CYCLOPEDIA

OF

LAW AND PROCEDURE

EDITED BY

WILLIAM MACK AND HOWARD P. NASH

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PREFACE

The cyclopedic method of treatment is far from being a new one in the law. As early as the time of Justinian I, at whose command the Roman law was compiled and annotated under the name "Corpus Juris Civilis," the desirability of the plan seems to have been recognized. Later, in England, Bacon and Viner, by their Abridgements of British jurisprudence, and in our own country Dane and Wait, by their Commentaries, demonstrated the merit of this system.

The need of a modern embodiment of this very old idea is apparent from the evident impracticability of consulting the ever-increasing number of reported cases themselves, and from the fact that while few practitioners have access to all the text-books and digests, fewer still are able to afford the time the use of such books entails. The Cyclopedia of Law and Procedure is designed to meet this need.

The titles of the Cyclopedia will group the law under certain well-defined heads, each of which will be preceded by a logical and minute analysis which will serve as a ready index to the matter treated thereafter, and which, taken with the cross-references immediately following, will render a general index to the work unnecessary. The cross-references will be arranged alphabetically in large type, making it possible to determine at a glance where kindred matter is treated elsewhere in the work.

With reference to the particular titles, there will be no splitting up of the law along an arbitrary line alleged to divide pleading and practice from substantive law; but the whole of each topic, including pleading, references to suitable forms, evidence, and questions of law and fact, will be treated under a single head. The statements of the text, which will be reduced to the utmost brevity consistent with precision of statement, will be supported, in the notes, by the adjudged cases of the various federal and state courts of the United States and of the courts of the United Kingdom of Great Britain and Ireland and of Canada, arranged in such a manner as will facilitate reference. Such exceptions, illustrations, and applications as seem necessary to a clear understanding of the text will also be included in the notes. To make the citations of greater value to the many lawyers who are not possessed of complete libraries, they will refer not only to the official reports, but also to the National Reporter System, to the American Reports, American Decisions, American State Reports, and the Lawyers' Reports Annotated, as well as, in many cases, to minor but valuable law magazines, which frequently give more exhaustive reports than the official series.

In addition to the larger titles and subdivisions of the law, the Cyclopedia of Law and Procedure will contain definitions of words and phrases which have been adjudged by the courts or explained by the leading lexicographers. Legal maxims will also be presented in both their original and the vernacular tongues, with citations referring to their use and to the cases in which they have been authoritatively quoted.

To render new editions unnecessary, and to prevent the Cyclopedia from falling behind the current of new decisions, a simple system of annual annotations has been adopted.

Fully realizing the magnitude of the task imposed upon

them, the editors have undertaken this compilation in the belief that the plan adopted is feasible, and in the hope that such success may attend their efforts as will result in furnishing, in comparatively few volumes, a complete working library, not only to the members of the profession, but to all students of the law; and, *ad majorem cautelam*, in addition to the work of the regular corps of editors, it is proposed that many of the articles shall be written or examined and approved by men of marked learning and skill in the particular subjects edited by them.

WILLIAM MACK
HOWARD P. NASH

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OF

LAW AND PROCEDURE

A. The indefinite article "a," while properly placed before a singular noun and having the meaning "one," [1] is not necessarily a singular term, and is often used in the sense of "any," and is then applied to more than one individual object.[2] It has also been held to be equivalent to the definite article "the." [3]

The letter "a" is often used to denote the first page of a folio,[4] the second being designated as "b." It is also used to signify "*al.*" in the expression "*et al.*" [5] When used in such an expression as "Int. a 6%," it is known and recognized among commercial people and business men as standing for the word "at." [6] The letter "*a.*" was used formerly, also, as an abbreviation for "*adversus*" in the title of a cause.[7]

The letter "A" in connection with the figure "1," thus: "A 1," is used in "Lloyd's Register of British and Foreign Shipping" and the "Record of American and Foreign Shipping" as standing for the highest character of vessel, and in commerce has come to denote the highest mercantile credit.[8]

In Law Latin the word "*a*" is a preposition meaning "by," [9] "from," [10]

1. Wades *v.* Figatt, 75 Va. 575, where the court, in construing the expression "what is paid or secured not being more altogether than a year's rent in any case," in Va. Code (1873), c. 134, § 12, held that the words "a year's rent" were equivalent to "one year's rent."

2. Lowe *v.* Brooks, 23 Ga. 325; Thompson *v.* Stewart, 60 Iowa 223, 14 N. W. 247; National Union Bank *v.* Copeland, 141 Mass. 257, 4 N. E. 794; *In re* Sanders, 54 L. J. Q. B. 331; Thompson *v.* Wesleyan Newspaper Assoc., 8 C. B. 849, 65 E. C. L. 849.

3. *Ex p.* Hill, 23 Ch. D. 695, where Bowen, L. J., in construing a section of the bankruptcy act containing the words "with a view of giving such creditor a preference," held that the words "a view" meant "the view."

Contra, Sharff *v.* Com., 2 Binn. (Pa.) 514, where, on an indictment for publishing a libel on the characters of A and B, and also upon the memory of C, deceased, the jury found the defendant "guilty of writing and publishing a bill of scandal against A and B, but not guilty as to any C, deceased;" and it was held that the defendant was not found guilty of the offense charged in the indictment, the court saying, "'a' bill of scandal is very different from 'the' bill, and it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.'"

4. For example, see Coke Litt. 114*a*, 114*b*.

5. For example, see Hitchins *v.* Pettingill, 58 N. H. 3.

6. Belford *v.* Beatty, 145 Ill. 414, 34 N. E. 254.

7. For example, see Cockle *a.* Underwood, 1 Abb. Pr. (N. Y.) 1.

8. Century Dict.

9. *A multo fortiori,*— by a much stronger reason. Adams Gloss. *A provisione viri,*— by the provision of man. 4 Kent Comm. 55.

10. *A cancellando,*— from cancelling. 3 Bl. Comm. 46. *A cancellis curiæ explodi,*— to be expelled from the bar of the court. Adams Gloss. *A confectione,*— from the making. Clayton's Case, 5 Coke, pt. II, 1*a*; Anonymous, 1 Ld. Raym. 480. *A confectione præsentium,*— from the making of the indentures. Clayton's Case, 5 Coke, pt. II, 1*a*. *A dato,*— from the date. Osbourn *v.* Rider, Cro. Jac. 135. *A datu,*— from the date. Anonymous, 1 Ld. Raym. 480; Haths *v.* Ash, 2 Salk. 413. *A die confectionis,*—

"in," [11] "of," [12] and "on." [13] It is also used in Law French as a preposition meaning "at," [14] "for," [15] "in," [16] "of," [17] "on," [18] "to," [19] and "with," [20] and in conjunction with other words as an adverb.[21]

In the Roman law the letter "*A*" was inscribed on the judges' and jurors' ballot in case of acquittal, it being the initial letter of "*absolvo*," meaning "I acquit." [22]

AB. The word "*ab*" is used in Law Latin as a preposition meaning "by," [23] "from," [24] "in," [25] and "of," [26] and in conjunction with other words as an adverb.[27]

AB ABUSU AD USUM NON VALET CONSEQUENTIA. A maxim meaning "from the abuse of a thing to its use a conclusion is invalid." [28] The maxim cannot apply where an abuse is directly charged and offered to be proved.[29]

AB ACTU AD POSSE, VALET CONSECUTIO. A maxim meaning "from the performance of a thing to what can be performed the sequence is valid." [30]

ABANDONEE. One to whom a right or property is abandoned by another.[31]

from the day of making. Barwick's Case, 5 Coke 93*b*. *A die datus,*— from the day of the date. Hatter *v.* Ash, 1 Ld. Raym. 84; Anonymous, 1 Ld. Raym. 480; Seignorett *v.* Noguire, 2 Ld. Raym. 1241. *A me,*— from me. Gardner *v.* Scott, 2 Bell Sc. App. 129, 133. *A mensa et thoro,*— from table and bed. 1 Bl. Comm. 440. *A nativitate,*— from birth. 3 Bl. Comm. 332. *A patre,*— from the father. 2 Bl. Comm. 232. *A qua,*— from which. Broom & H. Comm. bk. IV, 366. *A quo,*— from whom. Mattueof's Case, 10 Mod. 4. *A rubro ad nigrum,*— from the red to the black. Trayn. Lat. Max. *A tempore cujus contrarii memoria non existit,*— from time of which memory to the contrary does not exist. Black L. Dict. *A vinculo matrimonii,*— from the bond of marriage. 2 Kent Comm. 95.

11. *A retro,*— in arrear. Adams Gloss.

12. *A consiliis,*— of counsel. Burrill L. Dict.

13. *A latere,*— on the side. Adams Gloss.

14. *A cel jour,*— at this day. Adams Gloss. *A issue,*— at issue. Benl. C. P. 21. *A large,*— at large. Burrill L. Dict.

15. *A terme de sa vie,*— for the term of his life. Y. B. 3 Edw. II, 55. *A terme que n'est mye uncore passe,*— for a term which is not yet passed. Adams Gloss. *A terme que passe est,*— for a term which is passed. Burrill L. Dict.

16. *A lour foy,*— in their allegiance. Burrill L. Dict.

17. *A force,*— of necessity. Adams Gloss.

18. *A ma intent,*— on my action. Mitchell *v.* Reynolds, 1 Smith Lead. Cas. (7th Am. ed.) 516.

19. *A aver et tener,*— to have and to hold. Burrill L. Dict. *A la graunde grevaunce,*— to the great grievance. Adams Gloss.

20. *A force et armes,*— with force and arms. Burrill L. Dict.

21. *A remenaunt* or *a toutz jours,*— forever. Kelham Dict.

22. Taylor Civ. L. 191.

23. *Ab enumeratione partium,*— by enumeration of parts. Adams Gloss. *Ab olim consensu,*— by ancient consent. 3 Bl. Comm. 95.

24. *Ab ardendo,*— from burning. 4 Bl. Comm. 220. *Ab extra,*— from without. Lunt *v.* Holland, 14 Mass. 149; The Harmonie, 3 C. Rob. 318; Best Ev. § 14. *Ab inconvenienti,*— from inconvenience. Broom & H. Comm. bk. I, 62. *Ab ingressu ecclesiæ,*— from entering the church. Broom & H. Comm. bk. IV, 169. *Ab initio,*— from the beginning. Sackrider *v.* McDonald, 10 Johns. (N. Y.) 253; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Winterbourne *v.* Morgan, 11 East 395; Reniger *v.* Fogossa, Plowd. 1; 1 Bl. Comm. 434. *Ab initio mundi usque ad hodiernum diem,*— from the beginning of the world to this day. Y. B. 1 Edw. III, 25. *Ab intestato,*— from an intestate. 2 Bl. Comm. 490; Broom & H. Comm. bk. II, 649. *Ab intra,*— from within. Best Ev. § 14. *Ab inutili,*— from the useless. Manby *v.* Scott, 2 Smith Lead. Cas. (7th Am. ed.) 408.

25. *Ab ante,*— in advance. Allen *v.* McKeen, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229.

26. *Ab antiquo,*— of old. 3 Bl. Comm. 95.

27. *Ab antecedente,*— beforehand. Pattison *v.* Robinson, 5 M. & S. 105. *Ab invito,*— unwillingly. Bouvier L. Dict.

28. Adams Gloss.

29. Per Denman, C. J., in Stockdale *v.* Hansard, 9 A. & E. 1.

30. The maxim is intended to express the idea that when a thing has once happened it is logical to infer that a similar thing may occur again, or that "from what has happened we may infer what will happen." Adams Gloss.

31. Burrill L. Dict.

The word is applied to the underwriters of vessels in Case *v.* Davidson, 5 M. & S. 79.

ABANDONMENT

Edited by Frederick Geller

CROSS-REFERENCES

For Abandonment of:
Action, see Actions; Dismissal and Nonsuit.
Appeal, see Appeal and Error.
Attachment, see Attachment.
Attorney's Lien, see Attorney and Client.
Canal, see Canals.
Cemetery, see Cemeteries.
Charter, see Corporations.
Child, see Parent and Child.
Condemnation Proceedings, see Eminent Domain.
Contract, see Contracts; Sales; Vendor and Purchaser.
Copyright, see Copyright.
Dedication, see Dedication.
Easement, see Easements.
Execution, see Executions.
Factor's Lien, see Factors and Brokers.
Ferry, see Ferries.
Franchise, see Corporations; Franchises; Railroads; Street Railroads.
Highway, see Streets and Highways.
Homestead, see Homesteads.
Husband as Ground for Divorce, see Divorce.
Insured Vessel and Cargo, see Marine Insurance.
Invention, see Patents.
Lease, see Landlord and Tenant.
Levy, see Attachment; Executions.
Lien, see Liens.

For Abandonment of — (*continued*)
Literary Property, see LITERARY PROPERTY.
Maritime Lien, see MARITIME LIENS.
Mechanic's Lien, see MECHANICS' LIENS.
Mining Claim, see MINES AND MINERALS.
Motion, see MOTIONS.
Office, see OFFICERS.
Patent, see PATENTS.
Public Land, see PUBLIC LANDS.
Railroad Right of Way, see RAILROADS; STREET RAILROADS.
Salvor's Lien, see SALVAGE.
Street, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.
Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.
Vendor's Lien, see VENDOR AND PURCHASER.
Warehouseman's Lien, see WAREHOUSEMEN.
Water Rights, see WATERS.
Wife, see DIVORCE; DOWER; HUSBAND AND WIFE.
Writ of Error, see APPEAL AND ERROR.

I. DEFINITION.

Abandonment is the giving up of a thing absolutely, without reference to any particular person or purpose.[1]

II. ELEMENTS OF ABANDONMENT.

A. In General — 1. RULE STATED. Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.[2]

2. ABANDONMENT OF PROPERTY. To constitute abandonment in respect of property, there must be a concurrence of the intention to abandon and an actual relinquishment of the property, so that it may be appropriated by the next comer.[3]

1. Burrill L. Dict.; Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472.

"Abandonment is the relinquishment of a right, the giving up of something to which one is entitled." Per Wheeler, C. J., in Dikes *v.* Miller, 24 Tex. 417.

"Property is said to be abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner." Per Fairchild, J., in Eads *v.* Brazelton, 22 Ark. 499, 79 Am. Dec. 88.

Distinguished from "surrender."—"There is a difference between 'abandon' and 'surrender;' between abandoning a right or thing, and the surrender of such right or thing to another; between giving it up because it is regarded as utterly useless or valueless, and surrendering, assigning, or transferring it to another as a valuable right or thing. When one surrenders a right or thing to another by solemn agreement in writing, he does not abandon it in the sense in which all understand the word 'abandon.'" Per Bird, V. C., in Hagan *v.* Gaskill, 42 N. J. Eq. 215, 6 Atl. 879.

Distinguished from "sale" and "gift."—Abandonment must be made by the owner without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing; and further it must be made without any desire that any other person shall acquire the same. For if it were made for a consideration it would be a sale or barter; and if without consideration, or with an intention that some other person should become the possessor, it would be a gift. Richardson *v.* McNulty, 24 Cal. 339; Stephens *v.* Mansfield, 11 Cal. 363.

2. Stevens *v.* Norfolk, 42 Conn. 377; Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

Estoppel in pais as an element.—An estoppel *in pais* does not constitute an element in abandonment, nor is it one of the circumstances from which abandonment may be found. Marquart *v.* Bradford, 43 Cal. 526.

3. Smith *v.* Cushing, 41 Cal. 97; Judson *v.* Malloy, 40 Cal. 299; Richardson *v.* McNulty, 24 Cal. 339; Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472; Tayon *v.* Ladew, 33 Mo. 205; Barada *v.* Blumenthal, 20 Mo. 162; Page *v.* Scheibel, 11 Mo. 167; Miller *v.* Cresson, 5 Watts & S. (Pa.) 284; Perkins *v.* Blood, 36 Vt. 273.

Sunken steamboat.—A steamboat cargo having been sunk in a river for a period of thirty years, and during that time an island having been formed by the change of the current of the river over the wreck, and the owners having made no effort, nor done any act showing that a design was entertained to save the property, the law will imply an

3. ABANDONMENT OF RIGHT. To constitute abandonment in respect of a right secured, there must be a clear, unequivocal, and decisive act of the party; an act done which shows a determination in the individual not to have a benefit which is designed for him.[4]

B. Intention as Element. In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no abandonment without the intention to abandon.[5] Thus, in jurisdictions recognizing the doctrine that title to land may be lost by abandonment, ceasing to cultivate land, or mere inaction and removal to another place, is not enough, without some act of disclaimer or other fact importing and showing a positive intention to abandon all claim of ownership.[6] So the mere suspension of the exercise of a right, without evidence of the intention to abandon

abandonment of it. Eads *v.* Brazelton, 22 Ark. 499, 79 Am. Dec. 88.

Property sunk in a steamboat and unclaimed for twenty-three years is derelict. Creevy *v.* Breedlove, 12 La. Ann. 745.

Manure dropped in street.— Manure which had accumulated in a frequented place in a public street was raked into heaps by the plaintiff in the evening and left in that condition to be carried away by him the next evening. During the afternoon of the next day, the defendant, finding the manure in heaps, loaded it into his cart and carried it away. In an action of trover brought by the plaintiff for the value of the manure, it was held that it belonged originally to the owners of the animals that dropped it, but was to be regarded as abandoned by them, and that, being abandoned property, plaintiff, the first occupant, who took it, had a right to appropriate it. Haslem *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350.

Hides left in tannery.— The owner of a tannery, when removing his hides, omitted to remove all. The tannery was sold, and many years after, the plaintiff, while laboring for the defendant in erecting a factory on the premises, discovered the hides so left. The jury were instructed that if they should "find that the owners, for any reason satisfactory to themselves, intentionally abandoned the hides, expecting that the first finder, the first explorer, or excavater, should take possession and enjoy the property and the benefit, with an intention of the owner or agent not to resume possession and not to claim any control or dominion over them, thereafter finally relinquishing all interest in them . . . then these finders would have a right to the possession as against all persons whatsoever." But if the jury should find that "any owner, whoever he may have been, of the hides, intentionally, carefully, voluntarily, and in the ordinary course of business, placed them there as his property, and they were accidentally or inadvertently overlooked and forgotten, they remained the property of such owner or the heirs of such owner." It was held that such instruction was correct. Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

Land.— To abandon land, the owner must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess it, or reclaim it for himself, in any event, and regardless and indifferent as to what may become of it in the future. Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Richardson *v.* McNulty, 24 Cal. 339; Clark *v.* Hammerle, 36 Mo. 620.

4. Masson *v.* Anderson, 3 Baxt. (Tenn.) 290; Breedlove *v.* Stump, 3 Yerg. (Tenn.) 257; Dawson *v.* Daniel, 2 Flipp. (U. S.) 305, 7 Fed. Cas. No. 3,669.

5. *California.*— Myers *v.* Spooner, 55 Cal. 257; Sweeney *v.* Reilly, 42 Cal. 402; Smith *v.* Cushing, 41 Cal. 97; Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Davis *v.* Perley, 30 Cal. 630; St. John *v.* Kidd, 26 Cal. 263; Bell *v.* Bed Rock Tunnel. etc., Co., 36 Cal. 214; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Waring *v.* Crow, 11 Cal. 366.

Illinois.— Wilson *v.* Pearson, 20 Ill. 81; McGoon *v.* Ankeny, 11 Ill. 558.

Maine.— Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

Massachusetts.— Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399.

Minnesota.— Rowe *v.* Minneapolis, 49 Minn. 148, 51 N. W. 907.

Mississippi.— Hicks *v.* Steigleman, 49 Miss. 377.

Missouri.— Tayon *v.* Ladew, 33 Mo. 205; Landes *v.* Perkins, 12 Mo. 238.

Nevada.— Weill *v.* Lucerne Min. Co., 11 Nev. 200; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

New York.— Wiggins *v.* McCleary, 49 N. Y. 346.

Oregon.— Dodge *v.* Marden, 7 Oreg. 456.

Pennsylvania.— Goodman *v.* Losey, 3 Watts & S. (Pa.) 526.

South Carolina.— Parkins *v.* Dunham, 3 Strobh. (S. C.) 224.

But see Paine *v.* Griffiths, 86 Fed. 452, 30 C. C. A. 182, 58 U. S. App. 38, wherein it was said that abandonment was not always a question of intention exclusively for the jury, without a controlling instruction from the court. Under a certain uncontradicted state of facts the law will pronounce the conduct of the party to be an abandonment, whatever may have been his intention.

6. Clark *v.* Hammerle, 36 Mo. 620; Kercheval *v.* Ambler, 4 Dana (Ky.) 166, wherein it was held that the fact that the agent of the owner of land, after receiving possession under a writ of possession, left the land, is not of itself sufficient to show abandonment in the absence of a showing as to his intention.

it, is not sufficient to destroy the right.[7] The intention to abandon is to be derived from all the facts and circumstances of the case.[8]

C. Time as Element. Time is not an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete.[9] Lapse of time is, however, a circumstance for the jury to consider in determining the question of abandonment.[10]

D. Non-User as Element. Non-user is not of itself sufficient to show an abandonment of a right;[11] nor will neglect for more than twenty years to assert a title to an undivided interest in land, by one who has a valid title, operate as an abandonment, where there is no adverse possession.[12] It has been held, however, that a right acquired by user may be lost by non-user.[13]

III. WHAT MAY BE ABANDONED.

A. Real Property. At common law a perfect legal title to a corporeal hereditament cannot, it would seem, be lost by abandonment;[14] but under the Spanish law in force in some of the states an owner might depart from his land with an intention that it should be no longer his, and it then became the property of him who first entered upon it.[15]

7. Banks *v.* Banks, 77 N. C. 186; Faw *v.* Whittington, 72 N. C. 321; Mouson *v.* Boehm, 26 Ch. D. 398.

8. Myers *v.* Spooner, 55 Cal. 257; Davis *v.* Perley, 30 Cal. 630.

Removal of fence.—The removal of an enclosure of land for the purpose of replacing it with a better one is not evidence of an intention to abandon the premises. Sweetland *v.* Hill, 9 Cal. 556.

9. Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484; Snell *v.* Levitt, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414.

10. Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214; Gluckauf *v.* Reed, 22 Cal. 468; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484; Patchin *v.* Stroud, 28 Vt. 394.

Presumption from lapse of time.—An abandonment of the right of the state to personal property confiscated by it will not be presumed from lapse of time, where there is no evidence of a possession by individuals sufficient to authorize such a presumption in their favor. Kershaw *v.* Boykin, 1 Brev. (S. C.) 301.

11. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

Conveyance for specific purpose.—The fact that a building, conveyed to a corporation on condition that it should always be devoted to school purposes, had become out of repair, and that no school had been taught therein for a few years, does not amount to an abandonment of the property under a covenant of the deed. Carroll County Academy *v.* Gallatin Academy, (Ky. 1898) 47 S. W. 617.

Ditch.—Non-user of a ditch, brought about by circumstances over which the ditch-owner has no control, is not evidence of abandonment or of intention to abandon such ditch. Welch *v.* Garrett, (Ida. 1897) 51 Pac. 405.

Railroad right of way.—No abandonment of land taken for a railroad right of way can be presumed from a non-user of the land from the time of taking. Hummel *v.* Cumberland Valley R. Co., 175 Pa. St. 537, 34 Atl. 848.

12. Great Falls Co. *v.* Worster, 15 N. H. 412.

Absence for five years.—The intention to abandon is not necessarily inferable from the fact that the premises have been left vacant, unimproved, and without attention for more than five years, but such fact may be taken into consideration in deciding the question of abandonment. Judson *v.* Malloy, 40 Cal. 299.

Absence for eight years.—Absence from land for eight years will not be construed as necessarily amounting to an abandonment of a railroad pre-emption claim thereto. Cravens *v.* Moore, 61 Mo. 178.

Failure to exercise ownership for thirteen years.—The fact that a purchaser at a tax sale fails to exercise any act of ownership over land for thirteen years does not show an abandonment. Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866. But where a party purchased, at execution sale, land held by entry, but received no deed from the sheriff, or instituted no proceeding against the former owner, who remained in possession for thirteen years after the execution sale, such facts constitute conclusive evidence that the purchaser has abandoned his claim. Crutsinger *v.* Catron, 10 Humph. (Tenn.) 24.

13. Farrar *v.* Cooper, 34 Me. 394.

14. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319; Philadelphia *v.* Riddle, 25 Pa. St. 259; Perkins *v.* Blood, 36 Vt. 273; 2 Washburn Real Prop. §§ 453, 457.

15. Clark *v.* Hammerle, 36 Mo. 620; Fine *v.* St. Louis Public Schools, 30 Mo. 166; Landes *v.* Perkins, 12 Mo. 238; Sideck *v.* Duran, 67 Tex. 256, 3 S. W. 264; Tiebout *v.* Millican, 61 Tex. 514; Dikes *v.* Miller, 24 Tex. 417.

Title acquired by possession merely may be lost by abandonment of it. Jones *v.* Merrimack River Lumber Co., 31 N. H. 381.

Inchoate rights in land, such as rights dependent on possession and not ripened into legal titles; mining claims and rights appurtenant thereto;[16] and equitable rights,[17] may be lost by abandonment.

Incorporeal hereditaments acquired by user may be lost by non-user continued for the time required for their acquisition; but incorporeal hereditaments acquired by deed cannot be lost by non-user unless there is also shown some adverse possession, or loss of title in some of the ways recognized by law, or the destruction of the easement, or some act of the owner making its legitimate use impossible, or some other unequivocal act showing an intention permanently to abandon the same and often accompanied by some act creating an estoppel.[18]

B. Personal Property. Title to personal property may be lost by abandonment.[19]

IV. Pleading and Proof of Abandonment.

Where the strict legal title is not involved, and the plaintiff relies upon a right to recover founded upon inchoate possession, the defendant, under the general issue, without pleading abandonment, may prove abandonment of the premises by the plaintiff before the defendant's entry.[20]

V. Evidence of Abandonment.

A. In General. Upon a question of abandonment, as upon a question of fraud, a wide range should be allowed as to evidence, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived.[21]

B. Presumption and Burden of Proof. An intention to abandon property for which the party has paid a consideration will not be presumed,[22] and the burden of showing an abandonment rests upon the one who asserts it.[23]

16. Dikes *v.* Miller, 24 Tex. 417, wherein it was held that an incipient right to land, as a location, a survey, or other merely equitable title not perfected into a grant or vested by deed, may be lost by abandonment. Gluckauf *v.* Reed, 22 Cal. 469; Davis *v.* Butler, 6 Cal. 510; Dodge *v.* Marden, 7 Oreg. 456, 460; Philadelphia *v.* Riddle, 25 Pa. St. 259.

17. Picket *v.* Dowdall, 2 Wash. (Va.) 106.

Public rights.— In Derby *v.* Alling, 40 Conn. 410, it was held that public as well as private rights might be lost by an abandonment of them by those interested in enforcing them.

18. Arnold *v.* Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305; Smyles *v.* Hastings, 22 N. Y. 217; Wiggins *v.* McCleary, 49 N. Y. 346; Conabeer *v.* New York Cent., etc., R. Co., 156 N. Y. 474, 51 N. E. 402; Snell *v.* Levitt, 110 N. Y. 595, 18 N. E. 370; White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053.

19. McGoon *v.* Ankeny, 11 Ill. 558; Tiebout *v.* Millican, 61 Tex. 514.

20. Willson *v.* Cleaveland, 30 Cal. 192.

Necessity of special plea.— Evidence of the abandonment of a mining claim by a party suing to recover the same is admissible, without a special plea thereof, under a denial of title in the plaintiff, pleaded by the defendant. Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214.

21. Bell *v.* Bed Rock Tunnel, etc., Co., 36 Cal. 214, wherein it was held that, the leaving being established, it was competent for the opposite party to show any acts explanatory of the leaving which tend to show that it was not accompanied with an intent not to return.

Where the owner of land quit his occupancy, removed his mill from it, and subsequently, as an insolvent, made a sworn inventory which did not contain the land, these facts were held to be evidence for the jury. Barada *v.* Blumenthal, 20 Mo. 162.

Evidence of intent.— Evidence that the plaintiff left the premises sued for, removed his improvements to another tract in the vicinity, and knew of the entry of the defendants on the premises and their claim of title thereto, is competent as bearing upon the intentions of the plaintiff with reference to the premises. Sweeney *v.* Reilly, 42 Cal. 402.

22. Hicks *v.* Steigleman, 49 Miss. 377.

Land location.— In Troutman *v.* May, 33 Pa. St. 455, it was said that circumstances must be very strong to presume that the owner of a location has abandoned his title to the land.

Rebuttal of presumption.— The fact that a party, when ceasing to occupy premises, left an agent in charge of them, is sufficient, of itself, to rebut the presumption of abandonment arising from the cessation of his occupancy, and to render the question of abandonment one of intention proper for determination by a jury. Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

23. Tayon *v.* Ladew, 33 Mo. 205.

C. Acts and Declarations of the Party Abandoning. The acts and declarations of the party abandoning, made at the time of his alleged abandonment, are competent on the question of abandonment.[24]

VI. Province of Court and Jury.

The question of abandonment is one of fact to be determined by the jury from all the circumstances of the case.[25] In Pennsylvania, however, it has been held that an abandonment of land by a settler is not in all cases a matter of fact; it may be a conclusion of law from facts.[26] Thus, where the question arises from mere lapse of time it is a question of law to be decided by the court without regard to the intention of the party.[27]

VII. Effect of Abandonment.

An abandonment divests a title as fully as a conveyance[23] and operates from the time of the act of abandonment.[29]

ABARNARE. To discover and disclose to a magistrate any secret crime.[1]

AB ASSUETIS NON FIT INJURIA. A maxim meaning "from things to which we are accustomed, no legal wrong results."[2]

ABATAMENTUM. A word of art meaning an entry by interposition.[3]

ABATARE. In old English law, to Abate,[4] *q. v.*

ABATE. A generic term, derived from the French word "*abattre*," and signifying to quash, beat down, or destroy.[5]

24. Kercheval *v.* Ambler, 4 Dana (Ky.) 166; Dodge *v.* Marden, 7 Oreg. 456.

Where the defendant claims an abandonment of premises by the plaintiff's intestate, the declarations of the plaintiff's intestate, made in reply to an application to sell the premises, tending to rebut any presumption of abandonment, are admissible. Perkins *v.* Blood, 36 Vt. 273.

25. *California.*— Roberts *v.* Unger, 30 Cal. 676; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

Connecticut.— McArthur *v.* Morgan, 49 Conn. 347; Russell *v.* Davis, 38 Conn. 562.

Illinois.— Wilson *v.* Pearson, 20 Ill. 81.

Missouri.— Clark *v.* Hammerle, 36 Mo. 620; Fine *v.* St. Louis Public Schools, 30 Mo. 166; Landes *v.* Perkins, 12 Mo. 238.

New York.— Wiggins *v.* McCleary, 49 N. Y. 346.

South Carolina.— Parkins *v.* Dunham, 3 Strobh. (S. C.) 224.

Texas.— Hollingsworth *v.* Holshousen, 17 Tex. 41; Simpson *v.* McLemore, 8 Tex. 448.

Vermont.— Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866; Patchin *v.* Stroud, 28 Vt. 394.

26. Sample *v.* Robb, 16 Pa. St. 305; Atchison *v.* McCulloch, 5 Watts (Pa.) 13; Miller *v.* Cresson, 5 Watts & S. (Pa.) 284; Forster *v.* McDivit, 5 Watts & S. (Pa.) 359.

27. Brentlinger *v.* Hutchinson, 1 Watts (Pa.) 46; Clemmins *v.* Gottshall, 4 Yeates (Pa.) 330; Grant *v.* Allison, 43 Pa. St. 427, holding that a dereliction of possession for more than ten years, by a claimant of land by settlement and improvement, unexplained by evidence, amounts to abandonment by presumption of law and lapse of time.

Intention doubtful.— Where, from the evidence, the intention of a settler of land to abandon is doubtful, it must be referred to the jury. Heath *v.* Biddle, 9 Pa. St. 273.

28. Gluckauf *v.* Reed, 22 Cal. 468; McGoon *v.* Ankeny, 11 Ill. 558.

Property of finder.— Property derelict and abandoned, either on the high seas or anywhere else, belongs to the first finder who reduces it to possession. Wyman *v.* Hurlburt, 12 Ohio 81, 40 Am. Dec. 461.

29. Davis *v.* Butler, 6 Cal. 510.

Right of appropriation contingent on abandonment.— In Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116, it was held that if miners engaged in washing their mining claims with water abandon the water and tailings which pass from their mining grounds, any other persons have a right to take and appropriate the same to their own use, and their right to the water and tailings is contingent on the fact of continual abandonment; but it is not obligatory on the persons abandoning to continue to do so, even though other persons, encouraged by the circumstance of abandonment for a time, have incurred the expense of constructing flumes to use the water and tailings abandoned.

1. Jacob L. Dict.

2. Wharton L. Lex.

3. Coke Litt. 277*a*; Bedell *v.* Lull, Yelv. 151, Cro. Jac. 221.

4. Burrill L. Dict.

Used in the past tense (*abatavit*,— she abated) in Bedell *v.* Lull, Yelv. 151, Cro. Jac. 221.

5. Case *v.* Humphrey, 6 Conn. 130; 3 Bl. Comm. 168.

Abate is both an English and French word, and signifieth in its proper sense to diminish or take away. In another sense it signifieth to prostrate, beat down, or overthrow. Coke Litt. 277*a*.

ABATEMENT. A making less or destroying.[6] (For Abatement: Of Action, see Abatement and Revival. Of Appeal, see Appeal and Error; Criminal Law. Of Bastardy Proceedings, see Bastards. Of Criminal Prosecution, see Criminal Law. Of Freehold Estates, see Estates; Forcible Entry and Detainer. Of Nuisances, see Health; Intoxicating Liquors; Municipal Corporations; Nuisances. Of Obstructions, see Easements; Private Roads; Streets and Highways; Waters. Of Price of Land, see Vendor and Purchaser. Of Price on Account of Deficiency of Goods, see Sales. Of Rent, see Landlord and Tenant. Of Tax, see Taxation. Of Writ of Error, see Appeal and Error. On Foreclosure, see Mortgages. Pleas in, see Attachment; Criminal Law; Equity; Pleading.)

6. Wharton L. Lex.

ABATEMENT AND REVIVAL

By Archibald C. Boyd

CROSS-REFERENCES

For Abatement of:
Admiralty Proceedings, see ADMIRALTY.
Bastardy Proceedings, see BASTARDS.
Criminal Proceedings, see CRIMINAL LAW.
Proceedings on Appeal:
In Civil Cases, see APPEAL AND ERROR.
In Criminal Cases, see CRIMINAL LAW.
For Abatement of Action by Reason of:
Alienage of Party, see WAR.
Assignment for Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Bankruptcy of Party, see BANKRUPTCY.
Champertous Transaction, see CHAMPERTY AND MAINTENANCE.
Consolidation of Corporation-Party, see CORPORATIONS.
Coverture, see HUSBAND AND WIFE.
Defect in Process, see ATTACHMENT; DISMISSAL AND NONSUIT; PROCESS.
Defective Service of Process, see PROCESS.
Defect of Parties, see CORPORATIONS; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; PARTIES; PARTNERSHIP.
Disqualification of Judge, see JUDGES.
Dissolution of Corporation-Party, see CORPORATIONS.
Divorce of Party, see DIVORCE.
Failure to Give Security for Costs, see COSTS.
Immunity from Process, see PROCESS.
Incapacity of Party to Sue or to Be Sued, see PARTIES.
Infancy, see INFANTS.
Insanity of Party, see INSANE PERSONS.
Insolvency of Party, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; INSOLVENCY.
Loss of Instrument or Paper, see LOST INSTRUMENTS.
Marriage of Female Party, see HUSBAND AND WIFE.
Misjoinder of Parties, see PARTIES.

For Abatement of Action by Reason of — (*continued*).
Misnomer of Party, see PARTIES; PROCESS.
Non-Joinder of Parties, see PARTIES.
Premature Commencement of Suit, see ACTIONS.
Sentence in Criminal Prosecution, see CONVICTS.
Submission to Arbitration, see ARBITRATION AND AWARD.
Variance between Process and Other Papers, see ATTACHMENT; PROCESS.
Want of Jurisdiction, see COURTS; VENUE.
For Pleas or Answers in Abatement:
In General, see PLEADING.
In Admiralty Proceedings, see ADMIRALTY.
In Chancery, see EQUITY.
In Criminal Proceedings, see CRIMINAL LAW.

I. NATURE AND EFFECT OF ABATEMENT.

A. In General. Pleas in abatement, being dilatory pleas, are not favored either at common law[1] or under the code,[2] and can be used only to present matter which defeats the present suit.[3] Matter which denies the right of action must be pleaded in bar.[4]

B. At Law — 1. EFFECT ON PRINCIPAL SUIT. At law an abatement of a suit is a complete termination of it.[5]

2. EFFECT ON ANCILLARY PROCEEDING. The abatement of the main action abates proceedings ancillary or collateral to it.[6]

1. *Alabama.*— Nabors *v.* Nabors, 2 Port. (Ala.) 162.
Illinois.— Archer *v.* Claflin, 31 Ill. 306.
Kansas.— Bliss *v.* Burnes, McCahon (Kan.) 91.
Maryland.— Wilms *v.* White, 26 Md. 380, 90 Am. Dec. 113.
Missouri.— Hatry *v.* Shuman, 13 Mo. 547.
Pennsylvania.— Good Intent Co. *v.* Hartzell, 22 Pa. St. 277; Harrison *v.* Tillinghast, 3 Kulp (Pa.) 270; Fritz *v.* Thompson, 3 Clark (Pa.) 401, 5 Pa. L. J. 423; Chamberlin *v.* Hite, 5 Watts (Pa.) 373; Witmer *v.* Schlatter, 15 Serg. & R. (Pa.) 150.
Tennessee.— Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.
Virginia.— Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.
Wisconsin.— Bevier *v.* Dillingham, 18 Wis. 529.
England.— Ryland *v.* Wormald, 2 M. & W. 393; Roberts *v.* Moon, 5 T. R. 487.

2. Bliss *v.* Burnes, McCahon (Kan.) 91.

3. *Alabama.*— Roberts *v.* Heim, 27 Ala. 678.
Arkansas.— Fowler *v.* Scott, 11 Ark. 675; Peel *v.* Ringgold, 6 Ark. 546; Didier *v.* Galloway, 3 Ark. 501.
California.— Primm *v.* Gray, 10 Cal. 522.
Missouri.— Kincaid *v.* Storz, 52 Mo. App. 564.
Texas.—Tinnin *v.* Weatherford, Dall. (Tex.) 590.
Subsequent irregularities.— If a suit is rightly commenced, no irregularity afterward is properly the subject of a plea in abatement. Stapp *v.* Thomason, 2 Litt. (Ky.) 214.

4. Roberts *v.* Heim, 27 Ala. 678; Morgan *v.* Butterfield, 3 Mich. 615; Kincaid *v.* Storz, 52 Mo. App. 564; Tinnin *v.* Weatherford, Dall. (Tex.) 590.
An accord and satisfaction, being matter in bar, is not pleadable in abatement. Pennington *v.* Hamilton, 50 Ind. 397.

5. *Ex p.* Kirtland, 49 Ala. 403; State Bank *v.* Bates, 10 Ark. 631; Crane *v.* French, 38 Miss. 503; Hoxie *v.* Carr, 1 Sumn. (U. S.) 173, 12 Fed. Cas. No. 6,802; 3 Bl. Comm. 108.
Another suit pending.— A plaintiff's claim is not defeated by the fact that a former action between the same parties for the same cause is pending, but the fact asserted by the plea of such prior action turns him over to the pursuit of his claim in the action first commenced. Com. *v.* Cope, 45 Pa. St. 161.
Not a bar to new suit.— A judgment of abatement is not a bar to the issuance of a new writ or the institution of a new suit. Adams *v.* State, 9 Ark. 33.

6. Wintz *v.* Webb, 14 N. C. 27; Robertson *v.* Bingley, 1 McCord Eq. (S. C.) 333; Hagerty *v.* Hughes, 4 Baxt. (Tenn.) 222; Maxwell *v.* Lea, 6 Heisk. (Tenn.) 247; Gibson *v.* Carroll, 1 Heisk. (Tenn.) 23; Jones *v.* Cloud, 4 Coldw. (Tenn.) 236.
For abatement of principal suit destroying ancillary proceeding, see also ATTACHMENT; EQUITY; GARNISHMENT.
Ancillary bill.— Where a bill in equity is merely ancillary to a suit at law, if the latter abates the former does also. Robertson *v.* Bingley, 1 McCord Eq. (S. C.) 333.
An interplea between a plaintiff and a garnishee is abated by the death of the defendant in the attachment. Wintz *v.* Webb, 14 N. C. 27.
Effect of abatement of attachment on main action.— Where a plea in abatement of an attachment in aid of a suit is sustained, the main suit may go on. Brackett *v.* Brackett,

C. In Equity. In equity an abatement means merely a state of suspended animation from which the suit may be revived.[7]

II. Another Action Pending.[8]

A. General Rule — 1. Statement of Rule. It is a general principle of the law that the pendency of a prior suit for the same thing, or as is commonly said, for the same cause of action, between the same parties in a court of competent jurisdiction, will abate a later suit.[9]

2. Reason of Rule. The principle on which pleas of another action pending are sustained is that the law, which abhors a multiplicity of suits, will not permit a debtor to be harassed and oppressed by two actions to recover the same demand where the creditor can obtain a complete remedy by one of them.[10]

61 Mo. 221; Jones *v.* Snodgrass, 54 Mo. 597; Peery *v.* Harper, 42 Mo. 131. But see Gayoso Sav. Inst. *v.* Burrow, 37 Tex. 88, which was a case of an attachment sued out by non-residents and levied on land of a non-resident corporation. The attachment was quashed on account of defects in the bond. It was held that the suit abated.

7. Floyd *v.* Ritter, 65 Ala. 501; *Ex p.* Kirtland, 49 Ala. 403; Zoellner *v.* Zoellner, 46 Mich. 511, 9 N. W. 831; Evans *v.* Cleveland, 72 N. Y. 486; Taylor *v.* Taylor, 43 N. Y. 578; De Agreda *v.* Mantel, 1 Abb. Pr. (N. Y.) 130; Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 9 L. ed. 1041; Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405; Hoxie *v.* Carr, 1 Sumn. (U. S.) 173, 12 Fed. Cas. No. 6,802.

8. As to another suit pending as a ground of continuance, see Continuances.

As to injunction against other action, see Injunctions.

As to stay of proceedings because of another suit pending, see Actions.

9. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Troy Fertilizer Co. *v.* Prestwood, 116 Ala. 119, 22 So. 262; Foster *v.* Napier, 73 Ala. 595.

Arkansas.— Moss *v.* Ashbrooks, 12 Ark. 369.

California.— Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

Connecticut.— Damon *v.* Denny, 54 Conn. 253, 7 Atl. 409; Quinebaug Bank *v.* Tarbox, 20 Conn. 510; Beach *v.* Norton, 8 Conn. 71.

District of Columbia.— National Express, etc., Co. *v.* Burdette, 7 App. Cas. (D. C.) 551.

Georgia.— Heath *v.* Bates, 70 Ga. 633.

Illinois.— Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385, 17 N. E. 483; Branigan *v.* Rose, 8 Ill. 123.

Indiana.— Shepard *v.* Meridian Nat. Bank, 149 Ind. 20, 48 N. E. 352; Loyd *v.* Reynolds, 29 Ind. 299.

Iowa.— Rawson *v.* Guiberson, 6 Iowa 507.

Kansas.— Challiss *v.* Smith, 25 Kan. 563.

Kentucky.— Graves *v.* Dale, 1 T. B. Mon. (Ky.) 190.

Louisiana.— Rochereau *v.* Lewis, 26 La. Ann. 581; Bischoff *v.* Theurer, 8 La. Ann. 15; Kline *v.* Freret, 5 La. Ann. 494; Dick *v.* Gilmer, 4 La. Ann. 520.

Maine.— Fahy *v.* Brannagan, 56 Me. 42.

Massachusetts.—Com. *v.* Churchill, 5 Mass. 174.

Michigan.— Wales *v.* Jones, 1 Mich. 254.

Minnesota.— Merriam *v.* Baker, 9 Minn. 40.

Missouri.— Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776.

Nebraska.— State *v.* Matley, 17 Nebr. 564, 24 N. W. 200.

New Hampshire.—Rogers *v.* Odell, 39 N. H. 417.

New Jersey.— Hixon *v.* Schooley, 26 N. J. L. 461; Schenck *v.* Schenck, 10 N. J. L. 327.

New York.— Porter *v.* Kingsbury, 77 N. Y. 164; Baker *v.* Baker, 70 Hun (N. Y.) 95, 23 N. Y. Suppl. 1083; Lewis *v.* Maloney, 12 Hun (N. Y.) 207; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; Ratzer *v.* Ratzer, 2 Abb. N. Cas. (N. Y.) 461; Danvers *v.* Dorrity, 14 Abb. Pr. (N. Y.) 206; Ward *v.* Gore, 37 How. Pr. (N. Y.) 119.

North Carolina.— Alexander *v.* Norwood, 118 N. C. 381, 24 S. E. 119; McNeill *v.* Currie, 117 N. C. 341, 23 S. E. 216; Smith *v.* Moore, 79 N. C. 82; Gray *v.* Atlantic, etc., R. Co., 77 N. C. 299; Claywell *v.* Sudderth, 77 N. C. 287; Woody *v.* Jordan, 69 N. C. 189; Harris *v.* Johnson, 65 N. C. 478.

Ohio.— Weil *v.* Guerin, 42 Ohio St. 299.

Oregon.— Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326.

Pennsylvania.— Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380.

Rhode Island.— O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364.

South Carolina.— Walters *v.* Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1.

Vermont.— Kirby *v.* Jackson, 42 Vt. 552.

Washington.— Tacoma *v.* Commercial Electric Light, etc., Co., 15 Wash. 515, 46 Pac. 1043.

Wisconsin.— Blair *v.* Cary, 9 Wis. 543.

United States.— Renner *v.* Marshall, 1 Wheat. (U. S.) 215, 4 L. ed. 74; Harvey *v.* Lord, 10 Fed. 236; Wadleigh *v.* Veazie, 3 Sumn. (U. S.) 165, 28 Fed. Cas. No. 17,031.

England.— Sparry's Case, 5 Coke 61*a*.

Canada.— Bain *v.* Bain, 10 U. C. Q. B. 572; Commercial Bank *v.* Jarvis, 6 U. C. Q. B. O. S. 257.

See 1 Cent. Dig. tit. "Abatement and Revival," § 25 *et seq.*

10. The principle is based upon the supposition that the first is effective and available and affords an ample remedy to the cred-

3. Limitations of Rule. The rule, however, is not one of unbending rigor or of universal application, nor is it a principle of absolute law. It is rather a rule of justice and equity, generally applicable, and always so where the two suits are virtually alike and in the same jurisdiction.[11]

B. Vexatiousness of Second Action — 1. As Conclusion of Law. Upon a plea of a former action pending it has been held in some courts that vexatiousness is a conclusion of law drawn from the fact of two suits brought by one person against another for one cause and pending at one time.[12]

2. As Question of Fact. Other courts, instead of regarding the second suit as necessarily vexatious, have gone into inquiry as to whether it was in fact vexatious, on the principle that, as the reason for the adoption of the rule that the pendency of one action will abate a second is to prevent vexation, the rule should cease where the reason for it does not exist.[13]

itor, and that hence the second suit is unnecessary and consequently vexatious.

Alabama.— Coaldale Brick, etc., Co. *v.* Southern Constr. Co., 110 Ala. 605, 19 So. 45; Foster *v.* Napier, 73 Ala. 595.

California.— Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

Connecticut.— Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433; Quinebaug Bank *v.* Tarbox, 20 Conn. 510; Durand *v.* Carrington, 1 Root (Conn.) 355.

District of Columbia.— National Express, etc., Co. *v.* Burdette, 7 App. Cas. (D. C.) 551.

Illinois.— Branigan *v.* Rose, 8 Ill. 123.

Michigan.— Wales *v.* Jones, 1 Mich. 254.

Minnesota.— Merriam *v.* Baker, 9 Minn. 40.

Missouri.— Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776; Jacobs *v.* Lewis, 47 Mo. 344; State *v.* Dougherty, 45 Mo. 294.

New Hampshire.— Gamsby *v.* Ray, 52 N. H. 513.

New York.— Porter *v.* Kingsbury, 77 N. Y. 164; Crossman *v.* Universal Rubber Co., 60 N. Y. Super. Ct. 68, 16 N. Y. Suppl. 609; Smith *v.* Compton, 20 Barb. (N. Y.) 262; Compton *v.* Green, 9 How. Pr. (N. Y.) 228.

North Carolina.— Smith *v.* Moore, 79 N. C. 82.

Vermont.— Downer *v.* Garland, 21 Vt. 362.

United States.— Peterson *v.* U. S., 26 Ct. Cl. 93; Earl *v.* Raymond, 4 McLean (U. S.) 233, 8 Fed. Cas. No. 4,243.

11. Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433.

First suit instituted without authority.— The rule will not apply where it appears that the first suit was commenced without plaintiff's authority. Wolf *v.* Great Northern R. Co., 72 Minn. 435, 75 N. W. 702.

12. 1 Bacon Abr. 13; Jones *v.* McPhillips, 82 Ala. 102, 2 So. 468; Napier *v.* Foster, 80 Ala. 379; Foster *v.* Napier, 73 Ala. 595; Gamsby *v.* Ray, 52 N. H. 513, holding that it is not a matter of fact depending upon the question whether the first action was defective, or whether plaintiff was justified in seeking better security in the second, or whether, upon some other special ground, it is equitable that the second should be commenced while the first is pending.

Void affidavit or process.— If the affidavit or process by which a suit was commenced is void, a plea of the pendency of such suit in abatement of a subsequent suit falls. Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738; Minniece *v.* Jeter, 65 Ala. 222.

13. Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327; Quinebaug Bank *v.* Tarbox, 20 Conn. 510.

It is upon the application of this principle that such courts hold that a second suit is not vexatious, and consequently not abatable, when it appears that the prior suit is ineffectual or so defective that the second is necessary to secure the demand.

California.— Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

Connecticut.— Quinebaug Bank *v.* Tarbox, 20 Conn. 510; Ward *v.* Curtiss, 18 Conn. 290; Durand *v.* Carrington, 1 Root (Conn.) 355.

District of Columbia.— National Express, etc., Co. *v.* Burdette, 7 App. Cas. (D. C.) 551.

Georgia.— Gilmore *v.* Georgia R., etc., Co., 93 Ga. 482, 21 S. E. 50; Heath *v.* Bates, 70 Ga. 633; Rogers *v.* Hoskins, 15 Ga. 270.

Illinois.— Phillips *v.* Quick, 68 Ill. 324.

Michigan.— Wheeler *v.* Hatheway, 58 Mich. 77, 24 N. W. 780; Wales *v.* Jones, 1 Mich. 254.

Missouri.—State *v.* Dougherty, 45 Mo. 294.

New York.— Compton *v.* Green, 9 How. Pr. (N. Y.) 228.

Texas.— Langham *v.* Thomason, 5 Tex. 127.

Vermont.— Downer *v.* Garland, 21 Vt. 362; Hill *v.* Dunlap, 15 Vt. 645.

United States.— Peterson *v.* U. S., 26 Ct. Cl. 93.

See 1 Cent. Dig. tit. "Abatement and Revival," § 31 *et seq.*

Complaint stating no cause of action will not support a plea of a former action pending. Reynolds *v.* Harris, 9 Cal. 338; Drea *v.* Cariveau, 28 Minn. 280, 9 N. W. 802.

Failure to allege condition precedent.— The pendency of a bill in which full relief cannot be had by reason of the failure to allege a necessary condition precedent to suing will not abate a subsequent suit at law. Griffin *v.* Board of Mississippi Levee Com'rs, 71 Miss. 767, 15 So. 107.

Failure to make demand in first action.— The suit first commenced not being maintainable because of failure to make the proper statutory demand, its pendency will not defeat plaintiff's right to maintain an action

C. Pendency of Prior Action — 1. Necessity of Pendency. The first suit must be pending to be available in abatement of a second suit between the same parties for the same cause.[14]

2. When Action Deemed Pending — a. Suing Out of Writ. But there is much diversity of opinion as to what constitutes the pendency of an action to be thus available. Thus it has been held that, at law, the suing out of the writ constitutes the pendency of a suit without any further step.[15]

b. Service of Writ. In other states it is held that an action is not pending, to be available in abatement, until after service of the writ[16] or of process therein.[17]

by giving the required notice and commencing again. O'Malia *v.* Glynn, 42 Ill. App. 51.

First action premature.—A prior suit pending in which there can be no recovery because it was prematurely brought is no bar to a recovery in a new suit for the same cause of action. Blackwood *v.* Brown, 34 Mich. 4.

Illegal service of process.— An illegal service of process is not the commencement of an action the pendency of which may be objected to a second suit. Byne *v.* Byne, 1 Rich. (S. C.) 438.

Informality in bond.— The dismissal of an action in replevin for informality in the replevin bond is no bar to a second action of replevin for the same property between the same parties. Morton *v.* Sweetser, 12 Allen (Mass.) 134.

New action to avoid statute of limitations. — A plea of the pendency of another action is properly overruled where, to avoid the bar of the statute of limitations, plaintiff institutes a second action before dismissing his first. Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546, 14 S. E. 367.

14. *California.*— Primm *v.* Gray, 10 Cal. 522.

Colorado.— Craig *v.* Smith, 10 Colo. 220, 15 Pac. 337; Yentzer *v.* Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563.

Illinois.— Bancroft *v.* Eastman, 7 Ill. 259.

Indiana.— Lee *v.* Hefley, 21 Ind. 98.

Massachusetts.— Com. *v.* Churchill, 5 Mass. 174; Clifford *v.* Cony, 1 Mass. 495.

Michigan.— Pew *v.* Yoare, 12 Mich. 16; Wales *v.* Jones, 1 Mich. 254.

Minnesota.— Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

New York.— Porter *v.* Kingsbury, 77 N. Y. 164; O'Beirne *v.* Lloyd, 1 Sweeny (N. Y.) 19; Hadden *v.* St. Louis, etc., R. Co., 57 How. Pr. (N. Y.) 390.

Vermont.— Kirby *v.* Jackson, 42 Vt. 552; Downer *v.* Garland, 21 Vt. 362; Hill *v.* Dunlap, 15 Vt. 645.

Canada.— March *v.* Burns, 1 U. C. C. P. 334.

See 1 Cent. Dig. tit. "Abatement and Revival," § 35 *et seq.*

Destruction by fire of the papers in the first suit furnishes no ground for the institution of the second suit. The lost records should have been supplied as provided for by statute. Tolle *v.* Alley, (Ky. 1893) 24 S. W. 113.

Priority and not mere pendency of another suit founded on the same cause of action is available under a plea in abatement. Humphries *v.* Dawson, 38 Ala. 199.

See also *infra*, II, W.

Warrant in bastardy proceeding.— A complaint under the statute concerning the maintenance of bastard children, made before a police court five years previous, on which no proceedings have been had subsequent to the issuing of a warrant, and which has not been tried or brought forward on the docket, cannot be deemed to be a pending suit in any such sense as to operate in abatement of a new complaint. Meredith *v.* Wall, 14 Allen (Mass.) 155.

15. Fowler *v.* Byrd, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4,999*a*, wherein it is held that neither service of process nor any other proceeding is required to form a ground of a plea of another action pending for the same cause.

Suit before appearance in garnishment.— A foreign attachment between the same parties for the same cause of action in another state does not become an action pending between them until appearance thereto by defendant. And where the appearance is after the service of the writ in the action in the state, the pendency of the foreign suit cannot be pleaded in bar or abatement of the action in the state. Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488.

Filing of bill.— An action by bill on a statute to recover a penalty is so far considered as pending from the day the bill is filed, and before any process issues, that it may be pleaded in abatement of a subsequent suit for the same cause. Hawkins P. C. bk. 2, cap. 26, § 63.

16. Kirby *v.* Jackson, 42 Vt. 552; Downer *v.* Garland, 21 Vt. 362.

Merely suing out of a writ, the same not being served, will not abate a writ subsequently sued out and served. Morton *v.* Webb, 7 Vt. 123.

Pendency of second suit.— In order to constitute the commencement and pendency of an action in the sense that the pendency of a prior suit would abate the latter, the service of the writ in the second suit must have been such as would call defendant to answer to such second suit. Kirby *v.* Jackson, 42 Vt. 552.

17. Primm *v.* Gray, 10 Cal. 522; Weaver *v.* Conger, 10 Cal. 233; D. G. Burton Co. *v.* Cowan, 80 Hun (N. Y.) 392, 30 N. Y. Suppl.

c. Return of Writ. Again it has been held that the writ in the suit pleaded in abatement must be returned and entered before it can be pleaded.[18]

d. Service of Complaint. It has also been held that a plea in abatement of the pendency of a prior action fails where it appears that, though a summons has been issued and served in such prior action, no complaint has been served or filed in it.[19]

D. Dismissal or Discontinuance of Prior Action — 1. Effect of Dismissal. By the great weight of modern authority the dismissal or discontinuance in apt time of a prior action defeats a plea in abatement of the pendency of such action.[20]

2. Dismissal for Want of Jurisdiction. The plea will not be sustained where the prior action was dismissed for want of jurisdiction before the second action was commenced.[21]

3. Time of Dismissal — a. Before Plea in Abatement. There is a general concurrence of opinion that the dismissal or discontinuance of the first suit before the plea of the pendency of such suit is filed in the second suit defeats the plea.[22]

317; Warner *v.* Warner, 6 Misc. (N. Y.) 249, 27 N. Y. Suppl. 160, 57 N. Y. St. 763.

Failure to serve process.— Where a process is not served on the day fixed for its return, the action is discontinued. Consequently such action cannot be pleaded in abatement of an action commenced on the return-day of the first process. Webster *v.* Laws, 86 N. C. 178.

Illegal service of process is not the commencement of an action the pendency of which may be objected to a second suit. Byne *v.* Byne, 1 Rich. (S. C.) 438.

18. Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120; Com. *v.* Churchill, 5 Mass. 174; Bullock *v.* Bolles, 9 R. I. 501.

Levy and return of attachment.— An attachment sued out and returnable into a court of record having jurisdiction of the case, when levied and returned, is the commencement of a suit and may be pleaded in abatement to a suit subsequently instituted for the same cause. Reynolds *v.* McClure, 13 Ala. 159; Dean *v.* Massey, 7 Ala. 601.

19. Phelps *v.* Gee, 29 Hun (N. Y.) 202; Hoag *v.* Weston, 10 N. Y. Civ. Proc. 92.

20. *Arkansas.*— Grider *v.* Apperson, 32 Ark. 332.

California.— Moore *v.* Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

Iowa.— Rawson *v.* Guiberson, 6 Iowa 507.

Louisiana.— Schmidt *v.* Braunn, 10 La. Ann. 26.

Maryland.— Leavitt *v.* Mowe, 54 Md. 613.

Michigan.— Wales *v.* Jones, 1 Mich. 254.

Minnesota.— Nichols *v.* State Bank, 45 Minn. 102, 47 N. W. 462.

Missouri.— Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776; Rhoades *v.* McNulty, 52 Mo. App. 301.

New York.— Crossman *v.* Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91, 131 N. Y. 636, 30 N. E. 225; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285; Averill *v.* Patterson, 10 N. Y. 500; Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137; Hallett *v.* Hallett, 24 N. Y. Civ. Proc. 102, 30 N. Y. Suppl. 946; American Bible Soc. *v.* Hague, 4 Edw. (N. Y.) 117; Marston *v.* Lawrence, 1 Johns. Cas. (N. Y.) 397; Beals *v.* Cameron, 3 How. Pr. (N. Y.) 414.

Pennsylvania.— Findlay *v.* Keim, 62 Pa. St. 112.

Rhode Island.— Banigan *v.* Woonsocket Rubber Co., (R. I. 1900) 46 Atl. 183.

Vermont.— Kirby *v.* Jackson, 42 Vt. 552.

Virginia.— Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

Wisconsin.— Boland *v.* Benson, 50 Wis. 225, 6 N. W. 819.

See 1 Cent. Dig. tit. "Abatement and Revival," § 111 *et seq.*

But see Com. *v.* Churchill, 5 Mass. 174; Gamsby *v.* Ray, 52 N. H. 513; Parker *v.* Colcord, 2 N. H. 36; Le Clerc *v.* Wood, 2 Pinn. (Wis.) 37, wherein it was held that if a subsequent action be commenced while a prior one between the same parties and for the same cause of action is pending, the pendency of the prior one may be pleaded in abatement though discontinued before plea pleaded.

Dismissal at instance of defendant.— The defendant to a suit which has been dismissed at his own instance cannot, by moving to set aside the judgment, keep the suit pending so as to be an impediment in the way of a new suit in the same cause of action. Bailey *v.* Bremond, 7 Tex. 537.

Dismissal by stipulation.— An action will not be dismissed on the ground that at the time it was commenced there was another action pending between the same parties for the same cause of action, if prior to the trial of the second action the former had been dismissed by stipulation of the parties. Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

21. Smith *v.* Walke, 43 S. C. 381, 21 S. E. 249.

22. *Alabama.*— Coaldale Brick, etc., Co. *v.* Southern Constr. Co., 110 Ala. 605, 19 So. 45.

Georgia.— Singer *v.* Scott, 44 Ga. 659.

Iowa.— Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485; Toledo Sav. Bank *v.* Johnston, 94 Iowa 212, 62 N. W. 748.

Kentucky.— Adams *v.* Gardiner, 13 B. Mon. (Ky.) 197.

Maryland.— Leavitt *v.* Mowe, 54 Md. 613.

Michigan.— Wales *v.* Jones, 1 Mich. 254.

Oregon.— Hopwood *v.* Patterson, 2 Oreg. 49.

Virginia.— Archer *v.* Ward, 9 Gratt. (Va.) 622.

b. After Plea in Abatement — (I) *Common-Law Rule.* The authorities are not in accord, however, as to the effect of a dismissal or discontinuance made after the interposition of the plea of another action pending.[23] The rule at common law was to sustain the plea if it was true at the time it was filed. Accordingly, at common law, plaintiff could not, after a plea in abatement of the pendency of a prior suit, avoid the effect of the plea by discontinuing the prior action,[24] and this rule has been followed in some of the states.[25]

(II) *Present Rule.* The tendency of the later cases and a preponderance of authority sustain the doctrine that it is a good answer to a plea of the pendency of a prior action for the same cause that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea.[26] Under this doctrine the plea will be overruled unless the prior suit is pending at the time of the trial of the second.[27]

4. Order of Dismissal — a. Entry of Order. It has been held that a judgment or order of dismissal must be entered to make the dismissal of an action available in defeat of a plea of the pendency of such action.[28]

23. See *infra*, cases cited, notes 25–27.

24. Chitty Pl., (16th Am. ed.) 470.

25. Frogg *v.* Long, 3 Dana (Ky.) 157, 28 Am. Dec. 69.

26. *Arkansas.*— Grider *v.* Apperson, 32 Ark. 332.

Georgia.— Rogers *v.* Hoskins, 15 Ga. 270.

Kentucky.— Wilson *v.* Milliken, (Ky. 1898) 44 S. W. 660.

Missouri.— Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776.

New York.— Porter *v.* Kingsbury, 77 N. Y. 164; Averill *v.* Patterson, 10 N. Y. 500; Lord *v.* Ostrander, 43 Barb. (N. Y.) 337; Trow Printing, etc., Co. *v.* New York Book-Binding Co., 16 N. Y. Civ. Proc. 120, 3 N. Y. Suppl. 59; Beals *v.* Cameron, 3 How. Pr. (N. Y.) 414; Marston *v.* Lawrence, 1 Johns. Cas. (N. Y.) 397.

Oregon.— Farris *v.* Hayes, 9 Oreg. 81.

Pennsylvania.— Findlay *v.* Keim, 62 Pa. St. 112; Toland *v.* Tichenor, 3 Rawle (Pa.) 320.

Rhode Island.— Banigan *v.* Woonsocket Rubber Co., (R. I. 1900) 46 Atl. 183.

Texas.— Langham *v.* Thomason, 5 Tex. 127.

United States.— Chamberlain *v.* Eckert, 2 Biss. (U. S.) 124, 5 Fed. Cas. No. 2,576.

27. *California.*— Balfour-Guthrie Invest. Co. *v.* Woodworth, 124 Cal. 169, 56 Pac. 891; Moore *v.* Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

District of Columbia.— National Express, etc., Co. *v.* Burdette, 7 App. Cas. (D. C.) 551.

Iowa.— Moorman *v.* Gibbs, 75 Iowa 537, 39 N. W. 832; Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354; Rush *v.* Frost, 49 Iowa 183.

Louisiana.— Schmidt *v.* Braunn, 10 La. Ann. 26.

Minnesota.— Nichols *v.* State Bank, 45 Minn. 102, 47 N. W. 462; Page *v.* Mitchell, 37 Minn. 368, 34 N. W. 896.

New York.— Clark *v.* Clark, 7 Rob. (N. Y.) 276.

Texas.— Trawick *v.* Martin Brown Co., 74 Tex. 522, 12 S. W. 216; Payne *v.* Benham, 16 Tex. 364; International, etc., R. Co. *v.* Barton, (Tex. Civ. App. 1900) 57 S. W. 292; Texas, etc., R. Co. *v.* Kenna, (Tex. Civ. App. 1899) 52 S. W. 555.

Virginia.— Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

Wisconsin.— Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227; Bates *v.* Chesebro, 32 Wis. 594.

Noticing cause for trial.— Where defendant sets up in his answer a former suit pending for the same cause, plaintiff, to make his discontinuance of the first suit effectual and an answer to defendant's plea, must at least discontinue by the time that the issue is regarded as perfected and the cause noticed for trial in the second suit. Swart *v.* Borst, 17 How. Pr. (N. Y.) 69.

An order permitting the withdrawal of a counterclaim in the former action, obtained since issue was perfected in the second suit and after the same had been noticed by plaintiff upon the issues tendered by the plea, is not sufficient to defeat the plea of former action pending. Demond *v.* Crary, 1 Fed. 480.

28. Evans *v.* Johnston, 115 Cal. 180, 46 Pac. 906, wherein it was held that it was not sufficient that a dismissal was ordered by the court and was entered on the minutes; Trow Printing, etc., Co. *v.* New York Book-Binding Co., 16 N. Y. Civ. Proc. 120, 3 N. Y. Suppl. 59. But see Boland *v.* Benson, 50 Wis. 225, 6 N. W. 819, wherein defendant pleaded in abatement the pendency of another action in the county court for the same cause. On the trial of this issue by the circuit court it appeared that before the commencement of the second suit the county court, by an order in open court, not formally entered of record at the time it was made, had directed that action to be dismissed, and that afterward, on the hearing of a rule to show cause, it had directed such order to be entered *nunc pro tunc*. It was held that the circuit court did not err in treating such action as having been dismissed before the second action was brought.

b. Service of Order. It has also been held that the order of dismissal must be served in order to make the dismissal effectual.[29]

5. Payment of Costs. In some states the dismissal of an action after the appearance of defendant therein must be on payment of costs to defeat the plea of another action pending.[30]

E. Appeal or Writ of Error in Prior Action — 1. In General. The pendency of a prior action upon appeal or writ of error defeats a second action between the same parties for the same cause.[31]

2. Operation as Supersedeas. The appeal or writ of error must, however, operate as a supersedeas to be available in abatement of a second action.[32]

Entry of rule.—A pending action cannot be discontinued by notice to defendant. A rule for a discontinuance must be entered with the clerk. Averill *v.* Patterson, 10 N. Y. 500.

Ex parte order.— Where defendant interposes the plea of the pendency of a former action, plaintiff, if there has been no appearance by defendant in the former action, may effectually answer such plea by the subsequent entry of an *ex parte* order of discontinuance. Trow Printing, etc., Co. *v.* New York Book-Binding Co., 16 N. Y. Civ. Proc. 120, 3 N. Y. Suppl. 59.

Failure to enter mandate of appellate court.— A failure to enter final judgment in the trial court on the affirmance, on appeal, of an order of nonsuit, will not support a plea of another action pending, as the nonsuit was an abandonment of the cause. Karnes *v.* American F. Ins. Co., 53 Mo. App. 438.

29. Trow Printing, etc., Co. *v.* New York Book-Binding Co., 16 N. Y. Civ. Proc. 120, 3 N. Y. Suppl. 59, wherein it was held that an action could not be discontinued by mere notice.

Written notice of discontinuance.— In Vermont notice of discontinuance need not be in writing to avoid the effect of a plea in abatement of another action pending. Ballou *v.* Ballou, 26 Vt. 673; Hill *v.* Dunlap, 15 Vt. 645.

30. Trow Printing, etc., Co. *v.* New York Book-Binding Co., 16 N. Y. Civ. Proc. 120, 3 N. Y. Suppl. 59; Bedell *v.* Powell, 13 Barb. (N. Y.) 183; Smith *v.* White, 7 Hill (N. Y.) 520; International, etc., R. Co. *v.* Barton, (Tex. Civ. App. 1900) 57 S. W. 292.

Discontinuance before appearance.— A suit having been commenced, plaintiff, before receiving notice of retainer, entered a rule for discontinuance without paying or tendering any costs and commenced a second suit against defendants for the same cause, to which they pleaded the pendency of the first suit in abatement. It was held that defendants, not having appeared in the first suit until after the second was commenced, were not entitled to costs, and that the rule formed an answer to the plea. Smith *v.* White, 7 Hill (N. Y.) 520.

Dismissal upon condition of payment of costs.— If complainant files a new bill for the same cause of action without paying the costs in pursuance of a conditional order to dismiss upon payment of costs, defendant may plead the pendency of the first suit as a bar to the commencement of the second before the order to discontinue had become absolute by the payment of costs. Simpson *v.* Brewster, 9 Paige (N. Y.) 245.

31. *California.*— Fisk *v.* Atkinson, 71 Cal. 452, 10 Pac. 374, 12 Pac. 498.

Illinois.— McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Hailman *v.* Buckmaster, 8 Ill. 498; Meilinger *v.* People, 83 Ill. App. 436.

Indiana.— Merritt *v.* Richey, 100 Ind. 416; Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265.

Minnesota.— Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

New York.— Wemple *v.* Johnson, 13 Wend. (N. Y.) 515; Allen *v.* Malcolm, 12 Abb. Pr. N. S. (N. Y.) 335.

See 1 Cent. Dig. tit. "Abatement and Revival," § 118 *et seq.*

Action to annul proceedings.—A party who has appealed from a judgment homologating the proceedings of a family meeting cannot at the same time carry on an action to annul these proceedings. Stone *v.* Tucker, 12 La. Ann. 726.

Appeal from justice.— A plea that plaintiff impleaded defendant for the same cause of action in a justice's court, and there obtained a judgment against him which he appealed to the county court, where the appeal was pending at the return-term of the writ, is a good plea in abatement. Boswell *v.* Tunnell, 10 Ala. 958.

Replevin for attached property.—The pendency, upon appeal, of an intervenor's claim for attached property, constitutes a bar to a proceeding in replevin for the property by the same parties. Jennings *v.* Warnock, 37 Iowa 278.

Reversal on appeal.— Where a judgment is reversed on appeal and the case remanded, and no final disposition has been made of it, the action in which such judgment was recovered is pending, and a complaint in a suit brought upon the same cause of action upon which the judgment was founded, and between the same parties in interest, is demurrable. Capehart *v.* Van Campen, 10 Minn. 158.

32. McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Hailman *v.* Buckmaster, 8 Ill. 498; Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616; Wemple *v.* Johnson, 13 Wend. (N. Y.) 515.

3. PRIORITY OF APPEAL. The appeal or writ of error must, too, have been taken or sued out prior to the institution of the second suit.[33]

4. APPEAL SUBSEQUENT TO SECOND SUIT. It has been held that if a writ of error is sued out subsequent to a second suit between the same parties for the same cause the proper practice is to apply for an order to stay proceedings in the second suit until the writ of error is disposed of.[34]

5. FROM JUDGMENT OF DISMISSAL. An appeal from a judgment of dismissal will not restore the action so as to allow the interposition of its pendency as a bar to a suit subsequently commenced.[35]

6. SUIT ON JUDGMENT. A writ of error pending may be pleaded in abatement of an action on the judgment, where it appears that it was brought prior to the commencement of the suit on the judgment and that the requisite steps had been taken to render it a supersedeas to an execution.[36]

F. Identity of Subject-Matter and of Relief Sought — 1. IN GENERAL. To sustain the plea of a former suit pending it must appear that the subject-matter and the relief sought in the second suit are the same as in the first suit.[37]

33. McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Hailman *v.* Buckmaster, 8 Ill. 498; Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616; Wemple *v.* Johnson, 13 Wend. (N. Y.) 515.

Action on undertaking on appeal.— In an action on an undertaking given on appeal it appeared that a former action had been brought, the complaint in which omitted to allege that notice of judgment had been served; that the complaint was demurred to and demurrer sustained because of this omission; that before the commencement of the second action the former suit had proceeded to final judgment on the demurrer, which judgment remained unsatisfied; that notice of judgment was served after the commencement of the first and prior to the second action; and that an appeal was brought in the first action after the commencement of the second. It was held that such facts do not support a plea of another action pending. Porter *v.* Kingsbury, 77 N. Y. 164.

Perfection of appeal.— An answer that prior to the commencement of the action proper steps had been taken toward perfecting an appeal in another action is not sufficient to abate the action. Fitzgerald *v.* Gray, 61 Ind. 109.

34. Hailman *v.* Buckmaster, 8 Ill. 498.

35. Lord *v.* Ostrander, 43 Barb. (N. Y.) 337; Haviland *v.* Wehle, 11 Abb. Pr. N. S. (N. Y.) 447, wherein it was held that where attachments in one court have been vacated for irregularity, and the suits dismissed and the costs paid, the pendency of an appeal from the judgments vacating the attachments and dismissing the suits does not preclude the issuing of attachments for the same cause in subsequent suits by the same plaintiff against the same defendant in another court. See also Trimmier *v.* Trail, 2 Bailey (S. C.) 480, wherein it was held that where an appeal from an order of nonsuit has been dismissed, the order of nonsuit and not the dismissal of the appeal is to be regarded as the legal termination of the suit; and the pendency of the appeal cannot be pleaded in abatement of a new action for the same cause brought in the interval between the order of nonsuit and the dismissal of the appeal.

But see Peck *v.* Hotchkiss, 52 How. Pr. (N. Y.) 226, wherein it was held that it is a good answer to an action for seizing property under an attachment that the suit in which the attachment was issued is still pending; and this though plaintiff's complaint in the attachment suit was dismissed, if an appeal from the judgment of dismissal has been duly taken and the appeal be pending undetermined.

Action on appeal bond.—The pendency of a bill in equity to reinstate an appeal from a justice, dismissed in the circuit court, will not abate a suit upon the appeal bond. Evans *v.* Lingle, 55 Ill. 455.

36. Wemple *v.* Johnson, 13 Wend. (N. Y.) 515; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312; Prynn *v.* Edwards, 1 Ld. Raym. 47.

37. Numerous authorities sustain the text, among which may be cited the following cases:

Arkansas.— Bourland *v.* Nixon, 27 Ark. 315.

California.— Ayres *v.* Bensley, 32 Cal. 620; Henry *v.* Everts, 30 Cal. 425; Vance *v.* Olinger, 27 Cal. 358.

Connecticut.— La Croix *v.* Fairfield County, 50 Conn. 321, 47 Am. Rep. 648.

Indiana.— Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107; Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583.

Kansas.— Snow *v.* Hudson, 56 Kan. 378, 43 Pac. 260; Mullen *v.* Mullock, 22 Kan. 598.

Kentucky.—Mattingly *v.* Elder, (Ky. 1898) 44 S. W. 215; Goff *v.* Welborn, (Ky. 1894) 24 S. W. 871.

Louisiana.— Carre *v.* New Orleans, 41 La. Ann. 996, 6 So. 893; Pacific Express Co. *v.* Haven, 41 La. Ann. 811, 6 So. 650; State *v.* Kreider, 21 La. Ann. 482; Morgan *v.* Tamiet, 21 La. Ann. 266; Hacket *v.* Lenares, 16 La. Ann. 204; Ingram *v.* Richardson, 2 La. Ann. 839; City Bank *v.* Walden, 1 La. Ann. 46.

Massachusetts.— Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Hooton *v.* Gamage, 11 Allen (Mass.) 354.

Michigan.— Granger *v.* Wayne Circuit Judge, 27 Mich. 406, 15 Am. Rep. 195.

2. Test of Identity. A plea of the pendency of a prior action is not available unless the prior action is of such a character that, had a judgment been rendered therein on the merits, such judgment would be conclusive between the parties and could be pleaded in bar of the second action.[38]

3. Actions Seeking Different Relief. A plea in abatement of another action pending will fail where there is a substantial difference in the relief sought.[39]

Minnesota.— Wilson *v.* St. Paul, etc., R. Co., 44 Minn. 445, 46 N. W. 909; Mathews *v.* Hennepin County Sav. Bank, 44 Minn. 442, 46 N. W. 913; Mayerus *v.* Hoscheid, 11 Minn. 243.

