satisfaction with the venue until after the trial, or his abiding

84. Robbins *v.* Wells, 26 How. Pr. 15.
And see: Connor's Adm. *v.* Paul, 12 Bush 144.
Duncan *v.* Whedbee, 4 Colo. 143.
Mullin's Appeal, 40 Wis. 154.
Wright *v.* Wright, 72 Ind. 149.
S. W. Ry. Co. *v.* Paulk, 24 Ga. 370.
Rucks *v.* Taylor, 49 Miss. 560.
Palmer *v.* Ins. Co., 84 N. Y. 67.
Gregory *v.* McCormick, 120 Mo. 657; 25 S. W. 565.
85. Gowan *v.* Gilson, 142 Ind. 328; 41 N. E. 594.
Scheiber *v.* Tel. Co., 153 Ind. 609; 55 N. E. 742.
Louisville R. Co. *v.* House, 104 Tenn. 110; 56 S. W. 836.
Roderick *v.* Ry. Co., 7 W. Va. 54.
86. Brown *v.* Case Plow Works, 9 Kans. App. 685; 59 Pac. 601.
87. Anthony *v.* Slayden, 27 Colo. 144; 60 Pac. 826.

by it until the matter has proceeded to a hearing will be sufficient to constitute a waiver.

Sec. 380. The venue of an action has always been a privilege which the defendant could exact or waive, even as to districts. The right of a defendant to be sued in that of his domicile may be waived, and is waived by his failure to object[88]. If to be sued in the district of one's domicile is in the nature of a personal exemption or privilege which may be waived, surely to be sued in a certain division of that district is of a like nature and may be waived. Under the act of Congress of February 18, 1875[89], which exempted national banks from suits in state courts in counties other than the county in which the bank was located, it was held that such exemption was a personal privilege which could be waived and was waived by appearing in a suit brought in another county and not claiming the immunity thus granted[90]. Thus, where on motion of the defendant the action was transferred to and tried in the judicial division of its residence, the objection to the venue of the action which might have been raised was waived by such procedure[91]. And a stipulation for the removal of a cause to another county waives an objection that it was not brought in the proper county[92], as does

88. Central Trust Co. *v.* McGeorge, 151 U. S. 129; 38 L. Ed. 98.
89. 18 Stat. At. L. 316, Chap. 80.
90. First National Bank *v.* Morgan, 132 U. S. 141; 32 L. Ed. 282.
91. Nelson *v.* Willamette, 70 Fed. 874; 31 L. R. A. 715, citing:
Barry *v.* Foyles, 26 U. S. 1; 1 Pet. 314; 7 L. Ed. 158.
Pollard *v.* Dwight, 4 Cranch 421; 2 L. Ed. 666.
Harkness *v.* Hyde, 98 U. S. 476; 25 L. Ed. 237.
St. Louis Ry. Co. *v.* McBryde, 141 U. S. 127; 35 L. Ed. 659.
Eddy *v.* Lafayette, 49 Fed. 807; 4 U. S. App. 247.
92. Gay *v.* Brierfield Co., 94 Ala. 303; 11 So. 353; 33 A. S. R. 132; 16 L. R. A. 564.

also the appearance of the defendant and filing an answer in the cause[93].

Sec. 381. Where there has been a change of venue granted, any objections to such change are waived by a general appearance filed in the court to which the cause is sent[94]. This is especially true if the parties proceed to trial[95], or file pleas in the cause[96]; or even if a motion for a continuance be filed, the mover thereby waives the right to object[97].

3. IN ATTACHMENTS AND GARNISHMENTS:

A. DEFECTS IN AFFIDAVIT:—Sec. 382. Where defects exist in an affidavit filed as a basis for an attachment, they are fatal to the proceeding if taken advantage of at the proper time and in the proper manner. But they must be so taken advantage of as they are not matters which courts will judicially notice unless they are called to their attention by proper objections by the party affected by them. Thus, where the averments of the affidavit are traversed in the regular manner by the defendant, and the matter proceeds to trial upon such traverse without any objection to the sufficiency of the affidavit, and the issues are found against the

93. Granville, etc. *v.* State Board, 106 N. Car. 81; 10 S. E. 1002.
Bishop *v.* Silver Lake Co., 62 N. H. 455.
Ohio Ry. Co. *v.* Morey, 47 Oh. St. 207; 24 N. E. 269; 7 L. R. A. 701.
Sheenan Co. *v.* Sims, 36 Mo. App. 224.
Benev. Assoc. *v.* Woods, 21 Ill. App. 372.
McLemore *v.* Scales, 68 Miss. 47; 8 So. 844.
94. Schaeffner's Est., 45 Wis. 614.
Street *v.* Chapman, 29 Ind. 142.
95. Waller *v.* Logan, 5 B. Mon. 515.
Yater *v.* State, 58 Ind. 299.
Prussel *v.* Knowles, 5 Miss. 90.
96. Burnham *v.* Hatfield, 5 Blackf. 21.
97. Solomon *v.* Norton, 2 Ariz. 100; 11 Pac. 108.

defendant, such proceedings without calling the attention of the court to defects in the affidavit amount to a waiver of such defects, and they cannot later be urged as ground for reversal[98]. The rule is the same whatever the defect in the affidavit, but it will not be invoked to render valid an attachment proceeding carried on without the filing of an affidavit, for such affidavit is the basis upon which the entire proceeding rests.

B. DEFECTS IN WRIT:—Sec. 383. The rule above mentioned as applying to defects in affidavits in attachment and garnishment proceedings is equally applicable if the defects are in the writ issued upon such affidavit. They must be taken advantage of before trial and in the court below or the defects are waived and the proceeding will be as valid as if the writ had been regular in all details. Or, as it is said, defects in an attachment writ are waived where the defendant appears in the action and makes no objection in the trial court[99]. In this case the writ was issued by the clerk of the probate court instead of the clerk of the district court. But where the defendant in an attachment suit died before service of the writ upon him, and his executrix, after her motion to quash the writ had been overruled, appeared and filed an answer in the principal suit, such appearance did not waive or cure the want of service upon her intestate[100]. If a defendant in an attachment suit execute a re-delivery bond, he is held to have acknowledged notice of the suit and to be bound to enter his appearance or suffer default

98. De Stafford *v.* Gartley, 15 Colo. 33; 24 Pac. 580.
Rice *v.* Hamptman, 2 Colo. App. 565; 31 Pac. 862.
99. Romero *v.* Wagner, 3 N. Mex. 167; 3 Pac. 50.
100. Thompson *v.* White, 25 Colo. 226; 54 Pac. 718.

to be taken against him[1]. But the giving of such a bond is not a waiver of the right to have the writ rightfully issued[2], nor is it a waiver of irregularities in the attachment proceedings[3]. Of course a general appearance by the defendant and a traverse of the allegations of the attachment affidavit constitute a waiver of all defects in the notice or its publication[4], for by such appearance the defendant submits himself to the jurisdiction of the court, which is all that could be accomplished by the writ or notice. But a waiver that would be effective between the plaintiff and defendant might not be binding upon third parties. Thus, where an attachment was levied upon real estate, and the defendant was not served, and the case was prosecuted to judgment on publication of notice to him; and after the sale of the land on execution the defendant appeared and moved to set aside the judgment not only on account of the illegality of the publication but because the judgment was rendered on insufficient evidence; this was held to be an appearance to the merits and a submission to the jurisdiction of the court which, so far as the defendant was concerned, might cure the original defects; but that it did not so far validate the proceedings *ab initio* as to vitiate a conveyance of the land made by him during the pendency of the attachment proceedings[5].

1. Richard *v.* Mooney, 39 Miss. 357.
   Blyler *v.* Kline, 64 Pa. St. 130.
   Peebles *v.* Weir, 60 Ala. 413.
   Chastain *v.* Armstrong, 85 Ala. 215; 3 So. 788.
2. Avet *v.* Albo, 21 La. Ann. 349.
3. New Haven Co. *v.* Raymond, 76 Ia. 225; 40 N. W. 380.
4. Williams *v.* Stewart, 3 Wis. 773.
5. Anderson *v.* Coburn, 27 Wis. 558, cited in:
   Drake on Attachment, Art. 446a.

C. WAIVER OF ATTACHMENT LIEN:—Sec. 384. Courts do not cling as strictly to waivers of attachment liens if the question arise only between the attaching plaintiff and defendant as where the rights of other attaching creditors are involved. It was held that where the first of several attachers having a claim large enough to absorb all the property attached, by agreement with the defendant took all the property in satisfaction of the debt and discontinued the suit, as against subsequent attachers who perfected their respective liens by judgment and execution, the first attacher waived his lien and obtained no title to the property[6]. But in the absence of rights of other attachers or of third parties, an attaching creditor does not waive his lien by taking judgment and selling the attached property while an appeal from the order dissolving the attachment is pending[7]. And mere irregularities in an attachment proceeding do not affect the attachment so as to give subsequent attachers the right to make themselves parties for the purpose of defeating the action[8].

D. WAIVER BY GARNISHEE:—Sec. 385. A garnishee may waive defects in an affidavit upon which the proceeding is based the same as a defendant may. Thus, where a garnishee appears and answers and proceeds to a hearing upon citation issued

6. Brandon Iron Co. *v.* Gleason, 24 Vt. 228.
Cole *v.* Wooster, 2 Conn. 203, cited in:
Drake on Attachment, Art. 262.
7. Ryan *v.* Maxey, 14 Mont. 81; 35 Pac. 515.
8. Seibert *v.* Switzer, 35 Oh. St. 661.
Henderson *v.* Stetter, 31 Kans. 56; 2 Pac. 849.
Scrivener *v.* Dietz, 68 Cal. 1; 8 Pac. 609.
Nenny *v.* Schluter, 62 Tex. 327.
Rudolph *v.* McDonald, 6 Neb. 163.
Bank *v.* Jandon, 9 La. Ann. 8.

on an affidavit for an order for the examination of himself as garnishee, any objection to the sufficiency of the affidavit[9] or of the service of the writ[10] is thereby waived. But it is said that when the summons is void for not complying with the requirements of a statute, an appearance and answer by the garnishee will not waive the defects, and the court will acquire no jurisdiction, especially if the defendant be a non-resident and make no appearance[11].

4. IN CRIMINAL PROCEDURE:

A. JURISDICTION:—Sec. 386. The principles hereinbefore adverted to as affecting jurisdiction of courts in civil actions are analagous to those applicable in criminal cases. A court to render its acts valid and enforceable, must acquire and exercise proper jurisdiction over the person of the defendant as well as take lawful cognizance of the offense with which he is charged. And here, the same as in civil jurisprudence, jurisdiction over the person may be given by a voluntary appearance of the defendant, or the want of it may be waived by his pleas entered in the proceedings as if he had been brought before the court by the successive formalities of the law[12]. But jurisdiction of an offense is a matter derived solely by virtue of pro-

9. Coffee *v.* Haynes, 124 Cal. 561; 57 Pac. 482; 71 A. S. R. 99.
10. Wisecarver *v.* Braden, 146 Pa. St. 42; 23 Atl. 393.
Rosenberg *v.* Chaflin Co., 95 Ala. 249; 10 So. 521.
11. Phoenix Co. *v.* Street, 9 Okla. 422; 60 Pac. 221.
12. Rutter *v.* State, 1 Ia. 99.
People *v.* Myers, 1 Colo. 508.
Mills *v.* Commonwealth, 13 Pa. 627.
U. S. *v.* Rogers, 23 Fed. 658.
State *v.* Kinney, 41 Ia. 424.

visions of law and can in no event be imparted or conferred by consent of the party who is to be affected thereby. So, it follows that a defendant cannot waive the question of the jurisdiction of the court over the offense and any attempt to do so will render the whole proceeding void, including sentence if it has been passed, and the court may release the prisoner on *habeas corpus*[13], or the objection may even be raised in an appellate court[14], and such a case cannot be carried into the appellate court by agreement[15].

Sec. 387. As noted above, however, it is only the right given by law to be tried by a court having proper cognizance of his offense which a defendant cannot waive. All other objections touching the court's jurisdiction he may insist upon or waive as he may think best suited to his interests. Thus a prisoner has the right to be brought to the state which is the scene of the offense charged against him, by proper extradition papers; but if he voluntarily accompany the officer without the use of such papers, he thereby waives such right and cannot thereafter object to the regularity of the papers[16].

B. NO OFFENSE CHARGED IN INDICTMENT:—Sec. 388. Since the principles governing in civil actions, as hereinbefore noted, are to be applied to criminal cases in so far as they may, it fol-

13. Rice *v.* State, 3 Kans. 141.
People *v.* Durell, 1 Idaho 30.
Reich *v.* State, 53 Ga. 73.
Ex Parte Snyder, 64 Mo. 58.
Simpson *v.* U. S., 9 How. 571 (U. S.)
14. Jackson *v.* Commonwealth, 13 Gratt. 801.
15. Rutter *v.* State, 1 Ia. 99.
People *v.* Myers, 1 Colo. 508.
16. State *v.* Cutshall, 109 N. Car. 764; 14 S. E. 107; 26 A. S. R. 599.

lows that as in civil actions the complaint or petition must state a cause of action—which requirement cannot be waived by the defendant—so the indictment or complaint in a criminal prosecution must charge an offense against the defendant, or the proceeding or any judgment rendered thereon will not be sustained. And this requirement cannot be waived by the defendant[17], although statutes have provided means for liberal amendments of defective charges. There can be no legal punishment without an accusation, and every wrongful fact with each particular modification thereof which, in law, is required to be taken into account in determining the punishment upon a finding of guilty, must be alleged in the indictment. For in every criminal prosecution the accused shall enjoy the right to be informed of the nature and cause of the accusation against him[18], and this rule requires that the indictment or information shall contain the essential elements of the crime charged[19].

C. FORMER JEOPARDY:—Sec. 389. The right of a defendant not to be put in jeopardy a second time for the same offense is as sacred as the right to a trial by jury, and is guarded with as much care by the common law and the constitution[20]. But it is a right which may be availed of by a defendant only by a special plea for the support of which it is necessary to show the legal conviction or acquittal of the defendant in a court of competent jurisdiction and also the identity of the person convicted or acquitted and the offense for which he was tried.

17. Pattee *v.* State, 109 Ind. 545; 10 N. E. 421.
18. U. S. Const. Amend. Art. 6.
19. Riggs *v.* State, 104 Ind. 262; 3 N. E. 886.
20. Dinkey *v.* Commonwealth, 17 Pa. St. 126; 55 A. D. 542.

The special plea must be made in the trial court or this defense will be deemed waived[21]. And whenever a verdict, whether valid in form or not, has been rendered on an indictment, either good or bad, and the defendant moves in arrest of judgment or applies to the court to vacate a judgment already entered for any cause, as for many causes he may, he will be presumed to waive any objection to being put a second time in jeopardy and so he may ordinarily be tried anew. If the verdict against the prisoner is wrong, and it was produced by some error of the court to which he objected, a just view of the constitutional guaranty would permit him to have the error corrected without waiving his right to object to a second jeopardy. Still the practice in most cases has been otherwise[22]. And while the plea is not permissible as a defense under the general issue and must be specially pleaded[23], it is said that such is not necessary where two trials of the same case were in the same court[24].

Sec. 390. As to what constitutes a second jeopardy is a matter upon which not all courts agree, and it is a question with which we are not here to contend. Our object in these lines is to present the principles and proceedings by which a defendant is held to have waived or surrendered, or not to have waived or surrendered the protection in this behalf which organic law has guaranteed to him. And one of the primary principles in this regard is that the

21. In re Allison, 13 Colo. 525; 22 Pac. 820; 16 A. S. R. 224.
22. Bishop, Crim. Law, Sec. 998-9, cited and followed in:
Jones *v.* State, 25 Tex. App. 716; 8 A. S. R. 452.
23. Rickles *v.* State, 68 Ala. 538.
State *v.* Morgan, 95 N. Car. 641.
24. Robinson *v.* State, 21 Tex. App. 160; 17 S. W. 632.
Foster *v.* State, 25 Tex. App. 544; 18 S. W. 664.

procuring of a new trial is a waiver of the privilege, for the defendant thereby consents to the second trial, and the rule applies that a party cannot object to that to which he has consented[25]. The reasons are obvious in criminal cases and have been well stated thus: The new trial is often the convicted prisoner's only safeguard left. Deny him that on the plea that he shall not twice be put in jeopardy for the same offense, and you stab him to the heart with the weapon intended only for his security and defense. Such a construction of the rule would let him be hung, however innocent, in order to avoid the hazard of life or limb against which he is to be secured by the rule made for his benefit. Judges may be perplexed in giving interpretation and application to the rule, and may stick in the bark in so doing; but it seems that an innocent man, or guilty either, convicted wrongfully and sentenced to be hung, with the halter around his neck, could not be long nor doubtful in deciding for himself which construction of the rule was for his interest and necessities, which was in harmony with the spirit of justice and humanity that dictated the prisoner's safety[26].

Sec. 391. But the right to interpose a plea of former jeopardy was held not waived by the filing

25. Gannon *v.* People, 127 Ill. 507; 21 N. E. 525; 11 A. S. R. 147.
State *v.* Hart, 33 Kans. 218; 6 Pac. 288.
State *v.* Jenkins, 84 N. Car. 812.
Kendall *v.* State, 65 Ala. 492.
State *v.* Patterson, 88 Mo. 88.
Territory *v.* Dorman, 1 Ariz. 56; 25 Pac. 516.
Cochrane *v.* State, 6 Md. 400.
Small *v.* State, 63 Ga. 386.
State *v.* Blaisdell, 59 N. H. 328.
State *v.* Knouse, 33 Ia. 365.

26. Younger *v.* State, 2 W. Va. 579; 98 A. D. 791.
Sutcliffe *v.* State, 18 Oh. 469; 51 A. D. 459.

of a motion to set aside a verdict rendered by the jury in the absence of the defendant[27], the court noting that a distinction existed between such a procedure and a motion for a new trial. This proposition, however, has been denied on the theory that such absence was itself a waiver[28]. The criterion, it occurs to us, should be whether or not he voluntarily absented himself.

Sec. 392. Fraud has the effect of vitiating proceedings in a criminal prosecution as much as in a civil action. And where it is practiced by a defendant to procure his acquittal, it constitutes a waiver of his right not to be twice put in jeopardy for the same offense[29]. And while not constituting a waiver —which can be produced only by some act of the defendant himself—the result is the same if the fraud be the work of a third party and unknown to the defendant[30]. The fraud may be a prosecution sought and procured by the defendant himself in the hope of escaping a subsequent prosecution and heavier punishment, but whatever it may be, the prisoner, by such fraud, bars himself from the right to say that he has once been prosecuted on the charge and should not again be put in jeopardy[31].

27. Nolan *v.* State, 55 Ga. 521; 21 A. R. 281.
Cook *v.* State, 60 Ala. 39; 31 A. R. 31.
28. Temple *v.* Commonwealth, 14 Bush 769; 29 A. R. 442.
29. State *v.* Swepson, 79 N. Car. 632.
30. State *v.* Washington, 89 N. Car. 535; 45 A. R. 700.
31. State *v.* Simpson, 28 Minn. 66; 9 N. W. 78; 41 A. R. 269.
Watkins *v.* State, 68 Ind. 427; 34 A. R. 273.
Bigham *v.* State, 59 Miss. 529.
State *v.* Reed, 26 Conn. 202.
Commonwealth *v.* Dascom, 111 Mass. 404.
Warriner *v.* State, 3 Tex. App. 104; 30 A. R. 124.
McFarland *v.* State, 68 Wis. 400; 32 N. W. 226; 60 A. R. 867.
State *v.* Cole, 48 Mo. 70.
State *v.* Nichols, 38 Ark. 550.

CHAPTER 15.

CRIMINAL PRACTICE.

Section

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1. IN GENERAL:—Sec. 393. The following considerations in the chapter on Civil Practice cover a greater part of the field of criminal practice, as the rules treated are equally applicable to the two. But it is necessary to here consider a few subjects strictly under the operation of the rules and principles of practice in criminal cases. As far as the law of waiver has to do with the practice in criminal cases, it may be noted that, while in civil actions, a party having knowledge of a right belonging to him may insist upon that right or waive it as he may think best suited to his interests, such is not true in criminal actions as to all rights which a defendant has, for some of these he cannot be deprived of even with his own consent.

2. RIGHT TO JURY TRIAL:—Sec. 394. Some differences of opinion exist among the authorities as to the power of an accused to waive the right to be tried by a jury and submit the question of his guilt to the court. The trend of the authorities

seems to be, however, to the principle that in felonies a defendant cannot waive this right but that in misdemeanors he may, the distinction thus made being based upon the proposition that defendants in the latter class of cases were not absolutely given a jury trial at common law, therefore such was not fully guaranteed to them by the Constitution[32]. We recognize this principle as one adhered to by nearly all the authorities, but we confess to a hesitancy in accepting as our own conclusion the propriety of allowing a defendant in one class of cases to forego his right to a jury trial and refusing the discretion to a defendant in another class of crimes. Reason would dictate that the grade of the crime should be immaterial. The requirement of a jury trial is secured by the constitution upon a principle of public policy[33], as well as through considerations for the defendant. And that public policy is contravened and the rights of the accused jeopardized by putting him in a place where temptations may be held out to him to waive a jury trial and take his chances with the court in a case where his crime is one of low grade or one that would subject him to light punishment, as much as where the punishment might be death or life imprisonment. Another distinction has been made between cases in which the constitution or statute gives the accused the right to

32. Dailey *v.* State, 4 Oh. St. 58.
Ward *v.* People, 30 Mich. 116.
Arnold *v.* State, 38 Neb. 752; 57 N. W. 378.
State *v.* Davis, 66 Mo. 684.
State *v.* Worden, 46 Conn. 349.
Darst *v.* People, 51 Ill. 286.
Murphy *v.* State, 97 Ind. 579.

