RECENT CASES.

ATTORNEYS—EXPERT TESTIMONY AS TO FEES—In an action for legal services, the testimony of lawyers as experts on the value of their professional services was offered in evidence. *Held:* It was admissible to guide, but not necessarily to control the Court. Hunt v. Hill, 70 So. 522 (La. 1916).

It is universally agreed that opinion evidence is admissible on the question of the value of legal services. Sexton v. Bradley, 110 Ill. App. 495 (1903); Clark v. Ellsworth, 73 N. W. 1023 (Iowa 1898); Randall v. Packard, 36 N. E. 823 (N. Y. 1894). But such evidence is not binding on the jury. Head v. Hargrave, 105 U. S. 45 (1881); Morehead's Trustee v. Anderson, 100 S. W. 340 (Ky. 1907); Bodfish v. Fox, 23 Me. 90 (1843). Generally only the testimony of members of the same bar is admissible. State *ex rel.* First National Bank v. Flarsheim, 119 S. W. 17 (Mo. 1909); Thompson v. Boyle, 85 Pa. 477 (1877). In some states it is not necessary that the witness be an attorney if he has special knowledge of the subject matter. McNeil v. Davidson, 37 Ind. 336 (1871); Frye v. Estes, 52 Mo. App. 1 (1892). Also an attorney may testify in his own behalf as to the value of his services. Babbitt v. Bumpus, 41 N. W. 417 (Mich. 1889). But evidence of what another attorney would consider a reasonable fee for himself for similar services is not admissible. Latourette v. Miller, 135 Pac. 327 (Ore. 1913). The principal case was decided without a jury and is an extension of the older cases which held that such evidence was entirely immaterial. Succession of Macarty, 3 La. Ann. 517 (1848).

BANKRUPTCY—UNLIQUIDATED CLAIMS—DISCRETION OF REFEREE—While an appeal from a judgment entered against a bankrupt for breach of a contract of marriage was pending, the plaintiff filed a claim in the bankruptcy court. The appellate court of the state having reversed the judgment on technical grounds and ordered a new trial, the referee, on petition of the trustee, recommended that the claim be re-examined and liquidated by a jury trial in the state court. *Held:* The court properly confirmed the referee's order. *In re* Martin, 228 Fed. 184 (1915).

The court's interpretation of section 63*b* of the Bankruptcy Act, which provides for the liquidation of claims "as it [the court] shall direct", is in accord with the prevailing view. Under the power therein conferred it has been held that ample authority exists to adopt any procedure appropriate to the case, "whether it be submission to a jury on an issue framed, or production of evidence before the referee, or some other method." *In re* United Button Co., 140 Fed. 495 (1906). *In re* Silverman Bros., 101 Fed. 219 (1899). It is also within the discretion of the court or referee where it deems proper to permit the adjudication of the claim in the state courts. *In re* Johnson, 11 A. B. R. 544 (1904); and it may likewise direct litigation

to be instituted, or if already commenced, to be continued. Remington, Bankruptcy, 2d Ed., Vol. 1, Sec. 712 *et seq.*

In *in re* Fife, 109 Fed. 880 (1901), where a judgment for breach of promise of marriage was obtained after the petition had been filed but before the consideration of the application for discharge, it was held provable under section 63*a*5. It was contended on behalf of the bankrupt in the principal case that until the referee upon evidence was satisfied of the existence and breach of a contract of marriage there was no "unliquidated claim" within section 63*b* of which he could direct liquidation. The court held that the claim that such contract existed of itself constituted a claim within that section of the act.

CONFLICT OF LAWS—FOREIGN STATUTE OF LIMITATIONS—A fireman was injured while working for the defendant in Louisiana. The Louisiana statute extinguished the right of action in one year. All of the parties resided within the state of the forum since the date of the injury. *Held:* The Louisiana statute did not apply to an action in the forum brought within the time prescribed by the local statute. Smith v. Webb, 181 S. W. 814 (Tex. 1916).

The general rule is that the remedies as distinguished from the rights of the parties are determined by the law of the forum, and that the statutes of limitation are a part of the remedies and not of the law affecting the rights. Story, Confl. Laws, 576, 577 *et seq.*; Thomas v. Clarkson, 125 Ga. 72 (1906). But where the statute not merely denies a remedy after the statutory period, but extinguishes the cause of action upon the period of limitation, it seems that the same law will follow the liability into any other jurisdiction. Story, Confl. Laws, 582; Perkins v. Guy, 55 Miss. 153 (1877); Lyman v. Campbell, 34 Mo. App. 213 (1889). The principal case is apparently contrary to this general exception in holding that the parties must reside within the state where the cause of action occurred during the entire length of the statutory period in order that such statute extinguishing the right, should apply.

CONTRACTS—ILLEGALITY OF OBJECT—A financial newspaper owed considerable money to the director of a land corporation. The latter agreed to accept a smaller sum in payment of the debt, on the promise of the newspaper not to publish any comment upon the land company or upon any transaction in which it was directly or indirectly concerned. *Held:* The contract was unenforcible. Neville v. Dominion of Canada News Company, Limited, 113 L. T. R. 979 (Eng. 1916).

The rule is fundamental that a contract that is immoral, or in restraint of trade, or conducive to fraud or a breach of a trust, or is injurious to the public service, is void. Dexter v. McClellan, 116 Ala. 37 (1897); Charleston Natural Gas Co. v. Kanawha Natural Gas Co., 58 W. Va. 22 (1905); State v. Windle, 156 Ind. 648 (1901). But there is a large class of contracts providing for the partial restraint of trade, which have been upheld. Wolverton v. Bruce, 89 S. W. 1018 (Ind. 1905); especially where the promisor owes no duty to perform the acts he has stipulated not to do. Wittenberg v.

Mollyneaux, 60 Neb. 583 (1900); Clemons v. Meadows, 29 Ky. Law. Rep. 619 (1906). Rarely has a contract providing for the non-performance of acts not prescribed by law been declared invalid. Booth v. Davis, 127 Fed. 875 (1904). A few cases, however, recognize a duty to the public apart from a duty prescribed by law. The decision of the court in the principal case can be justified upon the above ground, the duty of a financial newspaper to disclose information to the public without reservation. In addition all contracts affecting public and quasi-public institutions will be strictly scrutinized by the courts. Enid Right of Way Company v. Tile, 150 Okl. 311 (1905).