Missouri.— State *v.* Dougherty, 45 Mo. 294.

Nebraska.— McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333.

New Hampshire.— Bennett *v.* Chase, 21 N. H. 570.

New Jersey.— Steers *v.* Shaw, 53 N. J. L. 358, 21 Atl. 940; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

New York.— Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Pullman *v.* Alley, 53 N. Y. 637; Witty *v.* Campbell, 44 N. Y. 410; Walker *v.* Pease, 17 Misc. (N. Y.) 415, 41 N. Y. Suppl. 219; Morris *v.* Rexford, 18 N. Y. 552; Haire *v.* Baker, 5 N. Y. 357; Parker *v.* Selye, 3 N. Y. App. Div. 149, 38 N. Y. Suppl. 164; Lawatsch *v.* Cooney, 86 Hun (N. Y.) 546, 33 N. Y. Suppl. 775; Raven *v.* Smith, 71 Hun (N. Y.) 197, 24 N. Y. Suppl. 601; Dawley *v.* Brown, 65 Barb. (N. Y.) 107; Commercial Bank *v.* Heilbronner, 52 N. Y. Super. Ct. 388; Fink *v.* Allen, 36 N. Y. Super. Ct. 350; Paige *v.* Wilson, 8 Bosw. (N. Y.) 294; Kelsey *v.* Ward, 16 Abb. Pr. (N. Y.) 98; Leavitt *v.* De Launay, 4 Sandf. Ch. (N. Y.) 281.

North Carolina.— Propst *v.* Mathis, 115 N. C. 526, 20 S. E. 710; Redfearn *v.* Austin, 88 N. C. 413.

Ohio.— Smith *v.* Findlay, 2 Handy (Ohio) 69.

Pennsylvania.— Hessenbruch *v.* Markle, 194 Pa. St. 581, 45 Atl. 669; Stewart's Appeal, 56 Pa. St. 413; Stecher *v.* Com., 6 Whart. (Pa.) 60.

Rhode Island.— Dodge *v.* Hogan, 19 R. I. 4, 31 Atl. 1059.

South Carolina.— Whaley *v.* Lawton, 57 S. C. 198, 35 S. E. 741; Trimmier *v.* Hardin, 32 S. C. 600, 11 S. E. 103.

Tennessee.— Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600; Hall *v.* Calvert, (Tenn. Ch. 1897) 46 S. W. 1120.

Texas.— Payne *v.* Benham, 16 Tex. 364; Bryan *v.* Alford, 1 Tex. App. Civ. Cas. § 85.

Vermont.— Thomas *v.* Freelon, 17 Vt. 138.

Virginia.— McAllister *v.* Harman, 97 Va. 543, 34 S. E. 474; Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.

Wisconsin.— Koch *v.* Peters, 97 Wis. 492, 73 N. W. 25.

United States.— De Grauw *v.* Attrill, 75 Fed. 764; Marshall *v.* Otto, 59 Fed. 249; Langstraat *v.* Nelson, 40 Fed. 783; Pierce *v.* Feagans, 39 Fed. 587; Hurd *v.* Moiles, 28 Fed. 897; Logan *v.* Greenlaw, 12 Fed. 10; Dwight *v.* Central Vermont R. Co., 9 Fed. 785; Steiger *v.* Heidelberger, 4 Fed. 455; Brooks *v.* Vermont Cent. R. Co., 14 Blatchf. (U. S.) 463, 4 Fed. Cas. No. 1,964; Wheeler *v.* McCormick, 8 Blatchf. (U. S.) 267, 29 Fed. Cas. No. 17,498; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559.

England.— Devie *v.* Brownlow, 2 Dick. 611; Behrens *v.* Sieveking, 2 Myl. & C. 602.

See 1 Cent. Dig. tit. "Abatement and Revival," § 39 *et seq.*

38. *Alabama.*— Foster *v.* Napier, 73 Ala. 595.

California.— Hall *v.* Susskind, 109 Cal. 203, 41 Pac. 1012; Martin *v.* Splivalo, 69 Cal. 611, 11 Pac. 484; Montgomery *v.* Harrington, 58 Cal. 270; Vance *v.* Olinger, 27 Cal. 358.

Massachusetts.— Newell *v.* Newton, 10 Pick. (Mass.) 470.

Minnesota.— Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678.

Nebraska.— Richardson *v.* Opelt, (Nebr. 1900) 82 N. W. 377; State *v.* North Lincoln St. R. Co., 34 Nebr. 634, 52 N. W. 369.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Mt. Pleasant, etc., R. Co., 76 Pa. St. 481.

Tennessee.— Moore *v.* Holt, 3 Tenn. Ch. 141.

United States.— The Haytian Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. ed. 930; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666; Hurd *v.* Moiles, 28 Fed. 897.

Same evidence sustaining both actions.— The criterion by which to decide whether two suits are for the same cause of action is whether the evidence properly admissible in the one will support the other. Steers *v.* Shaw, 53 N. J. L. 358, 21 Atl. 940; Steam-Packet Co. *v.* Bradley, 5 Cranch C. C. (U. S.) 393, 22 Fed. Cas. No. 13,333.

Distinguished from res judicata.— The two pleas of the pendency of a prior action and of a former recovery have not the same but a like office. The difference is that the one is interposed because of the pendency of the first action, the other after its termination; the one is in abatement of the second suit, the other in bar to defeat it absolutely. Foster *v.* Napier, 73 Ala. 595.

39. *California.*— Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Calaveras County *v.* Brockway, 30 Cal. 325.

Illinois.— Heuschkel *v.* Heuschkel, 86 Ill. App. 132.

Kentucky.— Johnson *v.* Robertson, (Ky. 1898) 45 S. W. 523.

Michigan.— Eaton *v.* Eaton, 68 Mich. 158, 36 N. W. 50.

Minnesota.— Coles *v.* Yorks, 31 Minn. 213, 17 N. W. 341.

United States.— Jenkins *v.* Eldredge, 3 Story (U. S.) 181, 13 Fed. Cas. No. 7,266.

4. Inability to Obtain Full Relief in First Action — a. In General. If the whole relief sought in the second suit is not attainable in the first,[40] or if the relief which may be given or the remedies available in the second suit are more extensive than can be attained in the first, a plea to the second suit of the pendency of the first is not good.[41]

b. Rule in Equity. The rule in equity is the same as at law, namely, that the plea of a prior suit pending can be pleaded only when all the relief sought for in the second action is obtainable in the first.[42]

5. Actions Differing in Form. Where the substantial facts upon which the plaintiff's right to relief is based are identical in the two actions, and the relief obtainable in the first includes all the relief sought in the second, the first will abate the second, although the actions differ in matters of form and in the relations of defendant to the infringement of plaintiff's rights.[43]

6. Second Action for Collateral Matter. Where the matter of the second suit is collateral to the matter of the first, though not embracing so much, a plea of former suit pending is good.[44]

7. Actions for Parts of Entire Demand. The pendency of a prior action for part of an entire and indivisible demand may be pleaded in abatement of a subsequent action for the balance of such demand.[45]

Actions for rent.— The pendency of four actions for rent, payable quarterly, is no bar to an action to recover rent upon the same tenancy under a claim that it is payable at the expiration of the year, as the actions are not for the same identical cause. Kelsey *v.* Ward, 16 Abb. Pr. (N. Y.) 98.

Proceedings for discovery and to wind up partnership.— Probate proceedings for discovery do not bar an otherwise proper suit in equity for winding up the concerns of a partnership. Perrin *v.* Lepper, 49 Mich. 347, 13 N. W. 768.

Suits affecting municipal bonds.—The pendency of a suit in equity brought to cancel bonds issued by a town is no bar to the remedy of a taxpayer to review by certiorari the proceedings on which the bonds were issued. People *v.* Morgan, 65 Barb. (N. Y.) 473.

Suits against insolvent.— A pending suit in equity under a bill filed on behalf of all the creditors of a dissolved partnership, seeking to have a conveyance of its property to one of its creditors, who is made a defendant, declared a general assignment for the equal benefit of all its creditors, is not a bar to a bill by the preferred creditor asserting his rights under the conveyance and asking relief against the claimants of adverse liens and incumbrances. Rapier *v.* Gulf City Paper Co., 64 Ala. 330.

40. *Illinois.*— Branigan *v.* Rose, 8 Ill. 123; Shepardson *v.* McDole, 49 Ill. App. 350.

Maryland.— McKaig *v.* Piatt, 34 Md. 249; Seebold *v.* Lockner, 30 Md. 133.

Massachusetts.— Scott *v.* Rand, 118 Mass. 215.

New Jersey.— Larter *v.* Canfield, (N. J. 1900) 45 Atl. 616.

New Mexico.— Bent *v.* Maxwell, etc., R. Co., 3 N. Mex. 158, 3 Pac. 721.

Pennsylvania.— Brooke *v.* Phillips, 6 Phila. (Pa.) 392, 24 Leg. Int. (Pa.) 132.

Rhode Island.— Horton *v.* Bassett, 17 R. I. 129, 20 Atl. 234.

Tennessee.— Macey *v.* Childress, 2 Tenn. Ch. 23.

Wisconsin.— Gibson *v.* Southwestern Land Co., 89 Wis. 49, 61 N. W. 282.

United States.— Carpenter *v.* Talbot, 33 Fed. 537.

41. Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279; Massachusetts Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 13 Fed. 857.

Stay of first suit.— The pendency of a prior suit will not be a bar to a subsequent suit if the latter embraces more of the subject-matter than the former; but it may justify an order of the court staying the further prosecution of the first suit. Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

42. Parker *v.* Selye, 3 N. Y. App. Div. 149, 38 N. Y. Suppl. 164; Geery *v.* Webster, 11 Hun (N. Y.) 428; Hertell *v.* Van Buren, 3 Edw. (N. Y.) 20; Cordier *v.* Cordier, 26 How. Pr. (N. Y.) 187; Macey *v.* Childress, 2 Tenn. Ch. 23.

43. 1 Bacon Abr. p. 29; Mullen *v.* Mullock, 22 Kan. 598; Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678. See also Steers *v.* Shaw, 53 N. J. L. 358, 21 Atl. 940, wherein it was held that if there was identity of evidence in the two actions it was immaterial that the form of both was not the same.

Insertion of other causes in second action. — Where it appears that the cause of action in the second suit is, in a material and substantial part, the same as in the first, although other causes of action are inserted in the second, it is within the meaning of the rule of law that an action instituted for the same cause of action is good cause of abatement. Buffum *v.* Tilton, 17 Pick. (Mass.) 510.

44. Dickinson *v.* Codwise, 4 Edw. (N. Y.) 341.

45. Secor *v.* Sturgis, 16 N. Y. 548; O'Beirne *v.* Lloyd, 1 Sweeny (N. Y.) 19; Hughes *v.* Dundee Mortg. Trust Invest. Co., 26 Fed. 831.

Breaches of covenant.— Where there are breaches of several and distinct covenants contained in the same instrument, and a suit

8. Actions for Parts of Same Cause. It has been held that a second suit for some of the same things sued for in a former suit still pending will not abate, in whole or in part, the former suit.[46] So a plea in abatement to the entire action that another suit for the same cause was pending at the time of the second suit is not a good plea if the proof shows that the first suit was only for part of the same matter sued for in the second.[47]

9. Actions Involving Same Property — a. In General. It is not enough to sustain the plea of a former action pending that the same property is involved in both actions.[48]

b. Actions Involving Same Land — (I) *In General.* So it is not sufficient to sustain a plea in abatement of another action pending that the second action is brought in respect of the same land. It must be for the same injury, and the same matters must be in issue that were in issue and might have been tried in the first action; otherwise the causes of action are not identical.[49]

(II) *Actions of Ejectment.* The pendency of an action in ejectment is not pleadable in abatement of a like subsequent suit between the same parties.[50]

is brought claiming damages for some of the breaches, and subsequently a second action is commenced claiming damages for other breaches, all of the causes of action having accrued at the time of the bringing of the first suit, the first action may be pleaded in abatement of the second. Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

46. Ballou *v.* Ballou, 26 Vt. 673.

47. Thompson *v.* Lyon, 14 Cal. 39; Bigelow *v.* Farmer, 5 Blackf. (Ind.) 31, wherein it was held that a plea in abatement to the whole declaration in slander, consisting of four counts, that another action was pending for the same cause contained in two of the counts, was bad on general demurrer.

48. Watson *v.* Richardson, (Iowa 1899) 80 N. W. 416; Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678.

Actions of replevin.— In replevin by one plaintiff against three defendants a plea in abatement was interposed of a prior action in replevin by two of the defendants against plaintiff and another by virtue of which the other defendant, as sheriff, took and detained the property. It was held that the issues in the two cases were not identical. Belden *v.* Laing, 8 Mich. 500.

Additional property.— Where it is not known at the time the first action was commenced that defendants had possession of other property of plaintiff than that sought to be recovered in that action, a second action may be brought for such additional property. Risley *v.* Squire, 53 Barb. (N. Y.) 280.

Injunction against sale and suit to quiet title.— The pendency of an action to enjoin the sheriff and the execution plaintiff from selling the property is no bar to an action by the same plaintiff to quiet the title to the property as against a third person who purchased at the sheriff's sale. Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310.

Replevin and action for value.— An action for the value of personal property may be maintained during the pendency of a replevin suit between the same parties for the delivery of the specific property. Mitchell Furniture Co. *v.* Payton, 4 Mo. App. 563.

49. Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500; Martin *v.* Splivalo, 69 Cal. 611, 11 Pac. 484; Larco *v.* Clements, 36 Cal. 132; Vance *v.* Olinger, 27 Cal. 358; Bolton *v.* Landers, 27 Cal. 104.

Injunction against waste and action for recovery.— An action for the recovery of land will not bar plaintiff from suing out an injunction against defendant's committing waste, nor deprive him of his right to sequester timber cut from the land. Bogart *v.* Rils, 8 La. Ann. 55.

Joinder of other parties as plaintiffs.— In an action for the recovery of land, a plea in abatement setting up the pendency of a former suit brought by plaintiffs and others to recover the same land is bad on demurrer. Hall *v.* Holcombe, 26 Ala. 720.

Second action on subsequently acquired title.—A plaintiff may have two suits against the same defendant for the recovery of the possession of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first. Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

Summary process before justice.— In the trial of an action to recover land, the pendency of a summary process of ejectment before a justice of the peace, under the landlord and tenant act, between the same parties, cannot be pleaded in bar, since the question of title is not within the jurisdiction of the justice. Campbell *v.* Potts, 119 N. C. 530, 26 S. E. 50.

50. Hall *v.* Wallace, 25 Ala. 438; Callahan *v.* Davis, 125 Mo. 27, 28 S. W. 162.— the reason for this rule being that a former judgment or recovery in ejectment cannot be pleaded in bar of a like suit between the same parties.

Ejectment and action to quiet title.—In an action to quiet plaintiff's title to land, alleged to be clouded by defendants' giving out that the title is in themselves and not in plaintiff, an action of ejectment pending in which defendants do not ask for affirmative relief is not available as a defense. Ayres *v.* Bensley, 32 Cal. 620.

Partition and ejectment.—The pendency of a partition suit in chancery, which has not

(III) *Ejectment and Unlawful Detainer.* The pendency of an action of ejectment will not abate a subsequent action of unlawful detainer brought by the same plaintiff for the possession of the same premises.[51]

(IV) *Actions of Forcible Entry and Detainer.* But the pendency of a prior action is a defense in an action of forcible entry and detainer to the same extent as in any other action.[52]

10. Creditors' Bills. The pendency of a creditor's bill brought by one creditor in behalf of all creditors of the common debtor cannot be pleaded in abatement of a subsequent bill brought by a different creditor in a different right.[53]

11. Actions for Personal Injuries and for Death. As an action for damages for an injury to plaintiff's person abates by his death, the pendency thereof cannot be pleaded in bar of a subsequent action brought by his personal representative for his death resulting from such injury and caused by the wrongful act or omission of defendant.[54]

12. Actions to Annul Marriage and for Divorce. The pendency of an action by the husband to annul the marriage on the ground of duress will not abate an action by the wife for divorce on the ground of non-support.[55]

13. Actions to Enforce and Set Aside Judgment. An action to enforce a judgment cannot be defeated by the pendency of an action by the judgment debtor to set such judgment aside.[56]

been revived by the heirs of a defendant after his death, does not deprive them of their right to bring ejectment to recover the premises. De Mill *v.* Port Huron Dry Dock Co., 30 Mich. 38.

51. Buettinger *v.* Hurley, 34 Kan. 585, 9 Pac. 197; Drey *v.* Doyle, 28 Mo. App. 249,— the reason being that these two actions are not the same either in substance or in form.

Deed and lease.— In ejectment in which plaintiff bases his right to recover on a deed from defendants to him, the pendency of an action brought by plaintiff against defendants for an unlawful detention by them of the same premises after the expiration of an alleged lease cannot be pleaded in abatement. Martin *v.* Splivalo, 69 Cal. 611, 11 Pac. 484.

52. Bond *v.* White, 24 Kan. 45.

Suits for different detentions.— An action of forcible detainer in which the complaint shows a notice to terminate the lease for non-payment of rent when due, and a subsequent action, brought after the lease has expired, for a holding over, are not the same and the pendency of the first will not operate to abate the latter. Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385, 17 N. E. 483.

Writ of possession and forcible detainer.— The remedies given a purchaser of land under a decree of foreclosure by writ of possession and by forcible detainer are concurrent, and both may be pursued until a satisfaction is had. Accordingly the pendency of proceedings by forcible detainer for possession on appeal cannot be set up in abatement of a motion for a writ of possession in the original cause. Kessinger *v.* Whittaker, 82 Ill. 22.

53. Maxwell *v.* Peters Shoe Co., 109 Ala. 371, 19 So. 412; Hall *v.* Alabama Terminal, etc., Co., 104 Ala. 577, 16 So. 439, 53 Am. St. Rep. 87; Sweeney Mfg. Co. *v.* Goldberg, 66 Ill. App. 568. But see also Penn Bank *v.* Hopkins, 111 Pa. St. 328, 2 Atl. 83, wherein it was held that the pendency of a creditor's suit brought against the directors of an insolvent corporation to which the assignee for the benefit of creditors of the same has been made a party defendant is a good plea in abatement to an action at law subsequently brought for the same cause by the assignee in the name of the bank against the directors.

Pendency of supplementary proceedings.— Proceedings supplementary to execution are not a bar to a bill by a creditor to set aside a fraudulent conveyance by the judgment debtor. Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39.

54. Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143.

Actions for injuries to married woman.— As a joint action by a husband and wife for personal injuries to the wife abates by her death, the pendency thereof is no defense to an action by the husband, after the death of the wife, for loss of the wife's services. Meese *v.* Fond du Lac, 48 Wis. 323, 4 N. W. 406.

55. Simpson *v.* Simpson, (Cal. 1895) 41 Pac. 804, assigning as a reason for this rule the fact that neither the cause of action nor the relief sought is the same.

Divorce a mensa and a vinculo.— The pendency of a libel for a divorce *a mensa* cannot be pleaded in abatement of a libel for a divorce *a vinculo*. Stevens *v.* Stevens, 1 Metc. (Mass.) 279.

Second action for different adultery.— In an action for a divorce for alleged adultery of defendant during a certain period, plaintiff is not required to proceed by supplementary complaint, but may commence a second action demanding the same relief for alleged adultery with the same person charged to have occurred after the commencement of the first action, and the answer of defendant to the second action, setting up the pendency of another action in the court for the same cause, is insufficient. Cordier *v.* Cordier, 26 How. Pr. (N. Y.) 187.

56. McGrath *v.* Maxwell, 17 N. Y. App. Div. 246, 45 N. Y. Suppl. 587.

14. Actions to Rescind and for Price. The pendency of an action by the buyer to rescind and for damages is not pleadable in abatement of a subsequent action by the seller for the price.[57]

15. Enforcement of Rights Secured by Chattel Mortgage. Under a statute providing that there can be but one action for the enforcement of any right secured by a mortgage upon personal property it is proper to dismiss an action of claim and delivery begun after the institution and during the pendency of an action to foreclose a chattel mortgage upon the same property.[58]

16. Criminal and Civil Proceedings — a. Larceny and Trover. An action of trover for the conversion of stolen goods may be instituted against the thief pending a criminal prosecution against him for larceny.[59]

b. Proceedings for Non-Payment of Taxes. A plea to a civil suit for the recovery of occupation taxes, alleging that a criminal prosecution has been instituted against defendant on account of the non-payment of such taxes, and that a fine was adjudged therein against defendant, from which an appeal has been taken which is still pending, presents no bar to the civil action, which is cumulative, where it is not shown that the criminal prosecution has resulted in the collection of the taxes.[60]

c. Proceedings for Violation of Liquor Law. License commissioners may take cognizance of an application for the revocation of a liquor license on the ground of a violation of law by the licensee while a criminal prosecution is pending against the licensee for the same violation of the law.[61]

17. Actions Relating to Public Office. The fact that a test proceeding between the persons claiming a public office is pending does not affect the right of the state to proceed by information against the incumbent.[62]

18. Proceedings against Attorney by Client. An application for an order to compel an attorney to pay money over to his client is properly denied where it appears that the client had, prior to the application, commenced an action against the attorney for such money, in which she had caused him to be arrested, and that such action was still pending.[63]

G. Identity of Parties — 1. Necessity of Identity. The rule is well settled that a suit pending which abates a subsequent one must be between the same parties.[64]

57. Jennison Hardware Co. *v.* Godkin, 112 Mich. 57, 70 N. W. 428. But see Bartholomay Brewing Co. *v.* Haley, 16 N. Y. App. Div. 485, 44 N. Y. Suppl. 915, wherein it was held that the pendency of an action by the buyer for breach of the contract of sale may be pleaded in abatement to a subsequent action by the seller for the price of the goods.

58. Cederholm *v.* Loofborrow, 2 Idaho, 176, 6 Pac. 641.

59. Keyser *v.* Rodgers, 50 Pa. St. 275, wherein it was held that if defendant desires to take advantage of the pendency of the public prosecution he may pray that the parol may demur, but beyond this he cannot defend for such a cause.

Rule at common law.— Originally at common law a party from whom goods had been stolen could only obtain restitution from the thief on an appeal of larceny. Hence it was held that an action of trover would not lie. Keyser *v.* Rodgers, 50 Pa. St. 275.

60. Heller *v.* Alvarado, 1 Tex. Civ. App. 409, 20 S. W. 1003.

61. La Croix *v.* Fairfield County, 50 Conn. 321, 47 Am. Rep. 648.

62. Vogel *v.* State, 107 Ind. 374, 8 N. E. 164.

63. Matter of Mott, 36 Hun (N. Y.) 569.

64. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Davis *v.* Petrinovich, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615; Meyer *v.* Johnston, 53 Ala. 237.

Arkansas.— Bourland *v.* Nixon, 27 Ark. 315.

California.— Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Kerns *v.* McKean, 65 Cal. 411, 4 Pac. 404; Walsworth *v.* Johnson, 41 Cal. 61; Calaveras County *v.* Brockway, 30 Cal. 325.

Connecticut.— La Croix *v.* Fairfield County, 50 Conn. 321, 47 Am. Rep. 648.

Georgia.— Rogers *v.* Hoskins, 15 Ga. 270.

Indiana.— Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107; Dawson *v.* Vaughan, 42 Ind. 395; Loyd *v.* Reynolds, 29 Ind. 299; Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583.

Kansas.— Mullen *v.* Mullock, 22 Kan. 598.

Kentucky.— Adams *v.* Gardiner, 13 B. Mon. (Ky.) 197.

Louisiana.— State *v.* Kreider, 21 La. Ann. 482; Hacket *v.* Lenares, 16 La. Ann. 204; Ingram *v.* Richardson, 2 La. Ann. 839.

2. Privies of Parties. An action by the privies of the parties to a prior action is within the rule.[65]

3. Actions against Different Defendants. Some of the authorities are inclined to hold that if the plaintiff is the same and the cause of action is the same the defendants need not be the same in each suit.[66]

4. Defendant in Different Capacities. If the characters in which defendant is sued be different, so that the funds from which satisfaction of the judgment is to be obtained are different, the rule that a pending suit abates a second one is not applicable.[67]

Maine.— Cumberland County *v.* Central Wharf Steam Tow-Boat Co., 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246.

Nebraska.— McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333.

New Hampshire.— Bennett *v.* Chase, 21 N. H. 570.

New York.— Middlebrook *v.* Travis, 68 Hun (N. Y.) 155, 22 N. Y. Suppl. 672; Dawley *v.* Brown, 65 Barb. (N. Y.) 107; Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Suppl. 533; Hertell *v.* Van Buren, 3 Edw. (N. Y.) 20.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425; Redfearn *v.* Austin, 88 N. C. 413.

Pennsylvania.—Streaper *v.* Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604.

South Carolina.— Davis *v.* Hunt, 2 Bailey (S. C.) 412; Jones *v.* Muse, 1 Brev. (S. C.) 67.

Tennessee.— Morley *v.* Power, 5 Lea (Tenn.) 691.

Texas.— Langham *v.* Thomason, 5 Tex. 127.

Virginia.— McAllister *v.* Harman, 97 Va. 543, 34 S. E. 474.

United States.— Langstraat *v.* Nelson, 40 Fed. 783; Estes *v.* Worthington, 30 Fed. 465; Brooks *v.* Mills County, 4 Dill. (U. S.) 524, 4 Fed. Cas. No. 1,955; Hacker *v.* Stevens, 4 McLean (U. S.) 535, 11 Fed. Cas. No. 5,887; Taylor *v.* The Royal Saxon, Wall. Jr. (U. S.) 311, 23 Fed. Cas. No. 13,803.

See 1 Cent. Dig. tit. "Abatement and Revival," § 73.

Thus an action in one court by a materialman against the contractor and owner to establish a mechanic's lien is not abated by the pendency of an action in another court by the contractor to foreclose his lien on the property, where the materialman is not made a party to the latter action. Egan *v.* Laemmle, 5 Misc. (N. Y.) 224, 25 N. Y. Suppl. 330.

Suits against different parties.— In an action against three it is no plea that there is another action pending against two of them for the same cause; nor to debt by two that the obligation was to three by whom an action is pending; nor that an action for the same cause is pending against a stranger; nor that a writ for the same cause is pending against others as executors of the same testator. Davis *v.* Hunt, 2 Bailey (S. C.) 412.

Suits against sheriff and deputy.— The pendency of an action against a deputy sheriff for wrongful acts done under the color of his office cannot be pleaded in abatement of an action against the sheriff for the same cause. Severy *v.* Nye, 58 Me. 246.

Suits by married woman.— A former suit pending on the same cause of action in the name of the wife alone is not a good plea in abatement to a suit in the name of the husband and wife. Langham *v.* Thomason, 5 Tex. 127.

Subsequent actions against each defendant. — The pendency of an action brought against persons claiming title under a referee's deed, to set aside such deed as fraudulent and for the recovery of the possession of the premises, may be pleaded in abatement of subsequent actions brought by the same plaintiff against each of the defendants in that action to recover the possession of the premises and for mesne profits. Dawley *v.* Brown, 65 Barb. (N. Y.) 107.

65. Richardson *v.* Opelt, (Nebr. 1900) 82 N. W. 377; Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326; Morley *v.* Power, 5 Lea (Tenn.) 691; Moore *v.* Holt, 3 Tenn. Ch. 141; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666.

Subsequent action by grantee.— If a person institutes a suit and afterward sells part of the property in question to another who files an original bill touching the part so purchased by him, a plea of a former suit pending, touching the whole property, is good. Holloway *v.* Holloway, 103 Mo. 274, 15 S. W. 536.

66. Rogers *v.* Hoskins, 15 Ga. 270; Bedford *v.* Bishop, Hob. 137.

Thus, if the same plaintiffs bring two actions at different times upon the same cause, the first one against a single defendant, and the second against the defendant in the prior action, and also against another joined as a defendant, the actions will, so far as concerns the defendant who is a party defendant to both actions, be between the same parties, and the second action as to him, by reason of the pendency of the prior action, may be abated. Rehman *v.* New Albany Belt, etc., R. Co., 8 Ind. App. 200, 35 N. E. 292.

Misjoinder of defendants.— In an action against A, the pendency of a former suit for the same cause, brought by plaintiff against A and B,— a misjoinder of defendants,— may be pleaded in abatement. Atkinson *v.* State Bank, 5 Blackf. (Ind.) 84.

67. Thus, if two suits be instituted at the same time, on the same cause of action, by the same plaintiff against the same defendant, but one of them is against defendant in his personal capacity, and the other is against him in an official capacity, so that judgments in the suits would be capable of reaching different funds, a plea setting up the pendency

5. Cross-Actions — a. In General. The plea of a prior action pending applies only where plaintiff in both suits is the same person, and both are commenced by himself, and not to cases where there are cross-suits by a plaintiff in one suit who is a defendant in the other.[68]

b. Actions for Accounting. This general rule as to cross-suits does not apply, it has been held, to an action for an accounting between the same parties where one or more items of the accounting are afterward made the subject of a separate suit.[69]

c. Effect of Ability to File Cross-Petition. The fact that there is an action pending in which plaintiff might by cross-petition obtain against defendant the relief he seeks will not abate the second suit.[70]

6. Omission of Party. It has been held that where an amended complaint is made for the purpose of adding new parties the original defendant on whom new summons has not been served cannot treat it as a new action and plead the pendency of the former action.[71]

of the one in abatement of the other is bad. Dengler *v.* Hays, (N. J. 1899) 42 Atl. 775.

Suits against partnership and partner.— A plea of the pendency of a former action cannot be sustained where in one case the action is against a firm on a joint or firm assignment, and in the other is against one of the firm alone and upon a several liability in which the firm has no interest and which can involve it in no responsibility. Blackburn *v.* Watson, 85 Pa. St. 241.

68. *Alabama.*— Hall *v.* Holcombe, 26 Ala. 720.

California.— Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634; Walsworth *v.* Johnson, 41 Cal. 61; Felch *v.* Beaudry, 40 Cal. 439; Ayres *v.* Bensley, 32 Cal. 620; O'Connor *v.* Blake, 29 Cal. 312.

Connecticut.— Allen *v.* Rogers, 1 Root (Conn.) 471; Ratcliff *v.* Dewit, 1 Root (Conn.) 155.

Illinois.— Tompkins *v.* Gerry, 43 Ill. App. 255.

Iowa.— Pratt *v.* Howard, 109 Iowa 504, 80 N. W. 546.

Kentucky.— Johnson *v.* Robertson, (Ky. 1898) 45 S. W. 523.

New York.— Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423.

North Carolina.— Casey *v.* Harrison, 13 N. C. 244.

Ohio.— Barr *v.* Chapman, 5 Ohio Cir. Ct. 69.

Vermont.— Thomas *v.* Freelon, 17 Vt. 138.

Wisconsin.— Wood *v.* Lake, 13 Wis. 84.

United States.— New England Screw Co. *v.* Bliven, 3 Blatchf. (U. S.) 240, 18 Fed. Cas. No. 10,156; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559.

But see Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326, wherein it was held that the fact that the parties, plaintiff and defendant, were reversed in the two suits, will not prevent the defense of another action pending, if the issues in the two suits were the same, and the same relief was attainable.

69. Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634.

Accounting and action to set aside conveyance.— An action by a partner to set aside a conveyance made by a copartner is not barred by the pendency of an action for a partnership accounting. But the accounting cannot be had until it is determined whether or not the subject of the conveyance is a partnership asset. Maloy *v.* Associated Lace-Makers' Co., 8 N. Y. Suppl. 815.

Partnership accounting.— During the pendency of a bill in equity brought by two of the four members of a partnership against the other two, for an account, defendants commenced a bill in equity against plaintiffs for the same purpose. It was held that the second bill should be dismissed. Wallace *v.* Robinson, 52 N. H. 286.

70. Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413; Washburn, etc., Mfg. Co. *v.* Scutt, 22 Fed. 710. See also Fink *v.* Allen, 36 N. Y. Super. Ct. 350, wherein it was held that the pendency of an action in which one defendant, by his answer, attempts to force a co-defendant to settle therein a controversy respecting the right of such co-defendant under a certain instrument, cannot be pleaded in bar or in abatement as another action pending to an action subsequently commenced on such instrument by such co-defendant against the defendant who so answered in the first action.

71. Hurley *v.* Second Bldg. Assoc., 15 Abb. Pr. (N. Y.) 206 note. See also Owens *v.* Loomis, 19 Hun (N. Y.) 606, wherein it appeared that plaintiff attempted to commence an action against defendants, but by mistake omitted to state the proper name of one of the defendants in the summons and complaint served. Subsequently, an order was made setting aside the complaint, directing the summons to be amended by adding the name of the defendant improperly named, and allowing plaintiff to serve an amended complaint and a copy of the amended summons within a certain time, upon payment of certain costs. Plaintiff did not pay the costs or serve the amended summons within the time allowed, but subsequently brought another action against the same defendants for the same cause of action. It was held that the former action was not pending at the time of the commencement of the second action so as to prevent the prosecution of the latter.

7. Rule as to Ability to Be Made Party. The mere pendency of a suit to which a person may be made a party, but has not been, is no bar to an action by him in another court to enforce his rights.[72]

8. Suits against Several Obligors. In an action against one of several obligors a plea that there is another action pending against all the obligors for the same cause will abate the action.[73]

9. Suits against Joint and Several Obligors. But the pendency of an action against all of joint and several obligors on a joint liability in no wise affects the right of action against each on the several liability, and cannot be pleaded in abatement of the several suit.[74]

10. Suits against Joint Tort-Feasors. Where two joint tort-feasors are sued separately for the same tort, the pendency of the suit against one cannot be pleaded in abatement of the suit against the other.[75]

11. Suits of a Penal Nature. An exception to the rule that the plea of the pendency of a former action is restricted to the same parties has been held to exist in the case of a penal action where a suit for the same cause has been instituted by a third person.[76]

H. Necessity of Jurisdiction in Court of Prior Action. The principle that the pendency of a prior action is a good ground of abatement of a subsequent action is not applicable unless the court in which the first suit was brought and is pending has jurisdiction of the subject-matter.[77]

I. Prior Action in Inferior Court. A plea of another action pending must show the pendency of another action between the same parties and growing out of the same cause of action before the same court or another court of concurrent jurisdiction.[78] Accordingly the pendency of a prior action in a court of

Suits in name of wrong party.— Where an administrator had sued as the representative of a wrong party, and was consequently compelled to bring a new action, a plea of the pendency of the prior action, pleaded in abatement of the new action, cannot be sustained. Cornelius *v.* Vanarsdallen, 3 Pa. St. 434.

72. Parsons *v.* Greenville, etc., R. Co., 1 Hughes (U. S.) 279, 18 Fed. Cas. No. 10,776.

73. Graves *v.* Dale, 1 T. B. Mon. (Ky.) 190.

74. Turner *v.* Whitmore, 63 Me. 526; U. S. *v.* Cushman, 2 Sumn. (U. S.) 426, 25 Fed. Cas. No. 14,908,— for the reason that there are two distinct remedies on a joint and several contract, one against all the obligors jointly, the other against each severally.

Death of joint obligor.— In State Bank *v.* Welles, 3 Pick. (Mass.) 15, an action was brought against two obligors on a joint and several bond. One died, and his death was suggested on the record, and the action proceeded against the other. It was held that a separate action might be sustained against the executor of the deceased while the first action was pending against the survivor. To same effect is Union Bank *v.* Mott, 27 N. Y. 633.

75. State *v.* Boyce, 72 Md. 140, 19 Atl. 366, 20 Am. St. Rep. 458, 7 L. R. A. 272.

Agents of several joint tort-feasors.— Where a sheriff levies two or more attachments in favor of different creditors at the same time on the same property, the levy being wrongful, only one action for damages can be maintained against him. So held in Harmon *v.* McRae, 91 Ala. 401, 8 So. 548 [*citing* Sparkman *v.* Swift, 81 Ala. 231, 233, 8 So. 160] wherein it is held that, although in such a case the creditors must be considered as joint wrongdoers, the officer must be regarded as "their common agent," notwithstanding each creditor was endeavoring to secure the priority of lien.

76. Colt *v.* Partridge, 7 Metc. (Mass.) 570; Harris *v.* Johnson, 65 N. C. 478.

Indictment and action for penalty.— A former action pending for a penalty will abate a subsequent indictment to recover the same penalty. Com. *v.* Churchill, 5 Mass. 174.

77. Coaldale Brick, etc., Co. *v.* Southern Constr. Co., 110 Ala. 605, 19 So. 45; Rood *v.* Eslava, 17 Ala. 430; Phillips *v.* Quick, 68 Ill. 324; Newell *v.* Newton, 10 Pick. (Mass.) 470; McKay *v.* Garcia, 6 Ben. (U. S.) 556, 16 Fed. Cas. No. 8,844; White *v.* Whitman, 1 Curt. (U. S.) 494, 29 Fed. Cas. No. 17,561; *Ex p.* Balch, 3 McLean (U. S.) 221, 2 Fed. Cas. No. 790; Morgan *v.* Ault, 8 Ont. Pr. 429.

78. Ludewig *v.* Ludewig, 3 Rob. (La.) 92.

Actions in justice's court.—It has been held that the pendency of an action before a justice of the peace is a good ground of abatement of a second action before a justice (Langford *v.* Doniphan, 53 Mo. App. 62; Wentworth *v.* Barnum, 10 Johns. (N. Y.) 238), and it seems to make no difference whether such suit was commenced by a summons or by warrant (Wentworth *v.* Barnum, 10 Johns. (N. Y.) 238). But on the failure of plaintiff to appear before a justice at the time fixed in the summons, or to give sufficient reason for his non-appearance, a discontinuance of the cause takes place and an-

inferior jurisdiction is not, it would seem, pleadable in abatement of a subsequent action in a court of superior jurisdiction.[79]

J. Actions in Different Jurisdictions — 1. Statement of Rule. The rule that a subsequent action may be abated by the pendency of a prior one between the same parties for the same cause is confined to those cases where the former one is pending in courts of the same state or government, and does not apply where such former action was commenced and is pending before the courts of a foreign or different jurisdiction.[80]

2. Action in Another State — a. Action in Personam. In the application of this doctrine the courts of the several states are regarded as foreign to one another.[81] Accordingly the pendency of an action *in personam* in one state is not, as a rule, pleadable in abatement of an action subsequently commenced in another state between the same parties on the same cause,[82] even though the court of

other suit may at once be instituted. Yentzer *v.* Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563.

79. Bullock *v.* Bolles, 9 R. I. 501; Laughton *v.* Taylor, 6 M. & W. 695. But see Johnston *v.* Bower, 4 Hen. & M. (Va.) 487, wherein it was held that the pendency of a prior action for the same cause in an inferior court that has jurisdiction is good cause of abatement.

80. *Arkansas.*— Grider *v.* Apperson, 32 Ark. 332.

Connecticut.— Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433.

Delaware.— Howard *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 471.

Illinois.— McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

Kentucky.— Salmon *v.* Wootton, 9 Dana (Ky.) 422.

Massachusetts.—American Bank *v.* Rollins, 99 Mass. 313; Newell *v.* Newton, 10 Pick. (Mass.) 470; Lindsay *v.* Larned, 17 Mass. 190.

New Hampshire.— Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

New York.— Williams *v.* Ayrault, 31 Barb. (N. Y.) 364; Sargent *v.* Sargent Granite Co., 31 Abb. N. Cas. (N. Y.) 131, 6 Misc. (N. Y.) 384, 26 N. Y. Suppl. 737; Walsh *v.* Durkin, 12 Johns. (N. Y.) 99; Bowne *v.* Joy, 9 Johns. (N. Y.) 221; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y.) 453; Republic *v.* Arrangois, 1 Abb. Pr. (N. Y.) 437.

Pennsylvania.— Smith *v.* Lathrop, 44 Pa. St. 326, 84 Am. Dec. 448; Ralph *v.* Brown, 3 Watts & S. (Pa.) 395; Lowry *v.* Hall, 2 Watts & S. (Pa.) 129, 38 Am. Dec. 495.

South Carolina.— Chatzel *v.* Bolton, 3 McCord (S. C.) 33.

Tennessee.— Lockwood *v.* Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

Texas.— Mexican Cent. R. Co. *v.* Charman, (Tex. Civ. App. 1894) 24 S. W. 958.

Virginia.— Davis *v.* Morriss, 76 Va. 21.

Wisconsin.— Wood *v.* Lake, 13 Wis. 84.

United States.— Mutual L. Ins. Co. *v.* Brune, 96 U. S. 588, 24 L. ed. 737; Briggs *v.* Stroud, 58 Fed. 717; Rawitzer *v.* Wyatt, 40 Fed. 609; Lynch *v.* Hartford F. Ins. Co., 17 Fed. 627; Radford *v.* Folsom, 14 Fed. 97; Lyman *v.* Brown, 2 Curt. (U. S.) 559, 15 Fed. Cas. No. 8,627; White *v.* Whitman, 1 Curt. (U. S.) 494, 29 Fed. Cas. No. 17,561.

England.— Foster *v.* Vassall, 3 Atk. 587; Cox *v.* Mitchell, 7 C. B. N. S. 55; Sparry's Case, 5 Co. 61*a*; Imlay *v.* Ellefsen, 2 East, 453; Ostell *v.* Lepage, 21 Eng. L. & Eq. 640; Scott *v.* Seymour, 31 L. J. Exch. 457; Bayley *v.* Edwards, 3 Swanst. 703; Maule *v.* Murray, 7 T. R. 470; Dillon *v.* Alvares, 4 Ves. Jr. 357.

See 1 Cent. Dig. tit. "Abatement and Revival," § 86 *et seq.*

81. Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309.

82. *Alabama.*— Humphries *v.* Dawson, 38 Ala. 199.

Arkansas.— Moore *v.* Emerick, 38 Ark. 203; Grider *v.* Apperson, 32 Ark. 332.

Delaware.— Howard *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 471.

Georgia.— Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109.

Illinois.— Allen *v.* Watt, 69 Ill. 655; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

Indiana.— Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457; De Armond *v.* Bohn, 12 Ind. 607.

Kentucky.— Davis *v.* Morton, 4 Bush (Ky.) 442, 96 Am. Dec. 309; Salmon *v.* Wootton, 9 Dana (Ky.) 422.

Maryland.— Cole *v.* Flitcraft, 47 Md. 312; Seevers *v.* Clement, 28 Md. 426.

Massachusetts.— Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116.

Michigan.— Wilcox *v.* Kassick, 2 Mich. 165.

Minnesota.— Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938.

New Hampshire.— Yelverton *v.* Conant, 18 N. H. 123.

New Jersey.— Fairchild *v.* Fairchild, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650; Kerr *v.* Willetts, 48 N. J. L. 78, 2 Atl. 782; Fulton *v.* Golden, 25 N. J. Eq. 353; Vail *v.* Central R. Co., (N. J. 1886) 4 Atl. 663.

New York.— Smith *v.* Crocker, 14 N. Y. App. Div. 245, 43 N. Y. Suppl. 427; Williams *v.* Ayrault, 31 Barb. (N. Y.) 364; Hadden *v.* St. Louis, etc., R. Co., 57 How. Pr. (N. Y.) 390; Burrows *v.* Miller, 5 How. Pr. (N. Y.) 51; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330.

North Carolina.— Sloan *v.* McDowell, 75 N. C. 29.

Pennsylvania.— Hogg *v.* Charlton, 25 Pa. St. 200; Lowry *v.* Hall, 2 Watts & S. (Pa.) 129, 37 Am. Dec. 495.

the state where the prior suit is pending has complete jurisdiction.[83] A recovery in one may be pleaded to the further continuance of the other, but until that is obtained, or unless the court in its discretion grants a continuance by reason of the pendency of the first action,[84] each may proceed to judgment and execution, when a satisfaction of either will require a discharge of both.[85]

b. Attachment — (I) *Abatement of Subsequent Action.* The doctrine that the pendency of an action in another state is not a good plea in abatement is not confined to actions *in personam.* Authorities are not wanting which hold that the pendency of an attachment suit in another state will not abate a subsequent suit between the same parties on the same demand,[86] even though the attachment has been levied upon property sufficient to satisfy the demand.[87]

(II) *Abatement of Subsequent Attachment.* An attachment of property in one state will not bar the right to issue a writ of the same nature in another state, even when the assets bound by the first writ might be sufficient to pay the demand.[88]

c. Garnishment — (I) *Abatement of Action by Prior Garnishment.* An exception to the doctrine that the pendency of an action in another jurisdiction is not a good plea in abatement has been made in some states for the protection of persons who have been summoned as trustees or garnishees in other jurisdictions. In these states the rule obtains that a trustee process or garnishment pending in another jurisdiction is a good defense to a subsequent action brought within the

Rhode Island.—Ostby, etc., Co. *v.* Goldman, (R. I. 1899) 43 Atl. 101; O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364.

South Carolina.— Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309.

Texas.— Drake *v.* Brander, 8 Tex. 351; Mexican Cent. R. Co. *v.* Charman, (Tex. Civ. App. 1894) 24 S. W. 958.

Pendency of probate proceedings in another state.— The pendency of proceedings for the allowance of a claim against an intestate in another state is no bar to the allowance of the claim against the estate within the state. Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

Restraining suit in other state.— Where, after the commencement of a suit in one state, plaintiff commences another suit for the same cause of action in the court of another state, and, after taking testimony in his suit in the first state, breaks off and proceeds to take testimony in his suit in the other state, the court of the first state has no power to make an order restraining him from prosecuting the latter suit. Hammond *v.* Baker, 3 Sandf. (N. Y.) 704.

83. Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118.

84. Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118.

85. Oneida County Bank *v.* Bonney, 101 N. Y. 173, 4 N. E. 332.

86. Barbe *v.* Glick, 20 Ill. App. 408; Clampitt *v.* Newport, 8 La. Ann. 124; Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Sargent *v.* Sargent Granite Co., 31 Abb. N. Cas. (N. Y.) 131, 6 Misc. (N. Y.) 384, 26 N. Y. Suppl. 737; Osgood *v.* Maguire, 61 Barb. (N. Y.) 54; Nason Mfg. Co. *v.* Rankin Ice Mfg. Co., 1 N. Y. City Ct. 455; Lockwood *v.* Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73. *Contra,* Lawrence *v.* Remington, 6 Biss. (U. S.) 44, 15 Fed. Cas. No. 8,141.

Reason of rule.— A security furnished by the mere service of an attachment in a legal sense neither extinguishes nor diminishes the debt and may not result in producing a satisfaction of the judgment ultimately recovered. The attachment itself may be vacated, superseded, or otherwise discharged, and the security released by proceedings had in the foreign jurisdiction, all without reference to any comity, credit, or respect which may have been given to it in proceedings pending in the state. Nason Mfg. Co. *v.* Rankin Ice Mfg. Co., 1 N. Y. City Ct. 455.

Subsequent action of assumpsit.—The pendency of an attachment suit in another state will not abate an action of *assumpsit* brought in the state upon the same cause of action between the same parties. Barbe *v.* Glick, 20 Ill. App. 408.

87. Hecker *v.* Mitchell, 6 Duer (N. Y.) 687.

88. Parsons *v.* Columbia Ins. Co., 2 Phila. (Pa.) 21, 13 Leg. Int. (Pa.) 12, wherein it is said: "An attachment is not like an execution, the end and accomplishment of the judgment of the law. It is primarily a means of compelling the appearance of the debtor, which may or may not end in satisfaction, but affords no reason against a simultaneous recourse to other remedies of the same or a different description in another state." But see Trubee *v.* Alden, 6 Hun (N. Y.) 75, wherein it appeared that plaintiff brought an action against defendant in another state to recover certain personal property which was seized by the sheriff and released upon the execution of a bond for its appraised value.— $14,000. Subsequently she brought an action in the state to recover

state by defendant in the first suit against his debtor, the trustee or garnishee.[89] A defense on this ground is not, however, an absolute one. It is available only so long as the peril elsewhere continues.[90]

(II) *Abatement of Action by Subsequent Garnishment.* It is to be observed that the exception obtains only where the garnishment in the other jurisdiction was pending at the institution of the suit within the state. Accordingly one who has been sued by his creditor cannot plead in abatement of the suit the fact that after it was commenced he was summoned in another jurisdiction as garnishee in an action against plaintiff.[91]

(III) *Assignment before Garnishment.* It has been held that the rule that the pendency of a prior garnishment proceeding in another state is sufficient to abate a subsequent suit in behalf of the creditor of the garnishee, defendant in the writ, has no application when an assignee, who has acquired the right to the debt sought to be reached by garnishment before the service of it, sues to enforce collection.[92]

(IV) *Abatement of Garnishment by Subsequent Action.* It has also been held that garnishment proceedings commenced in a state are not abated by the subsequent commencement of an action in another state by defendant in the garnishment against his debtor, the garnishee.[93]

3. Actions in State and Federal Courts — a. Abatement of Action in Federal Court. The pendency of a prior suit *in personam* in a state court cannot be pleaded in abatement of a suit between the same parties for the same cause in a federal court.[94] And the rule obtains even in the case of a suit brought in

damages for the conversion of the same property, and attached property of defendant of the value of $31,000. It was held that plaintiff should be allowed to attach only so much property as was necessary to secure the additional amount claimed in the second action, unless she elected to abandon the suit in the other state, in which case she might retain her attachment for the full amount.

89. *Massachusetts.*— Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116; American Bank *v.* Rollins, 99 Mass. 313; Whipple *v.* Robbins, 97 Mass. 107, 93 Am. Dec. 64.

Minnesota.— Harvey *v.* Great Northern R. Co., 50 Minn. 405, 52 N. W. 905.

New York.— Embree *v.* Hanna, 5 Johns. (N. Y.) 101; O'Neil *v.* Nagle, 14 Daly (N. Y.) 492.

Ohio.— Baltimore, etc., R. Co. *v.* May, 25 Ohio St. 347.

Pennsylvania.— Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190.

United States.— Mattingly *v.* Boyd, 20 How. (U. S.) 128, 15 L. ed. 845; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95.

But see Lynch *v.* Hartford F. Ins. Co., 17 Fed. 627, wherein it was held that in an action in a federal court it was not a good plea in abatement that the amount in defendant's hands due plaintiff had been attached by trustee process in a state court, but that a continuance would be granted *ex comitate* that plaintiff, in the action in the state court, may have an opportunity to make his attachment available. *Compare* Mars *v.* Virginia Home Ins. Co., 17 S. C. 514.

Reason of exception.— The attachment which the courts allow to be set up in abatement is an attachment of the debt which the suit sought to be abated was instituted to recover, and not an attachment of the goods of defendant in a suit pending in another state to recover the same debt; and the rule is for the protection of the garnishee and not at all for the benefit of defendant in the attachment. Barbe *v.* Glick, 20 Ill. App. 408.

Suit before appearance in garnishment.— A foreign attachment between the same parties for the same cause of action in another state does not become an action pending between them until appearance thereto by defendant. And where the appearance is after service of the writ in the action in the state, the pendency of the foreign suit cannot be pleaded in bar or abatement of the action in the state. Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488.

90. Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116.

91. Whipple *v.* Robbins, 97 Mass. 107, 93 Am. Dec. 64; Wood *v.* Lake, 13 Wis. 84; Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95.

In federal court.— Garnishment proceedings in a state court are not pleadable in abatement of a prior action in a federal court. Greenwood *v.* Rector, Hempst. (U. S.) 708, 10 Fed. Cas. No. 5,792; Campbell *v.* Emerson, 2 McLean (U. S.) 30, 4 Fed. Cas. No. 2,357.

92. North British Mercantile Ins. Co. *v.* Tyler First Nat. Bank, 3 Tex. Civ. App. 293, 22 S. W. 992.

93. Willard *v.* Sturm, 96 Iowa 555, 65 N. W. 847, wherein it was held that garnishee proceedings commenced in a state against a railroad company for wages due one of its employees are not abated by the subsequent bringing of an action in another state by the employee against the railroad company for such wages.

94. Gordon *v.* Gilfoil, 99 U. S. 169, 25 L. ed. 383; Mutual L. Ins. Co. *v.* Brune, 96

a federal court for the district embraced by the state.[95] The two courts, though not foreign to each other, belong to different jurisdictions in such sense that the doctrine of the pendency of a prior suit as matter of abatement is not applicable.[96]

b. Abatement of Action in State Court. So, too, the pendency of a suit *in personam* in a federal court cannot be pleaded in abatement of a like suit in a state court.[97]

c. Abatement as Matter of Comity and Discretion. Though a party pleading the pendency of a prior suit in a federal or state court is not entitled, as a matter of strict legal right, to have the subsequent one in the other court abated, either court, as a matter of sound discretion and comity, may abate a suit where a like one is pending in the other.[98]

U. S. 588, 24 L. ed. 737; Stanton *v.* Embrey, 93 U. S. 548, 23 L. ed. 983; The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 944; Humphrey *v.* Thorp, 89 Fed. 66; Green *v.* Underwood, 86 Fed. 427, 57 U. S. App. 535, 30 C. C. A. 162; Zimmerman *v.* So Relle, 80 Fed. 417, 49 U. S. App. 387, 25 C. C. A. 518; Gamble *v.* San Diego, 79 Fed. 487; Merritt *v.* American Steel-Barge Co., 79 Fed. 228, 49 U. S. App. 85, 24 C. C. A. 530; Wonderly *v.* Lafayette County, 77 Fed. 665; Marks *v.* Marks, 75 Fed. 321; Short *v.* Hepburn, 75 Fed. 113, 41 U. S. App. 520, 21 C. C. A. 252; Marshall *v.* Otto, 59 Fed. 249; Converse *v.* Michigan Dairy Co., 45 Fed. 18; Rawitzer *v.* Wyatt, 40 Fed. 609; Pierce *v.* Feagans, 39 Fed. 587; Washburn, etc., Mfg. Co. *v.* Scutt, 22 Fed. 710; Sharon *v.* Hill, 22 Fed. 28; Weaver *v.* Field, 16 Fed. 22; Currie *v.* Lewiston, 15 Fed. 377; Logan *v.* Greenlaw, 12 Fed. 10; Crescent City Live-Stock, etc., Co., *v.* Butchers Union Live-Stock, etc., Co., 12 Fed. 225; McKay *v.* Garcia, 6 Ben. (U. S.) 556, 16 Fed. Cas. No. 8,844; New England Screw Co. *v.* Bliven, 3 Blatchf. (U. S.) 240, 18 Fed. Cas. No. 10,156; Loring *v.* Marsh, 2 Cliff. (U. S.) 311, 15 Fed. Cas. No. 8,514; White *v.* Whitman, 1 Curt. (U. S.) 494, 29 Fed. Cas. No. 17,561; Lyman *v.* Brown, 2 Curt. (U. S.) 559, 15 Fed. Cas. No. 8,627; Wadleigh *v.* Veazie, 3 Sumn. (U. S.) 165, 28 Fed. Cas. No. 17,031. *Contra*, Nelson *v.* Foster, 5 Biss. (U. S.) 44, 17 Fed. Cas. No. 10,105; Earl *v.* Raymond, 4 McLean (U. S.) 233, 8 Fed. Cas. No. 4,243; *Ex p.* Balch, 3 McLean (U. S.) 221, 2 Fed. Cas. No. 790.

See 1 Cent. Dig. tit. "Abatement and Revival," § 87.

Pendency of bill in equity in state court.— The pendency of a suit in equity in a state court cannot be pleaded in abatement of a like suit involving the same subject-matter and between the same parties in a federal court. Latham *v.* Chafee, 7 Fed. 520; Hughes *v.* Elsher, 5 Fed. 263.

Pendency of probate proceedings in state court.— The pendency of administration proceedings in a state probate court does not bar proceedings in a federal court involving the same issues. Holton *v.* Guinn, 76 Fed. 96.

Pendency of replevin in state court.— A suit in a state court by replevin or by an attachment of the property cannot supersede the right of a court of admiralty to proceed by a suit *in rem* to enforce a right or lien against the property. Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559.

95. North Muskegon *v.* Clark, 62 Fed. 694, 22 U. S. App. 522, 10 C. C. A. 591; Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 61 Fed. 199; Dwight *v.* Central Vermont R. Co., 9 Fed. 785; Hughes *v.* Elsher, 5 Fed. 263. *Contra*, Radford *v.* Folsom, 14 Fed. 97.

96. International, etc., R. Co. *v.* Barton, (Tex. Civ. App. 1900) 57 S. W. 292; Marshall *v.* Otto, 59 Fed. 249.

97. *California.*— Russell *v.* Alvarez, 5 Cal. 48.

New Jersey.— Vail *v.* Central R. Co., (N. J. 1886) 4 Atl. 663.

New York.—Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782; Oneida County Bank *v.* Bonney, 101 N. Y. 173, 4 N. E. 332; Litchfield *v.* Brooklyn, 13 Misc. (N. Y.) 693, 34 N. Y. Suppl. 1090; Walsh *v.* Durkin, 12 Johns. (N. Y.) 99; Lorillard F. Ins. Co. *v.* Meshural, 7 Rob. (N. Y.) 308; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606.

North Carolina.— Sloan *v.* McDowell, 75 N. C. 29.

Pennsylvania.— Smith *v.* Lathrop, 44 Pa. St. 326, 84 Am. Dec. 448; McGeorge *v.* Hancock, Steele, etc., Co., 11 Phila. (Pa.) 602, 32 Leg. Int. (Pa.) 372.

Washington.— State *v.* Superior Ct., 14 Wash. 686, 45 Pac. 670; Caine *v.* Seattle, etc., R. Co., 12 Wash. 596, 41 Pac. 904.

But see Wilson *v.* Milliken, (Ky. 1898) 44 S. W. 660, wherein it was held that the pendency of another action for the same cause in a federal court of the same state is a good plea in abatement. To same effect is Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 21.

Pendency of libel in federal court.— In an action for freight-money brought in a state court it is not a sufficient answer to set up that the vessel has been libelled for the non-delivery of freight in a federal court. Russell *v.* Alvarez, 5 Cal. 48.

Pendency of proceedings to set aside assignment for creditors in federal court.— An action pending in the district court of the United States, brought by creditors of an assignor to set aside an assignment made for the benefit of creditors, is not a bar to a proceeding in the state court to enjoin the assignee from paying dividends under such assignment. Wurtz *v.* Hart, 13 Iowa 515.

98. Martin *v.* Baldwin, 19 Fed. 340.

Stay of subsequent suit.— In Vail *v.* Central R. Co., (N. J. 1886) 4 Atl. 663, it was

K. Actions at Law and in Equity. Since the jurisdiction of equity is limited to cases in which the law does not afford a complete and adequate remedy, it has been held by cases both at law and in equity that two causes, one at law and one in equity, are *ex necessitate* so dissimilar that the pendency of one cannot be pleaded in abatement of the other.[99]

L. Suits in Equity — 1. Statement of Rule. As a general rule the pendency of a prior suit in chancery may be pleaded to the prosecution of a subsequent suit in chancery between the same parties and upon the same equity.[1]

2. Practice on Sustaining Plea. In equity, where the defense of another suit pending is duly made and established, the court, it seems, will dismiss the second

said that defendant's remedy in the case of a prior suit pending in a federal court was to apply to the court of the state to stay the subsequent suit or to refuse to enter final judgment until the former suit shall have been discontinued.

99. *Alabama.*— Humphries *v.* Dawson, 38 Ala. 199.

Connecticut.— Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433.

Illinois.— Kelderhouse *v.* Hall, 116 Ill. 147, 4 N. E. 652.

Iowa.— Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358.

Kentucky.— Peak *v.* Bull, 8 B. Mon. (Ky.) 428; Curd *v.* Lewis, 1 Dana (Ky.) 351.

Maine.— Haskins *v.* Lombard, 16 Me. 140, 33 Am. Dec. 645.

Massachusetts.— Connihan *v.* Thompson, 111 Mass. 270; Colt *v.* Partridge, 7 Metc. (Mass.) 570.

Michigan.—Wheeler *v.* Hatheway, 58 Mich. 77, 24 N. W. 780; Robertson *v.* Baxter, 57 Mich. 127, 23 N. W. 711; McGunn *v.* Hanlin, 29 Mich. 476; Joslin *v.* Millspaugh, 27 Mich. 517; Granger *v.* Wayne Circuit Judge, 27 Mich. 406, 15 Am. Rep. 195.

New Jersey.— Fulton *v.* Golden, 25 N. J. Eq. 353; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

New York.— Consolidated Fruit Jar Co. *v.* Wisner, 38 N. Y. App. Div. 369, 56 N. Y. Suppl. 723; Livingston *v.* Kane, 3 Johns. Ch. (N. Y.) 224.

Oregon.— Farris *v.* Hayes, 9 Oreg. 81.

Pennsylvania.—Brooke *v.* Phillips, 6 Phila. (Pa.) 392, 24 Leg. Int. (Pa.) 132.

South Carolina.—Denny *v.* Garden, 2 Brev. (S. C.) 70.

Tennessee.— Lockwood *v.* Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

Virginia.—Williamson *v.* Paxton, 18 Gratt. (Va.) 475; Warwick *v.* Norvell, 1 Rob. (Va.) 308.

Wisconsin.— Quinn *v.* Quinn, 27 Wis. 168; Wilson *v.* Jarvis, 19 Wis. 597.

United States.— Griswold *v.* Bacheller, 77 Fed. 857; Thorne *v.* Towanda Tanning Co., 15 Fed. 289; Graham *v.* Meyer, 4 Blatchf. (U. S.) 129, 10 Fed. Cas. No. 5,673; Hunt *v.* Danforth, Brunn. Col. Cas. (U. S.) 678, 12 Fed. Cas. No. 6.888; Paul *v.* Hulbert, 24 Int. Rev. Rec. 53, 18 Fed. Cas. No. 10,841.

See 1 Cent. Dig. tit. "Abatement and Revival," § 100.

But see Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983, and State *v.* North Lincoln St. R. Co., 34 Nebr. 634, 52 N. W. 369, wherein it was held that the pendency of an equitable action might be pleaded in abatement of a suit at law based upon substantially the same facts.

Damages and specific performance.— The pendency of an action at law by the owner of land through which a railroad passes, for damages for the appropriation of the right of way, cannot be pleaded in abatement of an equitable action by the company against the landowner to compel specific performance of an agreement to convey the right of way in controversy. Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358.

Debt and creditor's suit.— The pendency of an action at law to recover a judgment for a debt does not preclude the plaintiff from proceeding by a suit in chancery to subject to the payment of his demand property fraudulently conveyed by the debtor. Anderson *v.* Newman, 60 Miss. 532.

Compelling election between remedies.— But the court may compel a plaintiff suing at law and in equity at the same time for the same cause to elect in which court he will proceed, and stay one suit until the other is determined. See Election of Remedies.

1. *Indiana.*— Loyd *v.* Reynolds, 29 Ind. 299.

Kentucky.— Savary *v.* Taylor, 10 B. Mon. (Ky.) 334; Curd *v.* Lewis, 1 Dana (Ky.) 351.

Maryland.— McKaig *v.* Piatt, 34 Md. 249; Seebold *v.* Lockner, 30 Md. 133.

New Jersey.— Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

Ohio.— Weil *v.* Guerin, 42 Ohio St. 299.

Oregon.— Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326.

Pennsylvania.— Streater *v.* Ricketts, 2 Kulp (Pa.) 529.

Wisconsin.— Rowley *v.* Williams, 5 Wis. 151.

See 1 Cent. Dig. tit. "Abatement and Revival," § 26.

Conveyance subsequent to bill.— A bill for a partition of lands filed by a recent grantee of a part thereof without notice that another bill for the same purpose, filed seventeen years before, was still pending, will not be dismissed where such prior bill, by reason of conveyances to other parties, will not justify the making of a decree, and it appears that under the new bill the interests of all parties can be speedily adjusted. Parcell *v.* Demorest, 48 N. J. Eq. 524, 22 Atl. 351.

bill, or, if the prior suit be in the same court and defective, a dismissal of the first suit may be ordered and complainant permitted to proceed in the second bill.[2]

M. Accounting by Personal Representative — 1. Proceedings by Same Creditor. It has been held that if a creditor who has filed a bill in chancery against an executor or administrator for an account afterward cites him to account before the surrogate, the pendency of the suit in chancery may be set up before the surrogate in the nature of a plea in abatement.[3]

2. Proceedings by Different Creditors. In analogy to the established right of different creditors to proceed simultaneously against the executor or administrator, in the same or different courts of equity, until a decree has been made in one of the courts, so that all may come in under the decree, the simple institution of a suit by one creditor in a court of chancery for an account, if the suit has not proceeded to a decree, is no bar to a proceeding instituted before the surrogate by another creditor for an account.[4]

N. Suits in Rem and in Personam — 1. Libel in Rem and Action at Law. As a general rule a libel *in rem* and an action at law for the same demand are not pleadable in abatement of each other.[5]

2. Attachment and Action in Personam[6] — a. Doctrine that Attachment Abates Action. The authorities are not in accord as to the effect of the pendency of an attachment suit on a subsequent action *in personam*. In some states it is held that an attachment is a suit at law admitting any plea appropriate to a common-law action on the same liability, and to which the pendency of another suit between the same parties for the same cause is a good plea in abatement.[7]

b. Doctrine that Attachment Does Not Abate Action. In other states it is held that the pendency of an attachment suit will not, of itself, abate a subsequent suit *in personam* for the same cause.[8]

2. Curd *v.* Lewis. 1 Dana (Ky.) 351; Moore *v.* Holt, 3 Tenn. Ch. 141; Anderson *v.* Piercy, 20 W. Va. 282.

Election between suits.— In Gaines *v.* Park, 3 B. Mon. (Ky.) 223, 38 Am. Dec. 185, it was held that in the case of two suits in equity pending at the same time the court would compel an election by the plaintiff as to which suit he would further prosecute. See also Election of Remedies.

3. Matter of De Pierris, 79 Hun (N. Y.) 279, 29 N. Y. Suppl. 360; Rogers *v.* King, 8 Paige (N. Y.) 210.

Filing claim and action.— In Indiana the mode prescribed by statute for filing claims against a decedent's estate — entering them upon the appearance docket and afterward, if necessary, upon the issue docket — is a mode of getting them into court to receive final adjudication as in a suit at law. Accordingly a claim so filed is a bar to an action against the administrator upon a note due from decedent. Morgan *v.* Squier, 8 Ind. 511.

4. Rogers *v.* King, 8 Paige (N. Y.) 210.

5. Granger *v.* Wayne Circuit Judge, 27 Mich. 406, 15 Am. Rep. 195; The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 944; Wolf *v.* Cook, 40 Fed. 432; Providence Washington Ins. Co. *v.* Wager, 35 Fed. 364; Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279; The Ship Prince Albert, 5 Ben. (U. S.) 386, 19 Fed. Cas. No. 11,426; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559; Harmer *v.* Bell, 22 Eng. L. & Eq. 62.

Libel against vessel and action against owner.— The pendency of a libel in admiralty against a vessel is no bar to an attachment suit at law against the owners of the vessel for the same cause of action. Wolf *v.* Cook, 40 Fed. 432.

6. As to attachment in another jurisdiction see *supra*, II, J, 2, b.

7. Reynolds *v.* McClure, 13 Ala. 159; Dean *v.* Massey, 7 Ala. 601; McKinsey *v.* Anderson, 4 Dana (Ky.) 62; Scott *v.* Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71.

Attachment against non-resident.—In Challiss *v.* Smith, 25 Kan. 563, plaintiff commenced an action against defendant, a non-resident, attached certain real estate, made service by publication, and obtained judgment and an order of sale of the attached property. The defendant did not personally appear, and jurisdiction was obtained in the attachment by publication only. Thereafter, and before any sale of the attached property, defendant coming into the state, plaintiff, ignoring the attachment proceedings, commenced an action on the original indebtedness and caused the arrest of defendant, who pleaded in abatement the attachment proceedings. It was held that in the absence of evidence that the attachment proceedings had been consummated by a sale, or that they were valueless by reason of defect of title in the property attached, encumbrances thereon, or otherwise, the plea was properly sustained.

8. *Illinois.*— Haldeman *v.* Starrett, 23 Ill. 393; Branigan *v.* Rose, 8 Ill. 123.

Louisiana.— Gibson *v.* Huie, 14 La. 124.

Maryland.— Cole *v.* Flitcraft, 47 Md. 312.

New York.—Bowne *v.* Joy, 9 Johns. (N. Y.) 221.

Pennsylvania.— Swartz *v.* Lawrence, 12 Phila. (Pa.) 181, 34 Leg. Int. (Pa.) 114.

3. Garnishment and Action in Personam[9] — a. Doctrine that Garnishment Abates Action. There is also a wide diversity of views entertained by the courts as to the effect of garnishment proceedings when the garnishee is sued by his creditor, defendant in attachment. It is the doctrine in some jurisdictions that where one is summoned as a garnishee in an attachment proceeding, and defendant in attachment, before judgment entered against the garnishee sequestering or condemning the debt, sues the garnishee for that debt, the garnishee may plead the attachment in abatement.[10]

b. Doctrine that Garnishment Does Not Abate Action. In other jurisdictions it is held that the pendency of garnishment proceedings is not pleadable in abatement of an action against the garnishee by his creditor, defendant in attachment.[11] Protection is afforded the garnishee in such jurisdictions by either suspending all proceedings in the action until the garnishment suit is determined,[12] or so molding the judgment as to stay execution for so much of the debt as ought to be held until the garnishee is set free from the garnishment proceedings.[13]

c. Abatement of Garnishment by Action. In some states the rule obtains that an attachment by trustee process may be made notwithstanding an action is pending in favor of the principal debtor against the trustee to recover the same debt.[14] But the court in such case will be careful to see that the trustee is not subjected to any danger of being compelled to pay his debt twice.[15] The practice

9. As to garnishment in another jurisdiction see *supra*, II, J, 2, c.

10. *Iowa.*— Clise *v.* Freeborne, 27 Iowa 280.

Maryland.— Brown *v.* Somerville, 8 Md. 444.

Michigan.— Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505; Near *v.* Mitchell, 23 Mich. 382.

New York.— Sargent *v.* Sargent Granite Co., 31 Abb. N. Cas. (N. Y.) 131, 6 Misc. (N. Y.) 384, 26 N. Y. Suppl. 737; Bowne *v.* Joy, 9 Johns. (N. Y.) 221.

Pennsylvania.— Fitzgerald *v.* Caldwell, 1 Yeates (Pa.) 274.

England.— Brook *v.* Smith, 1 Salk. 280; McDaniel *v.* Hughes, 3 East 267.

11. *California.*— McKeon *v.* McDermott, 22 Cal. 667, 83 Am. Dec. 86; Pierson *v.* McCahill, 21 Cal. 122; McFadden *v.* O'Donnell, 18 Cal. 160.

Georgia.— Shealy *v.* Toole, 56 Ga. 210.

Idaho.— Van Ness *v.* McLeod, 2 Idaho 1147, 31 Pac. 798.

Maine.— Ladd *v.* Jacobs, 64 Me. 347.

Massachusetts.— Creed *v.* Creed, 161 Mass. 107, 36 N. E. 749; Winthrop *v.* Carlton, 8 Mass. 456.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271.

New Hampshire.— Drew *v.* Towle, 27 N. H. 412; Wadleigh *v.* Pillsbury, 14 N. H. 373.

New Mexico.— Herlow *v.* Orman, 3 N. Mex. 291, 6 Pac. 935.

Pennsylvania.— Brown *v.* Scott, 51 Pa. St. 357.

Texas.— McRee *v.* Brown, 45 Tex. 503.

Vermont.— Hicks *v.* Gleason, 20 Vt. 139; Morton *v.* Webb, 7 Vt. 123.

England.— Nathan *v.* Giles, 5 Taunt. 558.

Assignment before garnishment.— In an action on a note by the assignee of the payee against the maker, the pendency of an attachment suit against the payee, wherein the maker was sued as garnishee, constitutes no defense if the assignment was made before the garnishment. Wilson *v.* Murphy, 45 Mo. 409.

12. *Alabama.*— Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463.

California.— McKeon *v.* McDermott, 22 Cal. 667; 83 Am. Dec. 86; Pierson *v.* McCahill, 21 Cal. 122; McFadden *v.* O'Donnell, 18 Cal. 160.

Idaho.—Van Ness *v.* McLeod, 2 Idaho 1147, 31 Pac. 798.

Kansas.— McDonald *v.* Carney, 8 Kan. 20.

Massachusetts.— Thorndike *v.* De Wolf, 6 Pick. (Mass.) 120; Winthrop *v.* Carlton, 8 Mass. 456.

Minnesota.— Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310.

New Hampshire.— Foster *v.* Dudley, 30 N. H. 463; Wadleigh *v.* Pillsbury, 14 N. H. 373.

Rhode Island.— Smith *v.* Carroll, 17 R. I. 125, 21 Atl. 343.

Vermont.— Spicer *v.* Spicer, 23 Vt. 678; Trombly *v.* Clark, 13 Vt. 118.

13. *Alabama.*— Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463.

Georgia.— Shealy *v.* Toole, 56 Ga. 210.

Minnesota.— Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271.

Montana.— Marden *v.* Wheelock, 1 Mont. 49.

Vermont.— Spicer *v.* Spicer, 23 Vt. 678.

14. *Maine.*— Smith *v.* Barker, 10 Me. 458.

Massachusetts.— Whipple *v.* Robbins, 97 Mass. 107, 93 Am. Dec. 64.

New Hampshire.— Foster *v.* Dudley, 30 N. H. 463.

Pennsylvania.— Sweeny *v.* Allen, 1 Pa. St. 380.

Rhode Island.— Smith *v.* Carroll, 17 R. I. 125, 21 Atl. 343.

Vermont.—Trombly *v.* Clark, 13 Vt. 118.

15. Jones *v.* Wood, 30 Vt. 268.

where the garnishment suit is subsequent in point of time to the action, and the fact is brought to the attention of the court, is to suspend all proceedings in the action or stay execution of the judgment therein until the garnishment suit is determined.[16]

0. Suits to Foreclose Lien and for Personal Judgment — 1. In General. The pendency of a suit in chancery for attaching and enforcing a lien is no cause for abating a suit at law on a note for the same debt.[17]

2. Foreclosure of Mortgage and Action in Personam. Upon the same principle a suit in equity to foreclose a mortgage and a suit at law to recover the debt secured by the mortgage may be pending at the same time. Neither is pleadable in abatement of the other.[18]

3. Foreclosure of Mechanic's Lien and Action in Personam. Upon the same principle, proceedings to foreclose a mechanic's lien and a suit to recover the debt secured by the lien may be pending at the same time.[19]

16. *Michigan.*— Burt *v.* Reilly, 82 Mich. 251, 46 N. W. 380.

Minnesota.— Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310.

Montana.— Marden *v.* Wheelock, 1 Mont. 49.

New Hampshire.— Foster *v.* Dudley, 30 N. H. 463.

Rhode Island.— Smith *v.* Carroll, 17 R. I. 125, 21 Atl. 343.

Vermont.— Trombly *v.* Clark, 13 Vt. 118.

Plea puis darrein continuance.— In Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505, it was held that the proper practice was to bring the fact of the subsequent garnishment to the attention of the court by plea *puis darrein continuance.*

17. Turner *v.* New Farmers' Bank, (Ky. 1897) 39 S. W. 425; Julian *v.* Pilcher, 2 Duv. (Ky.) 254; Peak *v.* Bull, 8 B. Mon. (Ky.) 428; Black *v.* Lackey, 2 B. Mon. (Ky.) 257,— the reason being that the two suits are brought for different purposes and are not commensurate in their objects. The chancery suit could afford no relief beyond the effects sought to be attached, and the creditor should not thereby be deprived of the right to obtain a personal judgment for the debt which might be essential to his security and ultimate satisfaction.

Second suit for personal judgment.— The pendency of an action on a promissory note secured by a mortgage, to have the amount due on the note found, and for a decree for the sale of the property described in the mortgage, but in which no personal judgment was demanded, is not a bar to another action upon the note against the maker for a personal judgment. Spence *v.* Union Cent. L. Ins. Co., 40 Ohio St. 517.

18. *Arkansas.*— Very *v.* Watkins, 18 Ark. 546.

Georgia.— Heath *v.* Bates, 70 Ga. 633; Clark *v.* Tuggle, 18 Ga. 604.

Kentucky.— Peak *v.* Bull, 8 B. Mon. (Ky.) 428; Black *v.* Lackey, 2 B. Mon. (Ky.) 257.

Michigan.— Joslin *v.* Millspaugh, 27 Mich. 517.

Missouri.— Jacobs *v.* Lewis, 47 Mo. 344.

New Jersey.— Copperthwait *v.* Dummer, 18 N. J. L. 258.

New York.— Gillette *v.* Smith, 18 Hun (N. Y.) 10; Suydam *v.* Bartle, 9 Paige (N. Y.) 294; Jones *v.* Conde, 6 Johns. Ch. (N. Y.) 77; Dunkley *v.* Van Buren, 3 Johns. Ch. (N. Y.) 330.

Ohio.— Spence *v.* Union Cent. L. Ins. Co., 40 Ohio St. 517.

Virginia.— Priddy *v.* Hartsook, 81 Va. 67.

Wisconsin.—Witter *v.* Neeves, 78 Wis. 547, 47 N. W. 938.

United States.— Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279.