33. State *v.* Lockwood, 43 Wis. 405, holding the right to a jury trial upon indictment or information one which can not be waived; a doctrine discarded for a more reasonable one in: In re Staff, 63 Wis. 285; 23 N. W. 587.

a jury trial and those cases where a jury trial is expressly required. In the latter class of cases, it is said that in no event can a jury trial be waived[34]. But it is said that the right may be waived in prosecutions for misdemeanors where the right to a jury trial is given by statute in cases which could be tried without a jury at common law[35].

Sec. 395. Judge Cooley says: "The infirmity in case of a trial by a jury of less than twelve, by consent, would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the state." We suppose the same reasoning would apply to the waiver of a jury. But this right to a jury is no more pronounced by the constitution than other rights given a defendant. He cannot twice be put in jeopardy for the same offense. Yet unless he properly object to an attempt to twice jeopardize him, he will be held to have waived his privilege. And the same is true of his right to have the witnesses confront him, to have a speedy trial, and many other rights conferred upon him by constitutional provision. Then where is the difference between felonies and misdemeanors except in the degree of punishment? A misdemeanor may be as disgraceful and humiliating to one man as a felony to another. And while we are aware that the preponderance of authority is in favor of the distinction and refuses to permit a waiver in felony cases, we do think that the better reasoning sanctions a waiver

34. Arnold *v.* State, 38 Neb. 752; 57 N. W. 378.
35. People *v.* Weeks, 99 Mich. 86; 57 N. W. 1091.

in both classes of cases either of the whole jury or any number of jurors, thus giving to the accused an additional benefit of saying whether it is to his own best interests to be tried by the court or a jury.

3. JURY OF FEWER THAN TWELVE:—Sec. 396. The courts are by no means harmonious in their conclusions regarding the power of a defendant in a criminal prosecution to waive his right to be tried by the full panel of jurymen as provided by law and consent to be tried by fewer. Although a few cases[36] seem to pronounce the doctrine that an accused person may in all cases waive his constitutional right to be tried by the full number of jurors, yet in nearly all cases the question is decided by the courts according to the degree of the crime with which the defendant is charged.

A. IN FELONIES:—Sec. 397. By far the greater number of authorities hold to the doctrine that in cases of felony the constitutional right to be tried by a common-law jury of twelve men cannot be waived, and that a verdict of a jury of fewer than that number, even by consent of the accused, will be set aside as a nullity[37]. To this opinion the Supreme Court of the United States gives the weight of its authority[38]. There are many considerations and reasons why this doctrine should be enforced. For a criminal prosecution involves public wrongs, a breach and violation of public rights and duties

36. State *v.* Grossheim, 79 Ia. 75; 44 N. W. 541.
State *v.* Kaufman, 51 Ia. 578; 2 N. W. 275; 33 A. R. 148.
State *v.* White, 33 La. Ann. 1218.
And see: Alfred *v.* State, 6 Ga. 483.
37. State *v.* Mansfield, 41 Mo. 470.
Arnold *v.* State, 38 Neb. 752; 57 N. W. 378.
Allen *v.* State, 54 Md. 461.
38. Thompson *v.* Utah, 170 U. S. 343; 42 L. Ed. 1061.

which affect the whole community considered as a community, in its social aggregate capacity, and the end such suits have in view is the prevention of similar offenses, not atonement or expiation for crimes committed, and the penalties and punishments for the enforcement of which they are a means to an end are not in the discretion or control of the party accused, for no one has a right by his own voluntary act to surrender his liberty or part with his life; the state, the public have an interest in the preservation of the lives and liberties of its citizens, and will not allow them to be taken away without due process of law when forfeited, as they may be, as a punishment for crime[39]. Therefore, the denial of the right to waive the number of jurors provided by law in felony cases arises from the fact that the substantial constitution of the legal tribunal, and the fundamental mode of its proceeding are not within the power of the parties to modify or deal with in other than the expressly provided manner[40].

B. MISDEMEANORS:—Sec. 398. In misdemeanors, the courts seem very generally to adhere to a doctrine contrary to that announced above as governing the trial for felonies. And in this class of cases the rule is that a defendant may, by his ex-

39. Cancemi *v.* People, 18 N. Y. 128.
40. State *v.* McClear, 11 Nev. 41.
Carpenter *v.* State, 4 How. 163 (Miss.); 34 A. D. 116.
Brazier *v.* State, 44 Ala. 387.
Territory *v.* Oritz, 8 N. Mex. 154; 42 Pac. 87.
Territory *v.* Ah Wah, 4 Mont. 149; 47 A. R. 341.
State *v.* Everett, 14 Minn. 447.
Work *v.* State, 2 Oh. St. 296; 59 A. D. 671.
People *v.* O'Neil, 48 Cal. 257.
State *v.* Meyers, 68 Mo. 266.
Hill *v.* People, 16 Mich. 351.
State *v.* Cox, 8 Ark. 436.
People *v.* Guidici, 100 N. Y. 503; 3 N. E. 492.

press consent, waive a jury of twelve and accept the verdict of a less number, the reason being that the right to a trial by jury of twelve was not in all such cases fully guaranteed to him by the constitution, as it did not exist as an absolute right at common law[41].

4. WAIVER OF PRIVILEGE FROM SELF-CRIMINATION:—Sec. 399. Every person accused of crime is protected by a constitutional privilege from being compelled to give evidence against himself. Under this protection an accused cannot be required against his will to testify in his own case. But it is not a bar to his testifying if he desires. And all courts agree, either by reason of statutory provision or by construction of the privilege itself that the right may be waived by the accused and that such waiver occurs where he takes the stand in his own behalf. The status of the accused is thereby changed from that of a defendant to that of a witness, and the same as any other witness, he may be compelled to give evidence against himself concerning all matters touched upon in his direct examination.

Sec. 400. But the courts are far from harmonious as to the extent such waiver operates. On the one hand, it is said that if an accused testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement which he declines to make a full one, such weight as under the circumstances they think it entitled to; otherwise, the statute must have set aside and overruled

41. Darst *v.* People, 51 Ill. 286; 2 A. R. 301.
Commonwealth *v.* Dailey, 12 Cush. 80.
State *v.* Borowsky, 11 Nev. 119.
State *v.* Sackett, 39 Minn. 69; 38 N. W. 773.
Warwick *v.* State, 47 Ark. 568; 2 S. W. 335.

the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger[42]. Under this rule, when a defendant takes the stand in his own behalf, he waives his privilege as to those matters only concerning which he testifies on direct examination, and his cross-examination must be limited to those matters referred to in his examination-in-chief[43].

Sec. 401. On the other hand, there is a rule adopted by perhaps a majority of the states to the effect that when an accused person takes the stand in his own behalf, he thereby establishes a complete waiver of his constitutional privilege of refusing to give testimony against himself, and may on cross-examination be asked any question pertinent to the issue or calculated to test his accuracy, veracity or credibility[44]. If this rule stopped here, it would not

42. Cooley's Constitutional Limitations, 384-6 (6th Ed.).

43. State *v.* Chamberlin, 89 Mo. 120; 1 S. W. 145.
State *v.* Saunders, 14 Oreg. 300; 12 Pac. 441.
State *v.* Underwood, 44 La. Ann. 852.
People *v.* Wong Ah Leong, 99 Cal. 440; 34 Pac. 105.
People *v.* Roemer, 114 Cal. 51; 45 Pac. 1003.
Mitchell *v.* State, 94 Ala. 68; 10 So. 518.
State *v.* Gallo, 18 Oreg. 425; 23 Pac. 264.
Howard *v.* Commonwealth, 22 Ky. L. R. 1845; 61 S. W. 756.
State *v.* O'Hara, 17 Wash. 525; 50 Pac. 477; 94 A. S. R. 864.

44. Spies *v.* People, 122 Ill. 1; 12 N. E. 865; 3 A. S. R. 320.
People *v.* Tice, 131 N. Y. 651; 30 N. E. 494; 15 L. R. A. 669; directly declaring the rule announced by Cooley to be out of harmony with the authorities and unsound in principle.
State *v.* Callian, 109 La. 346; 33 So. 363.
Baker *v.* State, 58 Ark. 513; 25 S. W. 603.
Parker *v.* State, 136 Ind. 284; 35 N. W. 1105.
Com. *v.* Clark, 145 Mass. 251; 13 N. E. 888.
People *v.* Sutherland, 104 Mich. 468; 62 N. W. 566.
State *v.* Blitz, 171 Mo. 530; 71 S. W. 1027.
Com. *v.* Mozier, 135 Pa. St. 221; 19 Atl. 943.
People *v.* Larsen, 10 Utah 143; 37 Pac. 258.
Payne *v.* State, 40 Tex. Crim. 290; 50 S. W. 363.
State *v.* Cohn, 9 Nev. 179.
State *v.* Weaver, 35 Oreg. 415; 58 Pac. 109.
State *v.* Snyder, 8 Kans. App. 686; 57 Pac. 135.

be as efficacious in dealing out justice to all parties as the rule first announced. But there is a limitation or qualification of the rule to this extent, that the accused may, on cross-examination, be asked only such questions as elicit matters pertinent to the issue or such as may be proved by other witnesses[45].

Sec. 402. We can see no reason for creating a distinction between a defendant witness and any other witness who is interested in the outcome of the action. In the case of a party to a civil action who takes the stand to testify, the same rules apply to him that apply to any other witness, for his status is changed from that of a party to that of a witness. And the same rules should apply to an accused in a criminal trial who testifies for himself, and he should be entitled to the same privileges and subject to the same treatment, and to be contradicted, discredited and impeached the same as any other witness[46].

5. RIGHT OF ACCUSED TO BE PRESENT AT TRIAL:—Sec. 403. It is the right of every person on the trial of a criminal charge against him to be personally present at all times during the course of his trial and during the rendition of verdict and the passing of sentence; and it is irregular to begin his trial without his presence and erroneous to deprive him of the right without his consent.

A. CRIMES LESS THAN CAPITAL:—Sec. 404. While it has been held that in the trial for crimes not capital the defendant is entitled to and

45. State *v.* Curtis, 39 Minn. 357; 40 N. W. 263.
Bailey *v.* State, 67 Miss. 333; 7 So. 348.
People *v.* Pinkerton, 79 Mich. 110; 44 N. W. 180.
State *v.* Wells, 54 Kans. 160; 37 Pac. 105.
State *v.* Clark, 100 Ia. 47; 69 N. W. 257.
State *v.* Pancoast, 5 N. Dak. 514; 67 N. W. 1052.

46. State *v.* Pfefferle, 36 Kans. 90; 12 Pac. 416.

must be present during the trial and rendition of verdict, and that a verdict rendered in his absence was void[47], the better rule is that the right to be present is one which the defendant cannot be deprived of without his consent, but that by his voluntary act he may waive the right and the verdict will be valid[48]. The absence must be voluntary in order to constitute a waiver of the right, although it has been held that the accused cannot waive the right whether his absence is voluntary or involuntary[49]. When a prisoner is so absent, it is usually due to his own act, as where, during the progress of the trial, he absconds; and it is the rule generally adhered to that if the defendant flees the court while his trial is pending, he waives his right to be present during the remainder of the trial and is not entitled to be discharged or have a new trial on account of his absence[50]. It is said that while the constitution guarantees him the right to be present, this guaranty was never intended to include the right to abscond and then complain of his own absence[51].

47. Sneed *v.* State, 5 Ark. 431; 41 A. D. 102.
Maurer *v.* People, 43 N. Y. 1.
People *v.* Beauchamp, 49 Cal. 41.

48. 1 Bishop's New Crim. Proc. Sec. 266.
State *v.* Guinness, 16 R. I. 401; 16 Atl. 910.
Barton *v.* State, 67 Ga. 655; 44 A. R. 743.
State *v.* Hope, 100 Mo. 347; 13 S. W. 490; 8 L. R. A. 603.
Gales *v.* State, 64 Miss. 105; 8 So. 167.
State *v.* Way, 76 Kans. 928; 93 Pac. 159; 14 L. R. A. (N. S.) 603.
Peterson *v.* State, 64 Neb. 875; 90 N. W. 964.
Hill *v.* State, 118 Ga. 21; 44 S. E. 820.
Stoddard *v.* State, 132 Wis. 520.

49. Summeralls *v.* State, 37 Fla. 162; 20 So. 242; 53 A. S. R. 247.
Clark *v.* State, 4 Humph. 254 (Tenn.)

50. State *v.* Kelley, 97 N. Car. 404; 2 S. E. 185; 2 A. S. R. 299.
Com. *v.* McCarthy, 163 Mass. 458; 40 N. E. 766.
U. S. *v.* Laughery, 13 Blatchf. 267; 26 Fed. Cas. No. 15,631.

51. Gore *v.* State, 52 Ark. 285; 12 S. W. 564; 5 L. R. A. 832.

B. CAPITAL OFFENSES:—Sec. 405. The rule among the authorities seems to be that in capital offenses the accused not only has the right to be present at all times during the course of his trial when anything is said or done affecting him as to the charge against him, and at the rendition of verdict and passing of sentence, but that he must be present, that he cannot waive the right, and that the taking of any steps without his presence renders the proceedings void[52].

C. WHO MAY WAIVE THE RIGHT:—Sec. 406. Although there are apparent exceptions[53], the holding of the courts appears to be that the right of an accused to be present during the progress of a trial and the rendition of verdict and imposing of sentence against him, is a right purely personal to himself; one that cannot be taken from him except by his consent, and one that no other person can forego for him. Consequently, it is held that the right cannot be waived by counsel for the prisoner[54].

52. State *v.* Kelley, 97 N. Car. 404; 2 S. E. 185; 2 A. S. R. 299.
Sherrod *v.* State, (Miss.); 20 So. 554.
53. Wells *v.* State, 147 Ala. 140; 41 So. 630.
Cawthon *v.* State, 119 Ga. 395; 46 S. E. 897.
54. Percer *v.* State, 118 Tenn. 765; 103 S. W. 780.
Green *v.* People, 3 Colo. 68.
Prine *v.* Com., 18 Pa. St. 103.
Cook *v.* State, 60 Ala. 39; 31 A. R. 31.

CHAPTER 16.

CIVIL PRACTICE.

SUBDIVISION 1.

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1. OBJECTIONS TO SPECIAL JUDGE:—Sec. 407. Many statutes make provision for the appointment of a special judge in the event of the disqualification of the regular judge or of his inability to act. Such special judge is one who takes the place of the regular judge under a temporary appointment for a particular purpose and derives his power to act solely through statutory provision, for there is no inherent power in courts or a judge thereof to delegate such authority to another. If there is no law authorizing or assuming to authorize the appointment of a special judge, any attempted appointment and any acts thereunder are void and of no binding effect[55]. And it has been said that even consent or agreement of parties to an action

55. Smith *v.* Haworth, 53 Mo. 88.
State *v.* Fritz, 27 La. Ann. 689.
Hoagland *v.* Creed, 81 Ill. 506.

cannot give validity to the acts of one assuming, under such circumstances, the functions of a judge[56]. Where there is an absolute absence of statutory authority therefor, the record itself shows that the person assuming to act was without authority to do so, that his acts were invalid, and they may be taken advantage of at any stage of the proceeding. But where the record does not show upon its face objections to the judge so assuming to act, such objections must be made specifically by the party entitled to do so. And the principle ramifying the whole field of the law, that objections are to be made at the first opportunity or are to be deemed waived, is applicable here. Therefore, objections to the competency of a special judge must be made with reasonable promptitude or they will be held waived[57]. The objections, it is said, must be made before trial[58], and this is true in a certain sense. But the law does not attempt to require an impossibility; so that a party, before he can be deprived of his right to object, must have knowledge of that right and of the grounds of the objection, or he must be so situated that by the exercise of reasonable care and diligence he could have ascertained them.

2. OBJECTIONS TO JURORS:

A. PANEL:—Sec. 408. There are many defects or irregularities in the formation of a jury

56. Hyllis *v.* State, 45 Ark. 478.
Haverly Co. *v.* Howcutt, 6 Colo. 574.
But see: Radford Co. *v.* East Tenn. Co., 21 S. W. 329.
57. Grant *v.* Holmes, 75 Mo. 109.
State *v.* Whitney, 7 Oreg. 386.
State *v.* Sachs, 3 Wash. 691; 29 Pac. 446.
Stears *v.* Wright, 51 N. H. 600.
State *v.* Voorhies, 41 La. Ann. 567; 6 So. 826.
Bowen *v.* Swander, 121 Ind. 164; 22 N. E. 725.
58. Dolan *v.* Church, 1 Wyo. 187.
State *v.* Greenwade, 72 Mo. 298.

which will render their acts invalid, provided they be taken advantage of at the proper time and in the proper manner by him who is entitled to object. The court will not protect a party in such case unless he assert his rights. So, if no objection be taken to the empaneling of a jury, it is presumed that both parties are satisfied with the panel chosen and the manner in which they are chosen, and neither party can be heard to object after the case has proceeded on such presumption[59]. So, it is held that a challenge to the polls generally is a waiver of the right to challenge the array[60].

Sec. 409. The same presumption that attaches to the regularity and sufficiency of the jury panel applies when objection could be made to individual jurors. Each party to an action has the right to fully examine each juror offered as an arbiter of his rights, and if either accepts the jury without such examination his right to object is thereby waived, and the qualifications of the jurymen are presumed to be sufficient and satisfactory[61]. And the challenge for all causes of disqualification of a juror known to a party, or which by diligence and reasonable care it is possible to learn, must be made

59. Queenan *v.* Territory, 11 Okla. 261; 71 Pac. 218; affirmed in 190 U. S. 548; 23 Sup. Ct. R. 762; 47 L. Ed. 1175.
Hardenburgh *v.* Crary, 15 How. Pr. 307.

60. Mueller *v.* Rebham, 94 Ill. 142.
Watkins *v.* Weaver, 10 Johns. 107 (N. Y.)
See: Weeping Water Co. *v.* Haldeman, 35 Neb. 139; 52 N. W. 892.

61. Tilton *v.* Kimball, 52 Me. 500.
Wassum *v.* Feeney, 121 Mass. 93.
Lane *v.* Scoville, 16 Kans. 402.
Faville *v.* Sheehan, 68 Ia. 241; 26 N. W. 131.
Daniels *v.* Lowell, 139 Mass. 56; 29 N. E. 222.
Manion *v.* Flynn, 39 Conn. 330.
Morrison *v.* McKinnon, 12 Fla. 552.

before trial and at the earliest opportunity[62], or otherwise the right of objection will be held waived.

Sec. 410. A divergence of opinion exists among the authorities as to whether the disqualification of a juror which is unknown to a party until after trial and verdict is sufficient to entitle him to a new trial when such disqualification is learned. It is said by one line of authorities that in such case a new trial should be granted[63], and others say that a new trial should be allowed only when the disqualification relates to the legal competency of the juror and not to mere bias or prejudice[64]. But if a juror has concealed his prejudice or partiality or interest in the cause, the verdict should be set aside upon a subsequent discovery of the fact[65]. The true rule to be applied in such cases, it seems to us, is that if a party has used due diligence and care to ascertain the competency of a juror and has been deceived or has failed to discover the disqualifying facts, the verdict should not be allowed to stand to his prejudice. A waiver of the grounds of objection could not be held against him, for a party can waive no right of which he is ignorant, and after he has availed himself of all the means provided by law for ascertaining the competency of a juror, he has done all that could reasonably be expected of him.

Sec. 411. If a challenge for cause has been interposed and overruled, it is held that an exception to such ruling is waived if the party subsequently

62. Johns *v.* Hodges, 60 Md. 215; 40 A. R. 722.
63. Lafayette Co. *v.* New Albany Co., 13 Ind. 90.
Hardy *v.* Sprowle, 32 Me. 310.
Williams *v.* McGrade, 18 Minn. 82.
Essex *v.* McPherson, 64 Ill. 349.
64. See: Wassum *v.* Feeney, 121 Mass. 93.
65. Jeffries *v.* Randall, 14 Mass. 205.
Childress *v.* Ford, 18 Miss. 25.

cause the juror to be excluded under a peremptory challenge[66]. And any error in such ruling is undoubtedly unavailing on appeal if the juror be accepted by the objecting party without having exhausted all of his peremptory challenges[67], but it is otherwise if all of his peremptory challenges have been exhausted and he is thus compelled to accept the juror objected to[68]. But if a challenge to the array has been overruled, an exception to such ruling is not waived by subsequently challenging individual jurors[69].

3. RIGHT TO JURY TRIAL:—Sec. 412. The right to have a jury try issues of fact is in many cases guaranteed to parties by constitutional provision, and such right cannot be taken away except by consent of the party entitled to it. And such jury, unless otherwise provided or agreed upon, must consist of twelve men. But the right to a jury is personal to the parties and may be waived by them, and such waiver may be either express or implied[70]. And while it is true as a general proposition that a waiver of a jury once made is good for all time[71], yet it has been held that where a jury was waived as to issues formed at the time of waiver, it could not be extended so as to apply where different

66. Burt *v.* Panjand, 99 U. S. 180.
Elliott's App. Pr. Art. 649.
67. St. Louis Ry. Co. *v.* Lux, 63 Ill. 523.
State *v.* Elliott, 45 Ia. 486.
68. Robinson *v.* Randall, 82 Ill. 521.
Hubbard *v.* Rutledge, 57 Miss. 7.
69. Clinton *v.* Englebrecht, 13 Wall. 434.
70. Love *v.* Bryson, 57 Ark. 589; 22 S. W. 341.
Carr *v.* Sullivan, 68 Hun 246.
Smith *v.* Barclay, 55 N. W. 827 (Minn.)
Bonewitz *v.* Bonewitz, 50 Oh. St. 373; 34 N. E. 332; 40 A. S. R. 671.
Petri *v.* Bank, 84 Tex. 212; 18 S. W. 752.
71. Marsh *v.* Brown, 57 N. H. 173.

issues were afterwards made on new pleadings[72]. But even where a jury has been waived by the parties, the waiver is not binding on the court and it may call a jury[73].