CONTRACTS—NOVATION—RELEASE OF ORIGINAL DEBTOR—The maker of notes transferred the goods for which they were given to another, who agreed to pay the notes and assume the maker's liability. The payee accepted the substitution but no notes were made by the transferee, as had been agreed. *Held:* There was no novation and the maker was still liable. Klinkoosten v. Mundt, 156 N. W. 85 (S. Dak. 1916).

In a novation there must be an agreement to substitute the new debtor in place of the original debtor, and an agreement to release and discharge the original debtor. Curry v. Whitmore, 110 Mo. App. 204 (1905); Clay Lumber Co. v. Hart's Branch Coal Co., 174 Mich. 613 (1913); Osborne v. West, 103 N. W. 118 (Ia. 1905). The third person must be substituted as the new debtor, with intent to release the original debtor. Carpy v. Dowdell, 131 Cal. 495 (1901); Dillard v. Dillard, 118 Ga. 97 (1903). As in the principal case, simply for the transferee to assume to pay the notes is not a novation, Kelso v. Flemming, 104 Ind. 180 (1885); nor is the agreement of the creditor to accept the note of a third person in payment by itself a novation. Fausett v. Foreman, 58 Cal. 513 (1915). The creditor must unconditionally release the original debtor and accept the new debtor in his stead. Goetz Brewing Co. v. Waln, 92 Neb. 614 (1912). There must be a mutual agreement. McNulty v. Cruff, 211 Mass. 489 (1912); Scharff Distilling Co. v. Springfield Coal, *etc.*, Co., 180 Mo. App. 497 (1914). The assent of the creditor is essential to a novation by substitution of the debtor. Gibbs v. Waring, 139 N. Y. S. 981 (1913); Detroit Service Co. v. Schermack, 179 Mich. 266 (1914). But such assent of the parties may be implied. Whitney v. Ins. Co., 127 Cal. 464 (1900). So also the release of the original debtor may be established by implication. Dewitt v. Monjo, 61 N. Y. S. 1046 (1900); Michigan Stove Co. v. Walker, 150 Ia. 363 (1911). The principal case is in accord with the weight of authority in holding that a mere executory agreement to accept a new debtor is not sufficient to constitute a novation. Fausett v. Foreman, *supra.*

CRIMINAL LAW—VERDICT—IMPEACHMENT—In support of a motion for a new trial after a conviction for involuntary manslaughter, affidavits of two jurors were offered to the effect that had they known that the crime of involuntary manslaughter was a felony under the laws they would not have agreed to a verdict of guilty. *Held:* This evidence was properly excluded. People v. Sidwell, 154 Pac. 290 (Cal. 1915).

This case is in accord with the general rule laid down in Vaise v. Delaval, 1 T. R. 11 (Eng. 1785), and since adhered to, that affidavits of jurors are not admissible to impeach their verdict. Straker v. Graham, 4 M. & W. 721 (Eng. 1839); Cluggage v. Swan, 4 Binn. 150 (Pa. 1811); McDonald v. Pless, 238 U. S. 264 (1915). Several American courts, however, considering the English rule more stringent than public policy demands, admit such affidavits when the misconduct involves some overt act. Perry v. Bailey, 12 Kan. 539 (1874); Harris v. State, 24 Neb. 803 (1888); but even under the rule in these jurisdictions reasons like those in the principal case which lie in the mind of the deponent and cannot be controverted are not admitted. Wright v. Illinois Telegraph Co., 20 Ia. 195 (1866). By code or statute in several states an exception to the general rule is made in the case of verdicts which are the result of chance. Col. Code. Civ. Pro., Sec. 657; Gaines v. White, 1 S. Dak. 434 (1890). The principal case held that in the instances provided for by statute alone, could such evidence be received. Sec. 64 UNIV. OF PENNA. LAW REVIEW, 86.

DEEDS—DEEDS IN BLANK—PAROL POWER OF ATTORNEY—A vendor of land delivered to the vendee a deed without filling in the name of the grantee, there being an understanding that the vendee could fill in the name of any subsequent purchaser as grantee. *Held:* This gave an irrevocable power to fill in the blank directly to the first vendee, and by implication to subsequent vendees, and when a name was filled in by one having such power the title became vested in that person as grantee of the original vendor. Fennimore v. Ingham, 181 S. W. 513 (Tex. 1915).

It is a basic principle that a deed which does not contain the name of the grantee is void. Allen v. Withrow, 110 U. S. 119 (1884); Wunderlin v. Cadogan, 50 Cal. 613 (1875); Mickey v. Barton, 194 Ill. 446 (1902). One having proper authority may fill in this blank; and it is on this point that courts do not agree. The strict rule is that the authority must equal the instrument in dignity, and so must at least be in writing. Hibblewhite v. McMorine, 6 M. & W. 200 (Eng. 1838); Upton v. Archer, 41 Cal. 85 (1871); Burns v. Lynde, 6 Allen 305 (Mass. 1863). In the American courts, however, the tendency is to allow parol authority; in many instances probably because of the abolishment of sealed instruments. 2 Jones, Real Property, Sec. 1328 ff.; Drury v. Foster, 2 Wall. 24 (U. S. 1864); Swartz v. Ballou, 47 Ia. 188 (1877); Thummel v. Holden, 149 Mo. 677 (1899); Lafferty v. Lafferty, 42 W. Va. 783 (1896). And in many states where parol authority is sufficient, the mere delivery of the deed, in blank as to the grantee, carries with it an implied authority to fill in. Creveling v. Barton, 138 Ia. 47 (1908); S. Berwick v. Huntress, 53 Me. 89 (1865). See also on the filling of blanks, 1 Devlin, Deeds, Sec. 457.

EQUITY JURISDICTION—REFORMATION OF INSTRUMENTS—MISTAKE—A contract for the sale of land failed to express the intention of the parties because of a mistaken conception of the law of another state. *Held:* The mistake as to the law of another state was a mistake of fact, and the contract

was subject to reformation on the basis of parol evidence. Schlosser v. Nicholson, 111 N. E. 13 (Ind. 1916).