Actions on note and to foreclose.— The pendency of an action on a note is not a bar to an action to foreclose a mortgage given to secure the payment of the note. Copperthwait *v.* Dummer, 18 N. J. L. 258; Gillette *v.* Smith, 18 Hun (N. Y.) 10; Witter *v.* Neeves, 78 Wis. 547, 47 N. W. 938.

Subsequent action by assignee.— The pendency of an action at law brought by the original payee of a note secured by a mortgage is not a bar to a proceeding in chancery by the assignee to foreclose the mortgage. Guest *v.* Byington, 14 Iowa 30.

Suits for different instalments.— The pendency of a suit to foreclose a mortgage for the non-payment of one instalment on a note is not sufficient ground for the abatement of a subsequent suit to foreclose the same mortgage based on the non-payment of the next instalment on the same note, although the parties to the note and to the mortgage are the same. Jacobs *v.* Lewis, 47 Mo. 344.

19. Culver *v.* Elwell, 73 Ill. 536; Delahay *v.* Clement, 4 Ill. 201; Gambling *v.* Haight, 59 N. Y. 354; Raven *v.* Smith, 71 Hun (N. Y.) 197, 24 N. Y. Suppl. 601; Maxey *v.* Larkin, 2 E. D. Smith (N. Y.) 540; Gridley *v.* Rowland, 1 E. D. Smith (N. Y.) 670; Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600.

Actions on note and to foreclose lien.— An action upon a note given to a sub-contractor as collateral security for the payment of work done by him in the erection of a building may be maintained at the same time with proceedings to enforce a mechanic's lien filed by him against the premises. Gambling *v.* Haight, 59 N. Y. 354. But see *contra*, Ogden *v.* Bodle, 2 Duer (N. Y.) 611.

Actions for wages and to foreclose lien.— The pendency of proceedings to enforce a mechanic's lien is no bar to the maintenance of an action to recover from the contractor for wages. Maxey *v.* Larkin, 2 E. D. Smith (N. Y.) 540.

P. Actions by Attachment. It has been held that the pendency of one attachment may be pleaded in abatement of a subsequent attachment between the same parties for the same cause of action in the same county.[20]

Q. Proceedings by Mandamus. The pendency of a proceeding by mandamus may be pleaded in abatement of a subsequent mandamus proceeding where the parties and the matter are the same, the practice being assimilated to that in other civil suits.[21]

R. Mandamus and Other Action. As mandamus is a civil action, the plea of the pendency of another suit is as applicable to it as to any other civil action.[22]

S. Simultaneous Actions. Where two suits are brought simultaneously, each, it has been held, abates the other. The complaint, as a penalty for the misuse of the process of the court, is deemed bad in both actions.[23] But if two writs be sued out on the same day and both are served at different times, the one first served will abate the other.[24]

T. Set-Off or Counterclaim in Prior Action — 1. EFFECT OF SET-OFF IN PRIOR ACTION. It is a good plea in abatement that in a prior suit the plaintiff in the second suit, defendant in the first, filed a counterclaim for the same cause of action.[25]

2. ABILITY TO SET OFF CLAIM IN PRIOR ACTION. In the absence of a statute requiring the set-off of all claims in a pending suit, a party having a claim against another may institute an action thereon, although at the same time an action is pending against him by his debtor wherein he might have set up his claim as a counterclaim.[26]

U. Prior Proceeding by Petition. In the application of the doctrine that the pendency of one proceeding is a bar to a subsequent proceeding for the same cause between the same parties it has been held that it matters not that the prior proceeding is not an action, but was instituted by the petition of the party who sets it up as a bar.[27]

20. James *v.* Dowell, 7 Sm. & M. (Miss.) 333; Harris *v.* Linnard, 9 N. J. L. 73.

As to attachment in another jurisdiction see *supra*, II, J, 2, b.

Attachment and bail writ.— A proceeding by attachment and another by bail writ cannot be pending at the same time between the same parties. Clark *v.* Tuggle, 18 Ga. 604.

First attachment insufficient.— A complainant obtaining an attachment in chancery in one county and levying it upon property not sufficient to pay the debt is no objection to his prosecuting another suit by attachment in another county and attaching other property. Savary *v.* Taylor, 10 B. Mon. (Ky.) 334.

21. State *v.* Sumter County, 20 Fla. 859. But see Foote *v.* Myers, 60 Miss. 790, wherein it was held that the existence of a proceeding by a person individually for a mandamus against the secretary of state is not a bar to the prosecution of a suit for mandamus by the district attorney on the relation of such person against the secretary of state, although both proceedings are founded upon the same state of facts and seek the accomplishment of the same performance.

22. People *v.* Chicago, 53 Ill. 424; People *v.* Wiant, 48 Ill. 263, 268; People *v.* Warfield, 20 Ill. 159; State *v.* North Lincoln St. R. Co., 34 Nebr. 634, 52 N. W. 369; State *v.* Matley, 17 Nebr. 564, 24 N. W. 200. But see Calaveras County *v.* Brockway, 30 Cal. 325, wherein it was held that the writ of mandamus was a high prerogative writ to abate or bar which a plea that another action was pending for the same cause was not available. See also State *v.* Kreider, 21 La. Ann. 482, wherein it was held that the plea of *lis pendens* was not available where it is shown that a suit by mandamus had been brought in the name of the state on the relation of a claimant for office and was still pending, and another suit had been brought in the name of the state by the district attorney, joining the same claimant for office as in the mandamus suit.

23. Beach *v.* Norton, 8 Conn. 71; Wales *v.* Jones, 1 Mich. 254; Davis *v.* Dunklee, 9 N. H. 545.

Rule in Georgia.— In Georgia a suitor is put to his election where two actions are commenced simultaneously for the same cause. Ga. Code, § 3737; Heath *v.* Bates, 70 Ga. 633.

24. Morton *v.* Webb, 7 Vt. 123.

25. Pennsylvania R. Co. *v.* Davenport, 154 Pa. St. 111, 25 Atl. 890; Tomlinson *v.* Nelson, 49 Wis. 679, 6 N. W. 366; Demond *v.* Crary, 1 Fed. 480.

Set-off in second suit.— In Stroh *v.* Uhrich, 1 Watts & S. (Pa.) 57, it was held that the pendency of a suit is no objection to a set-off of the debt upon which it is founded in another action between the same parties.

26. Jemison Hardware Co. *v.* Godkin, 112 Mich. 57, 70 N. W. 428; Seventh-Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274, 54 N. W. 759; Lignot *v.* Redding, 4 E. D. Smith (N. Y.) 285.

27. Groshon *v.* Lyon, 16 Barb. (N. Y.) 461.

V. Proceedings by Scire Facias. While a scire facias to make parties is in some of its features in the nature of a suit, it is more properly a continuation of the old case than the inception of a new one, and it is not such a suit or action as will abate under a plea setting out the pendency of another scire facias between the same parties and for the same purpose.[28]

W. Second Action in Abatement of First. The original or first suit cannot be abated by a plea that another action for the same cause was afterward commenced.[29]

X. Trial of Issue Raised by Plea — 1. At Common Law. At common law the issues arising upon a plea of another action pending must be disposed of before pleading to the merits.[30]

2. In Equity — a. Setting Plea Down for Argument. In equity several courses are open to the complainant on the filing of a plea of another suit pending. He may set such plea down for argument on its sufficiency;[31] but this course admits the truth of the plea and it must be allowed if not defective in form.[32]

b. Joinder of Issue upon Facts of Plea. Complainant may join issue upon the facts of the plea.[33]

c. Reference to Master — (1) *In General.* The complainant may obtain a reference to a master or other officer to ascertain whether both suits are for the same matter, which is the usual English practice.[34] Or the complain-

28. Heath *v.* Bates, 70 Ga. 633.

29. Numerous authorities hold that though the pendency of another suit may be pleaded in abatement of a suit subsequently commenced, the converse of the proposition does not hold true.

Indiana.—Sherwood *v.* Hammond, 4 Blackf. (Ind.) 504.

Kansas.—Rizer *v.* Gillpatrick, 16 Kan. 564.

Maryland.—U. S. Bank *v.* Merchants Bank, 7 Gill (Md.) 415.

Massachusetts.— Webster *v.* Randall, 19 Pick. (Mass.) 13; Buffum *v.* Tilton, 17 Pick. (Mass.) 510.

Michigan.— Callanan *v.* Port Huron, etc., R. Co., 61 Mich. 15, 27 N. W. 718.

New Hampshire.—Rogers *v.* Odell, 39 N. H. 452.

New York.— Nicholl *v.* Mason, 21 Wend. (N. Y.) 339; Haight *v.* Holley, 3 Wend. (N. Y.) 258; Embree *v.* Hanna, 5 Johns. (N. Y.) 101.

Ohio.— Spinning *v.* Ohio L. Ins., etc., Co., 2 Disney (Ohio) 336.

Texas.— Connor *v.* Saunders, 9 Tex. Civ. App. 56, 29 S. W. 1140.

Wisconsin.— Wood *v.* Lake, 13 Wis. 84.

United States.— Renner *v.* Marshall, 1 Wheat. (U. S.) 215, 4 L. ed. 74.

See 1 Cent. Dig. tit. "Abatement and Revival," § 33.

30. Peck *v.* Kirtz, 15 N. Y. St. 598.

Disposition of issue.— The court cannot dismiss a case on motion, on the ground of a former suit pending, when a plea of such suit pending has been replied to and the issue thereon remains undisposed of. Gruler *v.* McRoberts, 48 Mich. 316, 12 N. W. 201.

31. Moore *v.* Holt, 3 Tenn. Ch. 141; Macey *v.* Childress, 2 Tenn. Ch. 23; Searight *v.* Payne, 1 Tenn. Ch. 186; Montgomery *v.* Olwell, 1 Tenn. Ch. 183.

32. Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479; Rowley *v.* Williams, 5 Wis. 151; Tarleton *v.* Barnes, 2 Keen 632. But see McEwen *v.* Broadhead, 11 N. J. Eq. 129, wherein it was held that the only question for the court to determine when the plea of another action pending is set down for argument is whether the plea is good in point of form. If it is, then complainant may still reply if he desires, or he may take a reference to a master to ascertain the fact upon which the plea stands.

33. McEwen *v.* Broadhead, 11 N. J. Eq. 129; Allen *v.* Allen, 3 Tenn. Ch. 145; Searight *v.* Payne, 1 Tenn. Ch. 186; Montgomery *v.* Olwell, 1 Tenn. Ch. 183.

Practice in New Jersey.— In New Jersey, where a plea of a former suit pending is pleaded, complainant may take issue upon the facts of the plea, or a reference to a master to ascertain the fact whether both suits are for the same matter. If he does neither, defendant must set the plea down for argument. McEwen *v.* Broadhead, 11 N. J. Eq. 129.

Replication to plea.— In Tennessee the complainant may join issue on the plea of a former suit pending, and, whether a formal replication is required or not, a general replication, if filed, can do no harm. Allen *v.* Allen, 3 Tenn. Ch. 145.

34. *New Jersey.*— McEwen *v.* Broadhead, 11 N. J. Eq. 129.

New York.— Hart *v.* Philips, 9 Paige (N. Y.) 293.

North Carolina.— Brice *v.* Mallett, 3 N. C. 432.

Tennessee.—Searight *v.* Payne, 1 Tenn. Ch. 186.

Vermont.— Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479.

Wisconsin.— Rowley *v.* Williams, 5 Wis. 151.

England.— Beames' Orders, p. 176; Urlin *v.* Hudson, 1 Vern. 332; Jones *v.* Segueira, 1 Phil. 82; Long *v.* Storie, 9 Hare 542; Tarleton *v.* Barnes, 2 Keen 632.

Practice in Vermont.—In Vermont the prac-

ant may admit as much of the plea as he likes and take a reference for the remainder.[35]

(II) *Nature of Reference.* It has been held that where defendant pleads another suit pending for the same cause, the reference to the master to inquire and report as to the truth of the plea is a mere preliminary proceeding. And where the report is in favor of the truth of the plea no further proceedings can be had thereon by either party until the plea has been argued and disposed of.[36]

(III) *Manner of Obtaining Reference.* It seems that a reference as to whether two suits are for the same matter is obtained by plea and not by motion,[37] except where two suits are brought in the name of an infant. In such case it is a motion of course to obtain a reference on the statement of counsel that both suits are for the same purpose, to see which of them is most for the infant's benefit, and so most proper to be proceeded with.[38]

3. Under the Codes. By the code the distinction in the method of pleading another action pending and of proceeding upon the issue in that respect has been abolished. The plea of another action pending is joined by the answer with matter going to the merits, and all the issues raised by the answer are tried together.[39] If the jury find for defendant on such plea, other issues raised by the answer need not be considered.[40]

4. Proof of Plea — a. Necessity of Proof. The pendency of a former suit between the same parties cannot, it seems, be determined by the pleadings. There must be proof of the former suit.[41]

b. Burden of Proof. A plea of another action pending is an affirmative plea and casts the burden of proof on the party pleading it.[42]

tice on the filing of a plea of another action pending is not to reply to such a plea, nor to set it down for argument, but to refer it on motion at once and of course to a master, to ascertain and report whether or not both suits are for the same matter. The plaintiff may except to the master's report and bring the matter on to be argued before the court, and if he conceives the plea to be defective in form or otherwise, independent of the mere truth of the matter pleaded, he may set down the plea to be argued as in the case of pleas in general. Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479.

Practice in Wisconsin.— In Rowley *v.* Williams, 5 Wis. 151, 153, the court said: "As we have no masters in chancery in this state, nor any corresponding officer, with correlative powers and duties, many of the functions of that officer devolve upon the court, and we see no reason why a plea of [another suit pending] may not be disposed of by the court, as the like duties are performed in respect to other pleas, in like manner as the court would dispose of it upon hearing after the report of the master."

Reference to clerk of court.— Upon a plea in equity of another action pending, it is proper practice to refer the plea to the clerk to report whether the suits are for the same cause of action. Green *v.* Neal, 2 Heisk. (Tenn.) 217.

Reference to court commissioner.— In equity, on the filing of a plea of another action pending, the plea will be referred to a commissioner of the court to report upon the facts. Johnston *v.* Bower, 4 Hen. & M. (Va.) 487.

35. Searight *v.* Payne, 1 Tenn. Ch. 186; Jones *v.* Segueira, 1 Phil. 82.

36. Hart *v.* Philips, 9 Paige (N. Y.) 293, wherein it was held that where a defendant pleads another suit pending for the same cause, and the report of the master finds that the plea is true, defendant cannot obtain an order, on motion, to dismiss complainant's bill, but he must bring the cause on to be heard upon the plea and the master's report to enable the court to decide upon the validity of the plea.

37. Murray *v.* Shadwell, 17 Ves. Jr. 353.

38. Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479; Sullivan *v.* Sullivan, 2 Meriv. 40.

39. Peck *v.* Kirtz, 15 N. Y. St. 598; Montague *v.* Brown, 104 N. C. 161, 10 S. E. 186; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Hawkins *v.* Hughes, 87 N. C. 115.

40. Montague *v.* Brown, 104 N. C. 161; 10 S. E. 186; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Hawkins *v.* Hughes, 87 N. C. 115.

41. People *v.* De la Guerra, 24 Cal. 73, wherein it was held that the annexation in an answer of a copy of the record of a former suit did not do away with the necessity of a trial and the introduction of the record in evidence.

Time of proof of plea.— In an action of ejectment, where, in addition to the defense of abatement by reason of the pendency of a former action, defendant relies upon other defenses which go directly to the merits of the cause, it is better practice for the trial court to require defendant to present his evidence upon his plea in abatement at the opening of his defense. Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

42. Fowler *v.* Byrd, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4,999*a*.

c. Record Evidence. The proper proof to sustain a plea of another action pending is record evidence.[43]

d. Parol Evidence. In determining whether the first suit is for the same cause of action as the second, parol evidence has been held to be competent.[44] It has, however, been held that where no complaint is served in an action commenced by summons the subject of the controversy cannot be proven by parol evidence.[45]

e. Sufficiency of Proof. The defense of the pendency of another action for the same cause is a dilatory one not going to the merits, and hence of a character requiring full and complete proof to sustain it.[46]

f. Province of Court and Jury. It has been held that if there is any conflict in the evidence or objection by plaintiff to the court's passing upon the sufficiency of facts introduced in support of the plea of another action pending without the intervention of a jury, the question of fact may properly be referred to a jury.[47]

III. Death of Party.

A. Abatement or Survival of Action — 1. Effect of Death at Common Law. At common law a suit abated by the death of a party before trial or verdict. If the cause of action was one that did not survive, death put a final end to the suit. If the cause was one that survived or could survive, plaintiff or his personal representative was obliged to bring a new action against defendant or his personal representative.[48]

43. Smiley *v.* Dewey, 17 Ohio 156; Fowler *v.* Byrd, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4,999*a*.

Certified copy of record.— In Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600, it was held that the proper proof to support a plea of a former suit pending was a certified copy of the record of such suit.

Evidence supporting plea of former recovery.— A plea of the pendency of a prior action for the same cause between the same parties is supported by like evidence as a plea of a former recovery. Foster *v.* Napier, 73 Ala. 595.

Secondary evidence.— In Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496, it was held that, to support a plea of another action pending, secondary evidence was competent only when record evidence is shown to be unavailable.

Transcript of justice.— A transcript of the record of an action before a justice, showing the filing and approval of an appeal, is competent to show the pendency of a prior action between the same parties for the same cause. Bond *v.* White, 24 Kan. 45.

44. Damon *v.* Denny, 54 Conn. 253, 7 Atl. 409. But see Wright *v.* Maseras, 56 Barb. (N. Y.) 521, wherein it was held that the pendency of another action could not be proved by the testimony of witnesses.

Explanation of variance.—Where the pendency of a prior action is pleaded in abatement, and the record which is offered to sustain the plea shows a difference in the names of the plaintiffs in the two actions, parol evidence to explain the variance is not admissible without an averment in the plea that such plaintiffs are one and the same. Morris *v.* State, 101 Ind. 560.

Service of writ.— Where defendant pleads in abatement the pendency of another action for the same cause, commenced at the same time, the plaintiff, on a replication that the other action was not commenced and pending at the same time, may give evidence that it was commenced on a subsequent day, notwithstanding both writs bear date the same day. Davis *v.* Dunklee, 9 N. H. 545.

45. Phelps *v.* Gee, 29 Hun (N. Y.) 202; Curry *v.* Wiborn, 12 N. Y. App. Div. 1, 42 N. Y. Suppl. 178,— the reason for this being that by simply serving a summons plaintiff is under no legal obligation to follow it up with a complaint setting forth any particular claim or demand.

46. Hoag *v.* Weston, 10 N. Y. Civ. Proc. 92.

Papers purporting to be a complaint and answer in an action similarly entitled, but not shown to have been filed, served, or used in any action, with no evidence of a summons or its service, are insufficient to support a plea of another action pending. Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496.

Replication of nul tiel record.— The plea of another action pending is sustained as against a replication of *nul tiel record* by the bare record of an action between the same parties and involving the same issues. Merriam *v.* Baker, 9 Minn. 40.

47. Harmon *v.* McRae, 91 Ala. 401, 8 So. 548.

48. *Connecticut.*— Booth *v.* Northrop, 27 Conn. 325.

Georgia.— Henderson *v.* Alexander, 2 Ga. 81; Neal *v.* Haygood, 1 Ga. 514.

Illinois.— Brown *v.* Parker, 15 Ill. 307.

Iowa.— Shafer *v.* Grimes, 23 Iowa 550.

Maine.— Fulton *v.* Nason, 66 Me. 446; Treat *v.* Dwinel, 59 Me. 341; Dwinal *v.* Holmes, 37 Me. 97.

Massachusetts.— Putnam *v.* Putnam, 4 Pick. (Mass.) 139; Mellen *v.* Baldwin, 4 Mass. 480.

Missouri.— Kingsbury *v.* Lane, 21 Mo. 115; Carlisle *v.* Rawlings, 18 Mo. 166.

2. Rule as Modified by Statute. The inconvenience resulting from the defect in the common-law system of remedies on the death of a party led to the adoption of statutes which provided a mode for making the representative of the deceased party, where the cause of action survived, a party to the action;[49] and it is only by statute that the survivorship of the original action is given.[50]

3. Causes of Action Which Survive — a. What Law Governs — (I) *In General.* The question of the survivorship of an action on the death of a party depends on the laws of the state in which the cause of action accrued, and not on the laws of the state in which the action is brought.[51]

(II) *Actions in Federal Court.* If an action is brought in a federal court, and is based upon some act of congress, or arises under some rule of general law recognized in the courts of the Union, the question of survival will depend upon the statutes of the United States relating to that subject. Otherwise it depends upon the laws of the state in which it is commenced.[52]

New Hampshire.— Ela *v.* Rand, 4 N. H. 54.

New Jersey.—Hayden *v.* Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Freeborn *v.* Denman, 8 N. J. L. 142.

New York.— Matter of Palmer, 115 N. Y. 493, 22 N. E. 221; Holsman *v.* St. John, 90 N. Y. 461; Evans *v.* Cleveland, 72 N. Y. 486; Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Benjamin *v.* Smith, 17 Wend. (N. Y.) 208; Reed *v.* Butler, 11 Abb. Pr. (N. Y.) 128.

Ohio.— Carter *v.* Jennings, 24 Ohio St. 182.

Tennessee.— Lewis *v.* Outlaw, 1 Overt. (Tenn.) 139.

Texas.— Alexander *v.* Barfield, 6 Tex. 400.

Vermont.— Wright *v.* Eldred, 2 D. Chipm. (Vt.) 37.

Virginia.— Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120.

West Virginia.— Henning *v.* Farnsworth, 41 W. Va. 548, 23 S. E. 663.

United States.— Ransom *v.* Williams, 2 Wall. (U. S.) 313, 17 L. ed. 803; Warren *v.* Furstenheim, 35 Fed. 691, 1 L. R. A. 40; Griswold *v.* Hill, 1 Paine (U. S.) 483, 11 Fed. Cas. No. 5,834; Elliot *v.* Teal, 5 Sawy. (U. S.) 188, 8 Fed. Cas. No. 4,389.

England.— 2 Tidd's Prac. 1168; Wallop *v.* Irwin, 1 Wils. C. P. 315.

See 1 Cent. Dig. tit. "Abatement and Revival," § 294.

49. *Alabama.*— Evans *v.* Welch, 63 Ala. 250.

Illinois.— Brown *v.* Parker, 15 Ill. 307.

New York.— Heinmuller *v.* Gray, 35 N. Y. Super. Ct. 196.

Ohio.— Carter *v.* Jennings, 24 Ohio St. 182.

Vermont.— Whitcomb *v.* Cook, 38 Vt. 477.

United States.— Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Elliot *v.* Teal, 5 Sawy. (U. S.) 188, 8 Fed. Cas. No. 4,389.

England.— Flynn *v.* Perkins, 8 Jur. N. S. 1177.

50. Gould *v.* Carr, 33 Fla. 523, 15 So. 259, 24 L. R. A. 130; Neal *v.* Haygood, 1 Ga. 514; Matter of Palmer, 115 N. Y. 493, 22 N. E. 221; Matter of Schlesinger, 36 N. Y. App. Div. 77, 55 N. Y. Suppl. 514; Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256.

"**Judicial expositions** of the statutes which have been passed touching the survivorship of actions and causes of action seem to have been made in the same liberal spirit which has led to the various enactments. If the language of a statute will allow it, no reason is perceived why such a construction should not be adopted as will give to executors and administrators, for the benefit of heirs or creditors as the law may require, authority to institute or maintain suits for the recovery of such damages as the deceased party, whom they represent, may have suffered in his lifetime, either in his person or his property, by reason of the tortious or other acts of any person, in the same manner as the party injured might have done if living." Per May, J., in Hooper *v.* Gorham, 45 Me. 209, 213.

A statutory provision that a cause of action shall survive is equivalent to saying that the personal representative may sue on it. Rogers *v.* Windoes, 48 Mich. 628, 12 N. W. 882.

51. Davis *v.* New York, etc., R. Co., 143 Mass. 301, 9 N. E. 815; Whitford *v.* Panama R. Co., 23 N. Y. 465; Crowley *v.* Panama R. Co., 30 Barb. (N. Y.) 99; Beach *v.* Bay State Steamboat Co., 30 Barb. (N. Y.) 433; O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364; Needham *v.* Grand Trunk R. Co., 38 Vt. 294 (wherein it was held that a cause of action which by the rules of the common law is extinguished by the death of the party is by such death fully discharged unless it survives by force of some statute law of the state where it accrued); Burgess *v.* Gates, 20 Vt. 326.

Law of domicile.— The question of the survival of an action against the estate of a decedent is determined by the law of the jurisdiction within which he was domiciled at the time of his decease, and not by that of the jurisdiction where the cause of action arose. Whitten *v.* Bennett, 77 Fed. 271.

52. Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 19 S. Ct. 387, 43 L. ed. 677; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Henshaw *v.* Miller, 17 How. (U. S.) 212, 15 L. ed. 222; Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A.

b. Tests of Survivorship — (I) *In General.* As a general test an executor or administrator cannot come in and prosecute a suit unless he was in a condition to commence a like suit if it had not been begun by his testator or intestate.[53]

(II) *Assignability.* At common law, as a general rule, the qualities of assignability and survival are tests each of the other and are convertible terms.[54]

(III) *Nature and Not Form of Action.* The question whether an action survives depends upon the nature of the action and not upon the form of it.[55]

(IV) *Injury to Property and Not to Person.* It has been held that the line of demarcation at common law, separating those actions which survive from those which do not, is that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental; while in the latter the injury complained of is to the person, and the property and rights of property affected are merely incidental.[56]

c. Actions Ex Contractu. At common law the rule was a general one that

79; Great Western Min., etc., Co. *v.* Harris, 96 Fed. 503; Henderson *v.* Henshall, 54 Fed. 320, 7 U. S. App. 565, 4 C. C. A. 357; U. S. *v.* De Goer, 38 Fed. 80; Warren *v.* Furstenheim, 35 Fed. 691, 1 L. R. A. 40; Witters *v.* Foster, 26 Fed. 737; Hatfield *v.* Bushnell, 1 Blatchf. (U. S.) 393, 11 Fed. Cas. No. 6,211; Barker *v.* Ladd, 3 Sawy. (U. S.) 44, 2 Fed. Cas. No. 990.

Action for penalty.— The question whether an action for a penalty under a statute of the United States survives on the death of defendant is determined by the laws of the United States. Schreiber *v.* Sharpless, 110 U. S. 76, 3 S. Ct. 423, 28 L. ed. 65.

Forfeitures under revenue laws.— Actions for forfeitures under the revenue laws arise solely under the statutes of the United States, and are in no way subject to state legislation; and the question of the survival of such actions is not affected by the statutes of the state where the cause of action arose. U. S. *v.* De Goer, 38 Fed. 80.

53. Ferrin *v.* Kenney, 10 Metc. (Mass.) 294.

In Iowa it is the rule that the death of a party to an action does not have the effect to abate it unless, from the nature of the case, further proceedings would be of no avail. Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

54. Blake *v.* Griswold, 104 N. Y. 613, 11 N. E. 137; Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438; Hegerich *v.* Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; Morenus *v.* Crawford, 51 Hun (N. Y.) 89, 5 N. Y. Suppl. 453; Dininny *v.* Fay, 38 Barb. (N. Y.) 18; Cardington *v.* Fredericks, 46 Ohio St. 442, 21 N. E. 766; Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108.

55. *Connecticut.*— Booth *v.* Northrop, 27 Conn. 325.

Georgia.— Petts *v.* Ison, 11 Ga. 151, 56 Am. Dec. 419.

Indiana.— Feary *v.* Hamilton, 140 Ind. 45, 39 N. E. 516; Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

Maryland.— Ott *v.* Kaufman, 68 Md. 56, 11 Atl. 580, in which it was held that an action by a husband to recover damages for an assault and battery on his wife, *per quod* he lost her services and was obliged to expend money for medical and other attendance on her, does not survive on the death of defendant.

Massachusetts.— Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Smith *v.* Sherman, 4 Cush. (Mass.) 408.

South Carolina.— Huff *v.* Watkins, 20 S. C. 477.

Virginia.— Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

United States.— Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Schreiber *v.* Sharpless, 110 U. S. 76, 3 S. Ct. 423, 28 L. ed. 65; Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A. 79.

Thus an action for a false warranty, although in form an action in tort, is yet founded on the contract of warranty, and is therefore not abated by the death of plaintiff during its pendency. Booth *v.* Northrop, 27 Conn. 325.

56. *Indiana.*— Feary *v.* Hamilton, 140 Ind. 45, 39 N. E. 516; Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

Massachusetts.— Stebbins *v.* Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

New Hampshire.— Jenkins *v.* French, 58 N. H. 532.

New York.— Fried *v.* New York Cent. R. Co., 25 How. Pr. (N. Y.) 285.

South Carolina.— Nettle *v.* D'Oyley, 2 Brev. (S. C.) 27.

United States.— Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A. 79.

The injury sustained by the owner of personal property, by the larceny thereof, necessarily results in direct and immediate damage to his personal estate, and hence the right of action given by statute against the person convicted of larceny, in favor of the owner of the property taken, survives the death of the owner. Aylsworth *v.* Curtis, 19 R. I. 517, 34 Atl. 1109, 61 Am. St. Rep. 785, 33 L. R. A. 110.

actions *ex contractu* survived the death of a party to the action,[57] but where the damage resulting was to the person the rule was otherwise.[58]

d. Actions Ex Delicto — (1) *In General.* At common law, if an injury was done to either the person or the property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done.[59] It was early perceived in England, as personal property

57. *Arkansas.*— Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870.

Colorado.— Kelley *v.* Union Pac. R. Co., 16 Colo. 455, 27 Pac. 1058.

Connecticut.— Booth *v.* Northrop, 27 Conn. 325.

District of Columbia.— Hines *v.* District of Columbia, MacArthur & M. (D. C.) 141.

Georgia.— Bradley *v.* Saddler, 54 Ga. 681; Dempsey *v.* Hertzfield, 30 Ga. 866; Neal *v.* Haygood, 1 Ga. 514.

Indiana.— Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

Kentucky.— Winnegar *v.* Central Pass. R. Co., 85 Ky. 547, 4 S. W. 237.

Maine.— Hovey *v.* Page, 55 Me. 142.

Massachusetts.— Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336; Hunt *v.* Whitney, 4 Mass. 620.

New Hampshire.— Clark *v.* Manchester, 62 N. H. 577; Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416; Ela *v.* Rand, 4 N. H. 54.

New York.— Holsman *v.* St. John, 90 N. Y. 461; Cregin *v.* Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459; Potter *v.* Van Vranken, 36 N. Y. 619; McGregor *v.* McGregor, 35 N. Y. 218; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Mott *v.* Mott, 11 Barb. (N. Y.) 127; People *v.* Starkweather, 40 N. Y. Super. Ct. 453.

Ohio.— Cardington *v.* Fredericks, 46 Ohio St. 442, 21 N. E. 766; Wolf *v.* Wall, 40 Ohio St. 111.

South Carolina.—Huff *v.* Watkins, 20 S. C. 477; Chaplin *v.* Barrett, 12 Rich. (S. C.) 284, 75 Am. Dec. 731; Kincaid *v.* Blake, 1 Bailey (S. C.) 20.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79; Watson *v.* Loop, 12 Tex. 11.

Vermont.— Barrett *v.* Copeland, 20 Vt. 244; Wright *v.* Eldred, 2 D. Chipm. (Vt.) 37.

Virginia.— Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

West Virginia.— Cunningham *v.* Sayre, 21 W. Va. 440.

United States.— The Steamship City of Brussels, 6 Ben. (U. S.) 370, 5 Fed. Cas. No. 2,745; Jones *v.* Vanzandt, 4 McLean (U. S.) 599, 13 Fed. Cas. No. 7,503; Crapo *v.* Allen, Sprague (U. S.) 184, 6 Fed. Cas. No. 3,360.

England.— 3 Bl. Comm. 302.

See 1 Cent. Dig. tit. "Abatement and Revival," § 251.

An action for the breach of a covenant in a bond occurring during the lifetime of the obligee survives, on his death, to his personal representatives. Hurt *v.* Dougherty, 3 Sneed (Tenn.) 418.

An action on a note survives on the death of either of the parties whether plaintiff or defendant. Waller *v.* Nelson, 48 Ala. 531; Nettles *v.* Barnett, 8 Port. (Ala.) 181.

An action to rescind a transfer of personal property survives to the transferrer's executor. Coon *v.* Dennis, 111 Mich. 450, 69 N. W. 666.

58. Thus an executor or administrator could not maintain an action upon an express or implied promise to the deceased, where the damage consisted entirely of the suffering of the deceased, whether mental or corporeal.

Indiana.— Feary *v.* Hamilton, 140 Ind. 45, 39 N. E. 516.

Massachusetts.— Chase *v.* Fitz, 132 Mass. 359; Stebbins *v.* Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

New Hampshire.— Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416.

New York.— Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

Ohio.— Cardington *v.* Fredericks, 46 Ohio St. 442, 21 N. E. 766.

Pennsylvania.— Miller *v.* Wilson, 24 Pa. St. 114; Lattimore *v.* Simmons, 13 Serg. & R. (Pa.) 183.

England.— Chamberlain *v.* Williamson, 2 M. & S. 408; Bradshaw *v.* Lancashire, etc., R. Co., L. R. 10 C. P. 189; Potter *v.* Metropolitan Dist. R. Co., 30 L. T. Rep. N. S. 765; Knights *v.* Quarles, 2 B. & B. 102.

59. In other words, where the declaration imputed a tort to the person or property of another, and the plea must have been not guilty, the maxim was *actio personalis moritur cum persona.*

Alabama.— Nettles *v.* Barnett, 8 Port. (Ala.) 181.

Arkansas.— Ward *v.* Blackwood, 41 Ark. 295, 48 Am. Rep. 41.

Colorado.— Letson *v.* Brown, 11 Colo. App. 11, 52 Pac. 287.

District of Columbia.— Chichester *v.* Union Transfer Co., 1 MacArthur (D. C.) 295.

Georgia.— Neal *v.* Haygood, 1 Ga. 514.

Illinois.— Holton *v.* Daly, 106 Ill. 131; Knox *v.* Sterling, 73 Ill. 214; Bunker *v.* Green, 48 Ill. 243; Reed *v.* Peoria, etc., R. Co., 18 Ill. 403; Chicago, etc., R. Co. *v.* O'Connor, 19 Ill. App. 591.

Indiana.— Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143.

Kentucky.— Williams *v.* Morgan, 1 Litt. (Ky.) 167; Hawkins *v.* Glass, 1 Bibb (Ky.) 246.

Louisiana.—Jones *v.* Hoss, 29 La. Ann. 564.

Maryland.— Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 191.

Massachusetts.— Chase *v.* Fitz, 132 Mass. 359; Hollenbeck *v.* Berkshire R. Co., 9 Cush. (Mass.) 478; Wilbur *v.* Gilmore, 21 Pick. (Mass.) 250.

became more and more valuable, that it ought to be in some degree withdrawn from the rule admitted to prevail. Accordingly 4 Edw. III, c. 7, was enacted, which gave an action to an executor for an injury done to the personal property of his testator in his lifetime, which was subsequently extended, by other statutes, to the executor of an executor and to an administrator.[60]

(II) *Benefit to Wrongdoer's Estate.* But at common law, in order that a right of action arising out of a tort should survive against the executor or administrator of the tort-feasor, it was essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representative were increased. It was not enough that benefit resulted or that expense was saved to the tort-feasor, by which his estate was larger than it otherwise would have been.[61] But where there was a duty as well as a wrong an action survived against the executor.[62]

Missouri.— Davis *v.* Morgan, 97 Mo. 79, 10 S. W. 881; Kingsbury *v.* Lane, 21 Mo. 115; Higgins *v.* Breen, 9 Mo. 497; Melvin *v.* Evans, 48 Mo. App. 421.

New Hampshire.— Sawyer *v.* Concord R. Co., 58 N. H. 517; Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416; Wilson *v.* Knox, 12 N. H. 347.

New Jersey.— Ten Eyck *v.* Runk, 31 N. J. L. 428.

New York.— Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Kelsey *v.* Jewett, 34 Hun (N. Y.) 11; People *v.* Gibbs, 9 Wend. (N. Y.) 29; Grafton *v.* Union Ferry Co., 22 N. Y. Civ. Proc. 402, 19 N. Y. Suppl. 966; Smith *v.* Lynch, 12 N. Y. Civ. Proc. 348; Wood *v.* Phillips, 11 Abb. Pr. N. S. (N. Y.) 1; Putnam *v.* Van Buren, 7 How. Pr. (N. Y.) 31.

Ohio.— Cardington *v.* Fredericks, 46 Ohio St. 442, 21 N. E. 766.

Pennsylvania.— Moe *v.* Smiley, 125 Pa. St. 136, 17 Atl. 228, 3 L. R. A. 341; Means *v.* Associate Reformed Presb. Church, 3 Pa. St. 93; Penrod *v.* Morrison, 2 Penr. & W. (Pa.) 126; Keite *v.* Boyd, 16 Serg. & R. (Pa.) 300; Lattimore *v.* Simmons, 13 Serg. & R. (Pa.) 183.

Rhode Island.— Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639; Moies *v.* Sprague, 9 R. I. 541; Aldrich *v.* Howard, 8 R. I. 125, 86 Am. Dec. 615.

South Carolina.— Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929; Carson *v.* Bryant, 2 Brev. (S. C.) 159.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79; Watson *v.* Loop, 12 Tex. 11.

Utah.— Mason *v.* Union Pac. R. Co., 7 Utah 77, 24 Pac. 796.

Vermont.— Winhall *v.* Sawyer, 45 Vt. 466; Whitcomb *v.* Cook, 38 Vt. 477; Barrett *v.* Copeland, 20 Vt. 244; Wright *v.* Eldred, 2 D. Chipm. (Vt.) 37.

Virginia.— Grubb *v.* Sult, 32 Gratt. (Va.) 203; Harris *v.* Crenshaw, 3 Rand. (Va.) 14.

West Virginia.— Curry *v.* Mannington, 23 W. Va. 14; Cunningham *v.* Sayre, 21 W. Va. 440.

Wisconsin.— Milwaukee Mut. F. Ins. Co. *v.* Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627.

United States.— Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Henshaw *v.* Miller, 17 How. (U. S.) 212, 15 L. ed. 222; Macker *v.* Thomas, 7 Wheat. (U. S.) 530, 5 L. ed. 515; Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256; Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405; Hatch *v.* Eustis, 1 Gall. (U. S.) 160, 11 Fed. Cas. No. 6,207.

England.— Flynn *v.* Perkins, 8 Jur. N. S. 1177; Chamberlain *v.* Williamson, 2 M. & S. 408; Sale *v.* Lichfield, Owen 99; Hambly *v.* Trott, 1 Cowp. 371; 3 Bl. Comm. 302.

Canada.— Cameron *v.* Milloy, 22 U. C. C. P. 331.

See 1 Cent. Dig. tit. "Abatement and Revival," § 255 *et seq.*

Tort of third person.— The maxim *actio personalis moritur cum persona* does not apply to a case where the tort out of which the cause of action grows is the tort of a third party and not of the party deceased. Dayton *v.* Lynes, 30 Conn. 351.

60. *Alabama.*— Nettles *v.* Barnett, 8 Port. (Ala.) 181.

Illinois.— Bunker *v.* Green, 48 Ill. 243.

New York.— Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

Pennsylvania.— Lattimore *v.* Simmons, 13 Serg. & R. (Pa.) 183.

South Carolina.— Huff *v.* Watkins, 20 S. C. 477; Chaplin *v.* Barrett, 12 Rich. (S. C.) 284, 75 Am. Dec. 731.

United States.— U. S. *v.* De Goer, 38 Fed. 80.

61. *California.*— Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 478, 41 Pac. 328.

Connecticut.— Payne's Appeal, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215.

Georgia.—Ellington *v.* Bennett, 56 Ga. 158.

Massachusetts.— Houghton *v.* Butler, 166 Mass. 547, 44 N. E. 624; Cheney *v.* Gleason, 125 Mass. 166.

Missouri.— Melvin *v.* Evans, 48 Mo. App. 421.

New Jersey.— Hayden *v.* Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

Pennsylvania.— Penrod *v.* Morrison, 2 Penr. & W. (Pa.) 126.

South Carolina.— Nettle *v.* D'Oyley, 2 Brev. (S. C.) 27; Middleton *v.* Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596.

United States.— U. S. *v.* Daniel, 6 How. (U. S.) 11, 12 L. ed. 323; Head *v.* Porter, 70 Fed. 498.

62. Stebbins *v.* Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

(III) *Statutory Enactments.* In many, if not all, of the states of the United States there are statutes that very much limit the application of the common-law rule as to the effect of the death of a party in actions *ex delicto*,[63] so that it is now the general American doctrine that all causes of action arising from torts to property, real or personal — injuries to the estate by which its value diminishes — survive and go to the executor or administrator as assets in his hands.[64] And in some states statutory provision is made for the survival of actions of tort for injuries to the person.[65]

e. Actions Relating to Specific Property — (I) *Detinue.* An action of detinue, it seems, survives the death of the plaintiff,[66] and it has been held that at common law an action of detinue may be revived against the personal representative of a deceased defendant if the chattel demanded actually came into the representative's possession.[67]

(II) *Replevin.* At common law a cause of action in replevin survived the death of plaintiff, and such is the present general rule.[68] Upon the death of

Wrongful release of security.— Where one wrongfully releases a security which he holds for the benefit of another, the right of action is not one which dies with the person, and a suit in equity for an account may be maintained against the executor. Whittemore *v.* Hamilton, 51 Conn. 153.

63. Putnam *v.* Putnam, 4 Pick. (Mass.) 139; U. S. *v.* De Goer, 38 Fed. 80.

See, generally, the statutes of the several states.

64. Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309, 21 S. W. 491; Plumer *v.* McDonald Lumber Co., 74 Wis. 137, 42 N. W. 250; Great Western Min., etc., Co. *v.* Harris, 96 Fed. 503; Henderson *v.* Henshall, 54 Fed. 320, 7 U. S. App. 565, 4 C. C. A. 357.

65. Mumford *v.* Wright, 12 Colo. App. 214, 55 Pac. 744; Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Leggate *v.* Moulton, 115 Mass. 552; Slauson *v.* Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948.

A statutory provision that actions of tort for damage to the person survive includes every action the substantial cause of which is a bodily injury, or, in the words of Chief Justice Shaw, "damage of a physical character," where the connection between the cause and the effect is so close as to support an action of trespass, or so indirect as to require an action on the case at common law. Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298.

"Trespass" in sense of "tort."— In Ten Eyck *v.* Runk, 31 N. J. L. 428, it was held that under the New Jersey act relating to the abatement of suits [Nix. Dig. 4], which provides that where any deceased person shall, in his lifetime, have "committed any trespass" upon person or property, such cause of action shall survive to the injured party, the word "trespass" means "tort."

Diversion of watercourse.— It has been held that the obstruction and diversion of water flowing from a spring belonging to plaintiff is an injury to property within the meaning of a statute providing that actions for wrongs done to the property rights or interest of another may be maintained against the personal representatives of the wrongdoer. Miller *v.* Young, 90 Hun (N. Y.) 132, 35 N. Y. Suppl. 643. See also Brown *v.* Dean, 123 Mass. 254, wherein it was held that an action of tort against a mill-owner who obstructs the flow of water of a stream by maintaining his dam at too great a height survives under Mass. Gen. Stat. c. 127, § 1. But at common law such an action died with the person. Holmes *v.* Moore, 5 Pick. (Mass.) 257.

Overflowing land.— Under the statutes of some of the states an action to recover damages sustained by water being flowed back upon plaintiffs' land does not abate on the death of a party. Ten Eyck *v.* Runk, 31 N. J. L. 428; Howcott *v.* Warren, 29 N. C. 20; Howcott *v.* Coffield, 29 N. C. 24 (wherein it was held that the remedy given by the North Carolina statute relating to the recovery of damages for overflowing land by a mill-pond may be had against the executors or administrators of the person who committed the injury); Upper Appomattox Co. *v.* Hardings, 11 Gratt. (Va.) 1. But at common law the rule was otherwise. Kennedy *v.* McAfee, 1 Litt. (Ky.) 169; McLaughlin *v.* Dorsey, 1 Harr. & M. (Md.) 224; Chalk *v.* McAlily, 10 Rich. (S. C.) 92.

66. Trigg *v.* Conway, Hempst. (U. S.) 711, 24 Fed. Cas. No. 14,173.

67. Daniel *v.* Cobb, 1 N. C. 35; Hunt *v.* Martin, 8 Gratt. (Va.) 578; Catlett *v.* Russell, 6 Leigh (Va.) 344; Allen *v.* Harlan, 6 Leigh (Va.) 42, 29 Am. Dec. 205; 1 Wms. Saund. 216, note 1; Bro. Abr. tit. Detinue 19; 8 Vin. Abr. tit. Detinue, D, pl. 1, 4. *Compare* McDermott *v.* Doyle, 17 Mo. 362; Jones *v.* Littlefield, 3 Yerg. (Tenn.) 133.

68. *Illinois.*— McCrory *v.* Hamilton, 39 Ill. App. 490.

Maryland.— Fister *v.* Beall, 1 Harr. & J. (Md.) 31.

Massachusetts.— Mellen *v.* Baldwin, 4 Mass. 480; Pitts *v.* Hale, 3 Mass. 321.

Missouri.— Kingsbury *v.* Lane, 21 Mo. 115.

New York.— Potter *v.* Van Vranken, 36 N. Y. 619; Webbers *v.* Underhill, 19 Wend. (N. Y.) 447; Lahey *v.* Brady, 1 Daly (N. Y.) 443; Hopkins *v.* Adams, 5 Abb. Pr. (N. Y.) 351; Emerson *v.* Bleakley, 5 Abb. Pr. N. S. (N. Y.) 350.

defendant, however, the action abated,[69] although statutes now generally provide for the survival of such actions.[70]

(III) *TROVER.* As a general rule statutes provide that a cause of action for the wrongful taking and conversion of personal property survives the death of a party.[71]

(IV) *ATTACHMENT.* Though there is some conflict among the authorities, the weight of authority, as well as the better reason, is to the effect that an attachment is not dissolved by the death of defendant unless some statute expressly so declares,[72] or, in some states, unless attended by insolvency of his estate or admin-

Pennsylvania.— Reist *v.* Heilbrenner, 11 Serg. & R. (Pa.) 131.

South Carolina.— Miller *v.* Tollison, Harp. Eq. (S. C.) 145, 14 Am. Dec. 712.

Vermont.— Wright *v.* Eldred, 2 D. Chipm. (Vt.) 37.

England.— Berwick *v.* Andrews, 2 Ld. Raym. 971; Rutland *v.* Rutland, 1 Cro. Eliz. 377, 378; Sale *v.* Coventry, Anderson 241.

See 1 Cent. Dig. tit. "Abatement and Revival," § 280.

But see Burkle *v.* Luce, 1 N. Y. 163, wherein it was held that on the death of a plaintiff in replevin the action abates and cannot be revived by scire facias.

Action on replevin bond.— In Waples *v.* Adkins, 5 Harr. (Del.) 381, it was held that an action on a replevin bond does not abate by the death of one of the parties.

69. *Maine.*— Merritt *v.* Lumbert, 8 Me. 128.

Massachusetts.— Badlam *v.* Tucker, 1 Pick. (Mass.) 284; Mellen *v.* Baldwin, 4 Mass. 480; Pitts *v.* Hale, 3 Mass. 321.

Missouri.— Rector *v.* Chevalier, 1 Mo. 345.

New York.— Potter *v.* Van Vranken, 36 N. Y. 619; Webbers *v.* Underhill, 19 Wend. (N. Y.) 447; Lahey *v.* Brady, 1 Daly (N. Y.) 443; Burnham *v.* Brennan, 60 How. Pr. (N. Y.) 310; Hopkins *v.* Adams, 5 Abb. Pr. (N. Y.) 351.

England.— Hambly *v.* Trott, 1 Cowp. 371.

70. *Dakota.*— O'Neill *v.* Murry, 6 Dak. 107, 50 N. W. 619.

Illinois.— McCrory *v.* Hamilton, 39 Ill. App. 490.

Missouri.— Kingsbury *v.* Lane, 21 Mo. 115.

New York.— Roberts *v.* Marsen, 23 Hun (N. Y.) 486.

Pennsylvania.— Keite *v.* Boyd, 16 Serg. & R. (Pa.) 300.

South Carolina.— Talvande *v.* Cripps, 2 McCord (S. C.) 164.

71. *Alabama.*— Nations *v.* Hawkins, 11 Ala. 859.

Arkansas.— Eubanks *v.* Dobbs, 4 Ark. 173.

California.— Coleman *v.* Woodworth, 28 Cal. 567.

Georgia.— Woods *v.* Howell, 17 Ga. 495; Parrott *v.* Dubignon, T. U. P. Charlt. (Ga.) 261.

New Jersey.— Terhune *v.* Bray, 16 N. J. L. 54.

North Carolina.— Weare *v.* Burge, 32 N. C. 169; Clark *v.* Kenan, 2 N. C. 308; Avery *v.* Moore, 2 N. C. 362, 1 Am. Dec. 560.

Pennsylvania.— Schott *v.* Sage, 4 Phila. (Pa.) 87, 17 Leg. Int. (Pa.) 221.

Waiver of tort.— In Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1, it was held that where the owner of property converted elects to waive the tort, his right of action for the value of the property converted exists against the personal representative of the person converting it. To same effect is Middleton *v.* Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596.

Originally at common law such actions abated on the death of a party.

Iowa.— Shafer *v.* Grimes, 23 Iowa 550.

Massachusetts.— Barnard *v.* Harrington, 3 Mass. 228. But see Towle *v.* Lovet, 6 Mass. 394, wherein it was held that an action of trover for the conversion of title-deeds survived at common law.

Pennsylvania.— Hench *v.* Metzer, 6 Serg. & R. (Pa.) 272.

Tennessee.— Cherry *v.* Hardin, 4 Heisk. (Tenn.) 199.

England.— Hambly *v.* Trott, 1 Cowp. 371.

72. Supporting the rule, see:

Arkansas.— Frellson *v.* Green, 19 Ark. 376.

Florida.— Loubat *v.* Kipp, 9 Fla. 60.

Illinois.— Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Davis *v.* Shapleigh, 19 Ill. 386; Rauh *v.* Ritchie, 1 Ill. App. 188.

Iowa.— Lord *v.* Allen, 34 Iowa 281.

Michigan.— Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; Smith *v.* Jones, 15 Mich. 281.

Mississippi.— Lowenberg *v.* Tironi, 62 Miss. 19; Holman *v.* Fisher, 49 Miss. 472; Melius *v.* Houston, 41 Miss. 59.

Missouri.— Abernathy *v.* Moore, 83 Mo. 65.

New Hampshire.— Waitt *v.* Thompson, 43 N. H. 161, 80 Am. Dec. 136; Bowman *v.* Stark, 6 N. H. 459.

New Jersey.— Smith *v.* Warden, 35 N. J. L. 346.

New York.— More *v.* Thayer, 10 Barb. (N. Y.) 258; Thacher *v.* Bancroft, 15 Abb. Pr. (N. Y.) 243.

Ohio.— Cochran *v.* Loring, 17 Ohio 409.

Oregon.— Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306; Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

Tennessee.— Perkins *v.* Norvell, 6 Humphr. (Tenn.) 151.

Texas.— Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 24 S. W. 300.

Vermont.— Miller *v.* Williams, 30 Vt. 386.

West Virginia.— White *v.* Heavner, 7 W. Va. 324.

istration upon it within a certain time.[73] Nor will an attachment proceeding abate by plaintiff's death pending the proceeding.[74]

(v) *Garnishment*—(a) *Death of Garnishee.* Where, pending a trustee suit, the trustee dies, and his estate is reported insolvent, the action is not abated, but the administrator may be summoned in and the case proceed.[75]

(b) *Death of Defendant.* It has also been held that the death of the defendant in a foreign attachment after final judgment does not dissolve the attachment.[76]

(vi) *Enforcement of Lien*—(a) *Vendor's Lien.* It has been held that a vendor's lien does not die with the vendor, but survives to his personal representatives.[77]

(b) *Mechanic's Lien.* As a general rule the right to file a mechanic's lien and to proceed for its foreclosure is not defeated by the death of a party;[78] nor will the death of a party pending proceedings to enforce a mechanic's lien abate the proceedings.[79]

(vii) *Infringement of Patent.* A cause of action in equity for the infringement of a patent does not abate on the death of either plaintiff or defendant.[80]

Opposed to the rule, see:

California.— Ham *v.* Cunningham, 50 Cal. 365; Hensley *v.* Morgan, 47 Cal. 622; Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49.

Connecticut.— Green *v.* Barker, 14 Conn. 431.

Louisiana.— Collins *v.* Duffy, 7 La. Ann. 39.

Missouri.— Harrison *v.* Renfro, 13 Mo. 446; Sweringen *v.* Eberius, 7 Mo. 421, 38 Am. Dec. 463.

Pennsylvania.— Farmers, etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293.

Rhode Island.— Dwyer *v.* Benedict, 12 R. I. 459; Vaughn *v.* Sturtevant, 7 R. I. 372.

South Carolina.— Crocker *v.* Radcliffe, 1 Treadw. (S. C.) 83. *Compare* Kincaid *v.* Blake, 1 Bailey (S. C.) 20.

United States.— Pancost *v.* Washington, 5 Cranch C. C. (U. S.) 507, 18 Fed. Cas. No. 10,706.

See also Graham *v.* Boynton, 35 Tex. 712, wherein it was held that the death of one of the members of a firm whose property is attached in an action against the firm operates to dissolve the attachment as to him.

See, generally, Attachment.

Rule in Alabama.— In Alabama the death of defendant in attachment, unless attended by the insolvency of his estate judicially ascertained, does not affect the lien on personal property or the right to judgment on which process of execution may issue. McClellan *v.* Lipscomb, 56 Ala. 255; Woolfolk *v.* Ingram, 53 Ala. 11; Hale *v.* Cummings, 3 Ala. 398. But the death of defendant pending suit works a loss of the lien created by the levy of an attachment on real estate. Lipscomb *v.* McClellan, 72 Ala. 151; Phillips *v.* Ash, 63 Ala. 414.

73. Ridlon *v.* Cressey, 65 Me. 128; Willard *v.* Whitney, 49 Me. 235; Maxwell *v.* Pike, 2 Me. 8; Patterson *v.* Patten, 15 Mass. 473; Grosvenor *v.* Gold, 9 Mass. 209; Rockwood *v.* Allen, 7 Mass. 254; Bullard *v.* Dame, 7 Pick. (Mass.) 239; Day *v.* Lamb, 6 Gray (Mass.) 523; Parsons *v.* Merrill, 5 Metc. (Mass.) 356; Edes *v.* Durkee, 8 N. H. 460; Clindenin *v.* Allen, 4 N. H. 385.

74. Buller *v.* Woods, 43 Mo. App. 494; Boyd *v.* Roberts, 10 Heisk. (Tenn.) 474.

75. Rollins *v.* Robinson, 35 N. H. 381; Chapman *v.* Gale, 32 N. H. 141. But see White *v.* Ledyard, 48 Mich. 264, 12 N. W. 216, wherein it was held that garnishment proceedings cannot be revived against the administrator of a garnishee who died without making disclosure, and against whom no default was taken. See also Ward *v.* Vance, 3 Ont. Pr. 323.

See, generally, Garnishment.

76. Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557.

See, generally, Garnishment.

Proceedings against garnishee.— The death of an absent debtor after attachment issued will not vitiate proceedings against garnishees who make default in not returning on oath what effects they have in their hands. Kennedy *v.* Raguet, 1 Bay (S. C.) 484.

77. Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761 [*affirming* 22 Ill. App. 351]; Hubbard *v.* Clark, (N. J. 1886) 7 Atl. 26. *Contra,* Buford *v.* Guthrie, 14 Bush (Ky.) 677.

78. Death of contractor.—In Telfer *v.* Kiersted, 9 Abb. Pr. (N. Y.) 418, it was held that the right to file a mechanic's lien and to proceed for its foreclosure is not lost by the death of the contractor.

Death of owner.— In Williams *v.* Webb, 2 Disney (Ohio) 430, it was held that under the Ohio mechanic's lien law the death of the owner of the property does not defeat the lien for labor or materials.

79. Robins *v.* Bunn, 34 N. J. L. 322. But see Leavy *v.* Gardner, 63 N. Y. 624, wherein it was held that a foreclosure of a mechanic's lien under N. Y. Laws (1863), c. 500, relating to mechanics' liens in the city of New York, is not an action within Code, § 121, and the proceeding abates on defendant's death and cannot be revived against devisees or representatives.

See, generally, Mechanics' Liens.

80. Illinois Cent. R. Co. *v.* Turrill, 110 U. S. 301, 4 S. Ct. 5, 28 L. ed. 154; Griswold *v.* Hilton, 87 Fed. 256; Head *v.* Porter, 70 Fed. 498; Hohorst *v.* Howard, 37 Fed. 97; May *v.* Logan County, 30 Fed. 250; Kirk *v.* Du Bois, 28 Fed. 460; Smith *v.* Baker, 1 Bann. & A. Pat. Cas. 117, 22 Fed. Cas. No. 13,010; Atterbury *v.* Gill, 2 Flipp. (U. S.) 239, 2 Fed. Cas. No. 638. *Contra,* Draper *v.*

(VIII) *Trial of Right of Property.* It has been held that, if a plaintiff in execution dies pending a statutory trial of the right of property, the proceeding may be revived in the name of his personal representative.[81]

f. Actions Involving Particular Relations — (I) *Fiduciary Relations.* Where a relation has existed which involved the performance of certain duties for pay, and especially where that relation was of a fiduciary character, and there was a failure to perform those duties, the remedy of the person injured by such failure survives against the estate of the other after his death.[82]

(II) *Misfeasance of Sheriff.* Originally at common law an action for the misfeasance of a sheriff or his deputy did not survive against his personal representatives, nor in favor of the personal representatives of the party injured.[83] But statutes, as a general rule, now provide for the survival of such actions.[84]

Hudson, Holmes (U. S.) 208, 7 Fed. Cas. No. 4,069. See Peabody *v.* Norfolk, 98 Mass. 452, 96 Am. Dec. 664, wherein it was held that where plaintiff in a bill in equity to restrain defendant from making use of a secret process of manufacture belonging to him dies pending the suit, the executors of his will succeed to his rights. To same effect is Morison *v.* Moat, 9 Hare 241.

Infringement of trade-mark.— An action to restrain the infringement of a registered trade-mark, with the usual claim for an account of profits and damages, may be continued by the executors of plaintiff after his death. Oakey *v.* Dalton, 35 Ch. D. 700.

81. Gayle *v.* Bancroft, 22 Ala. 316.

82. Wineburgh *v.* U. S. Steam, etc., Railway Advertising Co., 173 Mass. 60, 53 N. E. 145; Warren *v.* Para Rubber Shoe Co., 166 Mass. 97, 44 N. E. 112; Houghton *v.* Butler, 166 Mass. 547, 44 N. E. 624; Cheney *v.* Gleason, 125 Mass. 166; Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Dodd *v.* Wilkinson, 41 N. J. Eq. 566, 7 Atl. 337; Concha *v.* Murrieta, 40 Ch. D. 543. See also Hazard *v.* Durant, 19 Fed. 471, wherein it was held that the personal representatives of a deceased trustee are liable to the extent of their interest in the trust property for breaches of trust committed by the trustee in his lifetime. And see Pierson *v.* Morgan, 52 Hun (N. Y.) 611, 4 N. Y. Suppl. 898, wherein it was held that an action by a receiver of a corporation against its trustees for an account of the assets of the company alleged to have been misapplied by them does not abate by the death of one of the defendants, but may be revived against his administratrix. To same effect is O'Brien *v.* Blaut, 17 N. Y. App. Div. 288, 45 N. Y. Suppl. 217.

Misappropriation of trust fund, etc.— Thus an action against a defendant for misappropriation or misuse of a trust fund or breach of duty occasioned through neglect while he was acting in a fiduciary capacity survives his death. Warren *v.* Robison, (Utah 1900) 61 Pac. 28. But see Brandon First Nat. Bank *v.* Briggs, 70 Vt. 599, 41 Atl. 580, wherein it was held that if claims in favor of a bank are lost through the neglect of its cashier to perform his duty, the cause of action arising to the bank therefrom dies with the cashier and cannot be enforced against his estate. And see Witters *v.* Foster, 26 Fed. 737, wherein it was held that an action against a director of a national bank for negligent performance of duty in not requiring a bond from the cashier, and otherwise mismanaging the affairs of the bank, abates by his death and cannot be revived against his administrator.

Death of cestui que trust.—At common law a suit in equity to charge defendant with the character of a trustee, and to enforce the trust, survives the death of the *cestui que trust.* Cheney *v.* Gleason, 125 Mass. 166; Allen *v.* Frawley, (Wis. 1900) 82 N. W. 593.

Vacation of order discharging trustee.— A proceeding by a *cestui que trust* to vacate an order discharging the trustee, which order was granted on the application of the trustee, may, upon the death of the trustee, be revived and continued against his personal representatives. Matter of Foster, 7 Hun (N. Y.) 129.

83. *Alabama.*—Logan *v.* Barclay, 3 Ala. 361.

Connecticut.— McEvers *v.* Pitkin, 1 Root (Conn.) 216.

Georgia.— Neal *v.* Haygood, 1 Ga. 514.

Maine.— Valentine *v.* Norton, 30 Me. 194; Gent *v.* Gray, 29 Me. 462.

Massachusetts.— Cravath *v.* Plympton, 13 Mass. 454.

New Jersey.— Cunningham *v.* Jaques, 19 N. J. L. 42.

New York.— People *v.* Gibbs, 9 Wend. (N. Y.) 29; Franklin *v.* Low, 1 Johns. (N. Y.) 396; Martin *v.* Bradley, 1 Cai. (N. Y.) 124.

North Carolina.— Rhodes *v.* Gregory, 3 N. C. 539.

Vermont.— Barrett *v.* Copeland, 20 Vt. 244.

United States.— U. S. *v.* Daniel, 6 How. (U. S.) 11, 12 L. ed. 323.

Escape.—At common law an action of debt against a sheriff for an escape out of final process does not survive against his representatives. Neal *v.* Haygood, 1 Ga. 514; Shafer *v.* Grimes, 23 Iowa 550; Cunningham *v.* Jaques, 19 N. J. L. 42; Franklin *v.* Low, 1 Johns. (N. Y.) 396; Martin *v.* Bradley, 1 Cai. (N. Y.) 124.

False return.— At common law an action of trespass on the case against a sheriff or marshal for a false return upon process does not survive to the administrator of the plaintiff (Barrett *v.* Copeland, 20 Vt. 244), nor against the executors of the deceased defendant (U. S. *v.* Daniel, 6 How. (U. S.) 11, 12 L. ed. 323).

84. *Arkansas.*— Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870.

(III) *Negligence of Attorney.* According to the general present rule an action for a breach of the duty of an attorney in not exercising due care and skill in the business of his client survives.[85] At common law the rule was otherwise.[86]

(IV) *Negligence of Druggist.* It has been held that an action against a druggist for the negligent sale of a poison survives to the personal representative of the person to whom such poison was so sold.[87]

(V) *Negligence of Surveyor.* It has also been held that *assumpsit* will lie against executors for the negligent performance, by their testator, of a contract to survey a tract of land.[88]

g. Actions for the Recovery of Land — (I) *Real Actions.* By the common law the death of a party in a real action pending the suit causes an abatement.[89] By statute, however, in most states, the common-law rule has been abrogated and provision made for the survival of such actions.[90]

Connecticut.— Dayton *v.* Lynes, 30 Conn. 351.

Kentucky.— Lynn *v.* Sisk, 9 B. Mon. (Ky.) 135, wherein it was held that an action against a sheriff for breach of official duty may be revived against his executor by scire facias.

Massachusetts.— Cravath *v.* Plympton, 13 Mass. 454; Paine *v.* Ulmer, 7 Mass. 317.

Missouri.— Jewett *v.* Weaver, 10 Mo. 234, wherein it was held that a right of action against a sheriff for a false return of an execution survives against his personal representatives.

New York.— Dininny *v.* Fay, 38 Barb. (N. Y.) 18.

Vermont.— Dana *v.* Lull, 21 Vt. 383 (wherein it was held that an action of trespass on the case against a sheriff for the default of his deputy in not keeping property attached, and not delivering it to the officer holding the execution obtained in the suit, will survive under a statute providing that actions of trespass on the case for damages done to real or personal estate survive); Bellows *v.* Allen, 22 Vt. 108 (wherein it was held that under the same statute an action against a sheriff for the default of his deputy in not paying to plaintiff money collected by the deputy upon an execution in favor of plaintiff against a third person will survive).

England.— Williams *v.* Cary, 4 Mod. 403.

Failure to justify sureties.— In Hamilton *v.* Gorman, 25 N. Y. Civ. Proc. 70, 14 Misc. (N. Y.) 114, 35 N. Y. Suppl. 183, it was held that an action against a sheriff to enforce the liability as bail arising from his failure to require the justification of sureties on a bail-bond given on the issuance of an order of arrest does not abate on the death of the sheriff.

Money had and received.— In Chenault *v.* Walker, 22 Ala. 275, it was held that an action of debt against a sheriff for money had and received may be revived against his administrator.

85. Stimpson *v.* Sprague, 6 Me. 470; Tichenor *v.* Hayes, 41 N. J. L. 193, 32 Am. Rep. 186; Miller *v.* Wilson, 24 Pa. St. 114. See also Knights *v.* Quarles, 2 B. & B. 102, which was a suit in *assumpsit* by an administrator growing out of an understanding by defendant, who was an attorney, to investigate and see that a title about to be conveyed to the intestate was a good one, the breach being that defendant failed to do so, and that the intestate, in consequence, took an insufficient title, to the injury of his personal estate. It was held that such cause of action survived to the personal representative even by the rule of the common law.

86. Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Tichenor *v.* Hayes, 41 N. J. L. 193, 32 Am. Rep. 186.

87. Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298.

88. Troup *v.* Smith, 20 Johns. (N. Y.) 33.

89. **The common-law doctrine** is that on the occurrence of the death the right descends to the heir, and a new cause of action springs up which changes the condition of the cause.

Florida.— Gould *v.* Carr, 33 Fla. 523, 15 So. 259, 24 L. R. A. 130.

Kentucky.— Gaines *v.* Conn, 2 Dana (Ky.) 231.

Maine.— Trask *v.* Trask, 78 Me. 103, 3 Atl. 37.

Massachusetts.— Ferrin *v.* Kenney, 10 Metc. (Mass.) 294; Alley *v.* Hubbard, 19 Pick. (Mass.) 243; Holmes *v.* Holmes, 2 Pick. (Mass.) 23.

Michigan.— Hoffman *v.* St. Clair Circuit Judge, 40 Mich. 351.

United States.— Macker *v.* Thomas, 7 Wheat. (U. S.) 530, 5 L. ed. 515.

Writs of entry.— In a writ of entry at common law the death of a sole tenant of the freehold necessarily abates the writ. Pierce *v.* Jaquith, 48 N. H. 231.

Writs of right.— By the common law a writ of right abates by the death of a party pending suit. Gaines *v.* Conn, 2 Dana (Ky.) 231; Alley *v.* Hubbard, 19 Pick. (Mass.) 243; Cutts *v.* Haskins, 11 Mass. 56; Lovell *v.* Arnold, 2 Leigh (Va.) 16; Drago *v.* Stead, 2 Rand. (Va.) 454; Carter *v.* Carr, Gilmer (Va.) 145.

90. Thus in New Hampshire the common-law rule that the death of a sole tenant of the freehold necessarily abates a writ of entry because the heir is seized in his own right, and must therefore bring a new action, is changed by Comp. Stat. c. 198, § 14, providing that real actions shall not abate by the death of either party. Pierce *v.* Jaquith, 48 N. H. 231; Ladd *v.* Sanborn, 5 N. H. 337. So in Massachusetts, by virtue of Act 1826, c. 70, providing that in all actions to recover lands

(II) *EJECTMENT* — (A) *In General.* It has long been the settled doctrine that the action of ejectment or the corresponding statutory real action may be revived on the death of plaintiff;[91] but at common law — and the rule still prevails in some states — in case of the death of defendant in an action of ejectment the action abates.[92]

or tenements the writ or suit shall not abate by the death of the demandant, a complaint by a landlord against a tenant to recover possession of a tenement does not abate by the death of complainant. Sacket *v.* Wheaton, 17 Pick. (Mass.) 103. And in New York under Code, § 121, providing that no action shall abate by the death of a party if the cause of action survive or continue, and that the court may, on a supplemental complaint, allow the action to be continued by or against his representative or successor in interest, an action against a sole defendant to recover the possession of land may be continued, after the death of defendant intestate, against his heir at law claiming to have succeeded to his legal rights and to own the land. Waldorph *v.* Bortle, 4 How. Pr. (N. Y.) 358.

Suit to enforce vendor's lien.— A suit against a vendee to enforce a lien reserved in the conveyance of land is not an action for the recovery of real property within the meaning of a statute providing that upon the death of a defendant in an action for the recovery of real property only, the action may be revived, and consequently such action cannot be revived. Buford *v.* Guthrie, 14 Bush (Ky.) 677. See *supra*, III, A, 3, e, (VI), (A).

91. *Alabama.*— *Ex p.* Swan, 23 Ala. 192; Rowland *v.* Ladiga, 21 Ala. 9; Baker *v.* Chastang, 18 Ala. 417; State *ex rel.* Nabor, 7 Ala. 459.

California.— Barrett *v.* Birge, 50 Cal. 655.

Florida.— Gould *v.* Carr, 33 Fla. 523, 15 So. 259, 24 L. R. A. 130.

Georgia.— Dean *v.* Feeley, 66 Ga. 273; O'Byrne *v.* Feeley, 61 Ga. 77. *Compare* Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142.

Illinois.— Coleman *v.* Henderson, 3 Ill. 251.

Kentucky.— Duncan *v.* Forsyth, 3 Dana (Ky.) 229; Bonta *v.* Clay, 5 Litt. (Ky.) 129; Robertson *v.* Morgan, 2 Bibb (Ky.) 148.

Maryland.— Stevenson *v.* Howard, 3 Harr. & J. (Md.) 554; Howard *v.* Moale, 2 Harr. & J. (Md.) 249. *Compare* Howard *v.* Gardiner, 3 Harr. & M. (Md.) 98.

Michigan.— McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868.

Mississippi.— Pintard *v.* Griffing, 32 Miss. 133.

Missouri.— Fine *v.* Gray, 19 Mo. 33.

New Jersey.— Den *v.* Sayre, 3 N. J. L. 183.

New York.— James *v.* Bennett, 10 Wend. (N. Y.) 540; Doe *v.* Butler, 3 Wend. (N. Y.) 149; Austin *v.* Jackson, 1 Wend. (N. Y.) 27; Frier *v.* Jackson, 8 Johns. (N. Y.) 495; Waldorph *v.* Bortle, 4 How. Pr. (N. Y.) 358.

North Carolina.— Thomas *v.* Kelly, 35 N. C. 43; Wilson *v.* Hall, 35 N. C. 489.

Virginia.— Purvis *v.* Hill, 2 Hen. & M. (Va.) 614; Kinney *v.* Beverley, 1 Hen. & M. (Va.) 531.

United States.— Hatfield *v.* Bushnell, 1 Blatchf. (U. S.) 393, 11 Fed. Cas. No. 6,211; Baylor *v.* Neff, 3 McLean (U. S.) 302, 2 Fed. Cas. No. 1,143.

England.— Moore *v.* Goodright, 2 Str. 899; Thrustout *v.* Grey, 2 Str. 1056.

Canada.— Doe *v.* Hunt, 12 U. C. Q. B. 625.

As to persons who may revive action of ejectment, see *infra*, III, B, 7, c, (II).

Death of one plaintiff.— Where ejectment is brought by seven plaintiffs, brothers and sisters, and one of them dies unmarried before trial, and no executor or administrator is appointed, the remaining co-plaintiffs and her mother being her heirs at law, inheriting her share of the land, the mother inheriting one seventh thereof and not being party plaintiff, the right of action for such mother's share does not survive to the brothers and sisters. Coffee *v.* Groover, 20 Fla. 64. See *infra*, III, A, 5.

Ejectment for mansion-house.— Where the widow dies pending an action of ejectment by her for the recovery of possession of the mansion-house, the suit may be revived in the name of the administrator and recovery had for rents and profits by way of damages to the time of her death. Roberts *v.* Nelson, 86 Mo. 21.

92. *Illinois.*— Guyer *v.* Wookey, 18 Ill. 536.

Massachusetts.— Alley *v.* Hubbard, 19 Pick. (Mass.) 243.

Michigan.— Hoffman *v.* St. Clair Circuit Judge, 40 Mich. 351.

New York.— Bradstreet *v.* Clark, 18 Wend. (N. Y.) 620; Kissam *v.* Hamilton, 20 How. Pr. (N. Y.) 369; Moseley *v.* Albany Northern R. Co., 14 How. Pr. (N. Y.) 71; Mosely *v.* Mosely, 11 Abb. Pr. (N. Y.) 105; Putnam *v.* Van Buren, 7 How. Pr. (N. Y.) 31.

North Carolina.— Anonymous, 2 N. C. 500.

Wisconsin.— Farrall *v.* Shea, 66 Wis. 561, 29 N. W. 634.

Action against husband and wife.— In Missouri it has been held that though an action in ejectment against husband and wife abates as to the husband by his death pending an appeal from a judgment rendered against him and his wife jointly for land in which the husband had a marital interest as against her, and after his death the possession becomes hers, yet this will not support the pending judgment against her or authorize the rendition of a new one. The plaintiff must commence a new action against her. Wilson *v.* Garaghty, 70 Mo. 517.

Death of one defendant.— In ejectment, if one of several defendants dies pending the suit, the action abates as to him and cannot be revived against his personal representative, or heirs, or either of them, but may proceed against the surviving defendants. Hoff-

(B) *Mesne Profits.* It has been held that a right of action for the recovery of the mesne profits of lands which accrued during the pendency of an action of ejectment survives where plaintiff dies after recovery is had in the action of ejectment;[93] and in states where recovery for mesne profits can be had in the action of ejectment the same rule obtains.[94] In states where the action of ejectment dies with the death of defendant, it seems that trespass for mesne profits also dies.[95]

h. Breach of Covenant. At common law a cause of action arising on a covenant on which the testator or intestate might have sued in his lifetime survives his death and is enforceable against his executor or administrator.[96]

i. Claim for Usury. A claim for money paid as usury survives against the estate of the person to whom it was paid.[97]

j. Creditors' Suits. In a creditor's suit, if he by whom the suit was commenced, or any one who has afterward come in and taken the position of a plaintiff, dies, the suit does not abate if there be at the time any other unsatisfied creditor standing as plaintiff;[98] but the filing of a judgment creditor's bill without answer, or the appointment of a receiver, creates no lien upon the debtor's property, and complainant, upon defendant's death, in such a case loses his right to prosecute the suit.[99]

man *v.* St. Clair Circuit Judge, 40 Mich. 351. See *infra*, III, A, 6.

Statutory change of rule.—In Alabama the action of ejectment or the corresponding statutory real action may be revived on the death of defendant. Evans *v.* Welch, 63 Ala. 250. In Illinois an action for ejectment does not abate by the death of a sole defendant after service and before plea. Guyer *v.* Wookey, 18 Ill. 536.

93. Means *v.* Associate Reformed Presb. Church, 3 Pa. St. 93. See also Rhodes *v.* Crutchfield, 7 Lea (Tenn.) 518, wherein it was held that where plaintiff dies pending an action of ejectment, a right of action for rents and profits survives to his personal representative on the theory that the tort or trespass may be waived and the right of action be considered one *ex contractu*.

94. See cases cited *supra*, note 91.

95. Matter of Renwick, 2 Bradf. Surr. (N. Y.) 80; Burgess *v.* Gates, 20 Vt. 326. Farrall *v.* Shea, 66 Wis. 561, 29 N. W. 634, wherein it was held that as the claim for mesne profits and the counterclaim for the value of improvements are mere incidents of the action of ejectment, upon the death of defendant the action cannot be revived even for the purpose of adjusting those claims. But see Molton *v.* Miller, 10 N. C. 490, wherein it was held that, under a statute allowing the revivor of actions in tort, an original action of trespass for mesne profits may be brought against the personal representatives to recover profits received by intestate in his lifetime. See also Arundel *v.* Springer, 71 Pa. St. 398 [*overruling* Harker *v.* Whitaker, 5 Watts (Pa.) 474; Bard *v.* Nevin, 9 Watts (Pa.) 328; Means *v.* Associate Reformed Presb. Church, 3 Pa. St. 93], wherein it was held that under the Pennsylvania statute of Feb. 24, 1834, trespass for mesne profits does not abate by the death of defendant in ejectment.

Recovery on contract.—In Campbell *v.* Renwick, 2 Bradf. Surr. (N. Y.) 80, it was held that trespass for mesne profits does not survive against the wrongdoer's personal representatives. They must be sued for in an action on contract.

96. Sprague *v.* Greene, 20 R. I. 153, 37 Atl. 699.

An action of covenant does not lie against the devisee of land to recover damages for a breach of covenant made by the devisor. Wilson *v.* Knubley, 7 East 128.