Sec. 413. Many statutes provide means in which a jury may be waived, and the modes prescribed must be followed[74]. But aside from such statutory provision, a variety of conditions have been held sufficient to constitute a waiver. Thus, submitting to a reference will produce this result[75]; and where by consent of counsel the case is set down for trial without a jury and the trial actually begins, it is a waiver of a jury trial[76]. And a defendant by not appearing at the time a case is called for trial waives the right to a trial by jury in his absence[77]. So, in a mandamus proceeding to try title to a county office, where the defendants submitted the evidence on which they acted to the court, asking the court to inspect the same, such constitutes a waiver of a jury trial, assuming that a jury could be had in such a case[78]. And in some instances the silence of a party or his failure to demand a jury has been held a waiver of his right to a jury trial[79]. Thus, a defendant waives his right to a trial by jury where,

72. McGeah *v.* Nordberg, 55 N. W. 117 (Minn.)
73. Fleming *v.* Wilson, 39 Wash. 106; 80 Pac. 1104.
74. Swasey *v.* Adair, 88 Cal. 179; 25 Pac. 1119.
75. Lee *v.* Tillottson, 24 Wend. 337; 35 A. D. 624.
76. Polack *v.* Gurnee, 66 Cal. 266; 5 Pac. 229; 610.
77. Weems *v.* McDavitt, 49 Kans. 260; 30 Pac. 481.
Green *v.* Bulkley, 23 Kans. 131.
Even where he has before demanded a jury: McGuire *v.* Drew, 83 Cal. 225; 23 Pac. 312.
78. Territory *v.* County Commsrs., 7 N. Mex. 568; 37 Pac. 1116.
79. Haley *v.* Bank, 21 Nev. 127; 26 Pac. 64; 12 L. R. A. 815.
Baird *v.* Mayor, 74 N. Y. 382.
Sheets *v.* Bray, 125 Ind. 33; 24 N. E. 357.
Grant *v.* Hughes, 96 N. Car. 177; 2 S. E. 339.
Pearce *v.* Albright, 12 N. Mex. 202; 76 Pac. 286.

after the withdrawal of the plaintiff's request for a jury, and after the clerk has taken the case from the list of cases for trial by jury and has placed it on the waived-jury list, though without any special order of court, he makes no complaint and no effort to have the case re-transferred to the jury list until the time when the case is actually reached for trial[80]. And an agreement that the pending action shall abide the result of another action constitutes a binding waiver of the right to try the pending action to a jury[81]. The parties entered into an agreement to relinquish their constitutional right to a jury trial. It was held that such agreement was valid and binding and even broader than a simple waiver in that it was a contract on a sufficient consideration to the performance of which both could be held[82].

A. NUMBER OF JURORS:—Sec. 414. The early cases seem to have denied to parties to civil actions the power to waive the right to a full jury and to consent to a jury of fewer than twelve. Thus, it was said that the common law right of trial by a jury of twelve could not be waived either directly or indirectly, and if a trial by jury was demanded and refused, the right was not waived by the subsequent trial by the court[83]. But this doctrine has long since been departed from, and it is now almost universally held that the parties may waive the right to trial by a jury of twelve or any other number that may be provided by law[84]. But

80. Stevens *v.* McDonald, 173 Mass. 382; 53 N. E. 885; 73 A. S. R. 300.
81. Cummings *v.* Smith, 50 Me. 568; 79 A. D. 629.
82. Lanahan *v.* Heaver, 77 Md. 605; 26 Atl. 866; 20 L. R. A. 759.
83. Norval *v.* Rice, 2 Wis. 22, followed in:
May *v.* Milwaukee Co., 3 Wis. 219.
84. Scott *v.* Russell, 39 Mo. 407.
Marlin *v.* Stockbridge, 14 Tex. 165.

the parties are absolutely entitled to have their cause tried by the full number and nothing short of their consent can deprive them of this right[85]; and it is said that the consent must be recorded or the judgment will be set aside[86]. And a waiver cannot be inferred merely from the absence of the adverse party, although his absence is considered a consent that the case be tried to the court[87]. So, during the progress of the trial the court has no right to withdraw one of the jurors and proceed with those remaining, without the consent of the parties[88], but it is held a waiver where the parties consent to the withdrawal[89].

Sec. 415. However, even though the record fail to show a submission by consent of parties to a jury of eleven, still the right to a full jury may be waived by failure to assign the matter complained of as grounds for a new trial[90]. And where the objection is first made upon appeal, it is conclusively presumed that the parties waived their right to the full number of jurors[91]. But aside from technical considerations, the right to a full number of jurors is an individual right within individual control and may be parted with at pleasure, and an irrevocable waiver of the right occurs where a party consents to a trial by a fewer number than that regularly provided for[92]. Yet in the absence of such waiver,

85. Bishop *v.* Mugler, 33 Kans. 145; 5 Pac. 756.
Van Sickle *v.* Kellogg, 19 Mich. 49.
86. Brown *v.* Hannibal Co., 37 Mo. 298.
87. Gillespie *v.* Benson, 18 Cal. 409.
88. Cloud Co. Com. *v.* Morgan, 7 Kans. App. 213; 52 Pac. 896.
89. Tram Lbr. Co. *v.* Hancock, 70 Tex. 312; 7 S. W. 724.
90. Mitchell *v.* Stevens, 23 Ind. 466.
91. Martin *v.* Stockridge, 14 Tex. 165.
92. Clague *v.* Hodgson, 16 Minn. 329.
Roach *v.* Blakey, 89 Va. 767; 17 S. E. 228.
City of Huron *v.* Carter, 5 S. Dak. 4; 57 N. W. 947.
Rhodes *v.* Mattox, 135 Ind. 372; 34 N. E. 326; 35 N. E. 11.

a defendant is not to be held responsible for the right construction of the jury in point of numbers, nor for the fault of the proper officers in that respect[93].

4. WITNESSES—

A. OATH:—Sec. 416. It is required by law and by rules of practice that a witness shall first be sworn to tell the truth, the whole truth and nothing but the truth before he can be interrogated concerning the matters at issue in the pending case. It is the duty of the party calling a witness to see that this formality of qualifying the witness is gone through with. But a failure in this respect is not necessarily fatal to any rights involved in the action, for if the opposite party permit the witness to proceed with his testimony without raising objection when he could have done so, the irregularity will be waived and the testimony allowed to stand as if the oath had been duly administered[94]. And it is equally true that if a party examine a witness knowing that the latter has not been sworn, yet make no objection on that account, the failure in administering the oath is waived; for the party must object at the earliest possible moment. And this rule applies whether the witness be present testifying in court or his testimony be taken by deposition. And where parties taking a deposition failed to carry out a stipulation as to the swearing of a witness in a manner not required by law, it was held not to be ground for suppressing the deposition[95].

93. Cowles *v.* Buckman, 6 Ia. 161.
94. Trammell Co. *v.* Mount, 68 Tex. 210; 4 S. W. 377; 2 A. S. R. 479.
95. Knapp *v.* Am. Shoe Co., 63 Kans. 698; 66 Pac. 996.

B. DEPOSITIONS:—Sec. 417. Statutes differing in minutia as to the taking of depositions of witnesses exist in the various states, and in the essential requirements these statutes are similar. Every deposition must be taken upon some sort of notice to the opposite party, and unless such notice be given, the deposition may be suppressed upon proper application. But after defective or insufficient notice, a party waives the defects by appearing and participating in the taking of the deposition[96]. And if he files cross-interrogatories and participates in the taking of the deposition, he waives any objection to the commission under which it was taken[97]. As a general proposition, appearing and taking part in the examination of the witness is a waiver of all formal objections that might be remedied by amendment or re-taking of the deposition[98]. Thus, preliminary proof that the witness resided out of the county where the cause was being tried was held waived where the party against whom the deposition was taken expressed himself as satisfied with a statement from opposing counsel as to the non-residence of the witness[99]. And an objection that the certificate does not show that the deposition was taken before the one to whom the commission was issued, nor in the official capacity designated therein, is waived unless taken by mo-

96. Kelly *v.* Ning Yung Co., 2 Cal. App. 460; 84 Pac. 321.
97. Palatine Ins. Co. *v.* Merc. Co., 13 New Mex. 241; 82 Pac. 363.
98. Shutte *v.* Thompson, 15 Wall. 151.
Waldron *v.* St. Paul. 33 Minn. 87; 22 N. W. 4.
Quadras *v.* Webster, 11 La. Ann. 203.
Goodfellow *v.*, Landis, 36 Mo. 168.
Jones *v.* Love, 9 Cal. 68.
Hobart *v.* Jones, 5 Wash. 385; 31 Pac. 878.
99. Estate of Learned, 70 Cal. 140; 11 Pac. 587.

tion to suppress made prior to trial[100]. And if a motion to suppress be made, but no ruling thereon had, it will be presumed that the objection was waived[1].

Sec. 418. It is the further general rule that objections to the manner and form of taking a deposition must be made at the time it is taken or they will be held waived. Such objections cannot be made for the first time at the trial[2]. And it is the same if objection be made to improper questions[3]. But objections going to the competency and relevancy of the evidence, if not known and not disclosed by the deposition, may generally be made at the trial[4].

C. COMPETENCY:—Sec. 419. Sometimes it appears before the examination-in-chief that a witness is incompetent to testify in the particular case. In such event the party entitled to object to such witness must make his objection promptly or he will be deemed to have waived it; for in this connection, as in all other cases, it is the rule that an objection

100. Sugar Pine Co. *v.* Garrett, 28 Oreg. 168; 42 Pac. 129.
Murray *v.* Larabie, 8 Mont. 208; 19 Pac. 574.

1. Garvin *v.* Luttrell, 10 Humph. 16 (Tenn.)
Faut *v.* Miller, 17 Gratt. 187 (Va.)
Hanks *v.* Van Garder, 59 Ia. 179; 13 N. W. 103.
McGinnis *v.* Gabe, 78 Ind. 457.

2. Oliver *v.* Oregon Sugar Co., 45 Oreg. 77; 76 Pac. 1086.
Inter-Nat. Ry. Co. *v.* Prince, 77 Tex. 560; 19 A. S. R. 795.
Bent Otero Co. *v.* Whitehead, 25 Colo. 354; 54 Pac. 1023; 71 A. S. R. 140.
Holman *v.* Bachus, 73 Mo. 49.
Uhle *v.* Burnham, 44 Fed. 729.
Akers *v.* Demond, 103 Mass. 318.
Bell *v.* Jamison, 102 Mo. 71; 14 S. W. 714.

3. Ala. Nat. Bank *v.* Rivers, 116 Ala. 1; 22 So. 580; 67 A. S. R. 95.

4. Leavitt *v.* Baker, 82 Me. 26; 19 Atl. 86.
Myers *v.* Murphy, 60 Md. 282.
Tays *v.* Carr, 37 Kans. 141; 14 Pac. 456.

should be made at the first opportunity, a ruling obtained, and an exception properly saved, or the proceedings will conclusively be presumed to have been satisfactory to all parties[5]. But it perhaps more frequently occurs that the incompetency of the witness does not become apparent until after his examination has been proceeded with. In cases of this kind, of course a party cannot object until he knows of his right to do so, but when it comes to his knowledge he must act promptly in presenting his objections or he will be held to have foregone his right to question the competency of the witness[6]. A party calling a witness in support of his own case cannot object to his competency[7], and it is said, also, that he waives the right to object to the credibility of the witness[8]. Such waiver, once made, is good for the entire trial and cannot be revoked[9]. But a party is only required to make his objection at the proper time and to save an exception to the court's ruling. His right to later insist upon the objection is not waived by proceeding with the cross-examination of the witness nor by introducing evidence to contradict the testimony[10].

D. SELF-CRIMINATION:—Sec. 420. The federal constitution and the constitutions of most of the states provide that no person can be com-

5. See: Lewis *v.* Morse, 20 Conn. 211.
   Groshom *v.* Thomas, 20 Md. 234.
   Patterson *v.* Wallace, 44 Pa. St. 88.
   Stuart *v.* Lake, 33 Me. 87.
   Weidenhoft *v.* Prim, 16 Wyo. 340; 94 Pac. 453.
6. Selp *v.* Torch, 52 Pa. St. 210.
   Stockton *v.* Demuth, 7 Watts 39; 32 A. D. 735.
7. Stockton *v.* Demuth, *supra.*
8. Mattice *v.* Allen, 33 Barb. 546.
9. Beall *v.* Lynn, 6 Harr. & Johns. 336 (Md.)
10. Boylan *v.* Meeker, 4 Dutch. 274 (N. J.)
    Carpenter *v.* Ginder, 1 Wis. 243

pelled, as a witness, to answer any question if the answer would tend to expose him to a criminal charge or any kind of punishment. It may be noted that the answer may be refused if it would *tend* to expose the witness to a criminal prosecution, the rule not being confined to matters which directly incriminate him. And a court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by law[11]. Whether the privilege extends to protecting a witness from answers that would disgrace him is a matter upon which there is still some divergence of opinion. But the weight of authority is that if the answer would have a tendency to disgrace him, and the proposed testimony be of materiality to the case, he may be required to answer, but that he may invoke the benefit of the privilege if the answer can have no effect on the case[12]. And we think the holding of most courts is to the same effect where the answer not only has a tendency, but is sure to disgrace the witness[13]; although an opposite rule is adhered to by some courts[14].

Sec. 421. But the question what the witness is privileged from, what will criminate him, who determines the character of the answer, and questions of like character are not matters which we are to discuss extensively. It is our purpose to consider the ways and instances in which a witness by his

11. 1 Burr's Trial, 244, per Chief Justice Marshall.
Counselman *v.* Hitchcock, 142 U. S. 547.
12. Brown *v.* Walker, 161 U. S. 591; and 70 Fed. 46.
13. Jennings *v.* Prentice, 39 Mich. 421.
People *v.* Rector, 19 Wend. 569.
Nioline Co. *v.* Preston, 39 Ill. App. 358.
14. U. S. *v.* James, 60 Fed. 257.

own conduct deprives himself of the protection afforded by the privilege. And to begin with, it is well to note that this privilege of refusing to answer questions of a nature incriminating is one that is merely personal to the witness and he alone can claim its protection. The rules regulating the waiver of this privilege are the same whether the witness be testifying in a civil action or in a criminal prosecution, except as to the defendant himself in the latter case.

(1) TIME TO CLAIM PRIVILEGE:—Sec. 422. Though there is some conflict of authority, the better doctrine is that a witness must claim the privilege of his exemption from answering at the threshold of the examination; it being said that he cannot wait and answer a part and then refuse to answer other questions legitimate to a cross-examination. If he voluntarily states a part of the testimony, he waives his right and cannot later stand on his privilege[15]. And while there is authority supporting the doctrine that a witness may in his direct examination stop at any point he may see fit and claim his privilege, after which he cannot be cross-examined touching any point not mentioned in the direct examination[16], still, whether or not it contravenes the general rules regulating cross-examinations, the trend and holding of modern authorities support the rule that a witness who,

15. Ex Parte, Park, 37 Tex. Cr. R. 590; 66 A. S. R. 835, citing:
Rapalje, Witnesses, Sec. 269.
Wharton's Crim. Evidence, Sec. 470.
State *v.* Blake, 25 Me. 350.
Com. *v.* Price, 10 Gray 472; 71 A. D. 668.
People *v.* Freshour, 55 Cal. 375.
Connors *v.* People. 50 N. Y. 240.
State *v.* K., 4 N. H. 562.

16. Cooley's Const. Lim. 6th Ed. 384.

in his direct examination, voluntarily, or without objection opens up an account of a transaction, will, on cross-examination, be compelled to complete the narrative; and that he will not be allowed to state a fact and afterwards refuse to give the details[17]. In fact, the time in which this privilege may be claimed is one of the distinguishing rights between an ordinary witness and a defendant in a criminal prosecution who takes the stand in his own behalf; for the former may testify in the case and then refuse to answer an incriminating question at the time it is asked, but the latter, by the mere fact of taking the stand, produces a complete waiver of the privilege so far as it relates to facts relevant to the case[18].

(2) PRIVILEGE MUST BE CLAIMED:—

Sec. 423. The protection afforded by the privilege extended to witnesses to refuse to answer questions of an incriminating character is not self-operative. It is not a matter that concerns any but the witness himself, or, in other words, it is entirely personal to him. If he would avail himself of its benefits, he must claim them properly, for the rule is general that unless he claim the privilege in time he will be

17. Rapalje on Law of Witnesses, Sec. 443.
Chamberlain *v.* Willson, 12 Vt. 491.
Alderman *v.* People, 4 Mich. 414.
State *v.* Nichols, 29 Minn. 357; 13 N. W. 153.
Este *v.* Wilshire, 44 Oh. St. 636; 10 N. E. 677.
Com. *v.* Pratt, 126 Mass. 462.

18. State *v.* Kent, 5 N. Dak. 516; 67 N. W. 1052.
Coburn *v.* O'Dell, 30 N. H. 540.
State *v.* Duncan, 7 Wash. 336; 35 Pac. 117; 38 A. S. R. 888.
State *v.* Murphy, 45 La. Ann. 958; 13 So. 229.
State *v.* Clinton, 67 Mo. 380; 29 A. R. 506.
State *v.* Allen, 107 N. Car. 805; 11 S. E. 1016.
State *v.* Fay, 43 Ia. 651.
Thomas *v.* State, 103 Ind. 419; 2 N. E. 808.

deemed to have waived it and exposed himself to a complete examination and cross-examination concerning the criminating matters. And while the privilege is one wholly personal to the witness, and one with which neither party has anything to do, it has been said that the rule does not require that the witness should in person address the court and claim the privilege[19], and that if the court understands that the witness claims the privilege, it is immaterial whether the claim be made in person or by counsel[20]. But the better rule is adverse to these holdings and supported by most authorities, and under it the witness must claim his privilege in person and must state under oath that the answer to the proposed question will tend to incriminate him[21]. The reason for the last-named rule is that if the witness is not required to personally claim the privilege under oath, there is no admission which tends to discredit him, and the real benefit to be derived by the party examining him from such a discrediting admission is very largely lost.

(3) EXTENT OF WAIVER:—Sec. 424. Some question has arisen as to how far the waiver by a witness of the privilege of refusing to testify shall be effective. It seems well settled that where a witness is connected with several distinct trans-

19. People *v.* Brown, 72 N. Y. 571; 28 A. R. 183, a case of a defendant as a witness for himself.
20. Clifton *v.* Granger, 86 Ia. 573; 53 N. W. 316.
21. Wharton, Evidence, Sec. 535.
State *v.* Kent, 5 N. Dak. 516; 67 N. W. 1052.
Roddy *v.* Finnegan, 43 Md. 490.
White *v.* State, 52 Miss. 216.
People *v.* Reinhart, 39 Cal. 449.
State *v.* Wentworth, 65 Me. 234; 20 A. R. 688.
State *v.* Butler, 47 S. Car. 25; 24 S. E. 991.
Bradford *v.* People, 22 Colo. 157; 43 Pac. 1013.
Burk *v.* Putnam, 113 Ia. 232; 84 N. W. 1053; 86 A. S. R. 372.

actions which tend to incriminate him, all of which are material to the issues in the case, he does not waive his privilege of refusing to testify as to some of the incriminating transaction by consenting to testify as to others. But he waives his privilege as to such transaction in so far as the inquiry as to them is within the proper limits of cross-examination[22]. A specific exemplification of the rule is found in a case where a witness in his deposition testified in chief to the execution of certain notes, and it was held that he did not thereby waive his privilege of refusing to answer on cross-examination whether the notes were respectively in the same condition at the time he was testifying as they were when signed and delivered, and it was held error in such case to strike out the deposition on the ground that the witness had by so answering in chief waived his privilege[23].

Sec. 425. There is authority for the proposition that if a witness voluntarily and freely testify before a grand jury, that he waives his privilege and may be required to testify fully at the trial[24]. But the rule is not well supported either by authority or reason; for the grand jury investigations are entirely separate and disconnected and have nothing to do with the court as far as the witness is concerned, since his testimony could not be considered as a continuous statement[25]. And the same is

22. Evans *v.* O'Connor, 174 Mass. 287; 54 N. E. 557; 75 A. S. R. 316.
Low *v.* Mitchell, 18 Me. 372.
23. Lombard *v.* Mayberry, 24 Neb. 674; 40 N. W. 271; 8 A. S. R. 234.
24. State *v.* Van Winkle, 80 Ia. 15; 45 N. W. 388.
25. Temple *v.* Commonwealth, 75 Va. 892.
People *v.* Lauder, 82 Mich. 109; 46 N. W. 956.

true if he first testify at a coroner's inquest[26], or if he waives his privilege at one trial and claims it at a second trial of the same case[27].

SUB-DIVISION 2.

TRIAL PRACTICE.

1. IN GENERAL:—Sec. 426. In the trial of all cases before courts of justice, either with or without the intervention of a jury, it is necessary, in order for a party to have errors alleged by him to have been committed by the trial court reviewed on appeal, that he should have objected to the matter alleged as error and excepted to the ruling of the court. The objection is the presentment of a point upon which a ruling is asked, and the exception is an objection registered against the ruling of the court. Without an exception, the objection is unavailing in the appellate court. And as the two are so closely related in their functions, and as the rules governing them apply whether the trial be of a civil or criminal action, the treatment of the two in the succeeding sections will necessarily be interwoven.