One exception to the general rule that parol evidence will not be admitted to vary the terms of a valid written instrument is found where the instrument fails to express the intention of the parties because of a mistake of fact. Gump's Appeal, 65 Pa. 476 (1870); Moynihan v. Brennan. 77 N. H. 273 (1914). But the reformation will be allowed only at the discretion of the court. Edmond's Appeal, 59 Pa. 220 (1868); Bank v. Hartman, 147 Pa. 558 (1892). And the mistake of fact must be mutual. Gough v. Williamson, 62 N. J. Eq. 526 (1901); Curtis v. Albee, 167 N. Y. 360 (1901); Light Co. v. Poor Dist., 21 Pa. Super. Ct. 95 (1902); except under very strong and extraordinary circumstances. Gaver v. Gaver, 119 Md. 634 (1913); Forrester v. Moon, 100 S. C. 157 (1914); or unless accompanied by fraud. Barnum v. White, 128 Minn. 58 (1914). The instrument will also be reformed when the error is made by a scrivener or draftsman. Newland v. Church Soc., 137 Mich. 335 (1904); Baab v. Houser, 203 Pa. 470 (1902).

On the other hand a mere mistake of law without other circumstances constitutes no ground for the reformation of written instruments. Atherton v. Roche, 192 Ill. 252 (1901); Wemple v. Hauenstein, 46 N. Y. S. 288 (1897). However, when the agreement is what it was intended to be, and a mistake of law is made in reducing the contract to writing, the instrument may be reformed. Huss v. Morris, 63 Pa. 367 (1879); Myer v. Idlewood Ass'n, 146 N. Y. S. 469 (1914). And as in the principal case when the mistake is as to the law of another state, it will be treated as a mistake of fact. Osincup v. Henthorn, 89 Kan. 58 (1913). This doctrine had its origin in the case of Haven v. Foster, 9 Pick. 112 (Mass. 1829). See also Rosenbaum v. Credit Co., 64 N. J. L. 34 (1899); Tyson v. Passmore, 2 Pa. 122 (1845); Bentley v. Whittemore, 18 N. J. Eq. 366 (1867).

EQUITY JURISDICTION—SPECIFIC PERFORMANCE WITH COMPENSATION—COLLATERAL REPRESENTATION—In negotiations for the sale of land, reference was made to the miles of fencing on the tract. It was not mentioned in the contract of sale, but the purchaser claimed compensation for the misrepresentation which was admittedly innocent. *Held:* The purchaser's right to specific performance with compensation, arises only where there is a deficiency in the subject matter mentioned in the contract, and not where the deficiency is in a collateral representation. Rutherford v. Acton-Adams, 113 L. T. 931 (Eng. 1915).

This is in accord with the equitable doctrine of specific performance in favor of a vendee, with compensation for a deficiency in the subject matter of the contract. Pomeroy, Specific Performance, Sec. 438 ff.; Sugden, Vender and Purchaser, p. 324 ff.; Townsend v. Vanderworker, 160 U. S. 171 (1895); Melick v. Cross, 62 N. J. Eq. 545 (1901). But where the vendor can convey a relatively small part, it has been intimated in some cases, that specific performance ought not to be granted to the vendee. Waterman, Specific Performance, Sec. 206; Chicago Co. v. Durant, 44 Minn. 361 (1890). Where the vendor tries to enforce the contract, equity will often grant specific performance even though there is a slight deficiency, awarding com-

pensation to the vendee. Towner v. Ticknor, 112 Ill. 217 (1885); Smyth v. Sturges, 108 N. Y. 495 (1888). When the deficiency is at all substantial, however, equity will rarely act in favor of the vendor. Beck v. Bridgman, 40 Ark. 382 (1883).

EVIDENCE ADMISSIONS—ACTS AND DECLARATIONS OF CO-CONSPIRATORS—In a prosecution for forgery the evidence tended to prove a conspiracy to obtain certain real estate by a forged deed, the land or its proceeds to be divided among the conspirators. Statements made by one conspirator after the execution of the forged deed, but before the profits were divided, were offered in evidence against a co-conspirator. *Held:* The evidence is admissible, though the statements were made after the forgery. Grayson v. State, 154 Pac. 334 (Okla. 1916).

The general rule is that admissions may be received in evidence only against the party who makes them. People v. Gonzales, 136 Cal. 666 (1902). But where several persons are proved to have combined for the same unlawful purpose, anything said, written, or done by one of the party, in pursuance of the concerted plan, with reference to the crime charged, is deemed to have been said, written or done by all, and is admissible against any and all of the others who were engaged in the same conspiracy. Franklin Union v. People, 220 Ill. 355 (1906); Knox v. State, 164 Ind. 226 (1905). But the competency of such evidence is determined by the fact that a conspiracy or combination existed; hence a foundation must first be laid by other evidence, sufficient in the opinion of the court to establish *prima facie* the fact of conspiracy between the parties. People v. Seidenshner, 210 N. Y. 341 (1914); Wallace v. State, 48 Tex. Crim. App. 318 (1905). The acts and declarations sought to be admitted, however, must have occurred during the course of the conspiracy; if occurring before the formation of the conspiracy or after the accomplishment of its object they are inadmissible. State v. Myers, 198 Mo. 225 (1906); State v. Wells, 33 Mont. 291 (1905); State v. Walker, 124 Ia. 414 (1904). The mere fact that the crime has been committed does not render subsequent acts and declarations inadmissible if they occur before complete fulfillment of the common purpose. State v. Soper, 118 Ia. 1 (1902). *E. g.*, where the conspiracy is for the purpose of obtaining money or property, the conspiracy is considered pending until the proceeds are divided. O'Brien v. State, 69 Neb. 691 (1903); Com. v. Zuern, 16 Pa. Super. 588 (1901). The principal case is therefore in accord with the general rule. Likewise, where it is part of a conspiracy to murder to conceal the evidences of the crime after its commission, the conspiracy is deemed to continue until the concealment, and acts and declarations up to that time are admissible against co-conspirators. Eggleston v. State, 59 Tex. Crim. 542 (1910).

EVIDENCE—CONFESSION—QUESTION OF LAW OR FACT—In the course of a criminal trial the question arose as to whether a confession sought to be introduced by the prosecution had been made voluntarily. The court admitted the confession but directed the jury to reject it if, upon the whole

evidence they were satisfied that it was not the voluntary act of the defendant. *Held:* The court pursued the proper course. United States v. Oppenheim, 228 Fed. 232 (1916).