97. Roberts *v.* Burton, 27 Vt. 396.

98. Young *v.* Kelly, 3 App. Cas. (D. C.) 296; Austin *v.* Cochran, 3 Bland (Md.) 337, 339 (wherein the reason for this rule is stated to be "because, although the interest of the deceased does not survive to any of the other parties; yet there are other plaintiffs to whom all the rights, privileges, and benefits of the suit do survive, and who are competent to call upon the court for its decree; and who must, therefore, be permitted to support their own interests, and to prosecute the suit for themselves"); Pringle *v.* Sizer, 2 S. C. 59. But see Hammond *v.* Hammond, 2 Bland (Md.) 306, wherein it was held that a creditor's suit by and against legatees and devisees abates by the death of one of the plaintiffs whose interest did not survive or fall into the common stock for the benefit of any one or all of the others.

Penalty for fraudulent conveyance.—If two joint creditors commence an action *qui tam*, as being the party aggrieved, to recover the penalty given by statute against fraudulent conveyances, and pending the action one of the plaintiffs dies, the action survives to the surviving plaintiff. Wright *v.* Eldred, 2 D. Chipm. (Vt.) 37.

99. German American Seminary *v.* Saenger, 66 Mich. 249, 33 N. W. 301; Jones *v.* Smith, Walk. (Mich.) 115; Mathews *v.* Neilson, 3 Edw. (N. Y.) 346. See also Austin *v.* Cochran, 3 Bland (Md.) 337, wherein it was held that a creditor's suit will abate by the death of the defendant, heir, or devisee, whether there be any surplus of the proceeds of the sale returned to him or not.

k. Husband's Action for Injury to Wife. Under a statute preserving from abatement actions "for wrongs done to the property, rights, or interests of another," upon the death of the husband in an action by him for a wrongful injury to the person of his wife the right to damages for the loss of the wife's services and the expenses necessarily incurred by reason of the injury survive to his personal representatives, as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife and the comforts of that society dies with him.[1]

l. Injuries to Passenger. According to the general present rule an action brought by a passenger against a common carrier to recover damages for personal injuries does not abate by the death of the passenger.[2]

m. Probate of Will. It has been held that a proceeding to probate a will, being *quasi in rem*, does not abate by the death of either proponent or contestant.[3]

n. Special Proceedings. By statute in some states a pending undetermined special proceeding may be continued in the name of an administrator or executor of a deceased party, if the right to the relief sought survives.[4] In the absence of such statute it has been held that such a proceeding abates on the death of a party.[5]

o. Summary Proceedings. As summary proceedings are purely statutory, and the regulations governing them vary in the several states, reference should be made to the statutes of the particular state to determine whether such proceedings survive the death of a party.[6]

p. Taxpayer's Action. It has been held that a taxpayer's action survives plaintiff's death.[7]

1. Cregin *v.* Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459, 83 N. Y. 595, 38 Am. Rep. 474 [*reversing* 19 Hun (N. Y.) 341]; Foels *v.* Tonawanda, 65 Hun (N. Y.) 624, 20 N. Y. Suppl. 447. See also Fordyce *v.* Dixon, 70 Tex. 694, 8 S. W. 504, wherein it was held that although the damages to be recovered for personal injuries to a married woman would be community property, the cause of action does not cease on the death of the husband pending the action. And see Mexican Cent. R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778, wherein it was held that after the husband's death the wife may continue an action brought by him for personal injuries to her.

Assault on wife.— In Maryland it has been held that under Rev. Code, art. 50, § 146, providing that actions for personal injuries shall not survive against an administrator or executor, an action to recover consequential damages for an assault and battery on the plaintiff's wife is not maintainable against the executor of the deceased, as the right depends upon the nature of the action, and not upon the character of damages claimed. Ott *v.* Kaufman, 68 Md. 56, 11 Atl. 580.

2. Peebles *v.* North Carolina R. Co., 63 N. C. 238; Bradshaw *v.* Lancashire, etc., R. Co., L. R. 10 C. P. 189; Potter *v.* Metropolitan Dist. R. Co., 30 L. T. Rep. N. S. 765. *Contra*, Jacksonville St. R. Co. *v.* Chappell, 22 Fla. 616, 1 So. 10; Norton *v.* Wiswall, 14 How. Pr. (N. Y.) 42.

3. Van Alen *v.* Hewins, 5 Hun (N. Y.) 44.

4. Matter of Camp, 81 Hun (N. Y.) 387, 30 N. Y. Suppl. 884.

Proceedings in surrogate's court.— In New York it has been held that the statute [Code Civ. Proc. § 755, as amended in 1891] providing that a special proceeding does not abate if the right to the relief sought survives, does not apply to proceedings in surrogates' courts. Matter of Schlesinger, 36 N. Y. App. Div. 77, 55 N. Y. Suppl. 514; Matter of Camp, 81 Hun (N. Y.) 387, 30 N. Y. Suppl. 884.

5. Matter of Palmer, 115 N. Y. 493, 22 N. E. 221 [*affirming* 43 Hun (N. Y.) 572]; Matter of Marshall, 55 Hun (N. Y.) 606, 7 N. Y. Suppl. 861; Matter of Roberts, 53 Hun (N. Y.) 338, 6 N. Y. Suppl. 195; Matter of Barney, 53 Hun (N. Y.) 480, 6 N. Y. Suppl. 401,— in which cases it was held that proceedings to vacate assessments were special proceedings which abated on the death of petitioners and could not be revived in the names of their executors or administrators.

6. **Rule in Alabama.**— In Jones *v.* Brooks, 30 Ala. 588, it was held that a summary proceeding against a sheriff for failing to make the money on an execution abates by the death of the plaintiff in execution, and cannot be revived in the name of his personal representative. In James *v.* Auld, 9 Ala. 462, it was held that in case of the death of a constable, a motion for judgment against his sureties for the constable's default cannot be maintained. In such case resort must be had to the common law for redress.

Rule in North Carolina.— In Mooring *v.* James, 13 N. C. 254, it was held that the right of plaintiff in execution to a summary remedy survives to his personal representatives.

Rule in Tennessee.— In Burroughs *v.* Goodall, 2 Head (Tenn.) 29, it was held that prior to the act of 1858 the remedy by motion did not extend to the personal representative of a deceased officer, or of his security. By that act, if the officer or either of his securities shall die during the pendency of a suit by motion against them, it may be revived against the personal representative of such officer or security. To same effect are Park *v.* Walker, 2 Sneed (Tenn.) 503; State *v.* Deberry, 9 Humphr. (Tenn.) 605.

7. Gorden *v.* Strong, 158 N. Y. 407, 53 N. E. 33, holding that in such a case the action

q. Wrongful Discharge of Servant. An action of trespass on the case for the wrongful dismissal of plaintiff by decedent from his service will survive even at common law.[8]

4. Actions and Proceedings Which Abate — a. In General — (I) *Amendment to Save Abatement.* On the death of defendant pending a suit defective for want of averments in the petition necessary to give the court jurisdiction, the action will abate, and no amendment will be allowed so as to relate back to the date of the filing of the petition.[9]

(II) *Stipulation to Save Abatement.* It has been held that jurisdiction of the person in an action for injury to the person may by stipulation be conferred upon the court so as to save the action from abatement by the death of a party.[10]

b. Personal Actions — (I) *In General.* At common law, and in the absence of statutes to the contrary, a purely personal action comes within the maxim *actio personalis moritur cum persona*,— a personal action dies with the person.[11] This rule has been applied to actions for assault and battery,[12] breach of promise of marriage,[13]

may be continued in the name of the executor or administrator on motion of such executor or administrator or on motion of defendant.

8. Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666 [*disapproving* Boyles *v.* Overby, 11 Gratt. (Va.) 202], the reason being that though in form an action *ex delicto* the cause of action in reality arises *ex contractu.*

9. Littlefield *v.* Fry, 39 Tex. 299.

10. Cox *v.* New York Cent., etc., R. Co., 63 N. Y. 414; Ames *v.* Webbers, 10 Wend. (N. Y.) 575. See also Garlington *v.* Clutton, 1 Call (Va.) 520, wherein it was held that an agreement that a suit shall not abate by the death of either party is obligatory, and, being entered of record, operates as a release of errors.

Stipulation for judgment absolute.— In New York a stipulation for judgment absolute in case of affirmance, given by defendant on appeal from the general term's order of reversal, does not prevent the abatement of the action where plaintiff dies after the appeal. Corbett *v.* Twenty-third St. R. Co., 114 N. Y. 579, 21 N. E. 1033.

Stipulation to abide decision in other action.— Plaintiff and defendant stipulated that a cause between them pending in the supreme court should abide the decision in another cause then pending in the court of errors, but there was no stay of proceedings by the court. The decision in the latter case was favorable to defendant, but at the time it was rendered he had died. It was held that, notwithstanding the stipulation, the cause abated, and, as it was not a case where the delay had proceeded from the court, judgment in the stipulated cause *nunc pro tunc*, as of a day previous to defendant's death, could not be entered. Ogden *v.* Lee, 3 How. Pr. (N. Y.) 153.

11. For this maxim see *post.*

12. **An action for assault,** at common law, does not survive. Hadley *v.* Bryars, 58 Ala. 185; Perkins *v.* Stein, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861; Winnegar *v.* Central Pass. R. Co., 85 Ky. 547, 4 S. W. 237; Anderson *v.* Arnold, 79 Ky. 370; Melvin *v.* Evans, 48 Mo. App. 421; Lattimore *v.* Simmons, 13 Serg. & R. (Pa.) 183.

In some states, by special statutory provision, such an action does survive. Brown *v.* Kendall, 6 Cush. (Mass.) 292; Wilkins *v.* Wainwright, 173 Mass. 212, 53 N. E. 397 (an action for injury to one's person from assault by another's dog).

In other states the statutes expressly provide that the action shall not survive. Perkins *v.* Stein, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861 (wherein it is held that to constitute an assault and battery, within the meaning of the Kentucky statute, which provides that actions for assault and battery shall die with the person, the act complained of must be done with a hostile intent, and that mere acts of negligence do not constitute such an assault and battery, even when trespass would lie therefor); Winnegar *v.* Central Pass. R. Co., 85 Ky. 547, 4 S. W. 237 (wherein it is held that a right of action for assault, committed on a passenger by a servant of the carrier, will survive in favor of the administrator, if the plaintiff counts upon the injury as a breach of contract, although the Kentucky statute excepts, from actions that survive, actions for assault and battery); Hannah *v.* Richmond, etc., R. Co., 87 N. C. 351.

13. **An action for breach of promise of marriage, where no special damage is alleged,** does not survive the death of either party.

Maine.— Hovey *v.* Page, 55 Me. 142.

Massachusetts.— Chase *v.* Fitz, 132 Mass. 359; Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336; Smith *v.* Sherman, 4 Cush. (Mass.) 408; Stebbins *v.* Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

Missouri.— Melvin *v.* Evans, 48 Mo. App. 421.

New Jersey.— Hayden *v.* Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

New York.— Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

Pennsylvania.— Lattimore *v.* Simmons, 13 Serg. & R. (Pa.) 183.

Tennessee.— Hullett *v.* Baker, 101 Tenn. 689, 49 S. W. 757; Weeks *v.* Mays, 87 Tenn. 442, 10 S. W. 771.

Virginia.— Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Grubb *v.* Sult, 32 Gratt. (Va.) 203.

criminal conversation,[14] enticing servant,[15] false imprisonment,[16] forcible entry and detainer,[17] libel and slander,[18] malicious prosecution;[19] malprac-

England.— Chamberlain *v.* Williamson, 2 M. & S. 408.

See 1 Cent. Dig. tit. "Abatement and Revival," § 252.

The reason of the rule is stated by Van Syckel, J., in Hayden *v.* Vreeland, 37 N. J. L. 372, 379, 18 Am. Rep. 723, in which he says that an action for breach of promise of marriage "does not survive at common law, not because it is not an action *ex contractu*, as distinguished from tort, but for the reason that the injury is purely personal, in which the representative of the estate has no interest. If it is not a tort in the legal acceptation of the term, refusal to consummate the engagement is a wrong in the same sense that it is a wrong to fail in the performance of any other agreement. It is not a *quasi*-tort, but purely a case of contract broken and disregarded, and upon this recovery in the action must be based." And in Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A. 79, it is said that an action for the breach of a promise of marriage does not survive, although it is on a contract and the breach occasions pecuniary loss, because the chief damage, the substance of the cause of action, is disappointed hope, which is an injury to the person, and the pecuniary loss is merely incidental thereto.

Where there is an allegation of special damage which will cause the action to survive, it must be an allegation of damage to the property, not to the person merely, and such as would be sufficient of itself to sustain a suit. Hovey *v.* Page, 55 Me. 142, wherein it was held that an allegation in an action for the alleged breach of promise of marriage, that after such promise the deceased promisee had a child born to her out of wedlock, and that the promisor is the father of such child, is not an allegation of special damage to property such as would cause the action to survive.

Antenuptial contract within statute of frauds.— An allegation of special damage for not executing an antenuptial contract which is within the statute of frauds is not sufficient to bring the case within the rule. Chase *v.* Fitz, 132 Mass. 359.

In New Hampshire and North Carolina, by statute, an action for breach of promise of marriage does not abate on the death of defendant. Stewart *v.* Lee, (N. H. 1900) 46 Atl. 31; Allen *v.* Baker, 86 N. C. 91, 41 Am. Rep. 444; Shuler *v.* Millsaps, 71 N. C. 297.

14. An action for criminal conversation, on the death of defendant before final judgment, abates and cannot be revived. Garrison *v.* Burden, 40 Ala. 513; Cox *v.* Whitfield, 18 Ala. 738; Clarke *v.* McClelland, 9 Pa. St. 128.

15. An action for enticing away the servant of another, being at common law actionable as a tort only, dies with the person. Huff *v.* Watkins, 20 S. C. 477.

16. False imprisonment.— In Harker *v.* Clark, 57 Cal. 245, it was held that a right of action for false imprisonment does not survive the death of defendant.

17. An action of forcible entry and detainer, or of unlawful detainer, in the absence of a saving statute, abates on the death of either plaintiff or defendant. Tucker *v.* Burns, 2 Swan (Tenn.) 35, wherein it appears the rule has been changed by statute; Havins *v.* Bickford, 9 Humphr. (Tenn.) 673; Moran *v.* Eldridge, 2 W. Va. 574.

In Alabama an action of unlawful detainer has been held to be within a statute authorizing the revival of real actions to try title or for the recovery of the possession of land. Ridgeway *v.* Waugh, 51 Ala. 423.

In Missouri an action of forcible entry and detainer does not abate by the death of one of the plaintiffs or of defendant. Brewington *v.* Stephens, 31 Mo. 38; Carlisle *v.* Rawlings, 18 Mo. 166.

In West Virginia it has been held that an action of unlawful entry and detainer may be revived on the death of a party, under a statute providing for the revival of "any action, whether the cause of action would survive at common law or not." Cunningham *v.* Sayre, 21 W. Va. 440, 443.

18. An action for libel or slander, at common law, does not survive to the representatives of a deceased plaintiff, nor against the representatives of a deceased defendant. Shafer *v.* Grimes, 23 Iowa 550 [but see Carson *v.* McFadden, 10 Iowa 91]; Walters *v.* Nettleton, 5 Cush. (Mass.) 544; Long *v.* Hitchcock, 3 Ohio 274. In Ireland *v.* Champney, 4 Taunt. 884, it was held that, although an assessment of damages takes place in the lifetime of a party plaintiff in an action for libel, and the death of plaintiff took place before entry of judgment, the action abated. And in some states there are specific provisions in the statutes that such an action shall not survive. Jones *v.* Townsend, 23 Fla. 355, 2 So. 612; Johnson *v.* Haldeman, (Ky. 1897) 43 S. W. 226; Moore *v.* Bennett, 65 Barb. (N. Y.) 338; Haight *v.* Hayt, 19 N. Y. 464; Roberts *v.* Marsen, 23 Hun (N. Y.) 486. In other states, however, the statutes expressly provide that the action shall survive. Johnson *v.* Bradstreet Co., 87 Ga. 79, 13 S. E. 250 [but see Swift Specific Co. *v.* Davis, 76 Ga. 787]; Carson *v.* McFadden, 10 Iowa 91 [but see Shafer *v.* Grimes, 23 Iowa 550]; Nutting *v.* Goodridge, 46 Me. 82; Alpin *v.* Morton, 21 Ohio St. 536.

In case of death of plaintiff pending the suit, by statute in Maine and Ohio, an action for slander survives. Nutting *v.* Goodridge, 46 Me. 82; Alpin *v.* Morton, 21 Ohio St. 536.

Loss of office by libel.— A right of action for libel does not survive by force of a statute providing that actions for "damage done to real or personal estate" survive, even though the party injured lost by the libel a valuable office. Cummings *v.* Bird, 115 Mass. 346.

19. An action for malicious prosecution, at common law, and in states where the statutes do not provide to the contrary, abates on the death of a party. Ward *v.* Blackwood, 41 Ark. 295, 48 Am. Rep. 41; Clark *v.* Carroll,

tice;[20] mental suffering for failure to deliver telegram;[21] misconduct on the part of an agent;[22] nuisance;[23] personal injuries.[24] The rule has also been held to

59 Md. 180; Conly *v.* Conly, 121 Mass. 550; Nettleton *v.* Dinehart, 5 Cush. (Mass.) 543; Bolin *v.* Stewart, 7 Baxt. (Tenn.) 298.

In Ohio an action for malicious prosecution does not abate by the plaintiff's death pending the action. Flynn *v.* Hirschauer, 1 Handy (Ohio) 480.

Suing out of malicious injunction.— An action for maliciously and without probable cause suing out an injunction, whereby the operation of plaintiff's mill was suspended, abates on the latter's death. Mumpower *v.* Bristol, 94 Va. 737, 27 S. E. 581.

20. Action for malpractice.— At common law a cause of action against a physician or a surgeon, arising from want of care or skill, does not survive the death of either party.

Indiana.— Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 772, wherein it is held that although the action does not survive at common law, the husband had a right of action for loss of wife's services, between the commission of the injury and her death, and if the action grew out of a breach of contract for skilful service it survives the death of the wife.

New Hampshire.— Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416.

New York.— Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

Ohio.— Wolf *v.* Wall, 40 Ohio St. 111.

Virginia.— Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

United States.— Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A. 79.

And this is true by express provision of statute in some states. Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Best *v.* Vedder, 58 How. Pr. (N. Y.) 187. But under 3 How. Stat. Mich. § 7397, which provides for the survival of actions for negligent injuries to the person, it had been held that an action for malpractice against a physician will survive against his executors. Norris *v.* Grove, 100 Mich. 256, 58 N. W. 1006.

21. An action against a telegraph company to recover for mental suffering caused by the failure of defendant to deliver within a reasonable time a message sent by plaintiff abates by the latter's death. Fitzgerald *v.* Western Union Tel. Co., 15 Tex. Civ. App. 143, 40 S. W. 421.

22. An action for misconduct of clerk of a deceased postmaster will not lie against the personal representative of the postmaster. So held in Franklin *v.* Low, 1 Johns. (N. Y.) 396.

23. An action on the case for a nuisance, at common law, dies with the person. Upper Appomattox Co. *v.* Hardings, 11 Gratt. (Va.) 1. See also Thayer *v.* Dudley, 3 Mass. 296, wherein it was held that where the plaintiff in review dies pending the review, the original action being case for special damage from a common nuisance in which the plaintiff in review was defendant, his administrator cannot be made a party to the review.

But see Aldrich *v.* Howard, 8 R. I. 125, 86 Am. Dec. 615, wherein it was held that by virtue of a statute providing that causes of actions and actions of trespass and trespass on the case for damages to the person or to real and personal estate shall survive the death of the plaintiff or defendant therein, an action on the case for erecting and maintaining a stable so near a hotel as to be a nuisance thereto survives the death of the defendant pending the action and may be prosecuted against his personal representative.

Liquor nuisance.— In New Hampshire a petition for the abatement of a liquor nuisance, under N. H. Laws (1887), c. 77, which provides that on petition of no less than twenty legal voters the supreme court shall have jurisdiction to restrain the same, being in its nature a criminal proceeding by the state, the jurisdiction of the court is not affected by the death of any of the petitioners after the petition has been filed. Beebe *v.* Wilkins, (N. H. 1892) 29 Atl. 693.

Nuisance in highway.— In Hawkins *v.* Glass, 1 Bibb (Ky.) 246, it was held that an action on the case will not lie against an executor for a nuisance erected by the testator in a highway, whereby the plaintiff's horse was killed. See also Cardington *v.* Fredericks, 46 Ohio St. 442, 21 N. E. 766, wherein it was held that an action against a municipal corporation, founded upon a petition alleging that a street much used by the public was so unskilfully and negligently constructed and left by the defendant as to be in an unsafe and dangerous condition, and allowed to become out of repair, and obstructed by the rubbish and refuse of the village so that it was highly dangerous, and that the plaintiff, while lawfully passing along the street, accidentally and without fault or negligence on her part, was precipitated down an enbankment whereby she was greatly bruised and injured, for which damages she asks judgment, is an action for a nuisance and abates on the death of the party injured.

An action by a city which has been charged for a nuisance, brought to recover over against an individual responsible in the first instance for creating it, does not survive the death of the defendant, so that it can be prosecuted against his estate. So held in Knox *v.* Sterling, 73 Ill. 214.

24. An action for personal injuries at common law abates on the death of the person injured or of the person inflicting the injury.

District of Columbia.— Chichester *v.* Union Transfer Co., 1 MacArthur (D. C.) 295.

Florida.— Jacksonville St. R. Co. *v.* Chappell, 22 Fla. 616, 1 So. 10.

Indiana.— Hilliker *v.* Citizens St. R. Co., 152 Ind. 86, 52 N. E. 607. *Compare* Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230.

Maryland.— Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 191.

Minnesota.— Green *v.* Thompson, 26 Minn. 500, 5 N. W. 376.

apply to actions for seduction;[25] trespass for injury to real property.[26]

Missouri.— Davis *v.* Morgan, 97 Mo. 79, 10 S. W. 881; Stanley *v.* Bircher, 78 Mo. 245; Stanley *v.* Vogel, 9 Mo. App. 98.

New Hampshire.— Sawyer *v.* Concord R. Co., 58 N. H. 517.

New York.— Norton *v.* Wiswall, 14 How. Pr. (N. Y.) 42.

North Carolina.— Harper *v.* Nash County, 123 N. C. 118, 31 S. E. 384.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79.

Wisconsin.— Milwaukee Mut. F. Ins. Co. *v.* Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627.

United States.— Munal *v.* Brown, 70 Fed. 967.

England.— Flynn *v.* Perkins, 8 Jur. N. S. 1177.

See 1 Cent. Dig. tit. "Abatement and Revival," § 261 *et seq.*

By express statutory provision the action was held to survive in the following cases:

Delaware.— Quinn *v.* Johnson Forge Co., 9 Houst. (Del.) 338, 32 Atl. 858.

Georgia.— Pritchard *v.* Savannah St., etc., R. Co., 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721.

Illinois.— Wehr *v.* Brooks, 21 Ill. App. 115.

Iowa.—McKinlay *v.* McGregor, 10 Iowa 111.

Kansas.— Atchison, etc., R. Co. *v.* Rowe, 56 Kan. 411, 43 Pac. 683.

Kentucky.— Perkins *v.* Stein, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861; Hansford *v.* Payne, 11 Bush (Ky.) 380.

Maine.— Hooper *v.* Gorham, 45 Me. 209.

Massachusetts.— Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298; Bancroft *v.* Boston, etc., R. Corp., 11 Allen (Mass.) 34; Demond *v.* Boston, 7 Gray (Mass.) 544; Hollenbeck *v.* Berkshire R. Co., 9 Cush. (Mass.) 478 (holding that instantaneous death vests no right of action in decedent, and hence no right can pass to the administrator).

Mississippi.— Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537.

Nebraska.— Webster *v.* Hastings, (Nebr. 1900) 81 N. W. 510.

Ohio.— Ohio, etc., Coal Co. *v.* Smith, 53 Ohio St. 313, 41 N. E. 254.

Pennsylvania.— Birch *v.* Pittsburg, etc., R. Co., 165 Pa. St. 339, 30 Atl. 826.

Vermont.— Eames *v.* Brattleboro, 54 Vt. 471; Bradley *v.* Andrews, 51 Vt. 525.

Wisconsin.— Lehmann *v.* Farwell, 95 Wis. 185, 70 N. W. 170, 60 Am. St. Rep. 111, 37 L. R. A. 333.

See 1 Cent. Dig. tit. "Abatement and Revival," § 255 *et seq.*

In Illinois, where the plaintiff, pending an action brought by him to recover for a personal injury resulting from negligence, dies from some other cause than such injury, the action will survive and may be prosecuted in the name of his administrator. Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263.

Cause of action not accruing during life of wrongdoer.— It has also been held that an action cannot be maintained against the administrator of a wrongdoer, for damages for personal injuries, where the wrongdoer was killed by the negligent act causing the injury, since the cause of action did not accrue against the deceased during his lifetime. Letson *v.* Brown, 11 Colo. App. 11, 52 Pac. 287. See also Dayton M. E. Church *v.* Rench, 7 Ohio St. 369, wherein it was held that the cause of action did not accrue during the lifetime of the decedent.

25. Action by father for seduction of his daughter, in the absence of statutory provision to the contrary, does not survive the death of either party.

Georgia.— Brawner *v.* Sterdevant, 9 Ga. 69.

Iowa.— See Shafer *v.* Grimes, 23 Iowa 550.

New Jersey.— But see Noice *v.* Brown, 39 N. J. L. 569, wherein an action for the seduction of a daughter, in the lifetime of the father, was allowed to be maintained by his personal representative.

New York.— Holliday *v.* Parker, 23 Hun (N. Y.) 71; George *v.* Van Horn, 9 Barb. (N. Y.) 523.

North Carolina.— McClure *v.* Miller, 11 N. C. 133.

Canada.— Udy *v.* Stewart, 10 Ont. 591; Healey *v.* Crummer, 11 U. C. C. P. 527; Ball *v.* Goodman, 10 U. C. C. P. 174; Cross *v.* Goodman, 20 U. C. Q. B. 242. *Compare* Chisholm *v.* Goodman, 6 U. C. L. J. 88.

Action by woman for her seduction survives to her administrator upon her death during its pendency. Shafer *v.* Grimes, 23 Iowa 550.

Seduction of servant.— A cause of action by a master for the seduction of his servant does not, it seems, survive. People *v.* Tioga C. Pl., 19 Wend. (N. Y.) 73.

26. An action of trespass for an injury to land, at common law, and in the absence of a statutory provision to the contrary, does not survive the death of a party.

Alabama.— Blakeney *v.* Blakeney, 6 Port. (Ala.) 109, 30 Am. Dec. 574.

California.—O'Conner *v.* Corbitt, 3 Cal. 370.

Georgia.— Petts *v.* Ison, 11 Ga. 151, 56 Am. Dec. 419.

Illinois.— Reed *v.* Peoria, etc., R. Co., 18 Ill. 403.

Kentucky.—Cowan *v.* Campbell, 17 B. Mon. (Ky.) 522, 66 Am. Dec. 184.

New Hampshire.— Forist *v.* Androscoggin River Imp. Co., 52 N. H. 477.

Pennsylvania.— McCallion *v.* Gegan, 9 Phila. (Pa.) 240, 29 Leg. Int. (Pa.) 12.

Tennessee.— Baker *v.* Dansbee, 7 Heisk. (Tenn.) 229.

Virginia.— Harris *v.* Crenshaw, 3 Rand. (Va.) 14.

By express statutory provision, however, in some states this action will survive.

California.— Haight *v.* Green, 19 Cal. 113.

Indiana.— Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586.

Massachusetts.— Goodridge *v.* Rogers, 22 Pick. (Mass.) 495; Wilbur *v.* Gilmore, 21 Pick. (Mass.) 250.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Missouri.— Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309, 21 S. W. 491.

In some states, however, an action to recover damages for an unlawful arrest survives the death of the person injured.[27]

(II) *Divorce.* From the very nature of things a cause of action does not survive the death of a party where the only relief sought is a dissolution of the marriage relation; death effectuates the very end which it is the purpose of the suit to accomplish.[28] But where the consequences of the divorce are such as affect

New Hampshire.— Forist *v.* Androscoggin River Imp. Co., 52 N. H. 477.

Pennsylvania.— McCallion *v.* Gegan, 9 Phila. (Pa.) 240, 29 Leg. Int. (Pa.) 12.

Wisconsin.— Cotter *v.* Plumer, 72 Wis. 476, 40 N. W. 379.

Benefits enuring from trespass.— A cause of action arising from one's trespass on land does not survive against his executrix except to the extent of enabling a recovery for the amount which actually enured to the benefit of the estate from the trespass. Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743.

Damages as incident to injunction.— An action for an injunction in which incidentally damages for the maintenance of a railroad are demanded is not an action for trespass, and on the death of the plaintiff may be revived in the name of his devisee and executor. Henderson *v.* New York Cent. R. Co., 78 N. Y. 423; Sanders *v.* New York El. R. Co., 15 Daly (N. Y.) 388, 7 N. Y. Suppl. 64.

Restraining trespass.— An action to restrain the defendant from entering upon land and cutting timber abates by the death of the defendant pending the action. Johnson *v.* Elwood, 82 N. Y. 362.

Trespass quare clausum fregit, it seems, is not converted into an action *de bonis asportatis* and thus made to survive by an allegation in the declaration that trees cut were carried away. Harris *v.* Crenshaw, 3 Rand. (Va.) 14.

Wilful cutting of forest.— It has been held that an action of debt for wilful cutting of the plaintiffs' forest trees, contrary to a statute, does not survive. Little *v.* Conant, 2 Pick. (Mass.) 527.

27. Unlawful arrest.— In Whitcomb *v.* Cook, 38 Vt. 477, it was held that an action to recover damages for an unlawful arrest survives the death of the person injured and may be maintained by his administrator. To same effect is Griffin *v.* Wilcox, 21 Ind. 370; Huggins *v.* Toler, 1 Bush (Ky.) 192.

28. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

California.—Kirschner *v.* Dietrich, 110 Cal. 502, 42 Pac. 1064.

Iowa.— Barney *v.* Barney, 14 Iowa 189.

Maryland.— McCurley *v.* McCurley, 60 Md. 185, 45 Am. Rep. 717; Thomas *v.* Thomas, 57 Md. 504.

Michigan.— Wilson *v.* Wilson, 73 Mich. 620, 41 N. W. 817; Zoellner *v.* Zoellner, 46 Mich. 511, 9 N. W. 831.

Oregon.— Nickerson *v.* Nickerson, 34 Oreg. 1, 48 Pac. 423, 54 Pac. 277.

England.— Stanhope *v.* Stanhope, 11 P. D. 103.

See 17 Cent. Dig. tit. "Divorce," § 269 *et seq.*

As to effect of death of husband or wife upon claims for alimony, see Divorce.

Action for separation.— Where a bill was filed by the wife against her husband for a separation from bed and board on account of alleged cruel treatment, and the assignees of the husband's interest in the wife's real estate were made defendants, and the husband died before a decree, but the wife failed to make out a case which would have entitled her to a decree of separation if the husband had lived until the hearing, the other defendants are entitled to have the bill dismissed as to them, with costs. Sackett *v.* Giles, 3 Barb. Ch. (N. Y.) 204.

Allowance for counsel fees.— In Pearson *v.* Darrington, 32 Ala. 227, it was held that an allowance for counsel fees in a suit for divorce cannot be made after the husband's death. But see Ballard *v.* Caperton, 2 Metc. (Ky.) 412, wherein it was held that in actions for divorce and alimony the attorney's fee, with the other items of cost for which the husband is liable, may be fixed after the death of the wife.

In McCurley *v.* McCurley, 60 Md. 185, 45 Am. Rep. 717, 720, the court said: "It is well settled that the death of either party to a divorce suit before decree, it being a personal action, abates the divorce proceedings; and this effect must extend to whatever is identified with those proceedings. The allowance of money to pay the wife's counsel fees is in furtherance of the procedure to obtain or prevent the divorce. When, therefore, the jurisdiction to pass a decree is ended, no jurisdiction can survive as to matters purely ancillary to that object."

Death of libellant before suit.— A libel for divorce cannot be prosecuted by libellant's father, or any third person, where libellant dies before entry of the libel, in order to exclude libellee from a share of her husband's estate or from the custody of their child. Kimball *v.* Kimball, 44 N. H. 122, 82 Am. Dec. 194.

Death pending trial.— By a fiction of law, all judicial proceedings during a term are treated as if they took place on the first day of the term. Under this rule, where plaintiff in a suit for divorce on the ground of adultery dies pending the trial, after it has been entered upon and before the retirement of the jury, if all issues are found by the jury in favor of plaintiff, judgment of divorce will be entered as of the first day of the term, while the plaintiff was still alive. Webber *v.* Webber, 83 N. C. 280.

Modification of decree.— The death of a husband pending his wife's proceeding for a modification of a decree of divorce abates the proceeding. O'Hagan *v.* O'Hagan, 4 Iowa 509.

the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation as that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce within itself, but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution.[29] It has also been held that the right of a party against whom a decree of divorce has been rendered, to have the same reversed for error, is not defeated by the death of the other party pending the appeal or writ of error.[30]

(III) *Dower.* The death of plaintiff pending an action to have her rights of dower determined abates the action;[31] and, in a suit at law, if a dowress dies before her right is established, her representatives have no remedy, either for costs or for the mesne profits of the premises after her right accrued.[32] But in some states the rule in chancery is different.[33] It has also been held that, as a

29. Thomas *v.* Thomas, 57 Md. 504; Nickerson *v.* Nickerson, 34 Oreg. 1, 48 Pac. 423, 54 Pac. 277; Stanhope *v.* Stanhope, 11 P. D. 103.

Wife claiming as widow.— Where the husband, in an action by him for divorce, had, after the wife had filed a counterclaim asking for divorce and alimony, filed an amended petition seeking to have the marriage declared void *ab initio*, his administrators had the right, after his death, to revive the cause of action set up in the amended petition, it being alleged in the amended petition that defendant was asserting certain rights in plaintiff's estate, as his widow. Barth *v.* Barth, (Ky. 1897) 42 S. W. 1116.

30. Danforth *v.* Danforth, 111 Ill. 236, wherein it was held that a divorced wife may, after her husband's death, prosecute a writ of error to reverse the decree, and thereby be restored to her rights as widow in the estate of her deceased husband. To same effect is Wren *v.* Moss, 7 Ill. 72. But see Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614, wherein it was held that a decree of divorce rendered against a non-resident on defective service, in that the affidavit for the warning order did not specify defendant's post-office address, will not be set aside after plaintiff's death because of such error, where it appears that defendant has no defense to the suit. See also note 92, p. 79.

Action to set aside decree.— An action may be maintained to set aside a decree of divorce fraudulently obtained, even after the death of the party obtaining such decree. Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341; Watson *v.* Watson, 47 How. Pr. (N. Y.) 240; Fidelity Ins. Co.'s Appeal, 93 Pa. St. 242; Boyd's Appeal, 38 Pa. St. 241; Johnson *v.* Coleman, 23 Wis. 452, 99 Am. Dec. 193.

Rule in Tennessee.— In Tennessee it has been held that after a decree of divorce and the death of one of the parties there is no statute authorizing a revivor of the cause,— it can be revived only by an appeal. Owens *v.* Sims, 3 Coldw. (Tenn.) 544.

31. *Delaware.*—Betts *v.* Matthews, 4 Harr. (Del.) 427.

Florida.— Roan *v.* Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180.

Illinois.— Hitt *v.* Scammon, 82 Ill. 519; Turney *v.* Smith, 14 Ill. 242.

Maine.— Rowe *v.* Johnson, 19 Me. 146.

Massachusetts.— Atkins *v.* Yeomans, 6 Metc. (Mass.) 438.

New Hampshire.— Tuck *v.* Fitts, 18 N. H. 171.

New Jersey.— Parks *v.* McClellan, 44 N. J. L. 552.

New York.— Robinson *v.* Govers, 138 N. Y. 425, 34 N. E. 209; McKeon *v.* Fish, 33 Hun (N. Y.) 28.

Ohio.— Miller *v.* Woodman, 14 Ohio 518.

Pennsylvania.— Sandback *v.* Quigley, 8 Watts (Pa.) 460.

See 17 Cent. Dig. tit. "Dower," § 356.

32. *Florida.*—Roan *v.* Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180.

Illinois.— Turney *v.* Smith, 14 Ill. 242.

Massachusetts.— Atkins *v.* Yeomans, 6 Metc. (Mass.) 438.

New Jersey.— Parks *v.* McClellan, 44 N. J. L. 552.

New York.— Johnson *v.* Thomas, 2 Paige (N. Y.) 377.

Pennsylvania.— Sandback *v.* Quigley, 8 Watts (Pa.) 460.

Death after judgment.— The fact that a plaintiff suing for dower, and the rental value thereof from the time of her husband's death, died after the rendition of judgment dismissing her petition, does not prevent a reversal of the judgment, her personal representatives being entitled to the rents. Kincaid *v.* Wilson, (Ky. 1899) 49 S. W. 333. But see Hitt *v.* Scammon, 82 Ill. 519, wherein it was held that where a decree assigning dower to a widow at her suit against the alienees of her husband is reversed on appeal and remanded for further proceedings, and before any further proceedings are had in the court below she died, her administrator cannot prosecute the suit for the recovery of damages and mesne profits.

33. Thus it has been held that, if the husband dies seized, the widow may recover, against the heir or devisee, her share of the rents and profits from the time the right accrued; and the death of the dowress pending suit does not deprive her personal representatives of the arrears of dower, but they may revive for the purpose of having such arrears determined by the decree of the court.

Kentucky.— Kincaid *v.* Wilson, (Ky. 1899) 49 S. W. 333; Magruder *v.* Smith, 79 Ky. 512.

Maryland.— Price *v.* Hobbs, 47 Md. 359.

widow's right to dower in the personalty of her deceased husband is absolute, a suit for its conversion does not abate upon her death, but survives to her personal representatives.[34]

(IV) *Fraud and Deceit* — (A) *In General.* At common law an action for fraud or deceit dies with the person, as it is an action *ex delicto*.[35] In some states the common-law rule has been changed by statute;[36] in others it still obtains.[37]

(B) *Fraudulent Procurement of Marriage.* It has been held that an action for deceit in falsely pretending that a party was divorced from his wife, whereby plaintiff was induced to marry him, does not survive against his personal representatives.[38]

Mississippi.— Harper *v.* Archer, 28 Miss. 212.

Montana.— Lynde *v.* Wakefield, 19 Mont. 23, 47 Pac. 5.

New Jersey.— Pollitt *v.* Kerr, 49 N. J. Eq. 65, 22 Atl. 800; McLaughlin *v.* McLaughlin, 20 N. J. Eq. 190.

New York.— Johnson *v.* Thomas, 2 Paige (N. Y.) 377.

Pennsylvania.— Paul *v.* Paul, 36 Pa. St. 270.

England.— Curtis *v.* Curtis, 2 Bro. Ch. 620.

See also Tibbets *v.* Langley Mfg. Co., 12 S. C. 465, wherein it was held that where a widow, after obtaining a decree for dower, died while an appeal was pending, her administrator is entitled to an account for rents and profits.

34. Clark *v.* Bramlett, (Ark. 1891) 16 S. W. 119.

35. *Alabama.*—Coker *v.* Crozier, 5 Ala. 369.

Georgia.— Newsom *v.* Jackson, 29 Ga. 61.

Maine.— Smith *v.* Estes, 46 Me. 158.

Vermont.— Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488.

Virginia.—Boyles *v.* Overby, 11 Gratt. (Va.) 202.

False answers in examination.— An action for making false answers in an examination under a trustee process is defeated by defendant's death. Stillman *v.* Hollenbeck, 4 Allen (Mass.) 391.

False representations.— A bill in equity seeking compensation in damages for alleged false and fraudulent representations does not survive unless the personal representatives have received an estate benefited by the fraud, or unless the person committing the fraud holds a fiduciary relation toward the person defrauded. Houghton *v.* Butler, 166 Mass. 547, 44 N. E. 624; Cheney *v.* Gleason, 125 Mass. 166.

False representations as to credit of third person.— An action on the case against a person to recover damages for fraudulently recommending a third person as worthy of credit, whereby a loss was incurred, does not survive. Henshaw *v.* Miller, 17 How. (U. S.) 212, 15 L. ed. 222. But see Hadcock *v.* Osmer, 38 N. Y. Suppl. 618, wherein it was held that a cause of action for deceit in inducing plaintiff's testator to loan money to a third person by falsely representing that such third person was good for the amount of the loan survives. To same effect is Bond *v.* Smith, 4 Hun (N. Y.) 48. Nor is such action embraced in a statute providing that actions of trespass and trespass on the case for damage done to real or personal estate shall survive. Read *v.* Hatch, 19 Pick. (Mass.) 47; Winhall *v.* Sawyer, 45 Vt. 466.

In Tennessee an action of deceit for false representations as to the credit of another survives by the peculiar law of that state saving the right of survival of the cause of action as well as the right of revival of the suit in all cases pending at the death of a party. And in an action brought in a federal court in Tennessee the same rule obtains. Warren *v.* Furstenheim, 35 Fed. 691, 1 L. R. A. 40.

Mere fraud or cheat by which one sustains a pecuniary loss cannot, it seems, be regarded as a "damage done to personal estate" within the meaning of a statute providing that actions for "damage done to personal estate" survive. Leggate *v.* Moulton, 115 Mass. 552; Stillman *v.* Hollenbeck, 4 Allen (Mass.) 391; Cutting *v.* Tower, 14 Gray (Mass.) 183; Read *v.* Hatch, 19 Pick. (Mass.) 47. *Compare* Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639.

36. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771; Baker *v.* Crandall, 78 Mo. 584, 47 Am. Rep. 126; Byxbie *v.* Wood, 24 N. Y. 607; Haight *v.* Hayt, 19 N. Y. 464; Henderson *v.* Henshall, 54 Fed. 320, 7 U. S. App. 565, 4 C. C. A. 357.

Conspiracy to cheat.— In some states a cause of action for a conspiracy to cheat and defraud has been held to affect property rights, and so survives. Fox *v.* Hale Silver Min. Co., 108 Cal. 475, 41 Pac. 328; Brackett *v.* Griswold, 103 N. Y. 425; Penrod *v.* Morrison, 2 Penr. & W. (Pa.) 126.

37. Bryant *v.* Rich, 104 Mich. 124, 62 N. W. 146; Stebbins *v.* Dean, 82 Mich. 385, 46 N. W. 778; Killen *v.* State Bank, (Wis. 1900) 82 N. W. 536; Lane *v.* Frawley, 102 Wis. 373, 78 N. W. 593; John V. Farwell Co. *v.* Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 65 Am. St. Rep. 22.

In Massachusetts an action for deceit in letting a dwelling-house infected with diphtheria, causing injury to the person, survives. Cutter *v.* Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429. But an action for deceit in the sale of poisoned grain, whereby the purchaser's horses were killed, does not survive. Cutting *v.* Tower, 14 Gray (Mass.) 183.

38. Grim *v.* Carr, 31 Pa. St. 533. See also Price *v.* Price, 75 N. Y. 244, 31 Am. Rep. 463, wherein it appeared that, by fraudulently representing that his first wife was dead, defendant induced plaintiff to marry him. He

c. **Accounting.** Proceedings for the settlement of the accounts of an executor or administrator abate, in some states, by the death of such executor or administrator pending the proceedings, and cannot be revived.[39]

d. Actions for Penalties—(1) *In General.* In the absence of express statutory provisions, actions for the recovery of statutory penalties do not survive. The death of either party, plaintiff or defendant, is an incurable abatement.[40]

subsequently abandoned her, and had the marriage annulled on the ground that his first wife was still living. It was held that as the cause of action was for a personal wrong, and not for a wrong to the property rights or interests of plaintiff, it would not, on the death of defendant, survive against his executor. But see Withee *v.* Brooks, 65 Me. 14, wherein it was held that under Me. Rev. Stat. c. 87, § 8, providing that actions of trespass and trespass on the case survive, an action against a man for inducing plaintiff to marry him by false representations that he was single may be revived against defendant's personal representatives after his death.

Action for services.— If a woman goes through a form of marriage and lives with a man as his wife for many years, performing all the duties of that relation, and after his death learns for the first time that he had a wife living and not divorced from him, she cannot recover from his administrator for her services as housekeeper under an implied contract with the intestate. Cooper *v.* Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721. *Contra,* Higgins *v.* Breen, 9 Mo. 497.

Action for support.— Where a woman induces a man to marry her by falsely representing that she is single, his cause of action is for a personal injury, and the damage to his estate, by reason of the support given to her, is but incidental to the wrong, and cannot be recovered on the theory of a *quasi*-contract, and therefore the cause of action therefor does not survive against her estate. Payne's Appeal, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215.

Action to cancel marriage contract.— The right of action to cancel a marriage contract which, if genuine and followed by the requisite consummation, would create rights in the property of the alleged husband, survives to his executor or administrator. Sharon *v.* Terry, 36 Fed. 337, 1 L. R. A. 572.

Action to impeach marriage.— In case of a marriage procured by fraud unknown to the injured party, no right to impeach the marriage survives to his personal representatives, where he died without discovering the fraud. Tomppert *v.* Tomppert, 13 Bush (Ky.) 326, 26 Am. Rep. 197.

39. Herbert *v.* Stevenson, 3 Dem. Surr. (N. Y.) 236. See also Matter of Steencken, 51 N. Y. App. Div. 417, 64 N. Y. Suppl. 660, wherein it was held that where co-executors, one of whom was also temporary administrator, filed their account, which was referred to a referee, who, after hearing, reported to the surrogate, and pending action by the surrogate the executor and administrator died, the right of the surrogate to enter any personal decree against such party abated by his death, except so far as such deceased had in his hands property of the estate for which he should personally account.

But see Quick *v.* Campbell, 44 S. C. 386, 22 S. E. 479, wherein it was held that under S. C. Code, § 142, providing that an action on a cause of action which survives shall not abate by the death of a party, but that, on motion within a year from such death, the court may allow the action to be continued by or against his representative or successor in interest, an action pending against an administrator for an accounting may, on the death of defendant after trial, and before judgment, be continued by a substitution of his representative, and judgment may be rendered against the substituted defendant without a second trial.

Accounting by guardian.— In Illinois it has been held that a proceeding in the county court against a guardian, to compel him to account, is not a suit either at law or in equity, and abates on his death, even after appeal to the circuit court, and no citation lies against his administrator to compel a settlement of the account. Harvey *v.* Harvey, 87 Ill. 54.

Death pending appeal.—Where an appeal is taken from the allowance of an administrator's account, and, pending the appeal, the administrator dies, the administrator of the administrator cannot be cited to appear before the court where the appeal was pending to settle such account. Wentworth *v.* Wentworth, 12 Vt. 244.

40. *Alabama.*— Willis *v.* Byrne, 106 Ala. 425, 17 So. 332; Jones *v.* Brooks, 30 Ala. 588; Fairley *v.* Davis, 6 Ala. 375.

Connecticut.— Mitchell *v.* Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146.

Illinois.— Diversey *v.* Smith, 103 Ill. 378, 42 Am. Rep. 14.

Indiana.— Davis *v.* State, 119 Ind. 555, 22 N. E. 9.

Kentucky.— Cowan *v.* Campbell, 17 B. Mon. (Ky.) 522, 66 Am. Dec. 184.

Massachusetts.—Yarter *v.* Flagg, 143 Mass. 280, 9 N. E. 649; Little *v.* Conant, 2 Pick. (Mass.) 527.

New York.— Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296, 28 N. Y. St. 260; Blake *v.* Griswold, 104 N. Y. 613, 11 N. E. 137; Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438; Stokes *v.* Stickney, 96 N. Y. 323.

North Carolina.— Fite *v.* Lander, 52 N. C. 247; Mason *v.* Ballew, 35 N. C. 483; Blount *v.* Fish, 2 N. C. 502; Estis *v.* Lenox, 1 N. C. 204.

Pennsylvania.— Reed *v.* Cist, 7 Serg. & R. (Pa.) 183.

Rhode Island.— Moies *v.* Sprague, 9 R. I. 541.

Tennessee.— Governor *v.* McManus, 11 Humphr. (Tenn.) 152.

(11) *Against Corporate Officers.* The action given by statute in some states against the officers of a corporation for failure to file a report of the condition of the corporation is penal in its character and hence does not survive.[41]

e. Actions under Civil-Damage Acts. It has been held that an action under the New York civil-damage act by a widow, to recover for an injury to her means of support, against a person who had sold intoxicants to her husband, who by reason thereof was drowned, is abated by the death of defendant and cannot be revived and prosecuted against his representatives.[42]

Texas.—Watson *v.* Loop, 12 Tex. 11; Nolan *v.* Tennison, 21 Tex. Civ. App. 332, 50 S. W. 1028; State *v.* Schuenemann, 18 Tex. Civ. App. 485, 46 S. W. 260.

Vermont.—Benson *v.* Egerton, Brayt. (Vt.) 21.

United States.—U. S. *v.* De Goer, 38 Fed. 80; Schreiber *v.* Sharpless, 17 Fed. 589; Jones *v.* Vanzandt, 4 McLean (U. S.) 604, 13 Fed. Cas. No. 7,504.

England.—Kirkham *v.* Wheely, 3 Salk. 282.

But see Prescott *v.* Knowles, 62 Me. 277, wherein it was held that an action of trespass for double damages under Me. Rev. Stat. c. 30, § 1, for injury done by a dog, survives plaintiff's death during its pendency. See also Wiener *v.* Peacock, 31 Mo. App. 238, wherein it was held that under Mo. Rev. Stat. § 96, providing that all wrongs to the property rights or interests of another shall survive, an action lies against the legal representatives of a mortgagee under Mo. Rev. Stat. §§ 3311, 3312, declaring that a mortgagee who fails to acknowledge satisfaction after demand on payment of the debt shall forfeit ten per cent., and any other damages sustained.

Illegal sale of liquor.—An action on a liquor-dealer's bond to recover a penalty for an alleged infraction of the bond abates on the death of defendant. State *v.* Schuenemann, 18 Tex. Civ. App. 485, 46 S. W. 260. But an action by a father on such bond, for "$500 as liquidated damages" for the sale of liquor to his son, does not abate on the principal's death. Nolan *v.* Tennison, 21 Tex. Civ. App. 332, 50 S. W. 1028.

Issuance of marriage license without authority.—An action against a probate judge to recover the statutory penalty for issuing a marriage license to one under age, without the consent of the parent or guardian, is incurably abated by the death of the judge or of plaintiff. Willis *v.* Byrne, 106 Ala. 425, 17 So. 332; Fairley *v.* Davis, 6 Ala. 375.

Issuance of writ without security.—An action against a clerk of court on his official bond, to recover a statutory penalty for issuing a writ without requiring security, abates on the death of the clerk. Fite *v.* Lander, 52 N. C. 247.

Removal of pauper.—An action upon a statute for transporting a pauper from one town to another without an order of removal, with intent to charge the latter town with the support of such pauper, does not survive. Winhall *v.* Sawyer, 45 Vt. 466.

Rule in Indiana.—A cause of action against a telegraph company for the statutory penalty is one that survives, and may be enforced by the representative of the person in whom the right existed after his death. Under the Indiana statute it is only causes of action arising out of an injury to the person which do not survive. Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604.

41. Mitchell *v.* Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146; Diversey *v.* Smith, 103 Ill. 378, 42 Am. Rep. 14; Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296; Blake *v.* Griswold, 104 N. Y. 613, 11 N. E. 137; Brackett *v.* Griswold, 103 N. Y. 425, 9 N. E. 438; Stokes *v.* Stickney, 96 N. Y. 323; California Bank *v.* Collins, 5 Hun (N. Y.) 209; Reynolds *v.* Mason, 54 How. Pr. (N. Y.) 213; Moies *v.* Sprague, 9 R. I. 541.

Directors of national bank.—It has been held that the act of congress imposing a liability on the directors of a national bank for acts resulting in injury to the bank, its stockholders or creditors, and making them liable for the amount of the damage, is a remedial and not a penal statute, and that an action under it survives against the estate of a director. Stephens *v.* Overstolz, 43 Fed. 465.

False report.—Under N. Y. Laws (1875), c. 611, § 21, providing that if any certificate or report made by the officers of a corporation created under the statute shall be false all the officers signing it shall be liable for all debts of the corporation contracted during their term of office, it has been held that the cause of action thus given abates with the death of the creditor. Dalton *v.* Godwin, 5 N. Y. Suppl. 257; Boyle *v.* Thurber, 50 Hun (N. Y.) 259, 2 N. Y. Suppl. 789.

42. Moriorty *v.* Bartlett, 99 N. Y. 651, 1 N. E. 794 [*reversing* 34 Hun (N. Y.) 272]. But see Morenus *v.* Crawford, 51 Hun (N. Y.) 89, 5 N. Y. Suppl. 453, wherein it was held that an action by a wife under the "civil-damage act," for the value of a horse killed by her husband while in a state of intoxication produced by liquor furnished by defendant, may be revived and prosecuted in the name of plaintiff's administrator after her death. See also Kilburn *v.* Coe, 48 How. Pr. (N. Y.) 144, wherein it was held that where an injury to the property or estate of an habitual drunkard results from selling such person liquor, an action for damages may be brought, in case of his decease, in favor of his executors or administrators.

Recovery back for illegal sale.—In Vermont an action as provided by statute, to recover money paid by plaintiff to a liquor-dealer for liquor sold in violation of the liquor law to plaintiff, a retail liquor-dealer, survives on the death of the seller. Yearteau *v.* Bacon, 65 Vt. 516, 27 Atl. 198.

f. Audita Querela. Where the basis of an audita querela is altogether personal, it will die with the person.[43]

g. Devastavit. A scire facias suggesting a *devastavit* by an executor or administrator does not survive against his personal representatives.[44]

h. Discovery. After answer and discovery the rule is that a suit brought merely for discovery cannot be revived.[45]

i. Habeas Corpus. Where, pending an appeal by petitioner in a habeas corpus proceeding to obtain possession of a child, respondent dies, the proceeding abates and cannot be revived against respondent's representatives.[46]

j. Insolvency Proceedings. It has been held that where an alleged insolvent dies before the return-day of an application for his insolvency, the proceedings in insolvency abate, and orders that have been made therein cease to have any force.[47]

k. Mandamus. An application for a mandamus has been classed with those personal actions which die with the person.[48]

l. Partition. Upon a writ of partition at common law, on which partition is to be made among all tenants, as well plaintiffs as defendants, it has been held that the death of any one of the parties abates the writ if it takes place before the interlocutory judgment is rendered.[49] But the death of a plaintiff after judgment *quod partitio fiat* does not abate the writ.[50]

m. Proceeding for Violation of Municipal Ordinance. A proceeding for the violation of a city ordinance abates upon defendant's death.[51]

n. Recovery of Life Estate. An action to recover land by one who has only a life estate therein is abated by his death.[52]

o. Supplementary Proceedings. Where, on the appearance for examination of persons alleged to be indebted to a judgment debtor, it is shown that the

43. Connecticut, etc., Rivers R. Co. *v.* Bliss, 24 Vt. 411, holding that in such case the bail upon the recognizance cannot be held.

44. Conrad *v.* Dalton, 14 N. C. 251. To same effect is Griffith *v.* Beasly, 10 Yerg. (Tenn.) 434. But see note 84, p. 99.

45. Horsburg *v.* Baker, 1 Pet. (U. S.) 232, 7 L. ed. 125; Gould *v.* Barnes, 1 Dick. 133,—the reason being that the object is obtained and plaintiff has no motive for reviving it.

46. Brown *v.* Rainor, 108 N. C. 204, 12 S. E. 1028.

47. Vermont Marble Co. *v.* Superior Ct., 99 Cal. 579, 34 Pac. 326. See also *In re* McDonald, 10 Phila. (Pa.) 273, 30 Leg. Int. (Pa.) 232, wherein it was held that, on the death of an involuntary bankrupt before a jury trial has been had to determine whether he has committed an act of bankruptcy, the proceedings abate.

A cause of action against an assignee in bankruptcy for wrongfully paying the assets in his hands to other creditors of the bankrupt than plaintiff does not abate on the assignee's death. U. S. *v.* Dewey, 39 Fed. 251.

48. Booze *v.* Humbird, 27 Md. 1.

Public officer.—In U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721, it was held that in the absence of statutory provisions to the contrary a mandamus against an officer of the government abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding or on order for the substitution of parties. But see Felts *v.* Memphis, 2 Head (Tenn.) 650, wherein it was held that in a suit for mandamus prosecuted by a public officer for the public benefit, if plaintiff dies or his term of office expires before the determination of the suit, it will not abate, but may be continued by his successor.

49. Brown *v.* Wells, 12 Metc. (Mass.) 501; Mitchell *v.* Starbuck, 10 Mass. 5. But see Osgood *v.* Taggard, 18 N. H. 318, wherein it was held that upon the death of one of several petitioners for partition the petition does not abate, but notice is to be given to his heirs, who, if competent, may come in as petitioners; otherwise they may be treated as petitionees. See also Wilkinson *v.* Parish, 3 Paige (N. Y.) 653, wherein it was held that a suit for partition may be revived, after the death of one of the parties, by petition and order. And see Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213, wherein it was held that under Ill. Rev. Stat. (1874), c. 1, § 22, providing that no suit for the partition of land shall abate by the death of any party thereto, where the heirs of a deceased person brought suit for partition against the widow, and, pending the suit, two of the complainants died intestate, leaving as their only heirs at law their co-complainants, the suit did not abate as to the interests of the deceased complainants.

Death of respondent.— Upon the death of a respondent named in a petition for partition his heirs cannot be admitted to defend, and the petition abates. Dwinal *v.* Holmes, 37 Me. 97; Thomas *v.* Smith, 2 Mass. 479.

50. Frohock *v.* Gustine, 8 Watts (Pa.) 121. As to persons who may revive see *infra*, III, B, 7, c, (VI).

51. Carrollton *v.* Rhomberg, 78 Mo. 547.

52. Brown *v.* Kendall, 13 Gray (Mass.) 272.

debtor was dead at the time the order for examination was made, the proceedings will abate.[53]

5. Death of One or More of Several Plaintiffs — a. In General. If there be two or more plaintiffs, and one or more of them die, and the cause of action survives to the surviving plaintiff or plaintiffs, the action will not be thereby abated, but may proceed at the suit of the surviving plaintiff or plaintiffs.[54]

b. Suit by Husband and Wife — (1) *Death of Wife.* Where a suit is brought by husband and wife to recover a demand in her right or for an injury solely to her interest in land, and during the pendency of the suit and before judgment the wife dies, the suit abates and the husband cannot proceed alone.[55]

53. Hasewell *v.* Penman, 2 Abb. Pr. (N. Y.) 230.

54. *Alabama.*— Rosser *v.* Timberlake, 78 Ala. 162; Evans *v.* Welch, 63 Ala. 250; Bebee *v.* Miller, Minor (Ala.) 364.

Georgia.— Castor *v.* Pace, 24 Ga. 137.

Illinois.—Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213.

Indiana.— Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Meek *v.* Ruffner, 2 Blackf. (Ind.) 23.

Kentucky.— Smith *v.* Ferguson, 3 Metc. (Ky.) 424.

Louisiana.— McCord *v.* West Feliciana R. Co., 1 Rob. (La.) 519.

Maine.— Barron *v.* Burrill, 86 Me. 66, 29 Atl. 939; Treat *v.* Dwinel, 59 Me. 341; Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208.

Massachusetts.— Richardson *v.* Pond, 15 Gray (Mass.) 387.

Minnesota.— Landis *v.* Olds, 9 Minn. 90.

Missouri.— Keyser *v.* Rawlings, 22 Mo. 126; Carlisle *v.* Rawlings, 18 Mo. 166.

New Jersey.— Freeborn *v.* Denman, 8 N. J. L. 142.

New York.— Webster *v.* Kings County Trust Co., 145 N. Y. 275, 39 N. E. 964; Doherty *v.* Matsell, 54 N. Y. Super. Ct. 17; Brown *v.* Story, 2 Paige (N. Y.) 594; Lachaise *v.* Libby, 21 How. Pr. (N. Y.) 362.

North Carolina.— Bond *v.* Hilton, 51 N. C. 180.

South Carolina.— Boyleston *v.* Cordes, 4 McCord (S. C.) 144.

Vermont.— Wright *v.* Eldred, 2 D. Chipm. (Vt.) 37.

Virginia.— Beckham *v.* Duncan, (Va. 1888) 5 S. E. 690; Clarkson *v.* Booth, 17 Gratt. (Va.) 490; Nichols *v.* Campbell, 10 Gratt. (Va.) 560; Rose *v.* Burgess, 10 Leigh (Va.) 186; Hairston *v.* Woods, 9 Leigh (Va.) 308.

England.—2 Tidd's Prac. 1116 *et seq.*; Wilson *v.* Wilson, L. R. 9 Eq. 452; Cave *v.* Cork, 2 Y. & C. Ch. 130.

See 1 Cent. Dig. tit. "Abatement and Revival," § 315 *et seq.*

As to revival on death of one or more plaintiffs see *infra*, III, B, 7, f.

Assumpsit by several plaintiffs does not abate by the death of one of them. Meek *v.* Ruffner, 2 Blackf. (Ind.) 23.

Petition by some of several infants against others to have land sold for their benefit does not abate by the death of one of them. Tilly *v.* Tilly, 2 Bland (Md.) 436.

Suit by trustees.— Where one of two trustees, plaintiffs in an action of detinue to recover the trust property, dies, the right of action survives to the other trustee. Nichols *v.* Campbell, 10 Gratt. (Va.) 560. So a suit by trustees of a mortgage for its foreclosure is not abated by the death of one of them. Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162.

Trespass quare clausum fregit survives to the co-plaintiffs on the death of one of several plaintiffs. Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208; Boynton *v.* Rees, 9 Pick. (Mass.) 528.

55. *California.*— Gee *v.* Moore, 14 Cal. 472.

Connecticut.— Buck *v.* Goodrich, 33 Conn. 37.

Kentucky.— Crozier *v.* Bryant, 4 Bibb (Ky.) 174.

Maine.— Ryder *v.* Robinson, 2 Me. 127.

New Hampshire.— Pettingill *v.* Butterfield, 45 N. H. 195.

Virginia.— Archer *v.* Colly, 4 Hen. & M. (Va.) 410.

England.—Checchi *v.* Powell, 6 B. & C. 253.

But see Syme *v.* Sanders, 2 Strobh. (S. C.) 332, wherein it was held that an action of trespass to try title, brought by husband and wife, is not abated by the death of the wife. See also Sankey *v.* Sankey, 6 Ala. 607 (wherein it was held that a proceeding by husband and wife to obtain the distributive share of the wife in an estate does not abate on the death of the wife, but may be continued by the husband as administrator of his wife); Baker *v.* Red, 4 Dana (Ky.) 158 (wherein it was held that where a husband and wife sued jointly for the settlement of her father's estate and to recover her share, and the wife died pending the suit, the right to sue survived to the husband as to so much of her interest as accrued pending coverture). *Compare* Jefcoat *v.* Knotts, 11 Rich. (S. C.) 649.

Money lent by wife when sole.—Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action, it was held that it thereby abated. Checchi *v.* Powell, 6 B. & C. 253. But where the husband takes out administration on her estate he may prosecute the suit as administrator. Pattee *v.* Harrington, 11 Pick. (Mass.) 221.

Recovery of estate by curtesy.— A statute providing that if one of the demandants in a real action die, such death shall not abate the writ, does not permit a husband in a real action, brought by him and his wife in her right, to proceed, after the death of the wife, for his estate by the curtesy. Ryder *v.* Robinson, 2 Me. 127.

(II) *Death of Husband.* But where, pending an action brought by husband and wife to recover a demand or the possession of land to which they are entitled in her right, the husband dies, the action survives to the wife, and, upon her death, to her heirs and devisees.[56]

(III) *Personal Injuries to Wife.* A joint action by a husband and wife for personal injuries to the wife abates by her death,[57] but may, in some states, be continued by the wife's personal representatives.[58]

c. Suit by Partnership. The law is well settled that in a suit by partners in favor of the partnership, and relating to partnership affairs, if one or more of them die, the right to prosecute the action survives to the other members of the firm alone.[59]

56. *Kentucky.*— Weagle *v.* Hensley, 5 J. J. Marsh. (Ky.) 378.

New Hampshire.— Little *v.* Downing, 37 N. H. 355.

New York.— McDowl *v.* Charles, 6 Johns. Ch. (N. Y.) 132.

North Carolina.— King *v.* Little, 77 N. C. 138.

Virginia.— Vaughan *v.* Wilson, 4 Hen. & M. (Va.) 452.

Canada.— Harrington *v.* McManamin, 4 Allen (N. Brunsw.) 599.

See also Teneick *v.* Flagg, 29 N. J. L. 25, wherein it was held that as to such of the wife's choses in action as accrued subsequent to the coverture, the husband may sue either in their joint names or alone at his pleasure. If he join her in the action and recover judgment and die, the judgment will survive to her. But see Shepherd *v.* Harrell, 9 Humphr. (Tenn.) 641, wherein it was held that where, during the pendency of a suit in chancery by a married woman, her husband dies, a decree cannot be made in her favor without making her husband's heirs parties or showing that they have no interest in the subject-matter of the suit.

Election of widow to proceed.— A bill filed by the husband in the name of himself and wife, although for a claim in the right of the wife, is considered as a bill of the husband. If he dies before a decree in the cause, the widow may proceed in the suit or not, at her election. Dewall *v.* Covenhoven, 5 Paige (N. Y.) 581.

Personalty in right of wife.— In a suit by husband and wife for the recovery of personal property in her right, if the husband dies the right survives to her. Vaughan *v.* Wilson, 4 Hen. & M. (Va.) 452.

57. Meese *v.* Fond du Lac, 48 Wis. 323, 4 N. W. 406.

For husband's action for injuries to wife, see *supra*, III, A, 3, k.

58. Norcross *v.* Stuart, 50 Me. 87; Saltmarsh *v.* Candia, 51 N. H. 71.

59. *Alabama.*— Davis *v.* Davis, 93 Ala. 173, 9 So. 736; Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

Georgia.— Guill *v.* Pierce, 78 Ga. 49; Atlanta *v.* Dooly, 74 Ga. 702.

Illinois.— Roberts *v.* Stigleman, 78 Ill. 120; Finnegan *v.* Allen, 60 Ill. App. 354.

Kentucky.— Robinson *v.* Pikeville Bank, (Ky. 1900) 56 S. W. 660; Wilson *v.* Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; McCandless *v.* Hadden, 9 B. Mon. (Ky.) 186; Smith *v.* Ferguson, 3 Metc. (Ky.) 424.

Louisiana.— Todd *v.* Young, 16 La. Ann. 162.

Maryland.— Keirle *v.* Shriver, 11 Gill & J. (Md.) 405.

Missouri.— Matney *v.* Gregg Brothers Grain Co., 19 Mo. App. 107.

Montana.— Bohm *v.* Dunphy, 1 Mont. 333.

New York.— Shale *v.* Schantz, 35 Hun (N. Y.) 622; Lachaise *v.* Libby, 21 How. Pr. (N. Y.) 362; Taylor *v.* Church, 9 How. Pr. (N. Y.) 190. *Compare* Hackett *v.* Belden, 10 Abb. Pr. N. S. (N. Y.) 123.

North Carolina.— Bond *v.* Hilton, 51 N. C. 180.

Pennsylvania.— Struthers *v.* Peacock, 3 Wkly. Notes Cas. (Pa.) 517.

Rhode Island.— Tucker *v.* Providence, etc., R. Co., 18 R. I. 322, 27 Atl. 448.

Texas.— Dunman *v.* Coleman, 59 Tex. 199; Gunter *v.* Jarvis, 25 Tex. 581; Blackman *v.* Green, 17 Tex. 322.

West Virginia.— Ruffner *v.* Hewitt, 14 W. Va. 737.

England.— Anderson *v.* Wallis, 4 Y. & C. Exch. 336.

As to revival on death of one or more partners see *infra*, III, B, 7, f, (II).

In Maine, where one of several plaintiffs dies, his administrator has until the second term after his death to determine whether or not he will come in to prosecute. Consequently the other plaintiffs cannot be compelled to elect before then whether they will join the administrator in prosecuting the suit as surviving partners, or will themselves prosecute it in that character in case the administrator fails to appear. Snow *v.* Bartlett, 64 Me. 384.

Death of all partners.— Where plaintiffs, who are partners, both die, the personal representatives of both may be made parties plaintiff. Blackman *v.* Green, 17 Tex. 322.

Death pending motion for new trial.—In an action to enforce a partnership claim, where one of the partners dies after verdict for defendant and pending a motion for new trial, the surviving partners are in court as plaintiffs and are entitled to prosecute the motion in the interest of the late firm. State *v.* Stratton, 110 Mo. 426, 19 S. W. 803.

Dissolution pending action.—A and B, partners, brought an action to foreclose a mortgage on land executed to them to secure a debt. Pending the action A and B dissolved

d. Suit by Tenants in Common. In case of the death of one of several plaintiffs who sue as tenants in common, the action may be continued in the name of the survivors.[60]

6. Death of One or More of Several Defendants. — a. In General. If there be two or more defendants, and one or more of them die, and the cause of action survives, the action will not be thereby abated, but may proceed against the surviving defendant or defendants.[61] There are also numerous authorities

partnership, but agreed "to hold as tenants in common" the debt in question. It was held that the partnership ceased as to the debt, and that, A having died pending the action, his personal representative should have been made a party thereto. Preston *v.* Fitch, 19 N. Y. Suppl. 849.

Slander of partnership.—An action brought by the members of a firm to recover damages for an alleged slander relating to the financial condition of the firm does not abate by the death of one of the plaintiffs during its pendency. The entire cause of action vests in the surviving plaintiffs, and the action may be prosecuted by them. Shale *v.* Schantz, 35 Hun (N. Y.) 622. To same effect is Taylor *v.* Church, 9 How. Pr. (N. Y.) 190.

Trustee in liquidation who signed and swore to the bill in a suit brought by a partnership association is not a party, and the status of the suit is not affected by his death. Manhard Hardware Co. *v.* Rothschild, 121 Mich. 657, 80 N. W. 707.

60. *Kansas.*— Crane *v.* Lowe, 59 Kan. 606, 54 Pac. 666.

Massachusetts.— Tyler *v.* Mather, 9 Gray (Mass.) 177.

New York.— Webster *v.* Kings County Trust Co., 145 N. Y. 275, 39 N. E. 964; Bucknam *v.* Brett, 35 Barb. (N. Y.) 596.

Texas.— Watrous *v.* McGrew, 16 Tex. 506.

West Virginia.— Rowe *v.* Shenandoah Pulp Co., 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870.

See also Wilson *v.* Wilson, L. R. 9 Eq. 452, which was a bill by two persons, one claiming to be tenant for life of an estate, the other to be tenant in fee, subject to the first plaintiff's life-estate, of one third of the entirety, against a defendant who claimed the entirety by an adverse title, and other defendants who claimed the remaining two thirds under the same title as the second plaintiff. The bill alleged that the first defendant had begun to cut timber on the estate and threatened to cut the whole. The first plaintiff died. It was held that a revivor was not necessary, and that the surviving plaintiff had a sufficient interest in the subject-matter to continue the suit.

Where joint tenants file a bill, and by the death of one the interest survives, there is no abatement, but the survivor may go on. Fallowes *v.* Williamson, 11 Ves. Jr. 306; Young *v.* Woollaston, Hardres 112; Harris *v.* Philips, Hardres 161.

61. *Alabama.*— Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; Evans *v.* Welch, 63 Ala. 250; Garrett *v.* Lynch, 44 Ala. 324; Rupert *v.* Elston, 35 Ala. 79; Hood *v.* Branch Bank, 9 Ala. 335; Gayle *v.* Agee, 4 Port. (Ala.) 507; Harrison *v.* King, Minor (Ala.) 364.

Arkansas.— Rheubottom *v.* Sadler, 19 Ark. 496.

Connecticut.— Bundy *v.* Williams, 1 Root (Conn.) 543.

Georgia.— Stancil *v.* Kenan, 35 Ga. 102; Castor *v.* Pace, 24 Ga. 137.

Illinois.— Steele *v.* Thatcher, 79 Ill. 400; Ballance *v.* Samuel, 4 Ill. 380.

Indiana.— Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

Iowa.— Harper *v.* Drake, 14 Iowa 533.

Kentucky.— Wilson *v.* Slaughter, 3 J. J. Marsh. (Ky.) 593; White *v.* Turner, 1 B. Mon. (Ky.) 130.

Massachusetts.— Tucker *v.* Utley, 168 Mass. 415, 44 N. E. 534; Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Cochrane *v.* Cushing, 124 Mass. 219; Ricker *v.* Gerrish, 124 Mass. 367; New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Sumner *v.* Tileston, 4 Pick. (Mass.) 308; Foster *v.* Hooper, 2 Mass. 572.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263.

Minnesota.—Lanier *v.* Irvine, 24 Minn. 116.

Missouri.— Carlisle *v.* Rawlings, 18 Mo. 166.

Nevada.— Fowler *v.* Houston, 1 Nev. 469.

New Jersey.— Hendrickson *v.* Herbert, 38 N. J. L. 296; Fisher *v.* Allen, 36 N. J. L. 203.

New York.— Scholey *v.* Halsey, 72 N. Y. 578; Potter *v.* Van Vranken, 36 N. Y. 619; Union Bank *v.* Mott, 27 N. Y. 633; Pierson *v.* Morgan, 52 Hun (N. Y.) 611, 4 N. Y. Suppl. 898; Masten *v.* Blackwell, 8 Hun (N. Y.) 313; Livermore *v.* Bushnell, 5 Hun (N. Y.) 285; Brown *v.* Andrews, 1 Barb. (N. Y.) 227; Mott *v.* Petrie, 15 Wend. (N. Y.) 317; Grant *v.* Shurter, 1 Wend. (N. Y.) 148; Jenkins *v.* De Groot, 1 Cai. Cas. (N. Y.) 122; Leake, etc., Orphan House *v.* Lawrence, 11 Paige (N. Y.) 80; Halstead *v.* Cockroft, 49 How. Pr. (N. Y.) 342; Heinmuller *v.* Gray, 44 How. Pr. (N. Y.) 260; Gardner *v.* Walker, 22 How. Pr. (N. Y.) 405; Lachaise *v.* Libby, 21 How. Pr. (N. Y.) 362; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405.

Pennsylvania.— Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Dec. 459; Walter *v.* Ginrich, 2 Watts (Pa.) 204; Machette *v.* Magee, 9 Phila. (Pa.) 24, 29 Leg. Int. (Pa.) 300.

Rhode Island.— Baker *v.* Braslin, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718.

Tennessee.— Claiborne *v.* Goodloe, Cooke (Tenn.) 391.

Texas.— Aldridge *v.* Mardoff, 32 Tex. 204.

Vermont.— Newton *v.* Higgins, 2 Vt. 366.

West Virginia.— Henning *v.* Farnsworth, 41 W. Va. 548, 23 S. E. 663.

which hold that the action in such case may be continued against the personal representatives of the deceased defendant.[62]

b. Suit against Husband and Wife — (I) *Death of Husband.* A suit against a husband and wife for a tort of the wife does not abate by the death of the husband pending the suit, unless the tort was committed by her in his presence or by his coercion.[63]

(II) *Death of Wife.* It has been held that an action against husband and wife for a debt of the wife before marriage abates by the death of the wife after commencement of the suit but before declaration filed.[64]

c. Suit against Partnership. If a partner dies pending an action against the firm, the action does not abate, but may proceed to judgment against the surviving partner, unless the cause of action dies, not only as against the personal representatives of the deceased partner, but as against the surviving partner also.[65]

Wisconsin.— Cairns *v.* O'Bleness, 40 Wis. 469; Jones *v.* Keep, 23 Wis. 45.

England.— 2 Tidd's Pr. 1116 *et seq.*; Young *v.* Woollaston, Hardres 112; Harris *v.* Philips, Hardres 161.

Canada.— Beatty *v.* Neelon, 9 Ont. 385; Allan *v.* McLagan, 1 Leg. News (Que.) 4.

See 1 Cent. Dig. tit. "Abatement and Revival," § 322 *et seq.*

As to death of principal or surety, see Principal and Surety.

As to joinder of representatives of deceased see *infra*, III, B, 8, e, (v).

Assault and battery.— On the death of one of two defendants an action of assault and battery does not abate, but may be continued against the survivor. Hill *v.* Tempest, Cro. Eliz. 145.

Damages for erection of dam.— The death, pending suit, of one of three defendants in an action for erecting a dam by which plaintiff's mills were obstructed does not abate the action. Sumner *v.* Tileston, 4 Pick. (Mass.) 308.

Death of resident defendant.— Where suit was properly brought against two defendants in the county of the residence of one of them, and defendants pleaded to the merits, the death of the defendant residing in the county where suit was brought, and dismissal as to his estate, will not defeat the jurisdiction as to the other defendant. Lewis *v.* Davidson, 51 Tex. 251.