Sec. 427. It is elementary that the point to which a party may wish to object must be raised at the trial or in the proceedings in the court below, or it cannot be taken advantage of in the appellate court[28]. Or, otherwise said in one instance, if the

26. Cullen *v.* Commonwealth, 24 Gratt. (Va.) 624.
27. Emery *v.* State, 101 Wis. 627; 78 N. W. 145.
Georgia Ry. Co. *v.* Lybrend, 99 Ga. 421; 27 S. E. 794.
28. Hershey *v.* Institute, 15 Ark. 128.
Spear *v.* Lomax, 42 Ala. 576.
New Orleans *v.* Congregation, 15 La. Ann. 389.
Scully *v.* Book, 3 Wash. 182; 28 Pac. 556.
Dimmey *v.* Wheeling Ry. Co., 27 W. Va. 32; 35 A. R. 292.
Bunks *v.* Chapman, 11 Ky. L. R. 260.
Benepe *v.* Wash, 38 Kans. 407; 16 Pac. 950.
Laber *v.* Cooper, 7 Wall. 565; 19 L. Ed. 151.

objection be to the introduction of evidence, the proper time to object is when it becomes apparent that error will be committed by receiving the evidence, as when it is offered[29], or, when a question is asked which is improper or calls for an improper answer[30]; and that an exception must be taken at the time to the ruling of the court[31]. Some states have statutory provisions regulating the mode and time of making objections and taking exceptions, but the rules are practically the same as in those states where no statutory provision exists. And the same principles obtain whatever be the matter objected to, the rule being that a party must avail himself of his rights at the earliest opportunity or they will be deemed waived.

2. OBJECTIONS TO EVIDENCE:

A. ADMISSION—

(1) TIME TO OBJECT:—Sec. 428. It is a rule of universal application, embracing practically every conceivable objection that could be made to evidence, that, in order to obtain any advantage of an error committed by the trial court, an objection must be made at the time the evidence is offered or it will be held waived; in support of which rule, the

29. Perrot *v.* Shearer, 17 Mich. 48.
Sharon *v.* Minneck, 6 Nev. 377.
McKay *v.* Lane, 5 Fla. 268.
Crump *v.* Starke, 23 Ark. 131.
Shain *v.* Sullivan, 106 Cal. 208; 39 Pac. 606.
Thomson *v.* Wilson, 26 Ia. 120.

30. Storms *v.* Lemon, 7 Ind. App. 435; 34 N. E. 644.
Blake *v.* Broughton, 107 N. Car. 220; 12 S. E. 127.
Duer *v.* Allen, 96 Ia. 36; 64 N. W. 682.

31. Laird *v.* Upton, 8 N. Mex. 409; 45 Pac. 1010.
Lester *v.* Georgia Co., 90 Ga. 802; 17 S. E. 113.
Missouri *v.* Hope, 100 Mo. 347; 13 S. W. 490; 8 L. R. A. 608.
Hanna *v.* Maas, 122 U. S. 24; 7 Sup. Ct. R. 1055; 30 L. Ed. 1117.
Williams *v.* Thomas, 3 N. M. 326; 9 Pac. 356.

adjudicated cases are numerically like unto the sands of the sea. And the reason upon which the rule is based is that if the alleged error be called to the attention of the trial court, an opportunity will thus be given for its correction, the expense of an appeal, and perhaps the annoyance of a second trial averted. Therefore, the objection will be too late if made for the first time after the cause has gone to the jury[32], or after argument[33], or after verdict[34], or on a motion for a new trial[35], or on appeal[36], and in either of such cases it is deemed waived.

Sec. 429. Thus, if parol evidence be offered in lieu of that required by law to be in writing, the error in the admission of such evidence is waived unless objected to at the time of the offer[37]. And the same result follows where the evidence introduced is secondary[38], or documentary with defects as to form which would render it inadmissible[39], or parol introduced to vary the terms of a written instru-

32. Hummel *v.* State, 17 Oh. St. 628.
33. Farmers Bank *v.* Greene, 43 U. S. App. 446; 74 Fed. 489; 20 C. C. A. 500.
34. Arons *v.* Smit, 173 Pa. St. 630; 34 Atl. 234.
Crump *v.* Starke, 23 Ark. 131.
Barton *v.* Gray, 57 Mich. 622; 24 N. W. 638.
35. Cook *v.* Ligon, 54 Miss. 368.
Feidler *v.* Motz, 42 Kans. 519; 22 Pac. 561.
State *v.* Peak, 85 Mo. 190.
Holten *v.* Lake Co., 55 Ind. 194.
36. West. Union *v.* Powell, 94 Va. 268; 26 S. E. 828.
Vietti *v.* Nesbitt, 22 Nev. 390; 41 Pac. 151.
Coleman *v.* Davis, 13 Colo. 98; 21 Pac. 1018.
McLaughlin *v.* Wheeler, 1 S. Dak. 197; 47 N. W. 816.
Dunham *v.* Holloway, 3 Okla. 244; 41 Pac. 140.
Ilstad *v.* Anderson, 2 N. Dak. 167; 49 N. W. 659.
Sutton *v.* Snokomish, 11 Wash. 24; 39 Pac. 273.
Paine *v.* Trask, 5 U. S. App. 283; 56 Fed. 233; 5 C. C. A. 497.
37. Brown *v.* Barnwell Co., 46 S. Car. 415; 24 S. E. 191.
Leeper *v.* Paschal, 70 Mo. App. 117.
38. West. Union *v.* Cline, 8 Ind. App. 364; 35 N. E. 564.
39. Western *v.* Flanagan, 120 Mo. 61; 25 S. W. 531.
Wells Fargo *v.* Davis, 105 N. Y. 670; 12 N. E. 42.

ment[40], or if a written instrument be introduced without proof of the signatures of the parties bound thereon[41], or if the evidence given be entirely outside of the issues raised by the pleadings[42], or be subject to the objection that the proof is a variance from the pleadings[43], or if proper preliminary proof has not been made[44].

Sec. 430. But it has been held that the objection that evidence incompetent has been admitted is not waived by neglect to make it when the evidence was introduced, and that it may be made at any time[45]. The ruling, however, is contrary to an almost unbroken line of authority which holds to the proposition dictated by reason, that a party should not be allowed to take his chances on incompetent evidence's being favorable to him and when it runs against him to have his belated objection given recognition[46]. But the law never requires of a party

40. Tebbs *v.* Weatherwax, 23 Cal. 58.
41. Perrott *v.* Shearer, 17 Mich. 48.
Knoll *v.* Kiessling, 23 Oreg. 8; 35 Pac. 248.
McKay *v.* Lane, 5 Fla. 268.
42. Boston Co. *v.* O'Reilly, 158 U. S. 334; 15 Sup. Ct. R. 830; 39 L. Ed. 1006.
Blanchard *v.* Cook, 147 Mass. 215; 17 N. E. 313.
Brady *v.* Nally, 151 N. Y. 258; 45 N. E. 547.
43. Colo. Inv. Co. *v.* Rees, 21 Colo. 435; 42 Pac. 42.
Stockton, etc. *v.* Glens Falls Co., 121 Cal. 167; 53 Pac. 565.
Bertha Co. *v.* Martin, 93 Va. 791; 22 S. E. 869.
44. Cox *v.* Gerkin, 38 Ill. App. 340.
45. Day *v.* Crawford, 13 Ga. 508. (See later cases same state below).
46. Maxwell *v.* Hannibal Ry., 85 Mo. 95.
O'Connell *v.* Hotel Co., 90 Cal. 515; 27 Pac. 373.
McCoy *v.* Wilson, 8 Colo. 335.
Jackson *v.* State, 88 Ga. 784; 15 S. E. 677.
Kinney *v.* Ry. Co., 34 N. J. L. 517.
De Garca *v.* Galvan, 55 Tex. 53.
Briesenmeister *v.* Lodge, 81 Mich. 525; 45 N. W. 977.
Pokrok Co. *v.* Zizkovsky, 42 Neb. 64; 60 N. W. 358.
Zabel *v.* Nyenhuis, 83 Ia. 756; 49 N. W. 999.
Murray *v.* Ry. Co., 3 N. Mex. 337; 9 Pac. 369.

that he do an unreasonable or an impossible thing, and if at the time evidence is offered or introduced a party against whom it operates is unaware of its inadmissibility and could not with reasonable diligence ascertain it, he will be permitted to object at the first opportunity offered after discovery of its inadmissibility, which objection should be in the form of a motion to strike out[47]. And it has been said, as a qualification of the general rule, that if the objectionable features of evidence could not under any circumstances have been obviated in the court below, objection may for the first time be made in the appellate court[48].

(2) SPECIFYING EVIDENCE AND GROUND OF OBJECTION—

(a) IN GENERAL:—Sec. 431. Objections to the introduction of evidence must not only be made at the proper time, but they must present to the court the substance of the complaint showing the inadmissibility of the offered evidence, so that the court may be fully advised of the claims of either party and thus be better able to avoid error in ruling. The objection must embrace all the reason the complaining party desires to urge for excluding the evidence, for it is the general rule, subject to a few exceptions, that if an objection specify particular reasons for excluding evidence, it will be considered only upon those grounds and all others will be

47. Sharon *v.* Nimrock, 6 Nev. 378.
Dyson *v.* Baker, 54 Miss. 24.
48. People *v.* Yee Funk Din, 106 Cal. 163; 39 Pac. 530.
Houghton *v.* Jones, 1 Wall. 702 (U. S.)

treated as waived[49]. A contrary rule would create confusion in the trial of cases. For, as has been said, if parties were not required to specify the grounds of their objections, such confusion might arise that many cases would practically never end. "The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons and the time and place to use them. Such things may do in love or war, when all things are said to be fair, but life is too short to transact business on such a system in courts of justice."[50]. If the party objecting will not specify the particulars rendering the evidence inadmissible, the court is not bound to speculate as to what counsel might have intended, for, unlike darkness, a general objection will not cover a multitude of errors[51].

49. Washington *v.* State, 106 Ala. 58; 17 So. 546.
Walker *v.* State, 97 Ga. 197; 22 S. E. 401.
Bell *v.* Sheridan, 21 D. C. 370.
Little *v.* People, 157 Ill. 153; 42 S. E. 389.
Davis *v.* Hopkins, 18 Colo. 153; 32 Pac. 70.
Morris *v.* Henderson, 37 Miss. 492.
Sullivan *v.* Richardson, 33 Fla. 1; 14 So. 692.
Bailey *v.* Ry. Co., 3 S. Dak. 531; 54 N. W. 596; 19 L. R. A. 653.
Evanston *v.* Gunn, 99 U. S. 660; 25 L. Ed. 306.
Violet *v.* Rose, 39 Neb. 660; 58 N. W. 216.
Rosina *v.* Trowbridge, 20 Nev. 105; 17 Pac. 751.
Burnside *v.* Ry. Co., 47 N. H. 554.
Crane *v.* State, 94 Tenn. 86; 28 S. W. 317.
Bournan *v.* Eppinger, 1 N. Dak. 21; 44 N. W. 1000.

50. Rush *v.* French, 1 Ariz. 123; 25 Pac. 816.

51. Heaslit *v.* Stratlin, 54 Ark. 185; 15 S. W. 461.
Alexander *v.* Thompson, 42 Minn. 498; 44 N. W. 534.
Howard *v.* Howard, 52 Kans. 469; 34 Pac. 1114.
States *v.* Chambers, 87 Ia. 1; 53 N. W. 1090.
Chandler *v.* Beal, 132 Ind. 596; 32 N. W. 597.
Davis *v.* Mills, 163 Mass. 481; 40 N. E. 852.
Holmes *v.* Roper, 141 N. Y. 64; 36 N. E. 180.
Fidler *v.* Hershey, 90 Pa. St. 363.
Arnold *v.* State, 5 Wyo. 439; 40 Pac. 967.
Turnbull *v.* Richardson, 69 Mich. 400; 37 N. W. 499.

Sec. 432. A general objection in the trial court will not permit the urging of a special ground in the appellate court, nor can a new ground be substituted in the higher court for the one presented below[52]. And a general objection will be ineffective for any purpose if a part of the evidence be admissible even though the other part be inadmissible[53]. It is immaterial for what purpose the evidence is admissible[54], although it has been held differently where the evidence had no bearing whatever on the issues[55]. But the exceptions to the rule are not many, for it is founded in reason, and in consonance with good sense requires a party objecting to specify the matters of which he complains and not to say, as counsel in one case did, that the objection is on "all grounds ever known or heard of"[56]. For as much as any other purpose, the objection is to give notice to the opposing party of the error in order that he may correct it—if it is objected that the question is leading, that the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, that the incompetency may be removed; if that it is immaterial, that the materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time[57].

52. Willey *v.* Portsmouth, 64 N. H. 219; 9 Atl. 220.
Bright *v.* Ecker, 9 S. Dak. 449; 69 N. W. 824.
53. Milligan *v.* Furniture Co., 111 Mich. 629; 70 N. W. 133.
54. Stringer *v.* Frost, 116 Ind. 447; 19 N. E. 331; 9 A. S. R. 875; 2 L. R. A. 614.
Three States Co. *v.* Rogers, 145 Mo. 445; 46 S. W. 1079.
55. First Nat. Bank *v.* Carson, 30 Neb. 104; 46 N. W. 276.
56. Johnston *v.* Clements, 25 Kans. 376.
57. Rush *v.* French, 1 Ariz. 124; 25 Pac. 816.
See, also: Helena *v.* Albertose, 8 Mont. 449; 20 Pac. 817.
Johnson *v.* Okerstrom, 70 Minn. 303; 73 N. W. 147.
Smith *v.* Hanle, 74 Ga. 324.
Masonic Soc. *v.* Lackland, 97 Mo. 137; 10 S. W. 895.

(b) INCOMPETENCY:—Sec. 433. However far the objection that evidence is incompetent may be effective, it is well settled that it cannot cover any other grounds for the exclusion of the evidence objected to, and, therefore, such other grounds will be considered waived. Thus, such objection will not raise the question of the competency of the witness to testify[58], nor that parol evidence was admitted to vary the terms of a written instrument[59], nor that secondary evidence was admitted[60], nor that a proper foundation for impeachment was not laid[61], nor that there was a variance between the pleading and the proof[62]. In all cases the objection should not stop with declaring the evidence incompetent, but in order to be of any avail it must state in what manner it is incompetent and what facts constitute the incompetency[63].

(c) INCOMPETENT, IRRELEVANT AND IMMATERIAL:—Sec. 434. The objection to evidence as being "incompetent, irrelevant and immaterial" is so generally heard in trials, whether civil or criminal, to the court or a jury, that it has

58. Young *v.* Ry. Co., 52 Mo. App. 530.

59. John Hutchinson Co. *v.* Pinch, 107 Mich. 15; 64 N. W. 729; 66 N. W. 340.

60. Kenosha Co. *v.* Sheet, 82 Ia. 540; 48 N. W. 933.
Walser *v.* Wear, 141 Mo. 443; 42 S. W. 928.
Eversdon *v.* Mayhew, 85 Cal. 1; 21 Pac. 431.

61. Frankel *v.* Wolf, 7 Misc. Rep. 190 (N. Y.).

62. Keigher *v.* St. Paul, 73 Minn. 21; 75 N. W. 732.
Burlington Co. *v.* Miller, 19 U. S. App. 588; 60 Fed. 254; 8 C. C. A. 612.
White *v.* Craft, 91 Ala. 139; 8 So. 420.
Le Mesnager *v.* Hamilton, 101 Cal. 532; 35 Pac. 1094.

63. State *v.* Eisenhour, 132 Mo. 140; 33 S. W. 785.
Benson *v.* State, 119 Ind. 488; 21 N. E. 1109.
Jones *v.* Inness, 32 Kans. 177; 4 Pac. 95.
Gladstone Bank *v.* Keating, 94 Mich. 429; 53 N. W. 1110.
Bagley *v.* Lodge, 31 Ill. App. 618.

come to be regarded by the layman as a part of the stock-in-trade of every lawyer. And it would be thought, from simply listening to many trials, that the lawyer may so regard it himself. But a review of the authorities in which this blanket objection has been considered will be convincing that it has not the efficiency as a healing potion that a majority of those practicing the profession suppose it to have. This will become apparent by remembering the rule hereinbefore adverted to that the right to object to the admission of evidence is waived if an objection interposed fail to specify the grounds rendering it inadmissible, to which rule nearly all courts give strict adherence. Many lawyers, however—and it may be truer of the young than of the old—feel it incumbent upon them to make some objection when evidence detrimental to their clients is offered, and knowing no other at all applicable, fall back upon the proposition that it is incompetent, irrelevant and immaterial, hoping that when the smoke of battle has cleared away they may be able to see more clearly wherein the incompetency, irrelevancy or immateriality lay embedded. But appellate courts do not look favorably upon attempts to cover every conceivable error by such generalities. For they say that a suitor has the right to be fairly appraised by the language of the objection just what point is made against his evidence to the end that he may then and there, if possible, save himself from the consequences of error[64], and courts are entitled to know exactly what

64. Kolka *v.* Jones, 6 N. Dak. 461; 71 N. W. 558; 66 A. S. R. 615, citing:
Springer Co. *v.* Faulk, 8 C. C. A. 224; 59 Fed. 707.
Warren *v.* Warren, 93 Va. 73; 24 S. E. 913.
Hutchinson Co. *v.* Pinch, 107 Mich. 12; 64 N. W. 729; 66 N. W. 340.

complaint is made so that they may intelligently rule upon the objection[65].

Sec. 435. So, where there is a general objection to evidence a part of which is admissible and a part is not, the objection is not sufficient to exclude any[66], for the rules of evidence under which objections are permitted to be made were not designed for the purpose of allowing them to be made grab-nets of to catch anything that might get fastened thereon. Counsel, who are presumed to have studied their cases, ought to be able to state the particular objections, and if none are stated, it is fair to assume that none exist, since an objection that cannot be particularly stated is not worth the making. The rule is a reasonable one, fair to the court and not burdensome to the parties[67].

Sec. 436. So, the rule being that objection to the introduction of evidence on one ground is a waiver of any right to object on other grounds, and that a general objection is a waiver of special grounds, it necessarily follows that evidence to which a general objection is interposed will not be excluded on account of such general objection if it be competent for any purpose[68]. As an illustration of this rule, plaintiffs brought an action against a

Bright *v.* Ecker, 9 S. Dak. 449; 69 N. W. 824.
Levine *v.* Lancashire Co., 66 Minn. 138; 68 N. W. 855.
Hawver *v.* Bell, 141 N. Y. 140; 36 N. E. 6.
Ladd *v.* Sears, 9 Oreg. 244.
Taylor *v.* Wendling, 66 Ia. 562; 24 N. W. 40.

65. Hoard *v.* Little, 7 Mich. 468.
Miller *v.* State, 12 Lea 225 (Tenn.).

66. Cofer *v.* Scroggins, 98 Ala. 342; 39 A. S. R. 54.
St. Louis Ry. Co. *v.* Hendricks, 48 Ark. 177; 3 A. S. R. 220.

67. Ohio Ry. Co. *v.* Walker, 113 Ind. 196; 15 N. E. 234; 3 A. S. R. 638.
Milligan *v.* Ry. Co., 111 Mich. 629; 70 N. W. 133.
New York Co. *v.* Gallaher ,79 Tex. 685; 15 S. W. 694.

68. Miss. Mills *v.* Smith, 69 Miss. 299; 30 A. S. R. 546.

railroad company for damages from an excavation on plaintiff's land by defendant. For the purpose of ascertaining the amount of the damage, witnesses were asked by plaintiffs, "What effect did the cut have upon the value of the property?" and upon their replying that its effect was to depreciate the value of the property, they were then asked "To what extent", and in reply stated the amount. These questions were objected to by the defendant on the ground that they were incompetent, irrelevant and immaterial; and on appeal of the case it was urged that the opinions of the witnesses should have been limited to the market value of the property before and after the excavation, and that the jury should have drawn its conclusion of the amount of damage from such evidence rather than from the opinions of the witnesses. But the court said that if this special objection had been made at the trial the plaintiffs could have asked the questions in such form as to obviate the objection; but it was further said that it is well settled that, unless the evidence is inadmissible for any purpose, a party is not at liberty under a general objection afterwards to urge a special objection[69].

Sec. 437. Since a general objection waives special grounds of complaint as to offered evidence, an objection thereto as incompetent, irrelevant and immaterial waives the question of the competency of a witness[70], that the evidence was not the best

69. Eachus *v.* Los Angeles Ry. Co., 103 Cal. 614; 37 Pac. 750; 42 A. S. R. 149.
Crocker *v.* Carpenter, 98 Cal. 418; 33 Pac. 271.
See, also: Bundy *v.* Cunningham, 107 Ind. 360; 8 N. E. 174.
Wilson *v.* Reeves, 70 Mo. App. 30.

70. Ball *v.* Keokuk Ry., 74 Ia. 132; 37 N. W. 110.

evidence[71], that no proper foundation was laid[72], that no preliminary proof of the execution and delivery of a deed was made[73], that the publication of a city ordinance was not established[74], that a city ordinance was invalid[75], that a question is leading[76], that an answer is not responsive[77] or that evidence is hearsay[78].