Upon the question raised by the principal case the decisions of the courts are in conflict. In many jurisdictions the matter is entirely in the discretion of the trial court, and only a clear abuse of that discretion constitutes a ground for reversal. Travers v. U. S. 6 App. D. C. 450 (1895); Howard v. Comm., 28 Ky. Law. Rep. 737 (1901). In other jurisdictions the admissibility of a confession is a matter to be determined by the jury. Milner v. State, 124 Ga. 86 (1905). Some courts decide the question as a matter of law before permitting the confession to be placed before the jury. State v. Stibbens, 188 Mo. 387 (1905); State v. Young, 68 N. J. L. 299 (1902). A large number however hold with the principal case and will decide the question of the admission of a confession only if the evidence points clearly in one direction; if the evidence is conflicting the confession will be submitted to the jury with instructions that they disregard it entirely if they believe it involuntary. Comm. v. Antaya, 184 Mass. 326 (1903); Roesel v. State, 162 N. J. L. 216 (1898); State v. Storms, 113 Iowa 385 (1901).

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—COMPARATIVE NEGLIGENCE—A laborer, employed in repairing a track used in interstate commerce, was injured, partly through his own negligence and partly through the negligence of his employer. *Held:* Under the Federal Employers' Liability Act he could recover such proportion of the total damage suffered as the negligence attributable to the carrier bore to the negligence attributable to both. Waina v. Pennsylvania Co., 251 Pa. 213 (1915).

The purpose of the Federal Employers' Liability Act is to abrogate completely the common law rule, that an employee cannot recover for injuries if he has been guilty of contributory negligence and to substitute a system of awarding damages based upon a comparison of the negligence of the employer and employee respectively. Norfolk & Western Rwy. Co. v. Earnest, 229 U. S. 114 (1912); Second Employers' Liability Cases, 223 U. S. 1 (1911). Under the Act the defendant is free from liability only when the plaintiff's act is the sole cause of the injury and when the defendant's act is no part of the causation. Grand Trunk Rwy. Co. v. Lindsay, 233 U. S. 42 (1913). Under the comparative negligence theory the jury should determine the entire amount of damages sustained and then deduct therefrom a reasonable amount for the contributory negligence of the plaintiff, such reasonable amount being left for the determination of the jury. Seaboard Air Line v. Tilghman, 237 U. S. 499 (1914). Nearly all of the states have repudiated the doctrine of comparative negligence.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF" THE EMPLOYMENT—"LARKING" BY FELLOW EMPLOYEE—As a practical joke a workman held the nozzle of a compressed air hose to a fellow workman's rectum, resulting in the rupture of his intestines. *Held:* Compensation should be refused; the injury did not arise out of the employment. Federal Rubber Mfg. Co. v. Havolic, 156 N. W. 143 (Wis. 1916).

The principal case illustrates an application of the rule generally followed where the Compensation Act, like the English Act, contains a provision that the injury must "arise out of and in the course of the employment," or a similar provision. The rule briefly is that there must be a causal connection between the employment and the injury and it must occur while the workman is doing the duty which he is employed to perform. McNicol's Case, 215 Mass. 497 (1913). While the rule seems well settled, considerable difficulty has been experienced in its application and the cases are not at all harmonious. See 64 UNIV. OF PENNA. L. REV. 108, and 64 Id. 326. Cases analogous on the facts to the principal case have been rare. In Knopp v. American Car & Foundry Co., 186 Ill. App. 605 (1914), recovery was allowed where a workman was injured when removing a tin can placed under a trip hammer by a bystander for fun. In Hulley v. Moosbrugger, 87 N. J. L. 103 (1915), compensation was allowed where a workman was injured in dodging a playful attack by a fellow workman. On the other hand in De Filippis v. Falkenberg, 155 N. Y. Supp. 761 (1915), an employee was injured by the sportive act of another employee while both were in the toilet room, and while it was admitted that the injury was by accident in the course of the employment, compensation was refused on the ground that it did not "arise out of" the employment.

In the principal case the court was no doubt justified in its decision. A deeper consideration of the theory on which Workmen's Compensation Acts are based might have led to a different conclusion.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY "IN THE COURSE OF THE EMPLOYMENT"—NECESSARY ACTS OF PERSONAL MINISTRATION—On account of the unsatisfactory water supply in the place of employment, workmen were accustomed to use water taken from a nearby well in bottles and buckets. The deceased drank from a bottle which he thought contained water, but which in fact contained a poisonous liquid used in the work. *Held:* The injury arose in the course of the employment and resulted therefrom. Archibald v. Ott, 87 S. E. 971 (W. Va. 1916).

The rule of the principal case that acts of personal ministration by a workman which are reasonably necessary to his health and comfort while at work are acts done in the service of the master, and hence that injuries resulting from such acts "arise out of and in the course of the employment," seems to be the prevailing opinion. There is the necessary causal connection between the injury and the employment demanded by the cases construing that clause, although the act from which the injury arises is a more remote and indirect act of service than usually appears. See cases and annotations cited under Federal Rubber Co. v. Havolic, annotated in this issue, page 637. The few decisions on the question are all in accord. Compensation has been allowed where a workman was injured going down stairs from the workshop, on his way to lunch, Sundine's Case, 218 Mass. 1 (1914); where an employee crossing a street to get to a toilet was run down by an automobile, Zabriskie v. Erie R. Co., 85 N. J. L. 157 (1913); where an employee contracted typhoid fever from drinking impure water in the shop, Vennen v.

Lumber Co., 154 N. W. 641 (Wis. 1915); and even where a drayman on his rounds stopped in at a public house for a drink and remained about two minutes and while going back to his team was run down by a motor car, Martin v. Lovibond, 7 B. W. C. C. 243 (Eng. 1914).

MASTER AND SERVANT—WRONGFUL DISCHARGE—BASEBALL MANAGER—The manager of a baseball team sued for breach of contract of employment; and the baseball company defended on the ground that he had violated a term of the contract to perform his duty faithfully, by instructing the third baseman to play back in order to help the manager's favorite, in the contest for batting honors. *Held:* It was a question of fact for the jury whether the manager acted as charged, and if so, whether it was a violation of his duty under the contract and tended to the employer's injury, thereby giving the employer cause for discharging him. O'Connor v. St. Louis American League Baseball Co., 181 S. W. 1167 (Mo. 1916).