62. Colt *v.* Learned, 133 Mass. 409; Union Bank *v.* Mott, 27 N. Y. 633; Githers *v.* Clarke, 158 Pa. St. 616, 28 Atl. 232; Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818; Dingman *v.* Amsink, 77 Pa. St. 114; Megrath *v.* Gilmore, 15 Wash. 558, 46 Pac. 1032; Donnerberg *v.* Oppenheimer, 15 Wash. 290, 46 Pac. 254.

Where, pending an accounting of receivers, one dies, the court may summon in his executor in his stead. Matter of Columbian Ins. Co., 30 Hun (N. Y.) 342.

63. Douge *v.* Pearce, 13 Ala. 127. See also Baker *v.* Braslin, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718, holding that where, in trespass for assault and battery against a husband and wife jointly, the husband died pending the action, the action did not abate but could be prosecuted against the wife alone.

As to revival of suit on death of one spouse see *infra*, III, B, 8, e, (II).

Contract of wife before coverture.— An action against a husband and wife upon a contract of the wife before marriage abates as to the husband at his death. Nutz *v.* Reutter, 1 Watts (Pa.) 229.

Death pending appeal in ejectment.—Where judgment goes against husband and wife jointly for land in which the husband has a marital interest as against her, and pending an appeal the husband dies, the suit abates as to him. After his death the possession becomes hers, but this will not support the pending judgment against her or authorize the rendition of a new one. Wilson *v.* Garaghty, 70 Mo. 517.

Suit by wife against husband.—If the wife survive she may sue her husband's personal representatives for a conversion of her separate property. If the husband survive, her personal representatives may sue him. Jenkins *v.* McConico, 26 Ala. 213.

Suit for dower.—An action against husband and wife to recover dower in lands of the wife survives against her, on the death of the husband pending the action. Cozens *v.* Long, 3 N. J. L. 331.

64. Williams *v.* Kent, 15 Wend. (N. Y.) 360.

65. *Alabama.*— Clark *v.* Stoddard, 3 Ala. 366; Cullum *v.* Batre, 1 Ala. 126.

Georgia.— Crapp *v.* Dodd, 92 Ga. 405, 17 S. E. 666. And see Ross *v.* Everett, 12 Ga. 30.

Illinois.— Ballance *v.* Samuel, 4 Ill. 380.

Indiana.— Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

Louisiana.— Todd *v.* Young, 16 La. Ann. 162.

Massachusetts.— Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Nebraska.— King *v.* Bell, 13 Nebr. 409, 14 N. W. 141.

New York.— Pope *v.* Briggs, 21 N. Y. Suppl. 718; Voorhies *v.* Baxter, 1 Abb. Pr. (N. Y.) 43.

Tennessee.— Hammond *v.* St. John, 4 Yerg. (Tenn.) 107.

Virginia.— Townes *v.* Birchett, 12 Leigh (Va.) 173.

United States.— Troy Iron, etc., Factory *v.* Winslow, 11 Blatchf. (U. S.) 513, 24 Fed. Cas. No. 14,199.

As to revival on death of partner see *infra*, III, B, 8, e, (III).

Malpractice.—Where, pending a suit against two physicians, partners, for damages for an injury alleged to have been caused by the

d. Suit against Personal Representatives. It seems that on the death of one of several defendant executors or administrators the action may be continued against the survivors.[66]

e. Effect on Counterclaim. It has been held that the death, pending suit, of one of two defendants entitled to a counterclaim, does not abate the prosecution of the counterclaim.[67]

7. Death of Person Suing in Representative Capacity. As a general rule an action prosecuted by a person in a representative capacity does not abate on the death of such party pending the action.[68] This rule has been applied to suits by next friend,[69] by personal representatives,[70] and by trustees.[71]

unskilful manner in which they reset and treated plaintiff's shoulder, one of the partners dies, the action, while abating against the personal representatives of the deceased partner, may be prosecuted to judgment against the surviving partner. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

Sale of liquor.— In an action against partners as saloon-keepers for injury caused by the sale of liquor by them, the action does not abate by reason of the death of one of the partners pending the action. King *v.* Bell, 13 Nebr. 409, 14 N. W. 141.

Suit against partner.— In *Ex p.* Ware, 48 Ala. 223, it was held that an action brought against one member of a partnership on a contract made by the partnership survives upon the death of defendant and may be revived in the name of the personal representative as defendant. To same effect is Travis *v.* Tartt, 8 Ala. 574.

66. Castor *v.* Pace, 24 Ga. 137; Hicks *v.* Harris, 26 Miss. 420; Patterson *v.* Copeland, 52 How. Pr. (N. Y.) 460.

An action of devastavit against two joint administrators is not abated by the death of one of them pending the suit, but, the death being suggested on the record, the action may proceed against the survivor. Castor *v.* Pace, 24 Ga. 137.

67. Moorehead *v.* Hyde, 38 Iowa 382.

68. Edrington *v.* Mathews, 30 Ark. 665; Wright *v.* Rogers, 26 Ind. 218; Greer *v.* Howard, 41 Ohio St. 591; Bell *v.* Humphrey, 8 W. Va. 1.

See 1 Cent. Dig. tit. "Abatement and Revival," § 330 *et seq.*

As to persons entitled to revive see *infra*, III, B, 7, g.

Action by administrator and agent.— Replevin does not abate by the death of one who sued as administrator and agent for heirs. Talvande *v.* Cripps, 2 McCord (S. C.) 164.

Action on official bond.— In Rabun *v.* Fowler, R. M. Charlt. (Ga.) 60, it was held that an action on an official bond in the name of the governor does not abate by the death of the governor pending the suit; and it may proceed to judgment without amendment or substitution of the name of the successor. And see Anonymous, 2 N. C. 166, wherein it was held that where the obligee in a bond is a public trustee, as a president of the county court, the action will not abate if he die *pendente lite*.

69. A suit by infants by their next friend is not abated by the death, pending the suit, of the next friend. Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898.

As to persons who may continue suit see *infra*, III, B, 7, g, (III).

Death of ward.— A suit commenced by a trustee of an intemperate person, appointed to manage and preserve the latter's estate, to set aside a conveyance of land made after plaintiff's appointment, abates upon the death of the ward, and cannot be revived and prosecuted by his heirs. *Ex p.* Williams, 87 Ala. 547, 6 So. 314.

70. An action instituted by an executor or administrator does not abate on the death of such executor or administrator.

Alabama.— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412.

Arkansas.— Hemphill *v.* Hamilton, 11 Ark. 425; State *v.* Murray, 8 Ark. 199.

Georgia.— Walton *v.* Gill, 46 Ga. 600. And see Saffold *v.* Banks, 69 Ga. 289.

Kentucky.—Bardstown, etc., Turnpike Road Co. *v.* Howell, (Ky. 1891) 17 S. W. 481; Fletcher *v.* Sanders, 7 Dana (Ky.) 345, 32 Am. Dec. 96.

New Jersey.— Crane *v.* Alling, 14 N. J. L. 593.

North Carolina.— Merrill *v.* Merrill, 92 N. C. 657; North Carolina University *v.* Hughes, 90 N. C. 537.

Tennessee.— Brasfield *v.* Cardwell, 7 Lea (Tenn.) 252; Stott *v.* Alexander, 2 Sneed (Tenn.) 650.

West Virginia.—List *v.* Pumphrey, 3 W. Va. 672.

As to persons entitled to revive see *infra*, III, B, 7, g, (IV).

71. An action instituted by a trustee in his own name on a cause of action affecting the trust estate does not abate by the death of such trustee pending the action. McDougald *v.* Carey, 38 Ala. 320; Mauldin *v.* Armistead, 14 Ala. 702; Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Hook *v.* Dyer, 47 Mo. 214. And see Means *v.* Associate Reformed Presb. Church, 3 Pa. St. 93, wherein it was held that where an action of ejectment for the recovery of land is brought in the name of a trustee for the use of a church, and a recovery is had, and an action is brought in such trustee's name for the mesne profits which accrued during the pendency of the action of ejectment, and the trustee dies, the action does not abate by his death, and his heir at law is the proper party to be substituted on the record to prosecute such action to judgment.

8. Death of Person Sued in Representative Capacity. As a general rule an action prosecuted against a person in his representative capacity does not abate by the death of such party pending the action.[72] This rule has been applied to suits against committees of lunatics,[73] guardians,[74] or personal representatives.[75]

9. Death of Nominal Plaintiff. The death of a nominal plaintiff pending the suit does not abate the suit, but it may progress in the name of the real plaintiff.[76]

10. Death of Beneficial Plaintiff. It has been held that the death of the person for whose use a suit is brought does not abate the suit, but it may proceed in the name of the nominal plaintiff.[77]

As to persons entitled to revive see *infra*, III, B, 7, g, (v).

Death of cestui que trust.— If a trustee in whom the legal title is vested brings suit for real property, and the *cestui que trust*, who is a married woman, dies *pendente lite*, and there is no administration on her estate, the action does not abate, but may be continued for the recovery of the property for her heirs. Artope *v.* Goodall, 53 Ga. 318.

Trustee and executor.— Upon the death of the vendor of an estate, certain persons who, under an order in chancery, had been appointed trustees of the vendor's personal estate for the purpose of his will, filed their bill against the representatives of the purchaser for specific performance of the agreement for sale; after the commencement of the suit one of the trustees, who was also executor of the vendor, died. It was held that the suit thereby became wholly abated. Cave *v.* Cork, 2 Y. & C. Ch. 130.

72. Edrington *v.* Mathews, 30 Ark. 665.

As to persons entitled to revive, see *infra*, III, B, 7, g.

73. In a suit to which a lunatic and his committee are defendants the death of the committee before decree does not warrant an order substituting the new committee as defendant. Rudd *v.* Speare, 3 De G. & Sm. 374.

Death after decree.— Where, after a decree in a suit in which a lunatic and his committee are defendants, the committee dies and a new one is appointed, it is proper, upon motion, that the new committee should be named as such in all future proceedings in the cause. Lyon *v.* Mercer, 1 Sim. & St. 356.

Death of lunatic.— Where, pending a suit against a lunatic represented by his committee, the lunatic dies, the committee *ipso facto* becomes *functus officio*, and the suit abates and must be revived and proceeded with in the name of the lunatic's personal representative and heirs; and all proceedings had after the lunatic's death and before such revival are void. Paxton *v.* Stuart, 80 Va. 873.

74. Death of a guardian pending a suit against him for a debt contracted by him for the benefit of his ward does not abate the suit. Lewis *v.* Allen, 68 Ga. 398.

As to persons who may revive suit see *infra*, III, B, 7, g, (II).

75. Suit against a personal representative on a cause of action against his decedent does not abate on the death of such personal representative pending the action. Portevant *v.* Pendleton, 23 Miss. 25; Jones *v.* Jones, 8 Humphr. (Tenn.) 705; Parks *v.* Lubbock, (Tex. Civ. App. 1899) 50 S. W. 466. But see Merrill *v.* Merrill, 92 N. C. 657, wherein it was held that a suit by next of kin against an administrator for the distribution of the estate abates on the death of the administrator pending the suit.

As to accounting by personal representatives see *supra*, III, A, 4, c.

As to persons who may revive see *infra*, III, B, 7, g, (IV).

76. *Alabama.*— Tait *v.* Frow, 8 Ala. 543; Bates *v.* Terrell, 7 Ala. 129.

Illinois.— Phillips *v.* Wilson, 25 Ill. App. 427.

Mississippi.—Anderson *v.* Leland, 46 Miss. 290; Denton *v.* Stephens, 32 Miss. 194; Grand Gulf Bank *v.* Jeffers, 12 Sm. & M. (Miss.) 486; Humphreys *v.* Irvine, 6 Sm. & M. (Miss.) 205.

Pennsylvania.— Mehaffy *v.* Share, 2 Penr. & W. (Pa.) 361.

Texas.— Moore *v.* Rice, 51 Tex. 289; Clark *v.* Hopkins, 34 Tex. 139; Price *v.* Wiley, 19 Tex. 142, 70 Am. Dec. 323.

United States.— Campbell *v.* Strong, Hempst. (U. S.) 265, 4 Fed. Cas. No. 2,367a.

But see Morrison *v.* Deaderick, 10 Humphr. (Tenn.) 342, wherein it was held that, where a bill is filed in the name of an assignor for the benefit of the assignee, on the death of the assignor the suit abates.

As to revival of suit on death of nominal plaintiff see *infra*, III, B, 7, e.

Action by agent for use of principal.— An action by an agent for the use of the principal is virtually an action by the principal, and the death of the agent before or pending the action will not affect the suit. Martin *v.* Lamb, 77 Ga. 252, 3 S. E. 10.

77. Gray *v.* Turner, 7 Ala. 30; Wright *v.* Rogers, 26 Ind. 218; Lee *v.* Gardiner, 26 Miss. 521; Holt *v.* Briscoe, Walk. (Miss.) 19. See also Royce *v.* Barnes, 11 Metc. (Mass.) 276, wherein it was held that, where the holder of a note payable to bearer transfers it to an agent for collection, an action by such agent on the note does not abate by the death of the principal. But see Barker *v.* Bethune, 3 Ga. 159, wherein it was held that in a claim case brought to foreclose a mortgage by A for the use of B, administrator of C, the death of B suspends the case until the legal representative of C is made a party.

Action by grantee in name of grantor.— An action brought by a grantee in the name of his grantor against one who, at the time of

11. Death of Both Parties. It has been held that a statute providing that the death of either party shall not cause the suit to abate if the cause of action survives should be construed as embracing a case in which both parties die before the substitution of the personal representatives of either of them.[78]

12. Death after Hearing. In courts of equity it is the practice, when a party dies after a cause has been submitted upon the final hearing, for the court, notwithstanding, to go on and render its decision and direct a final decree to be entered up as of the day when the cause was submitted for decision,[79] and the same practice obtains in courts of law.[80]

13. Death after Report of Referee. In some states, if either party to an action dies after a report by a referee, final judgment may be entered in the name of the original parties.[81]

14. Death after Verdict — a. Common-Law Rule. At common law, if either party dies after verdict and pending the time taken for argument or advising thereon, judgment may be entered after his death as of a date preceding such

the execution of the deed, was in possession of the premises under an adverse claim of title, does not abate by the death of the grantee, but the same may be revived and continued by his devisees. Ward *v.* Reynolds, 25 Hun (N. Y.) 385.

Action on bond.—In Logan *v.* State, 39 Md. 177, and State *v.* Dorsey, 3 Gill & J. (Md.) 75, it was held that, where a suit is brought on a bond for the use of an individual, the individual for whose use it is entered is not the legal plaintiff. The use is entered only for the protection of his equitable interest, and if he dies pending the suit his death is not the subject of a plea, but the suit goes on as if he were still living or the use had never been entered. But see McLaughlin *v.* Neill, 25 N. C. 294, wherein it was held that, where an action is brought on an official bond for the benefit of a person injured, in the name of the state or of an officer of the state to whom the bond is made payable, it is the action of the relator, and on his death is abated as other actions abate by the death of plaintiff, unless revived in the manner prescribed by law. To same effect is Johnson *v.* State, 2 Houst. (Del.) 378. *Compare* Harvey *v.* Baltimore, etc., R. Co., 70 Md. 319, 17 Atl. 88.

Death of one beneficiary.— In an action by trustees for damages to property, plaintiff's rights are not affected by the death of one of the beneficiaries subsequent to the commencement of the action, the action being for such damages as accrued prior to the suit. Knox *v.* Metropolitan El. R. Co., 58 Hun (N. Y.) 517, 12 N. Y. Suppl. 848.

78. *Georgia.*— Henderson *v.* Alexander, 2 Ga. 81.

Illinois.— Northern Trust Co. *v.* Palmer, 171 Ill. 383, 49 N. E. 553.

Maine.— Fulton *v.* Nason, 66 Me. 446.

Massachusetts.— Hunt *v.* Whitney, 4 Mass. 620.

New York.— Holsman *v.* St. John, 90 N. Y. 461.

Ohio.—Carter *v.* Jennings, 24 Ohio St. 182.

Case standing under rule of reference.— In Price *v.* Tyson, 2 Gill & J. (Md.) 475, it was held that it was the duty of the court to continue a case standing under a rule of reference until an award is returned, and the death of both parties while it remains under that rule does not abate the action.

Probate proceedings.— In Lafferty *v.* Lafferty, 5 Redf. Surr. (N. Y.) 326, it was held that, after the death of all the parties, probate proceedings may be revived by bringing in their successors in interest.

79. *California.*— Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 478, 41 Pac. 328.

New Jersey.—Benson *v.* Wolverton, 16 N. J. Eq. 110.

New York.—Wood *v.* Keyes, 6 Paige (N. Y.) 478; Vroom *v.* Ditmas, 5 Paige (N. Y.) 528; Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; Reed *v.* Butler, 11 Abb. Pr. (N. Y.) 128.

South Carolina.—Hall *v.* Clifton, 2 McCord Eq. (S. C.) 88.

England.— Davies *v.* Davies, 9 Ves. Jr. 461.

80. Jennings *v.* Ashley, 5 Ark. 128; Mannix *v.* Elder, 1 Ohio Cir. Ct. 59; Griswold *v.* Hill, 1 Paine (U. S.) 483, 11 Fed. Cas. No. 5,834; Cumber *v.* Wane, 1 Str. 426.

Death after continuance for advisement.— Where, after a continuance, by order of court, for advisement, the defendant in the action dies, judgment will be entered as of the former term. Perry *v.* Wilson, 7 Mass. 393; McLean *v.* State, 8 Heisk. (Tenn.) 22.

Death after expiration of rule to plead.— The death of defendant after the expiration of the rule to plead does not abate the action, as, on the expiration of the rule to plead, plaintiff is entitled to enter up interlocutory judgment. Kincaid *v.* Blake, 1 Bailey (S. C.) 20.

81. Burhans *v.* Burhans, 10 Wend. (N. Y.) 601; Scranton *v.* Baxter, 3 Sandf. (N. Y.) 660; Kissam *v.* Hamilton, 20 How. Pr. (N. Y.) 369.

Reference to compute amount due on mortgage.— The report of a referee appointed to compute the amount due, etc., in a foreclosure suit, is not a report within the meaning of a statute providing that if either party to an action dies [after a report], but before final judgment is entered, the court must enter final judgment, in the name of the original parties. Smith *v.* Joyce, 14 Daly (N. Y.) 73.

death, that the delay arising from the act of the court may not turn to the prejudice of the party.[82]

b. Statutory Rule. By statute, in many states, a rule similar to the common-law rule obtains, the usual statutory provision being that no action shall abate by the death of a party after a verdict or decision shall have been rendered.[83]

15. Death Pending Motion for New Trial — a. Actions Which Survive. The death of a party pending a motion for a new trial of an action on a cause of action which survives does not bring about an abatement of the action,[84] nor does it affect the power of the court to consider and determine the motion.[85] On the

82. *Connecticut.*— Brown *v.* Wheeler, 18 Conn. 199; Collins *v.* Prentice, 15 Conn. 423.
Illinois.— Bunker *v.* Green, 48 Ill. 243; Brown *v.* Parker, 15 Ill. 307.
Indiana.— Hilker *v.* Kelley, 130 Ind. 356, 30 N. E. 304, 15 L. R. A. 622.
Kentucky.— Gaines *v.* Conn, 2 Dana (Ky.) 231.
Maine.— Lewis *v.* Soper, 44 Me. 72; Goddard *v.* Bolster, 6 Me. 427, 20 Am. Dec. 320.
Massachusetts.— Tapley *v.* Martin, 116 Mass. 275; Kelley *v.* Riley, 106 Mass. 339; Springfield *v.* Worcester, 2 Cush. (Mass.) 52; Currier *v.* Lowell, 16 Pick. (Mass.) 170.
New Hampshire.— Blaisdell *v.* Harris, 52 N. H. 191.
New York.— Grant *v.* Griswold, 21 Hun (N. Y.) 509; Crawford *v.* Wilson, 4 Barb. (N. Y.) 504; Gilbert *v.* Corbin, 18 Wend. (N. Y.) 600; Ryghtmyer *v.* Durham, 12 Wend. (N. Y.) 244; Springsted *v.* Jayne, 4 Cow. (N. Y.) 423; Mackay *v.* Rhinelander, 1 Johns. Cas. (N. Y.) 408; Diefendorf *v.* House, 9 How. Pr. (N. Y.) 243; Ehle *v.* Moyer, 8 How. Pr. (N. Y.) 245.
North Carolina.— Beard *v.* Hall, 79 N. C. 506.
Ohio.— Dial *v.* Holter, 6 Ohio St. 228.
Oregon.— Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282.
Pennsylvania.— Chase *v.* Hodges, 2 Pa. St. 48; Wood *v.* Boyle, 17 Pa. Co. Ct. 325; Griffith *v.* Ogle, 1 Binn. (Pa.) 172.
South Carolina.—Miller *v.* Jones, 2 Speers (S. C.) 315.
Tennessee.— McLean *v.* State, 8 Heisk. (Tenn.) 22.
United States.— Hatch *v.* Eustis, 1 Gall. (U. S.) 160, 11 Fed. Cas. No. 6,207.
England.— Green *v.* Cobden, 4 Scott 486; Doe *v.* Roe, 4 Burr. 1970; Tooker *v.* Beaufort, 1 Burr. 146; Fewins *v.* Lethbridge, 4 H. & N. 418; Toulmin *v.* Anderson, 1 Taunt. 385; Kramer *v.* Waymark, L. R. 1 Exch. 241.
Canada.— Neil *v.* McMillan, 27 U. C. Q. B. 257; Davy *v.* Cameron, 15 U. C. Q. B. 175; Proctor *v.* Jarvis, 15 U. C. Q. B. 157.
Rule nisi for setting aside verdict.— Where the court made absolute a rule *nisi* for setting aside a verdict, and directed a nonsuit to be entered pursuant to leave reserved at the trial, and plaintiff died between the term at which the rule *nisi* was granted and that in which it was made absolute, the court, in order to prevent an abatement of the suit, ordered the judgment of nonsuit to be entered as of the term preceding the death. Moor *v.* Roberts, 3 C. B. N. S. 830.

83. *Illinois.*— Murphy *v.* McGrath, 79 Ill. 594.
Massachusetts.— Holyoke *v.* Haskins, 9 Pick. (Mass.) 259.
Minnesota.—Cooper *v.* St. Paul City R. Co., 55 Minn. 134, 56 N. W. 588.
Missouri.— State *v.* Stratton, 110 Mo. 426, 19 S. W. 803.
New York.— Vitto *v.* Farley, 6 N. Y. App. Div. 481, 39 N. Y. Suppl. 683; Morris *v.* Corson, 7 Cow. (N. Y.) 281; Lyons *v.* Third Ave. R. Co., 7 Rob. (N. Y.) 605; Wood *v.* Phillips, 11 Abb. Pr. N. S. (N. Y.) 1; Adams *v.* Nellis, 59 How. Pr. (N. Y.) 385.
Virginia.— Hooe *v.* Pierce, 1 Wash. (Va.) 212.
A statute providing that, "after verdict, report, or decision in an action to recover damages for a personal injury, the action does not abate by the death of a party," refers to a verdict or decision which remains unopened and unimpaired at the time of the death of the judgment creditor, and not to a case where, prior to such death, defendant was allowed to come in and defend, the judgment standing merely as security for any future recovery. Smith *v.* Lynch, 8 N. Y. St. 341, 342.
Death after nonsuit.— A nonsuit is not a "decision" within the meaning of a statute providing that after decision in an action to recover damages for a personal injury the action does not abate by the death of a party. Consequently an action to recover damages for a personal injury in which the court orders a nonsuit abates by the death of a party. Corbett *v.* Twenty-third St. R. Co., 114 N. Y. 579, 21 N. E. 1033.

84. *Illinois.*— Bunker *v.* Green, 48 Ill. 243.
Kentucky.—Turner *v.* Booker, 2 Dana (Ky.) 334.
Missouri.— State *v.* Stratton, 110 Mo. 426, 19 S. W. 803.
New Jersey.— Den *v.* Tomlin, 18 N. J. L. 14, 35 Am. Dec. 525.
New York.—Spalding *v.* Congdon, 18 Wend. (N. Y.) 543.
Pennsylvania.— Rothstein *v.* Brooks, 6 Pa. Co. Ct. 411.
Canada.— Swan *v.* Clelland, 13 U. C. Q. B. 335.
See also *supra*, note 59, p. 71.
Exceptions to verdict.— Where defendant dies after taking exceptions to a verdict for plaintiff, the supreme court may pass thereon and, if justice requires, enter judgment *nunc pro tunc*. Tapley *v.* Martin, 116 Mass. 275.

85. Turner *v.* Booker, 2 Dana (Ky.) 334; Sinclair *v.* Fear, 2 Ohio N. P. 373, 1 Ohio Leg. Dec. 26.

denial or dismissal of the motion judgment may be entered as of a day in which the party was in life.[86]

b. Actions Which Do Not Survive — (I) *Recovery by Plaintiff.* The death of a party pending a motion for a new trial of an action on a cause of action which does not survive does not abate the action if there has been a recovery by the plaintiff, as by the recovery the cause of action is merged therein.[87]

(II) *Recovery by Defendant.* But it has been held that the death of a party pending a motion for a new trial after verdict for defendant on a cause of action which does not survive abates the action.[88]

16. Death after Judgment — a. Statement of Rule. Numerous decisions support the doctrine that the death of a party after judgment does not abate the action or open or vacate the judgment; but such judgment survives in favor of or against the representatives of the deceased.[89]

b. Actions Which Do Not Survive. This doctrine has been held to apply even in cases of a recovery on a cause of action which does not survive the death of a party.[90]

86. *Connecticut.*— Collins *v.* Prentice, 15 Conn. 423.

Indiana.— Hilker *v.* Kelley, 130 Ind. 356, 30 N. E. 304, 15 L. R. A. 622.

New Jersey.— Den *v.* Tomlin, 18 N. J. L. 14, 35 Am. Dec. 525.

New York.—Spalding *v.* Congdon, 18 Wend. (N. Y.) 543.

Ohio.— Dial *v.* Holter, 6 Ohio St. 228.

Pennsylvania.— Fitzgerald *v.* Stewart, 53 Pa. St. 343.

87. *Connecticut.*— Collins *v.* Prentice, 15 Conn. 423.

Indiana.— Hilker *v.* Kelley, 130 Ind. 356, 30 N. E. 304, 15 L. R. A. 622.

New York.—*Ex p.* Webber, 18 Wend. (N. Y.) 510.

Ohio.— Dial *v.* Holter, 6 Ohio St. 228.

Pennsylvania.— Fitzgerald *v.* Stewart, 53 Pa. St. 343.

88. Webbers *v.* Underhill, 19 Wend. (N. Y.) 447; Benjamin *v.* Smith, 17 Wend. (N. Y.) 208, wherein it was held that where there is a verdict for defendant in an action for a false return, and plaintiff applies for a new trial and, pending the motion, dies, the suit abates and cannot be revived.

89. *Indiana.*—Kelly *v.* Kelly, 137 Ind. 690, 37 N. E. 545.

Kentucky.—Turner *v.* Booker, 2 Dana (Ky.) 334.

Maryland.— Thomas *v.* Thomas, 57 Md. 504.

Massachusetts.— Wilkins *v.* Wainwright, 173 Mass. 212, 53 N. E. 397.

Missouri.—Beck *v.* Dowell, 40 Mo. App. 71; Remmler *v.* Shenuit, 15 Mo. App. 192.

New York.— Robinson *v.* Govers, 138 N. Y. 425, 34 N. E. 209; Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296, 28 N. Y. St. 260.

North Carolina.— Farley *v.* Lea, 20 N. C. 169, 32 Am. Dec. 680.

Pennsylvania.—Gemmill *v.* Butler, 4 Pa. St. 232; Stroop *v.* Swarts, 12 Serg. & R. (Pa.) 76.

Rhode Island.— Hambly *v.* Hayden, 20 R. I. 558, 40 Atl. 417.

Tennessee.—Kimbrough *v.* Mitchell, 1 Head (Tenn.) 539.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79.

See also *supra*, notes 32, p. 65; 73, p. 75.

As to revival of judgment see Judgments.

As to issuance of execution after death of party see Executions.

Death of a party before enrollment of the decree does not prevent the enrollment. Harrison *v.* Simons, 3 Edw. (N. Y.) 394.

Death after decision rendered.— Where, after decision rendered, but before judgment entered, the defendant dies, the action does not abate. Wilkins *v.* Wainwright, 173 Mass. 212, 53 N. E. 397; Robinson *v.* Govers, 138 N. Y. 425, 34 N. E. 209; Fulton *v.* Fulton, 8 Abb. N. Cas. (N. Y.) 210; Hambly *v.* Hayden, 20 R. I. 558; 40 Atl. 417; Fox *v.* Hopkinson, 19 R. I. 704, 36 Atl. 824. The proper manner to enter judgment, where the party dies after decision has been rendered and before judgment has been entered, is in the names of the original parties. Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Tuomy *v.* Dunn, 77 N. Y. 515; Arents *v.* Long Island R. Co., 36 N. Y. App. Div. 379, 55 N. Y. Suppl. 401; Wasson *v.* Hoff, 27 Misc. (N. Y.) 55, 57 N. Y. Suppl. 953.

If a defendant die after an order for judgment, final judgment may be entered at any time within two terms afterward. Lynch *v.* Inglis, 1 Bay (S. C.) 449; Dubose *v.* Dubose, Cheves (S. C.) 29.

90. The theory upon which this rule is based is that by judgment the cause of action is merged therein.

Indiana.— Kelly *v.* Kelly, 137 Ind. 690, 37 N. E. 545.

Missouri.— Beck *v.* Dowell, 40 Mo. App. 71.

New Hampshire.— Knox *v.* Knox, 12 N. H. 352.

New York.—Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296; Blake *v.* Griswold, 104 N. Y. 613, 11 N. E. 137; Stokes *v.* Stickney, 96 N. Y. 323; Hart *v.* Washburn, 62 Hun (N. Y.) 543, 16 N. Y. Suppl. 923.

Pennsylvania.— Stroop *v.* Swarts, 12 Serg. & R. (Pa.) 76.

Tennessee.—Akers *v.* Akers, 16 Lea (Tenn.) 7, 57 Am. Rep. 207; Kimbrough *v.* Mitchell, 1 Head (Tenn.) 539.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79 [*overruling* Taney *v.* Edwards, 27 Tex. 224].

17. Death Pending Writ of Review. It has been held that the personal representatives may come in and prosecute a writ of review pending at the death of their decedent, even though the original cause of action does not survive.[91]

18. Death Pending Appeal or Writ of Error — a. Statement of Rule. As a general rule the death of a party pending an appeal or writ of error furnishes no ground for the abatement of the action.[92] In such case it is a common practice for the appellate court to affirm or reverse the judgment *nunc pro tunc*.[93]

b. Actions Which Do Not Survive — (I) *Judgment for Plaintiff.* The rule applies in cases where there has been a judgment for plaintiff on a cause of action which does not survive, as by the judgment the cause of action is merged therein.[94]

Virginia.— Harris *v.* Crenshaw, 3 Rand. (Va.) 14.

In an action for a penalty the death of one of the parties after judgment does not abate the action. Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296, 28 N. Y. St. 260; Stokes *v.* Stickney, 96 N. Y. 323; Hart *v.* Washburn, 62 Hun (N. Y.) 543, 16 N. Y. Suppl. 923.

91. Otis *v.* Bixby, 9 Mass. 520; Monumoi Great Beach *v.* Rogers, 1 Mass. 159; Knox *v.* Knox, 12 N. H. 352 [*overruling* Fernald *v.* Ladd, 4 N. H. 145]. See also Colman *v.* Churchill, 2 N. H. 407, wherein it was held that, notwithstanding plaintiff's death immediately after judgment in trover in his favor, defendant could sue out a writ of review against plaintiff's administratrix within a year after such death. But see Thayer *v.* Dudley, 3 Mass. 296, wherein it was held that, where plaintiff in review dies pending the review, the original action being case for special damage from a common nuisance in which plaintiff in review was defendant, his administrator cannot be made a party to the review.

92. Danforth *v.* Danforth, 111 Ill. 236. See also *supra* notes 39, p. 67; 63, p. 73.

As to abatement of appeal or writ of error see Appeal and Error.

Appeal from justice.— A perfected appeal from a justice's judgment devests it of legal effect; and the action, if one whose cause does not survive, will abate on defendant's death before entry of judgment above. Carrollton *v.* Rhomberg, 78 Mo. 547.

Divorce proceedings.— Where the party seeking a divorce appeals from a judgment, simply denying it, and pending the appeal either party dies, the appeal and the action abate absolutely and cannot be revived, there being no one living who can legally have any interest in the same. Downer *v.* Howard, 44 Wis. 82. But see, *contra*, McCollum *v.* McCollum, 1 Heisk. (Tenn.) 565 note. See also *supra* III, A, 4, b, (II).

Ejectment against husband and wife.— A judgment in ejectment was rendered against husband and wife; defendants filed a motion in error, and while it was pending the husband died. It was held not to affect the case. Norris *v.* Sullivan, 47 Conn. 474.

In real actions the death of either party after a writ of error sued out does not abate the suit. Macker *v.* Thomas, 7 Wheat. (U. S.) 530, 5 L. ed. 515; Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256.

Trial de novo in appellate court.— When a party appeals from the decree of a chancery court to the supreme court, which appeal is never abandoned or dismissed, the cause stands for trial *de novo* in the supreme court, and if, upon the death of the other party, an abatement takes place, it is an abatement of the suit and not merely of the appeal. Maskall *v.* Maskall, 3 Sneed (Tenn.) 208.

93. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418.

California.— Phelan *v.* Tyler, 64 Cal. 80, 28 Pac. 114.

Illinois.—O'Sullivan *v.* People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143; Danforth *v.* Danforth, 111 Ill. 236.

Indiana.— Jeffries *v.* Lamb, 73 Ind. 202.

Missouri.—Central Sav. Bank *v.* Shine, 48 Mo. 456, 8 Am. Rep. 112; Meade *v.* Meade, 1 Mo. App. 247.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116.

North Carolina.— Lea *v.* Gauze, 26 N. C. 9.

Vermont.— Adams *v.* Newell, 8 Vt. 190.

United States.— Coughlin *v.* District of Columbia, 106 U. S. 7, 1 S. Ct. 37, 27 L. ed. 74.

94. *Alabama.*—Pope *v.* Welsh, 18 Ala. 631.

Indiana.— Kelly *v.* Kelly, 137 Ind. 690, 37 N. E. 545.

Missouri.— Lewis *v.* McDaniel, 82 Mo. 577; Remmler *v.* Shenuit, 15 Mo. App. 192.

New York.—Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296; Blake *v.* Griswold, 104 N. Y. 613, 11 N. E. 137; Hart *v.* Washburn, 62 Hun (N. Y.) 543, 16 N. Y. Suppl. 923; Vitto *v.* Farley, 3 N. Y. Annot. Cas. 308, 39 N. Y. Suppl. 683.

Tennessee.— Akers *v.* Akers, 16 Lea (Tenn.) 7, 57 Am. Rep. 207; Kimbrough *v.* Mitchell, 1 Head (Tenn.) 539.

Texas.— Galveston City R. Co. *v.* Nolan, 53 Tex. 139; Gibbs *v.* Belcher, 30 Tex. 79 [*overruling* Taney *v.* Edwards, 27 Tex. 224]; Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268.

United States.—*In re* St. Albans First Nat. Bank, 49 Fed. 120.

But see Faith *v.* Carpenter, 33 Ga. 79, wherein it was held that where a judgment is obtained at common law against a defendant in a suit for slander, from which an appeal is taken, and, pending the appeal, defendant dies, the suit, the judgment, and all its incidents abate. See also Miller *v.* Umbehower, 10 Serg. & R. (Pa.) 31, wherein it was held that an action of assault and battery abates

(II) *Judgment for Defendant.* There are cases, however, which hold the rule to be otherwise where a judgment is rendered for defendant on a cause of action which does not survive and a party dies pending the appeal. In such case the cause of action is that on which the suit was originally founded, and does not survive.[95]

19. Death after Reversal on Appeal. The reversal on appeal of a judgment in a cause of action which does not survive restores the demand to its original character, and the subsequent death of a party abates the suit as though no judgment had been obtained.[96]

20. Suggestion of Death — a. Necessity of Suggesting Death. An action does not abate *ipso facto* by the death of a party. There must be a suggestion of such death to the court to effect an abatement.[97]

by plaintiff's death after an appeal by defendant from an award in favor of plaintiff. And see Harrison *v.* Moseley, 31 Tex. 608, in which it appeared that appellant, against whom a judgment had been rendered for assault and battery, appealed, and died pending appeal. It was held that the whole proceeding abated.

Appeal from intermediate appellate court. —In an action for personal injuries, the death of plaintiff pending an appeal by him from a reversal, by an intermediate court, of a judgment in his favor, does not abate the suit. Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, 21 Am. Rep. 385.

Erroneous setting aside of judgment.— A judgment for plaintiff in an action for personal injuries having been erroneously set aside and a subsequent final judgment against him brought up by writ of error, pending which he dies, the judgment in his favor will be affirmed *nunc pro tunc* to prevent the abatement of the action. Coughlin *v.* District of Columbia, 106 U. S. 7, 1 S. Ct. 37, 27 L. ed. 74.

95. Davis *v.* Morgan, 97 Mo. 79, 10 S. W. 881; Woehrlin *v.* Schaffer, 17 Mo. App. 442; Galveston City R. Co. *v.* Nolan, 53 Tex. 139; Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268. And see Pessini *v.* Wilkins, 54 N. Y. Super. Ct. 146, wherein it was held that N. Y. Code Civ. Proc. § 764, providing that, after verdict, report, or decision in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as in a case where the cause of action survives, is not applicable to a case where defendant dies pending an appeal by plaintiff from a judgment of dismissal. Plaintiff must show a verdict or decision in his favor at the time of the death of defendant.

Ejectment.— If, in ejectment, judgment be given for defendant, and plaintiff appeals, pending which defendant dies, plaintiff cannot sue out scire facias against his heirs. Tomkies *v.* Walters, 6 Call (Va.) 44.

Malicious prosecution.— Where, in an action for malicious prosecution, plaintiff appeals from a judgment in favor of defendant, and after appeal taken defendant dies, the suit will abate. Clark *v.* Carroll, 59 Md. 180.

Unlawful detainer.— Where defendant in a proceeding of unlawful detainer dies pending an appeal by plaintiff below, the cause cannot be revived. Chapman *v.* Dunlap, 4 Gratt. (Va.) 86.

96. *Georgia.*— Thompson *v.* Central R. Co., 60 Ga. 120.

Indiana.— Stout *v.* Indianapolis, etc., R. Co., 41 Ind. 149.

New York.— Carr *v.* Rischer, 119 N. Y. 117, 23 N. E. 296; Kelsey *v.* Jewett, 34 Hun (N. Y.) 11; Comstock *v.* Dodge, 43 How. Pr. (N. Y.) 97.

Tennessee.— Hullett *v.* Baker, 101 Tenn. 689, 49 S. W. 757; Akers *v.* Akers, 16 Lea (Tenn.) 7, 57 Am. Rep. 207.

Wisconsin.— Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

Action for dower.— If a widow, to whom dower has been assigned in her suit against the alienees of her husband, dies after her decree has been reversed in the supreme court and remanded for further proceedings, and before any further proceedings are had in the circuit court, her administrator cannot prosecute the suit for the recovery of damages and mesne profits. Hitt *v.* Scammon, 82 Ill. 519.

Reversal by intermediate appellate court. —In an action for personal injuries, the death of plaintiff pending an appeal by him from a reversal, by an intermediate appellate court, of a judgment in his favor, does not abate the suit. Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, 21 Am. Rep. 385.

97. *California.*— Judson *v.* Love, 35 Cal. 463.

Delaware.— Smith *v.* Simmons, 1 Pennew. (Del.) 249, 40 Atl. 59; Johnson *v.* State, 2 Houst. (Del.) 378.

Kentucky.— Crook *v.* Turpin, 10 B. Mon. (Ky.) 243.

Maryland.—Appold *v.* Prospect Bldg. Assoc., 37 Md. 457; Hall *v.* Hall, 1 Bland (Md.) 130.

Mississippi.— Young *v.* Pickens, 45 Miss. 553.

Missouri.—Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823.

New Jersey.— Hendrickson *v.* Herbert, 38 N. J. L. 296.

North Carolina.— Moore *v.* North Carolina R. Co., 74 N. C. 528; Baggarly *v.* Calvert, 70 N. C. 688; Burke *v.* Stokely, 65 N. C. 569.

Tennessee.— Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467.

Texas.— Hanley *v.* Lemmon, 28 Tex. 155.

b. Manner of Suggesting Death — (I) *Plea in Abatement.* To avail of the fact of the death of a party such death must, in some states, be pleaded in abatement.[98]

(II) *Asking Instruction of Court.* In other states advantage may be taken of the death of a party by asking the instruction of the court without pleading such death in abatement.[99]

(III) *Filing Suggestion with Clerk.* In others it will be sufficient if a suggestion of the death in writing is filed with the clerk.[1]

c. Time of Suggesting Death. A suggestion of the death of a party should be made in apt time after the occurrence of the death, to be available as a ground of abatement, otherwise it will be deemed waived.[2]

d. By Whom Suggestion May Be Made. A suggestion of the death of a party may be made by either party.[3]

e. Proof of Suggestion of Death. The truth of the suggestion of the death of a party may be put in issue,[4] and if put in issue must be proved.[5]

United States.—Nevitt *v.* Clarke, Olc. Adm. 316, 18 Fed. Cas. No. 10,138.

England.— Pinkus *v.* Sturch, 5 C. B. 474.

But see Logan *v.* State, 39 Md. 177, and State *v.* Dorsey, 3 Gill & J. (Md.) 75, wherein it was held that, where a suit is brought on a bond for the use of an individual, the individual for whose use it is entered is not the legal plaintiff, and that upon his death pending the suit there is no necessity of suggesting his death.

As to necessity of suggesting death to permit revival see *infra*, III, B, 9, a, (II).

98. Life Assoc. of America *v.* Fassett, 102 Ill. 315; Stoetzell *v.* Fullerton, 44 Ill. 108; Camden *v.* Robertson, 3 Ill. 507; McPherson *v.* Wood, 52 Ill. App. 170; Spalding *v.* Wathen, 7 Bush (Ky.) 659.

Plea puis darrein continuance.— The death of a party suggested on the record at one term cannot be pleaded in abatement at a subsequent term by plea *puis darrein continuance.* Gaines *v.* Conn, 2 Dana (Ky.) 231.

99. Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 191.

1. Smith *v.* Simmons, 1 Pennew. (Del.) 249, 40 Atl. 59.

2. Roberts *v.* Marsen, 23 Hun (N. Y.) 486 (wherein it was held that, after the administrator of the sole defendant in a replevin suit has been substituted by an order entered upon the written stipulation of the parties, and has appeared and proceeded with the trial, it is too late for plaintiff to insist that the action abated by the death); McAdams *v.* Stilwell, 13 Pa. St. 90 (wherein it was held that the death of a defendant while a suit is pending cannot be taken advantage of if not suggested until after judgment on the verdict); Dana *v.* Lull, 21 Vt. 383 (wherein it was held that if plaintiff in a suit, the cause of action in which does not survive, dies while the suit is pending in the county court, and his administrator enters and prosecutes the suit, and trials are had in the county court, and the case is carried to the supreme court on exceptions, and no motion to dismiss the suit is filed in the county court, such motion, filed for the first time in the supreme court, will be out of time). But see Judson *v.* Love, 35 Cal. 463, and May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726,— wherein it was held that a suggestion of the death of a party to a pending action may be made at any stage of the proceedings. See also Bremer *v.* Porch, 17 N. J. L. 377.

After return-term.— In Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467, it was held that a plea in abatement of the death of a party cannot be filed after the return-term of the writ without leave of court.

Suit in equity.— Defendant may raise the objection at the hearing that the suit has abated as to some of the parties whose rights should be before the court to enable it to make a proper decree. And if it appears that the suit is not properly revived, or that complainant had no right to revive, he cannot have a decree. Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

3. Stoetzell *v.* Fullerton, 44 Ill. 108; May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

Suggestion by plaintiff.— In Burke *v.* Stokely, 65 N. C. 569, it was held that plaintiff should make the suggestion of the death of one of the defendants.

Suggestion by personal representative.— The administrator of a deceased plaintiff may move the court to dismiss the action on the ground that the cause thereof does not by law survive. Nettleton *v.* Dinehart, 5 Cush. (Mass.) 543. So the motion of one not a party to the record, except as represented by an administratrix whose authority he denies, to dismiss a suit instituted by a deceased claimant, will be allowed. Cosgrove *v.* U. S., 33 Ct. Cl. 167.

4. Johnson *v.* State, 2 Houst. (Del.) 378; Armstrong *v.* Nixon, 16 Tex. 610.

5. Johnson *v.* State, 2 Houst. (Del.) 378.

Necessity of admission or proof of suggestion.—In Settle *v.* Settle, 10 Humphr. (Tenn.) 474, and Young *v.* Officer, 7 Yerg. (Tenn.) 137, it was held that a suggestion of the death of a party cannot be noticed unless it be admitted or proved. But see Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641, wherein it was held that the suggestion of the death of a plaintiff in the record, and an order to make his devisees parties, are *prima facie* evidence of his death for the pur-

21. Necessity of Order of Abatement. To give effect to the abatement of a suit by the death of a party, it must be declared by act of the court, for though the cause is abated *de facto*, yet the abatement must be judicially pronounced; and the rule applies to all cases, whether before or after a decision upon the merits, whether the cause of action does or does not survive to the representatives of the deceased party, or whether the death be that of a sole plaintiff or defendant or of one of several joint plaintiffs or defendants.[6]

B. Revival or Continuance of Action — 1. Nature of Right to Revive. The right to revive an action at law, where the cause of action survives, is not dependent upon the discretion of the court, but is a matter of right, if sought under the conditions and within the time limited by the statute or the practice of the particular state.[7] And the same is true of the right to bring a bill of revivor in equity.[8] It has also been held that the fact that the proceedings in an action

poses of the trial. And see Thompson *v.* Real Estate Bank, 5 Ark. 59, wherein it was held that where no exception is taken it is not error to discontinue a cause as to one defendant on suggestion of his death, though the death of the defendant was not proved. See also Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445, wherein it was held that the court may render a decree without regard to defendant's suggestion of plaintiff's death, if the same appears not to have been based on actual knowledge thereof.

Sufficiency of admission.—Where defendant pleads the death of the nominal plaintiff, and that plea is stricken out after a demurrer filed thereto on the motion of the use plaintiff, it cannot be considered and taken as a suggestion of the nominal plaintiff's death which is admitted, so as to abate the suit. Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467.

Use of affidavits.—In North Carolina, upon the suggestion of the death of a party, which is denied, the court will decide the question on affidavits. Lee *v.* Gause, 25 N. C. 585.

6. May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726. But see Sprawles *v.* Barnes, 1 Sm. & M. (Miss.) 629, wherein it was held that on the death of one of two partners, plaintiffs in an action, the survivor, on suggesting the death, may proceed to judgment without any formal judgment in abatement of the suit as to the deceased being entered. And see Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256, wherein it was held that the failure of the clerk to enter a formal minute of the action of the court in striking from a complaint the names of some of the plaintiffs who were dead, and whose names were inserted by mistake as joint heirs with other plaintiffs, does not affect meritorious claims of the survivors.

Suit in equity.— The death of a party to a suit in chancery does not abate it until an order of the court is entered abating it. Crook *v.* Turpin, 10 B. Mon. (Ky.) 243.

The entry of an order abating an action is nothing more than evidence of the fact that the action has abated, and is not the abatement thereof. The abatement takes place by the death of a party, and not by virtue of the record which evidences such death. Meese *v.* Fond du Lac, 48 Wis. 323, 4 N. W. 406.

Time of entry of order.— In Kentucky the practice is not to have an order of abatement entered on the death of a party, but to let the case remain on the docket for revivor within a reasonable time; and if no steps are taken to revive within such time it is stricken from the docket. Hull *v.* Deatly, 7 Bush (Ky.) 687. In Tennessee, by statute, a suit does not abate until the second term after the death has been suggested and proven or admitted, and entry to that effect made of record. Brooks *v.* Jones, 5 Lea (Tenn.) 244.

7. Gillette *v.* Morrison, 7 Nebr. 263; O'Sullivan *v.* New York El. R. Co., 25 N. Y. Civ. Proc. 163, 36 N. Y. Suppl. 16; Dalton *v.* Sandland, 4 N. Y. Civ. Proc. 73; Roach *v.* La Farge, 43 Barb. (N. Y.) 616; Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211; Garvey *v.* Owens, 9 N. Y. St. 227; Carter *v.* Jennings, 24 Ohio St. 182; Arthur *v.* Allen, 22 S. C. 432; Parnell *v.* Maner, 16 S. C. 348. *Contra*, Beach *v.* Reynolds, 53 N. Y. 1. See also Mayer *v.* Bruns, 15 Misc. (N. Y.) 695, 37 N. Y. Suppl. 1021, wherein it was held that N. Y. Code Civ. Proc. § 757, providing that, in case of the death of a sole defendant, if the cause of action survives or continues, the court must, on motion, allow the action to be continued against his representatives, does not require the court to allow substitution of defendant's administrator where the complaint shows on its face that the action was not begun within the statutory period, and the answer pleads the statute.

Failure to pay costs of prior order.— The fact that the original plaintiff had failed to pay the costs of a prior order is no objection to a motion to revive. Matter of Clute, 50 Hun (N. Y.) 604, 16 N. Y. Civ. Proc. 123, 2 N. Y. Suppl. 874.

8. Crook *v.* Turpin, 10 B. Mon. (Ky.) 243; Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Reid *v.* Stuart, 20 W. Va. 382; Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 9 L. ed. 1041; Fitzpatrick *v.* Domingo, 14 Fed. 216.

Security for costs.— In an equitable action the court has power to require plaintiff to give security for costs as a condition to making an order reviving the action against an executrix of a deceased defendant. Collins *v.* Jewell, 23 N. Y. Civ. Proc. 153, 3 Misc. (N. Y.) 341, 22 N. Y. Suppl. 716. *Compare* Van Loan *v.* Squires, 51 Hun (N. Y.) 360, 4 N. Y.

at the time of the death of one of the parties do not disclose facts showing that the action survives does not defeat the right to continue it in favor of or against the representative of deceased if the cause of action in fact survives.[9]

2. Pendency of Suit as Determining Right of Revival. There is much diversity of opinion as to when a suit is deemed pending so as to permit of revival on the death of a party. In some states it is held that a suit is so pending from the time of the suing out of the writ,[10] or of filing the complaint or bill.[11] In other states a suit is not considered as pending until after service of the writ [12] or of the summons.[13] Again, it has been held that where a party dies after service of process, but before the action is entered in court, the action is not pending within the

Suppl. 371; Knoch *v.* Funke, 28 Abb. N. Cas. (N. Y.) 240, 19 N. Y. Suppl. 242.

9. Plumer *v.* McDonald Lumber Co., 74 Wis. 137, 42 N. W. 250.

Justices of the peace.—In Nebraska the provisions of the code for the revival of actions have been held to apply to actions before justices of the peace. Hunter *v.* Leahy, 18 Nebr. 80, 24 N. W. 680; Miller *v.* Curry, 17 Nebr. 321, 22 N. W. 559.

Rights pending proceedings to revive.—Where a suit abates by the death of complainant, those who succeed to his rights may apply to the court to punish a breach of an injunction which has taken place, either before or after his death, as soon as they have taken the preliminary steps to revive the suit, either by filing a bill of revivor or otherwise. And it is not necessary for them to wait until a decree of revivor is actually obtained. Hawley *v.* Bennett, 4 Paige (N. Y.) 163.

10. Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Hubbard *v.* Johnson, 77 Me. 139; Heard *v.* March, 12 Cush. (Mass.) 580.

"After issue joined."—In N. J. Rev. Stat. p. 953, § 3, providing that if any plaintiff die after issue joined the action shall not abate, the words "after issue joined" mean after the end of the pleadings in the case, and not the joining of issue on any one plea. Dickerson *v.* Stoll, 24 N. J. L. 550.

Impetration of writ.—The death of one of the parties named as defendant in a writ before the impetration of it is ground of abatement. McLaughlin *v.* De Young, 3 Gill & J. (Md.) 4.

Settlement pending action.—While an action of foreclosure by the receiver of a corporation was pending, the land was discharged from the mortgage, by arrangement between the parties, on payment of the fund into the receiver's hands. It was held that the action was not discontinued, and might be revived, on the death of the receiver, by his successor. Palmer *v.* Murray, 18 How. Pr. (N. Y.) 545.

11. Rheubottom *v.* Sadler, 19 Ark. 496; Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580; Gordon *v.* Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70; Lavell *v.* Frost, 16 Mont. 93, 40 Pac. 146; *In re* Connaway, 178 U. S. 421, 20 S. Ct. 951, 44 L. ed. 1134. See also Thacher *v.* Bancroft, 15 Abb. Pr. (N. Y.) 243, wherein it was held that, in an action which by law survives, the court has power to continue an attachment against defendant's representatives after defendant's death, though no summons was served.

Suits in equity.—There are cases which hold that until defendant in a suit in equity has been served with process and appeared there is no cause in court against him, and therefore, if he dies before service of process and appearance, the suit cannot be continued against his representatives, and that in such case an original bill is necessary. U. S. *v.* Fields, 4 Blatch. (U. S.) 326, 25 Fed. Cas. No. 15,089; Bland *v.* Davison, 21 Beav. 312; Foster *v.* Foster, 16 Sim. 637; Hardy *v.* Hull, 14 Sim. 21; Crowfoot *v.* Mander, 9 Sim. 396; Oxburgh *v.* Fingham, 1 Vern. 308; Stewart *v.* Nicholls, Tamlyn 307; Watson *v.* Ham, 1 Ch. Chamb. (U. C.) 398.

12. Clark *v.* Helms, 1 Root (Conn.) 486; Buswell *v.* Babbitt, 65 N. H. 168, 18 Atl. 748; Clindenin *v.* Allen, 4 N. H. 385.

13. White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726. See also Maxwell *v.* Lea, 6 Heisk. (Tenn.) 247, wherein it was held that where a summons issued is not served before the term to which it was made returnable, and no *alias* is issued during the term, the action is discontinued. And see Green *v.* McMurtry, 20 Kan. 189, wherein it appeared that an attachment was issued before and served after the death of plaintiff, and his administrator filed, as such, a new petition, on which was indorsed a waiver of service of summons by defendant's attorney. It was held that this was no authority for a revivor, and that the attachment was irregular and could be set aside on notice and motion.

Service by publication.—In Auerbach *v.* Maynard, 26 Minn. 421, 4 N. W. 816, it was held that where a defendant dies after publication of summons has been commenced against him, but before the expiration of the time during which the publication is required to be made, the court acquires no jurisdiction, and the action cannot be revived as to such defendant. See also Reilly *v.* Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540, wherein it was held that where service of summons is commenced by publication, and before the expiration of the time of publication plaintiff dies, the continuance of the publication without regard to his death does not complete the service so as to authorize a revival of the action by plaintiff's personal representative. But see Moore *v.* Thayer, 6 How. Pr. (N. Y.) 47, wherein it was held that under N. Y. Code, § 139, providing that, from the time of an allowance of a provisional remedy in a civil action, the court shall be deemed to have acquired juris-

meaning of a statute authorizing a revival of a pending action by or against personal representatives.[14]

3. Presentation of Claim to Personal Representative. It has been held that the usual statutory requirement that unless a claim has been exhibited to an executor or administrator, and has been disallowed, he shall not be liable at the suit of a creditor, does not apply to proceedings to revive an action against the personal representative of a deceased party.[15]

4. Necessity of Revival — a. Statement of Rule. It is a general rule that where the death of a party takes place during the pendency of an action, though the cause of action continues in favor of or against some one else, nothing further can be done in the action until the person in whose favor or against whom the cause of action survives is brought before the court by some proper proceeding.[16] And it has been held that even an admission or agreement by the surviving parties to a suit, that the interest of a deceased party has been extinguished or satisfied, will not dispense with the necessity of bringing his representatives before the court.[17]

diction, where, in an action in which an attachment had been obtained and an order made for service of summons by publication, defendant died before the period of publication had expired, the court had jurisdiction to substitute defendant's representatives. *Compare* Barron *v.* South Brooklyn Saw Mill Co., 18 Abb. N. Cas. (N. Y.) 352.

14. Hyde *v.* Leavitt, 2 Tyler (Vt.) 170.

15. Musser *v.* Chase, 29 Ohio St. 577; Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

16. *Alabama.*— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Frowner *v.* Johnson, 20 Ala. 477; Koger *v.* Weakly, 2 Port. (Ala.) 516; Kennedy *v.* Pickering, Minor (Ala.) 137.

California.— Judson *v.* Love, 35 Cal. 463; Ewald *v.* Corbett, 32 Cal. 493.

District of Columbia.— Corbett *v.* Pond, 10 App. Cas. (D. C.) 17.

Georgia.— Glisson *v.* Carter, 28 Ga. 516.

Illinois.— Life Assoc. of America *v.* Fassett, 102 Ill. 315; Bunker *v.* Green, 48 Ill. 243; Barbour *v.* White, 37 Ill. 164; Thorpe *v.* Starr, 17 Ill. 199; Singleton *v.* Wofford, 4 Ill. 576; King *v.* Mitchell, 83 Ill. App. 632.

Indiana.— Binkley *v.* Forkner, (Ind. 1888) 15 N. E. 343.

Kentucky.— Rains *v.* Lee, (Ky. 1896), 36 S. W. 176; Smith *v.* Ferguson, 3 Metc. (Ky.) 424; Grider *v.* Payne, 9 Dana (Ky.) 188; Morgan *v.* Dickerson, 1 T. B. Mon. (Ky.) 20; Morton *v.* Long, 3 A. K. Marsh. (Ky.) 414.

Louisiana.— Norton *v.* Jamison, 23 La. Ann. 102; Woodman *v.* Richardson, 15 La. Ann. 508; Hiriat *v.* Hildreth, 8 La. Ann. 54; McMicken *v.* Smith, 5 Mart. N. S. (La.) 427.

Maine.— Trask *v.* Trask, 78 Me. 103, 3 Atl. 37.

Maryland.— Glenn *v.* Clapp, 11 Gill & J. (Md.) 1; Tilly *v.* Tilly, 2 Bland (Md.) 436.

Massachusetts.— Smith *v.* Sherman, 4 Cush. (Mass.) 408.

Michigan.— Botsford *v.* Sweet, 49 Mich. 120, 13 N. W. 385.

Missouri.— Gamble *v.* Daugherty, 71 Mo. 599; Murphy *v.* Redmond, 46 Mo. 317; Harkness *v.* Austin, 36 Mo. 47.

Nebraska.— Hendrix *v.* Rieman, 6 Nebr. 516.

New Hampshire.— Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Parker *v.* Badger, 26 N. H. 466; Ela *v.* Rand, 4 N. H. 54.

New York.— Reilly *v.* Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540; Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863; Hasbrouck *v.* Bunce, 62 N. Y. 475; Arents *v.* Long Island R. Co., 36 N. Y. App. Div. 379, 55 N. Y. Suppl. 401; Gueli *v.* Lenihan, 55 Hun (N. Y.) 608, 8 N. Y. Suppl. 453; Anderson *v.* Anderson, 20 Wend (N. Y.) 585; Secor *v.* Clark, 54 N. Y. Super. Ct. 461; Jarvis *v.* Felch, 14 Abb. Pr. (N. Y.) 46; Reed *v.* Butler, 11 Abb. Pr. (N. Y.) 128; Holmes *v.* Honie, 8 How. Pr. (N. Y.) 383.

North Carolina.— Aycock *v.* Harrison, 71 N. C. 432; Simmons *v.* Ratcliff, 5 N. C. 113; Stephenson *v.* Prescott, 3 N. C. 350.

Ohio.— Mannix *v.* Elder, 1 Ohio Cir. Ct. 59.

Pennsylvania.— Finney *v.* Ferguson, 3 Watts & S. (Pa.) 413.

South Carolina.— Parnell *v.* Maner, 16 S. C. 348.

Tennessee.— Wheatley *v.* Harvey, 1 Swan (Tenn.) 484; Morrison *v.* Deaderick, 10 Humphr. (Tenn.) 342; Perkins *v.* Norvell, 6 Humphr. (Tenn.) 151; Green *v.* Shaver, 3 Humphr. (Tenn.) 139; Breedlove *v.* Stump, 3 Yerg. (Tenn.) 257.

Texas.— Clayton *v.* Preston, 54 Tex. 418; McCampbell *v.* Henderson, 50 Tex. 601; Hollingsworth *v.* Bagley, 35 Tex. 345.

Vermont.— Dow *v.* Batchelder, 45 Vt. 60.

Virginia.— Paxton *v.* Stuart, 80 Va. 873.

West Virginia.— Nichols *v.* Nichols, 8 W. Va. 174.

Wisconsin.— La Pointe *v.* O'Malley, 47 Wis. 332, 2 N. W. 632.

United States.— Maury *v.* Fitzwater, 88 Fed. 768; Wright *v.* Phipps, 58 Fed. 552; Baldwin *v.* Lamar, Chase (U. S.) 432, 2 Fed. Cas. No. 800.

England.— Smith *v.* Horsfall, 24 Beav. 331.

See 1 Cent. Dig. tit. "Abatement and Revival," § 364 *et seq.*

17. Glenn *v.* Clapp, 11 Gill & J. (Md.) 1. But see Boog *v.* Bayley, R. M. Charlt. (Ga.) 190, wherein it was held that the necessity of filing a bill of revivor to make the representative of a deceased complainant a party

b. Suits in Equity. In equity a suit is abated by the death of a party during its pendency. Such abatement, however, merely suspends the progress of the suit until new parties are brought before the court. The abatement is either as to the suit or as to the party. If there is no longer any person before the court by or against whom the suit can proceed, it must be revived before any further proceedings can be had.[18] But if, on the death of a party, the cause of action survives to or against some other of the parties so that a perfect decree can be made between the surviving parties, the suit does not abate as to the survivors and may proceed without a revival.[19]

c. Counterclaim. On the death of a defendant who has filed a counterclaim it is necessary that his representatives, if they wish to prosecute the counterclaim against plaintiff in the original action, should obtain an order of revivor against him.[20]

d. Effect on Judgment of Want of Revival. It has been held that where one of the defendants in an action on a joint contract dies before judgment, and the judgment is taken against all the defendants without any suggestion of his death or making his representatives parties, such judgment is not void, but merely voidable.[21]

5. Revival by Consent. In some states a suit may be revived by consent on

to the suit may be waived by agreement between such representative and defendant, and under such circumstances a replication may be dispensed with. See also Spalding *v.* Wathen, 7 Bush (Ky.) 659.

18. *Alabama.*— Floyd *v.* Ritter, 65 Ala. 501; Frowner *v.* Johnson, 20 Ala. 477; Eldridge *v.* Turner, 11 Ala. 1049; Koger *v.* Weakly, 2 Port. (Ala.) 516.

Florida.— Mitchell *v.* Wamble, 18 Fla. 169.

Georgia.— Grace *v.* Rowell, 30 Ga. 764; Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121; Berry *v.* Mathewes, 7 Ga. 457; Howard *v.* Darien Bank, R. M. Charlt. (Ga.) 216.

Kentucky.— Ullery *v.* Blackwell, 3 Dana (Ky.) 300; Morgan *v.* Dickerson, 1 T. B. Mon. (Ky.) 20.

Maryland.— Glenn *v.* Clapp, 11 Gill & J. (Md.) 1; Brogden *v.* Walker, 2 Harr. & J. (Md.) 285; Austin *v.* Cochran, 3 Bland (Md.) 337.

Nebraska.— Fox *v.* Abbott, 12 Nebr. 328, 11 N. W. 303.

New Hampshire.— Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362.

New York.— Livermore *v.* Bainbridge, 49 N. Y. 125; Taylor *v.* Taylor, 43 N. Y. 578; Requa *v.* Holmes, 16 N. Y. 193; Penniman *v.* Norton, 1 Barb. Ch. (N. Y.) 246; Quackenbush *v.* Leonard, 9 Paige (N. Y.) 334; Reynolds *v.* Reynolds, 5 Paige (N. Y.) 161; Fayerweather *v.* Smith, 3 How. Pr. (N. Y.) 98.

Ohio.— Carter *v.* Jennings, 24 Ohio St. 182.

Tennessee.— Rogers *v.* Breen, 9 Heisk. (Tenn.) 679; Kelly *v.* Hooper, 3 Yerg. (Tenn.) 395.

Virginia.— Ayres *v.* Alphin, 88 Va. 416, 13 S. E. 899; Sexton *v.* Crockett, 23 Gratt. (Va.) 857; Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120.

West Virginia.— Bock *v.* Bock, 24 W. Va. 586.

United States.— Mandeville *v.* Riggs, 2 Pet. (U. S.) 482, 7 L. ed. 493; Wright *v.* Phipps, 58 Fed. 552.

England.— Boddy *v.* Kent, 1 Meriv. 361; Williams *v.* Kinder, 4 Ves. Jr. 387.

See 1 Cent. Dig. tit. "Abatement and Revival," § 365, and *supra*, I, C.

19. *Illinois.*— Stoetzell *v.* Fullerton, 44 Ill. 108.

Maine.— Adams *v.* Stevens, 49 Me. 362.

Nebraska.— Fox *v.* Abbott, 12 Nebr. 328, 11 N. W. 303.

New York.— Leggett *v.* Dubois, 2 Paige (N. Y.) 211; Lachaise *v.* Libby, 13 Abb. Pr. (N. Y.) 6.

United States.— Fisher *v.* Rutherford, Baldw. (U. S.) 188, 9 Fed. Cas. No. 4,823.

England.— Williamson *v.* Llanelly R., etc., Co., L. R. 10 Eq. 401; Finch *v.* Winchelsea, 1 Eq. Cas. Abr. 2, par. 7.

Revival against heirs.— Where one of the defendants in an equity suit dies while the suit is pending, and his heirs cannot be prejudiced by the proceedings, they need not be made parties. Adams *v.* Stevens, 49 Me. 362.

20. Andrew *v.* Aitken, 21 Ch. D. 175.

21. Swasey *v.* Antram, 24 Ohio St. 87. See also Smith *v.* Joyce, 11 N. Y. Civ. Proc. 257, 259, which was an action to foreclose a mortgage. All the defendants except certain infants defaulted, and they interposed the usual general answer by guardian *ad litem*. The plaintiff died after the report of the referee appointed "to compute the amount due to the plaintiff for the principal and interest upon the bond and mortgage set forth in the plaintiff's complaint, and also to take [all the] facts and circumstances stated in the plaintiff's complaint, and to examine the plaintiff or his agent on oath as to any payment which may have been made." It was held that there should have been a revival of the action before entry of judgment on the report, but that judgment entered in the absence of such revival was simply irregular and not void.

the death of a party.[22] But in such states the agreement to revive must be entered of record.[23]

6. REVIVAL AS TO PARTS OF CAUSES. An action may be revived as to causes of action which survive, even though some of the causes of action declared on do not survive.[24]

7. WHO MAY REVIVE OR CONTINUE — a. In General — (1) *SUCCESSORS IN INTEREST.* On the death of plaintiff a suit should be revived in the name of the person succeeding to his interest.[25]

22. Williams *v.* Thompson, 80 Ky. 325; Pugh *v.* Bell, 1 J. J. Marsh. (Ky.) 399; Durrett *v.* Simpson, 3 T. B. Mon. (Ky.) 517; Greenlee *v.* Bailey, 9 Leigh (Va.) 526.

Notice of revival.— In Pugh *v.* Bell, 1 J. J. Marsh. (Ky.) 399, it was held that where a revivor is made by consent the decree rendered is not irregular where no service of notice upon those against whom it was revived is shown.

Status of cause on revival by consent.— Upon the death of a defendant in detinue, if his administrator consents that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a scire facias against the administrator alleging that the property had come to his possession and was detained by him. Greenlee *v.* Bailey, 9 Leigh (Va.) 526.

Waiver of objections.—In Tompkins *v.* Vintroux, 3 W. Va. 148, 100 Am. Dec. 735, it was held that trespass *quare clausum fregit* cannot be revived in the name of the personal representative of one of the joint plaintiffs who dies pending the action and before verdict; but that such revival, if by consent in the name of the sole devisee of the decedent, is not a ground for reversal.

23. Williams *v.* Thompson, 80 Ky. 325.

24. Booth *v.* Northrop, 27 Conn. 325. See also Andrews *v.* Scotton, 2 Bland (Md.) 629, wherein it was held that a suit which, by the death of a party, has abated as well to real as to personal estate, may be revived as against either, leaving the abatement to stand as to either. And see Cregin *v.* Brooklyn Crosstown R. Co., 83 N. Y. 595, 38 Am. Rep. 474, wherein it was held that where a right of action for damages which can survive involves (mingled with but separable from it) damages of such a character as die with the party, the revival of the action does not permit the recovery of the latter class of damages.

Determination of costs.— Where, upon the abatement of a suit by the death of complainant, the cause of action does not survive, the suit cannot be revived to settle a question of costs. Johnson *v.* Thomas, 2 Paige (N. Y.) 377.

Striking out cause which does not survive. — Where two causes of action are joined in one complaint, only one of which survives the death of defendant, the court has power to order, as a condition of granting an order to revive, that the cause of action which does not survive shall be stricken from the complaint. Forster *v.* Cantoni, 4 N. Y. Annot. Cas. 375, 19 N. Y. App. Div. 306, 46 N. Y. Suppl. 118.

25. *Arkansas.*— Driver *v.* Hays, 51 Ark. 82, 9 S. W. 853; Grace *v.* Neel, 41 Ark. 165; Martin *v.* Tyree, 41 Ark. 314.

California.— Blakeslee *v.* Hall, 94 Cal. 159, 29 Pac. 623.

Illinois.— Funk *v.* Stubblefield, 62 Ill. 405.

Kentucky.— Russell *v.* Craig, 3 Bibb (Ky.) 377.

Louisiana.— Bourguinon *v.* Boudousquie, 3 La. 526.

Maryland.— Hawkins *v.* Chapman, 36 Md. 83.

Minnesota.— Landis *v.* Olds, 9 Minn. 90.

Mississippi.— Hamilton *v.* Homer, 46 Miss. 378.

Missouri.— Brewington *v.* Stephens, 31 Mo. 38.

Nebraska.— Morrow *v.* Jones, 41 Nebr. 867, 60 N. W. 369.

New York.— Northrup *v.* Smith, 58 N. Y. Super. Ct. 120, 9 N. Y. Suppl. 802; St. John *v.* Croel, 10 How. Pr. (N. Y.) 253.

West Virginia.— Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424; Reid *v.* Stuart, 20 W. Va. 382.

United States.— Barribeau *v.* Brant, 17 How. (U. S.) 43, 15 L. ed. 34.

Grantee of heir.— Where, in an action of partition, a sole plaintiff dies intestate, the action may be revived by the grantee of his heir at law as being the successor in interest of the intestate. Cheney *v.* Rankin, 27 Misc. (N. Y.) 609, 58 N. Y. Suppl. 263.

Heirs of devisee.—A husband and daughter of a devisee who dies after commencing an action to set aside for fraud a judgment refusing to admit the will to probate have such an interest, as the heirs of such plaintiff, as make them proper parties plaintiff after her death. Burnett *v.* Milnes, 148 Ind. 230, 46 N. E. 464.

Overseers of poor on death of pauper.— In Pennsylvania the overseers of the poor have a right to be substituted as plaintiffs for one who, after bringing an action of ejectment, became and died a pauper. Jester *v.* Jefferson Tp., 11 Pa. St. 540.

Where inability to obtain administration exists.—In some states actions which should be revived in the name of the personal representatives of a deceased plaintiff may be revived by his heirs if no one can be found who will administer upon the estate. Campbell *v.* Hubbard, 11 Lea (Tenn.) 6; Edgington *v.* Jamison, 2 Lea (Tenn.) 569; Brown *v.* Rocco, 9 Heisk. (Tenn.) 187; Boyd *v.* Titzer, 6 Coldw. (Tenn.) 568; Bandy *v.* Walker, 3 Head (Tenn.) 568. But in Texas the heir cannot sue as such without alleging that there is no administration pending and that there is no necessity for an administration

(II) *Assignee*— (A) *Assignment Before Death of Plaintiff.* Where plaintiff assigns his interest in the subject-matter of an action during its pendency, and then dies, the action, if the cause thereof survives, may be revived in the name of the assignee.[26] But in such case notice of motion for substitution should be given both to defendant and the representatives of decedent.[27]

(B) *Assignment After Death of Plaintiff.* It has been held, however, that one to whom a cause of action has been assigned by the personal representative of a plaintiff who died pending the suit cannot revive the same.[28]

(III) *Defendant or His Representatives*— (A) *Death Before Decree.* It is a general rule that where a suit abates by the death of a party before a decree or decretal order is made by which defendant becomes entitled to an interest in the further continuance of the suit, neither he nor his representatives can have it revived.[29]

(B) *Death After Decree*—(1) In General. The rule is otherwise after a decree or decretal order.[30]

on the estate of the deceased. Low *v.* Felton, 84 Tex. 378, 19 S. W. 693; Gayle *v.* Hoffman, 29 Tex. 1; Grayson *v.* Winnie, 13 Tex. 288; Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112; Galveston, etc., R. Co. *v.* Kelley, (Tex. Civ. App. 1894) 26 S. W. 470.

26. Reynolds *v.* Quaely, 18 Kan. 361; Schell *v.* Devlin, 82 N. Y. 333; Moore *v.* North Carolina R. Co., 74 N. C. 528. *Compare* Barribeau *v.* Brant, 17 How. (U. S.) 43, 15 L. ed. 34.

Option of court.— In Sheldon *v.* Havens, 7 How. Pr. (N. Y.) 268, it was held that in case of a transfer of plaintiff's interest in the subject of the action it is optional with the court, on plaintiff's death, whether or not to allow the assignee to be substituted and the action continued in his name; and, on the application, defendant should be heard and his interests taken into account.

27. Abadie *v.* Lobero, 36 Cal. 390; McLaughlin *v.* New York, 8 Daly (N. Y.) 474; Howard *v.* McKenzie, 54 Tex. 171; Smith *v.* Harrington, 3 Wyo. 503, 27 Pac. 803. But see Bennett *v.* Thompson, 76 Hun (N. Y.) 125, 27 N. Y. Suppl. 565, wherein it was held that where plaintiff assigns his cause of action and afterward dies, the assignee may be substituted as plaintiff without notice to the personal representative of decedent.

28. Rogers *v.* Adriance, 22 How. Pr. (N. Y.) 97. But see Dock *v.* South Brooklyn Saw Mill Co., 6 N. Y. Civ. Proc. 144, which was an action to foreclose a mortgage. Plaintiff died before the cause was tried, and thereafter one A moved to be substituted as plaintiff on proof that plaintiff died testate; that his will was probated in a foreign state; that the executrix, who was sole legatee under the will, had qualified and had assigned the mortgage to A. It was held that the motion should be granted. See also Robinson *v.* Brisbane, 7 Hun (N. Y.) 180, wherein it appeared that after judgment of foreclosure and before sale the plaintiff died and his executor assigned the judgment. It was held that the assignee was properly allowed to file a supplemental complaint to carry the judgment into effect.

29. The reason for the rule is that no one can be compelled to commence, renew, or revive a suit against another. Griffith *v.* Bronaugh, 1 Bland (Md.) 547; Benson *v.* Wolverton, 16 N. J. Eq. 110; Peer *v.* Cookerow, 13 N. J. Eq. 136; Livermore *v.* Bainbridge, 49 N. Y. 125; Republic *v.* Reeves, 40 N. Y. Super. Ct. 316; Keene *v.* La Farge, 1 Bosw. (N. Y.) 671; Souillard *v.* Dias, 9 Paige (N. Y.) 393; McDermott *v.* McGown, 4 Edw. (N. Y.) 592; Kissam *v.* Hamilton, 20 How. Pr. (N. Y.) 369; Hooe *v.* Pierce, 1 Wash. (Va.) 212.

30. The reason is that the rights of the parties are then ascertained. In such case plaintiff and defendant are equally entitled to the benefit of the decree, and either has a right to revive it.

Maryland.— Ridgely *v.* Bond, 18 Md. 433; Glenn *v.* Clapp, 11 Gill & J. (Md.) 1.

New Jersey.— Benson *v.* Wolverton, 16 N. J. Eq. 110; Peer *v.* Cookerow, 13 N. J. Eq. 136.

New York.— Halstead *v.* Cockcroft, 40 N. Y. Super. Ct. 519; Anderson *v.* White, 10 Paige (N. Y.) 575; Souillard *v.* Dias, 9 Paige (N. Y.) 393; Rogers *v.* Paterson, 4 Paige (N. Y.) 409; Pell *v.* Elliot, Hopk. (N. Y.) 86.

Tennessee.— Thompson *v.* Hill, 5 Yerg. (Tenn.) 418.

West Virginia.— Reid *v.* Stuart, 20 W. Va. 382.

England.— Horwood *v.* Schmedes, 12 Ves. Jr. 311; Williams *v.* Cooke, 10 Ves. Jr. 406; Gordon *v.* Bertram, 1 Meriv. 154.