(d) EXCEPTIONS TO RULE:—Sec. 438. The rules announced in this division are general in their application, but not without exceptions. The requirement that the objection shall point out the evidence and the particular grounds rendering it inadmissible, and holding all grounds waived if not specified, is for the purpose of calling to the attention of the court and the opposite party possible errors in order that they may be corrected or obviated. But the cases in which this object could not possibly be attained constitute the exceptions to the rule, and the holding of the courts in this connection is that if the defect could not be cured by a special objection, a general objection, or the total want of an objection, is no waiver of the defect in the evidence

71. Rich *v.* Trustees, 158 Ill. 242; 41 N. E. 924.
Homestead Co. *v.* Duncombe, 51 Ia. 525; 1 N. W. 725.
8 Enc. Pl. & Pr. 232 and cases cited.
72. Seventy-Day Assoc. *v.* Fisher, 95 Mich. 274; 54 N. W. 759.
73. Rupert *v.* Penner, 35 Neb. 587; 53 N. W. 598.
Knoll *v.* Kiessling, 23 Oreg. 8; 35 Pac. 248.
Calhoun *v.* Hannan, 87 Ala. 277.
Thompson *v.* Ellenz, 58 Minn. 301; 59 N. W. 1023.
74. Klotz *v.* Winona Ry. Co., 68 Minn. 341; 71 N. W. 257.
Chicago Ry. *v.* People, 120 Ill. 667; 12 N. E. 207.
75. Pittsburg Ry. *v.* Lyons, 159 Ill. 576; 43 N. E. 377.
76. Yannish *v.* Tarbox, 57 Minn. 245; 59 N. W. 300.
77. O'Callaghan *v.* Bode, 84 Cal. 489; 24 Pac. 269.
78. Sherwood *v.* Sissa, 5 Nev. 349.
Yeatman *v.* Erwin, 5 La. 265.

and same may be taken advantage of at any time[79]. This is analogous to the rule that objections to a complaint for failure to state a cause of action are never waived, for the theory is that in the latter case no cause of action is alleged and in the former none is proved.

(e) OBJECTIONS ABANDONED:—Sec. 439. Even if a party has made a proper objection to the admission of evidence and duly excepted to the court's ruling, he is not yet over the shoals; for he may by his subsequent conduct waive his right to insist on his objection. Thus, if he leave to the discretion of a witness the objection to the privileged character of the facts inquired about he waives the right to further object to such testimony as being privileged[80]. Or, if he introduce as a part of his case the same evidence objected to, he thereby waives his right to object[81]; and such result has been held to have been produced by his bringing the same evidence out on cross-examination[82], although such is doubtless not true if he cross-examine the

79. Nutwell *v.* Tongue, 22 Md. 419.
Espalla *v.* Richard, 94 Ala. 159; 10 So. 137.
Dow *v.* Merrill, 65 N. H. 107; 18 Atl. 317.
McCadden *v.* Lowenstein, 92 Tenn. 614; 22 S. W. 426.
Snowden *v.* Coal Co., 16 Utah 366; 52 Pac. 599.
Lothrop *v.* Roberts, 16 Colo. 250; 27 Pac. 698.
Connor *v.* Black, 119 Mo. 126; 24 S. W. 184.
Tozer *v.* N. Y. Ry., 105 N. Y. 659; 11 N. E. 846.
Waller *v.* Leonard, 89 Tex. 507; 35 S. W. 1045.
Hodges *v.* Hodges, 106 N. Car. 374; 11 S. E. 364.
Bowman *v.* Eppinger, 1 N. Dak. 21; 44 N. W. 1000.
Brumley *v.* Flint, 87 Cal. 471; 25 Pac. 683.
State *v.* Soule, 14 Nev. 453.
Greenleaf *v.* Ry. Co., 30 Ia. 301.
80. Scates *v.* Henderson, 44 S. Car. 548; 22 S. E. 724.
81. Miles *v.* Chicago Ry., 76 Mo. App. 484.
82. Schroeder *v.* Michel, 89 Mo. 43; 11 S. W. 314.

same witness upon the evidence to which he has properly objected[83].

B. VARIANCE:—Sec. 440. Where there is a variance between the pleading and the proof, such variance is fatal to a recovery. But it is not so unless properly taken advantage of by the party entitled to insist upon it. To present the question of variance as one of law the evidence should be objected to upon that ground at the time it is offered, or when the variance becomes apparent, the party should move to exclude the evidence, or in some other appropriate way the question should be raised so that the trial court may pass upon it; and, to properly raise the question in any of these modes, the variance should be distinctly pointed out so as to enable the trial judge to pass upon it understandingly, and to enable the other party, if such a course should become necessary, to obviate the objection by an amendment[84]. Thus, it was held that in the appellate court an objection that there was a variance between an instrument set out in the declaration and the one offered and admitted in evidence could not be made when objection on this ground was not made in the court below although objection was there made on other grounds[85]. In other words, objection to evidence on the ground of variance between it and the pleading under which it was offered must specify the variance as ground of ob-

83. Kans. City Ry. Co. *v.* Crocker, 95 Ala. 412; 11 So. 262.
Lyons *v.* Elevator Co., 26 App. Div. 57; 49 N. Y. Supp. 610.
84. Libby *v.* Scherman, 146 Ill. 540; 34 N. E. 801; 37 A. S. R. 191.
85. Richelieu Hotel Co. *v.* Military Co., 140 Ill. 248; 29 N. E. 1044; 33 A. S. R. 234.

jection[86], must be made at the time it is offered or as soon as the variance becomes apparent[87], cannot be made after verdict[88], or on a motion for a new trial[89], or on appeal[90]; and unless made at the proper time and in the proper manner it will be held waived. The only exception to such rule is the case where the variance is so pronounced as to leave the allegations without supporting proof in their entire scope[91].

3. EXCEPTIONS TO RULINGS OF THE COURT—

A. IN GENERAL:—Sec. 441. The object of an objection to any portion of the procedings before courts is to present to the court the complaint a party has against those matters which, under the rules of procedure, he claims as prejudicial to his

86. Colfax Trust Co. *v.* So. Pac., 118 Cal. 648; 50 Pac. 775; 40 L. R. A. 78.
Murchie *v.* Peck, 160 Ill. 175; 43 N. E. 356.
Dano *v.* Sessions, 65 Vt. 79; 26 Atl. 585.
Sup. Council *v.* Fidelity Co., 63 Fed. 48.
87. Strauss *v.* Young, 36 Md. 246.
Cunningham *v.* Bostwick, 7 Colo. App. 169; 45 Pac. 151.
Shmit *v.* Day, 27 Oreg. 110; 29 Pac. 870.
Shenandoah Ry. *v.* Moose, 83 Va. 827; 3 S. E. 796.
88. Doyle *v.* Mulren, 7 Abb. Pr. (N. S.) 258.
89. Waidner *v.* Pauly, 141 Ill. 442; 30 N. E. 1025.
90. Wechselbery *v.* Bank, 64 Fed. 90; 26 L. R. A. 470.
Broughel *v.* Telephone Co., 72 Conn. 617; 49 L. R. A. 404.
Willey *v.* Elec. Lt. Co., 168 Mass. 40; 46 N. E. 395; 37 L. R. A. 723.
Fryer *v.* Breeze, 16 Colo. 323; 26 Pac. 817.
Bond *v.* State, 56 Ark. 444; 19 S. W. 1062.
Lary *v.* Lewis, 76 Ga. 46.
Emerson *v.* Gainey, 26 Fla. 133; 27 So. 526.
Challis *v.* Atchison, 45 Kans. 22; 25 Pac. 223.
Smith *v.* Phelan, 40 Neb. 765; 59 N. W. 562.
Bardwell *v.* Anderson, 13 Mont. 87; 32 Pac. 285.
Ireland *v.* Drown, 61 N. H. 638.
Cremer *v.* Miller, 56 Minn. 52; 57 N. W. 318.
Rainsford *v.* Massengale, 35 Pac. 774.
Shanks *v.* Whitney, 66 Vt. 405; 29 Atl. 367.
91. Roberts *v.* Graham, 6 Wall. 578 (U. S.).

rights. An exception is the follow-up complement of the objection, the registered intention of the party to rely upon his objection for the purpose of reviewing in the appellate court the ruling of the court below. And as an objection is necessary in order to bring the cause of complaint to the attention of the trial court, so is the preserving of an exception essential to procure a review of alleged error in the ruling thereon. And if an exception be not taken to the ruling of the court, a party will be held to have abandoned or waived his objection and no error of the court in such ruling can be later complained of by him. Therefore, to constitute a complete record sufficient for the review of alleged errors, there must be an objection to such alleged erroneous procedure, a ruling thereon and an exception to the ruling.

Sec. 442. As objections must specify clearly the matters constituting the cause of complaint, so, exceptions, to be of any avail, must present distinctly and specifically the ruling objected to. A case ought not to be left in such condition after trial that the defeated party may hunt through the record and if he finds an unsuspected error, attach it to a general exception and thus obtain a reversal of the judgment upon a point that may never have been brought to the attention of the court below[92]. And they must be sufficiently specific that the court may know to what ruling the exceptions are intended to apply. Therefore, an exception must be taken to each ruling as made, as a single exception will not be sufficient to cover several rulings. It is well established, also, that the exception

92. Springfield Ins. Co. *v.* Sea, 21 Wall 162 (U. S.).

must be taken at the time the ruling or decision is made, for a rule permitting it at any other time would be the cause of endless confusion in attempts to connect the exception to the proper ruling. So, it is held practically uniformly that erroneous rulings or decisions of the trial court are waived, even though properly objected to, unless an exception is taken at the time and before any further steps are taken in the case[93]. The rule however, is modified through statutory provision in some states, and the procedure is governed thereby. It is not our object, however to cover extensively in these pages the subject of exceptions; our purpose is to show what may be waived and what will amount to a waiver in the taking or failing to take exceptions.

B. TO EXCLUSION OF EVIDENCE:—Sec. 443. The negligence or unskillfulness of counsel is responsible for losses to litigants more frequently through failure to properly conduct their trial so as to present errors to an appellate court for review than in any other phase of the proceeding. For such there is little excuse, for the rules are simple and easily followed if proper attention be given

93. Laird *v.* Upton, 8 N. Mex. 409; 45 Pac. 1010.
Territory *v.* Baker, 4 N. Mex. 236; 13 Pac. 30.
Allen *v.* Sallinger, 108 N. Car. 159; 12 S. E. 896.
Lester *v.* Ga. Ry., 90 Ga. 802; 17 S. E. 113.
Carelton *v.* Lewis, 67 Me. 77.
Barney *v.* Scherling, 40 Miss. 320.
Matsinger *v.* Fort, 118 Ind. 107; 20 N. E. 653.
Meier *v.* Morgan, 82 Wis. 289; 52 N. W. 174.
McAnaw *v.* Matthis, 129 Mo. 142; 31 S. W. 344.
Bransford *v.* Karn, 87 Va. 242; 12 S. E. 404.
Powers *v.* McCue, 48 Kans. 477; 29 Pac. 686.
Franks *v.* State, 12 Oh. St. 1.
Stedham *v.* Creighton, 28 S. Car. 609; 9 S. E. 465.
United States *v.* Cary, 110 U. S. 51.
Hanna *v.* Maas, 122 U. S. 24; 7 Sup. Ct. R. 1055; 30 L. Ed. 1117.

to details. Thus, the rule is of long standing and the object of general adherence by the courts that to reserve any ruling of the trial court in excluding evidence, a pertinent question must be asked the witness testifying, and, upon objection, a statement made to the court as to what the answer will be, and an exception at the time to the adverse ruling of the court[94]. And it is said that no rule of practice is better settled than that in taking exception to the decision of the court in overruling the offer of evidence or excluding a defense, the exception must state the ground upon which the offer was made[95]; and that an exception to the exclusion of a question cannot be maintained where there is nothing to show what the answer would have been or what the exceptant expected to prove thereby[96]. Furthermore, the exception must be specific and directed to the exclusion of that evidence alone which is illegal for a general exception to the entire ruling of the trial court in granting a motion to exclude evidence in general including both legal and illegal evidence will not be sufficient to present any question for review[97]. The principle obtaining that the failure of the prejudiced party to except to the ruling of the trial court in excluding evidence is a waiver of any error in such ruling and debars such

94. Kern *v.* Bridwell, 119 Ind. 226; 21 N. E. 664; 12 A. S. R. 409.
Chicago Ry. *v.* Champion, 9 Ind. App. 510; 36 N. E. 221; 37 N. E. 21; 71 A. S. R. 357.
Ebner *v.* Mackey, 186 Ill. 297; 57 N. E. 834; 78 A. S. R. 280.
Flach *v.* Gottschalk, 88 Md. 368; 41 Atl. 908; 71 A. S. R. 418.
95. Dale *v.* See, 51 N. J. L. 378; 18 Atl. 306; 14 A. S. R. 688.
96. Shinners *v.* Locks & Canals, 154 Mass. 168; 28 N. E. 10; 12 L. R. A. 554.
97. Henry *v.* Hall, 106 Ala. 84; 17 So. 187; 54 A. S. R. 22.

party from relying thereon in the appellate court[98], it is further the doctrine of the cases that the exception must be taken at the time the evidence is excluded or it will be held waived[99]. Thus, an exception not taken until the term of court following the trial is too late[100], and even where it is not taken until the case is submitted to the jury[1] the question cannot be reviewed on appeal. It is of no moment at what stage of the trial the excluded evidence was offered and rejected, the rule is the same, and an exclusion by refusal to re-open the case to admit it must be excepted to at the time or any error therein will be held waived[2].

C. TO ADMISSION OF EVIDENCE:—Sec. 444. The principles of waiver applying to exceptions to the decisions of the trial court excluding or rejecting evidence are by analogy applicable to cases wherein objections are made to the admission of evidence. So, objections to the admission of evidence become abortive in so far as the review of errors thereon in the appellate court may be

98. Belk *v.* Meaghler, 104 U. S. 279; 26 L. Ed. 735.
Pittsburgh Co. *v.* Heck, 102 U. S. 120; 26 L. Ed. 58.
Collier *v.* Jenks, 19 R. I. 493; 34 Atl. 998.
Lewis *v.* McDougall, 19 Wash. 388; 52 Pac. 664.
Newmark *v.* Marks, 28 Pac. 960.
Marfel *v.* Knott, 128 Pa. St. 528; 18 Atl. 390.
Souster *v.* Black, 87 Ia. 519; 54 N. W. 534.
Roehl *v.* Baasen, 8 Minn. 26.
Chicago Co. *v.* Elliott, 117 Mo. 549; 24 S. W. 53.
Emeric *v.* Alvarado, 90 Cal. 444; 27 Pac. 356.
Mahany *v.* People, 138 Ill. 311; 27 N. E. 918.

99. Voorman *v.* Voight, 46 Cal. 392.
Downey *v.* Read, 125 Mo. 501; 28 S. W. 860.
State *v.* Ballard, 79 N. Car. 627.
Griggs *v.* Howe, 31 Barb. 100.
Weis *v.* Madison, 75 Ind. 241.
Roberts *v.* Graham, 73 U. S.; 6 Wall 578; 18 L. Ed. 791.

100. U. S. *v.* Carey, 110 U. S. 51.

1. Roberts *v.* Graham, supra.

2. Barnum *v.* Andrews, 106 Mich. 81; 63 N. W. 983.

concerned unless the objection be supported and re-enforced by a proper exception; for without such exception, the objecting party will be held to have abandoned his objection and waived any error of the trial court in its ruling on the evidence[3]. And to be of any avail, the exception must be timely, following immediately after the ruling of the court[4], for if be not made at that time, much difficulty would be incurred in finding the evidence objected to and attaching it to the proper exception. To permit or countenance this would be going beyond the bounds of reason, for the purpose of courts is to administer justice through convenient and speedy means, and rules of evidence are devised and applied to facilities the despatch of judicial business, and not to become straws to save submerged counsel. These rules are uniformly applied unless changed by statute or rules of court[5]. Thus, it is held that a party objecting to the admission of evidence will be held to have waived any error in

3. Clark *v.* Hodges, 65 Vt. 273.
Newport News *v.* Pace, 158 U. S. 63.
Sahlien *v.* Lonoke Bank, 90 Tenn. 221; 16 S. W. 373.
Halstead *v.* Horton, 38 W. Va. 727.
Kumler *v.* Ferguson, 22 Minn. 117.
Branson *v.* Com. 92 Ky. 330; 17 S. W. 1019.
Morris *v.* Everly, 19 Colo. 529; 36 Pac. 150.
Benepe *v.* Wash., 38 Kans. 407; 16 Pac. 950.
Fager *v.* State, 22 Neb. 332; 35 N. W. 195.

4. Chambers *v.* Baptist Soc., 1 B. Mon. 215 (Ky.).
Pool *v.* Fleeger, 36 U. S.; 11 Pet. 185; 9 L. Ed. 681.
Texas, etc., Ry. *v.* Saxton, 7 N. Mex. 302; 34 Pac. 532.
Tayloe *v.* Steamship Co., 88 N. Car. 15.
Gueringer *v.* Creditors, 33 La. Ann. 1279.
Feidler *v.* Motz, 42 Kans. 519; 22 Pac. 561.
Griffiths *v.* Hanks, 91 Mo. 109; 4 S. W. 508.
Downey *v.* Read, 125 Mo. 501; 28 S. W. 860.
Collins *v.* Bank, 75 Tex. 254; 11 S. W. 1053.
McPhee *v.* Sullivan, 77 Wis. 33; 45 N. E. 808.
Watson *v.* Skating Rink, 177 Ill. 203; 52 N. E. 317.

5. In re Brundage, 31 App. Div. 348; 52 N. Y. Supp. 362.
Greenbrier Ex. *v.* Ocheltree, 44 W. Va. 626; 30 S. E. 78.

the court's ruling by failing until after verdict to have an exception noted[6]. The principle of waiver of errors in the admission of evidence by failure to preserve proper exceptions at the proper time is equally applicable to cases tried by the court and those tried to a jury unless changed by statute[7].

Sec. 445. It makes no difference what the objection to the admission of evidence may be, the rules are the same. The evidence may be hearsay, secondary, parol introduced to vary the terms of a writing, may be offered without the required foundation or preliminary proof, or irrelevant, immaterial or incompetent in any manner, but whatever be the facts rendering it inadmissible, it will be admitted unless objection be made at the time it is offered; and if objected to at the proper time, any error of the court in its ruling receiving the evidence will be waived unless the objector except to the ruling of the court at the time it is made[8].

Sec. 446. The principles of waiver governing in the admission or exclusion of evidence apply with equal force where a ruling is made on the competency of a witness. When the testimony is

6. Tayloe *v.* Steamship Co., 88 N. Car. 15.
7. McCullough *v.* Biedler, 66 Md. 283; 7 Atl. 454.
8. Coleman *v.* Davis, 13 Colo. 98; 21 Pac. 1018.
Sims *v.* State, 87 Ga. 569; 13 S. E. 551.
Paxon *v.* Brown, 61 Fed. 874.
Spies *v.* Illinois, 123 U. S. 143.
Allen *v.* Ozark Co., 55 Ark. 549; 18 S. W. 1042.
Sherwood *v.* Sissa, 5 Nev. 349.
Huey *v.* Drinkgrave, 19 La. 482.
Zabel *v.* Hyenhuis, 83 Ia. 756; 45 N. W. 999.
Lyons *v.* Child, 61 N. H. 72.
Brown *v.* Oldham, 123 Mo. 621; 27 S. W. 409.
Lamberts *v.* Cooper, 29 Gratt. 61.
Holman *v.* Ry. Co., 114 Mich. 308; 72 N. W. 202.
Colo. Co. *v.* Brown, 15 Colo. 195; 25 Pac. 87.
Wise *v.* Wakefield, 118 Cal. 107; 53 Pac. 664.

offered, it is the duty of him who will be prejudiced by the witness to register an objection to the witness and whichever way the court rule, the losing party should have an exception noted; for if he fail to except, he will be held to have waived his objection and any error of the court in its ruling thereon[9]. And the same is true if the objection be to the question asked[10], or that evidence was not offered in the proper time[11]. And it is safe to say that the general rule, subject to but few exceptions, is that where there is an objection in the course of taking the evidence in a case, the ruling thereon must be excepted to at the time or the objection is waived and the waiver precludes consideration of the point on appeal.

4. WAIVER AS TO NON-SUITS:—Sec. 447. A non-suit is a mode of taking a case from the jury in which the court determines as a matter of law that there is no evidence before the jury upon which they could find a verdict for the plaintiff. In those jurisdictions where the practice obtains of moving for a non-suit, the test seems to be that if from a view of all the evidence it is apparent that the court would be required in the interest of justice to set aside a verdict if one should be rendered for the plaintiff, it is the court's duty to grant a non-suit upon motion of the defendant therefor. But, if

9. State *v.* Steeves, 29 Oreg. 85; 44 Pac. 898.
Walker *v.* State, 34 Fla. 167; 16 So. 80.
Brown *v.* Foster, 112 Mo. 297; 20 S. W. 611.
Young *v.* Omohundro, 69 Md. 424; 16 Atl. 120.
Downey *v.* Hicks, 14 How. 240; 14 L. Ed. 404.
Auchampaugh *v.* Schmidt, 70 Ia. 642; 27 N. W. 805.
10. Corcaran *v.* Batchelder, 147 Mass. 541; 18 N. E. 420.
Scott *v.* Lloyd, 9 Pet. 418; 9 L. Ed. 178.
11. Olmstead *v.* Webb, 5 App. D. C. 38; 23 Wash. L. R. 169.
Kingman *v.* Sharley, 1 Mo. App. 281.

viewed in its most favorable light, the evidence of plaintiff could in any way warrant a verdict in his behalf, a non-suit should be denied.