This is in accord with the general doctrine that a discharge is warranted by any act prejudicial or likely to be prejudicial to the interests of the master. Pearce v. Foster, 17 Q. B. D. 536 (Eng. 1887); Vinson v. Kelly, 99 Ga. 270 (1896). It is unnecessary that actual loss shall have occurred. Deane v. Cutler, 20 N. Y. S. 617 (1892). But if the contract is for a definite time, there must be a good cause to relieve the master of liability for the discharge. Jones v. Graham, 51 Mich. 539 (1883); Beggs v. Fowler, 82 Mo. 599 (1884). At the time of discharge it is not necessary for the master to state the cause on which he may later rely. Ridgway v. The Market Co., 3 Ad. & El. 171 (Eng. 1835); Odeneal v. Henry, 70 Miss. 172 (1892). Indeed, many courts hold that the master need not even know of the cause, at the time of discharge. Allen v. Aylesworth, 58 N. J. Eq. 349 (1899); Arkush v. Hanan, 60 Hun. 518 (N. Y. 1881). The burden of showing that there was a good cause is on the master. Morris v. Taliaferro, 44 Ill. App. 359 (1892); Eubanks v. Alspaugh, 139 N. C. 520 (1905). Whether the cause alleged is sufficient is generally left to the jury, as in the principal case. Silk Co. v. Porter, 94 Ill. App. 609 (1900); Conklin v. The Institute, 51 N. Y. App. Div. 638 (1900). But if the facts are undisputed, it is for the court to decide. Peniston v. Huber, 196 Pa. 580 (1900). And some courts hold that it is always a matter for the court. McIntyre v. Hockin, 16 Ont. App. 498 (Can. 1889); Hendrickson v. Anderson, 50 N. C. 246 (1858).

PARTNERSHIP—PARTNERSHIP PROPERTY SOLD IN BULK—NOTICE TO INDIVIDUAL CREDITORS—One partner sold the entire stock in trade to his co-partner, no notice having been given to the separate creditors of the selling partner. *Held:* No notice was necessary when the purchasing partner consumed practically the whole fund in paying partnership creditors. Gilbert v. Ashby, 181 S. W. 321 (Tenn. 1916).

A sale of goods out of the ordinary course of business is considered as fraudulent against the creditors of the vendor. Hart v. Dean, 93 Md. 432 (1901). This principle has been incorporated in the "sales in bulk" statutes, some of which have made the sale of an entire stock of merchandise pre-

sumptively fraudulent, unless the creditors are duly notified. Fisher v. Herrmann, 118 Wis. 428 (1903); Schumacher-Binzley Co. v. Riddle, 52 Pa. Super. Ct. 6 (1912); while others have made the presumption of fraud conclusive. Jaques Co. v. Warehouse Co., 131 Ga. 1 (1908); Pennell v. Robinson, 164 N. C. 257 (1913). But the failure to give notice to one creditor does not make the sale of stock fraudulent as to the creditors who received proper notice. Ritter v. Wray, 45 Pa. Super. Ct. 440 (1911). And trade fixtures are not generally included within the meaning of "goods in bulk." Lee v. Gillen and Boney, 134 N. W. 278 (Neb. 1912). As regards partnership property, an individual creditor may secure a levy on firm assets, but the firm creditors take precedence over the attachment of an individual creditor. Lewis v. Crane, 50 W. Va. 239 (1901); Lovins v. Laub, 147 N. Y. S. 304 (1914). So it has been held that the "sales in bulk" acts do not apply to sales of stock by a partner to a co-partner, at least where the property is exhausted in satisfying firm creditors. Yancey v. Lamar-Rankin Drug Co., 140 Ga. 359 (1913); Fairfield Shoe Co. v. Olds, 96 N. E. 592 (Ind. 1911). Where a merchant sold part of the stock for the purpose of taking the vendee into the partnership, the statute was held to apply. Daly v. Drug Co., 155 S. W. 167 (Tenn. 1913). And where the sale in bulk is made by the firm it is necessary to give notice to the individual creditors of the members of the firm. Bank v. Van Allsburg, 165 Mich. 524 (1911); Mahoney-Jones Co. v. Sams Bros., 159 S. W. 1094 (Tenn. 1913). *Contra*, Whitehouse v. Nelson, 43 Wash. 174 (1906).

PLEADING—AMENDMENT—A declaration was amended after the Statute of Limitations had run to show that notice of injury had been given to a municipality as required by law. *Held:* The Statute of Limitations was no bar to the suit. Enberg v. Chicago, 111 N. E. 114 (Ill. 1916).

The general doctrine is that when an amendment introduces a new cause of action it does not relate back to the origin of the pleadings so as to bar the operation of the Statute of Limitations. Schuck v. Bramble, 122 Md. 411 (1914); Mumma v. Mumma, 246 Pa. 407 (1914). But if the amendment merely amplifies the original pleading it relates back to the commencement of the suit and the statute is arrested at that point. Southern R. Co. v. Horine, 121 Ga. 386 (1904); Herbstritt v. Lumber Co., 212 Pa. 495 (1905). Permission to amend is given or withheld at the discretion of the court. Phila. v. Hestonville R. Co., 203 Pa. 38 (1902). As a result the decision in a particular case will in large measure depend on the authorities in the jurisdiction. Grier v. Northern Assurance Co., 183 Pa. 334 (1898). Yet certain principles are recognized, and the question is always decided on the basis of the pleadings themselves. Kansas City v. Hart, 60 Kan. 684 (1899). The following tests are usually applied: Will the same evidence support both the original declaration and the amendment? Wabash R. Co. v. Bhymer, 214 Ill. 579 (1905). Will the same measure of damages cover both? Midland R. Co. v. Cardwell, 67 S. W. 157 (Tex. 1901). Will a judgment against one pleading be a bar to the other? Van Patten v. Waugh, 122 Ia. 302 (1904). Because the tests are not uniformly applied, contrary decisions arise. Some courts will not allow a change from one contract action to

another. Whalen v. Gordon, 37 C. C. A. 70 (1899); Nelson v. Bank, 139 Ala. 578 (1904); while some states allow a change from contract to tort after the statute has run. Rand v. Webber, 64 Me. 191 (1874). See also Verdery v. Barrett, 89 Ga. 349 (1892). Pennsylvania applies the strict rule but allows an amendment alleging additional damages. Mining Co. v. Pennsylvania R. Co., 237 Pa. 420 (1912). Some courts, contrary to the principal case, will not allow an amendment alleging the notice requisite to recovery. Higman v. Quindaro, 91 Kan. 673 (1914); Barnett v. Cain, 51 Pa. Super. Ct., 642 (1912). *Contra,* Miller v. Erie R. Co., 109 N. Y. App. 612 (1905). An amendment praying for different relief is sometimes held not to be affected by the statute. Kent v. Union, 130 Cal. 401 (1900); Truman v. Lester, 71 N. Y. App. 612 (1902). But an amendment cannot be allowed to change the capacity in which a party is sued after the limitations have run. Tonge v. Publishing Co., 244 Pa. 417 (1914). When the declaration is demurrable only the defect may be remedied after the statutory period. Salmon v. Libby, 219 Ill. 421 (1906). When an essential averment is lacking most courts do not allow amendment. Klawiter v. Jones, 219 Ill. 626 (1906); Bender v. Penfield, 235 Pa. 58 (1912). *Contra,* Pullen v. Hutchinson, 25 Me. 249 (1845); Woodcock v. Bostic, 128 N. C. 243 (1901).