See also Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131, wherein it was held that where the situation of a suit is such that defendant as well as complainant has the right to have it revived, the court will direct that if complainant does not procure it to be revived within a specified time defendant shall be at liberty to file a bill of revivor.

To permit appeal.— Where there is a decree against a defendant, and the suit then abates by the death of the adverse party, defendant cannot appeal from such decree until the suit is revived. Such defendant has therefore a right to revive the suit in case the adverse party neglects to revive for the purpose of enabling him to appeal if he has no other remedy, and an appeal will lie. Anderson *v.* White, 10 Paige (N. Y.) 575.

(2) Decree to Account. After a decree to account, defendant or his representative has an interest in the further continuance of the suit, and may accordingly revive the suit in case of its abatement by the death of a party.[31]

(c) *Filing of Counterclaim.* Where a defendant has become an actor in the proceedings by the presentation of a counterclaim, he or his representatives may revive the suit on the death of a party.[32]

(d) *Compelling Revival or Suffering Dismissal.* In many states the rule obtains that on the failure of plaintiff or his representatives to institute proceedings for the revival or continuance of an action on the death of a party, defendant or his representatives may compel the institution of such proceedings or else have the action abated or dismissed.[33]

(iv) *Special Administrator.* It has been held that where a plaintiff dies pending suit the court before which the cause is pending may appoint a special administrator to conduct the suit.[34]

(v) *Where Defendant Is Personal Representative of Plaintiff.* On the death of plaintiff pending suit and the qualification of defendant as the

31. Griffith *v.* Bronaugh, 1 Bland (Md.) 547; Halstead *v.* Cockcroft, 40 N. Y. Super. Ct. 519; Horwood *v.* Schmedes, 12 Ves. Jr. 311; Stowell *v.* Cole, 2 Vern. 219; Devaynes *v.* Morris, 1 Myl. & C. 213; Anonymous, 3 Atk. 691.

32. Livermore *v.* Bainbridge, 49 N. Y. 125; Pierson *v.* Morgan, 44 Hun (N. Y.) 517.

Cross-bill.— In Woolsey *v.* Livingston, 5 Johns. Ch. (N. Y.) 265, a cross-bill filed by defendant in a suit to foreclose, in which he prayed relief against the mortgage and also against a judgment and execution, was held to be in the nature of an original bill, and on the abatement of the suit by the death of defendant his representatives were permitted to revive the suit.

33. *Georgia.*— Anderson *v.* Cary, 89 Ga. 258, 15 S. E. 309.

Kentucky.—Hull *v.* Deatly, 7 Bush (Ky.) 687.

Mississippi.— Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 24 Am. Rep. 674.

New York.— Holsman *v.* St. John, 90 N. Y. 461; Livermore *v.* Bainbridge, 49 N. Y. 125; Johnson *v.* Elwood, 15 Hun (N. Y.) 14; Banta *v.* Marcellus, 2 Barb. (N. Y.) 373; Williamson *v.* Moore, 5 Sandf. (N. Y.) 647; Harrington *v.* Becker, 2 Barb. Ch. (N. Y.) 75; Pells *v.* Coon, Hopk. (N. Y.) 450; Pell *v.* Elliot, Hopk. (N. Y.) 86; Jarvis *v.* Felch, 14 Abb. Pr. (N. Y.) 46; Crawford *v.* Whitehead, Code Rep. N. S. (N. Y.) 345; Keene *v.* La Farge, 16 How. Pr. (N. Y.) 377; Chapman *v.* Foster, 15 How. Pr. (N. Y.) 241.

North Carolina.— Coggins *v.* Flythe, 114 N. C. 274, 19 S. E. 701.

South Carolina.— Parnell *v.* Maner, 16 S. C. 348.

Texas.— McCampbell *v.* Henderson, 50 Tex. 601; Beck *v.* Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207; Tucker *v.* Bryan, 1 Tex. App. Civ. Cas. § 1157.

West Virginia.— Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

Wisconsin.— Plumer *v.* McDonald Lumber Co., 74 Wis. 137, 42 N. W. 250.

England.— Pearce *v.* Wrigton, 24 Beav. 253; Chichester *v.* Hunter, 3 Beav. 491; Hogan *v.* Morgan, 2 Molloy 417; Norton *v.* White, 2 De G. M. & G. 678; Adamson *v.* Hall, Turn. & R. 258.

Canada.— Watson *v.* Watson, 6 Ont. Pr. 229.

See also Whitehear *v.* Hughes, 1 Dick. 283, wherein it was held that if a plaintiff files a bill to revive, and neglects to do so, defendant may be allowed to revive and carry on the decree under plaintiff's bill. And see Hutchings *v.* Eddy, 6 Kan. App. 490, 50 Pac. 944, wherein it was held that where a case is commenced against the receivers of a railroad, and afterward the receivers die, and a receiver *de bonis non* is appointed as their executor, and no attempt is made to substitute or revive the action in the name of the receiver *de bonis non* for more than a year after his appointment, a motion to abate the action for the reason that it has not been revived will be sustained. And see New Hampshire Banking Co. *v.* Ball, 57 Kan. 812, 48 Pac. 137, wherein it was held that if by lapse of time the action cannot be revived, it abates, and any rights that have been acquired by virtue of the pendency of the suit will be lost to the plaintiff. But see Treadway *v.* Pharis, (Ky. 1892) 18 S. W. 225, wherein it was held that, in proceedings by administrators to have their decedent subrogated to the rights of certain judgment creditors, a motion to strike the action in which the judgment was rendered from the docket because no revivor has been had within a year from the qualification of the administrator, or from the time the action could have been revived, will be denied where all the parties to such action are still living.

Waiver of right to dismissal.—In McKey *v.* Torry, 28 Miss. 78, it was held that failure to make a motion to have a discontinuance of the cause entered because two terms of the court had elapsed, after a party's death was suggested, before the administrator became a party to the suit, and proceeding to trial on the merits, waives the right to have the case dismissed.

34. Mangum *v.* Cooper, 28 Ark. 253. See also Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791, wherein it was held that a special administrator of a deceased plaintiff in an action for personal injuries may be substituted to prosecute the action.

executor of his estate, the action may be revived and continued by the co-executor.[35]

b. In Actions Affecting Personalty. If a suit is in respect of the personalty of a deceased plaintiff, and the cause of action survives, the personal representatives of deceased are the proper persons to revive or continue.[36]

c. In Actions Affecting Realty — (I) *Damages to Land.* If plaintiff die pending a suit for the recovery of damages done to his land the suit may be revived by his personal representatives.[37]

(II) *Ejectment.* An action of ejectment, or the statutory real action in the nature of ejectment, for the recovery of a freehold, should be revived on the death of plaintiff in the name of his heirs or devisees.[38] It has, however, been

35. McGregor *v.* McGregor, 35 N. Y. 218. See also Smith *v.* Pattison, 45 Miss. 619, wherein it was held that where one of several defendants in a chancery suit becomes administrator of complainant on his death pending suit, and voluntarily suggests the death of complainant, the case may be revived in his name as administrator.

36. *Alabama.*— Thompson *v.* Lee, 31 Ala. 292.

Arkansas.— Grace *v.* Neel, 41 Ark. 165; Martin *v.* Tyree, 41 Ark. 314; Noland *v.* Leech, 10 Ark. 504.

Illinois.— McLean County Coal Co. *v.* Long, 91 Ill. 617.

Kansas.— Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008.

Kentucky.— Hull *v.* Deatly, 7 Bush (Ky.) 687; Russell *v.* Craig, 3 Bibb (Ky.) 377; Meek *v.* Ealy, 2 J. J. Marsh. (Ky.) 329.

Maryland.— Hawkins *v.* Chapman, 36 Md. 83.

Missouri.— Brewington *v.* Stephens, 31 Mo. 38.

New York.— Emerson *v.* Bleakley, 2 Abb. Dec. (N. Y.) 22.

Ohio.—Welton *v.* Williams, 28 Ohio St. 472.

United States.— Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405.

A lease for a term of years, being a mere chattel interest, goes to the administrator upon the death of the intestate and not to the heirs, and therefore a suit respecting it is properly revived in the name of the administrator. Sutter *v.* Lackmann, 39 Mo. 91.

Money demand.— On the death of plaintiff pending an action by him for a mere money demand, the action should be revived by the administrator and not by the heir. Martin *v.* Tyree, 41 Ark. 314.

Replevin.— Where plaintiff in an action of replevin dies intestate, the administrator of his estate is the person in whose name the action must be revived. Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008.

Waiver of objection.—Where plaintiff in an action to have a deed of trust given him declared a prior lien died pending suit, there should have been a revival in the name of his administrator. But where the amended petition sets out the death of the original plaintiff and alleges that plaintiffs therein are his only heirs at law, and no objection is made by demurrer on the ground of defect of parties plaintiff, the defect is thereby waived. Rogers *v.* Tucker, 94 Mo. 346, 7 S. W. 414.

37. Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549; Conklin *v.* Keokuk, 73 Iowa 343, 35 N. W. 444; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Upper Appomattox Co. *v.* Hardings, 11 Gratt. (Va.) 1.

Interference with easement.—In Matthews *v.* Delaware, etc., Canal Co., 20 Hun (N. Y.) 427, it was held that an action to recover for interference with an easement may be revived and continued by the personal representatives of the deceased plaintiff.

Trespass quare clausum fregit.—The action of trespass *quare clausum fregit* is purely a personal action sounding wholly in damages, and, if permitted to survive the person damaged, survives to his executor or administrator. It cannot be revived by the heir or devisee of the person injured. Dobbs *v.* Gullidge, 20 N. C. 68; McPherson *v.* Sequine, 14 N. C. 153.

Proceedings under mill act.— In Massachusetts, on the death of complainant pending proceedings under the mill act, the administrator of his estate may be admitted to prosecute the complaint and recover such damages as he might have recovered. Darling *v.* Blackstone Mfg. Co., 16 Gray (Mass.) 187.

38. *Alabama.*— Rowland *v.* Ladiga, 21 Ala. 9; Jordan *v.* Abercrombie, 15 Ala. 580.

Florida.— Gould *v.* Carr, 33 Fla. 523, 15 So. 259, 24 L. R. A. 130. *Compare* Whitlock *v.* Willard, 18 Fla. 156.

Illinois.— Milliken *v.* Marlin, 66 Ill. 13; Funk *v.* Stubblefield, 62 Ill. 405.

Maryland.— James *v.* Boyd, 1 Harr. & G. (Md.) 1.

Michigan.— Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42.

New York.—More *v.* Deyoe, 22 Hun (N. Y.) 208.

Pennsylvania.— Ballantine *v.* Negley, 158 Pa. St. 475, 27 Atl. 1051.

As to survival of action of ejectment on the death of the plaintiff see *supra*, III, A, 3, g, (II).

Infant heir.—The lessor of plaintiff in ejectment died pending the action, and his heirs at law were made parties in his place without objection. It was held that it was not competent for defendant to defeat the action by giving evidence that one of the heirs was an infant when she was made a party, and that evidence that she was an infant at the time of the trial would not entitle defendant to a verdict against the other heirs who were of full age. James *v.* Boyd, 1 Harr. & G. (Md.) 1.

held that where damages are sought for the mesne profits as well as the lands, the personal representatives, as well as the heirs or devisees, are necessary parties in order to revive the suit.[39]

(III) *Enforcement of Vendor's Lien.* It has been held that on the death of complainant in a bill to enforce a vendor's lien on land his personal representatives are the proper persons to revive, and not the heirs.[40]

(IV) *Redemption from Mortgage.* On the death of the mortgagor an action to redeem from the mortgage may be maintained by the person who succeeded, by the mortgagor's death, to his interest in the mortgaged premises.[41]

(V) *Recovery of Realty.* If a suit is for the recovery of the realty of a deceased plaintiff, the heirs or devisees of deceased are the proper persons to revive or continue,[42] unless the will creates in the executor a title to the land

Person "next in interest."— If a tenant in tail institutes ejectment for land and dies pending the suit, the child and next heir in tail is such "person next in interest" as may be substituted as party plaintiff. Schoemaker *v.* Huffnagle, 4 Watts & S. (Pa.) 437.

Purchaser at execution sale.— In Hamilton *v.* Homer, 46 Miss. 378, it was held that the purchaser at execution sale of the title of plaintiff in a pending action of ejectment, who has died, is not the "legal representative" of plaintiff within the meaning of Miss. Code, art. 25, which provides that in such actions the legal representative of the deceased plaintiff may be substituted, and the action proceed.

Revival by all of heirs.—Where a sole plaintiff in an action of ejectment dies it is not necessary that the suit be revived in the names of all his heirs at law, and it is not error to allow the suit to be revived and prosecuted by a part of his heirs. Funk *v.* Stubblefield, 62 Ill. 405.

Substitution of personal representative.— In Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42, it was held that the substitution of an administrator to prosecute in ejectment on the death of plaintiff was not prejudicial error. See also Williams *v.* Savannah, etc., R. Co., 94 Ga. 540, 20 S. E. 487, wherein it was held that though the personal representatives of a plaintiff in ejectment who dies pending the suit, and not his heirs, are the proper persons to succeed him in the suit where the heirs have been made parties by order of court, they may recover if the personal representatives could had they been made parties.

Successors to title.— In James *v.* Bennett, 10 Wend. (N. Y.) 540, it was held that parties succeeding to the title of a plaintiff in ejectment dying after issue joined and before verdict may be substituted.

39. Evans *v.* Welch, 63 Ala. 250; *Ex p.* Swan, 23 Ala. 192; State *ex rel.* Nabor, 7 Ala. 459. See also Roberts *v.* Nelson, 86 Mo. 21, wherein it was held that where the widow dies pending an action of ejectment by her for the recovery of possession of the mansion-house and messuages, the suit may be revived in the name of her administrator, and recovery be had for rents and profits, by way of damages, to the time of her death. But see Means *v.* Associate Reformed Presb. Church, 3 Pa. St. 93, wherein it was held that on the death of plaintiff in ejectment after recovery, an action for the recovery of mesne profits which accrued during the pendency of the action of ejectment should be brought in the name of the heirs.

40. Batre *v.* Auze, 5 Ala. 173; Meek *v.* Ealy, 2 J. J. Marsh. (Ky.) 329.

41. Morrow *v.* Jones, 41 Nebr. 867, 60 N. W. 369.

Revival by heirs.—In Putnam *v.* Putnam, 4 Pick. (Mass.) 139, it was held that where a bill in equity to redeem mortgaged premises is abated by the death of complainant, his heirs may revive the suit. See also Sutherland *v.* Rose, 47 Barb. (N. Y.) 144, wherein it was held that on the death of a mortgagor in an action by him for the cancellation and satisfaction of the mortgage, the heirs, and not the personal representatives, are the proper parties to continue the action, as the heirs alone have an interest in the satisfaction of the mortgage and in the right to redeem.

Recovery of surplus on sale.— In Cope *v.* Wheeler, 41 N. Y 303, it was held that an action brought by a mortgagor against a mortgagee to recover a surplus arising after foreclosure and sale does not abate by the death of plaintiff, but may be continued in the name of his administrator.

Foreclosure of mortgage.— In Tennessee, where a mortgagee files his bill to foreclose the mortgage and dies, his heir, or the assignee of the heir, may maintain a bill of revivor to revive the suit without joining the personal representative of the mortgagee. Atchison *v.* Surguine, 1 Yerg. (Tenn.) 400.

42. *Kentucky.*— Kincart *v.* Sanders, 2 A. K. Marsh. (Ky.) 26; Jameson *v.* Smith, 4 Bibb (Ky.) 307; Russell *v.* Craig, 3 Bibb (Ky.) 377.

Maryland.— Hawkins *v.* Chapman, 36 Md. 83.

Missouri.— Brewington *v.* Stephens, 31 Mo. 38.

Nebraska.— Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848.

New Jersey.— Lanning *v.* Cole, 6 N. J. Eq. 102.

Wisconsin.— Jones *v.* Graham, 80 Wis. 6, 49 N. W. 122.

United States.— Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405.

Joinder of widow.— On the death of plaintiff in an action to recover real property it is not necessary that the widow should join in the petition of the heir for leave to continue

which authorizes him to prosecute the suit. It seems that it is only in such case that he will be permitted to revive.[43]

(VI) *Partition.* On the death of plaintiff pending a suit for partition the personal representatives cannot revive,[44] except so far as the suit is for the recovery of the rents and profits.[45]

(VII) *Rescission of Contract for Sale of Land.* If complainant dies in a suit for the rescission of a contract for the sale of lands the suit should be revived in the name of the heirs and not of the personal representatives.[46]

(VIII) *Specific Performance of Contract for Sale of Land.* Where a suit for the specific performance of a contract to convey land abates by the death of plaintiff, his heirs at law may revive the suit.[47]

d. In Actions Affecting Both Realty and Personalty. If a suit is in respect of both the personalty and the realty of a deceased plaintiff it should be revived in the names of both the heirs and the personal representatives.[48]

e. On Death of Nominal Plaintiff. On the death of the nominal plaintiff after the name of the beneficial plaintiff has been stricken from the declaration, the suit is properly continued by the substitution of the nominal plaintiff's personal representatives.[49]

f. On Death of One or More of Several Plaintiffs — (I) *In General.* If there be two or more plaintiffs and one or more of them die, and the entire cause

the suit or be made party to the subsequent proceeding until her dower is assigned. Ash *v.* Cook, 3 Abb. Pr. (N. Y.) 389.

Writ of right.— In Taylor *v.* Rightmire, 8 Leigh (Va.) 468, it was held that a writ of right should be revived in the names of the devisees on the death of demandant pending the action.

43. Webb *v.* Janney, 9 App. Cas. (D. C.) 41.

44. Greeley *v.* Hendricks, 23 Fla. 366, 2 So. 620; Whitlock *v.* Willard, 18 Fla. 156; Richards *v.* Richards, 136 Mass. 126.

As to survival of suits for partition see *supra*, III, A, 4, l.

Infant devisee.— Where a bill for partition is filed and complainant subsequently dies, and his devisee thereupon files a bill to revive and continue the proceedings in the original suit, it is no objection to this last bill that the devisee is an infant and therefore incapable of commencing an original suit for the partition of lands. McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329.

45. Hoffman *v.* Tredwell, 6 Paige (N. Y.) 308. See also Ruffners *v.* Lewis, 7 Leigh (Va.) 720, 30 Am. Dec. 513, in which it appeared that after a decree ascertaining the rights of plaintiffs in respect to certain land, and after partition made and a conveyance directed to A of the moiety sued for, A died. It was held that as the suit was then proceeded in for the lands and profits only to which the executors of A were entitled it was proper to revive it in their names, and not in the names of the heirs of A.

46. Webb *v.* Janney, 9 App. Cas. (D. C.) 41; Huston *v.* Noble, 4 J. J. Marsh. (Ky.) 130; Kincart *v.* Sanders, 2 A. K. Marsh. (Ky.) 26. See also Scott *v.* Scott, 3 B. Mon. (Ky.) 2, wherein it was held that where a father conveyed land to his son on condition that he should maintain his parents during their life, and the father afterward brought an action to cancel the deed, on his death the bill should be revived in the name of his widow and heirs. But see Roberts *v.* Hoskins, (Ky. 1887) 4 S. W. 35, which was an action to enforce notes given for the purchase-money of land. The vendee, who had only a title-bond, set up a defect in the title and by cross-petition claimed a rescission of the purchase and a cancellation of the notes, but died before the trial. It was held that the action should have been revived, not only in the name of his administrator, but also in those of his heirs.

47. Quackenbush *v.* Leonard, 9 Paige (N. Y.) 334. See also Nevill *v.* Rentzell, 39 Ark. 289, wherein it was held that to a suit for the specific performance of the covenants of a title-bond the heirs of the obligee are, after his death pending the suit, necessary parties plaintiff.

Contract to make lease.— In Reynolds *v.* Stark County, 5 Ohio 204, it was held that where a plaintiff brought a bill to enforce specific performance of a contract to make a lease, and died during the pendency of the suit, his administrators should be made parties to a bill of revivor.

48. Smith *v.* Mosby, 3 Bibb (Ky.) 283; Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Lanning *v.* Cole, 6 N. J. Eq. 102.

Land and rents.—Upon the death of a plaintiff in a suit in equity for lands and rents, the suit should be revived in the name of his heirs and also of his administrator in consideration of the latter's right to possession for the payment of debts. Grace *v.* Neel, 41 Ark. 165.

49. Katz *v.* Moessinger, 110 Ill. 372. See also Phillips *v.* Wilson, 25 Ill. App. 427, wherein it was held that a suit commenced by an assignor for the use of the assignee may be continued on the death of the assignor in the name of his legal representatives.

As to survival of action see *supra*, III, A, 9.

of action survives to the survivor or survivors, the action may proceed in the name of the survivor or survivors without a revival as to the deceased plaintiff or plaintiffs.[50] And in such case it has been held to be improper to join the representatives of deceased as co-plaintiffs with the survivor or survivors.[51] Where, however, the cause of action survives to the representatives of deceased, the action may be continued in the name of the survivors and the representatives of deceased.[52]

(II) *Suit by Partnership.* In a suit by partners in favor of the partnership and relating to partnership affairs, if one or more of the partners die it is unnecessary to revive the suit in the name of the personal representatives of the deceased partner or partners.[53]

g. On Death of Person Suing in Representative Capacity — (I) *In General.* An action prosecuted by a person in a representative capacity should be revived, on the death of such person pending the action, in the name of his successor in such capacity.[54]

(II) *Suit by Guardian.* Where a bond or note given to one as guardian is sued on in his name, and he dies, the suit should be revived in the name of his administrator and not in that of the minor or guardian subsequently appointed.[55]

(III) *Suit by Next Friend.* Where, in a suit by infants by their next

50. See cases cited *supra*, note 54, p. 70.

As to survival on death of one or more plaintiffs see *supra*, III, A, 5.

51. Rupert *v.* Elston, 35 Ala. 79; Gregg *v.* Bethea, 6 Port. (Ala.) 9; Gayle *v.* Agee, 4 Port. (Ala.) 507; Bebee *v.* Miller, Minor (Ala.) 364; Bostwick *v.* Williams, 40 Ill. 113; Hairston *v.* Woods, 9 Leigh (Va.) 308.

52. Watson *v.* White, 152 Ill. 364, 38 N. E. 902 (wherein it was held that where, pending a suit for specific performance, the complainant dies testate, and it appears that the firm of which he was a member had a beneficial interest in the contract, it was proper, on revival of the suit, to join his executors, devisees, and surviving partner as parties complainant); Wilson *v.* Paxton, 2 A. K. Marsh. (Ky.) 193 (wherein it was held that where one of the joint obligees of a bond died during the pendency of the suit, the survivors should not proceed to a decree without reviving the suit in the name of the heirs of the deceased complainant); Cope *v.* Wheeler, 41 N. Y. 303 (which was a joint action by mortgagors to recover for surplus money arising upon a foreclosure. It was held that on the death of one of the plaintiffs the action was properly continued in the name of the surviving plaintiff and the representative of the deceased plaintiff). And see Powell *v.* Glenn, 21 Ala. 458, wherein it was held that where one of several co-plaintiffs in an action of trover dies pending the suit, and his personal representative is not made a party, the objection can only avail to reduce the amount of the recovery.

53. See cases cited *supra*, note 59, p. 71.

As to survival of suit see *supra*, III, A, 5, c.

54. See cases cited *supra*, note 68, p. 74.

Action by assignee for benefit of creditors. — An executor of an assignee for the benefit of creditors is not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee unless such executor has been substituted as assignee. Steinhouser *v.* Mason, 135 N. Y. 635, 32 N. E. 69.

Action by officer. — Where a suit by or against an officer in his official capacity is abated by his death, his successor and not his administrator should be substituted. Edrington *v.* Mathews, 30 Ark. 665.

Action by sheriff. — In New York it has been held that where a sheriff dies pending an action prosecuted in his name it is not proper to substitute his personal representatives or the claimant for whose benefit the action is brought, but the successor in office of the sheriff should be substituted. Orser *v.* Glenville Woolen Co., 60 Barb. (N. Y.) 371, 11 Abb. Pr. N. S. (N. Y.) 85. But in Virginia it has been held that where a suit in equity is brought by a high sheriff against his deputy for a settlement of accounts in several administrations which had been committed to him, and which had gone into the hands of his deputy, on the death of the sheriff the suit was properly revived in the name of his personal representative and not in the names of the representatives of the different estates administered. Tyler *v.* Nelson, 14 Gratt. (Va.) 214.

Action by deputy sheriff. — In Tucker *v.* Potter, (R. I. 1900) 45 Atl. 741, it was held that a statute providing that no action pending by or against any officer shall abate by reason of his death, but his successor in office shall come in and defend, does not preclude the personal representative of a deputy sheriff from being substituted as plaintiff in an action commenced by such officer before his death upon a delivery bond running to him, since a deputy sheriff has no successor in office.

Action by tax-collector. — In Vermont, where a tax-collector dies pending a suit commenced by him for the collection of taxes, his administrator may be substituted as plaintiff and prosecute the suit to judgment. Smith *v.* Blair, 67 Vt. 658, 32 Atl. 504.

55. Godbold *v.* Meggison, 16 Ala. 140.

friend, the next friend dies, the court may continue the suit by appointing a guardian *ad litem*.[56]

(IV) *Suit by Personal Representative.* Where an executor or administrator brings an action and dies pending it, the administrator *de bonis non* of the original testator should continue the suit.[57]

(V) *Suit by Trustee.* Where the statute does not otherwise provide, a cause of action affecting a trust estate pending at the death of the trustee in his own name should be revived and prosecuted in the name of his executor or administrator.[58]

h. On Death of Unnecessary Party. On the death, pending suit, of an unnecessary or formal party the suit may proceed without making the representatives of such party parties to the suit.[59]

8. Against Whom Suits May Be Revived or Continued — a. In General — (I) *Successors in Interest.* A suit should be revived on the death of defendant in the name of his successor in interest.[60]

56. Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555.

As to survival of suit see *supra*, III, A, 7.

Attainment of majority.—In Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898, it was held that where minors who have sued by their next friend attain their majority, after the death of the next friend all that is necessary is for complainants to appear as adults and prosecute the suit; but a bill of revivor, though unnecessary, is a proper mode of giving notice to the court and adverse parties.

A prochein ami may sign judgment for a deceased infant plaintiff without the administrator intervening. Kramer *v.* Waymark, 12 Jur. N. S. 395.

Proceedings in revivor are not necessary in substituting a new next friend for one who had previously acted in behalf of an infant. Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

57. See cases cited *supra*, note 70, p. 74.

"Executor or administrator" as descriptio personæ.— Where a plaintiff styles himself executor or administrator and declares on a note payable to himself in that capacity, but the declaration does not aver that the note is assets of the estate, the words "executor or administrator" are a mere *descriptio personæ*, and on the death of plaintiff the suit is properly revived in the name of his personal representative. Arrington *v.* Hair, 19 Ala. 243. So, upon the death of a plaintiff who has described himself in the caption of his declaration as administrator in right of his wife, but has declared on a right of action accruing to him individually, the suit should be revived in the name of his personal representative. Tate *v.* Shackelford, 24 Ala. 510, 60 Am. Dec. 488.

Foreign administrator.— On the death of a foreign administrator pending a suit on a judgment obtained by him in the state in which he was appointed, the suit may be revived in the name of his administrator. Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

Note given to administrator.—Where a note given to one as administrator, for a debt due the estate, is sued by the administrator in his representative capacity, and the administrator dies before the suit is determined, revivor may be had either by his own administrator or by an administrator *de bonis non* of the original intestate; recovery in either case to be subject to all proper accounts between the two estates. Wood *v.* Tomlin, 92 Tenn. 514, 22 S. W. 206.

Revival of decree.— In Owen *v.* Curzon, 2 Vern. 237, it was held that where an administrator obtains a decree and dies the administrator *de bonis non* may revive the decree. See also Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1, wherein it was held that where an administrator obtains a judgment and, after the estate has been fully settled and the debts paid, dies pending scire facias sued out by him on the judgment, the proceedings therein may be revived in the names of the distributees.

58. See cases cited *supra*, note 71, p. 74.

"Trustee" as descriptio personæ.— Where, in the original action, the designation "trustee" was appended to the plaintiff's name as a mere *descriptio personæ*, it is not necessary to continue the action on the death of the plaintiff in the name of his successor as "trustee." People *v.* Donohue, 19 N. Y. Suppl. 36.

59. Dennis *v.* Green, 8 Ga. 197; Hancock *v.* Hancock, 22 N. Y. 568 (wherein it was held that as a prior mortgagee is not a necessary party to a foreclosure suit, if he dies, or his interest devolves on another pending the action, the proceedings may go on without reviving or continuing them against his successor); Lemon *v.* Smith, 20 N. Y. App. Div. 523, 47 N. Y. Suppl. 158 (wherein it was held that where a defendant without whose presence the issues between plaintiffs and other defendants can be determined and a proper judgment be rendered dies before the referee to whom the controversy has been referred has delivered his report, the survivors may proceed without bringing in as a party the successor to the rights and liabilities of the deceased party).

60. *Alabama.*— Batre *v.* Auze, 5 Ala. 173.

Arkansas.—Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966; Price *v.* Sanders, 39 Ark. 306; Dixon *v.* Thatcher, 8 Ark. 134.

Iowa.— Parshall *v.* Moody, 24 Iowa 314.

(II) *Executor De Son Tort.* It has been held that an action may be revived against an executor *de son tort* as well as against a rightful executor or administrator.[61]

(III) *Foreign Executor or Administrator.* In the absence of a permissive statute[62] an action cannot be revived against an executor or administrator appointed in another state.[63]

(IV) *Where Plaintiff Is Personal Representative of Defendant.* It has been held that the fact that a plaintiff in a suit is appointed administrator of a deceased defendant does not affect the revival of the suit by the substitution of such administrator in the stead of defendant.[64]

Kentucky.— De Wolf *v.* Mallet, 2 J. J. Marsh. (Ky.) 401; Shields *v.* Craig, 6 T. B. Mon. (Ky.) 373; Archer *v.* Robinet, 2 Bibb (Ky.) 70.

Maryland.— Glenn *v.* Hebb, 17 Md. 260.

Missouri.—Brewington *v.* Stephens, 31 Mo. 38.

New York.—Coit *v.* Campbell, 82 N. Y. 509; Benedict *v.* Cobb, 17 N. Y. Civ. Proc. 245, 7 N. Y. Suppl. 916; Green *v.* Martine, 1 N. Y. Civ. Proc. 129; Weyh *v.* Boylan, 62 How. Pr. (N. Y.) 397; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405; Putnam *v.* Van Buren, 7 How. Pr. (N. Y.) 31.

North Carolina.— Fellow *v.* Fulgham, 7 N. C. 254.

Guardian of minor heirs.— On a bill to be relieved from a judgment for breach of contract by specific execution the defendant, after duly answering, died. His death was duly suggested and it was shown that his heirs were all minors. A guardian *ad litem* was appointed for the minor heirs, and he appeared and accepted the appointment. It was held that the action was then properly revived against them. Morrow *v.* Mason, 4 J. J. Marsh. (Ky.) 326.

Proceedings to restrain liquor nuisance.— In an action to set aside a decree granted to restrain a liquor nuisance it appeared that defendant in the action, plaintiff in the injunction suit, died pending an appeal. It was held that either the state or any citizen qualified to commence the original action might be substituted as defendant in his stead. Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

Revival against all representatives.—A failure to make one of several executors of a deceased defendant a party on the revival of a suit will not avail as error where it appears that such executor died before any objection was made to the fact that he was not made a party. Sherrod *v.* Hampton, 25 Ala. 652.

Where no administration has been obtained, generally.— In some states actions which should be revived against the personal representatives of a deceased defendant may be revived against his heirs if no personal representative qualifies. Hagan *v.* Patterson, 10 Bush (Ky.) 441; Preston *v.* Golde, 12 Lea (Tenn.) 267; Bandy *v.* Walker, 3 Head (Tenn.) 568; Smith *v.* Stump, Peck (Tenn.) 278. But see Anderson *v.* McRoberts, 1 Tenn. Ch. 279, wherein it was held that the personal representative of a decedent cannot come into a case by petition to set aside or review proceedings had prior to his appointment by revivor against the heirs of decedent.

Compliance with statute.—The heirs can be proceeded against alone only by strict compliance with the statute. There must be a suggestion of record that no one can be procured to administer, and a motion for a scire facias to revive against the heirs on this ground. Preston *v.* Golde, 12 Lea (Tenn.) 267; Britton *v.* Thompson, 6 Yerg. (Tenn.) 325.

In Texas, where, after the death of defendant in a pending action, there is no administration on his estate, and especially if, from lapse of time, administration cannot be granted, the action may be revived against the heirs in possession of the property. Low *v.* Felton, 84 Tex. 378, 19 S. W. 693; Webster *v.* Willis, 56 Tex. 468; McCampbell *v.* Henderson, 50 Tex. 601; Hearne *v.* Erhard, 33 Tex. 60; Thomas *v.* Jones, 10 Tex. 52; Tucker *v.* Bryan, 1 Tex. App. Civ. Cas. § 1157.

61. Norfolk *v.* Gantt, 2 Harr. & J. (Md.) 435, wherein it was held that on defendant's death pending an action of debt an executor *de son tort* may be summoned in, there being no legal executor or administrator; Cobb *v.* Lanier, 4 Hayw. (Tenn.) 296; Keena *v.* O'Hara, 16 U. C. C. P. 435. *Contra,* Irwin *v.* Sterling, 27 Ga. 563.

62. In Brown *v.* Brown, 35 Minn. 191, 192, 28 N. W. 238, it was held that under Minn. Gen. Stat. (1878), c. 53, § 16, providing that in actions pending against a deceased person at the time of his death, if the cause of action survives, "the executor or administrator may be admitted to defend the same," a foreign administrator may be admitted to defend an action pending against his intestate at the time of the latter's decease.

63. *Alabama.*— Branch Bank *v.* McDonald, 22 Ala. 474.

Arkansas.—Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966.

Illinois.— Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Missouri.— Rentschler *v.* Jamison, 6 Mo. App. 135.

New York.— Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863.

United States.— Vaughan *v.* Northup, 15 Pet. (U. S.) 1, 10 L. ed. 639; Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405.

64. Rice *v.* Hodge, 26 Kan. 164. See also Hill *v.* Clay, 26 Tex. 650, wherein it appeared that an agent sold property of his principal,

b. In Suits Affecting Personalty. If defendant in a suit in respect of personalty dies, the suit should be revived in the name of his personal representatives.[65]

c. In Suits Affecting Realty — (I) *Affecting Title to Realty.* On the death of defendant pending a suit involving the title to land, the suit should be continued in the name of his heirs or devisees.[66]

(II) *Damages to Land.* Where defendant in an action for injury to land dies, the action should be revived against his personal representatives and not against his heirs.[67]

(III) *Ejectment.* In jurisdictions permitting the revival of an action of ejectment on the death of defendant the revival should be in the name of the heirs or devisees of the deceased.[68] But if damages for the mesne profits as well as the

took a note therefor in his own name, and died pending a suit by the principal against him and the maker for the proceeds. The principal, administering upon his estate, moved to be made a party plaintiff as administrator. It was held that although the plaintiff was not a proper person to represent the interest of the deceased defendant, yet the court may make him a party as administrator and protect the surviving defendant by its decree.

65. Shields *v.* Craig, 6 T. B. Mon. (Ky.) 373; Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405.

Accounting.—Where an action which sought an accounting and recovery of a balance due was revived against the executors of the testator, and after such revivor plaintiff moved to bring in the devisees and heirs at law and to revive and continue the said action against them on the ground that the personalty would not be sufficient to satisfy the judgment if recovered, it was held that as the action did not seek to charge the testator's real estate it was completely revived when the personal representatives of the testator were made parties, and that the devisees and heirs at law should not be made parties. Green *v.* Martine, 1 N. Y. Civ. Proc. 129.

66. *Arkansas.*— Haley *v.* Taylor, 39 Ark. 104; McCauley *v.* Six, 34 Ark. 379.

Iowa.— Walker *v.* Schreiber, 47 Iowa 529.

New York.—Coit *v.* Campbell, 82 N. Y. 509.

Virginia.— Key *v.* Lambert, 1 Hen. & M. (Va.) 330.

United States.— Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405.

See also Thomas *v.* Jones, 10 Tex. 52, wherein it was held that where defendant dies during the pendency of a suit to recover land, and no one will administer, plaintiff may make his heirs parties defendant and proceed to judgment.

Condemnation proceedings.—Where defendant in a proceeding under a statute to condemn land for public use dies during the pendency of the proceeding, the revivor of the proceeding must be had in the names of the heirs or devisees and not in the name of the administrator. Valley R. Co. *v.* Bohm, 29 Ohio St. 633.

Suit to charge separate realty of married woman.— When a married woman dies pending a suit to charge her separate realty with her debts, it is not proper to make her personal representative a party thereto, but the same should proceed thereafter against her heirs or devisees only. Clifton *v.* Anderson, 40 Mo. App. 616.

Suit to enforce lien of street assessment.— An action to enforce the lien of a street assessment should, on the death of defendant, be revived against his heirs or devisees and not against his executor. Louisville *v.* Hexagon Tile-Walk Co., (Ky. 1898) 45 S. W. 667.

Suit to enforce mechanic's lien.—Where the owner of real estate dies pending a statutory proceeding of scire facias to enforce a mechanic's lien, the suit must be revived against his heirs and not against his personal representatives. Belcher *v.* Schaumburg, 18 Mo. 189.

Suit to enforce vendor's lien.— In Price *v.* Sanders, 39 Ark. 306, it appeared that a vendor of land by title-bond indorsed the purchase-money note. Suit was brought by the indorsee against the makers and indorser to enforce the vendor's lien. The indorser and one of the makers died pending suit. It was held that the heirs of each were necessary parties. See also Batre *v.* Auze, 5 Ala. 173, wherein it was held that a bill against a subpurchaser to enforce the vendor's lien for the purchase-money due from the first purchaser must be revived, after the death of the subpurchaser, against his heirs at law unless he has parted with his interest by assignment or devise; and if the suit is revived against his personal representatives it is error.

67. Fellow *v.* Fulgham, 7 N. C. 254.

Trustee of defendant.— An action was begun to recover damages for malicious trespass and for an injunction against maintaining brick-stacks on defendants' land. Defendants died. It was held that a trustee of the property of one of the defendants could not be made a party to the suit. Equitable L. Assur. Soc. *v.* Schermerhorn, 60 How. Pr. (N. Y.) 477.

68. Shipley *v.* Johns, 72 Md. 542, 20 Atl. 180; Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940; Love *v.* Scott, 26 N. C. 79; Davis *v.* Davis, 13 Pa. Co. Ct. 221. See also Moss *v.* Scott, 2 Dana (Ky.) 271, wherein it was held that if one of several defendants in ejectment dies the surviving parties cannot revive the suit by agreement, but the heirs or devisees of defendant must be summoned.

As to survival of action of ejectment on the death of the defendant see *supra*, III, A, 3, g, (II).

Rule in Tennessee.— It has been held that

lands are sought the revival should be in the name of both the personal representatives and the heirs or devisees.[69]

(IV) *Rescission of Contract for Sale of Land.* Where defendant in a suit for the rescission of a contract for the sale of lands dies, the suit should be revived in the name of the heirs or devisees.[70]

d. In Suits Affecting Both Realty and Personalty. On the death of defendant pending an action affecting both personalty and realty the suits should be revived in the names of both the heirs and the personal representatives of the deceased.[71]

e. On Death of One or More of Several Defendants — (I) *In General.* It is a well-settled principle of law that on the death of one of two defendants, jointly and severally liable, plaintiff may proceed against the survivor without bringing in the representative of the deceased co-defendant.[72]

Tenn. Laws (1819), c. 16, authorizing a plaintiff in ejectment to proceed against the heirs or devisees of the deceased landlord, does not compel plaintiff to revive the suit against them, but he may proceed against the tenant in possession alone. Huff *v.* Lake, 9 Humphr. (Tenn.) 137.

Joinder of person claiming adversely.— In Richter *v.* Beaumont, 71 Miss. 713, 16 So. 293, it was held that where defendant in ejectment dies pending the action, and an order is made to revive against his heirs, it is erroneous to make a person defendant who is in possession, asserting an independent adverse title, and not claiming as heir, and to render judgment against him.

69. Crutchfield *v.* Hudson, 23 Ala. 393; *Ex p.* Swan, 23 Ala. 192; Jordan *v.* Abercrombie, 15 Ala. 580; Cavender *v.* Smith, 8 Iowa 360.

70. Kincart *v.* Sanders, 2 A. K. Marsh. (Ky.) 26.

Setting aside fraudulent conveyance.— Where the purchaser of lands conveyed in fraud of creditors dies pending a suit to set the conveyance aside and apply the lands to the payment of the debts of the vendor, no revivor as to his personal representative is necessary. McCutchen *v.* Pigue, 4 Heisk. (Tenn.) 565.

71. Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Brewington *v.* Stephens, 31 Mo. 38; De Agreda *v.* Mantel, 1 Abb. Pr. (N. Y.) 130; Townsend *v.* Champernowne, 9 Price 130.

Forcible entry and detainer.— In Brewington *v.* Stephens, 31 Mo. 38, it was held that on the death of the defendant in an action of forcible entry and detainer the suit should be revived in the names of the heirs and the administrator, since it is an action for damages and also for the possession of the land.

Suit to rescind and to recover back purchase-money.— If the vendor dies while a bill is pending against him by the vendee for a rescission of the contract for the sale of the land and to recover the amount paid as purchase-money, the cause should be revived against his administrator as well as against his heirs. Preston *v.* Golde, 12 Lea (Tenn.) 267.

72. *Alabama.*— Foster *v.* Chamberlain, 41 Ala. 158; Rupert *v.* Elston, 35 Ala. 79; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472; Gregg *v.* Bethea, 6 Port. (Ala.) 9; Gayle *v.* Agee, 4 Port (Ala.) 507; Bebee *v.* Miller, Minor (Ala.) 364.

Delaware.— Farmers', etc., Bank *v.* Polk, 1 Del. Ch. 167.

Georgia.—Gardner *v.* Granniss, 57 Ga. 539; Sanders *v.* Etcherson, 36 Ga. 404; Henderson *v.* Hackney, 13 Ga. 282.

Illinois.— Ballance *v.* Samuel, 4 Ill. 380.

Kentucky.— White *v.* Turner, 1 B. Mon. (Ky.) 130.

Massachusetts.—Colt *v.* Learned, 133 Mass. 409; New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Foster *v.* Hooper, 2 Mass. 572.

Minnesota.—Lanier *v.* Irvine, 24 Minn. 116.

Nevada.— Fowler *v.* Houston, 1 Nev. 469.

New Jersey.— Fisher *v.* Allen, 36 N. J. L. 203.

New York.— Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863; Davis *v.* Van Buren, 72 N. Y. 587; Risley *v.* Brown, 67 N. Y. 160; Wood *v.* Fisk, 63 N. Y. 245, 20 Am. Rep. 528; Getty *v.* Binsse, 49 N. Y. 385, 10 Am. Rep. 379; Angell *v.* Lawton, 14 Hun (N. Y.) 70; Livermore *v.* Bushnell, 5 Hun (N. Y.) 285; Parker *v.* Jackson, 16 Barb. (N. Y.) 33; American Copper Co. *v.* Lowther, 25 Misc. (N. Y.) 441, 54 N. Y. Suppl. 960; Mott *v.* Petrie, 15 Wend. (N. Y.) 317; Grant v. Shurter, 1 Wend. (N. Y.) 148; Jenkins *v.* De Groot, 1 Cai. Cas. (N. Y.) 122; Higgins *v.* Freeman, 2 Duer (N. Y.) 650; Leake, etc., Orphan House *v.* Lawrence, 11 Paige (N. Y.) 80; Halstead *v.* Cockroft, 49 How. Pr. (N. Y.) 342; Gardner *v.* Walker, 22 How. Pr. (N. Y.) 342; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405.

Pennsylvania.— Githers *v.* Clarke, 158 Pa. St. 616, 28 Atl. 232; Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818; Dingman *v.* Amsink, 77 Pa. St. 114; Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Dec. 459; Mechanics, etc., Ins. Co. *v.* Spang, 5 Pa. St. 113; Walter *v.* Ginrich, 2 Watts (Pa.) 204; Machette *v.* Magee, 9 Phila. (Pa.) 24, 29 Leg. Int. (Pa.) 300.

Tennessee.— Gilchrist *v.* Cannon, 1 Coldw. (Tenn.) 581; Claiborne *v.* Goodloe, Cooke (Tenn.) 391.

Texas.— Aldridge *v.* Mardoff, 32 Tex. 204.

Virginia.— Richardson *v.* Jones, 12 Gratt. (Va.) 53.

West Virginia.— Henning *v.* Farnsworth, 41 W. Va. 548, 23 S. E. 663.

But see Vietor *v.* Goodman, 26 Misc. (N. Y.) 545, 57 N. Y. Suppl. 599, wherein it

(II) *Suit against Husband and Wife.* Where a husband is joined as a defendant in a suit against his wife simply, in compliance with a statute requiring him to be so joined, and not to obtain any relief against him, the action may be continued against the wife after the death of the husband without a revivor against his administrator.[73]

(III) *Suit against Partnership.* In a suit against partners on a cause of action relating to partnership affairs, if one or more of the partners die, it is unnecessary to revive the suit in the name of the personal representatives of the deceased partner or partners.[74]

(IV) *Suit against Tenants in Common.* It has been held that the death of a tenant in common pending an action for partition does not necessitate the revival of the action against his administrator, where his share descended to his cotenants and where no effort was made to charge him with the rents and profits of the land.[75]

(V) *Joinder of Survivors and Representatives of Deceased.* The doctrine very generally obtains that on the death of one of several defendants jointly and severally liable the action cannot be revived, in the absence of a permissive statute,[76] as a joint action against the surviving defendant and the repre-

was held that where, after judgment, creditors have brought an action to set aside transfers made by one defendant, their judgment debtor, to another, the transferrer dies, and appoints his transferee his administratrix, she should be made a party defendant in her representative capacity, as her presence in that capacity is necessary to complete the determination of the controversy.

Death of life-tenant.— Where a life-tenant dies pending an action to subject the remainder interest in land it is not necessary to revive the action against her personal representative. Ritchey *v.* Buricke, (Ky. 1899) 54 S. W. 173.

Probate of will.— In Stancil *v.* Kenan, 35 Ga. 102, it was held that if one of several caveators die pending the proceeding to probate a will, the propounder may proceed and try the case without making the representative of the deceased a party.

73. Crook *v.* Tull, 111 Mo. 283, 20 S. W. 82; Parker *v.* Steed, 1 Lea (Tenn.) 206.

See also Haggins *v.* Peck, 10 B. Mon. (Ky.) 210, wherein it was held that where the husbands of heirs who are sued die pending suit in chancery to subject lands descended to their wives, no revivor is necessary against their personal representative unless they have received of the estate of decedents, and it is designed to hold them responsible.

As to survival of suit on death of one spouse see *supra*, III, A, 6, b.

Curtesy.— Upon the death of the wife, in an action against her and her husband to enforce a lien on her land for taxes, no revival against the husband is necessary in order to subject his life-estate as tenant by the curtesy. Louisville *v.* Woolley, (Ky. 1900) 57 S. W. 499.

Foreclosure of trust deed on wife's land.— In Lawrence *v.* Armstrong, (Tenn. Ch. 1898) 48 S. W. 403, it was held that where, pending a suit against a husband and wife to foreclose a trust deed on her land given by them to secure a joint note, the husband dies, plaintiff may proceed against the wife alone, and obtain a decree of sale without reviving the cause against the husband's representatives or heirs. But see Thomson *v.* Dudley, 3 Edw. (N. Y.) 137, wherein it was held that upon the death of the husband in a suit against him and his wife to foreclose a mortgage executed by them, after the bill had been taken *pro confesso* but before decree, no decree could be had without a revivor of the suit against the representatives of the husband.

74. See cases cited *supra*, note 65, p. 73.

As to survival of suit against partners see *supra*, III, A, 6, c.

Assignment for benefit of creditors.—Where one of two assignors for the benefit of creditors who were partners dies during an accounting by the assignee, before a reference in an action by a creditor for the payment of his share of the assigned estate, a motion by the assignee to suspend the reference until some representative of the deceased assignor can be brought in will not be granted where it does not appear that the deceased ever had any individual property; for as to the firm rights and property he is represented by the surviving partner. Pope *v.* Briggs, 21 N. Y. Suppl. 718.

Specific performance.—In an action for specific performance against a firm, where one of the members dies pending the action, his heirs become necessary parties. Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959.

Suit for accounting.—In Pearce *v.* Bruce, 38 Ga. 444, it was held that in an action by a third person against partners for an account, if one of the defendants dies pending the suit his representatives must be made parties unless it is shown that there are no firm assets, or that they are insufficient to pay the debts of the concern, so that such representatives would have no interest in the partnership effects.

75. Donnor *v.* Quartermas, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472.

76. In the following cases statutes were held to permit the continuance of the action

sentatives of the deceased defendant.[77] It has been held, however, that if two parties to a contract whose liability is several are joined as defendants in an action thereon under a statute permitting such joinder, and one of them dies, his personal representative may be summoned in to defend the action as against him.[78] It has also been held that in an equity action against several defendants for an accounting, on the death of one of them the action survives and his executors and representatives should be made parties.[79]

(VI) *Revival as Separate Actions.* On the death of one of several defendants jointly and severally liable the action may be separated and continued as two actions, one against the survivors and the other against the representatives of deceased.[80]

as a joint action against the survivor and the representatives of the deceased: Smith *v.* Crutcher, 27 Miss. 455; Woodhouse *v.* Lee, 6 Sm. & M. (Miss.) 161; Henderson *v.* Talbert, 5 Sm. & M. (Miss.) 109; Brown *v.* Clary, 2 N. C. 107; Dingman *v.* Amsink, 77 Pa. St. 114. *Compare* Bennett *v.* Spillars, 9 Tex. 519.

Election to proceed against survivors.— In Harrell *v.* Park, 32 Ga. 555, it was held that where one of several defendants dies pending the action, and the plaintiff elects to proceed against the survivors without joining the representative of the deceased, such plaintiff, after judgment has been rendered against the survivors, cannot maintain scire facias against the representative of the deceased to have him made a party to the suit.

77. *Alabama.*— Gilbreath *v.* Jones, 66 Ala. 129; Jay *v.* Stein, 49 Ala. 514; Foster *v.* Chamberlain, 41 Ala. 158; Gayle *v.* Agee, 4 Port. (Ala.) 507.

Arkansas.— Bruton *v.* Gregory, 8 Ark. 177.

Illinois.— Eich *v.* Sievers, 73 Ill. 194; Ballance *v.* Samuel, 4 Ill. 380.

Iowa.— Pecker *v.* Cannon, 11 Iowa 20.

Kentucky.— Com. *v.* York, 9 B. Mon. (Ky.) 40.

Maine.— Treat *v.* Dwinel, 59 Me. 341.

Massachusetts.— Ricker *v.* Gerrish, 124 Mass. 367; Cochrane *v.* Cushing, 124 Mass. 219; New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Foster *v.* Hooper, 2 Mass. 572.

New Jersey.—Fisher *v.* Allen, 36 N. J. L. 203.

New York.— Hanck *v.* Craighead, 67 N. Y. 432; Union Bank *v.* Mott, 27 N. Y. 633; Jersey City First Nat. Bank *v.* Lenk, 57 Hun (N. Y.) 588, 10 N. Y. Suppl. 261; Masten *v.* Blackwell, 8 Hun (N. Y.) 313; Livermore *v.* Bushnell, 5 Hun (N. Y.) 285; Arthur *v.* Griswold, 2 Hun (N. Y.) 606; McVean *v.* Scott, 46 Barb. (N. Y.) 379; Grant *v.* Shurter, 1 Wend. (N. Y.) 148; Jenkins *v.* De Groot, 1 Cai. Cas. (N. Y.) 122; Wright *v.* Marshall, 3 Daly (N. Y.) 331; Heinmuller *v.* Gray, 35 N. Y. Super. Ct. 196; Leake, etc., Orphan House *v.* Lawrence, 11 Paige (N. Y.) 80; Gardner *v.* Walker, 22 How. Pr. (N. Y.) 405.

Pennsylvania.— Given *v.* Albert, 5 Watts & S. (Pa.) 333.

Texas.— Martin *v.* Harrison, 2 Tex. 456.

Wisconsin.— Cairns *v.* O'Bleness, 40 Wis. 469; Jones *v.* Keep, 23 Wis. 45.

United States.— Seaman *v.* Slater, 18 Fed. 485.

Joint tort-feasors.—An action against joint tort-feasors, upon the death of either, becomes incapable of being continued as a joint action against the survivor and the representatives of the deceased. Heinmuller *v.* Gray, 35 N. Y. Super. Ct. 196.

78. Colt *v.* Learned, 133 Mass. 409.

79. Halstead *v.* Cockcroft, 40 N. Y. Super. Ct. 519. And see Wood *v.* Leland, 1 Metc. (Mass.) 387, wherein it was held that in a bill for contribution by a surety against the heirs of his co-surety, one of the heirs summoned having died pending the suit, his administrator should be summoned in, and that the same decree would be passed against him that would have been passed against his intestate.

Specific performance.—In De Agreda *v.* Mantel, 1 Abb. Pr. (N. Y.) 130, it was held that in an action against two purchasers of land to enforce the contract a judgment rendered after the death of one of the defendants decreeing performance, and, in case of non-compliance therewith, directing the sale of the property and the entry of a judgment for a deficiency if there should be any, could not be carried into effect until the representatives of the deceased were before the court. See also Madison *v.* Wallace, 2 J. J. Marsh. (Ky.) 581, wherein it was held, in a suit for specific performance against heirs, that suggestion, on the record, of the death of a female heir who retained her patronymic name to her death, does not dispense with the necessity of revivor against her representatives.

80. *Massachusetts.*— State Bank *v.* Welles, 3 Pick. (Mass.) 15.

Mississippi.— Woodhouse *v.* Lee, 6 Sm. & M. (Miss.) 161.

New York.— Union Bank *v.* Mott, 27 N. Y. 633; Bond *v.* Smith, 4 Hun (N. Y.) 48; Arthur *v.* Griswold, 2 Hun (N. Y.) 606; McVean *v.* Scott, 46 Barb. (N. Y.) 379; Rogers *v.* Paterson, 4 Paige (N. Y.) 409; Heinmuller *v.* Gray, 44 How. Pr. (N. Y.) 260; Gardner *v.* Walker, 22 How. Pr. (N. Y.) 405.

Wisconsin.— Cairns *v.* O'Bleness, 40 Wis. 469; Jones *v.* Keep, 23 Wis. 45.

United States.— Seaman *v.* Slater, 18 Fed. 485.

But see Gas Works Constr. Co. *v.* Monheimer, 65 Hun (N. Y.) 626, 20 N. Y. Suppl. 501, wherein it was held that where, in an action to set aside certain transfers of a patent to which the deceased defendant was a party, it appeared that all of the parties defendant should be before the court in one action, a continuance of the action against the admin-

f. On Death of Person Sued in Representative Capacity — (I) *Suit against Guardian.* Upon the death of a guardian pending a suit against him for a debt contracted by him for the benefit of his ward, his personal representative may be made a party in his stead.[81]

(II) *Suit against Officer.* On the death of an officer pending a suit against him in his official capacity the suit should be continued in the name of his successor in office.[82]

(III) *Suit against Personal Representatives.* On the death of an administrator pending an action against him on a cause of action against his intestate, the action should be continued in the name of the administrator *de bonis non* of the intestate.[83] It has, however, been held that where an administrator dies pending a proceeding against him to hold him accountable for maladministration, his administrator, and not the administrator *de bonis non* of his intestate, is the proper party against whom to revive.[84]

9. Proceedings to Revive or Continue — a. Conditions Precedent — (I) *Leave of Court.* Leave of court is not necessary for the institution of proceedings to revive or continue an action[85] except in the case of a bill in the nature of a bill of revivor and supplement.[86]

(II) *Suggestion of Death.* A suggestion of the death of a party is necessary to permit the revival or continuance of the action in the name of the successors in interest.[87]

istratrix of such deceased defendant was proper.

81. Lewis *v.* Allen, 68 Ga. 398.

As to survival of suit see *supra*, III, A, 8.

82. Edrington *v.* Mathews, 30 Ark. 665.

As to survival of suit see *supra*, III, A, 8.

Assignee of bankrupt.— A cause of action against one as assignee of a bankrupt does not survive against such assignee's personal representatives. Hall *v.* Cushing, 8 Mass. 521; Richards *v.* Maryland Ins. Co., 8 Cranch (U. S.) 84, 3 L. ed. 496.

County treasurer.— In a proceeding against a county treasurer to compel the application of taxes, as directed by N. Y. Laws (1869), c. 907, defendant answered that such taxes had been applied under the direction of the board of supervisors, and afterward died pending an inquiry before a referee as to the facts of such application. It was held that his successor in office was properly made defendant to the proceeding in his stead. Matter of Marvin, 60 Hun (N. Y.) 585, 15 N. Y. Suppl. 500.

Officer of corporation.—Where an officer has been made a party to a bill to discover corporate assets solely on account of the knowledge of the corporation's affairs he was supposed to possess, and to coerce a disclosure of such knowledge, and he dies pending the hearing, his personal representative cannot be brought in as a party defendant by revivor. Le Grand *v.* McKenzie, 110 Ala. 493, 20 So. 131.

83. Jones *v.* Jones, 8 Humph. (Tenn.) 705.

As to survival of suit see *supra*, III, A, 8.

Widow's support.— In Holliday *v.* Holland, 41 Miss. 528, it was held that an action commenced by a widow against the administrator of her husband for the year's support and the exempt property cannot be revived against the representatives of the administrator, but only against the administrator *de bonis non* of the husband.

84. Leonard *v.* Cameron, 39 Miss. 419. And see Brandon *v.* Mason, 1 Lea (Tenn.) 615, wherein it was held that where an executor of a will authorizing him to sell lands comes into court to have the will construed, becomes a commissioner of the court to sell the lands, and dies before final decree, defendants or their representatives may maintain a bill of supplement and revivor in the nature of a cross-bill to hold his sureties liable for the proceeds, and in such case the court may, in its discretion, dispense with the presence of an administrator *de bonis non.*

Devastavit.— In Clopton *v.* Haughton, 57 Miss. 787, it was held that where an executor dies pending suit for *devastavit* it is necessary to revive the suit against his administrator in order to procure a personal decree. But see *supra*, III, A, 4, g.

85. Crook *v.* Turpin, 10 B. Mon. (Ky.) 243; Webster *v.* Hitchcock, 11 Mich. 56; Roach *v.* La Farge, 43 Barb. (N. Y.) 616; Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211; Stewart *v.* Powers, 38 N. Y. Super. Ct. 56; Garvey *v.* Owens, 9 N. Y. St. 227; Pendleton *v.* Fay, 3 Paige (N. Y.) 204; Arthur *v.* Allen, 22 S. C. 432; Parnell *v.* Maner, 16 S. C. 348. *Contra*, Chapman *v.* Foster, 15 How. Pr. (N. Y.) 241.

86. Pendleton *v.* Fay, 3 Paige (N. Y.) 204.

87. *California.*— Campbell *v.* West, 93 Cal. 653, 29 Pac. 219; Judson *v.* Love, 35 Cal. 463; Gregory *v.* Haynes, 21 Cal. 443.

Delaware.— Johnson *v.* State, 2 Houst. (Del.) 378.

Maryland.— Appold *v.* Prospect Bldg. Assoc., 37 Md. 457; Price *v.* Tyson, 2 Gill & J. (Md.) 475; Hall *v.* Hall, 1 Bland (Md.) 130.

Massachusetts.— Holyoke *v.* Haskins, 9 Pick. (Mass.) 259.

Mississippi.— Young *v.* Pickens, 45 Miss. 553.

Missouri.—Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823.

b. Modes of Revival — (I) *In General.* The mode of revival of a suit abated by the death of a party is determined by the statutes of the particular state,[88] and with the mode so prescribed there must be a substantial compliance.[89]

(II) *By Amendment of Pleadings.* In some states substitution may be made on an amendment of the complaint showing the appointment and qualification of a personal representative.[90]

(III) *By Motion.* In other states the statutes provide that a suit may be revived on motion.[91]

New Jersey.— Hendrickson *v.* Herbert, 38 N. J. L. 296.

North Carolina.— Lynn *v.* Lowe, 88 N. C. 478; Burke *v.* Stokely, 65 N. C. 569.

Pennsylvania.—Philadelphia *v.* Jenkins, 162 Pa. St. 451, 29 Atl. 794.

Tennessee.—Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467.

Texas.— Siese *v.* Malsch, 54 Tex. 355; Hanley *v.* Lemmon, 28 Tex. 155; Gowings *v.* Loyd, 4 Tex. 483. *Compare* Blum *v.* Goldman, 66 Tex. 621, 1 S. W. 899.

But see Stoetzell *v.* Fullerton, 44 Ill. 108, wherein it was held that the suggestion of the death of a party to a suit is a mere matter of form to prevent abatement where the cause of action survives. It may be made by any party, or, if not made at all, the judgment is not necessarily invalidated by its omission. See also Alexander *v.* Patton, 90 N. C. 557, wherein it was held that where the record shows that a party, through his counsel, assumed the defense of an action as administrator, the regularity of his substitution for his intestate is sufficiently established though there was no suggestion of death and no service on the administrator of notice to appear. And see Remington *v.* Willard, 15 Wis. 583, wherein it was held that where a married woman was made a defendant in a complaint for foreclosure in order to bar her right of dower, and it appeared by the officer's return and by one of the answers that she had died before service of process, it was not necessary to suggest her death or to mention her further in the proceedings.

In equity.—Upon the death of a party to a suit in equity the court should be informed of the fact, so that new parties should be made or other proceedings had. Appold *v.* Prospect Bldg. Assoc., 37 Md. 457.

Correction of entry.— An entry suggesting plaintiff's death and ordering his administrator (leaving the name blank) to be substituted as plaintiff can be subsequently corrected by a *nunc pro tunc* order inserting the name of the administratrix. Maish *v.* Crangle, 80 Iowa 650, 45 N. W. 578.

Oral suggestion.— In Pope *v.* Irby, 57 Ala. 105, it was held that a mere oral suggestion of plaintiff's death, not acted on or entered of record, was not sufficient to revive the suit.

The effect of a suggestion of the death of a party is simply to give notice to the court of the facts stated in order that any further action may be taken intelligently. The suggestion does not make the heirs parties to the cause — it simply points them out. Philadelphia *v.* Jenkins, 162 Pa. St. 451, 29 Atl. 794.

88. See the statutes of the several states, and 1 Cent. Dig. tit. "Abatement and Revival," § 445 *et seq.*

In Nebraska, where a party dies or his authority as a representative ceases, two methods of revivor coexist. A conditional order of revivor may issue and be served, and the order made final, unless cause be shown against it or the court may substitute the new party and supplementary pleadings may be filed and summons served. Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130; Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848; Fox *v.* Abbott, 12 Nebr. 328, 11 N. W. 303.

89. Singleton *v.* Wofford, 4 Ill. 576; Durbin *v.* Waldo, 15 Wis. 352. See also Hill *v.* Truby, 117 Pa. St. 320, 11 Atl. 300, wherein the record showed that the suit was brought against H., and T., his surety on a promissory note. T. died before trial, and his administrators were erroneously substituted as co-defendants — as they claimed — without their knowledge or consent and without notice. The record failed to show how they were brought in. It was held that the record was fatally defective.

Filing of petition.— That a petition for the revival of a suit against the heirs of the original defendant was filed sufficiently appears from a recital of that fact in the order of revival. Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580.

Revival against infant.—No decree or order of revival can be made against an infant by default; but if the infant neglects to appear and procure the appointment of a guardian the same steps for the appointment of a guardian *ad litem* must be taken as in other cases where the infant neglects to appear. Wilkinson *v.* Parish, 3 Paige (N. Y.) 653.

90. Campbell *v.* West, 93 Cal. 653, 29 Pac. 219. See also Floyd *v.* Ritter, 65 Ala. 501, wherein it was held that an amendment of the bill is not the regular or usual mode of bringing in the personal representatives or heirs of a deceased defendant, but it may serve the purpose of a suggestion of the death of the deceased and of the names of the legal representatives; and when they are served with notice requiring them to appear and plead or answer, a decree *pro confesso* may be taken against them and the cause treated thereafter as revived against them. To same effect is Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136.

91. **In code states** this is the usual method of revival where the revival is sought within a year from the death causing the abatement.

Alabama.— Evans *v.* Welch, 63 Ala. 250.

California.— Campbell *v.* West, 93 Cal. 653, 29 Pac. 219.

(iv) *By Supplemental Complaint.* In other states the statutes provide for the filing of a supplemental complaint to effect a revival.[92]

(v) *By Scire Facias.* Statutes in still other states provide for the issuance of a scire facias to revive a suit.[93]

(vi) *In Suits in Equity*—(a) *In General.* In the ordinary course of proceedings in equity, where no statute or rule in chancery intervenes, the mode of continuing a bill on the death of a party is by bill of revivor or by an original bill in the nature of a bill of revivor and supplement.[94]

Georgia.— Dean *v.* Feeley, 66 Ga. 273.

Massachusetts.— Cheney *v.* Gleason, 125 Mass. 166.

Minnesota.— Willoughby *v.* St. Paul German Ins. Co., (Minn. 1900) 83 N. W. 377; Lough *v.* Pitman, 25 Minn. 120; Landis *v.* Olds, 9 Minn. 90.

New York.— Holsman *v.* St. John, 90 N. Y. 461; Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63; Matter of Bainbridge, 67 Barb. (N. Y.) 293; Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211; Lyon *v.* Park, 55 N. Y. Super. Ct. 539; Halstead *v.* Cockcroft, 40 N. Y. Super. Ct. 519; O'Sullivan *v.* New York El. R. Co., 25 N. Y. Civ. Proc. 163, 36 N. Y. Suppl. 16; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405; Coon *v.* Knapp, 13 How. Pr. (N. Y.) 175; Garvey *v.* Owens, 9 N. Y. St. 227.

Rhode Island.— Robinson *v.* Bailey, 17 R. I. 546, 23 Atl. 637.

South Carolina.— Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197; Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829; Arthur *v.* Allen, 22 S. C. 432; Parnell *v.* Maner, 16 S. C. 348.

Tennessee.— Campbell *v.* Hubbard, 11 Lea (Tenn.) 6; Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Mayfield *v.* Stephenson, 6 Baxt. (Tenn.) 397; Foster *v.* Burem, 1 Heisk. (Tenn.) 783.

Virginia.—Wilson *v.* Smith, 22 Gratt. (Va.) 493.

Washington.— Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

Wisconsin.— Tarbox *v.* French, 27 Wis. 651; Stephens *v.* Magor, 25 Wis. 533.

Rule in federal courts.— In an action in a federal court, upon suggestion to the court of the death of the plaintiff, where the cause of action continues, the executor or administrator may upon motion be substituted as plaintiff without filing any supplemental pleading showing the transfer of the cause of action. Equitable L. Assur. Soc. *v.* Trimble, 83 Fed. 85, 48 U. S. App. 565, 27 C. C. A. 404.

92. In code states this is the usual method where the revival is sought after a year from the death causing the abatement.

Indiana.— Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075.

Minnesota.— Stocking *v.* Hanson, 22 Minn. 542; Lee *v.* O'Shaughnessy, 20 Minn. 173.

Nebraska.— Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848; Fox *v.* Abbott, 12 Nebr. 328, 11 N. W. 303.

New York.— Lyon *v.* Park, 55 N. Y. Super. Ct. 539; Mackey *v.* Duryea, 22 Abb. N. Cas. (N. Y.) 284, 6 N. Y. Suppl. 573; Coon *v.* Knapp, 13 How. Pr. (N. Y.) 175; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405; Greene *v.* Bates, 7 How. Pr. (N. Y.) 296.

South Carolina.— Arthur *v.* Allen, 22 S. C. 432; Parnell *v.* Maner, 16 S. C. 348.

Wisconsin.— Plumer *v.* McDonald Lumber Co., 74 Wis. 137, 42 N. W. 250.

Death of one of several defendants.—Where, upon the death of one or more of several defendants, the cause of action does not survive against the other defendants, but does survive against the representatives of the deceased, the proper remedy is to bring them in by a supplementary summons and complaint. Mackey *v.* Duryea, 22 Abb. N. Cas. (N. Y.) 284, 6 N. Y. Suppl. 573.

93. *Mississippi.*— Morris *v.* Henderson, 37 Miss. 492.

Missouri.— Harkness *v.* Austin, 36 Mo. 47; Ferris *v.* Hunt, 18 Mo. 480; Doering *v.* Kenamore, 36 Mo. App. 147.

Pennsylvania.— Philadelphia *v.* Jenkins, 162 Pa. St. 451, 29 Atl. 794.

West Virginia.— Garrison *v.* Myers, 12 W. Va. 330.

United States.—Allen *v.* Fairbanks, 40 Fed. 188.

94. *Alabama.*— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Floyd *v.* Ritter, 65 Ala. 501; Cullum *v.* Batre, 2 Ala. 415; Bowie *v.* Minter, 2 Ala. 406; Duval *v.* McLoskey, 1 Ala. 708.

Illinois.— Welch *v.* Louis, 31 Ill. 446.

Kentucky.— Peyton *v.* McDowell, 3 Dana (Ky.) 314; Smith *v.* Bryant, 7 J. J. Marsh. (Ky.) 374; Hall *v.* Johnston, 5 J. J. Marsh. (Ky.) 284; Holder *v.* Mount, 2 J. J. Marsh. (Ky.) 187; Feemster *v.* Markham, 2 J. J. Marsh. (Ky.) 303, 19 Am. Dec. 131; Nall *v.* Combs, 1 J. J. Marsh. (Ky.) 323; Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Shields *v.* Craig, 6 T. B. Mon. (Ky.) 373; Gatewood *v.* Rucker, 1 T. B. Mon. (Ky.) 21; Russell *v.* Craig, 3 Bibb (Ky.) 377.

Massachusetts.— Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Michigan.—Brown *v.* Thompson, 29 Mich. 72.

New York.— Coit *v.* Campbell, 82 N. Y. 509; Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211; Philips *v.* Drake, 1 Code Rep. (N. Y.) 63; Johnson *v.* Snyder, 7 How. Pr. (N. Y.) 395.

Ohio.— Curtis *v.* Hawn, 14 Ohio 185.

Tennessee.— Foster *v.* Burem, 1 Heisk. (Tenn.) 783; Carson *v.* Richardson, 3 Hayw. (Tenn.) 231; Lewis *v.* Outlaw, 1 Overt. (Tenn.) 139; Cobb *v.* Conway, 1 Overt. (Tenn.) 294.

West Virginia.— Bock *v.* Bock, 24 W. Va. 586; Reid *v.* Stuart, 20 W. Va. 382.

United States.— Head *v.* Porter, 70 Fed. 498.

England.— Spencer *v.* Wray, 1 Vern. 463.

In Alabama, on motion *ex parte*, or upon a verbal suggestion before a registrar in vaca-

(B) *By Bill of Revivor.* According to the strict chancery practice, whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to a representative which the law gives or ascertains, as an heir at law or an executor or administrator, the suit may be continued by a bill of revivor merely.[95]

(C) *By Bill in Nature of Bill of Revivor and Supplement.* But when, by the death of a party, his interest in the property in controversy is transmitted by a devise or in any other manner, so that the title as well as the person entitled may be questioned, the suit cannot be continued by a bill of revivor. In such case an original bill in the nature of a bill of revivor and supplement must be filed.[96] The ground of distinction is that bills of revivor proper are founded on

tion, or to the chancellor in term-time, of the fact and cause of the abatement, an order may be made for a summons to issue to the proper parties to appear and defend; and upon the expiration of the period appointed for them to appear, service of summons having been made, if they interpose no just objection the cause is considered as revived. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136.

In Indiana it has been held that if a defendant in chancery dies before he has answered, the suit can be revived only by a bill of revivor; but if he die after answer filed the suit may be revived, by virtue of the statute, on motion of the complainant, without such bill. Aldridge *v.* Dunn, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224.

Under the law and practice in Mississippi, suits in equity may be revived in the name of the representative of a deceased complainant before the clerk at rules. A bill of revivor is not required. Mitchell *v.* Conner, 42 Miss. 550.

95. 2 Daniel Ch. Pr. (4th Am. ed.) 1507.

New Jersey.— Peer *v.* Cookerow, 14 N. J. Eq. 361; Ross *v.* Hatfield, 2 N. J. Eq. 363.

New York.— Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

Rhode Island.— Manchester *v.* Mathewson, 2 R. I. 416.

Tennessee.— Northman *v.* Liverpool, etc., Ins. Co., 1 Tenn. Ch. 312.

United States.— Mellus *v.* Thompson, 1 Cliff. (U. S.) 125, 16 Fed. Cas. No. 9,405; Slack *v.* Walcott, 3 Mason (U. S.) 508, 22 Fed. Cas. No. 12,932.

As to requisites of bill of revivor see *infra,* III, B, 9, d, (III), (B).

Death of partner pending suit against partnership.— On the death of a partner pending suit against the partnership the representatives of the deceased partner may be made parties by a bill of revivor. Wilson *v.* Seligman, 30 Fed. Cas. No. 17,832*a*.

96. *Kentucky.*— Russell *v.* Craig, 3 Bibb (Ky.) 377.

Massachusetts.— Pingree *v.* Coffin, 12 Gray (Mass.) 288.

Michigan.— Barnett *v.* Powers, 40 Mich. 317.

New Jersey.— Lyons *v.* Van Riper, 26 N. J. Eq. 337; Peer *v.* Cookerow, 14 N. J. Eq. 361; Ross *v.* Hatfield, 2 N. J. Eq. 363; Pelletreau *v.* Rathbone, 1 N. J. Eq. 331.

New York.— Brady *v.* McCosker, 1 N. Y. 214; Douglass *v.* Sherman, 2 Paige (N. Y.) 358; Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

Rhode Island.— Manchester *v.* Mathewson, 2 R. I. 416.

Tennessee.— Anderson *v.* McNeal, 4 Lea (Tenn.) 303; Thompson *v.* Hill, 5 Yerg. (Tenn.) 418; Northman *v.* Liverpool, etc., Ins. Co., 1 Tenn. Ch. 312.

United States.— Currell *v.* Villars, 72 Fed. 330; Metal Stamping Co. *v.* Crandall, 17 Fed. Cas. No. 9,493*c*; Slack *v.* Walcott, 3 Mason (U. S.) 508, 22 Fed. Cas. No. 12,932.

England.— Ryland *v.* Green, 5 Bro. P. C. 403; Huet *v.* Lord Say & Seal, Cas. t. King 53; Backhouse *v.* Middleton, Ch. Cas. 173.

As to requisites of bill in nature of bill of revivor and supplement see *infra,* III, B, 9, d, (III), (B).

Death of all parties.—Where all the parties to a suit in chancery have died, the course indicated by the practice in chancery by which to bring the case again before the court is by a bill in the nature of a bill of revivor by the heirs at law of one party against the heirs at law of the other party. Welch *v.* Louis, 31 Ill. 446.

Death of defendant before appearance.— If a defendant dies before appearance the suit cannot be continued against his personal representatives by a bill of revivor, but a bill ought to be filed against him which will be an original bill as far as respects him, but a supplemental bill with respect to the suit. Hardy *v.* Hull, 14 Sim. 21.

Devisees claiming under different wills.— Where a suit has been originally instituted by a devisor, and upon his death revived by a party claiming under a first will, the proper course to be adopted by a devisee under a second will is not to file a supplemental bill praying to have the benefit of the proceedings in the revived suit, but to revive *de novo* the suit as abated on the death of the devisor. Rylands *v.* Latouche, 2 Bligh 566.

Intervention of third person.—Where a suit abates by the death of one of the original defendants and a third party subsequently acquires the interest of the deceased party by purchase from his heirs before the revival of the suit against such heirs, the suit must be revived by a bill of revivor and supplement against the purchaser. Harrington *v.* Becker, 2 Barb. Ch. (N. Y.) 75. So, where the complainant in a suit assigns all his interest therein to a third person and then dies, his grantee cannot revive and continue the proceedings by a simple bill of revivor. It can

mere privity of blood or representation by proof of law and original bills in the nature of bills of revivor upon privity of estate or title by the act of the party.[97]

(D) *Statutory Mode.* Modes prescribed by statute for continuing a suit in equity on the death of a party may of course be followed.[98]

(VII) *Voluntary Appearance of Representative.* The representative of a deceased party, either plaintiff or defendant, may come voluntarily into court and make himself a party to the suit.[99]

(VIII) *Revival of Several Suits by One Proceeding.* It has been held that a person interested in distinct suits cannot, on abatement, revive all by one bill of revivor and supplement.[1]

c. Time of Instituting Proceedings — (I) *When Right to Revive Accrues.* The time in which proceedings may be instituted to revive or continue an action on the death of a party varies in the different states and is largely dependent upon statutes.[2]

be done in such case only by an original bill in the nature of a bill of revivor and supplement. Anderson *v.* White, 10 Paige (N. Y.) 575.