Sec. 448. But cases are not always made up of the evidence of plaintiff alone, for it frequently occurs that the defendant, in presenting his side of the controversy, may supply a link in the chain, the absence of which had up to that time rendered plaintiff's case imperfect. Accordingly, the rule has been generally adopted that if the court has erroneously overruled the motion of defendant for a non-suit on account of the absence of evidence required to make out a case for the plaintiff, the defendant waives his right to a non-suit and any error of the court in overruling his motion by himself introducing evidence which supplies the defects in plaintiff's proof[12]. Or, as it has been said, "where a motion for a non-suit was improperly denied, but the defendant then introduced testimony enabling the plaintiff to supply the defect in his case, that defendant thereby waived the objection"[13]. On the trial of a cause, after the plaintiff had introduced his evidence which, as the appellate court found, was insufficient to warrant a verdict for him, the defendant introduced evidence supplying the defects in the case of plaintiff; and the appellate court on this point said that it seems to be well settled that if a defendant, after a motion for a non-

12. Barrow *v.* Lumber Co., 14 Idaho, 698; 95 Pac. 682.
Smith *v.* Compton, 6 Cal. 24.
Oakes *v.* Thornton, 28 N. H. 44.

13. Smith *v.* Compton, 6 Cal. 24, cited in:
Jennings *v.* Bank, 13 Colo. 417; 22 Pac. 777; 16 A. S. R. 210.
Illstad *v.* Anderson, 2 N. Dak. 167; 49 N. W. 659.
Bogk *v.* Gassert, 149 U. S. 17; 13 Sup. Ct. R. 738.
Trickey *v.* Clark, 50 Oreg. 516; 93 Pac. 457.
N. W. Pac. Co. *v.* Bentley, 93 Pac. 150.

suit, himself supplies the evidence on the want of which his motion was founded, he cannot have a reversal on the technical ground that such evidence was not before the court when the non-suit was asked[14].

Sec. 449 It is said, too, that the defendant waives any error of the trial court in overruling his motion for a non-suit if he fail to renew his motion at the time the testimony is closed and after he has introduced evidence. The same authorities hold him to a waiver if he introduce evidence after the overruling of his motion[15]. But, despite the eminence of the authorities sustaining the doctrine, we find it hard to perceive its justice. The true rule ought to be that if a defendant properly presents his motion for a non-suit after the plaintiff has presented all of his evidence, he should not, from the mere fact of introducing his side of the controversy, be precluded from having a review of the decision of the trial court overruling his motion, to which decision he has duly excepted. This view is more persuasive in the light of the law that the burden is upon the plaintiff to make out his case upon his own evidence. Some cases have approached this view in saying that the denial of a motion for a non-suit before the introduction of the defendant's evidence will not prevent the granting of such a motion after the defendant's evidence has been introduced, if a verdict for the plaintiff

14. Barton *v.* Kane, 17 Wis. 38; 84 A. D. 728.
Bounsaball *v.* Pease, 45 Wis. 511.
Hyland *v.* Sherman, 2 E. D. Smith 234.
15. Barrow *v.* Lumber Co., 14 Idaho 698; 90 Pac. 682.
Dunham Co. *v.* Dandelin, 143 Ill. 409; 32 N. E. 258.
Accident Ins. Co. *v.* Crandal, 120 U. S. 527; 7 Sup. Ct. R. 685.
Gaylord *v.* Gallagher, 20 N. Y. S. 682.

could not be sustained upon the evidence[16]. Perhaps most cases hold this, but they do not go farther.

Sec. 450. If a defendant move for a non-suit upon one ground, he must stay by that till the last, for he will, by thus limiting his motion, be held to have waived all other grounds upon which he might have asked for a non-suit. As was said in one case, a party cannot avail himself of a different position, on appeal, from that which he assumed in the court below. This doctrine is well established and is necessary to be sustained in order that the plaintiff may not be misled in the course of the trial and in the settlement of the bill of exceptions in case the non-suit should be ordered[17]. And if it does not appear in the record that any grounds were stated in the motion, there is nothing that can be reviewed[18].

Sec. 451. But as in all other cases of rulings or decisions by the court during the progress of a trial, the party against whom the ruling on a motion for a non-suit goes must take a proper and timely exception to the ruling or he will be deemed to have waived any error and precluded the right to have the ruling reviewed[19].

16. Fagundes *v.* Cent. Ry. Co., 79 Cal. 97; 21 Pac. 437; 3 L. R. A. 824.
17. Mateer *v.* Brown, 1 Cal. 221; 52 A. D. 303.
Bronzan *v.* Drobaz, 93 Cal. 647; 29 Pac. 254.
18. Loring *v.* Stewart, 79 Cal. 200; 21 Pac. 651.
19. Wyatt *v.* Evins, 52 Ala. 285.
McBride *v.* Latham, 79 Ga. 661; 4 S. E. 928.
Harper *v.* Dail, 92 N. Car. 394.
Stewart *v.* Davenport, 23 Minn. 346.
Blair *v.* Pray, 103 Ill. 615.
Brown *v.* Warren, 16 Nev. 228.
Oakes *v.* Thornton, 28 N. H. 44.
Harrison *v.* Bank, 9 Mo. 161.

5. DEMURRER TO THE EVIDENCE:—Sec. 452. A demurrer to the evidence is analogous to a demurrer to the facts alleged in a pleading. By it the trial court is called upon to declare the law upon the facts presented, and it is a means of taking the case from the jury when the facts, after the law has been applied to them, are not sufficient for the jury to find a verdict upon for plaintiff.

Sec. 453. In cases of a demurrer to the plaintiff's evidence, the authorities seem to hold, as in cases of a motion by defendant for a non-suit, that if the defendant demurs to the plaintiff's evidence and his demurrer be overruled, he waives his exception to, and consequently his right to insist upon, his demurrer by afterward introducing his evidence. And it is said that the rule is the same where the defendant, instead of demurring to the evidence moves for a peremptory instruction to the jury to render a verdict in his favor. If, after such request is denied, the defendant introduces his evidence, he thereby waives any objection to the ruling of the court in denying such request[20]. The case from the federal court cited in the preceding note, with others of like holding, is cited with approval in Elliott's General Practice[21]. But another case is cited in the same work showing an opposite view of the same question[22]. This latter case is from a Missouri

20. German Ins. Co. *v.* Frederick, 58 Fed. 144, citing:
Railroad Co. *v.* Hawthorne, 144 U. S. 202; 12 Sup. Ct. R. 591.
Joliet Co. *v.* Shields, 134 Ill. 209; 25 N. E. 569.

21. 2 Elliott's Gen. Prac. 865, citing:
Accident Ins. Co. *v.* Crandal, 120 U. S. 527; 7 Sup. Ct. R. 685.
Railroad *v.* Hawthorne, 144 U. S. 202; 12 Sup. Ct. R. 591.
Bradley *v.* Poole, 98 Mass. 169.
Gluck *v.* Cox, 90 Ala. 331; 8 So. 161.

22. Weber *v.* Kans. City Co., 100 Mo. 194; 12 S. W. 804 and 13 S. W. 587; 18 A. S. R. 541.

court, and with due deference to the authorities first cited, and recognizing their controlling weight, it yet occurs to the writer that the Missouri case has the better reasoning and the better principle back of it. The rule supported by a majority of cases appears technical in its application; the reason upon which it is founded being that by a demurrer, joined in by both parties, the case is effectually taken away from the jury, and it is difficult to see how a case can be literally taken from the jury and yet submitted to them for decision. But it should be remembered that a demurrer to the evidence is simply saying that the plaintiff has made no case, a proceeding analogous to a demurrer to a complaint for failure to state a cause of action; and the rule being universal that the latter demurrer may be made at any time and is never waived, similar reasoning dictates that the former demurrer be given the same latitude within which to operate, and that a defendant should be permitted to demur to the evidence at the close of the plaintiff's case, introduce his evidence in the event of an adverse ruling, demur again at the close of the trial as was done in the Missouri case, and even to insist upon it on appeal. Of course, by introducing his evidence after the overruling of his demurrer, a defendant runs the risk of supplying the defects in plaintiff's case, which would be fatal to his demurrer; but this is a risk he should be permitted to take if he see fit as it cannot work damage to the plaintiff, whereas, the other rule might frequently, through the mistaken belief of counsel in the justness of their demurrer, be the cause of grievous hardships to litigants.

Sec. 454. Of course, after the court rules upon

a demurrer to the evidence, it is necessary, as in all other decisions, that the losing party except to the ruling in order to have it reviewed on appeal; for a failure to so except is deemed an abandonment of the demurrer and a waiver of any right to insist upon it on appeal.

6. DIRECTING VERDICT:—Sec. 455. When the plaintiff, in the trial of a civil action, has introduced all of his evidence other than that properly to be offered as rebuttal, if there be nothing more than a mere scintilla of evidence in support of the cause of action alleged in the complaint or petition, the defendant has the right, upon proper application, to have the court direct the jury to render a verdict for him. The plaintiff has the same right to a directed verdict at the close of the defendant's evidence if there be nothing more than a scintilla of evidence in support of the alleged defense. But in order for his application to have any reserved force or future effect, the party moving for a directed verdict must stand squarely upon his motion; for if he introduce evidence after the overruling of his motion, he will be deemed to have abandoned it and waived his right to insist upon the ruling of the court as error[23]. This rule does not mean, however, that after a party's motion to direct a verdict has been overruled, his subsequently introducing evidence waives his right to again make the same request at the close of all the evidence[24]. But the lat-

23. Columbia *v.* Hawthorne, 144 U. S. 202; 12 Sup. Ct. R. 591.
Walker *v.* Windsor Bank, 56 Fed. 76.
Chicago Co. *v.* Van Vleck, 143 Ill. 480; 32 N. E. 262.
Poling *v.* Ohio, etc., Co., 38 W. Va. 645; 18 S. E. 782.

24. Weber *v.* Kans. City Co., 100 Mo. 194; 12 S. W. 804 and 13 S. W. 587; 18 A. S. R. 541.
McPherson *v.* St. Louis Ry. Co., 97 Mo. 254; 10 S. W. 846.
Rochat *v.* No. Hudson Co., 49 N. J. L. 445; 9 Atl. 688.

ter request is not a revival of the former, for that has been abandoned through waiver; it is merely a new motion to direct, made as if no other had been interposed.

7. INSTRUCTIONS—

A. IN GENERAL:—Sec. 456. Among the innumerable windings and turnings occurring in the trial of almost every case where the services of a jury are availed of, any court is likely to fall into error in the matter of instructing the jury as to the law to be applied to the facts of the particular case. For this reason, it is necessary for counsel to assist courts all they may by calling to their attention errors or irregularities in the giving or failing to give instructions, so that they may be avoided. And to the same extent that counsel must point out errors to the trial court in its instructions, they must also make request for instructions in any particular they deem material, for otherwise in either instance any error will be deemed waived.

B. INSTRUCTIONS GIVEN:—Sec. 457. Following the rule generally applicable to all subjects of the law, a party having cause of complaint against instructions given by the court must, for the benefit of the court and his opponent, point out the alleged defects in order that errors may be corrected and the expense and annoyance of an appeal and a second trial thus obviated. This is properly done by an objection to the instruction in which is pointed out the particular reasons rendering the instructions improper. This objection is solely for the benefit of the trial court and the opposing party; but if the objector desire to save the point made by him for the purpose of having alleged errors re-

viewed in an appellate court, he must, in the event of a ruling by the court adversely to him, duly except to such ruling. For it is the general rule, subject only to statutory qualification in any case of departure, that without such objection taken at the trial to instructions there given, error cannot be predicated upon them in the appellate court; and by such failure to object and to point out to the trial court what is claimed as error, a party waives the irregularities or defects in the instructions[25]. The rule is the same whatever may be the reasons or grounds of complaint rendering the particular instruction objectionable. It may be that the instructions are erroneous in that they do not state the law correctly[26], or that they are insufficient[27], or that

25. State *v.* Bayne, 88 Mo. 604.
Ritzenger *v.* Hart, 43 Mo. App. 183.
McDaneld *v.* Logi, 143 Ill. 487; 32 N. E. 423.
Pielke *v.* Chicago Co., 6 Dak. 444; 43 N. W. 813.
McSwain *v.* Howell, 29 Fla. 248; 10 So. 588.
Chattahoochee Co. *v.* Sullivan, 86 Ga. 50; 12 S. E. 216.
State *v.* Sheard, 35 La. Ann. 543.
People *v.* Caldwell, 107 Mich. 374; 65 N. W. 213.
Carter *v.* Mo. Co., 41 Pac. 356 (Okla.)
St. Louis, etc. Co. *v.* Vincent, 36 Ark. 451.
Mo. Co. *v.* Johnson, 44 Kans. 660; 24 Pac. 1116.
Wheatley *v.* Waldo, 36 Vt. 237.
Burnet *v.* Cavanaugh, 56 Neb. 190; 76 N. W. 578.
McFarland *v.* So. Imp. Co., 107 N. Car. 368.
State *v.* Anderson, 20 Wash. 193; 55 Pac. 39.
Dawson *v.* Coston, 18 Colo. 493; 33 Pac. 189.
Gum *v.* Murray, 6 Mont. 10.
Thirkfield *v.* Mtn. View Assoc., 12 Utah 76; 41 Pac. 564.
Jenkins *v.* Dean, 130 N. Y. 275; 29 N. E. 126.
Territory *v.* O'Donnell, 4 N. Mex. 196; 12 Pac. 743.
Lawrence *v.* Bucklen, 45 Minn. 195; 47 N. W. 655.
Simonds *v.* Baraboo, 93 Wis. 40; 67 N. W. 40.
Leeper *v.* State, 29 Tex. App. 63.
Kennedy *v.* Cunningham, 59 Ky. 538.
Eddy *v.* Lafayette, 163 U. S. 456; 16 Sup. Ct. R. 1082; 41 L. Ed. 225.

26. Williamson *v.* State, 30 Tex. App. 330; 17 S. W. 722.
Bourke *v.* Van Keuren, 20 Colo. 95; 36 Pac. 882.

27. Box *v.* Kelso, 5 Wash. 360; 31 Pac. 973.

they are not suited to the issues[28], or are a misstatement of the issues[29], or of law[30], or a submission of law to the jury[31], or that they are a comment on the weight of the evidence[32]; or there may be error in failing to define terms used in instructions[33], or in assuming controverted facts to be uncontroverted[34], or the instructions may be subject to successful attack for any other reason going to their substance or applicability to the issues involved; but whatever the cause of complaint or the ground of objection, the attention of the court must be called thereto at the time of the giving of the defective instructions, or the matter cannot be urged on appeal[35].

Sec. 458. As well as being deficient in some matter of substance, instructions may be erroneous in matters of form, the rule being the same in either case, for a proper objection must be made or any error will by such failure to object be waived. Thus, the fact that instructions are incomplete[36], or uncertain and ambiguous[37], or that they are inconsistent

28. Shaw *v.* N. Y. etc. Co., 150 Mass. 182; 22 N. E. 884.
Stoner *v.* Devilbiss, 70 Md. 144; 16 Atl. 440.
29. Milmo *v.* Adams, 79 Tex. 526; 15 S. W. 690.
30. Bergh *v.* Sloan, 53 Minn. 116; 54 N. W. 943.
31. Stansbury *v.* Fogle, 37 Md. 369.
32. Atchison Co. *v.* Worley, 25 S. W. 478 (Tex.)
33. People *v.* Flynn, 73 Cal. 511; 15 Pac. 102.
Cogswell *v.* West., etc., Co., 5 Wash. 46; 31 Pac. 411.
Johnson *v.* Mo. Pac., 96 Mo. 340, 9 S W. 790.
34. State *v.* Fenalson, 78 Me. 495; 7 Atl. 385.
35. Phelps *v.* Mayer, 15 How. 150 (U. S.).
Cheatham *v.* Wilbur, 1 Dak. 335; 46 N. W. 580.
Hayes *v.* Solomon, 90 Ala. 520; 7 So. 921.
Spooner *v.* Handley, 151 Mass. 313; 23 N. E. 840.
Wray *v.* Carpenter, 16 Colo. 271; 27 Pac. 248.
Burr *v.* Joy, 151 Mass. 295; 23 N. E. 838.
Rumph *v.* Hiott, 35 S. Car. 444; 15 S. E. 235.
Muetze *v.* Tuteur, 77 Wis. 236; 46 N. W. 123.
36. Goldhammer *v.* Dyer, 7 Colo. App. 29; 42 Pac. 177.
37. People *v.* Olsen, 80 Cal. 122; 22 Pac. 125.
Holm *v.* Sandberg, 32 Minn. 427; 21 N. W. 416.

with each other[38], or that formal requirements have not been complied with, as that special instructions are not numbered and signed[39], or two paragraphs were written on the same page[40], or that the instructions are misleading[41]—any of these defects, while fatal to the instructions, if properly called to the attention of the court, will be held waived unless objected to at the time the instructions are given.

(1) WAIVER OF WRITTEN INSTRUCTIONS:—Sec. 459. Parties having the right to a written charge to the jury cannot with impunity sit silently by and see that right transgressed. To be available in a higher court, complaint of error must be predicated upon a proper and timely objection in the trial court to the manner in which instructions are given. The objection must be timely in that it must be registered at the time the instructions are given; and it must be proper by being placed on the particular ground that oral instructions are not satisfactory; otherwise, the irregularity or error will be held waived[42]. And the same effect was held to have resulted where the failure to make a timely objection was caused by an agreement between counsel that "at any time within which a stay was granted either party might take exceptions to the charges or any part thereof." The appellate court said that it is not competent for counsel to sit by and make no objection to oral instructions where

38. Williams *v.* So. Ry. Co. 110 Pac. 457; 42 Pac. 974.
39. Moffatt *v.* Tenney, 17 Colo. 189; 30 Pac. 348.
40. Davenport *v.* Cummings, 15 Ia. 219.
41. Pellum *v.* State, 89 Ala. 28; 8 So. 83.
42. Jacobs *v.* Mitchell, 2 Colo. App. 456; 31 Pac. 235.
Wright *v.* Gillespie, 43 Mo. App. 244.
Sackett's Instructions, 14.
Vanwey *v.* State, 41 Tex. 639.
Leonardo *v.* Territory, 1 N. Mex. 291.

given on that ground, and by agreement save their exceptions weeks later. Such a course is not fair to the court and has the support of no adjudicated case so far as we know. When counsel so sit by without objection, they must be held to have waived the error[43].

(2) EXCEPTIONS:—Sec. 460. As in all other cases of error in the trial of a cause, an objection to an instruction as given is for the benefit of the trial court, to call to its attention errors therein so that same may be properly corrected. But on appeal, the objection is futile unless followed in due course by an exception to the court's decision overruling the objection. Without this exception, the legal conclusion is inevitable that the objector is satisfied with the court's ruling and has abandoned his objection. While this is the regular course to pursue, it frequently occurs that at the outset the objection takes the form of an exception, the party aggrieved simply notifying the court that he excepts to the opinion and direction of the court[44]. But whatever form it may assume, the rule, except where modified by statute[45], is universal that a failure to except to an instruction amounts to a waiver of any irregularities or errors therein, which means

43. Boss *v.* No. Pac. R. Co., 2 N. Dak. 128; 49 N. W. 655; 33 A. S. R. 756.
See: Garton *v.* Bank, 34 Mich. 279.
U. S. *v.* Gough, 8 Utah 428; 32 Pac. 695.
44. 2 Thompson, Trials, Art. 2395.
45. Wesson *v.* State, 109 Ala. 61; 19 So. 514.
Denver, etc. Ry. *v.* Bedell, 11 Colo. App. 139; 54 Pac. 280.
Marriner *v.* Jno. L., etc. 113 N. Car. 52; 18 N. E. 94.
Little River Co. *v.* Fitzpatrick, 42 Oh. St. 318.
Gassert *v.* Bogk, 7 Mont. 585; 19 Pac. 281; 1 L. R. A. 240.
Internat'l Co. *v.* Click, 5 Tex. Civ. App. 224; 23 S. W. 833.

that same cannot be urged on appeal[46]. And the rule is the same where the error is in the modification of a requested instruction[47].

Sec. 461. It is a general rule to be followed with absolute safety and to be departed from only with prospects of peril, that where an exception is taken to an instruction it must point out the alleged defect, and must be directed not to the charge as a whole, but to those portions considered objectionable. For a general exception is not available as to specific defects if any one of the propositions in the

46. Lowell *v.* Gathright, 97 Ind. 313.
McSwain *v.* Howell, 29 Fla. 248.
Jackson *v.* Com., 12 Ky. L. R. 575; 14 S. W. 677.
Lobdell *v.* Hall, 3 Nev. 507.
McCart *v.* Squire, 150 Mass. 484; 23 N. E. 323.
City *v.* Smith, 47 Neb. 408; 66 N. W. 538.
Packard *v.* Bergen Co., 54 N. J. L. 553; 23 Atl. 722.
State *v.* Hilsabeck, 132 Mo. 348; 34 S. W. 38.
Lefkow *v.* Allred, 54 Mo. App. 141.
Cram *v.* Gas Co., 75 Hun 316.
Georgia Ry. Co. *v.* West, 66 Miss. 310; 6 So. 207.
Williams *v.* So. Pac. Ry., 110 Cal. 457; 42 Pac. 974.
Werner *v.* Jewett, 54 Kans. 530; 38 Pac. 793.
Territory *v.* O'Donnell, 4 N. Mex. 66; 12 Pac. 743.
Dugan *v.* Thomas, 79 Me. 221; 9 Atl. 354.
Chemical Co. *v.* Johnson, 101 N. Car. 223; 7 S. E. 770.
Berry *v.* Smith, 2 Okla. 345; 35 Pac. 576.
State *v.* Williams, 13 Wash. 335; 43 Pac. 15.
Everett *v.* Summer, 32 Oh. St. 562.
Leach *v.* Hill, 97 Ia. 81; 66 N. W. 69.
Norfork Co. *v.* Hoover, 79 Md. 253; 29 Atl. 994.
Willard *v.* Petitt, 153 Ill. 663; 39 N. E. 991.
Hawley *v.* Harran, 79 Wis. 379; 48 N. W. 676.
Tucker *v.* U. S., 151 U S. 164.
Hedden *v.* Iselin, 142 U. S. 676.
Little Rock Co. *v.* Dallas Co., 66 Fed. 522.