SALES—TITLE TO STANDING TIMBER—REVERSION—All the timber standing on a tract of land was granted by a deed which made no provision as to the time of removal. *Held:* The deed conveyed a fee simple to the timber and removal within a reasonable time was not necessary. Chapman v. Dearman, 181 S. W. 808 (Tex. 1916).

A small minority of courts hold that a sale of standing timber is an executory contract for the sale of chattels. Fletcher v. Livingston, 153 Mass. 388 (1891); Whittington v. Hall, 116 Md. 467 (1911). Other courts, as in the principal case, hold that there is a grant in fee simple. Midyette v. Grubbs, 58 S. E. 795 (N. C. 1907). Most courts hold that there is a sale of an interest in land, or that an easement is created whereby the vendee may enter and remove the timber granted. Land Co. v. Parker, 59 So. 959 (Fla. 1912); McNeil v. Hall, 187 N. Y. 549 (1907). The manner of regarding standing timber depends entirely on the intention of the parties as expressed by the contract. McClintock's Appeal, 71 Pa. 365 (1872). At all events, the contract conveys a present interest and it is not merely an executory agreement. Wilson v. Scarboro, 163 N. C. 380 (1913); Nutting v. Stratton, 77 N. H. 79 (1913).

Where the time for removal is fixed in the contract, failure to remove within the time specified causes a reversion of the title to the grantor in most jurisdictions. Prentis v. Ross's Estate, 96 Mich. 83 (1893); Bennett v. Lumber Co., 28 Pa. Super. Ct. 495 (1905); even where the deed conveys a fee. Williams v. Parsons, 167 N. C. 529 (1914). A few cases hold that the title remains in the vendee, but that the right to enter and remove is lost. Halstead v. Jessup, 150 Ind. 85 (1898); Irons v. Webb, 41 N. J. L. 203 (1879). The weight of authority is that mere cutting does not prevent title from reverting. Bond v. Ungerecht, 129 Tenn. 631 (1914). Where the seller has

prevented the removal of part of the timber within the time specified the purchaser should be allowed a reasonable time thereafter. Jackson v. Hardin, 87 S. W. 1119 (Ky. 1905). Otherwise, the vendee may be restrained from cutting by injunction. Luffburrow v. Everett, 113 Ga. 1054 (1901); and the vendor may sell to a second purchaser. Chestnut v. Green, 120 Ky. 385 (1905). Where no time has been specified for removal the general rule is that a reasonable time is allowed for removal, after which title reverts to the grantor. Kidder v. Flanders, 73 N. H. 345 (1905); Patterson v. Graham, 164 Pa. 234 (1894). The sale may be regarded as absolute, and failure to remove would be a breach of covenant. Ore Co. v. Lumber Co., 104 Ala. 465 (1894). A few cases are in accord with the principal case and do not require removal within a reasonable time. Lumber Co. v. Britton, 62 So. 648 (Miss. 1913). See also Boults v. Mitchell, 15 Pa. 371 (1850).

TORTS—DEPRIVATION OF MEANS OF SUPPORT—INTOXICATING LIQUORS—A married woman and her minor children may maintain an action for loss of means of support against all those who have furnished intoxicating liquors to the husband and father, which occasioned or contributed to the damages. Whipple v. Rosenstock, 155 N. W. 898 (Neb. 1915).

The right of action of a wife against a liquor dealer and his bondsman for injury to her means of support caused by the sale of intoxicants to her husband arises entirely under the civil damage laws of the various states and is unknown at common law. Duckworth v. Stalnaker, 68 W. Va. 197 (1910). The wife has an interest in her husband's capacity to perform labor as a means of support, and if his intoxication results in injuries, or so impairs his mental or physical powers as to incapacitate him for work she sustains an actionable injury. Schneider v. Hosier, 21 Ohio St. 98 (1871). Or if the husband, without being incapacitated for labor, falls into idle and dissolute habits, Jockers v. Borgman, 29 Kan. 109 (1883); or flees to parts unknown, leaving the wife destitute, she can recover from the saloonkeeper who caused his intoxication, Waxmuth v. McDonald, 96 Ill. App. 242 (1901). If his earning capacity is taken away by his being imprisoned for a crime committed while drunk, a child dependent upon him for support may bring an action. Loftus v. Hamilton, 105 Ill. App. 72 (1902). But see Bradford v. Boley, 167 Pa. 506 (1895).

The license of the saloonkeeper is not a bar to a recovery by a party so injured in means of support. Carrier v. Bernstine, 104 Ia. 572 (1898). The saloonkeeper cannot escape liability because he could not reasonably have foreseen the consequences. Parsons v. Smith, 164 Ill. App. 509 (1911). That the wife may have means of her own, or an income from other than her husband, does not affect her right to damages. Deel v. Heiligenstein, 244 Ill. 239 (1910). Nor is it material that the husband failed to furnish the wife support. Knott v. Peterson, 125 Ia. 404 (1904). Death caused by the intoxication is clearly an injury to the means of support, Nelson v. State, 32 Ind. App. 88 (1903); and in such action it is unnecessary to show that the saloonkeeper knew the decedent was in the habit of getting intoxicated, Bennett v. Miller's Est., 160 Mich. 309 (1910). Notice forbidding the sale

of intoxicants to an habitual drunkard is required by many statutes. Keyser v. Damron, 159 Ky. 444 (1914); Bower v. Fredericks, 46 Pa. Super. 540 (1911).