Suit affecting dower.— If the husband dies pending a partition suit to which the wife is not made a party, the suit can be revived or continued against the widow as to her right of dower in the premises only by an original bill in the nature of a bill of revivor and supplement. Wilkinson *v.* Parish, 3 Paige (N. Y.) 653.

97. Northman *v.* Liverpool, etc., Ins. Co., 1 Tenn. Ch. 312; Metal Stamping Co. *v.* Crandall, 17 Fed. Cas. No. 9,493*c*.

A bill of revivor and supplement is a compound of a supplemental bill and bill of revivor, and not only continues the suit which has abated by the death of a plaintiff, but supplies any defects in the original bill arising from subsequent events so as to entitle the plaintiff to relief on the whole merits of his case. Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306.

98. *Massachusetts.*— Cheney *v.* Gleason, 125 Mass. 166.

Minnesota.— Landis *v.* Olds, 9 Minn. 90.

New York.— Halstead *v.* Cockcroft, 40 N. Y. Super. Ct. 519; White *v.* Buloid, 2 Paige (N. Y.) 475; Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

Rhode Island.— Robinson *v.* Bailey, 17 R. I. 546, 23 Atl. 637.

Tennessee.— Foster *v.* Burem, 1 Heisk. (Tenn.) 783.

Virginia.— Vaughan *v.* Wilson, 4 Hen. & M. (Va.) 480.

West Virginia.— Garrison *v.* Myers, 12 W. Va. 330.

Cumulative remedy.— Such modes do not, as a rule, supersede the chancery mode by bill of revivor or by an original bill in the nature of a bill of revivor and supplement, but are merely cumulative of such mode. Floyd *v.* Ritter, 65 Ala. 501; Hall *v.* Hall, 1 Bland (Md.) 130; Griffith *v.* Bronaugh, 1 Bland (Md.) 547; Cobb *v.* Conway, 1 Overt. (Tenn.) 294; Bock *v.* Bock, 24 W. Va. 586.

99. *Arkansas.*— Noland *v.* Leech, 10 Ark. 504.

Indiana.— Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075; Watson *v.* State, 21 Ind. 109.

Kentucky.— Roberts *v.* Elliott, 3 T. B. Mon. (Ky.) 395.

Mississippi.— McKey *v.* Torry, 28 Miss. 78.

Missouri.— Harkness *v.* Austin, 36 Mo. 47; Ferris *v.* Hunt, 18 Mo. 480.

Vermont.— Babcock *v.* Culver, 46 Vt. 715.

United States.— Griswold *v.* Hill, 1 Paine (U. S.) 483, 11 Fed. Cas. No. 5,834.

Appearance without questioning the mode of revival of an action waives any objection to the mode of revival.

Connecticut.— Ashmead *v.* Colby, 26 Conn. 287.

Kansas.— Reed *v.* Sexton, 20 Kan. 195.

Kentucky.— Greer *v.* Powell, 1 Bush (Ky.) 489; Biggs *v.* McIlvain, 3 A. K. Marsh. (Ky.) 360.

Mississippi.— McKey *v.* Torry, 28 Miss. 78.

North Carolina.— Borden *v.* Thorpe, 35 N. C. 298.

Texas.— Boone *v.* Roberts, 1 Tex. 147.

As to effect of appearance as waiving objection to want of notice see *infra*, III, B, 9, e, (III).

1. McDermott *v.* McGown, 4 Edw. (N. Y.) 592.

2. **Thus in some states** the death of a party may be suggested and his representatives made a party to the action while the trial is progressing. Farley *v.* Nelson, 4 Ala. 183; Hatch *v.* Cook, 9 Port. (Ala.) 177.

Close of evidence.— In Meade *v.* Rutledge, 11 Tex. 44, it was held that the death of a party may be suggested after the close of the evidence and his executor made a party to the suit, it being sufficient to have a party at the time of the verdict and judgment.

In federal court.— The Judiciary Act of 1789, § 31, declares "that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, if the cause of action survived, shall have full power to prosecute or defend any such suit or action." Under this act it has been held that an executor or administrator may come in voluntarily and instanter and be made a party on motion, without a scire facias, and may proceed to trial immediately if he pleases and the cause is ready for trial: but may have a continuance if he wishes. Griswold *v.*

(II) *Limitation of Time*—(A) *In General.* In the absence of a statute prescribing a time within which an application to revive or continue an action must be made, lapse of time will not of itself defeat such an application.[3]

(B) *Statutory Limitation*—(1) In General. In states prescribing a time within which applications to continue or revive an action should be made, a failure to apply for a continuance or revival within the time so prescribed is usually fatal.[4] And the same rule applies where revivor is sought in the name of a suc-

Hill, 1 Paine (U. S.) 483, 485, 11 Fed. Cas. No. 5,834.

In justice's court.—In Iowa it has been held that where, in an action in a justice's court, defendant dies after service is completed and before the return-day, the administrator or executor may be substituted as party defendant and the cause may be adjourned for more than thirty days, or, if necessary, more than once, to make such substitution. Caughlin *v.* Blake, 55 Iowa 634, 8 N. W. 475.

In other states the statutes provide that an order to revive cannot be made, unless by consent, until the expiration of a specified time after the qualification of the personal representatives. McNutt *v.* State, 48 Ark. 30, 2 S. W. 254; Rexroad *v.* Johnson, 4 Kan. App. 333, 45 Pac. 1008; Forst *v.* Davis, 101 Ky. 343, 41 S. W. 27; Thomson *v.* Williams, 86 Ky. 15, 4 S. W. 914; Buford *v.* Guthrie, 14 Bush (Ky.) 677.

3. Brighton Bank *v.* Russell, 13 Allen (Mass.) 221; Pringle *v.* Long Island R. Co., 157 N. Y. 100, 51 N. E. 435; Mason *v.* Sanford, 137 N. Y. 497, 33 N. E. 546; Holsman *v.* St. John, 90 N. Y. 461; Coit *v.* Campbell, 82 N. Y. 509; Evans *v.* Cleveland, 72 N. Y. 486; Crowley *v.* Murphy, 33 N. Y. App. Div. 456, 54 N. Y. Suppl. 54; Markell *v.* Nester, 29 N. Y. App. Div. 55, 51 N. Y. Suppl. 852; Van Brocklin *v.* Van Brocklin, 17 N. Y. App. Div. 226, 45 N. Y. Suppl. 541; Greene *v.* Martine, 21 Hun (N. Y.) 136; Shipman *v.* Long Island R. Co., 17 Misc. (N. Y.) 102, 39 N. Y. Suppl. 498; Lehman *v.* Koch, 18 N. Y. Civ. Proc. 301, 9 N. Y. Suppl. 302; Parnell *v.* Maner, 16 S. C. 348. See also Coggins *v.* Flythe, 114 N. C. 274, 19 S. E. 701, wherein it was held that as it is within the power of defendant at any time after the death of plaintiff to apply to the court to have the action abated as to them unless proper parties are brought in, where this is not done it is within the discretion of the court to allow plaintiff's representatives to file a supplementary complaint and prosecute the action upon his motion to that effect, made before the final determination of the cause. And see Beck *v.* Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207, wherein it was held that where plaintiff dies leaving minor heirs, no administrator of his estate is appointed, and defendant does not move to discontinue the suit, the heirs, on becoming of age, may move for a revival of the suit.

In Tennessee, if a personal representative appears and asks to revive at any time before the suit is actually abated by order, a revivor will be allowed notwithstanding a previous motion to abate. Brooks *v.* Jones, 5 Lea (Tenn.) 244; Churchwell *v.* East Tennessee Bank, 1 Heisk. (Tenn.) 780; Holland *v.* Harris, 2 Sneed (Tenn.) 68; Young *v.* Officer, 7 Yerg. (Tenn.) 137. *Compare* Evens *v.* Jackson, 1 Overt (Tenn.) 237.

4. *Alabama.*— Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; *Ex p.* Sayre, 69 Ala. 184; Glenn *v.* Billingslea, 64 Ala. 345; Evans *v.* Welch, 63 Ala. 250; Brown *v.* Tutwiler, 61 Ala. 372; Pope *v.* Irby, 57 Ala. 105; Dumas *v.* Robbins, 48 Ala. 545; Waller *v.* Nelson, 48 Ala. 531.

Arkansas.— State Bank *v.* Tucker, 15 Ark. 39.

District of Columbia.— Danenhower *v.* Ball, 8 App. Cas. (D. C.) 137.

Indian Territory.— Bell *v.* Eddy, (Indian Terr. 1899) 51 S. W. 959.

Kentucky.— Horsley *v.* Asher, 94 Ky. 314, 22 S. W. 434; Bardstown, etc., Turnpike Road Co. *v.* Howell, (Ky. 1891) 17 S. W. 481; Thomson *v.* Williams, 86 Ky. 15, 4 S. W. 914.

Maryland.— Shipley *v.* Johns, 72 Md. 542, 20 Atl. 180.

Missouri.— Prior *v.* Kiso, 96 Mo. 303, 9 S. W. 898; Rutherford *v.* Williams, 62 Mo. 252; Gallagher *v.* Delargy, 57 Mo. 29; Ranney *v.* Bostic, 15 Mo. 216; Doerge *v.* Heimenz, 1 Mo. App. 238. *Compare* Posthlewaite *v.* Ghiselin, 97 Mo. 420, 10 S. W. 482.

North Carolina.— Lea *v.* Gauze, 26 N. C. 9; McLaughlin *v.* Neill, 25 N. C. 294.

Oregon.— White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515; Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282; Dick *v.* Kendall, 6 Oreg. 166.

West Virginia.— Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

Computation of time.—In Missouri the suit must be revived on or before the third term after the term at which the suggestion of death is made. In making the application the term at which the death is suggested must be excluded. Gallagher *v.* Delargy, 57 Mo. 29.

Proceedings in probate court.—In Alabama the statute which requires actions to be revived within eighteen months after the death of a party does not apply to a proceeding for the settlement of an administrator's accounts in the probate court. Glenn *v.* Billingslea, 64 Ala. 345.

Rule in Connecticut.— In Connecticut, in case of the death of plaintiff during the pendency of a suit, his executor or administrator may enter at the next term as a matter of right, but he will not be permitted to enter afterward without showing good reason for his neglect. Johnson *v.* New York, etc., R. Co., 56 Conn. 172, 14 Atl. 773; Russell *v.* Hosmer, 8 Conn. 229.

ceeding administrator or other successor in the right to sue or to be sued in the place of the one removed, as where the revivor is made necessary by the death of the original party.[5]

(2) Institution of Proceedings. It seems, however, that the representatives need not actually be made parties within the time prescribed by the statute.[6]

(3) Failure to Make All Representatives Parties. It has also been held that a failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit within the time required by the statute will cause the suit to abate only as to those representatives not brought in and made parties.[7]

(c) *In Equity*—(1) Statement of Rule. Courts of equity, in the matter of the revival of suits, are governed by their own rules of limitation. The limitation usually is the time required to bar the cause of action,[8] but it is subject to the discretion of the court and may be diminished when necessary to subserve the purposes of justice.[9]

Rule in Ohio.— In Ohio the court has authority, on application and good cause shown, to allow the representative of a deceased party to be made a party to the proceeding and to direct the cause to be carried on against such representative, although more than a year may have intervened from the death of such defendant to the time of making the application. Pavey *v.* Pavey, 30 Ohio St. 600; Black *v.* Hill, 29 Ohio St. 86; Carter *v.* Jennings, 24 Ohio St. 182; Barr *v.* Chapman, 11 Ohio Cir. Ct. 196; McArthur *v.* Williamson, 45 Fed. 154.

Rule in Vermont.—In Vermont an administrator or executor cannot be cited in to maintain or defend a suit in which deceased was a party if a term of the court has elapsed in which he could have been cited. Babcock *v.* Culver, 46 Vt. 715; Wentworth *v.* Wentworth, 12 Vt. 244; Tyler *v.* Whitney, 8 Vt. 26. *Compare* Treasurer *v.* Raymond, 16 Vt. 364.

Waiver of delay.— Where the executors of a plaintiff filed a motion to revive an action more than one year after the time when the order might have been made, the filing of a brief in the action by defendant is not a consent to a revivor. Houghton *v.* Lannon, 1 Kan. App. 510, 40 Pac. 819.

5. Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Waller *v.* Nelson, 48 Ala. 531.

6. It is sufficient if proceedings have been taken within such time to make them such. Keyser *v.* Fendall, 5 Mackey (D. C.) 47; Thomson *v.* Williams, 86 Ky. 15, 4 S. W. 914. See also Clements *v.* Hussey, 4 N. C. 611, wherein it was held that if a scire facias regularly issue from term to term, in order to make a defendant's administrator a party, which is not effected till after a lapse of five or more terms, the suit is not abated. But see Love *v.* Scott, 26 N. C. 79, wherein it was held that in an action of ejectment, upon the death of defendant, a scire facias and a copy of the declaration must be served on the heirs at law within two terms after the decease of defendant, or the suit will be abated. It is not sufficient to apply for such process within the two terms.

Filing letters of administration.—In Wilson *v.* Harbaugh, 1 Cranch C. C. (U. S.) 315, 30 Fed. Cas. No. 17,807, it was held that in case of plaintiff's death the filing of letters of administration by his administrator is such a "proceeding" in the case as will justify the court in retaining cognizance of the case, under Md. Act (1785), c. 80, § 1, providing that if there be no appearance or other proceeding before the tenth day of the second court, etc., the action shall be struck off.

Order granting made after time.— In Oregon the representatives or successors in interest of a deceased party have a year after his death within which to make application for a continuance of the action, and the application, if made within the year, is in time although the order granting the continuance be not made until the expiration of the year. Dick *v.* Kendall, 6 Oreg. 166.

7. Farrell *v.* Brennan, 25 Mo. 88.

8. Story Eq. Pl. § 831, and see also the following cases:

Alabama.— Fearn *v.* Ward, 80 Ala. 555, 2 So. 114; *Ex p.* Kirtland, 49 Ala. 403.

District of Columbia.— Young *v.* Kelly, 3 App. Cas. (D. C.) 296.

New York.— Coit *v.* Campbell, 82 N. Y. 509; Beach *v.* Reynolds, 53 N. Y. 1.

South Carolina.— Best *v.* Sanders, 22 S. C. 589.

United States.—Mason *v.* Hartford, etc., R. Co., 19 Fed. 53.

England.— Hollingshead's Case, 1 P. Wms. 742; Perry *v.* Jenkins, 1 Myl. & C. 118; Murray *v.* East India Co., 5 B. & Ald. 204.

But see Best *v.* Sanders, 22 S. C. 589, wherein it was held that where a case is prematurely marked "Ended" on the docket the right to proceed by bill of revivor and supplement is not affected by the statute of limitations, though relief on the merits of the action may be barred.

Decree to account.— The statute of limitations cannot be pleaded in bar to a bill of revivor after a decree to account; but it rests in the discretion of the court to be regulated by the circumstances of the particular case whether relief shall be given. Egremont *v.* Hamilton, 1 Ball & B. 516.

9. Fearn *v.* Ward, 80 Ala. 555, 2 So. 114; *Ex p.* Kirtland, 49 Ala. 403; Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Pells *v.* Coon, Hopk. (N. Y.) 450.

(2) When Statute Begins to Run. In equity, on the death of complainant, the statute of limitations does not begin to run against the right to revive until administration is taken out on complainant's estate.[10]

(d) *In Federal Court.* It has been held that the time in which an action must be revived in a federal court on the death of a party is governed by the practice of the state in which the action is brought.[11]

(e) *Laches in Reviving* — (1) Refusal of Leave. In jurisdictions where lapse of time is not of itself sufficient to defeat an application to revive or continue an action the court may in its discretion refuse leave to revive or continue where the applicant has been guilty of laches in the institution of proceedings to revive or continue.[12]

(2) Imposition of Conditions. Conditions may be imposed on granting leave to continue an action where there has been long delay in instituting proceedings to continue.[13]

d. Requisites and Sufficiency of Application — (1) *In General.* An appli-

10. Coe *v.* Finlayson, (Fla. 1899) 26 So. 704; Mason *v.* Hartford, etc., R. Co., 19 Fed. 53; Perry *v.* Jenkins, 1 Myl. & C. 118; Murray *v.* East India Co., 5 B. & Ald. 204.

11. Barker *v.* Ladd, 3 Sawy. (U. S.) 44, 2 Fed. Cas. No. 990.

12. *Georgia.*— Pickett *v.* Crumbley, 90 Ga. 147, 15 S. E. 910; Wilcher *v.* Outz, 67 Ga. 401.

Massachusetts.— Terry *v.* Briggs, 12 Cush. (Mass.) 319.

Minnesota.— Stocking *v.* Hanson, 22 Minn. 542.

New York.— Pringle *v.* Long Island R. Co., 157 N. Y. 100, 51 N. E. 435; Mason *v.* Sanford, 137 N. Y. 497, 33 N. E. 546; Duffy *v.* Duffy, 117 N. Y. 647, 23 N. E. 119; Lyon *v.* Park, 111 N. Y. 350, 18 N. E. 863; Beach *v.* Reynolds, 53 N. Y. 1; Crowley *v.* Murphy, 33 N. Y. App. Div. 456, 54 N. Y. Suppl. 54; Markell *v.* Nester, 29 N. Y. App. Div. 55, 51 N. Y. Suppl. 852; Wright *v.* Chase, 77 Hun (N. Y.) 90, 28 N. Y. Suppl. 310; Gas Works Constr. Co. *v.* Monheimer, 65 Hun (N. Y.) 626, 20 N. Y. Suppl. 501; Matter of Palmer, 59 Hun (N. Y.) 625, 13 N. Y. Suppl. 675; Matter of Roberts, 53 Hun (N. Y.) 338, 6 N. Y. Suppl. 195; Shipman *v.* Long Island R. Co., 17 Misc. (N. Y.) 102, 39 N. Y. Suppl. 498.

Ohio.— Carter *v.* Jennings, 24 Ohio St. 182.

Texas.— Weaver *v.* Shaw, 5 Tex. 286.

Wisconsin.— Carberry *v.* German Ins. Co., 86 Wis. 323, 56 N. W. 920; Cavanaugh *v.* Scott, 84 Wis. 93, 54 N. W. 328.

United States.— Goodyear Dental Vulcanite Co. *v.* White, 46 Fed. 278.

England.— Alsop *v.* Bell, 24 Beav. 451.

Delay of eight years.— In Wilcher *v.* Outz, 67 Ga. 401, it was held that where, pending suit by an administrator, he died and the parties in interest failed for eight years to have a plaintiff substituted, though they were all that time *sui juris,* it was then too late to do so.

Delay of twelve years.—In Goodyear Dental Vulcanite Co. *v.* White, 46 Fed. 278, it was held that after the lapse of nearly twelve years after the death of a sole defendant in a suit in which issue has never been joined, though the suit was begun four years before his death, the suit cannot be revived against his executor.

Delay of fifteen years.—In Baker *v.* Baker, 13 B. Mon. (Ky.) 406, it was held that where a bill of revivor was not brought until fifteen years after the death of complainant the right to revive was barred by lapse of time.

Delay of twenty years.— In Bland *v.* Davison, 21 Beav. 312, it was held that a suit which had been abated for more than twenty years will not be revived.

Delay of twenty-two years.— In Beach *v.* Reynolds, 53 N. Y. 1, it was held that a delay of twenty-two years in instituting proceedings to revive a suit was fatal.

Purchaser pendente lite.—Where defendant dies pending suit to subject an estate to the satisfaction of a debt, and complainant fails to revive within a reasonable time, one who purchases the estate between the date of the abatement and the time within which the action ought to have been revived will be protected, notwithstanding the *lis pendens* subsequently revived, unless complainant can show a good excuse for the delay. Watson *v.* Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459.

13. Van Horne *v.* France, 32 Hun (N. Y.) 504; McInnis *v.* Gardiner, 26 Misc. (N. Y.) 487, 57 N. Y. Suppl. 471 (wherein it appeared that the executors of a deceased plaintiff delayed two years in moving to continue an action, and in the meantime some of defendant's witnesses died. The court granted the motion on payment by the executors of all costs to date as well as costs of the motion, and also required the executors to stipulate that they would try the case when it was reached); Livingston *v.* Olyphant, 3 Rob. (N. Y.) 639 (which was an action by the receiver of an insurance company upon a promissory note which defendants alleged to be without consideration. Plaintiff died pending the action. After seven years his successor in office applied for permission to continue the action by supplemental complaint. It was held that as a condition of granting such application plaintiff should be required to prove the consideration of the note).

cation to revive or continue an action should set forth the grounds upon which the application is based.[14]

(II) *Name of Person Summoned in.* The application should set out the name of the person sought to be summoned in.[15]

(III) *Showing Title to Revive*—(A) *In General.* An application to revive in whatever form made should show a title in the applicant to revive.[16]

14. Stocking *v.* Hanson, 22 Minn. 542; Winter *v.* Shankland, 3 Tenn. Ch. 361. See also Landis *v.* Olds, 9 Minn. 90, wherein it appeared that, pending an action to foreclose a mortgage, plaintiff died, and his executor filed a notice of motion asking that the foreclosure sale be set aside and "for such further order in the premises as to the court shall seem meet and proper," and with such notice were copies of plaintiff's will and of letters testamentary issued to the executor. It was held that under the prayer for further relief the court properly allowed the executor to be substituted as plaintiff in the action. *Compare* Gueli *v.* Lenihan, 55 Hun (N. Y.) 608, 8 N. Y. Suppl. 453.

Application in writing.— In Georgia, objection to an order to make parties on the ground that the motion was not in writing should be made at the time of the order, or it will be deemed waived. Dean *v.* Feeley, 66 Ga. 273.

Court of appearance.— A citation issued to the executor of a deceased assignee to revive the suit against him must show with certainty in what court he must appear. Waddill *v.* John, 48 Ala. 232.

Supplementary complaint.—In Minnesota a supplementary complaint to continue a cause made a year after the decease of a party should set forth, not only the grounds upon which the application is based, but also some sufficient excuse for the delay in making it. Stocking *v.* Hanson, 22 Minn. 542.

Detinue.—A scire facias to revive an action of detinue against the administrator should suggest the coming of the property into the hands of the administrator since the death of the testator. Hunt *v.* Martin, 8 Gratt. (Va.) 578; Catlett *v.* Russell, 6 Leigh (Va.) 344; Allen *v.* Harlan, 6 Leigh (Va.) 42, 29 Am. Dec. 205.

15. *Ex p.* Sayre, 69 Ala. 184, wherein it was held that leave granted to revive against defendant's personal representative without giving the representative's name or adding "when known" does not amount to a motion to revive. See also Caller *v.* Malone, 1 Stew. & P. (Ala.) 305, wherein it was held that a scire facias to bring in the representatives of a deceased party must be directed to them in their representative capacity. But see Preston *v.* Dunn, 25 Ala. 507, wherein it was held that where an infant defendant to a bill of revivor is described as the deceased defendant's "only infant son, whose name is unknown," the decree rendered against him is not void for uncertainty and cannot be collaterally impeached, especially when the infant, by his subsequent bill to redeem lands sold under the decree, shows that he is the person against whom the bill of revivor was filed. And see McCracken *v.* Nelson, 15 Lea (Tenn.) 312, wherein it was held that where one is actually served in scire facias to revive, the revivor is valid although the party so served was not named in the order, or although the officer's return misstated the name. *Compare* Brigham *v.* Smith, 2 Ch. Chamb. (U. C.) 257.

Names of heirs.— A bill of revivor against an administrator and minor heirs must state the name of at least one of the heirs. Pickering *v.* Walcott, 1 Ind. 262.

16. *California.*— Campbell *v.* West, 93 Cal. 653, 29 Pac. 219.

Kentucky.—Walter *v.* Clark, 6 J. J. Marsh. (Ky.) 629.

New Jersey.— Grant *v.* Chambers, 7 N. J. Eq. 223.

New York.— Northrup *v.* Smith, 58 N. Y. Super. Ct. 120, 9 N. Y. Suppl. 802; Jauncey *v.* Rutherford, 9 Paige (N. Y.) 273; Rogers *v.* Paterson, 4 Paige (N. Y.) 409; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653; Phinney *v.* Phinney, 17 How. Pr. (N. Y.) 197; Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

Texas.— Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112.

Applications of the rule.— Where a person moving to be substituted as plaintiff claims under assignments made by the administratrix of the deceased plaintiff, the assignments should be put in evidence so that the court may judge if they have the efficacy claimed; and a petition which alleges that the cause of action was duly assigned by the administratrix by an instrument duly executed to a third person, who thereafter transferred the same to petitioner, states mere results of opinion and is insufficient. Northrup *v.* Smith, 58 N. Y. Super. Ct. 120, 9 N. Y. Suppl. 802.

An amended complaint alleged that the original plaintiff died testate, and that D. was "duly appointed and qualified as executor of the last will and testament of said deceased, and ever since has been, and now is, the duly acting and qualified executor of the estate of said deceased." It was held that while the allegation of representative capacity would have been insufficient if the action had been originally brought by the executor, it served the purpose where the amended complaint was filed by leave of court, in connection with a decree, for the purpose of showing that the action was continued in the name of plaintiff as executor. Campbell *v.* West, 93 Cal. 653, 29 Pac. 219.

In a supplemental complaint by a devisee of an original plaintiff, an allegation that the latter died on, etc., and by his last will devised all his interest in the said land to plaintiff, his son, is sufficient on demurrer. Phinney *v.* Phinney, 17 How. Pr. (N. Y.) 197; Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

(B) *Bills of Revivor and Supplement*—(1) In General. One who files a bill of revivor or bill in the nature of a bill of revivor and supplement should state so much of the original bill as is necessary to show that he has a right to revive.[17]

(2) Introduction of New Matter. New matter may be introduced into a bill of revivor or bill in the nature of a bill of revivor and supplement, to the end that defects in the original bill arising from subsequent events may be supplied.[18] But this cannot be done where there is nothing in the original bill by which it may be sustained.[19]

(3) Parties to Bill. In a bill of revivor, or a bill in the nature of a bill of revivor, filed by a person who was not a party to the original suit, all the surviving parties to such original suit who have any interest in the further proceedings to be had therein should be made parties, either as complainants or defendants.[20] But where the abatement of a suit is caused by the death of one of several defendants, and the suit is revived by complainant in the original suit, it appears to be only necessary, in a simple bill of revivor, to bring the representatives of deceased before the court without making surviving defendants parties to such bill.[21]

An allegation in a petition for substitution that petitioner is a "legal representative" is insufficient. Petitioner must allege a valid appointment, by a court of competent jurisdiction, as executor or administrator of the decedent's estate. Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112.

17. Feemster *v.* Markham, 2 J. J. Marsh. (Ky.) 303, 19 Am. Dec. 131; Taylor *v.* Taylor, 43 N. Y. 578; Gillett *v.* Robbins, 12 Wis. 319; Griffith *v.* Ricketts, 3 Hare 476; Vigers *v.* Audley, 9 Sim. 72; Phelps *v.* Sproule, 4 Sim. 318.

Applications of the rule.—A statement in a bill of revivor that complainants therein are the heirs at law of complainant in the original bill, who has died intestate, is a sufficient allegation of heirship without a more minute statement of the facts which show them to be such heirs. Gillett *v.* Robbins, 12 Wis. 319.

In a bill of revivor it is only necessary to state how plaintiff became entitled to revive, and to charge that the cause ought to be revived and to stand in the same condition with respect to the parties to the original bill as it was at the time the abatement happened. Taylor *v.* Taylor, 43 N. Y. 578.

Where a party brings his bill in his own right as assignee he cannot be entitled to a decree as administrator of his assignor on simply stating, in a supplemental bill, that since the suit was commenced the assignor had died and that complainant had become his administrator. Walter *v.* Clark, 6 J. J. Marsh. (Ky.) 629.

A conveyed land to B, and B gave back a deed of defeasance providing for a reconveyance on A's paying, etc. A filed a bill to redeem, and, after answer, replication, and some proofs, died. C filed a bill stating the proceedings on A's bill, and that A, in his lifetime, conveyed all his interest in the premises to him, C, and praying that the said suit of A might stand revived, etc., without saying in what character C sought to revive. B pleaded that D was the true administrator of the personal estate of A, and not B. It was held that the plea was properly sustained. Grant *v.* Chambers, 7 N. J. Eq. 223.

Rule in Tennessee.—A bill of revivor resorted to in place of a scire facias need state only the matters required by statute to be stated in a scire facias when that remedy is used. Foster *v.* Burem, 1 Heisk. (Tenn.) 783.

18. *Alabama.*—Bowie *v.* Minter, 2 Ala. 406.

New Hampshire.—Eastman *v.* Batchelder, 36 N. H. 141.

New York.—Pendleton *v.* Fay, 3 Paige (N. Y.) 204; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306.

Rhode Island.—Manchester *v.* Mathewson, 2 R. I. 416.

England.—Bampton *v.* Birchall, 5 Beav. 330.

Remedy for introduction of improper matter.—If the matter added be irrelevant or improper, defendant may avail himself of the objection by plea, by demurrer, or by exceptions for impertinence. Bowie *v.* Minter, 2 Ala. 406; Randolph *v.* Dickerson, 5 Paige (N. Y.) 517; Pendleton *v.* Fay, 3 Paige (N. Y.) 204.

19. The original bill must show a case for complainant, otherwise new matter would be a new cause in court. Eastman *v.* Batchelder, 36 N. H. 141; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Bampton *v.* Birchall, 5 Beav. 330.

20. Peer *v.* Cookerow, 14 N. J. Eq. 361; Penniman *v.* Norton, 1 Barb. Ch. (N. Y.) 246; Farmers' L. & T. Co. *v.* Seymour, 9 Paige (N. Y.) 538.

21. Farmers' L. & T. Co. *v.* Seymour, 9 Paige (N. Y.) 538. See also Randolph *v.* Dickerson, 5 Paige (N. Y.) 517, wherein it was held that where a complainant files a bill to set aside a conveyance made by him on the ground of fraud in obtaining it, if the suit abates by the death of complainant, and the wife of defendant is one of the heirs at law, the other heirs may file a bill of revivor against the wife and her husband without alleging therein that she refused to join.

(4) Demurrer to Bill. If the bill is not properly a bill of revivor, or if supplemental matter is improperly inserted in it, defendant may demur.[22] But a bill of revivor cannot be demurred to for want of a party who was not before the court at the time of the abatement of the suit.[23]

(5) Answer to Bill. No answer to a bill of revivor is either necessary or proper except to put in issue the fact as to whether the party sought to be brought in bears such a relation to deceased as makes him a proper party; as, for example, whether he is the heir at law or administrator or executor of such deceased party.[24]

e. Notice of Application — (1) *Necessity of Notice* — (A) *In General.* In some states the practice requires that notice of an application to revive be given to the opposite party.[25] But where one of the surviving parties has no interest in the question and would have no right to resist the application notice, it seems, is not necessary.[26]

The same principle is applicable to a supplemental bill in the nature of a bill of revivor to revive or continue the suit against the devisee or assignee of one of the original defendants. Farmers' L. & T. Co. *v.* Seymour, 9 Paige (N. Y.) 538.

22. Bowie *v.* Minter, 2 Ala. 406; Bornsdorff *v.* Lord, 41 Barb. (N. Y.) 211; Randolph *v.* Dickerson, 5 Paige (N. Y.) 517; Nanney *v.* Totty, 11 Price 117; Codrington *v.* Houlditch, 5 Sim. 286; Lewis *v.* Bridgman, 2 Sim. 465.

Demurrer to supplemental matter.— Where supplemental matter is improperly inserted in a bill of revivor and supplement it does not authorize defendant to demur to the whole bill; he should demur to the supplemental matter only. Randolph *v.* Dickerson, 5 Paige (N. Y.) 517.

Scire facias.—A defendant may plead or demur to a scire facias given by statute to revive a suit in the same manner as he could to a bill of revivor under the old chancery practice. Vaughan *v.* Wilson, 4 Hen. & M. (Va.) 480.

23. Bettes *v.* Dana, 2 Sumn. (U. S.) 383, 3 Fed. Cas. No. 1,368; Metcalfe *v.* Metcalfe, 1 Keen 74.

And this rule holds good notwithstanding the suit might have been imperfect without such party, as it is not the office of a demurrer to a bill of revivor to correct such imperfection. Metcalfe *v.* Metcalfe, 1 Keen 74.

24. Story Eq. Pl. §§ 370, 377; Feemster *v.* Markham, 2 J. J. Marsh. (Ky.) 303, 19 Am. Dec. 131; Quick *v.* Campbell, 44 S. C. 386, 22 S. E. 479; Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197; Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769; Gunnell *v.* Bird, 10 Wall. (U. S.) 304, 19 L. ed. 913; Sharon *v.* Terry, 36 Fed. 337, 1 L. R. A. 572. But see Douglass *v.* Sherman, 2 Paige (N. Y.) 358, wherein it was held that it sometimes becomes necessary, on a simple bill of revivor, to call for an answer, as in the case of an executor or administrator of a deceased defendant, to ascertain whether he has assets to pay complainant's demand.

Accordingly statements in an answer to a bill of revivor which merely show irregularity and misconduct in the former proceedings in the suit are impertinent. Wagstaff *v.* Bryan, 1 Russ. & M. 28.

Admission by failure to answer.—If a party fails to answer a bill of revivor against the administrator of a defendant to the original bill, the fact that he was such administrator must be considered as admitted by such failure. Sprague *v.* Sprague, 7 J. J. Marsh. (Ky.) 331.

25. The reason for this notice is that he may have an opportunity to be heard as to the right of the applicant to revive.

Alabama.— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Floyd *v.* Ritter, 65 Ala. 501.

Georgia.— Meeks *v.* Johnson, 75 Ga. 629.

Minnesota.—Lee *v.* O'Shaughnessy, 20 Minn. 173.

New York.— Douglass *v.* Sherman, 2 Paige (N. Y.) 358; White *v.* Buloid, 2 Paige (N. Y.) 475; Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405.

Ohio.— Bishop *v.* Stoddard, 1 Cleve. L. Rep. 201, 4 Ohio Dec. (Reprint) 276.

Oregon.— White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515.

Texas.— Beck *v.* Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207.

Wisconsin.— Brooks *v.* Northey, 48 Wis. 455, 4 N. W. 589.

Canada.— Goodeve *v.* Manners, 4 Grant Ch. (U. C.) 101.

In California the practice in case of the death of a party to an action is to allow the substitution of his legal representative to be made upon suggestion of the death on an *ex parte* motion showing the appointment and qualification of the executor or administrator of the estate of the deceased party. Campbell *v.* West, 93 Cal. 653, 29 Pac. 219; Taylor *v.* Western Pac. R. Co., 45 Cal. 323.

Waiver of notice.— Where plaintiff dies while the cause is pending on demurrer to the complaint, and the court makes an order reviving the action in the name of one who petitions therefor as executor of such deceased, and defendant afterward appears and argues the demurrer without moving to set aside the order for want of notice to him of the petition, such objection is waived. Brooks *v.* Northey, 48 Wis. 455, 4 N. W. 589.

26. Gordon *v.* Sterling, 13 How. Pr. (N. Y.) 405. See also White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515, wherein it was held that if the original defendant was not served before his

(B) *Bills of Revivor*—(1) DEATH OF PLAINTIFF. By the standard practice in chancery the representatives of a deceased plaintiff, on filing a bill of revivor, should cause process to issue on the bill in the absence of the voluntary appearance of defendant.[27]

(2) DEATH OF DEFENDANT. So a suit in equity cannot be revived by bill of revivor against the representatives of a deceased defendant, in the absence of their voluntary appearance without process executed upon them.[28]

(II) *SERVICE OF NOTICE*—(A) *In General.* A process to make parties on the death of a party should be served.[29]

(B) *Bills of Revivor.* Process should be executed on a bill of revivor in the same manner as process on an original bill.[30]

(III) *APPEARANCE AS WAIVER OF NOTICE.* But appearance without questioning the want of notice is a waiver of such notice.[31]

death, and did not appear, his representative is not entitled to notice of an application for an order of continuance, since on the service of summons he can make all objections that could have been urged on the application for the order.

27. Barnes *v.* Smith, 5 J. J. Marsh. (Ky.) 311; Hall *v.* Johnston, 5 J. J. Marsh. (Ky.) 284; Stout *v.* Higbee, 4 J. J. Marsh. (Ky.) 632; Shields *v.* Craig, 6 T. B. Mon. (Ky.) 373; Roberts *v.* Elliott, 3 T. B. Mon. (Ky.) 395; Sweets *v.* Biggs, 5 Litt. (Ky.) 17; Robenson *v.* Hopkins, 3 A. K. Marsh. (Ky.) 564; Yates *v.* Payne, 4 Hen. & M. (Va.) 412; Duguid *v.* Patterson, 4 Hen. & M. (Va.) 445.

28. Chambers *v.* Warren, 6 B. Mon. (Ky.) 244; Moss *v.* Scott, 2 Dana (Ky.) 271; Kincart *v.* Sanders, 2 A. K. Marsh. (Ky.) 26; Lawrence *v.* Bolton, 3 Paige (N. Y.) 294; Lewis *v.* Outlaw, 1 Overt. (Tenn.) 139. But see MacGregor *v.* Gardner, 14 Iowa 326, wherein it was held that the heirs and executors of a deceased person, who were all co-defendants with him in a proceeding in chancery, pending which he died, are to be charged with notice of his decease and of their substitution as his legal representatives; and they cannot object to the decree, upon appeal, on the ground that they were not made parties, as deceased's representatives, by service of original notice.

Service on part of defendants.— A decree upon a bill of revivor against a foreign executor, without actual service upon him, and against resident heirs and devisees who are served with process within the jurisdiction, though void as to the executor for want of jurisdiction, is not void as to the heirs and devisees. Warren *v.* Hall, 6 Dana (Ky.) 450.

29. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075; Segars *v.* Segars, 76 Me. 96; Harkness *v.* Austin, 36 Mo. 47; Ferris *v.* Hunt, 18 Mo. 480.

In Vermont, on the death of a party, the action is continued until the appointment of an executor or administrator, who may thereupon appear voluntarily to prosecute or defend the action. If he does not appear voluntarily it is made the duty of the surviving party to cite him in. Babcock *v.* Culver, 46 Vt. 715.

Upon whom served.— Where the heirs of a deceased plaintiff to a bill in equity against whom a revivor is sought are infants residing with their mother, the widow of their deceased ancestor, a service of summons to answer, made on them personally and not on the mother, is sufficient. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136.

An acknowledgment of service by an attorney is not equivalent to legal service where no appearance follows. Segars *v.* Segars, 76 Me. 96.

Time of service.— In Doering *v.* Kenamore, 36 Mo. App. 147, it appeared that a scire facias to revive a suit, the defendant in which had deceased intestate, was issued before the appointment of an administrator and directed to one K., individually, who was subsequently appointed administrator of the deceased's estate. It was held that an order made thereon, reviving the suit as against K. as administrator, was a nullity. In Segars *v.* Segars, 76 Me. 96, it was held that a citation issued before the time allowed for the representative to appear voluntarily is of no effect.

30. Chambers *v.* Warren, 6 B. Mon. (Ky.) 244; Moss *v.* Scott, 2 Dana (Ky.) 271; Barnes *v.* Smith, 5 J. J. Marsh. (Ky.) 311; Hall *v.* Johnston, 5 J. J. Marsh. (Ky.) 284; Stout *v.* Higbee, 4 J. J. Marsh. (Ky.) 632; Shields *v.* Craig, 6 T. B. Mon. (Ky.) 373; Roberts *v.* Elliott, 3 T. B. Mon. (Ky.) 395; Sweets *v.* Biggs, 5 Litt. (Ky.) 17; Robenson *v.* Hopkins, 3 A. K. Marsh. (Ky.) 564; Kincart *v.* Sanders, 2 A. K. Marsh. (Ky.) 26; Lawrence *v.* Bolton, 3 Paige (N. Y.) 294; Lewis *v.* Outlaw, 1 Overt. (Tenn.) 139; Yates *v.* Payne, 4 Hen. & M. (Va.) 412; Duguid *v.* Patterson, 4 Hen. & M. (Va.) 445.

Absent defendants.— The practice as to reviving where plaintiff dies and there are absent and home defendants is to issue process to revive as well against the absent as against the home defendant, and then to make publication. Yates *v.* Payne, 4 Hen. & M. (Va.) 412; Duguid *v.* Patterson, 4 Hen. & M. (Va.) 445. See also Foster *v.* Burem, 1 Heisk. (Tenn.) 783, wherein it was held that the Tennessee statute authorizing publication in lieu of personal service of process in certain specific cases is applicable to bills of revivor, and the difficulty of non-residents may be thereby obviated. To same effect is Otis *v.* Wells, 1 Edw. (N. Y.) 83.

31. *Alabama.*— Parker *v.* Abrams, 50 Ala. 35.

f. Proof of Title to Revive — (I) *In General.* An applicant for the revival of a suit should prove both the death of the party necessitating the revival and his own title to revive.[32]

(II) *Revival by Personal Representatives.* In case of a revival by a personal representative there should be proof of the death of his decedent and of his own appointment as personal representative.[33] It has been held, however, that the court may permit a petitioner to continue an action without proof of his representative capacity where such capacity is not denied by the opposite party.[34]

g. Objections to Revival — (I) *In General.* Where persons claiming to be

Indiana.— Watson *v.* State, 21 Ind. 109.

Kentucky.—Bently *v.* Gregory, 7 T. B. Mon. (Ky.) 368; Roberts *v.* Elliott, 3 T. B. Mon. (Ky.) 395.

North Carolina.— Alexander *v.* Patton, 90 N. C. 557; Newland *v.* Tate, 38 N. C. 226.

Texas.— Boone *v.* Roberts, 1 Tex. 147.

United States.—Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408.

32. *Alabama.*—Copewood *v.* Taylor, 7 Port. (Ala.) 33.

Louisiana.—Hawkins *v.* Dartest, 3 La. Ann 547.

Mississippi.— Myrick *v.* McRaven, 54 Miss 11; Clifton *v.* Galbraith, 23 Miss. 292.

New York.—Boynton *v.* Hoyt, 1 Den. (N. Y.) 53; Day *v.* Potter, 9 Paige (N. Y.) 645.

Tennessee.— Anderson *v.* McNeal, 4 Lea (Tenn.) 303; Settle *v.* Settle, 10 Humphr. (Tenn.) 474.

But see Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641, wherein it was held that the suggestion of the death of the sole plaintiff, and the substitution of his heir, without objection, settles *prima facie* the fact of his death, and the defendant cannot on the trial require further proof thereof without notice of his purpose to raise that issue. See also Isham *v.* Davison, 3 Thomps. & C. (N. Y.) 745, which was an action originally brought by plaintiff's testator, and continued in the name of plaintiff as executrix. It was held that the fact that the court had, on suggestion of the testator's death, ordered the action to be revived in the name of plaintiff as executrix was an answer to the objection that there was no proof of the testator's death.

Amicable scire facias.—In Pennsylvania, if the person coming in is denied to be the legal representative of plaintiff, the court, on reasonable ground laid, will order the parties to appear to an amicable scire facias, to which this defense may be made, and will stay proceedings in the meantime. Deiser *v.* Sterling, 10 Serg. & R. (Pa.) 119.

Oral suggestion of death.— In Louisiana it has been held that a mere oral suggestion of plaintiff's death made on the day fixed for trial, without being supported by affidavit, is insufficient. Hawkins *v.* Dartest, 3 La. Ann. 547.

Proof of heirship.— In Tennessee proof of heirship may be made in open court or by the depositions of witnesses taken upon notice or before the clerk upon a reference to him for that purpose. Campbell *v.* Hubbard, 11 Lea (Tenn.) 6.

33. Conwell *v.* Watkins, 71 Ill. 488; Vickery *v.* Beir, 16 Mich. 50; Douglass *v.* Sherman, 2 Paige (N. Y.) 358. See also Moore *v.* Rand, 1 Wis. 245, wherein it was held that if an appearance has been entered by an administrator on the death of his intestate pending the suit, his right to appear must be proved in the same manner as though he had originally commenced the suit, but he cannot be required to prove it before he becomes a party.

Presumption of proof.— The action of the court in ordering the revival of a cause in the name of a certain person claiming to be administratrix of the deceased party will be presumed to have been based on sufficient proof of the appointment of the administratrix, where the record fails to show that any evidence was offered on that point. Hendrix *v.* Rieman, 6 Nebr. 516.

Production of letters testamentary.— The opposite party may insist upon the production of the letters testamentary before the executor will be permitted to prosecute. Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408. But see Curry *v.* Paine, 3 Ala. 154, wherein it was held that, in a proceeding to revive a suit in the name of an administrator, defendant, after pleading the general issue, cannot require the production of the letters of administration.

Waiver of proof.—In Brooks *v.* Northey, 48 Wis. 455, 4 N. W. 589, it was held that where plaintiff dies while the cause is pending on demurrer to the complaint, and the court makes an order reviving the action in the name of one who petitions therefor as executor of such deceased, and defendant afterward appears and argues the demurrer without moving to set aside the order, on the ground that such order was made without sufficient evidence of the petitioner's representative character, this is a waiver of such objection. See also Bond *v.* Bishop, 18 La. Ann. 549, wherein it was held that the proper time to require proof of the death of a party to a suit, and of the qualification of the administrator in whose name the suit is revived, is at the time the suggestion of death and the motion to revive are made. Proceeding to trial on the merits is a waiver of proof.

34. Warner *v.* Shweitzer, 52 N. Y. App. Div. 520, 65 N. Y. Suppl. 384.

the representatives of deceased parties present themselves and move to revive, the adverse party may resist the revivor upon any sufficient ground.[35]

(II) *Manner of Raising Objections.* In some states the question whether a cause of action survives after the death of plaintiff may be raised by demurrer.[36]

(III) *Time of Raising Objections.* If a suit is improperly revived, or complainant has no right to revive it, the objection may be made at the hearing.[37] And this is true where revivor is sought by conditional order.[38]

h. Questions Determinable on Proceedings to Revive. The sole questions before the court on proceedings to revive are the competency of the parties to revive and the sufficiency of the application therefor.[39]

10. Order of Revival — a. Necessity. Regularly there should be a formal order of revival on the substitution of a party.[40] It has been held, however, that

35. Campbell *v.* Hubbard, 11 Lea (Tenn.) 6; Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Mayfield *v.* Stephenson, 6 Baxt. (Tenn.) 397. See also Newman *v.* Pryor, 18 Ala. 186, wherein it was held that where a suit abated by the death of plaintiff is, without notice, afterward revived on motion under the statute in the name of a third person as his personal representative, the defendant may deny, by plea, the representative character of the new plaintiff, and contest his right to maintain the action.

36. Leggate *v.* Moulton, 115 Mass. 552.

Motion to dismiss.— The question whether a cause of action survives to the personal representatives cannot be raised by a motion to dismiss the suit after the administratrix has been substituted in the place of the deceased plaintiff, as a motion to dismiss reaches only defects apparent upon the face of the record. Holton *v.* Daly, 106 Ill. 131.

37. Rowland *v.* Ladiga, 21 Ala. 9; Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

Delay in raising objection.— Where executors are substituted for deceased plaintiff July 31, 1872, a plea of *ne unques executor*, filed Nov. 19, 1872, comes too late. Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Objection that action does not survive.— An objection that a cause of action does not survive on the death of plaintiff may be taken at the trial and is not waived by defendant's consenting to the revival of the action in favor of one claiming the right of action. Mundt *v.* Glokner, 20 Misc. (N. Y.) 63, 44 N. Y. Suppl. 430.

38. Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130.

39. *Georgia.*— McArdle *v.* Bullock, 45 Ga. 89.

Nebraska.— Gillette *v.* Morrison, 7 Nebr. 263.

New York.— Taylor *v.* Taylor, 43 N. Y. 578; Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63; Matter of Clute, 50 Hun (N. Y.) 604, 16 N. Y. Civ. Proc. 123, 2 N. Y. Suppl. 874; Boynton *v.* Hoyt, 1 Den. (N. Y.) 53; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329.

North Carolina.— Grant *v.* Bell, 91 N. C. 495.

South Carolina.— Dunham *v.* Carson, 42 S. C. 383, 20 S. E. 197.

Tennessee.— Reed *v.* Brewer, Peck (Tenn.) 275.

United States.—Allen *v.* Fairbanks, 40 Fed. 188; Bettes *v.* Dana, 2 Sumn. (U. S.) 383, 3 Fed. Cas. No. 1,368.

Illustrations.— Upon a summary application to revive an action of ejectment in the name of the deceased plaintiff's representative, the question as to whether the deeds under which plaintiff claimed were illegal and void under a particular statute, or as to the validity of her claim for damages, cannot be raised. Such questions are matters of defense to the action after it is revived. Matter of Clute, 50 Hun (N. Y.) 604, 16 N. Y. Civ. Proc. 123, 2 N. Y. Suppl. 874.

After an action to set aside a conveyance as fraudulent has been referred it is too late, on a motion to revive against defendant's executor, to raise the objection that plaintiff is a non-resident of the state, that his bond is void, or that plaintiffs in the supplementary proceedings are dead and have no personal representatives, as all such questions will be assumed to have been determined before the reference was ordered. Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63.

Where an action survives defendant's death and his executor asks to be made a party defendant, the question of assets or no assets cannot then be raised, having nothing to do with the matter. Grant *v.* Bell, 91 N. C. 495.

It is not ground for a motion to dismiss a scire facias to revive a suit upon the death of a defendant that the bill does not state a cause of action or is not sustained by the proofs. Allen *v.* Fairbanks, 40 Fed. 188.

40. *Arkansas.*— Hodges *v.* Taylor, (Ark. 1890) 13 S. W. 129; Moore *v.* Estes, 23 Ark. 152.

Georgia.— McDougald *v.* Carey, 17 Ga. 185.

Kentucky.— Greer *v.* Powell, 1 Bush (Ky.) 489; Hunter *v.* Miller, 6 B. Mon. (Ky.) 612.

Michigan.— Ferguson *v.* Wilson, (Mich. 1899) 80 N. W. 1006.

Missouri.— Baker *v.* Crandall, 78 Mo. 584, 47 Am. Rep. 126; Shockley *v.* Fischer, 21 Mo. App. 551.

New York.—Day *v.* Potter, 9 Paige (N. Y.) 645.

Tennessee.—Boyd *v.* Titzer, 6 Coldw. (Tenn.) 568.

England.— Troward *v.* Bingham, 4 Sim. 483.

Canada.—Matthews *v.* Mears, 21 Grant Ch. (U. C.) 99.

proceeding in a cause without objection to a formal order of revival is a waiver of such order.[41]

b. Requisites. The order of revival should state the character in which the substituted party is permitted to revive,[42] but it need not show that the court was satisfied of the truth of the facts suggested as the reason for revival.[43]

c. Amendment. The court may during the same term amend an order of revival.[44]

d. Notice. Notice of an order for the continuance of a suit should be given the opposite party.[45]

e. Service. According to the practice in some states an order of revival should be served in the same manner as a summons is served.[46]

But see Moore *v.* Rand, 1 Wis. 245, wherein it was held that in case of the death of a party while the suit is pending the executor or administrator may appear, the death having been suggested on the record, and take upon himself the prosecution or defense of the suit. No order of the court for the revival of the suit is necessary. To same effect are Tarbox *v.* French, 27 Wis. 651; Durbin *v.* Waldo, 15 Wis. 352.

41. Jones *v.* Acre, Minor (Ala.) 5; Moore *v.* Estes, 23 Ark. 152; Greer *v.* Powell, 1 Bush (Ky.) 489; Baker *v.* Crandall, 78 Mo. 584, 47 Am. Rep. 126; Judy *v.* St. Louis Ice Mfg., etc., Co., 60 Mo. App. 114; Shockley *v.* Fischer, 21 Mo. App. 551. See also Ferguson *v.* Wilson, (Mich. 1899) 80 N. W. 1006, wherein it appeared that after plaintiff's death the suit was revived in the name of his administrator, the order of revival being signed by the attorneys in the case but not by the court. No objection was taken to the form of it when the declaration was filed, but a plea to the general issue was interposed. At the trial objection was made that the case had not been revived. It was held that, it being an order which the court would have granted, the case will be treated as if the court then and there granted the order. And see De Ford *v.* Furniss, 43 Miss. 132, wherein it appeared that plaintiff in an action died before the cause was ready for trial. His death was suggested and the suit was revived and prosecuted to judgment in the name of his administrator, but the record did not show any formal order of revival. It was held that inasmuch as the record distinctly showed two facts,— the death of plaintiff, and the substitution of the administrator, in his stead, as a party,— the appellate court would not disregard the facts and reverse the judgment merely because the entries in the record were awkwardly and inartificially made.

42. Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

Names of infants.— The christian names of infant parties need not be inserted in the order of revival. Wilson *v.* Smith, 22 Gratt. (Va.) 493.

Waiver of irregularities in order.— When defendant is in court and consents to the revival of a suit in the name of an administrator as plaintiff, and at a subsequent term continues the cause, he will be held to have waived all objections to the order of revival. Townsend *v.* Jeffries, 24 Ala. 329. But where a suit has been irregularly revived no presumption of a waiver of the irregularity can be made against a party not before the court by service of publication. Batre *v.* Auze, 5 Ala. 173.

43. Miller *v.* Koger, 9 Humphr. (Tenn.) 231.

44. Shull *v.* Caughman, 54 S. C. 203, 32 S. E. 301, wherein it was held that the court may during the same term amend an order authorizing an action to be continued against the administrator *cum testamento annexo* of a deceased defendant by permitting the substitution of the devisee of the deceased for the said administrator.

Vacation of order.— An order of court reviving against the personal representatives of a deceased defendant an action which had abated and by statute did not survive is void, and no error is committed by the court in vacating it at a subsequent term. Garrison *v.* Burden, 40 Ala. 513.

45. Hodges *v.* Taylor, (Ark. 1890) 13 S. W. 129; McCreery *v.* Everding, 44 Cal. 284; Judson *v.* Love, 35 Cal. 483; Hunter *v.* Miller, 6 B. Mon. (Ky.) 612; Hawkins *v.* Marshall, 4 Bibb (Ky.) 472; Harkness *v.* Austin, 36 Mo. 47; Fine *v.* Gray, 19 Mo. 33; Ferris *v.* Hunt, 18 Mo. 480.

46. *Arkansas.*— McNutt *v.* State, 48 Ark. 30, 2 S. W. 254; Haley *v.* Taylor, 39 Ark. 104; Evans *v.* Davies, 39 Ark. 235.

Kentucky.—Arnyx *v.* Smith, 1 Metc. (Ky.) 529.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130.

Ohio.— Carter *v.* Jennings, 24 Ohio St. 182.

Wyoming.— Wolcott *v.* Fee, 1 Wyo. 255.

Canada.— Smith *v.* Lines, 1 Ch. Chamb. (U. C.) 398.

See also Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829, wherein it was held that the service of an order of continuance containing substantially all the elements of a summons is sufficient.

Time of service.— In Kentucky, under Civ. Code, §§ 501–509, an order to revive cannot be made within six months from the qualification of the personal representative of defendant; and if made after six months from the qualification and entered of record, if there is no service of the order for twelve months from the time of qualification, or from the time the order could have been made, it is a bar to the right to revive, and plaintiff is required to resort to his action against the

f. Conclusiveness. It has been held that an order of revivor is conclusive upon the point whether the action had been properly revived in the name of the person therein named as plaintiff, and whether a recovery could be had in his name.[47]

11. Proceedings after Revival or Continuance — a. In General. On the revival or continuance of an action the issues and proceedings are taken up at the point where the death of the party as to whom the change is made left them. The new or substituted party takes the place of the former one, and the case proceeds in all respects as if the new party had been in the case from the beginning.[48]

b. Title of Action. An action subsequent to its revival should be entitled according to the character in which the substituted party revives it,[49] and all proceedings thereafter should be had in his name.[50]

c. Continuance. It has been held that the death of a party plaintiff and the

personal representatives. Thomson *v.* Williams, 86 Ky. 15, 4 S. W. 914.

Upon whom served.— Service of the order of revival must be made on the same parties upon whom the subpœna would have to be served if a bill of revivor was filed (Wilkinson *v.* Parish, 3 Paige (N. Y.) 653), and service upon the attorney of record is insufficient unless a summons may be so served (Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130).

Appearance as waiver of service.—A failure to serve a conditional order of revivor goes only to the jurisdiction of the person and is waived by a voluntary general appearance. Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130. To same effect is Bently *v.* Gregory, 7 T. B. Mon. (Ky.) 368.

47. Underhill *v.* Crawford, 18 How. Pr. (N. Y.) 112, 29 Barb. (N. Y.) 664. See also Riley *v.* Gitterman, 55 Hun (N. Y.) 605, 24 Abb. N. Cas. (N. Y.) 89, 10 N. Y. Suppl. 38, wherein it was held that an improper order of revival made by the court of appeals cannot be collaterally attacked, but can be remedied only by an application to vacate the order.

48. *Alabama.*— Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Evans *v.* Welch, 63 Ala. 250.

Florida.— Parker *v.* Hendry, 8 Fla. 53.

Indiana.—Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787.

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kentucky.— French *v.* Frazier, 7 J. J. Marsh. (Ky.) 425.

Massachusetts.— Guild *v.* Richardson, 6 Pick. (Mass.) 364.

Michigan.— Mason *v.* Finch, 28 Mich. 282.

New Jersey.—Havens *v.* Seashore Land Co., 57 N. J. Eq. 142, 41 Atl. 755; Marlatt *v.* Warwick, 19 N. J. Eq. 439.

New York.— Moore *v.* Hamilton, 44 N. Y. 666; People *v.* Donohue, 19 N. Y. Suppl. 36; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Tindal *v.* Jones, 11 Abb. Pr. (N. Y.) 258, 19 How. Pr. (N. Y.) 469; Carpenter *v.* Willett, 28 How. Pr. (N. Y.) 376.

Oregon— White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515.

Tennessee.— Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Reed *v.* Brewer, Peck (Tenn.) 275.

Texas.— McCampbell *v.* Henderson, 50 Tex. 601.

United States.—Green *v.* Watkins, 6 Wheat. (U. S. 260, 5 L. ed. 256; Hatfield *v.* Bushnell, 1 Blatchf. (U. S.) 393, 11 Fed. Cas. No. 6,211; Trigg *v.* Conway, Hempst. (U. S.) 711, Fed. Cas. No. 14,173.

England.— 1 Bacon Abr. 11.

Canada.— Burke *v.* Pyne, 2 Ch. Chamb. (U. C.) 193.

Defendant succeeding to interest of co-defendant.—Where, pending an equitable action, the principal defendant dies and the title and interest in the subject-matter of the suit descends to his co-defendants as his heirs, they take his rights of remedy and defense without prejudice by reason of their own stand as defendants in court. Harper *v.* Drake, 14 Iowa 533.

Order of reference is not affected by the death or substitution of a new party. Moore *v.* Hamilton, 44 N. Y. 666.

49. Stimpson *v.* Judge, 41 Mich. 3; Rogers *v.* Paterson, 4 Paige (N. Y.) 450; Douglass *v.* Sherman, 2 Paige (N. Y.) 358.

Failure to change title.— In Brandt *v.* Albers, 6 Nebr. 504, it was held that where, upon the death of plaintiff, there is an order of revivor in the name of the administrator duly entered, the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered. It is a mistake that may be remedied on motion even after judgment.

50. Thorpe *v.* Starr, 17 Ill. 199. See also Montgomery *v.* Sawyer, 100 U. S. 571, 25 L. ed. 692, wherein it was held that in Louisiana, if a person dies pending suit against him and the proceedings are continued by his heirs becoming parties, the judgment should be against his succession or them. If, without reference to the revival of the suit, it be entered only against the deceased *eo nomine* and be so recorded, it is, as a judicial mortgage, void against third persons. But see Clow *v.* Brown, 1 Yeates (Pa.) 324, wherein it was held that where no declaration has been filed in plaintiff's lifetime, and the suit has been continued after his death, it must be filed in the name of the original party. To the same effect is Haussman *v.* Reiss, 11 Phila. (Pa.) 196, 33 Leg. Int. (Pa.) 83.

substitution of his administrator do not constitute a sufficient ground for the continuance of the action.[51]

d. Publication De Novo. On the continuance of an action on the death of a plaintiff, publication against defendant should commence *de novo* and continue for the requisite time.[52]

e. Pleadings. On the revival or continuance of an action the pleadings remain the same as before.[53] They need not be altered by the insertion of the name of the substituted party.[54]

f. Evidence. Evidence properly taken in a cause before the death of a party remains admissible, and is properly used on the final hearing on the revival of the cause.[55]

g. Amount Recoverable. It has been held that as an administrator succeeds to the cause of action as it existed at the time of the death of his intestate he may recover just such damages as the intestate would have been entitled to recover if he had survived.[56] But where a right of action for damages which can survive involves (mingled with but separable from such damages), other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor.[57]

51. Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791; Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408. But see Grove *v.* Grove, (Ky. 1892) 18 S. W. 456, wherein it was held that where a propounder of a will dies before term-time and a revivor is necessary, the contestants are entitled to a continuance. See also Minor *v.* Jones, 4 Hen. & M. (Va.) 480, wherein it was held that the party against whom a suit is revived is allowed one term after the return of process to prepare for trial. But as the rule is for such party's benefit he may waive it. Chew *v.* Hoe, 4 Hen. & M. (Va.) 489. And see St. Clair *v.* Hotchkiss, 28 Tex. 474, wherein it was held that unless a representative of a deceased party to a suit in the district court has been served with scire facias to revive five days before the term, he is not liable to answer at the return-term.

52. Reilly *v.* Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540.

53. Bentley *v.* Dickson, 1 Ark. 165; Moore *v.* Hamilton, 44 N. Y. 666; People *v.* Donohue, 64 Hun (N. Y.) 635, 19 N. Y. Suppl. 36. See also Woodhouse *v.* Lee, 6 Sm. & M. (Miss.) 161, wherein it was held that where a defendant dies pending suit and his administrators are brought in by scire facias, a plea filed during the lifetime of the intestate will be considered as the plea of the administrators if they omit to file a plea to the scire facias.

Amendment of complaint.— In Shirk *v.* Coyle, 2 Ind. App. 354, 27 N. E. 638, it was held that where a defendant dies pending suit and the suit is properly revived against his administrator, the court has jurisdiction of any cause of action stated in any amendment properly allowed to the complaint, though such amendment is allowed after the substitution has taken place.

Filing new declaration.—Where an executor, pending a suit against him, dies after *narr.* filed, and the administrator is made a party, a new *narr.* need not be filed. Mitchell *v.* Williamson, 9 Gill (Md.) 71.

54. Towns *v.* Mathews, 91 Ga. 546, 17 S. E. 955; Hoes *v.* Van Alstyne, 20 Ill. 201; Stimpson *v.* Judge, 41 Mich. 3; Webster *v.* Hitchcock, 11 Mich. 56; Douglass *v.* Sherman, 2 Paige (N. Y.) 358. But see Central Branch Union Pac. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213, wherein it was held that where an action is revived in the name of the personal representative of deceased plaintiff the petition originally filed should be amended so as to allege, in an issuable form, his representative capacity and the appointment or authority under which he proceeds. See also Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451, wherein it was held that though a complaint, on the death of defendant and the substitution of his administrator, is not amended so as to aver his death and the appointment of the administrator, yet the defect is merely an informality; and where the administrator appears and answers and the cause appears to have been fairly tried the error is merely an imperfection.

55. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136. See also Russell *v.* Moore, 8 Sm. & M. (Miss.) 700, wherein it was held that where an appeal is taken from a justice to the circuit court, and plaintiff dies, and the suit is revived in the name of his administrator before trial is had in the circuit court, the administrator will be permitted to prove, on the trial in such court, what the plaintiff stated when examined on oath before the justice.

56. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Exemplary damages for wrongful attachment.— The death of plaintiff pending suit for wrongful attachment, and the substitution of his administrator, will not prevent the recovery of exemplary damages which might have been recovered by decedent himself. Union Mill Co. *v.* Prenzler, 100 Iowa 540, 69 N. W. 876.

57. Cregin *v.* Brooklyn Crosstown R. Co., 83 N. Y. 595, 38 Am. Rep. 474.

IV. Transfer or Devolution of Title, Right, Interest, or Liability.[58]

A. Abatement or Survival of Action — 1. Plaintiff's Title, Right, or Interest — a. Statement of Rule — (I) *At Common Law.* At common law the termination, or transfer *pendente lite*, of the interest of the plaintiff in the subject-matter of the action abated it.[59]

(II) *In Equity.* It is also a well-settled principle that a complainant in equity suing in his own right, and alone, cannot, after he has parted with his whole interest in the subject-matter of the litigation, further prosecute the suit.[60] It has been held, however, that a transfer by plaintiff of part only of his interest will not abate the suit.[61]

(III) *Under the Statute.* The common-law rule above stated has been abrogated, however, in most of the states; and it is now the general American doctrine that the termination or transfer of plaintiff's interest in the subject-matter of the action after the commencement thereof furnishes no ground for abatement.[62]

58. As to effect of assignment generally, see Assignments.

As to effect of assignment for benefit of creditors, see Assignments for Benefit of Creditors.

As to effect of bankruptcy, see Bankruptcy.

As to effect of insolvency, see Insolvency.

59. *Maine.*— Rowell *v.* Hayden, 40 Me. 582; Howard *v.* Chadbourne, 5 Me. 15.

Maryland.— Cresap *v.* Hutson, 9 Gill (Md.) 269.

Massachusetts.— Wolcot *v.* Knight, 6 Mass. 418.

New Hampshire.— Bailey *v.* March, 2 N. H. 522.

Pennsylvania.— McCulloch *v.* Cowher, 5 Watts & S. (Pa.) 427.

United States.— Elliot *v.* Teal, 5 Sawy. (U. S.) 188, 8 Fed. Cas. No. 4,389.

Release obtained by duress.— In Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438, it was held that a release obtained from plaintiff by duress does not abate the suit.

Severance of joint interest.— Where parties having a joint right of action bring suit and pending the litigation sever their interests, the suit will not abate. Alford *v.* Dewin, 1 Nev. 207.

Transfer of negotiable instrument.—An action on a promissory note transferred pending suit cannot be further maintained even though it was agreed at the time of the transfer that it should be continued in the name of the plaintiff. Hayden *v.* Goodnow, 39 Conn. 164; Clark *v.* Connecticut Peat Co., 35 Conn. 303; Vila *v.* Weston, 33 Conn. 42; Curtis *v.* Bemis, 26 Conn. 1, 68 Am. Dec. 377; Lee *v.* Jilson, 9 Conn. 94; Rothschild *v.* Bruschke, 33 Ill. App. 282. *Contra*, Dolberry *v.* Trice, 49 Ala. 207; Keyser *v.* Shepherd, 2 Mackey (D. C.) 66; Newberry *v.* Trowbridge, 13 Mich. 263; Arnold *v.* Keyes, 37 N. Y. Super. Ct. 135; Converse *v.* Sorley, 39 Tex. 515.

Transfer of part interest.— Where a plaintiff assigns a part only of his interest in the subject-matter of the suit, an objection that the suit has abated will be overruled. McDonell *v.* Upper Canada Min. Co., 2 Ch. Chamb. (U. C.) 400.

60. 2 Daniel Ch. Pr. § 1518; Story Eq. Pl. § 348.

Illinois.— Smith *v.* Brittenham, 109 Ill. 540.

Maine.— Mason *v.* York, etc., R. Co., 52 Me. 82.

Michigan.— Bigelow *v.* Booth, 39 Mich. 622; Brewer *v.* Dodge, 28 Mich. 359; Perkins *v.* Perkins, 16 Mich. 162; Webster *v.* Hitchcock, 11 Mich. 56; Wallace *v.* Dunning, Walk. (Mich.) 416.

New Jersey.— Johnson *v.* Clarke, (N. J. 1894) 28 Atl. 558; Fulton *v.* Greacen, 44 N. J. Eq. 443, 15 Atl. 827.

New York.— Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33; Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287.

Rhode Island.—Bailey *v.* Smith, 10 R. I. 29.

Wisconsin.— Boyle *v.* Laird, 2 Wis. 431.

United States.— Tappan *v.* Smith, 5 Biss. (U. S.) 73, 23 Fed. Cas. No. 13,748; Hoxie *v.* Carr, 1 Sumn. (U. S.) 173, 12 Fed. Cas. No. 6,802; Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003.

England.— Binks *v.* Binks, 2 Bligh 593.

Reassignment.— Where a complainant in a suit in chancery assigns his interest in the subject-matter of the suit *pendente lite* and obtains a reassignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the court by a bill in the nature of a bill of revivor, but the party may proceed in the same manner as if no such assignment had been made. Scouten *v.* Bender, 1 Barb. Ch. (N. Y.) 647.

61. Begole *v.* Hershey, 86 Mich. 130, 48 N. W. 790. See also Sharon *v.* Terry, 36 Fed. 337, 1 L. R. A. 572, wherein it was held that the transfer of plaintiff's property pending a suit to cancel a forged marriage contract will not abate the suit if plaintiff retains a right during his life to claim the rents and profits of the property.

62. *Alabama.*— Dolberry *v.* Trice, 49 Ala. 207.

California.— California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599; Walker *v.* Felt, 54 Cal. 386; Camarillo *v.* Fenlon, 49 Cal. 202; Barstow *v.* Newman, 34 Cal. 90; Moss *v.* Shear, 30 Cal. 467.

Colorado.— Perkins *v.* Marrs, 15 Colo. 262, 25 Pac. 168.

b. Transfer by Plaintiff to Co-Plaintiff. A transfer by a plaintiff of his interest in the action to a co-plaintiff during the pendency of the suit is no ground for dismissal.[63]

c. Transfer by Plaintiff to Defendant. If, pending a real action, the title to the land in question and the right of possession pass from plaintiff to defendant, this fact may be pleaded to the further maintenance of the suit.[64] It has been held, however, that if one plaintiff in a suit has assigned his interest in the cause of action to the defendants, the remaining plaintiffs may proceed with the suit and recover the judgment to which they are entitled.[65]

2. Defendant's Title, Interest, or Liability. An assignment, by a defendant, of his interest in the subject-matter of a pending suit does not necessarily defeat the suit.[66] But it has been held that where one of several defendants

District of Columbia.— Keyser *v.* Shepherd, 2 Mackey (D. C.) 66.

Georgia.— Wood *v.* McGuire, 21 Ga. 576.

Indiana.— Mathis *v.* Thomas, 101 Ind. 119; Taylor *v.* Elliott, 52 Ind. 588; Keller *v.* Miller, 17 Ind. 206.

Iowa.— Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Price *v.* Baldauf, 90 Iowa 205, 57 N. W. 710; Chickasaw County *v.* Pitcher, 36 Iowa 593; Jordan *v.* Ping, 32 Iowa 64.

Kansas.— Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279; Crocker *v.* Ball, (Kan. App. 1900) 59 Pac. 691.

Kentucky.— Smith *v.* Price, (Ky. 1890) 13 S. W. 428; Bonta *v.* Clay, 5 Litt. (Ky.) 129; Jackson *v.* Jeffries, 1 A. K. Marsh. (Ky.) 88.

Louisiana.— Blake *v.* State Bank, 22 La. Ann. 572.

Maine.— Berry *v.* Whitaker, 58 Me. 422.

Massachusetts.— Hooton *v.* Holt, 139 Mass. 54, 29 N. E. 221; Casey *v.* King, 98 Mass. 503; King *v.* Lawson, 98 Mass. 309; Blish *v.* Harlow, 15 Gray (Mass.) 316.

Michigan.— McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868; Rajnowski *v.* Detroit, etc., R. Co., 78 Mich. 681, 44 N. W. 335; Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888; Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381; Michigan Cent. R. Co. *v.* McNaughton, 45 Mich. 87, 7 N. W. 712; Moon *v.* Harder, 38 Mich. 566; Peters *v.* Gallagher, 37 Mich. 407.

Minnesota.— Chisholm *v.* Chitherall, 12 Minn. 375; Whitacre *v.* Culver, 9 Minn. 295.

Missouri.— State *v.* Philips, 97 Mo. 331, 10 S. W. 855; Smith *v.* Phelps, 74 Mo. 598; Spurlock *v.* Sproule, 72 Mo. 503; Green's Bank *v.* Wickham, 23 Mo. App. 663.

Montana.— Campbell *v.* Irvine, 17 Mont. 476, 43 Pac. 626.

Nebraska.— Howell *v.* Alma Milling Co., 36 Nebr. 80, 54 N. W. 126, 38 Am. St. Rep. 694; Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604; Dodge *v.* Omaha, etc., R. Co., 20 Nebr. 276, 29 N. W. 936; Temple *v.* Smith, 13 Nebr. 513, 14 N. W. 527; Magemau *v.* Bell, 13 Nebr. 247, 13 N. W. 277.

Nevada.— Virgin *v.* Brubaker, 4 Nev. 31.

New York.— McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647; Hirshfeld *v.* Bopp, 27 N. Y. App. Div. 180, 50 N. Y. Suppl. 676; Mutual Bank *v.* Burrell, 29 Misc. (N. Y.) 322, 60 N. Y. Suppl. 522; Boston Woven Hose, etc., Co. *v.* Jackson, 25 Misc. (N. Y.) 781, 55 N. Y. Suppl. 573; Pegram *v.* New York El. R. Co., 8 Misc. (N. Y.) 425, 28 N. Y. Suppl. 592; Arnold *v.* Keyes, 37 N. Y. Super. Ct. 135; Moss *v.* New York El. R. Co., 27 Abb. N. Cas. (N. Y.) 318, 17 N. Y. Suppl. 586; Van Rensselaer *v.* Owen, 33 How. Pr. (N. Y.) 12; Emmet *v.* Bowers, 23 How. Pr. (N. Y.) 300; St. John *v.* Croel, 10 How. Pr. (N. Y.) 253; Ford *v.* David, 1 Bosw. (N. Y.) 569.

North Carolina.— Murray *v.* Blackledge, 71 N. C. 492.

Pennsylvania.— McClure *v.* McClure, 1 Phila. (Pa.) 117, 7 Leg. Int. (Pa.) 195.

Texas.— Lee *v.* Salinas, 15 Tex. 495; Ostrom *v.* Layer, (Tex. Civ. App. 1898) 48 S. W. 1095; Drouilhet *v.* Pinckard, (Tex. Civ. App. 1897) 42 S. W. 135; Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

Wisconsin.—La Pointe *v.* O'Malley, 47 Wis. 332, 2 N. W. 632; Noonan *v.* Orton, 31 Wis. 265, 34 Wis. 259, 17 Am. Rep. 441.

United States.— Rodgers *v.* Pitt, 96 Fed. 668; Elliot *v.* Teal, 5 Sawy. (U. S.) 188, 8 Fed. Cas. No. 4,389; French *v.* Edwards, 4 Sawy. (U. S.) 125, 9 Fed. Cas. No. 5,097.

Ejectment.— In Michigan the general rule that judgment in ejectment is determined by the state of the title at the beginning of suit is modified by Mich. Comp. Laws, § 6232, which makes the expiration of plaintiff's title pending suit and before trial operate in partial abatement of the action. Hurd *v.* Raymond, 50 Mich. 369, 15 N. W. 514.

63. Luebbering *v.* Oberkoetter, 1 Mo. App. 393; Magemau *v.* Bell, 13 Nebr. 247, 13 N. W. 277. See also Coburn *v.* Palmer, 8 Cush. (Mass.) 124, wherein it was held that an action by two landlords, under Mass. Rev. Stat. c. 104, against a tenant is not abated by a release of his interest by one plaintiff to the other. But see McCulloch *v.* Cowher, 5 Watts & S. (Pa.) 427, wherein it was held that where one of two plaintiffs conveys his interest to his co-plaintiff after action brought, such co-plaintiff cannot recover.

64. Leavitt *v.* School Dist. No. 19, 78 Me. 574, 7 Atl. 600.

65. McPike *v.* McPherson, 41 Mo. 521.

66. Moseley *v.* Albany Northern R. Co., 14 How. Pr. (N. Y.) 71; *Ex p.* South, etc., Alabama R. Co., 95 U. S. 221, 24 L. ed. 355.

In detinue, if, after action brought and issue joined, plaintiff gets possession of the thing sued for, that fact may be pleaded since the last continuance in abatement of the suit,

assigns to the complainant, the suit abates if the principal relief was sought against such defendant.[67]

3. Termination or Devolution of Representative or Official Capacity[68] — **a. Actions by or against Executors and Administrators.** Authorities are not wanting which hold that an action by or against an executor or administrator as such is not abated by the resignation, discharge, or removal of such executor or administrator pending the action.[69]

b. Actions by Guardians — (1) *In General.* An action by a guardian as such is not abated by his resignation or removal pending the action.[70]

but it seems that it would not be a good plea in bar. Morgan *v.* Cone, 18 N. C. 234 [*overruling* Merritt *v.* Merritt, 1 N. C. 1].

Transfer to co-defendant.— In partition, where some defendants have conveyed their interest to others, the suit may be dismissed as to the alienors, or the jury may find in their favor on a plea of *non tenent insimul*, but the suit will not be dismissed entirely. McClure *v.* McClure, 1 Phila. (Pa.) 117, 7 Leg. Int. (Pa.) 195.