47. Tracey *v.* State, 46 Neb. 361; 64 N. W. 1069; and it is the same where the error is technical in its nature, as a failure to number the instructions: Moffat *v.* Teeney, 17 Colo. 189; 30 Pac. 348; Jolly *v.* State, 43 Neb. 587; 62 N. W. 300; Cunningham *v.* Seattle Elec. Co., 3 Wash. 471; 28 Pac. 745; or failure of the judge to sign the instructions; Jones *v.* Greeley, 25 Fla. 629; 6 So. 448.

charge is correct[48]. And the principle that objection or exception to any proceeding on one ground only is a waiver of all other grounds of complaint is applicable to instructions. For it is said that a party excepting must make his exception so specific that the matter relied on as error will be apparent to his adversary and to the primary court. For his adversary, having his attention directed to the special matter alleged erroneous, has the right and privilege of waiving such matter rather than, by insisting on it, incur the hazard and delay of an appeal to a superior tribunal. The court, having its attention specially directed to the erroneous matter, might be satisfied of the error into which it may have fallen through inadvertence, and could voluntarily correct it by a reversal of its rulings, and thus protect the parties excepting from all injury[49]. And one ground of exception only being specified at the trial, no others will be considered on appeal, for the conclusive presumption is that others are waived[50].

48. Fordyce *v.* Russell, 59 Ark. 312; 27 S. W. 82.
Willis *v.* State, 93 Ga. 208; 19 S. E. 43.
Campbell *v.* Arruth, 32 Fla. 264; 13 So. 432.
Crosby *v.* Wilson, 53 Kans. 565; 36 Pac. 985.
Reeves *v.* Harrington, 85 Ia. 741; 52 N. W. 517.
Cavallaro *v.* Tex. etc. Co., 110 Cal. 348; 42 Pac. 918.
Hickam *v.* People, 137 Ill. 75; 27 N. E. 88.
Reynolds *v.* Boston Ry., 43 N. H. 580.
Gross *v.* Hays, 73 Tex. 515; 11 S. W. 523.
Lichty *v.* Tannatt, 11 Wash. 37; 39 Pac. 260.
Newport News *v.* Pace, 158 U. S. 36.
Green *v.* Hanson, 89 Wis. 597; 62 N. W. 408.
People *v.* Hart, 10 Utah 204; 37 Pac. 330.
Main *v.* Olen, 47 Minn. 89; 49 N. W. 523.
Com. *v.* Tolman, 149 Mass. 229; 21 N. E. 377.
Hooks *v.* Houston, 109 N. Car. 623; 14 S. E. 40.

49. Irvin *v.* State, 50 Ala. 181, cited in:
8 Am. & Eng. Enc. L. 264.

50. Phipps *v.* Pierce, 94 N. Car. 514.
Concoran *v.* Harran, 55 Wis. 120; 12 N. W. 468.
Sanford *v.* Gates, 38 Kans. 405; 16 Pac. 807.

Sec. 462. The cases in which the above points have been decided are almost innumerable, and the citation of them all would only present a mass of adjudications for counsel to wade through, all of which, through their various intermingling of facts, present a parallel tendency in the same direction. But a few illustrations will serve to show more clearly the application of the principles outlined. Thus, if the court fail to write the word "given" on an instruction as required by law, this error is waived unless that ground of complaint be specified in an exception[51]. And the same is true of failure of the court to define malice in a case where that definition is required[52], and where the exception was that the verdict was contrary to the instructions of the court, this does not raise the question of the legality of the instructions[53]. Or, where the exceptions are on the ground that the court did not permit a question of fact to be submitted to the jury, the exception is unavailing if there was no question of fact involved[54]. So, a general exception will not present the question of the completeness of the instructions[55]. And it may be stated as a general rule that a general exception will be insufficient to present any special ground of error, and that such will be waived and ineffective if any part of the instructions is correct or applicable[56]. So, where the

51. Omaha Co. *v.* Hansen, 32 Neb. 449; 49 N. W. 456.
52. People *v.* Thiede, 11 Utah 241; 39 Pac. 837.
53. Britt *v.* Aylett, 11 Ark. 475.
54. Guggenheim *v.* Kirchofer, 66 Fed. 755.
55. Hamilton *v.* Great Falls Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.
56. Goodwin *v.* Perkins, 39 Vt. 598.
Grantz *v.* Price, 130 Pa. St. 415; 18 Atl. 646.
Rock *v.* Indian Mills, 142 Mass. 522; 8 N. E. 401.
Whelan *v.* Georgia, etc. Co., 84 Ga. 506; 10 S. E. 1091.
Kearney *v.* Snodgrass, 12 Oreg. 317; 7 Pac. 309.

general exception is to the whole charge, it will be of no avail if any portion of the charge is correct[57].

C. INSTRUCTIONS REFUSED:—Sec. 463. It is the duty of the court, when instructions are given by it, to cover fully and fairly the points involved in the case on trial. But if the court omit to instruct as to any of the points at issue between the parties, it is the duty of counsel to request instructions on the particular point desired by them to be presented to the jury. If counsel fail to ask for such instructions as they think should be given, they will be held to have been satisfied and to have waived any error of the court in the omission, the consequence being that an appeal cannot be predicated upon such error[58]. In this connection, a distinction exists and must be observed between the giving of erroneous instructions and the failure to

Maling *v.* Crummey, 5 Wash. 222; 31 Pac. 600.
Frost *v.* Grizzly Co., 102 Cal. 525; 36 Pac. 929.
Serviss *v.* Stockstill, 30 Oh. St. 418.
Burton *v.* West Jersey Co., 114 U. S. 474.
State *v.* Chopin, 10 La. Ann. 458.
Probst *v.* Trustees, 3 N. Mex. 373; 5 Pac. 702.

57. Beall *v.* Territory, 1 N. Mex. 507.
Wallace *v.* Exc. Bank, 126 Ind. 265; 26 N. E. 175.
Welcome *v.* Mitchell, 81 Wis. 566; 51 N. W. 1080.
Post *v.* Bird, 28 Fla. 1; 9 So. 888.
Fleming *v.* L. D. Co., 48 Kans. 773; 30 Pac. 166.
Brooks *v.* Dutcher, 22 Neb. 644; 36 N. W. 128.
And see extended note in 99 A. D. 114, to the case of Strohn *v.* Detroit Co., 23 Wis. 126.

58. Territory *v.* Caldwell, 14 N. Mex. 535; 98 Pac. 167.
Mead *v.* State, 53 N. J. L. 601; 23 Atl. 264.
U. S. *v.* De Amador, 6 N. Mex. 173; 27 Pac. 488.
Blount *v.* State, 30 Fla. 287.
Darby *v.* Hayford, 56 Me. 246.
Com. *v.* Zappe, 153 Pa. St. 498; 26 Atl. 16.
McCadden *v.* Lowenstein, 92 Tenn. 614; 22 S. W. 426.
State *v.* Schielier, 130 Mo. 510; 32 S. W. 976.
Silberberg *v.* Pearson, 75 Tex. 287; 12 S. W. 850.
Texas Co. *v.* Ludlam, 26 S. W. 430 (Tex.)
Frick *v.* Wilson, 36 S. Car. 65; 15 S. E. 331.
Johnson *v.* Sherwood, 45 Minn. 9; 47 N. W. 262.
Small *v.* Williams, 87 Ga. 681; 13 S. E. 589.

give correct and adequate instructions. In the former case the objection is sufficiently called to the attention of the trial court by a single objection and exception, and it is not necessary to request and submit a correct instruction to be given in the place of the erroneous one. But in the case of a mere failure to give correct instructions covering the case, the error is not available on appeal in the absence of a request by the appellant for a proper instruction[59]. And where the charge is, for any reason, incomplete, incorrect or unsatisfactory, the party dissatisfied with it ought, before the jury leaves the bar, to ask the court to make it correct. He should not acquiesce in the instruction, take his chances with the jury, and, after the verdict is against him, claim the benefit of error in the instructions[60]. The rule is the same whatever the cause rendering the charge erroneous.

Sec. 464. Thus, error cannot be predicated on the fact that an instruction is obscure where a party complaining fails to ask for an explanatory or qualifying charge[61], and the same is true if the charge be misleading[62], although this latter is contrary to some decisions which, with better reason, hold that if the charge be clearly misleading the case should be reversed even though correct instructions were not requested[63]. The rule is applied, however,

59. 1 Blashfield's Instructions, Art. 362.
60. Schuylkill Co. *v.* Munson, 14 Wall. 442 (U. S.)
61. Fife *v.* Com. 29 Pa. 429.
Stockwell *v.* Byrne, 22 Ind. 6.
62. Towns *v.* State, 111 Ala. 1; 20 So. 598.
Wyman *v.* Hart, 12 How. Pr. 122.
Churchill *v.* Gronewig, 81 Ia. 449; 46 N. W. 1063.
Jones *v.* State, 49 Ind. 549.
Milne *v.* Ponchertrain, 9 La. 257.
63. Pierson *v.* Duncan, 162 Pa. St. 187; 29 Atl. 733.
Internat. Co. *v.* Phillips, 63 Tex. 590.
Hill *v.* Newman, 47 Ind. 187.

where the instructions are vague, indefinite and uncertain, for it is clearly the duty of him who is dissatisfied to present an instruction which meets with his approval and request that it be presented to the jury, failing in which he will be held to any error on account of such elements in the charge[64]. And a request for correct instructions is necessary in case of ambiguity[65], or where the court fails to explain or define terms[66], such as "adverse possession"[67], "reasonable care and diligence"[68], "reasonable doubt"[69], "negligence," "gross negligence," "ordinary care," "unfitness," and so forth[70]. And it is necessary to make a request for a proper instruction as to probable cause in an action for malicious prosecution[71]; or as to mental capacity where that is involved[72]; notice[73]; adverse possession[74]; statute of limitations[75]; fellow servants[76]; measure or miti-

64. Rousel *v.* Stanger, 73 Tex. 670; 11 S. W. 906.
State *v.* Falk, 46 Kans. 500.
Clapp *v.* Minn., etc. Co., 36 Minn. 6; 29 N. W. 340.
People *v.* Olsen, 80 Cal. 122; 22 Pac. 125.
65. McQuillan *v.* Seattle, 13 Wash. 600; 43 Pac. 893.
Stratton *v.* Staples, 59 Me. 94.
Schoellhamer *v.* Rometsch, 26 Oreg. 394; 38 Pac. 344.
66. State *v.* Potter, 15 Kans. 302.
Texas, etc. Ry. *v.* O'Donnel, 58 Tex. 27.
67. Robinson *v.* McIver, 23 S. W. 915 (Tex.).
68. Johnson *v.* Mo. Pac. Ry., 96 Mo. 340; 9 S. W. 790.
69. People *v.* Flynn, 73 Cal. 511; 15 Pac. 102.
70. Kelley *v.* Cable Co., 7 Mont. 70.
Galveston Co. *v.* Arispe, 81 Tex. 517; 17 S. W. 47.
Quirk *v.* St. Louis Co., 126 Mo. 279; 28 S. W. 1080.
71. Peterson *v.* Toner, 80 Mich. 350; 45 N. W. 346.
Lueck *v.* Heisler, 87 Wis. 644; 58 N. W. 1101.
72. Berryman *v.* Schumaker, 67 Tex. 312; 3 S. W. 46.
73. Brown *v.* Foster, 41 S. Car. 118.
Street *v.* Lynch, 38 Ga. 631.
74. Robinson *v.* McIver, 23 S. W. 915 (Tex.)
Wood *v.* Figard, 28 Pa. St. 403.
75. Hocker *v.* Day, 80 Tex. 529; 16 S. W. 322.
76. Phila. & R. Ry. *v.* Trainor, 137 Pa. 148; 20 Atl. 632.

gation of damages[77]; scope of employment[78]; false representations[79]; effect[80]; sufficiency[81] or purpose[82] of evidence; explanation of pleadings[83]; and where the court fails to submit to the jury an issue raised by the pleadings[84]; and it is the general rule that in order to raise the point that instructions are insufficient, a request for proper instructions should be made[85]. The rule is not, however, universal; for in some states by statute the court is required to submit the law fairly and fully to cover the case, and his failure to do so is error for which a reversal will be ordered, even though no requests for instructions were made. But even if this prevail by statute or by rule, if the instructions given fairly and substantially cover the issues involved, the failure to give a particular instruction is not reversible error unless a request for it is made.

(1) EXCEPTIONS TO REFUSAL TO INSTRUCT:—Sec. 465. A party presenting to the court an instruction with the request that it be submitted to the jury has not thereby perfected his

77. Browning *v.* Wabash Ry., 124 Mo. 55; 27 S. W. 644.
Page *v.* Finley, 8 Oreg. 45.
Buzzell *v.* Emerton, 161 Mass. 176; 36 N. E. 796.
78. Vernon *v.* Cornwell, 104 Mich. 62; 62 N. W. 175.
79. Davis *v.* Elliott, 15 Gray 90 (Mass.)
80. Hollywood *v.* Reed, 55 Mich. 308.
Howland *v.* Bartlett, 86 Ga. 669; 12 S. E. 1068.
81. Gottstein *v.* Seattle Co., 7 Wash. 424; 35 Pac. 133.
Louisville Co. *v.* Spencer, 149 Ill. 97; 36 N. E. 91.
82. People *v.* Gray, 66 Cal. 276; 5 Pac. 240.
Stone *v.* Redman, 38 Me. 578.
Dow *v.* Merrill, 65 N. H. 107; 18 Atl. 317.
Shumard *v.* Johnson, 66 Tex. 70; 17 S. W. 398.
83. Roebke *v.* Andrews, 26 Wis. 312.
Conrad *v.* Kinzie, 105 Ind. 281; 4 N. E. 863.
84. Newton *v.* Whitney, 77 Wis. 515; 46 N. W. 882.
Brinzer *v.* Longenecker, 169 Pa. St. 51; 32 Atl. 60.
Lynch *v.* Johnson, 109 Mich. 640; 67 N. W. 908.
85. See: 1 Blashfield, Instructions, and the several hundred cases there cited.

right to have reviewed the ruling of the court refusing to submit such instruction, but he must, after such refusal, register a proper and timely exception, for without such exception he will be held to have waived any error of the court in its ruling and to have abandoned his request[86]. This is only another application of the general rule requiring a party dissatisfied with any ruling of the court to give notice of such dissatisfaction by means of his exception, thereby indicating to the court and opposing counsel that he intends to present the matter for review in a higher court[87].

Sec. 466. A party excepting to the ruling of a court refusing to submit an instruction must point out specifically the grounds upon which his exception is based, for a general exception will be of no avail. And an exception made on one ground cannot on appeal be switched to some other, for the statement of one is a waiver of all others not called to the attention of the trial court, and such others will not be considered by the appellate court[88]. And

86. Bonino *v.* Caledonio, 144 Mass. 299; 11 N. E. 98.
Thrasher *v.* Postel, 79 Wis. 503; 48 N. W. 600.
Territory *v.* Caldwell, 14 N. Mex. 535; 98 Pac. 167.
People *v.* Northey, 77 Cal. 618; 19 Pac. 865; 20 Pac. 129.
Burns *v.* People, 126 Ill. 282; 18 N. E. 550.
Kearney *v.* Smith, 47 Neb. 408; 66 N. W. 538.
Poullain *v.* Poullain, 79 Ga. 11; 4 S. E. 92.
Post *v.* Bird, 28 Fla. 1; 9 So. 888.
Crane *v.* Schloss, 14 N. Y. Supp. 886.
Cent. Vt. Ry. *v.* Soper, 59 Fed. 879.
Du Souchett *v.* Dutcher, 113 Ind. 249; 15 N. E. 459.

87. Keeling *v.* Kuhn, 19 Kans. 441.
Leahy *v.* So. Pac. Ry., 65 Cal. 151; 3 Pac. 622.
East St. Louis Ry. *v.* Stout, 150 Ill. 9; 36 N. E. 963.
State *v.* Brewer, 70 Ia. 384; 30 N. W. 646.
Stewart *v.* Murray, 92 Ind. 543.

88. Price *v.* Burlington Co., 42 Ia. 16.
Sanford *v.* Gates, 38 Kans. 405; 16 Pac. 807.
Phipps *v.* Pierce, 94 N. Car. 514.
Cole *v.* Curtis, 16 Minn. 182.

it is obvious that the refusal of each separate instruction must be properly excepted to, for an exception to one necessarily raises no question as to another[89].

D. TIME FOR EXCEPTIONS:—Sec. 467. The general rule being that any decision of the court in the trial of an action detrimental to a party must be objected to or excepted to by him at the earliest possible moment, which is usually at the time the ruling is made, it follows that where an objectionable instruction is given, or a requested one refused, exception must be taken to the giving or refusing at the time, or any error in the court's ruling will be waived, unless by statute exceptions are rendered unnecessary; and even where such provision is made by statute, it is held that some kind of objection must be presented to the court in apt time or error of the court cannot be urged on appeal[90]. The reason of the rule is the same as in all other involuntary waivers—a party having a right must take advantage of it, or if, being deprived of a right, must register a protest, or if, failing in either of these as the case may be, he will, as a matter of law, be deemed satisfied with the proceeding and cannot later object thereto.

Sec. 468. Thus, while on appeal, in the absence of any showing to the contrary, it will be presumed that exceptions to instructions were taken in proper

89. Ryall *v.* Cent. Pac. Ry., 76 Cal. 474; 18 Pac. 430.
Columbia Co. *v.* Nat. Bank of Com., 52 Minn. 224; 53 N. W. 1061.
Pound *v.* Port Huron Co., 54 Mich. 13; 19 N. W. 570.
Jumper *v.* Com. Bank, 39 S. Car. 296; 17 S. E. 980.

90. City of Durango *v.* Luttrell, 18 Colo. 124; 31 Pac. 852.
Moffatt *v.* Tenney, 17 Colo. 189; 30 Pac. 348.

time[91], if the record show that an exception was not taken until after verdict, the exception then taken will be too late and the party taking it will be held to have waived the court's error in the giving of the instruction[92]. And the same rule prevails where the exception is to the refusal of the court to instruct[93]. And whether the exception be to the giving or refusal of instructions, it is held that any error of the court in the giving or refusal is waived if the exception be not taken until after the jury retire[94], or until after part of the jury retire[95]; and the same rule applies where the exception is not taken until after a verdict has been delivered into court[96], or is taken for the first time in a motion for

91. Strickenfaden *v.* Zipprick, 49 Ill. 286.
Wakeman *v.* Lyon, 9 Wend. 241 (N. Y.).
92. Thiede *v.* Utah, 159 U. S. 510.
State *v.* Hart, 116 N. Car. 976; 20 S. E. 1014.
Bynum *v.* So. Pump Co., 63 Ala. 462.
Barker *v.* Todd, 37 Minn. 370; 34 N. W. 895.
Wustland *v.* Potterfield, 9 W. Va. 438.
93. Holley *v.* State, 75 Ala. 20.
State *v.* Debnam, 98 N. Car. 712; 3 S. E. 742.
See: State *v.* Varner, 115 N. Car. 744; 20 S. E. 513.
94. Barnewall *v.* Murrell, 108 Ala. 366; 18 So. 831.
Garoutte *v.* Williamson, 108 Cal. 135; 41 Pac. 13 and 413.
City of Durango *v.* Luttrell, 18 Colo. 124; 31 Pac. 853.
Gibson *v.* Sullivan, 18 Neb. 558; 26 N. W. 368.
Schroeder *v.* Rinehard, 25 Neb. 75; 40 N. W. 593.
Butler *v.* Carns, 37 Wis. 61.
State *v.* Burk, 89 Mo. 635; 2 S. W. 10.
Allen County *v.* Boyd, 31 Kans. 765; 3 Pac. 523.
Gibson *v.* State, 26 Fla. 109; 7 So. 376.
McDonald *v.* U. S., 63 Fed. 426.
Barton *v.* Forsyth, 20 How. 532.
Shepherd *v.* State, 36 Fla. 374; 18 So. 773.
Dozier *v.* German, 30 Mo. 216.
Branton *v.* O'Briant, 93 N. Car. 99.
95. Spooner *v.* Cummings, 151 Mass. 313; 23 N. E. 839.
96. State *v.* Debnan, 98 N. Car. 712; 3 S. E. 742.
State *v.* O'Donald, 4 Idaho 343; 29 Pac. 556.
Wash. etc. *v.* Hobson, 15 Gratt. 122.
Mich. Ins. Bank *v.* Eldred, 143 U. S. 293.
Barker *v.* Todd, 37 Minn. 370; 34 N. W. 895.

a new trial[97], or on appeal[98]. These rules are supplanted in some states by statutory provisions, or at least modified in their application. Thus, in one state exceptions may be taken at any time before the entry of final judgment[99], in another within three days after verdict[100], in another at any time before verdict[1], in another the exception may be taken in a motion for a new trial[2].