TRUSTS—RIGHT TO PROCEEDS OF NOTES SENT FOR COLLECTION—A bank sent certain notes to another bank for collection with instructions that the moneys collected be remitted on the day received. Contrary to these instructions the second bank deposited the money to the credit of the first bank, and without its knowledge used the money in the conduct of its own business. On the failure of the second bank, the receiver collected certain other sums due to the bank. *Held:* The first bank was merely a general creditor. Citizens' Nat. Bank of Danville v. Haynes, 187 Ga. 399 (1916).

The rule is that where a bank sends a note to another bank for collection and remittance, a trust relation is established between them *qua* the moneys collected. Harrison v. Coquillard, 26 Ill. App. 513 (1887); Bank v. Weems, 69 Tex. 489 (1888). Nor does the right of the first bank to follow the trust money cease when the second bank mingles the money with the mass of its other funds. Bank v. Weems, *supra.*

Formerly the equitable right of the *c. q. t.* to follow and recover property misapplied by the trustee, vested upon his ability to identify it. The right was later extended so as to attach to the proceeds of the trust property also. Taylor v. Plumer, 3 M. & S. 575 (Eng. 1815); Knatchbull v. Hallett, L. R. 13, Chancery Div. 696 (Eng. 1888). But when the trust fund has been dissipated and can be traced no further than into the hands of the trustee, it is lost, and the *c. q. t.* stands upon no better footing than a general creditor. Bank v. Armstrong, 39 Fed. 693 (1889); Nonotuck Silk Co. v. Flanders, 87 Wis. 237 (1894). A number of the courts, however, have allowed the *c. q. t.* a preference over the general creditors even where it has become impossible to trace the money into any particular form. First Nat. Bank v. Sanford, 62 Mo. App. 394 (1895); Germania Fire Ins. Co. v. Kimble, 66 Mo. App. 370 (1896). The latter rule is the modern doctrine of equity and proceeds upon the theory of the enrichment of the estate out of which the priority is sought to be secured. The former view, however, has to support it the great weight of authority.

TRUSTS—SPENDTHRIFT TRUSTS—Where the donor of a trust provides that the income shall not be alienated in advance nor attached by the creditors of the *cestui que trust* a valid spendthrift trust is created and the creditor of the *cestui que trust* cannot reach the funds. Boston Trust Co. v. Collier, 111 N. E. 163 (Mass. 1916).

Since it is a well-settled rule that the incidents of a legal title attach to an absolute equitable interest, the English courts have held that restraints upon the attachment of the income of trust property are invalid because they are inconsistent with the absolute right to the income. Branden v. Robinson, 3 Ves. 324 (Eng. 1797); Trappes v. Meredith, 39 L. J. Chan. 366 Eng. (1870); and this view has been approved and applied in many decisions in the United States. Tillingast v. Bradford, 5 R. I. 205 (1858); Jones

v. Reese, 65 Ala. 134 (1880). Under this view the only way to exclude creditors is to stipulate that if the *cestui que trust* becomes insolvent or bankrupt his interest will be determined and will go to some other person. For in this case the equitable fee that vests in the *cestui que trust* is not an absolute one but only conditional. Nichols v. Levy, 5 Wall. 441 (U. S. 1866); Dommat v. Bedford, 3 Ves. Jr. 149 (Eng. 1797). The increasing weight of authority in the United States favors the rule that provisions against alienation of an income to which a beneficiary is absolutely entitled are not inconsistent with any estate granted to him and are not against the policy of the law, and therefore, as in the principal case, are valid. *In re* Seegworth's Estate, 226 Pa. 591 (1910); Bennett v. Bennett, 217 Ill. 434 (1905); Shelton v. King, 229 U. S. 90 (1913). The provisions exempting the funds from the claims of the creditors need not be expressed but may be implied from the terms of the trust. Stanbaugh's Estate, 135 Pa. 585 (1890). But a spendthrift trust cannot be created by a person for his own benefit, either directly or indirectly, so as to exempt the trust funds from payment of his debts. Menken Co. v. Brinkly, 94 Tenn. 721 (1894); Mackasor's Appeal, 42 Pa. 330 (1862). Moreover in order to have a spendthrift trust the income alone must be given to the *cestui que trust,* for the whole American doctrine rests upon the ground that a right to receive the income of a trust fund is not necessarily an interest in the fund itself. Kessner v. Phillips, 189 Mo. 515 (1905). In some states statutes provide for such restraints. Blankburn v. Webb, 133 Cal. 420 (1901); North Dak. Code (1905) 4834; North Car. Code (1905) 1588. The New York code provides that a person beneficially interested in the income of property held in trust cannot assign his right to future income unless the trust instrument provides that he shall have that right. N. Y. Real Prop. Laws (1909) 103; Stringer v. Barker, 110 N. Y. App. 37 (1905).

WILLS—CONSTRUCTION—JOINT TENANCY AND TENANCY IN COMMON—A testator directed trustees to sell his leasehold property and pay the proceeds to his nephews and nieces. Children of members of the class dying were to be paid "a parent's share." *Held:* There was a joint tenancy among the children of a nephew dying. *Re* Clarkson, 113 L. T. 917 (Eng. 1916).

At the common law a devise to two or more persons made the devisees joint tenants. Barnes v. Allen, 1 B. C. C. 181 (Eng. 1782); Bustard v. Saunders, 7 Bea. 92 (Eng. 1843). Under the second branch of the rule in Wild's Case, 6 Co. Rep. 16*b* (Eng. 1599), a devise to one and his children carries a joint tenancy when the person named has children living at the time of the devise. Moore v. Gary, 149 Ind. 51 (1897); Noble v. Teeple, 58 Kan. 398 (1897). But a conviction that tenancy in common is better adapted than joint tenancy to answer the exigencies of families led the later judges to give effect to the slightest expressions in favor of tenancy in common. Bill v. Payne, 62 Conn. 140 (1892); Jolliffe v. East, 3 Br. C. C. 25 (Eng. 1789). Language that indicates an intention to divide the property is held to abrogate the idea of a joint tenancy, and to create a tenancy in common. Robertson v. Fraser, L. R. 6 Ch. 696 (Eng. 1871). So, a devise or bequest to several persons in specified unequal shares, Candle v. Candle, 74 S. E. 631

(N. C. 1912), or "share and share alike," Humason v. Andrews, 72 Conn. 595 (1900), or "to be equally divided," whether among a class, Potter v. Nixon, 82 N. J. Eq. 661 (1914); Hazard v. Stevens, 88 Atl. 980 (R. I. 1914), or among persons named, Blaine v. Dew, 111 Me. 480 (1914), now creates a tenancy in common, even when "jointly" is used. Houghton v. Brantingham, 86 Conn. 630 (1913).