8. VERDICT:—Sec. 469. If a verdict as returned by a jury in the trial of a cause is unsatisfactory to either party for any reason, such party must make a proper and timely objection or the defect in the verdict will be held waived and the party precluded from questioning it on appeal as to any matters that could have been called to the attention of the trial court. The objection must be specific as to the matters or grounds rendering it defective, for a general or blanket objection will be insufficient to present any question for consideration[3]. The rule is the same whatever the objection to or defect in the verdict. Thus, upon appeal error cannot be predicated upon a defect in the form of the verdict unless an objection was made and the defect called to the attention of the trial court and an exception duly saved to the decision of the court overruling

97. State *v.* Myers, 99 Mo. 107; 12 S. W. 516.
Louisville Co. *v.* Hart, 119 Ind. 273; 21 N. E. 753.
Harrison *v.* Chappell, 84 N. Car. 258.
Vanwey *v.* State, 41 Tex. 639.
State *v* Halford, 104 N. Car. 874; 10 S. E. 524.
98. Fish *v.* Chicago Co., 81 Ia. 310; 46 N. W. 998.
99. Collins Ice Cream Co. *v.* Stephens, 189 Ill. 200; 59 N. E. 524.
Uhe *v.* Chicago Co., 4 S. Dak. 505; 57 N. W. 484.
100. Maxon *v.* Chicago Co., 67 Ia. 226; 25 N. W. 144.
1. Vaughn *v.* Ferral, 57 Ind. 182.
2. Barney *v.* Scherling, 40 Miss. 320.
3. Mahoney *v.* Van Winkle, 21 Cal. 553.
Fickle *v.* St. Louis Co., 54 Mo. 219.

the objection[4], whether the verdict be general or special[5]. It has been held, however, that no exception is necessary[6]. The rule is equally applicable where the defects in a verdict are other than as to form, as where it is contrary to or not supported by the evidence[7], or is inadequate[8] or excessive in amount[9].

9. FINDINGS OF FACT:—Sec. 470. Where findings of fact are made, if they be objectionable the party aggrieved must except to them in the court where they are filed, for without such exception no review of the findings can be had on appeal; this is consonant with the general rule requiring an exception for the review of any question by an appellate tribunal, and without the exception, error is considered waived[10]. If an exception be not taken

4. Kuhlman *v.* Williams, 1 Okla. 136; 28 Pac. 867.
Sternberger *v.* Bernheimer, 121 N. Y. 194; 24 N. E. 311.
Ryan *v.* Fitzgerald, 87 Cal. 345; 25 Pac. 546.
Ranlerson *v.* Rockner, 17 Fla. 809.
Rawson *v.* Ellsworth, 13 Wash. 667; 43 Pac. 934.
Greenfield *v.* State, 113 Ind. 597; 15 N. E. 241.
Chapman *v.* White, 52 Mo. 179.
McNally *v.* Weld, 30 Minn. 209; 14 N. W. 895.

5. Josephi *v.* Mady Clo. Co., 13 Mont. 195; 33 Pac. 1.
Wright *v.* Mulvaney, 78 Wis. 89; 46 N. W. 1045.
Mack *v.* Leedle, 78 Ia. 164; 42 N. W. 636.
Eaton *v.* Barnhill, 68 Miss. 305; 8 So. 849.
Headley *v.* Renner, 129 Pa. St. 542; 18 Atl. 549.
Roach *v.* Hulings, 16 Pet. 321 (U. S.).
Johnson *v.* Visher, 96 Cal. 314; 31 Pac. 106.

6. French *v.* Hotchkiss, 60 Ill. App. 580.
Halderman *v.* Birdsall, 14 Ind. 304.

7. Clapp *v.* Mass. Assoc., 146 Mass. 519; 16 N. E. 433.
Schwinger *v.* Raymond, 105 N. Y. 648; 11 N. E. 592.
Couch *v.* Gentry, 113 Mo. 248; 20 S. W. 890.
Smith *v.* Pearson, 44 Minn. 397; 46 N. W. 849.

8. West. N. Co. *v.* Va. Paper Co., 87 Va. 418; 12 S. E. 755.

9. Brower *v.* Town Co., 84 Ga. 219; 10 S. E. 629.
Van Gorder *v.* Sherman, 81 Ia. 403; 46 N. W. 1087.
Schmitz *v.* St. Louis Co., 119 Mo. 256; 24 S. W. 472.
Flannagan *v.* Heath, 31 Neb. 776; 48 N. W. 904.

10. Bassett *v.* Monte Christo, 15 Nev. 293.
Verdier *v.* Bign, 16 Oreg. 208; 19 Pac. 64.
McLennan *v.* Prentice, 85 Wis. 427; 55 N. W. 764.
Schoonover *v.* Condon, 12 Wash. 475; 41 Pac. 195.
Packer *v.* Roberts, 140 Ill. 9; 29 N. E. 668.
Abernathy *v.* Withers, 99 N. Car. 520; 6 S. E. 376.

in the trial court, the only question that can be raised on appeal is whether the findings are consistent with the judgment[11]. A waiver of error or defects in findings occurs by failure of the complaining party to except, whether the findings be unsupported by the evidence[12], or there be an omission to find as to an issue made by the pleadings[13], or upon a particular question of fact[14], or whether the findings be indefinite, uncertain and incomplete[15].

10. NEW TRIAL:—Sec. 471. A motion for a new trial must set out the errors or irregularities constituting the grounds upon which a new trial is asked. These must be pointed out clearly and specifically as the object or office of the motion is to call to the attention of the trial court in the first instance and to the appellate court on review the matters relied on by the movant as error entitling him to another trial, to the end that the trial court may

11. Atch. Ry. Co. *v.* Scaggs, 64 Kans. 561; 67 Pac. 1103.
Callahan *v.* James, 141 Cal. 291; 74 Pac. 853.
Upton *v.* Weisling, 8 Ariz. 298; 71 Pac. 917.
First Nat. B. *v.* Citiz. Bank, 11 Wyo. 32; 70 Pac. 726; 100 A. S. R. 925.
U. S. Mtg. Co. *v.* Marquam, 41 Oreg. 391; 69 Pac. 37.
Spencer *v.* Com. Co., 36 Wash. 374; 78 Pac. 914.
Sankville *v.* Grafton, 68 Wis. 192; 31 N. W. 719.
12. Wagner *v.* Marht, 32 Wash. 542; 73 Pac. 675.
Brand *v.* Merritt, 15 Colo. 286; 25 Pac. 175.
Waterhouse *v.* Black, 87 Ia. 317; 54 N. W. 342.
Tuomey *v.* Willman, 43 Neb. 28; 61 N. W. 126.
Joyner *v.* Stancill, 108 N. Car. 153; 12 S. E. 912.
Winterburn *v.* Chambers, 91 Cal. 170; 27 Pac. 658.
Allen *v.* Hutchinson, 45 Wis. 259.
Haws *v.* Victoris Co., 160 U. S. 303.
13. Merrill *v.* Chapman, 34 Cal. 251.
Ashmead *v.* Reynolds, 134 Ind. 139; 33 N. E. 763.
14. Sharp *v.* Wright, 35 Barb. 236.
Heroy *v.* Kerr, 8 Bosw. 194; 21 How. Pr. 409.
15. Tackaberry *v.* Bank, 85 Tex. 488; 22 S. W. 151 and 299.
Cummings *v.* Rogers, 37 Minn. 317; 30 N. W. 892.
State *v.* Mining Co., 4 Nev. 318.

have an opportunity to correct its erroneous proceedings, or that the appellate court may intelligently pass upon the proceedings of the court below[16]. Any grounds that might have been set out but were not will be considered waived and cannot be urged either in the lower court or on appeal[17].

Sec. 472. If a party file a proper motion for a new trial and set out therein specifically and clearly all the grounds desired to be relied upon as error in the trial of the cause, he will yet be held to have waived not only his motion but any error of the court upon which his motion was predicated if he fail to except to the ruling of the court denying his motion. This is necessarily so under the general rule that an objection and exception in erroneous proceedings are complements of each other, in that each must be added to the other in order to form a complete record for review[18]. And in the case of a motion for a new trial, the motion itself is the objection, and an adverse ruling thereon must be excepted to or the movant will be held to have been

16. Powell *v.* Palmer, 45 Mo. App. 236.
Lyons *v.* Van Gorder, 77 Ia. 600; 42 N. W. 500.
Stewart *v.* Scott, 57 Ark. 153; 20 S. W. 1000.
Emery *v.* Real Est. Exc., 88 Ga. 321; 14 S. E. 566.

17. Miller *v.* State, 3 Wyo. 657; 29 Pac. 136.
Hintz *v.* Granpner, 138 Ill. 159; 27 N. E. 935.
Barney *v.* Scherling, 40 Miss. 320.
Gray *v.* Gwinn, 30 Ind. 409.
Territory *v.* Anderson, 4 N. M. 213; 13 Pac. 21.

18. Knop *v.* Ins. Co., 101 Mich. 359; 59 N. W. 653.
Taylor *v.* Switzer, 110 Mo. 410; 19 S. W. 735.
U. S. *v.* De Amador, 6 N. Mex. 173; 27 Pac. 488.
Cogshall *v.* Spurry, 47 Kans. 448; 28 Pac. 154.
Vaughn Lbr. Co. *v.* Mo. etc. Co., 3 Okla. 174; 41 Pac. 81.
State *v.* Rollins, 31 W. Va. 363.
Augusta Ry. *v.* Andrews, 89 Ga. 653; 16 S. E. 203.
Moss *v.* Smith, 19 Ark. 683.
Danforth *v.* Lindell etc. Co., 123 Mo. 196; 27 S. W. 715.

satisfied with the ruling and to have acquiesced therein[19].

11. WAIVER IN APPELLATE PRACTICE: —Sec. 473. In the previous sections of this chapter we have considered the matters which will not receive attention from an appellate court unless proper foundation is laid in the trial court by way of pleadings or proper and timely objections and exceptions to evidence or other matters of practice. It only remains to mention a few matters of practice pertaining strictly to the appellate court.

Sec. 474. Thus, it is necessary in order for a party to obtain a review of any alleged erroneous procedure that he should present to the court an assignment of error specifying the grounds relied upon for a reversal. And unless the assignment is made, the appellee has the right to have the appeal dismissed. But to do this, he must move for the dismissal at the proper time; for it is said that the objection that no assignment of errors has been made and filed on appeal, not raised until after argument in the appellate court, comes too late and must be held waived[20]. But the assignment of error must be made in accordance with the rules of court, and if not so made, will not be noticed by the court[21]. And even where the assignments are properly made the party assigning them must urge them in the appellate court, for by

19. Mausur *v.* Churchman, 84 Ind. 573.
Fletcher *v.* Waring, 137 Ill. 159.
Grady v. Jeffares, 25 Fla. 743; 6 So. 828.
Roach *v.* Blakey, 89 Va. 767; 17 S. E. 228.
State *v.* Boyce, 39 La. Ann. 229; 1 So. 450.
20. Smith *v.* Hill, 83 Ia. 684; 49 N. W. 1043; 32 A. S. R. 329.
Andrews *v.* Burdick, 62 Ia. 714; 16 N. W. 275.
21. Martin *v.* Jackson, 27 Pa. St. 504; 67 A. D. 489.

failing to insist upon an assignment in argument before the court, he must be held to have waived it[22]. And an assignment properly made but not mentioned in appellant's brief will be held waived[23]. The assignment must contain all the errors relied on by appellant for reversal, for the appellate court will not notice errors not assigned.

Sec. 475. Practically the whole effect of a waiver in matters of practice is to preclude a party from taking a different position in the superior court from that taken by him in the court below, or from taking advantage of some right on appeal that he had, by his conduct in the trial court, induced the court or the opposing party to believe would not be asserted by him. But there are matters to be noticed which constitute a bar to a party's right to appeal at all.

A. WAIVER OF RIGHT TO APPEAL—

(1) FROM CONSENT JUDGMENTS:—Sec. 476. Parties to a civil action have the right to consent or agree to any kind of judgment they desire, provided no question of public policy is involved or the rights of third parties are not affected. And where such a judgment is entered, no question of fraud arising, any errors in the action theretofore existing are cured and the judgment ends all contention between the parties. After such consent, nothing remains for the court to do but to enter the judgment the parties have agreed upon, and the parties themselves are thereby pre-

22. Arnold *v.* Arnold, 124 Ala. 550; 27 So. 465; 82 A. S. R. 199.
Ward *v.* Hood, 124 Ala. 570; 27 So. 245; 82 A. S. R. 205.

23. Johnson *v.* Schlosser, 146 Ind. 509; 45 N. E. 702; 36 L. R. A. 59.
Ferguson *v.* Wilson, 122 Mich. 97; 80 N. W. 1006; 80 A. S. R. 543.
Black *v.* Dawson, 82 Mich. 485; 46 N. W. 793.

cluded[24]. And from such judgment there is no appeal. The parties have by their consent waived any error and right to appeal[25]. And the same is true where the parties have stipulated that the judgment shall be final[26]. The reason is that in the appellate court, as well as in the trial court, there must be some real issue or controversy, for where there is no controversy, there can be no appeal[27]. And where the controversy has been ended by any acts of the parties themselves, the right to appeal is waived[28], as where the cause of action has been settled[29]. And where a party has the right to either prosecute a suit to review a judgment or to appeal therefrom, he waives the right to appeal by prosecuting his suit to review[30].

(2) BY PAYING JUDGMENT:—Sec. 477. There are cases holding that payment of judgment extinguishes it and that there is then nothing to appeal from. Consequently the holding of these

24. Rader *v.* Barr, 22 Oreg. 496; 29 Pac. 889.
Schmidt *v.* Mining Co., 28 Oreg. 9; 40 Pac. 406 and 1016; 52 A. S. R. 759.
Duncan *v.* Hartwell, 9 Tex. 495; 60 A. D. 176.
Stephens *v.* Bicknell, 27 Ill. 444; 81 A. D. 242.
25. Schmidt *v.* Mining Co., 28 Oreg. 9; 40 Pac. 406 and 1016; 52 A. S. R. 759.
Beach, Modern Eq. Pr. Sec. 795.
Armstrong *v.* Cooper, 11 Ill. 540.
26. Townsend *v.* Stone Co., 15 N. Y. 587.
27. Little *v.* Bowers, 134 U. S. 547.
Nunan *v.* Valentine, 83 Cal. 588; 23 Pac. 713.
Treat *v.* Hiles, 77 Wis. 475; 44 N. W. 1088.
State *v.* Westmoreland, 29 S. Car. 1; 6 S. E. 847.
Hintrager *v.* Mahoney, 78 Ia. 537; 43 N. W. 522; 6 L. R. A. 50.
28. State *v.* Kans. City, etc., 97 Mo. 331; 10 S. W. 855.
County *v.* So. Pac. Ry., 116 U. S. 138.
29. Monnett *v.* Hemphill, 110 Ind. 299; 11 N. E. 230.
Wood, etc. *v.* Heft, 8 Wall. 333.
Cartwright *v.* Howe, 1 How. 188 (U. S.).
30. Masonic Co. *v.* Commonwealth, 87 Ky. 349; 12 S. W. 143.
New Orleans Co. *v.* Crescent Co., 33 La. Ann. 934.
Harvey *v.* Fink, 111 Ind. 249; 12 N. E. 396.

courts is that a voluntary payment of a judgment is a waiver of the right to appeal from it, and that an appeal taken or pending at the time of payment is void and may be dismissed on motion[31]. But these cases are not in line with the weight of authority which is to the effect that a judgment defendant does not waive his right to appeal by paying the judgment either before or after taking his appeal. It being immaterial whether such payment is voluntary or after execution has been issued and served upon him[32]. A contrary rule would often result in injury to a judgment defendant, while the rule stated can produce injury to neither party.

Sec. 478. Payment by a judgment defendant is often necessary in order to save his property from sacrifice, and what he does to save his property under a judgment should in no manner preclude him from attacking the judgment. As has been said: "Suppose a judgment has been rendered against a party and he cannot give security to supersede its enforcement while he prosecutes his appeal, and an execution is therefore issued, and his property is about to be sold under it—his homestead, it may be. Now can it be claimed that if he shall pay off the judgment he is thereby deprived of an appeal? Surely this cannot be the law"[33]. And this is the principle upon which the

31. State *v.* Conkling, 54 Kans. 108; 37 Pac. 992; 45 A. S. R. 270.
Sager *v.* Moy, 15 R. I. 528; 9 Atl. 847.
Morton *v.* Superior Court, 65 Cal. 496; 4 Pac. 489.

32. Grim *v.* Semple, 39 Ia. 570.
Mayor, etc. *v.* Riker, 38 N. J. L. 225; 20 A. R. 386.
Richeson *v.* Ryan, 14 Ill. 74; 56 A. D. 493.
2 Freeman, Judgments, Sec. 480a.
Belton *v.* Smith, 45 Ind. 291.
Hayes *v.* Nourse, 107 N. Y. 577; 14 N. E. 508; 1 A. S. R. 891.

33. Grim *v.* Semple, 39 Ia. 570.

doctrine is usually announced[34]. Thus, a party does not lose his right to appeal by complying with a decree in equity[35], executing a conveyance in accordance with a decree[36], or by otherwise doing what the judgment or decree required.

(3) BY ACCEPTING BENEFITS OF JUDGMENT:—Sec. 479. A different rule obtains where an attempt to appeal is made by a judgment plaintiff. In such case, the rule is that a party who accepts the benefits of a judgment waives his right to appeal from it[37]. The reason is that when a judgment is satisfied it has passed beyond review; for the satisfaction thereof is the last act and end of the proceeding. Payment produces a permanent and irrevocable discharge; after which the judgment cannot be restored by any subsequent agreement nor kept on foot to cover new and distinct engagements[38].

Sec. 480. But the rule is not without qualification and exceptions. Thus, it is said that the right to take an appeal is not waived by accepting

34. Factors Co. *v.* New Harbor Co., 37 La. Ann. 233.
Bruce *v.* Smith, 44 Ind. 1.
Edwards *v.* Perkens, 7 Oreg. 149.
Kelly *v.* Bloom, 17 Abb. Pr. 229.
Burrows *v.* Micklin, 22 Fla. 577.
Chapman *v.* Sutton, 68 Wis. 657; 32 N. W. 683.
35. Peer *v.* Cookerow, 14 N. J. Eq. 361.
County Com. *v.* Johnson, 21 Fla. 577.
36. O'Hara *v.* MacConnell, 93 U. S. 150.
37. Ullery *v.* Clark, 18 Pa. St. 148.
McCracken *v.* Cabell, 120 Ind. 266; 22 N. E. 136.
Smith *v.* Coleman, 77 Wis. 343; 46 N. W. 664.
Stinson *v.* O'Neal, 32 La. Ann. 947.
Paine *v.* Wooley, 80 Ky. 568.
38. Freeman on Judgments, Sec. 466.
Cassell *v.* Fagin, 11 Mo. 208; 47 A. D. 151.
Portland Co. *v.* O'Neil, 24 Oreg. 54; 32 Pac. 764.
Bolen *v.* Cumby, 53 Ark. 514; 14 S. W. 926.
Alexander *v.* Alexander, 104 N. Y. 643; 10 N. E. 37.

payment of a judgment where the error in it respects the computation of interest and was not known to the plaintiff when he accepted payment[39]. And it is stated that it is the possibility that the appeal by a plaintiff from a judgment of which he has received the benefits may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal; consequently, where there is no such possibility, his right to appeal is unaffected by acceptance of benefits under the judgment appealed from[40]. And if it is possible for him to obtain a more favorable judgment in the appellate court without the risk of a less favorable one from a new trial of the whole case there or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without a re-trial of the whole case, a decision more favorable to himself[41].

Sec. 481. The rule holding a judgment plaintiff to have waived his right to appeal by accepting benefits under the judgment is equally applicable to cases where he sues out execution to enforce the judgment, for he thereby elects to take it as it

39. Jackson *v.* City, 182 Mass. 26; 64 N. E. 418; 94 A. S. R. 635.
40. Tyler *v.* Shea, 4 N. Dak. 377; 61 N. W. 468; 50 A. S. R. 660, citing:
Reynes *v.* Dumont, 130 U. S. 354.
Mellen *v.* Mellen, 137 N. Y. 606; 33 N. E. 545.
Morriss *v.* Garland, 78 Va. 215.
Upton Mfg. Co. *v.* Hulske, 69 Ia. 557; 29 N. W. 621.
41. Id. And see:
Monnett *v.* Merz, 131 N. Y. 646; 30 N. E. 866.
Tarleton *v.* Goldthwaite, 23 Ala. 346; 58 A. D. 296.
Meaders *v.* Gray, 60 Miss. 400; 45 A. R. 414.
Clift *v.* Wade, 51 Tex. 15.

was rendered[42]. And a party cannot avail himself of the fruits of that part of a judgment favorable to him, and then by appeal seek to reverse such portions as militate against him[43].

The rules applicable to a judgment plaintiff attempting to appeal from a judgment of which he has accepted the benefits obtain with equal force where judgment was in favor of the defendant and he attempts to appeal therefrom. In such case he is held to have waived his right to appeal by enforcing the provisions of the judgment[44].

B. NOTICE OF APPEAL:—Sec. 482. One entitled to notice of appeal may waive such notice and submit the cause without it, or he may waive defects or irregularities in same. Where the appellate court has jurisdiction of the subject-matter, a voluntary appearance by the respondent, and taking steps in the appellate court constitute a waiver of mere irregularities in the service of notice of appeal[45], and such irregularities are waived by a submission without objection[46]. But a submission will not be a waiver where no notice at all was given[47]; although it is said that an implied waiver of notice will be held where there is an ap-

42. Hall *v.* Lacy, 37 Pa. St. 366.
Knapp *v.* Brown, 45 N. Y. 207.
43. Holt *v.* Rees, 46 Ill. 181.
Webster, etc. Co. *v.* St. Croix Co., 71 Wis. 317; 36 N. W. 864.
44. Bennett *v.* Van Syckel, 13 N. Y. 481.
45. Holden *v.* Haserodt, 2 S. Dak. 220; 49 N. W. 97.
Cleveland Ry. *v.* Mara, 26 Oh. St. 185.
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46. Benson *v.* Carrier, 28 S. Car. 119; 5 S. E. 272.
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Chicago Co. *v.* Abilene Co., 42 Kans. 104; 21 Pac. 1112.
Cain *v.* Goda, 94 Ind. 555.
47. Burkam *v.* McElfresh, 88 Ind. 223.

pearance and a brief upon the merits filed by the respondent[48].

48. Bates *v.* Scott, 26 Mo. App. 428.
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