In most of the American states statutes have been enacted requiring the testator wishing to create a joint tenancy, to use words clearly showing such intention. Stimson American Statute Law, Sec. 1371. Under such statutes a devise or bequest to named children, Wittel v. Wittel, 82 N. J. Eq. 229 (1914), to named heirs, *in re* Tamargo, 155 N. Y. S. 845 (1916), or to a "son and his children," Moore v. Ennis, 87 Atl. 1009 (Del. Ch. 1913) creates a tenancy in common. In construing a will the court will take into consideration the fact that it was drawn by a layman, *in re* Haddock's Will, 155 N. Y. S. 630 (1916), and the use by him of the word "jointly" does not rebut the presumption established by the statute. Overheiser v. Lackey, 207 N. Y. 229 (1913). For a complete discussion of this subject, see 64 UNIV. OF PENNA. L. REV. 394.

WILLS—GIFT FOR ILLEGAL PURPOSE—A testator left his residuary estate upon trust for a "limited company," the object of which was to promote "the principle that human conduct should be based upon natural knowledge and not upon supernatural belief." *Held:* The bequest was not for purposes illegal or contrary to public policy. *Re* Bowman, 113 L. T. 1095 (Eng. 1916).

Where the object of a testamentary gift is to carry into effect some illegal purpose that the law regards as subversive of sound public policy or good morals, the devise or bequest is void. Jackson v. Phillips, 14 Allen 539 (Mass. 1867); DeCamp v. Dobbins, 31 N. J. Eq. 671 (1879). A trust for the erection of a hall for religious discussion under the administration of a society of infidels will not be upheld. Zeiweiss v. James, 63 Pa. 465 (1870). A direction that property shall not be used for a certain time, Brown v. Burdett, 21 Ch. D. 667 (Eng. 1882), or that a business be carried on for a period without giving anyone the benefit of the profits, is nugatory. *Re* Cameron, 26 Ch. D. 19 (Eng. 1884). A condition tending to separation or divorce between husband and wife is void. Conrad v. Long, 33 Mich. 78 (1875). As to the validity of a testamentary disposition in restraint of marriage, see the note to Holbrook's Estate, 213 Pa. 93 (1905) in 5 Ann. Cas. 138. A condition in a will divesting the interest of a devisee or legatee in the event of his entering the naval or military service is void. *In re* Beard [1908] 1 Ch. 383 (Eng.)

A condition attached to a devise or bequest requiring the recipient to attend religious worship, *in re* Paulson, 127 Wis. 612 (1906) or, to renounce, Barnum v. Baltimore, 62 Ind. 275 (1884), or embrace a particular religious belief is not against public policy. Clavering v. Ellison, 7 H. L. Cas. 707 (Eng. 1859); Magee v. O'Neill, 19 S. Car. 170 (1882). Conditions providing against marriage contrary to a particular religious form, or against marrying a person of particular religious belief, have been held to be valid. Haughton

v. Haughton, 1 Molloy 611 (Eng. 1824); *in re* Knox, 23 L. R. Ir. 542 (1889).

A bequest to be used in advocating a constitutional amendment providing for woman suffrage does not violate the policy of the law, Garrison v. Little, 75 Ill. App. 402 (1898), nor does a provision forfeiting the devise or legacy of any beneficiary that contests the will. Estate of Hite, 155 Cal. 436 (1909); Chew's Appeal, 45 Pa. 228 (1863).

WILLS—PRECATORY AND MANDATORY WORDS—A testator gave his real and personal property to his wife, "she to have full control for and during her natural life." He then "desired" certain disposition of his property to be made after his wife's death. His wife died before him. *Held:* There was no intestacy; the word "desire" was mandatory. Keplinger v. Keplinger, 110 N. E. 698 (Ind. 1915).

The intent of the testator is the cardinal rule in the construction of wills; and if the intent can be clearly ascertained and is not contrary to some positive rule of law, it must prevail. Finlay v. King, 3 Pet. 346 (U. S. 1830). A request will be held mandatory if made use of in a direct devise. Taylor v. Martin, 6 Sad. 125 (Pa. 1887). But a request will not be held mandatory where, having made a disposition the testator expresses a mere desire that the donee should make a certain use of his bounty. Floyd v. Smith, 59 Fla. 485 (1910); *in re* Stinson's Estate, 232 Pa. 218 (1911). A will should be construed to give effect to all the words therein, without rejecting any of them, provided this can be done by a reasonable construction not inconsistent with the manifest intention of the testator. John v. Brown, 201 Fed. 224 (1912); Mersman v. Mersman, 136 Mo. 244 (1896). Where a word is used in one sense in one part of the will it is presumed that the same meaning was intended in other parts, unless there is something to indicate that a different meaning was intended. Blaine v. Dow, 111 Me. 480 (1914). The word "desire," as ordinarily used, is mandatory rather than precatory. Moseley v. Bolster, 201 Mass. 135 (1909). Presbyterian Board v. Culp, 151 Pa. 467 (1892).

WORDS AND PHRASES—"TENT"—The defendant constructed a moving picture theatre 97 feet long, 58 feet wide and 30 feet high along the center, using telegraph poles joined by a wire cable. The theatre was electrically lighted, contained booths of glass and wood, and was capable of seating 640 persons. The defendant claimed exemption from the ordinance of the city regulating "buildings" on the ground that the structure described was a "tent." *Held:* The theatre was a "building." City of St. Louis v. Nash, 181 S. W. 1145 (1916).

Whether a certain structure is or is not a "building" is often a question of great importance. Blakemore v. Stanley, 159 Mass. 6 (1893); the subtle line that distinguishes a chicken coop from a chicken house may mark the difference between larceny and burglary, or between murder in the second degree and murder in the first degree. Williams v. State, 105 Ga. 814 (1898); People v. Steckman, 34 Cal. 242 (1867). Under the dictionary definition of "building" as "that which is built" the courts seem at liberty to include anything erected by man. A "wall" has, however, been held not to be a building. Nowell v. Academy of Notre Dame, 130 Mass. 209 (1881).