67. Widner *v.* Olmstead, 14 Mich. 124.

Dissolution of municipal corporation.— In Bowlby *v.* Dover, (N. J. 1899) 44 Atl. 844, it appeared that a certiorari was issued against a city corporation pending proceedings by quo warranto to dissolve it, and before the certiorari was brought to a hearing a judgment of ouster was rendered, and the municipal government passed into the control of a previously existing town corporation. It was held that judgment should not be pronounced on the certiorari unless the town corporation was brought into court, and, the prosecutor having failed to bring it in before the hearing, the certiorari should be dismissed. See also Plunkett's Creek Tp. *v.* Crawford, 27 Pa. St. 107; O'Connor *v.* Memphis, 6 Lea (Tenn.) 730.

Voluntary dissolution of corporation.— In Owen *v.* Kellogg, 56 Hun (N. Y.) 455, 10 N. Y. Suppl. 75, it was held that there is no "devolution of liability" where a receiver is appointed on the voluntary dissolution of a corporation, within N. Y. Code Civ. Proc. § 756, providing that in case of a "devolution of liability" an action may be continued against the original party unless the court directs the person on whom the liability is devolved to be substituted in the action or joined with the original party, as the case requires. *Compare* People *v.* Troy Steel, etc., Co., 82 Hun (N. Y.) 303, 31 N. Y. Suppl. 337.

68. See case cited *infra*, notes 69–76.

69. *Alabama.*—Lunsford *v.* Lunsford, (Ala. 1899) 25 So. 171; *Ex p.* Jones, 54 Ala. 108; Townsend *v.* Jeffries, 24 Ala. 329; Witherington *v.* Brantley, 18 Ala. 197; Elliott *v.* Eslava, 3 Ala. 568.

Arkansas.— Hill *v.* Bryant, 61 Ark. 203, 32 S. W. 506.

California.— Peck *v.* Agnew, 126 Cal. 607, 59 Pac. 125.

Massachusetts.—National Bank *v.* Stanton, 116 Mass. 435.

Mississippi.— Cox *v.* Martin, 75 Miss. 229, 21 So. 611, 65 Am. St. Rep. 604, 36 L. R. A. 800.

Nebraska.— Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219.

South Carolina.— Henderson *v.* McClure, 2 McCord Eq. (S. C.) 466.

Texas.— Hall *v.* Pearman, 20 Tex. 168.

United States.— Taylor *v.* Savage, 1 How. (U. S.) 282, 11 L. ed. 132, 2 How. (U. S.) 395, 11 L. ed. 313.

But see Vaugh *v.* Cox, 27 Miss. 701, wherein it was held that a bill to enjoin an executor from removing decedent's property, in possession of complainants, out of the state, with a view of defeating the rights of complainants as creditors, and to require the executor to apply the property in payment of complainants' debt and to permit complainants to retain the property until such security should be given, abates on the resignation of the executor and should not be revived against administrators *de bonis non* appointed by the probate court. See also Gormly *v.* Skinner, Wright (Ohio) 680, wherein it was held that in the absence of a saving statute the removal of an executor pending an action against him as such abates the suit.

Action for account.— Pending a suit against an administrator for an account, and where the cause was nearly ready for a decree, the administration was revoked and administration was immediately granted to another person. It was held that the plaintiff might proceed to a decree by making the new administrator a party to the suit. Henderson *v.* McClure, 2 McCord Eq. (S. C.) 466.

Pendency of removal proceedings.— The pendency of proceedings to remove an administrator *de bonis non* is not a ground for staying or abating proceedings in an action brought by him. Langsdale *v.* Woollen, 99 Ind. 575.

Public administrator.— A suit by or against a public administrator does not abate by such administrator's going out of office pending the action. Russell *v.* Erwin, 41 Ala. 292; Carley *v.* Barnes, 11 Ark. 291; Burras *v.* Looker, 2 Edw. (N. Y.) 499. And where, pending a suit against the ordinary who had taken charge of a derelict estate to enforce a debt of the intestate, the act under which the suit was instituted was repealed, a plea setting up such repeal in abatement is insufficient without a further plea of *plene administravit* or *plene administravit præter*. Strobhart *v.* Morrall, 7 Rich. (S. C.) 140.

70. Horning *v.* Poyer, 18 Ohio Cir. Ct. 732. See also Wade *v.* Carpenter, 4 Iowa 361, wherein it was held that the resignation of a guardian pending proceedings for the sale of his ward's realty does not abate such proceedings.

(II) *Attainment of Majority by Infant Pending Suit.* A suit by a guardian or by an infant by his next friend is not abated by the coming of age of the ward or infant pending the suit.[71]

c. Actions by or against Public Officers — (I) *In General.* An action by or against a public officer is not abated by a change in the incumbency of the office pending the action, if the action is in its nature by or against the office.[72] But if the delinquency of a public officer is personal and does not involve any charge against the office itself the rule is otherwise.[73]

71. *Georgia.*— Lasseter *v.* Simpson, 78 Ga. 61; Sims *v.* Renwick, 25 Ga. 58.

Indiana.— Holmes *v.* Adkins, 2 Ind. 398.

Iowa.— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

Kentucky.— Clements *v.* Ramsey, (Ky. 1887) 4 S. W. 311.

Mississippi.— Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898.

New York.— Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

Ohio.— Gard *v.* Neff, 39 Ohio St. 607; Hanly *v.* Levin, 5 Ohio 227.

South Carolina.—Shuttlesworth *v.* Hughey, 6 Rich. (S. C.) 329, 60 Am. Dec. 130.

Texas.— Zachary *v.* Gregory, 32 Tex. 452. See also Simpson *v.* Belvin, 37 Tex. 674.

England.— Ballard *v.* White, 2 Hare 158, 7 Jur. 506; Anonymous, Cary 22.

See also Hamlin *v.* Stevenson, 4 Dana (Ky.) 597, wherein it was held that the infancy of plaintiff and the want of a next friend cannot be pleaded in abatement after plaintiff has become of age, though the suit was brought while he was under age. To same effect is Woodman *v.* Rowe, 59 N. H. 453.

72. *Alabama.*— Smith *v.* Inge, 80 Ala. 283; Russell *v.* Erwin, 41 Ala. 292.

Arkansas.— Edrington *v.* Mathews, 30 Ark. 665; Carley *v.* Barnes, 11 Ark. 291.

Colorado.—Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893.

Florida.— Columbia County *v.* Bryson, 13 Fla. 281.

Kentucky.— Clark *v.* McKenzie, 7 Bush (Ky.) 523; Lindsey *v.* Auditor, 3 Bush (Ky.) 231; Maddox *v.* Graham, 2 Metc. (Ky.) 56; Louisville *v.* Kean, 18 B. Mon. (Ky.) 9.

Maryland.— State *v.* Dorsey, 3 Gill & J. (Md.) 75.

Massachusetts.— Holten *v.* Cook, 12 Mass. 574.

Michigan.— People *v.* Treasurer, 37 Mich. 351.

Mississippi.— McDuff *v.* Beauchamp, 50 Miss. 531; Hardee *v.* Gibbs, 50 Miss. 802.

Nebraska.— State *v.* Cole, 25 Nebr. 342, 41 N. W. 245.

New York.— Griggs *v.* Griggs, 56 N. Y. 504; Board of Excise *v.* Garlinghouse, 45 N. Y. 249; Manchester *v.* Herrington, 10 N. Y. 164; People *v.* Carson, 78 Hun (N. Y.) 544, 29 N. Y. Suppl. 619; People *v.* Board of Police Com'rs, 23 Hun (N. Y.) 351; People *v.* Cram, 30 Misc. (N. Y.) 561, 63 N. Y. Suppl. 1027; Colegrove *v.* Breed, 2 Den. (N. Y.) 125; People *v.* Collins, 19 Wend. (N. Y.) 56; People *v.* Champion, 16 Johns. (N. Y.) 61; Matter of City Bank, 10 Paige (N. Y.) 378; Burras *v.* Looker, 2 Edw. (N. Y.) 499; Flynn *v.* Cornell, 24 N. Y. Wkly. Dig. 2.

North Carolina.— State *v.* McKee, 98 N. C. 500, 4 S. E. 545; Pegram *v.* Cleaveland County, 65 N. C. 114; Anonymous, 2 N. C. 166.

Ohio.— Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690; Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317.

Pennsylvania.— Com. *v.* Overseers of Poor, 4 Kulp (Pa.) 87.

Rhode Island.— Saunders *v.* Pendleton, 19 R. I. 659, 36 Atl. 425.

South Carolina.— Clowney *v.* Foote, 1 Hill (S. C.) 421.

Tennessee.—State *v.* Puckett, 7 Lea (Tenn.) 709; Felts *v.* Memphis, 2 Head (Tenn.) 650.

Virginia.— Chapline *v.* Overseers of Poor, 7 Leigh (Va.) 231, 30 Am. Dec. 504.

Wisconsin.— State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; State *v.* Gates, 22 Wis. 210; State *v.* Madison, 15 Wis. 30.

United States.— Thompson *v.* U. S., 103 U. S. 480, 26 L. ed. 521; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333.

Action by foreign sovereign.— An action by a foreign sovereign does not abate by a change in the person of the sovereign pending the suit. The Sapphire, 11 Wall. (U. S.) 164, 20 L. ed. 127.

Action for teacher's wages.—A suit against the trustees of a school district to recover a teacher's wages does not abate and is not discontinued by the expiration of defendants' term of office pending the suit. Colegrove *v.* Breed, 2 Den. (N. Y.) 125.

Proceedings in mandamus do not abate by the expiration of defendant's term of office where there is a continuing duty irrespective of the incumbent and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached.

Florida.— Columbia County *v.* Bryson, 13 Fla. 281.

Michigan.— People *v.* Treasurer, 37 Mich. 351.

New York.— People *v.* Collins, 19 Wend. (N. Y.) 56; People *v.* Champion, 16 Johns. (N. Y.) 61.

Pennsylvania.— Com. *v.* Overseers of Poor, 4 Kulp (Pa.) 87.

United States.— Thompson *v.* U. S., 103 U. S. 480, 26 L. ed. 521; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333.

Contra, State *v.* Guthrie, 17 Nebr. 113, 22 N. W. 77.

73. *Ex p.* Rowe, 7 Cal. 175; Beachy *v.* Lamkin, 1 Idaho 50; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 17 S. Ct. 225, 41

(II) *Abolition of Office and Creation of New One.* It has been held that a suit by or against a public officer is not abated by the enactment, pending the suit, of a statute abolishing the office and creating a new one in its stead.[74]

d. Actions by Receivers. It has been held that the removal of a receiver of a corporation pending an action brought by him as receiver does not abate the action.[75]

e. Actions by Trustees. Where the trustee of an express trust commences an action on a cause of action relating to the trust estate and resigns or is removed the action is not thereby abated.[76]

B. Continuance or Revival of Action — 1. By and against Whom Action May Be Continued or Revived — a. On Change of Executor or Administrator. On the resignation, removal, or discharge of a personal representative pending an action brought by or against him in his representative capacity the action should be continued in the name of his successor in the administration.[77]

b. On Change of Guardian. Where, pending a suit by a guardian, a new

L. ed. 621; U. S. *v.* Lochren, 164 U. S. 701, 17 S. Ct. 1001, 41 L. ed. 1181; U. S. *v.* Chandler, 122 U. S. 643; U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721; Secretary *v.* McGarrahan, 9 Wall. (U. S.) 298, 19 L. ed. 579.

Filing additional bond.— A suit to compel an officer to file an additional office bond abates on his resignation of the office. *Ex p.* Rowe, 7 Cal. 175.

74. People *v.* Cram, 30 Misc. (N. Y.) 561, 63 N. Y. Suppl. 1027; Board of Excise *v.* Garlinghouse, 45 N. Y. 249; Hemingway *v.* Stansell, 106 U. S. 399, 1 S. Ct. 473, 27 L. ed. 245. See also State *v.* Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 21 L. R. A. 189, wherein it was held that the Florida act of June 9, 1891, which gives to the board of phosphate commissioners control of the phosphate interests of the state and authorizes it to institute suits and legal proceedings in the name of the state to protect such interests, does not abate an action previously instituted by the attorney-general in the name of the state. But see Judges *v.* Phillips, 2 Bay (S. C.) 519, wherein it was held that where a suit is brought in the name of "the judges of the county court," and the court is abolished, it is a good plea in abatement that there are no such judges.

Action by use plaintiff.— Where a levy court is abolished pending a suit brought in the name of the state for the use of that court against the obligors in a collector's bond, a plea in abatement *puis darrein continuance* that the court was abolished will not stop the further prosecution of the suit. State *v.* Dorsey, 3 Gill & J. (Md.) 75.

75. Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658; Sheldon *v.* Adams, 18 Abb. Pr. (N. Y.) 405.

76. Dumas *v.* Robbins, 48 Ala. 545; Cobb *v.* Edmondson, 30 Ga. 30; Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.) 407.

Trustees of charity.— If, pending a suit by trustees of a charity, one of the plaintiffs resigns, this may be pleaded in abatement. Adams *v.* Leland, 7 Pick. (Mass.) 62.

77. *Alabama.*—Lunsford *v.* Lunsford, (Ala. 1899) 25 So. 171; Brown *v.* Tutwiler, 61 Ala. 372; Townsend *v.* Jeffries, 24 Ala. 329; Elliott *v.* Eslava, 3 Ala. 568.

California.— More *v.* More, 127 Cal. 460, 59 Pac. 823.

Massachusetts.—National Bank *v.* Stanton, 116 Mass. 435; Conkey *v.* Kingman, 24 Pick. (Mass.) 115.

Mississippi.— Cox *v.* Martin, 75 Miss. 229, 21 So. 611, 65 Am. St. Rep. 604, 36 L. R. A. 800.

Nebraska.— Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219.

New Jersey.— Trimmer *v.* Todd, 52 N. J. Eq. 426, 28 Atl. 581.

Ohio.— Greer *v.* Howard, 41 Ohio St. 591; Matter of Dunham, 8 Ohio Cir. Ct. 160.

United States.— Taylor *v.* Savage, 1 How. (U. S.) 282, 11 L. ed. 132, 2 How. (U. S.) 395, 11 L. ed. 313.

Change of one of several representatives.— If there be more than one personal representative the suit will proceed in the name of or against those remaining. Elliott *v.* Eslava, 3 Ala. 568.

Public administrator.— Where a public administrator goes out of office a suit brought by or against him may be revived in the name of his successor in the administration. Russell *v.* Erwin, 41 Ala. 292; Carley *v.* Barnes, 11 Ark. 291; Burras *v.* Looker, 2 Edw. (N. Y.) 499.

Reinstatement of administrator.— Under Sand. & H. Ark. Dig. (1894) § 5925, providing that when one's powers as personal representative cease before judgment the action may be revived if the right of action survive in favor of his successor, an action by an administrator that had been abated by the revocation pending the action of his letters of administration may be revived by him on his subsequent reinstatement as administrator. Hill *v.* Bryant, 61 Ark. 203, 32 S. W. 506.

Waiver of failure to revive.— Where an action is commenced by an administrator who is discharged before judgment is rendered, defendants waive revivor in the proper parties when, with notice of the discharge, they fail to plead it. Bailey *v.* Rockafellow, 57 Ark. 216, 21 S. W. 227.

guardian is appointed, the court may order the latter substituted and that the action proceed in his name.[78]

c. On Change in Incumbency of Public Office. In case of a change in the incumbency of a public office the action may proceed as commenced,[79] or the new incumbent may be substituted.[80]

d. On Change of Receiver. On the resignation or removal of the receiver of a corporation pending an action brought by him as such receiver the action may still be prosecuted in his name,[81] or the new receiver may be substituted as plaintiff.[82]

e. On Change of Trustee. On the resignation of a trustee of an express trust

78. Horning *v.* Poyer, 18 Ohio Cir. Ct. 732.

79. Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690; Clowney *v.* Foote, 1 Hill (S. C.) 421.

Actions by attorney-general.—In New York the duty prescribed by the code in relation to actions by the people is an official one pertaining to the office of attorney-general and not to the person who at any time happens to be the incumbent of the office; it is a duty which goes with the office and devolves in turn upon each incumbent, and it is contrary to the theory of the action that each successive incumbent of the office of attorney-general should be required to be individually substituted for his predecessor by an order of the court before he can proceed in behalf of the people with the prosecution of those actions which are pending when he succeeds to such office. People *v.* Carson, 78 Hun (N. Y.) 544, 29 N. Y. Suppl. 619.

Action by or against highway commissioner.— In New York, in an action brought by or against a commissioner of highways as such, his opponent, if successful, is entitled to a personal judgment against him, and therefore his successor in office cannot be substituted in his place as a party to such action, even though such successor consents to be so substituted. Hitchman *v.* Baxter, 5 N. Y. Civ. Proc. 226.

Action by overseers of poor.— Where the term of office of one of two overseers of the poor expired, and his successor was elected and qualified after the commencement of the circuit at which the cause was tried, but before the trial, there is no ground of nonsuit or any objection to a recovery in the name of plaintiffs upon the record. Manchester *v.* Herrington, 10 N. Y. 164.

Action by town supervisor.— Under N. Y. Code, § 1926, providing that when the term of a town supervisor expires pending an action brought by him the court may, "in a proper case," substitute his successor as plaintiff, it is ground for a refusal to make such substitution that it is desired apparently rather for the purposes of defendant than for anything else. Farnham *v.* Benedict, 29 Hun (N. Y.) 44.

80. *Alabama.*— Smith *v.* Inge, 80 Ala. 283; Russell *v.* Erwin, 41 Ala. 292.

Arkansas.— Edrington *v.* Mathews, 30 Ark. 665; Carley *v.* Barnes, 11 Ark. 291.

California.— *Ex p.* Tinkum, 54 Cal. 201.

Colorado.— Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893.

Kentucky.— Clark *v.* McKenzie, 7 Bush (Ky.) 523.

Louisiana.— Louisiana Mut. Ins. Co. *v.* Costa, 32 La. Ann. 1.

Massachusetts.— Holten *v.* Cook, 12 Mass. 574.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802.

New York.— Board of Excise *v.* Garlinghouse, 45 N. Y. 249; Flynn *v.* Cornell, 24 N. Y. Wkly. Dig. 2.

North Carolina.— Anonymous, 2 N. C. 166.

Ohio.— Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690.

Rhode Island.— Saunders *v.* Pendleton, 19 R. I. 659, 36 Atl. 425.

Tennessee.— Felts *v.* Memphis, 2 Head (Tenn.) 650; Polk *v.* Plummer, 2 Humphr. (Tenn.) 500, 37 Am. Dec. 556.

Abolition of office.— In Matter of City Bank, 10 Paige (N. Y.) 378, it was held that where a bill has been filed by bank commissioners against an incorporated insolvent bank, and the office of bank commissioners has been abolished, any creditor who has presented and proved his claim, or any creditor who has duly presented his claim and who presents a petition on oath showing the validity of his claim, will be permitted to revive the suit. But see Carson *v.* Cleaveland County, 64 N. C. 566, wherein it was held that the board of county commissioners is the successor, not the representative, of the former county court as regards matters of administration; therefore a suit pending against the latter at the time of its dissolution cannot be revived against the former.

Certiorari.— In People *v.* Oswego County Ct. Sess., 2 Thomps. & C. (N. Y.) 431, an overseer of the poor of a town, as relator, obtained a common-law writ of certiorari to review proceedings in a bastardy case instituted by him. After the writ was served and return thereto made, his term of office expired. It was held that the certiorari was a special proceeding and not an "action" or "suit" under the provisions of 2 N. Y. Rev. Stat. p. 474, § 100, relating to suits by or against certain officers, and his successor in office could not be substituted as relator.

81. Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658.

82. Sheldon *v.* Adams, 18 Abb. Pr. (N. Y.) 405.

pending an action by him on a cause of action relating to the trust estate the action should be continued in the name of his successor in the trust.[83]

f. On Transfer of Interest — (1) *In General.* On the transfer pending suit of plaintiff's interest in the subject-matter in litigation the action may be continued in such plaintiff's name,[84] or the assignee may be substituted as plaintiff[85]

83. Dumas *v.* Robbins, 48 Ala. 545; Cobb *v.* Edmondson, 30 Ga. 30; Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.) 407. See also Dillon *v.* Dougherty, 2 Grant (Pa.) 99, wherein it was held that succeeding trustees may be substituted in ejectment for those by whom the suit was brought. And see Roane *v.* Brodie, 7 Ark. 264, which was an action by fifteen original trustees. Defendant pleaded that since the commencement of the suit plaintiffs ceased to be trustees by limitation of the deed of assignment, and that five residuary trustees had been elected from their number under the provisions of the deed, to whom the assets of the corporation, including the notes sued on, passed. It was held on demurrer that while the election by which the number of original trustees was reduced from fifteen to five did not occasion such a change of interest as would operate to defeat the suit in the names of the latter in case the election of the five and a transfer of the assets to them had been suggested on the record, it was improper to permit the suit to proceed in the names of the entire fifteen.

84. *California.*— Camarillo *v.* Fenlon, 49 Cal. 202; Moss *v.* Shear, 30 Cal. 467.

Colorado.— Perkins *v.* Marrs, 15 Colo. 262, 25 Pac. 168.

District of Columbia.— Keyser *v.* Shepherd, 2 Mackey (D. C.) 66.

Georgia.— Wood *v.* McGuire, 21 Ga. 576.

Illinois.— Rothschild *v.* Bruschke, 33 Ill. App. 282.

Indiana.—Mathis *v.* Thomas, 101 Ind. 119; Taylor *v.* Elliott, 52 Ind. 588.

Iowa.—Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Chickasaw County *v.* Pitcher, 36 Iowa 593; Jordan *v.* Ping, 32 Iowa 64; Allen *v.* Newberry, 8 Iowa 65.

Kansas.— Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279; Crocker *v.* Ball, (Kan. App. 1900) 59 Pac. 691.

Michigan.— McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868; Rajnowski *v.* Detroit, etc., R. Co., 78 Mich. 681, 44 N. W. 335; Peters *v.* Gallagher, 37 Mich. 407; Newberry *v.* Trowbridge, 13 Mich. 263.

Minnesota.— Whitacre *v.* Culver, 9 Minn. 295.

Missouri.— Asher *v.* St. Louis, etc., R. Co., 89 Mo. 116, 1 S. W. 123; Spurlock *v.* Sproule, 72 Mo. 503; Green's Bank *v.* Wickham, 23 Mo. App. 663.

Nebraska.— Dodge *v.* Omaha, etc., R. Co., 20 Nebr. 276, 29 N. W. 936; Temple *v.* Smith, 13 Nebr. 513, 14 N. W. 527.

New York.— Boston Woven Hose, etc., Co. *v.* Jackson, 25 Misc. (N. Y.) 781, 55 N. Y. Suppl. 573; Cuff *v.* Dorland, 7 Abb. N. Cas. (N. Y.) 194.

Ohio.— Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97.

Texas.— Hearne *v.* Erhard, 33 Tex. 60; Ostrom *v.* Layer, (Tex. Civ. App. 1898) 48 S. W. 1095; Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

United States.— Elliot *v.* Teal, 5 Sawy. (U. S.) 188, 8 Fed. Cas. No. 4,389; French *v.* Edwards, 4 Sawy. (U. S.) 125, 9 Fed. Cas. No. 5,097.

Assignment for benefit of creditors.—A bill in equity alleged that petitioner had an interest in certain patents under which respondents were licensees, and a right to a share of the tariffs which they were to pay under their license, and called for an account. While the suit was pending petitioner made an assignment of all his property, including his interest in the patents and his claim on respondents, to a trustee for the benefit of his creditors, with a provision that any surplus of the property that should be left should be returned to him. It was held that this did not so completely devest the petitioner of all interest that he could not further maintain the suit, but that it was necessary that the trustee should be brought in as a party. Judson *v.* Metropolitan Washing Mach. Co., 33 Conn. 467. See also Lawson *v.* Woodstock, 37 Hun (N. Y.) 352, wherein it was held that where plaintiff, pending the action, makes a general assignment for the benefit of creditors, the action may be continued in plaintiff's name, for he still has an interest in whatever surplus there may be.

Part interest.— Pending an action to prevent injury to plaintiff's land and its appurtenances he agreed to sell, but retained title to secure the price. It was held that he could prosecute the action to final determination, since, though there was a change of interest, there was not a transfer of all interest. Price *v.* Baldauf, 90 Iowa 205, 57 N. W. 710.

85. *Alabama.*—Davis *v.* Davis, 93 Ala. 173, 9 So. 736.

California.— California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599.

District of Columbia.— Young *v.* Kelly, 3 App. Cas. (D. C.) 296.

Louisiana.—Towne *v.* Couch, 7 La. Ann. 93.

Minnesota.— Chisholm *v.* Clitherall, 12 Minn. 375.

Missouri.— Neilon *v.* Kansas City, etc., R. Co., 85 Mo. 599; Childs *v.* Thompson, 81 Mo. 337.

Montana.— Campbell *v.* Irvine, 17 Mont. 476, 43 Pac. 626.

Nebraska.— Howell *v.* Alma Milling Co., 36 Nebr. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

Nevada.— Virgin *v.* Brubaker, 4 Nev. 31.

New York.— Hirshfeld *v.* Bopp, 27 N. Y. App. Div. 180, 50 N. Y. Suppl. 676; Moss *v.* New York El. R. Co., 27 Abb. N. Cas. (N. Y.) 318, 17 N. Y. Suppl. 586; Emmet *v.* Bowers, 23 How. Pr. (N. Y.) 300; Shearman *v.* Coman, 22 How. Pr. (N. Y.) 517; St. John *v.*

or be joined with the original plaintiff, as the case may require.[86] But the original plaintiff must still be *in esse* after a transfer in order to permit the proceedings to continue in his name or in the joint names of the original plaintiff and the person to whom the cause of action has been transferred.[87]

(II) *Transfer by Plaintiff to Co-Plaintiff.* It has been held that where one of the plaintiffs, after the commencement of the suit, transfers his interest in the controversy to his co-plaintiffs, such co-plaintiffs may continue the action in their name and to their use.[88]

2. Modes of Continuing or Reviving Action — a. In General. The mode by which an action may be continued in the name of the successor in interest on the transfer or devolution of title *pendente lite* is governed by the statutes of the particular state.[89] Thus in some states the continuance may be had on motion;[90] in other states provision is made for the filing of supplemental pleadings;[91] in others the continuance may be had by scire facias.[92]

b. In Equity — (I) *Transfer of Complainant's Interest.* If complainant in a suit in chancery assigns his interest in the subject-matter in controversy pending the suit, the only mode by which the assignee may revive or get the benefit of the suit is by filing an original bill in the nature of a bill of revivor and supplement.[93]

Croel, 10 How. Pr. (N. Y.) 253; Sheldon *v.* Havens, 7 How. Pr. (N. Y.) 268; Harris *v.* Bennett, 6 How. Pr. (N. Y.) 220; Ford *v.* David, 1 Bosw. (N. Y.) 569.

North Carolina.— Murray *v.* Blackledge, 71 N. C. 492.

Pennsylvania.— McClure *v.* McClure, 1 Phila. (Pa.) 117, 7 Leg. Int. (Pa.) 195.

Texas.— Converse *v.* Sorley, 39 Tex. 515.

86. McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647. But see Mutual Bank *v.* Burrell, 29 Misc. (N. Y.) 322, 60 N. Y. Suppl. 522, wherein it was held that a statute providing that an action does not abate if the cause survives, and that in case of transfer of interest the action may be continued unless the court directs the person to whom the interest is transferred to be substituted or joined, as the case requires, cannot be invoked to aid a receiver of a membership corporation to continue an action for dues brought in the name of a bank to which they had been assigned by the corporation as collateral, where the bank had no right to commence it.

87. La Pointe *v.* O'Malley, 47 Wis. 332, 2 N. W. 632, wherein it was held that Wis. Rev. Stat. 1878, § 2801, which provides that in case of a transfer of interest the action may be continued by the original party, etc., has no application to a case where the original sole plaintiff, a town, has ceased to exist.

88. Luebbering *v.* Oberkoetter, 1 Mo. App. 393.

Transfer to one of several defendants.— In Hackley *v.* Hope, 2 Abb. Dec. (N. Y.) 298, it was held that after a sole plaintiff has assigned his interest in the subject of litigation to one of several defendants and a decree has been made in favor of such defendant against the other defendant, an appeal cannot be maintained in the name of plaintiff for the benefit of the unsuccessful defendant.

89. See the statutes of the several states.

In Indiana it has been held that a transfer of interest in the cause of action pending the suit requires no additional pleading except, perhaps, to show the transfer. Keller *v.* Miller, 17 Ind. 206.

In Nevada it has been held that after the issues in a cause are all made up a person claiming to be assignee of the cause of action may be substituted as plaintiff; and if so substituted it is not necessary for him to file a supplementary complaint. Virgin *v.* Brubaker, 4 Nev. 31.

90. *Alabama.*— Smith *v.* Inge, 80 Ala. 283; Russell *v.* Erwin, 41 Ala. 292.

Georgia.—Cobb *v.* Edmondson, 30 Ga. 30.

Massachusetts.— Holten *v.* Cook, 12 Mass. 574; Cutts *v.* Parsons, 2 Mass. 440.

Missouri.— Gamble *v.* Johnson, 9 Mo. 605.

Ohio.— Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690.

Appointment of new trustee.— In Georgia, in an action by a trustee of a married woman, the court may substitute, upon motion, the name of a new trustee who has been duly appointed in place of the former, and allow the case to proceed. Cobb *v.* Edmondson, 30 Ga. 30.

Change in incumbency of office.— Where plaintiff sues in an official character and his term of office expires by limitation of law before termination of the suit, his successor may be substituted on motion. Smith *v.* Inge, 80 Ala. 283; Holten *v.* Cook, 12 Mass. 574; Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690.

91. Styles *v.* Fuller, 101 N. Y. 622, 4 N. E. 348; Murray *v.* Blackledge, 71 N. C. 492.

92. Hardee *v.* Gibbs, 50 Miss. 802.

93. *Illinois.*— Lunt *v.* Stephens, 75 Ill. 507.

Iowa.— Wright *v.* Meek, 3 Greene (Iowa) 472.

Maine.— Mason *v.* York, etc., R. Co., 52 Me. 82.

Michigan.— Perkins *v.* Perkins, 16 Mich. 162; Webster *v.* Hitchcock, 11 Mich. 56.

New Jersey.— Fulton *v.* Greacen, 44 N. J. Eq. 443, 15 Atl. 827.

(II) *Transfer of Defendant's Interest.* And the same mode of revival is necessary against an assignee *pendente lite* of the interest of defendant in the subject-matter of the suit.[94]

3. Notice. It has been held that the revivor of an action by the substitution as plaintiff of the successor of a resigned administrator must be on notice to the adverse parties.[95]

V. Presentation of Grounds of Abatement.

A. Necessity of Presentation — 1. Statement of Rule. It is a well-settled rule of law that matter in abatement of an action, excepting objections to the jurisdiction over the subject-matter,[96] must be pleaded, or in some way presented to the court, to be available.[97]

New York.— Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33; Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287; Botts *v.* Cozine, Hoffm. (N. Y.) 79.

United States.— Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003.

See also Griggs *v.* Detroit, etc., R. Co., 10 Mich. 117, wherein it was held that where a third person has acquired an interest in having a decree executed he should be brought in by a supplemental bill rather than by a bill of revivor.

In Tennessee an assignee *pendente lite* of the subject-matter of the suit may prosecute in the assignor's name, or in his own by supplemental bill. Paul *v.* Williams, 12 Lea (Tenn.) 215.

Bankruptcy of complainant.— Where complainant in equity becomes a bankrupt pending suit the appropriate proceeding by his assignee is an original bill in the nature of a supplemental bill. Springer *v.* Vanderpool, 4 Edw. (N. Y.) 362; Northman *v.* Liverpool, etc., Ins. Co., 1 Tenn. Ch. 312; Anonymous, 1 Atk. 88.

94. Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33, wherein it was held that if complainant in a foreclosure suit assigns all his interest in the mortgage *pendente lite*, and defendant also sells his interest in the equity of redemption, it is irregular to proceed in the name of the original complainant to foreclose the equity of redemption as against such assignee of the mortgagor. The suit should be continued against him by a bill in the nature of a bill of revivor and supplement filed by the assignee of complainant. See also Barnard *v.* Hartford, etc., R. Co., 2 Fed. Cas. No. 1,003, wherein it was held that if defendant in a bill to foreclose or redeem a mortgage conveys his interest in the property pending the suit to a third person, and that person desires to have the benefit of the title so gained for affirmative relief in respect to the matters charged in the original bill, as, for example, to redeem the mortgaged property, he must obtain such relief by filing a bill in the nature of a cross-bill.

Bankruptcy of defendant husband.— In Johnson *v.* Fitzhugh, 3 Barb. Ch. (N. Y.) 360, it was held that where a bill is filed against a husband and wife to foreclose a mortgage, and before decree the husband is declared bankrupt, complainant must file a supplemental bill in the nature of a bill of revivor to continue the proceedings against the assignee in bankruptcy.

95. Bishop *v.* Stoddard, 1 Clev. L. Rep. (Ohio) 201, 4 Ohio Dec. (Reprint) 276. But see Farrell *v.* Jones, 63 Cal. 194, wherein it was held that where a third person, during the pendency of an action, succeeds to the rights of plaintiff, the court has power to substitute such person as plaintiff, and notice of the substitution need not be given to a defendant defaulted for failure to appear.

96. *Alabama.*— Wyatt *v.* Judge, 7 Port. (Ala.) 37.

Indiana.— Lane *v.* Taylor, 40 Ind. 495; Loeb *v.* Mathis, 37 Ind. 306; Riley *v.* Butler, 36 Ind. 51.

Michigan.— Farrand *v.* Bentley, 6 Mich. 281.

Nevada.— Phillips *v.* Welch, 11 Nev. 187.

New Jersey.— Collins *v.* Keller, 58 N. J. L. 429, 34 Atl. 753; School District No. 28 *v.* Stocker, 42 N. J. L. 115.

New York.— Chambers *v.* Feron, etc., Co., 56 N. Y. Suppl. 338.

North Carolina.— Randleman Mfg. Co. *v.* Simmons, 97 N. C. 89, 1 S. E. 923; Branch *v.* Houston, 44 N. C. 85.

Ohio.— Steamboat General Buell *v.* Long, 18 Ohio St. 521.

South Dakota.— Wayne *v.* Caldwell, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750.

Texas.— Swigley *v.* Dickson, 2 Tex. 192; Wright *v.* Cullers, 2 Tex. App. Civ. Cas. § 750; Heidenheimer *v.* Marx, 1 Tex. App. Civ. Cas. § 171.

Wisconsin.— Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753; Mathie *v.* McIntosh, 40 Wis. 120.

United States.— Maisonnaire *v.* Keating, 2 Gall. (U. S.) 325, 16 Fed. Cas. No. 8,978.

See 1 Cent. Dig. tit. "Abatement and Revival," § 495 *et seq.*

97. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Abraham *v.* Hall, 59 Ala. 386; Long *v.* Bakefield, 48 Ala. 608; Blount *v.* McNeill, 29 Ala. 473.

Arkansas.— Neale *v.* Smith, 61 Ark. 564, 33 S. W. 1058; Bailey *v.* Rockafellow, 57 Ark. 216, 21 S. W. 227; Hanna *v.* Harter, 2 Ark. 392.

California.— Small *v.* Gwinn, 6 Cal. 447.

Colorado.— Western Union Tel. Co. *v.* Claymore, 2 Colo. 32.

2. Another Suit Pending. The rule applies to the defense of another suit pending.[98]

B. By Whom Presented — 1. Presentation in Propria Persona. A plea in abatement to the jurisdiction of the person must be pleaded *in propria persona*

District of Columbia.— White *v.* Hilton, 2 Mackey (D. C.) 339.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Illinois.— Camden *v.* Robertson, 3 Ill. 507.

Indiana.— Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234, 17 N. E. 593; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; Ayres *v.* Foster, (Ind. App. 1900) 57 N. E. 725; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 865.

Iowa.— Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

Kansas.— Burton *v.* Cochran, 5 Kan. App. 508, 47 Pac. 569.

Kentucky.— Anderson *v.* Irvine, 11 B. Mon. (Ky.) 341.

Maine.— Blaisdell *v.* Pray, 68 Me. 269; Page *v.* McGlinch, 63 Me. 472.

Maryland.— Wilms *v.* White, 26 Md. 380, 90 Am. Dec. 113; Hawkins *v.* Bowie, 9 Gill & J. (Md.) 428; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

Massachusetts.— Martin *v.* Woods, 9 Mass. 377. But see Adams *v.* Leland, 7 Pick. (Mass.) 62, wherein it was held that where the want of plaintiff's capacity to maintain the action was suggested by plaintiff himself, defendant may take advantage of the suggestion though he has not pleaded it.

Michigan.— Breckon *v.* Ottawa Circuit Judge, 109 Mich. 615, 67 N. W. 906.

Minnesota.— McNair *v.* Toler, 21 Minn. 175.

Mississippi.— Commercial Bank *v.* Thompson, 7 Sm. & M. (Miss.) 443; Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641, 45 Am. Dec. 293.

Missouri.— Montgomery *v.* Tipton, 1 Mo. 446.

Nebraska.— Forbes *v.* McHaffie, 32 Nebr. 742, 49 N. W. 721; Brown *v.* Goodyear, 29 Nebr. 376, 45 N. W. 618; Johnson *v.* Jones, 2 Nebr. 126.

New Hampshire.— Bishop *v.* Silver Lake Min. Co., 62 N. H. 455; Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25.

New York.— Burnside *v.* Matthews, 54 N. Y. 78; Swartwout *v.* Roddis, 5 Hill (N. Y.) 118.

North Carolina.— Fort *v.* Penny, 122 N. C. 230, 29 S. E. 362; Branch *v.* Houston, 44 N. C. 85; Newman *v.* Tabor, 27 N. C. 231; Clark *v.* Cameron, 26 N. C. 161; Green *v.* Mangum, 7 N. C. 39.

Oklahoma.— Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. 242.

Oregon.— Fiore *v.* Ladd, 29 Oreg. 528, 46 Pac. 144; Elder *v.* Rourke, 27 Oreg. 363, 41 Pac. 6.

Pennsylvania.— But see Hurst *v.* Fisher, 1 Watts & S. (Pa.) 438, where plaintiff's death at time of commencement of action was allowed to be pleaded in bar.

South Carolina.— Drago *v.* Moso, 1 Speers (S. C.) 212, 40 Am. Dec. 592; Edwards *v.* Ford, 2 Bailey (S. C.) 461; Treasurers *v.* Wiggins, 1 McCord (S. C.) 568.

Tennessee.—Isaacks *v.* Edwards, 7 Humphr. (Tenn.) 465; Covington *v.* Neilson, 6 Yerg. (Tenn.) 475; Martin *v.* Carter, 1 Yerg. (Tenn.) 489.

Texas.— Hoffman *v.* Cleburne Bldg., etc., Assoc., 85 Tex. 409, 22 S. W. 154; Little *v.* State, 75 Tex. 616, 12 S. W. 965; Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511; Beville *v.* Rush, (Tex. Civ. App. 1894) 25 S. W. 1022.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; Plath *v.* Braunsdorff, 40 Wis. 107.

United States.— Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Fremont *v.* Merced Mining Co., McAll. (U. S.) 267, 9 Fed. Cas. No. 5,095; Walker *v.* Flint, 2 McCrary (U. S.) 341, 7 Fed. 435; Evans *v.* Davenport, 4 McLean (U. S.) 574, 8 Fed. Cas. No. 4,558; Blachly *v.* Davis, 1 McLean (U. S.) 412, 3 Fed. Cas. No. 1,456.

See 1 Cent. Dig. tit. "Abatement and Revival," § 495 *et seq.*

As to necessity of suggesting death as ground of abatement see *supra*, III, A, 20, a.

98. *California.*— Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12; Walsworth *v.* Johnson, 41 Cal. 61; Lake Merced Water Co. *v.* Cowles, 31 Cal. 215.

Georgia.— Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470; Williams *v.* Rawlins, 33 Ga. 117.

Illinois.— Shepardson *v.* McDole, 49 Ill. App. 350.

Indiana.— Lorch *v.* Aultman, 75 Ind. 162.

Kansas.— Ft. Scott *v.* Peck, 5 Kan. App. 593, 49 Pac. 111.

Kentucky.— Curd *v.* Lewis, 1 Dana (Ky.) 351; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265.

Louisiana.— State *v.* Riedy, 50 La. Ann. 258, 23 So. 327.

Maine.— North Bank *v.* Brown, 50 Me. 214, 79 Am. Dec. 609.

Massachusetts.— Morton *v.* Sweetser, 12 Allen (Mass.) 134.

Michigan.— Sullings *v.* Goodyear Dental Vulcanite Co., 36 Mich. 313.

Minnesota.—Williams *v.* McGrade, 18 Minn. 82; Estes *v.* Farnham, 11 Minn. 423.

Missouri.— Bernecker *v.* Miller, 44 Mo. 102.

Nebraska.— Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685.

New York.— Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. 782; Golden *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 142, 20 N. Y. Suppl. 630.

North Carolina.— Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944; Montague *v.* Brown, 104 N. C. 161, 10 S. E. 186; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Hawkins *v.* Hughes, 87 N. C. 115; Wells *v.* Goodbread, 36 N. C. 9.

and not by attorney, since appearance by attorney is deemed to be by leave of court, and hence constitutes an acknowledgment of the court's jurisdiction.[99]

2. Plea Personal to One Defendant. A plea in abatement by two defendants of a matter personal to one of them is bad.[1] And the same rule applies to a plea by one defendant of matter which affects his co-defendant alone.[2] It has been held, however, that where two or more defendants are sued on a joint cause of action they may jointly plead in abatement a defect in service as to one of them.[3]

Pennsylvania.— Com. *v.* Cope, 45 Pa. St. 161.

Washington.— State *v.* Superior Ct., 14 Wash. 686, 45 Pac. 670.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

Wisconsin.— Witte *v.* Foote, 90 Wis. 235, 62 N. W. 1044; Quinn *v.* Quinn, 27 Wis. 168; Wilson *v.* Jarvis, 19 Wis. 597.

Pendency of an arbitration proceeding, to be available as a defense, must be pleaded in abatement. Small *v.* Thurlow, 37 Me. 504.

Pendency of an attachment execution ought to be pleaded in abatement and not in bar of the suit. Derham *v.* Berry, 5 Phila. (Pa.) 475, 21 Leg. Int. (Pa.) 188.

Pendency of garnishment proceedings.—The rule requiring the pendency of another suit to be pleaded in abatement and not in bar applies as well where the prior suit is a garnishee proceeding as in other cases. Near *v.* Mitchell, 23 Mich. 382; Navigation Co. *v.* Navigation Co., 3 Phila. (Pa.) 214, 15 Leg. Int. (Pa.) 325; Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190.

Judgments for taxes.—In Illinois the pendency of an application for judgment against land for the taxes of a prior year is a good defense against the rendition of judgment for the same taxes on a second application. The statute prescribing that the causes of objection to the rendering of judgment shall be specified in writing embraces every defense, and the objector is therefore not bound to plead the pendency of the former suit in abatement. Andrews *v.* People, 75 Ill. 605.

99. *Arkansas.*— Watkins *v.* Brown, 5 Ark. 197.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Tennessee.— Boon *v.* Rahl, 1 Heisk. (Tenn.) 12; Shelby *v.* Johnson, 7 Humphr. (Tenn.) 503.

Vermont.— Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850.

Virginia.— Hortons *v.* Townes, 6 Leigh (Va.) 47.

Contra, Yoe *v.* Gelston, 37 Md. 233; Guild *v.* Richardson, 6 Pick. (Mass.) 364; Richardson *v.* Wells, 3 Tex. 223. *Compare* Tyler *v.* Murray, 57 Md. 418.

See also Brisco *v.* Brewer, 2 Ga. Dec. 105, wherein it was held that "a plea to the jurisdiction" is a personal right and available only by defendant himself.

By amicus curiæ.— A motion to dismiss cannot be made by an *amicus curiæ.* Piggott *v.* Kirkpatrick, 31 Ind. 261; Little *v.* Thompson, 24 Ind. 146.

By corporation.— An objection to the jurisdiction by a corporation must be interposed by attorney, since a corporation cannot appear in person. Nispel *v.* Western Union R. Co., 64 Ill. 311; Nixon *v.* Southwestern Ins. Co., 47 Ill. 444.

1. Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12; Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634; Shannon *v.* Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; De Forest *v.* Jewett, 1 Hall (N. Y.) 137. See also Weaver *v.* Crenshaw, 6 Ala. 873, wherein it was held that the right of a freeholder to be sued in the county of his residence is a personal privilege, and therefore a joint plea by two defendants, one of whom is liable to the suit, is bad.

2. Moore *v.* Smith, 2 B. Mon. (Ky.) 340 (wherein it was held that an objection to the jurisdiction on a personal ground, available by one defendant, is not available on behalf of another); Bonzey *v.* Redman, 40 Me. 336 (wherein it was held that a defendant cannot plead in abatement that his co-defendant was a deputy of the sheriff who served the writ); Harrison *v.* Urann, 1 Story (U. S.) 64, 11 Fed. Cas. No. 6,146 (wherein it was held that in an action in a federal court a plea that the court has no jurisdiction over a co-defendant because he is a citizen of the same state with the plaintiff, where the bill alleges diverse citizenship, is personal to such co-defendant). See also Campbell *v.* Hampton, 11 Lea (Tenn.) 440, wherein it was held that where defendants in ejectment plead not guilty, and afterward another is admitted to defend on his own application, he can plead only to the merits, and cannot plead in abatement that the original defendants were not served.

3. Butts *v.* Francis, 4 Conn. 424; Sawtelle *v.* Jewell, 34 Me. 543. See also Draper *v.* Moriarty, 45 Conn. 476, wherein it was held that a defendant on whom service has been made in an action founded on contract can by himself plead in abatement the want of service upon a co-defendant. To same effect is Curtis *v.* Baldwin, 42 N. H. 398. But see Harker *v.* Brink, 24 N. J. L. 333 (wherein it was held that in an action on a joint contract a defendant cannot plead in abatement want of service on his co-defendants, such being a matter which in no wise prejudices his rights, but is personal and peculiar to the others); Boots *v.* Boots, 84 Ind. 171 (wherein it was held that a return of process not served as to one of two joint obligors sued together does not abate the suit as to him, nor is it a ground for a plea in abatement by the other defendant); Cooper *v.* Gordon, 4 McLean (U. S.) 6, 6 Fed. Cas. No. 3,195, and Craig *v.* Cummings, 2 Wash. C. C. (U. S.) 505, Pet. C. C. (U. S.) 431 note, 6 Fed. Cas. No. 3,331 (in which cases it was held that in a suit in

C. Manner of Presentation — 1. Grounds Existing at Commencement of Action — a. Statement of Rule — (I) *At Common Law.* At common law a ground of abatement existing at the commencement of an action and not going to the jurisdiction of the court over the subject-matter must be pleaded by a plea in abatement or it will be deemed to be waived.[4]

(II) *In Equity.* In chancery, matter constituting a ground for the abatement of the suit apparent on the face of the bill may be taken advantage of by demurrer.[5] If the matter is not so apparent a plea is necessary.[6]

(III) *Under the Codes.* In code states, as the designation of pleas in abatement has disappeared and the matter which at common law was interposed by them falls into the term of defenses indiscriminately applied to matter going to defeat the alleged cause of action, advantage should be taken of a ground of abatement existing at the commencement of the action by demurrer where it is apparent on the face of the record, otherwise by answer.[7]

the federal circuit court on a joint contract, where only part of the defendants are found within the district and served with process, it is not a good plea in abatement that the other defendant is a citizen of another district).

4. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Jordan *v.* Bell, 8 Port. (Ala.) 53.

Arkansas.— Melvin *v.* Steamboat General Shields, 15 Ark. 207.

Connecticut.— Bishop *v.* Vose, 27 Conn. 1.

District of Columbia.— Barbour *v.* Moore, 4 App. Cas. (D. C.) 535.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Illinois.— Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Union Nat. Bank *v.* Centreville First Nat. Bank, 90 Ill. 56; Wallace *v.* Cox, 71 Ill. 548; Holloway *v.* Freeman, 22 Ill. 197.

Indiana.— Baily *v.* Schrader, 34 Ind. 260; Ludwick *v.* Beckamire, 15 Ind. 198.

Iowa.— Funk *v.* Israel, 5 Iowa 438.

Kansas.— Bliss *v.* Burnes, McCahon (Kan.) 91.

Kentucky.— Anderson *v.* Irvine, 11 B. Mon. (Ky.) 341.

Maine.— Stephenson *v.* Davis, 56 Me. 73; North Bank *v.* Brown, 50 Me. 214, 79 Am. Dec. 609; Badger *v.* Towle, 48 Me. 20.

Massachusetts.— Crosby *v.* Harrison, 116 Mass. 114; Lincoln *v.* Taunton Copper Mfg. Co., 11 Cush. (Mass.) 440; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Nye *v.* Liscombe, 21 Pick. (Mass.) 263; Guild *v.* Richardson, 6 Pick. (Mass.) 364.

Michigan.— Webb *v.* Mann, 3 Mich. 139.

New Hampshire.— Bishop *v.* Silver Lake Min. Co., 62 N. H. 455; Educational Soc. *v.* Varney, 54 N. H. 376.

North Carolina.— McLean *v.* McDugald, 53 N. C. 383; Whicker *v.* Roberts, 32 N. C. 485; Killian *v.* Fulbright, 25 N. C. 9; State Bank *v.* Davenport, 19 N. C. 45; Allison *v.* Hancock, 13 N. C. 296; Sheppard *v.* Briggs, 9 N. C. 369.

Pennsylvania.— Machette *v.* Musgrave, 1 Phila. (Pa.) 186, 8 Leg. Int. (Pa.) 74.

South Carolina.— Comstock *v.* Alexander, 2 Speers (S. C.) 274.

Tennessee.— Peters *v.* Neely, 16 Lea (Tenn.) 275; Grove *v.* Campbell, 9 Yerg. (Tenn.) 7; Posey *v.* McCubbins, 5 Yerg. (Tenn.) 235; Agee *v.* Dement, 1 Humphr. (Tenn.) 332.

Vermont.— Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

Virginia.— Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

West Virginia.— Middleton *v.* White, 5 W. Va. 572; Valley Bank *v.* Gettinger, 3 W. Va. 309; Valley Bank *v.* Berkeley Bank, 3 W. Va. 386.

United States.— Wickliffe *v.* Owings, 17 How. (U. S.) 47, 15 L. ed. 44; Marshall *v.* Otto, 59 Fed. 249; Pierce *v.* Feagans, 39 Fed. 587; U. S. *v.* American Bell Telephone Co., 29 Fed. 17; Van Antwerp *v.* Hulburd, 7 Blatchf. (U. S.) 426, 28 Fed. Cas. No. 16,826; Hoyt *v.* Wright, 1 McCrary (U. S.) 130, 2 McCrary (U. S.) 222, 4 Fed. 168.

England.— Addison *v.* Overend, 6 T. R. 766; Cabell *v.* Vaughan, 1 Saund. 291.

See 1 Cent. Dig. tit. "Abatement and Revival," § 495 *et seq.*

5. Kendrick *v.* Whitfield, 20 Ga. 379; Varick *v.* Dodge, 9 Paige (N. Y.) 149; Municipal Invest. Co. *v.* Gardiner, 62 Fed. 954.

In Tennessee, under the Code, § 4309, providing that the jurisdiction of the court of chancery in which the suit is brought can be resisted only by a plea in abatement, demurrer, or motion to dismiss, an objection to the jurisdiction is not available by answer. Boyd *v.* Martin, 9 Heisk. (Tenn.) 382.

6. Cummins *v.* Bennett, 8 Paige (N. Y.) 79; Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479; Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746; Pierce *v.* Feagans, 39 Fed. 587.

7. *Arkansas.*— Grider *v.* Apperson, 32 Ark. 332.

California.— Doll *v.* Feller, 16 Cal. 432.

Colorado.— Davis *v.* Wannamaker, 2 Colo. 637.

Connecticut.— G. M. Williams Co. *v.* Mairs, 72 Conn. 430, 44 Atl. 729.

Indiana.— Wilcox *v.* Moudy, 82 Ind. 219; Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505; Keiser *v.* Yandes, 45 Ind. 174; Ragan *v.* Haynes, 10 Ind. 348.

Iowa.— Meunch *v.* Breitenbach, 41 Iowa 527; Rawson *v.* Guiberson, 6 Iowa 507.

Kansas.— Burton *v.* Cochran, 5 Kan. App. 508, 47 Pac. 569; Bliss *v.* Burnes, McCahon (Kan.) 91.

(iv) *When Presented by Motion.* In some states advantage may be taken of matter in abatement by motion where such matter is apparent on the face of the record.[8]

b. Another Suit Pending. At common law the pendency of another suit between the same parties and involving the same subject-matter must be pleaded by a plea in abatement.[9] In equity this defense should be made by plea and not

Kentucky.— Moore *v.* Sheppard, 1 Metc. (Ky.) 97; Grant *v.* Tams, 7 T. B. Mon. (Ky.) 218.

Missouri.— Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776.

Nebraska.— Barry *v.* Wachosky, 57 Nebr. 534, 77 N. W. 1080; Kyd *v.* Exchange Bank, 56 Nebr. 557, 76 N. W. 1058; Burlington Voluntary Relief Dept. *v.* Moore, 52 Nebr. 719, 73 N. W. 15; Herbert *v.* Wortendyke, 49 Nebr. 182, 68 N. W. 350; Hurlburt *v.* Palmer, 39 Nebr. 158, 57 N. W. 1019.

New York.— Peck *v.* Kirtz, 15 N. Y. St. 598; Wright *v.* Maseras, 56 Barb. (N. Y.) 521; Bishop *v.* Bishop, 7 Rob. (N. Y.) 194; Ansorge *v.* Kaiser, 22 Abb. N. Cas. (N. Y.) 305, 3 N. Y. Suppl. 785; Christy *v.* Libby, 5 Abb. Pr. N. S. (N. Y.) 192; Hornfager *v.* Hornfager, 6 How. Pr. (N. Y.) 279.

North Carolina.— Alexander *v.* Norwood, 118 N. C. 381, 24 S. E. 119; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944; Montague *v.* Brown, 104 N. C. 161, 10 S. E. 186; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Hawkins *v.* Hughes, 87 N. C. 115; Smith *v.* Moore, 79 N. C. 82; Flack *v.* Dawson, 69 N. C. 42; Charlotte Bank *v.* Britton, 66 N. C. 365; Harris *v.* Johnson, 65 N. C. 478.

Ohio.— Allen *v.* Miller, 11 Ohio St. 374; Smith *v.* Smith, 21 Cinc. L. Bul. 295, 10 Ohio Dec. (Reprint) 494.

Oregon.— Fiore *v.* Ladd, 29 Oreg. 528, 46 Pac. 144; Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326.

Texas.— Bigham *v.* Talbot, 51 Tex. 450; Johnston *v.* Price, 2 Tex. App. Civ. Cas. § 756.

Wisconsin.— Vincent *v.* Starks, 45 Wis. 458; Dutcher *v.* Dutcher, 39 Wis. 651; Moir *v.* Dodson, 14 Wis. 279; Millett *v.* Hayford, 1 Wis. 401.

8. *Alabama.*— Blankenship *v.* Blackwell, (Ala. 1900) 27 So. 551.

Colorado.— Western Union Tel. Co. *v.* Claymore, 2 Colo. 32.

Connecticut.— Bishop *v.* Vose, 27 Conn. 1.

Florida.— Campbell *v.* Chaffee, 6 Fla. 724.

Georgia.— Central R., etc., Co. *v.* Coleman, 88 Ga. 294, 14 S. E. 382.

Illinois.— Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Holloway *v.* Freeman, 22 Ill. 197.

Iowa.— Funk *v.* Israel, 5 Iowa 438.

Maine.— Mansur *v.* Coffin, 54 Me. 314; Badger *v.* Towle, 48 Me. 20; Chamberlain *v.* Lake, 36 Me. 388; Cook *v.* Lothrop, 18 Me. 260.

Maryland.— Gittings *v.* State, 33 Md. 458; Hamilton *v.* State, 32 Md. 348.

Massachusetts.— Crosby *v.* Harrison, 116 Mass. 114; Haynes *v.* Saunders, 11 Cush. (Mass.) 537; Brown *v.* Webber, 6 Cush. (Mass.) 560; Amidown *v.* Peck, 11 Metc. (Mass.) 467; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Nye *v.* Liscombe, 21 Pick. (Mass.) 263.

Michigan.— Jewell *v.* Lamoreaux, 30 Mich. 155.

New Hampshire.— Educational Soc. *v.* Varney, 54 N. H. 376; Crawford *v.* Crawford, 44 N. H. 428.

Ohio.— Craig *v.* Toledo, etc., R. Co., 3 Ohio Dec. 146.

Tennessee.— Padgett *v.* Ducktown Sulphur, etc., Co., 97 Tenn. 690, 37 S. W. 698; Willey *v.* Roirden, 2 Baxt. (Tenn.) 227; Armstrong *v.* Harrison, 1 Head (Tenn.) 379.

Vermont.— Gustin *v.* Carpenter, 51 Vt. 585; Bent *v.* Bent, 43 Vt. 42; Bliss *v.* Smith, 42 Vt. 198; Howard *v.* Walker, 39 Vt. 163; Barrows *v.* McGowan, 39 Vt. 238; Bennett *v.* Allen, 30 Vt. 684; Ferris *v.* Ferris, 25 Vt. 100; Bliss *v.* Connecticut, etc., Rivers R. Co., 24 Vt. 428; Connecticut, etc., Rivers R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181; Culver *v.* Balch, 23 Vt. 618; Overseers of Poor *v.* Overseers of Poor, 2 Vt. 200.

United States.— U. S. *v.* American Bell Telephone Co., 29 Fed. 17; Walker *v.* Flint, 2 McCrary (U. S.) 341, 7 Fed. 435.

Defects in attachment writ or bond.— In attachment proceedings, defects in the writ or apparent on the face of the affidavit or bond may be raised by motion to quash or vacate. Blankenship *v.* Blackwell, (Ala. 1900) 27 So. 551; Melvin *v.* Steamboat General Shields, 15 Ark. 207.

Failure to take bond in replevin.— An objection to the maintenance of an action of replevin on the ground that the sheriff serving the writ of replevin did not take a bond from plaintiff may be interposed by a motion to dismiss, since such fact appears from the record. Bent *v.* Bent, 43 Vt. 42.

9. *Alabama.*—Holley *v.* Younge, 27 Ala. 203.

Georgia.— Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470.

Indiana.—Sherwood *v.* Hammond, 4 Blackf. (Ind.) 504; Smock *v.* Graham, 1 Blackf. (Ind.) 314.

Kentucky.— Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265.

Massachusetts.— Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116; Mattel *v.* Conant, 156 Mass. 418, 31 N. E. 487; Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Morton *v.* Sweetser, 12 Allen (Mass.) 134.

Michigan.— Sullings *v.* Goodyear Dental Vulcanite Co., 36 Mich. 313; Near *v.* Mitchell, 23 Mich. 382.

New York.— Wemple *v.* Johnson, 13 Wend. (N. Y.) 515; Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

North Carolina.— Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Harris *v.* Johnson, 65 N. C. 478.

by answer.[10] Under the code advantage should be taken of it by demurrer where the fact of such pendency appears on the face of the complaint, otherwise by answer.[11]

2. Grounds Arising Subsequent to Commencement of Action. Matter constituting a ground for the abatement of an action arising subsequent to the interposition of a plea in bar may be pleaded by a plea *puis darrein continuance*.[12]

3. Joinder of Matter in Abatement with Matter in Bar — a. At Common Law. At common law a plea in abatement cannot be joined with a plea in bar,[13]

Pennsylvania.— Gardner *v.* Kiehl, 182 Pa. St. 194, 37 Atl. 829; Com. *v.* Cope, 45 Pa. St. 161; Matter of Linn, 2 Pearson (Pa.) 487.

Tennessee.— Southern R. Co. *v.* Brigman, 95 Tenn. 624, 32 S. W. 762.

United States.— Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 4 S. Ct. 336, 337, 28 L. ed. 399; North Muskegon *v.* Clark, 62 Fed. 694, 22 U. S. App. 522, 10 C. C. A. 591; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559.

By affidavit.— In Kellogg *v.* Sutherland, 38 Ind. 154, it was held that an affidavit cannot serve the purpose of an answer in abatement.

10. Cummins *v.* Bennett, 8 Paige (N. Y.) 79; Battell *v.* Matot, 58 Vt. 271, 5 Atl. 479; Pierce *v.* Feagans, 39 Fed. 587.

By plea or motion to dismiss.— In Anderson *v.* Piercy, 20 W. Va. 282, it was held that an objection to a suit in a chancery court that another chancery suit was pending in the same court for the same cause of action should be presented by a plea or motion to dismiss.

11. *Arkansas.*— Grider *v.* Apperson, 32 Ark. 332.

Kentucky.— Moore *v.* Sheppard, 1 Metc. (Ky.) 97.

Missouri.— Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776.

New York.— Peck *v.* Kirtz, 15 N. Y. St. 598; Wright *v.* Maseras, 56 Barb. (N. Y.) 521; Bishop *v.* Bishop, 7 Rob. (N. Y.) 194; Ansorge *v.* Kaiser, 22 Abb. N. Cas. (N. Y.) 305, 3 N. Y. Suppl. 785; Christy *v.* Libby, 5 Abb. Pr. N. S. (N. Y.) 192; Hornfager *v.* Hornfager, 6 How. Pr. (N. Y.) 279.

North Carolina.— Alexander *v.* Norwood, 118 N. C. 381, 24 S. E. 119; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944; Montague *v.* Brown, 104 N. C. 161, 10 S. E. 186; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Hawkins *v.* Hughes, 87 N. C. 115; Smith *v.* Moore, 79 N. C. 82; Harris *v.* Johnson, 65 N. C. 478.

Oregon.— Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326.

By motion to dismiss.— By the apparent weight of authority the pendency of another action cannot be taken advantage of in defense by a motion to dismiss. Maxwell *v.* Peters Shoe Co., 109 Ala. 371, 19 So. 412; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Central R., etc., Co. *v.* Coleman, 88 Ga. 294, 14 S. E. 382; Kennon *v.* Petty, 59 Ga. 175; Killen *v.* Compton, 57 Ga. 63; Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787; Morton *v.* Sweetser, 12 Allen (Mass.) 134. *Contra*, Curd *v.* Lewis, 1 Dana (Ky.) 351; Long *v.* Jarratt, 94 N. C. 443; Claywell *v.* Sudderth, 77 N. C. 287; State *v.* Atlantic, etc., R. Co., 77 N. C. 299. See also Rogers *v.* Odell, 39 N. H. 417, wherein it was held that advantage may be taken of a former suit pending, in the discretion of the court, on motion to dismiss as a vexatious abuse of the authority of the court.

By motion to quash writ.— The pendency of a prior action is the subject of a plea in abatement, not of a motion to quash the second writ. Gardner *v.* Kiehl, 182 Pa. St. 194, 37 Atl. 829.

12. *Georgia.*— Mott *v.* Hall, 41 Ga. 117; Howes *v.* Chester, 33 Ga. 89.

Maryland.— Young *v.* Citizens' Bank, 31 Md. 66; Eschbach *v.* Bayley, 28 Md. 492; U. S. Bank *v.* Merchants' Bank, 7 Gill (Md.) 415; Chapman *v.* Davis, 4 Gill (Md.) 166; Semmes *v.* Naylor, 12 Gill & J. (Md.) 358; Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Mississippi.— Simmons *v.* Thomas, 43 Miss. 31, 5 Am. Rep. 470; Planters Bank *v.* Sharp, 4 Sm. & M. (Miss.) 17.

New York.— Ressequie *v.* Brownson, 4 Barb. (N. Y.) 541.

Tennessee.— Yancey *v.* Marriott, 1 Sneed (Tenn.) 28.

United States.— Thompson *v.* U. S., 103 U. S. 480, 26 L. ed. 521; Yeaton *v.* Lynn, 5 Pet. (U. S.) 224, 8 L. ed. 105.

Submission to arbitration.— A plea in abatement *puis darrein continuance* is the proper mode of taking advantage of an agreement to submit to arbitration the matters of controversy in a suit entered into after issue joined. Ressequie *v.* Brownson, 4 Barb. (N. Y.) 541.

13. *Alabama.*— Holley *v.* Younge, 27 Ala. 203; Hart *v.* Turk, 15 Ala. 675; Cleveland *v.* Chandler, 3 Stew. (Ala.) 489.

Illinois.— Grand Lodge, etc. *v.* Randolph, 186 Ill. 89, 57 N. E. 882.

Indiana.— Carmien *v.* Cornell, 148 Ind. 83, 47 N. E. 216; Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433; Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; Brink *v.* Reid, 122 Ind. 257, 23 N. E. 770; Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466; Field *v.* Malone, 102 Ind. 251, 1 N. E. 507; Thompson *v.* Greenwood, 28 Ind. 327.

Iowa.— Rush *v.* Frost, 49 Iowa 183.

Louisiana.— Mix *v.* His Creditors, 39 La. Ann. 624, 2 So. 391.

Maryland.— Glenn *v.* Williams, 60 Md. 93; Cruzen *v.* McKaig, 57 Md. 454.

Mississippi.— Dean *v.* McKinstry, 2 Sm. & M. (Miss.) 213.

and if so pleaded by a party defendant the matter in abatement will be deemed waived.[14]

b. Under the Codes. But under the codes, permitting defendant to present by his answer as many defenses as he may have, the rule is otherwise. Accordingly in most code states defendant may plead matter in abatement with matter in bar, and such joinder does not constitute a waiver of the matter in abatement.[15]

D. Time of Presentation — 1. Grounds Existing at Commencement of Action — a. At Common Law. A ground of abatement existing at the commencement of an action, and not going to the jurisdiction of the court over the subject-matter, must be interposed, at common law, where it is not waived by

New Jersey.— Kerr *v.* Willetts, 48 N. J. L. 78, 2 Atl. 782.

New York.— Sweet *v.* Tuttle, 14 N. Y. 465; Peck *v.* Kirtz, 15 N. Y. St. 598; Gardiner *v.* Clark, 6 How. Pr. (N. Y.) 449.

Oregon.— Oregon Cent. R. Co. *v.* Scoggin, 3 Oreg. 161; Hopwood *v.* Patterson, 2 Oreg. 49.

Pennsylvania.— Lindsley *v.* Malone, 23 Pa. St. 24; Gallagher *v.* Thornley, 10 Wkly. Notes Cas. (Pa.) 189; Reimer *v.* Philadelphia, 5 Wkly. Notes Cas. (Pa.) 449.

South Carolina.— Preston *v.* Simons, 1 Rich. (S. C.) 262.

Tennessee.— Douglass *v.* Belcher, 7 Yerg. (Tenn.) 105.

Vermont.— Lyman *v.* Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346.

United States.— Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902; Sheppard *v.* Graves, 14 How. (U. S.) 505, 14 L. ed. 518; Marshall *v.* Otto, 59 Fed. 249; Wythe *v.* Myers, 3 Sawy. (U. S.) 595, 30 Fed. Cas. No. 18,119; Adams *v.* White, 2 Pittsb. (Pa.) 21, 1 Fed. Cas. No. 68.

Canada.— Mercer *v.* Cosman, 13 N. Brunsw. 240; Brown *v.* York County, 8 Ont. Pr. 139.

14. *Alabama.*— Cleveland *v.* Chandler, 3 Stew. (Ala.) 489; Wilson *v.* Oliver, 1 Stew. (Ala.) 46.

Indiana.— State *v.* Ruhlman, 111 Ind. 17, 11 N. E. 793; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; Dwiggins *v.* Clark, 94 Ind. 49, 48 Am. Rep. 140; Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Maryland.— Tyler *v.* Murray, 57 Md. 418.

Minnesota.— Gerrish *v.* Pratt, 6 Minn. 53.

Mississippi.— Pearce *v.* Young, Walk. (Miss.) 259.

Missouri.— Moody *v.* Deutsch, 85 Mo. 237; Fordyce *v.* Hathorn, 57 Mo. 120.

Tennessee.— Southern R. Co. *v.* Brigman, 95 Tenn. 624, 32 S. W. 762; Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503; Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.

United States.— De Sobry *v.* Nicholson, 3 Wall. (U. S.) 420, 18 L. ed. 263; Marshall *v.* Otto, 59 Fed. 249; Wythe *v.* Myers, 3 Sawy. (U. S.) 595, 30 Fed. Cas. No. 18,119.

But see Gardner *v.* James, 5 R. I. 235, wherein it was held, under Rhode Island rules of practice requiring defendant to plead all his defenses at one time, whether in abatement or in bar, that a plea in abatement filed by defendant at the same time that he filed a plea in bar will not be deemed waived though the plea in bar was first in order. See also O'Loughlin *v.* Bird, 128 Mass. 600 [*overruling* Machinist Nat. Bank *v.* Dean, 124 Mass. 81; Morton *v.* Sweetser, 12 Allen (Mass.) 134; Pratt *v.* Sanger, 4 Gray (Mass.) 84], wherein it was held that where an answer in abatement and one to the merits are filed in apt time and in proper order, the answer in abatement is not waived though both were filed on the same paper.

15. *Arkansas.*— Union Guaranty, etc., Co. *v.* Craddock, 59 Ark. 593, 28 S. W. 424; Erb *v.* Perkins, 32 Ark. 428; Grider *v.* Apperson, 32 Ark. 332.

Georgia.— Jernigan *v.* Carter, 51 Ga. 232.

Minnesota.— Page *v.* Mitchell, 37 Minn. 368, 34 N. W. 896.

Missouri.— Johnson *v.* Detrick, 152 Mo. 243, 53 S. W. 891; Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96; Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267; Byler *v.* Jones, 79 Mo. 261; Little *v.* Harrington, 71 Mo. 390; McIntire *v.* Calhoun, 27 Mo. App. 513; Thompson *v.* Bronson, 17 Mo. App. 456.

Nebraska.— Hurlburt *v.* Palmer, 39 Nebr. 158, 57 N. W. 1019.

New York.— Gardner *v.* Clark, 21 N. Y. 399 [*overruling* 6 How. Pr. (N. Y.) 449]; Sweet *v.* Tuttle, 14 N. Y. 465; Owens *v.* Loomis, 19 Hun (N. Y.) 606; Peck *v.* Kirtz, 15 N. Y. St. 598.

North Carolina.— Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944.

Wisconsin.—Hooker *v.* Greene, 50 Wis. 271, 6 N. W. 816; Dutcher *v.* Dutcher, 39 Wis. 651; Freeman *v.* Carpenter, 17 Wis. 126.

In Oregon, though the statute provides that defendant may set forth by answer as many defenses as he may have, an answer in the nature of a plea in abatement should be pleaded separately and disposed of before an answer to the merits is interposed. Oregon Cent. R. Co. *v.* Scoggin, 3 Oreg. 161; Hopwood *v.* Patterson, 2 Oreg. 49.

In Wisconsin, while the code allows defenses in abatement and bar to be pleaded in one answer, it does not permit the same defense to be pleaded in abatement and in bar (Hooker *v.* Greene, 50 Wis. 271, 6 N. W. 816), and if so pleaded the latter waives the former (Crowns *v.* Forest Land Co., 99 Wis. 103, 74 N. W. 546).

Another suit pending.— In code states the defense of another action pending is properly joined in the same answer with defenses on the merits. Grider *v.* Apperson, 32 Ark. 332; Gardner *v.* Clark, 21 N. Y. 399; Owens *v.* Loomis, 19 Hun (N. Y.) 606; Peck *v.* Kirtz, 15 N. Y. St. 598; Curtis *v.* Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944.

appearance,[16] before pleading to the merits, or it will not be available.[17] As a general demurrer is considered as a plea to the merits, it follows that defendant cannot plead such matter in abatement after filing a general demurrer.[18] It has

16. As to effect of appearance as waiver of grounds of abatement see APPEARANCES.

17. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Nabors *v.* Nabors, 2 Port. (Ala.) 162; Cleveland *v.* Chandler, 3 Stew. (Ala.) 489.

Arkansas.— State Bank *v.* Whiting, 12 Ark. 119; Heilman *v.* Martin, 2 Ark. 158.

Connecticut.— James *v.* Morgan, 36 Conn. 348; Prosser *v.* Chapman, 29 Conn. 515.

Delaware.— Lycoming F. Ins. Co. *v.* Bush, 1 Marv. (Del.) 181, 40 Atl. 947; Townsend *v.* Steward, 4 Harr. (Del.) 94.

Illinois.— Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Fisher *v.* Cook, 125 Ill. 280, 17 N. E. 763.

Indiana.— Estep *v.* Larsh, 21 Ind. 190; Keller *v.* Miller, 17 Ind. 206.

Kentucky.— Wickliffe *v.* Carroll, 14 B. Mon. (Ky.) 169; Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 254.

Louisiana.— Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108; Giraud *v.* Mazier, 13 La. Ann. 147.

Maine.— Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181; Otis *v.* Ellis, 78 Me. 75, 2 Atl. 851.

Maryland.— Spencer *v.* Patten, 84 Md. 414, 35 Atl. 1097; Cruzen *v.* McKaig, 57 Md. 454.

Massachusetts.— Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Breed *v.* Breed, 110 Mass. 532.

Michigan.— Pangborn *v.* Smith, 65 Mich. 1, 31 N. W. 599.

Mississippi.— Lewis *v.* State, 65 Miss. 468, 4 So. 429; McKey *v.* Torry, 28 Miss. 78.

New Hampshire.— Bedford *v.* Rice, 58 N. H. 227; Kimball *v.* Wellington, 20 N. H. 439.

New York.— Smith *v.* Elder, 3 Johns. (N. Y.) 105.

North Carolina.— Burroughs *v.* McNeill, 22 N. C. 297; Dalzell *v.* Stanley, 1 N. C. 40.

Pennsylvania.— Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567; Larkin *v.* Scranton City, 162 Pa. St. 289, 29 Atl. 910.

Rhode Island.— Potter *v.* Smith, 7 R. I. 55; Gardner *v.* James, 5 R. I. 235.

South Carolina.— King *v.* Ferguson, 2 Nott & M. (S. C.) 588.

Tennessee.— Foster *v.* Hall, 4 Humphr. (Tenn.) 346; Webber *v.* Houston, 6 Yerg. (Tenn.) 314.

Vermont.— Lyman *v.* Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346; Wilder *v.* Stafford, 30 Vt. 399.

Virginia.— Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909; May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366; Valley Bank *v.* Berkeley Bank, 3 W. Va. 386.

Wisconsin.— Goodrich *v.* Compound School Dist. No. 5, 2 Wis. 102; Knowlton *v.* Culver, 2 Pinn. (Wis.) 86.

United States.— Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902; Sheppard *v.* Graves, 14 How. (U. S.) 505, 14 L. ed. 518.

England.— Buddle *v.* Willson, 6 T. R. 369; Roberts *v.* Moon, 5 T. R. 487.

Before affidavits of merits.— In Massachusetts, a defendant, after filing an affidavit of merits under Stat. (1852), c. 312, § 10, providing that a default shall be entered against a defendant unless within a specified time he shall have filed an affidavit declaring that he verily believes he has a substantial defense to the action on its merits and intends to bring the same to trial, cannot interpose a plea in abatement, since the affidavit is equivalent to a plea in bar (Walpole *v.* Gray, 11 Allen (Mass.) 149; Cole *v.* Ackerman, 7 Gray (Mass.) 38); and this rule is not changed by the fact that the affidavit omits to state that the defense alluded to is "on the merits" (Whipple *v.* Rogerson, 12 Gray (Mass.) 347) or that it is interposed with an express reservation that it should be without prejudice to a plea in abatement (Pattee *v.* Harrington, 11 Pick. (Mass.) 221).

Amendment of declaration.— An amended declaration becomes to all intents a new declaration, and defendant, though he has pleaded to the merits of the original declaration, may plead either in abatement or in bar to the amended declaration. Shaw *v.* Brown, 42 Miss. 309.

Interposition in first court.— A plea in abatement should be filed in the first court in which defendant has an opportunity to file it, and failure so to do constitutes a waiver. Hence where defendant demanded a jury trial in an action brought in a police court, and, after it was transferred to a court wherein a jury trial could be had, for the first time pleaded in abatement, the plea was held too late. Bedford *v.* Rice, 58 N. H. 227.

18. *Alabama.*— Powers *v.* Bryant, 7 Port. (Ala.) 9; Callison *v.* Lemons, 2 Port. (Ala.) 145.

Arkansas — Foreman *v.* Gibson, 15 Ark. 206; Heilman *v.* Martin, 2 Ark. 158.

Indiana.— Slauter *v.* Hollowell, 90 Ind. 286; Indiana, etc., R. Co. *v.* Scearce, 23 Ind. 223.

Massachusetts.— Ripley *v.* Warren, 2 Pick. (Mass.) 592.

Michigan.— Thompson *v.* Michigan Mut. Ben. Assoc., 52 Mich. 522, 18 N. W. 247.

Texas.— Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995.

Wisconsin.— Knowlton *v.* Culver, 2 Pinn. (Wis.) 86.

But see Bauer *v.* Samson Lodge, etc., 102 Ind. 262, 1 N. E. 571, wherein it was held that the interposition of a demurrer does not preclude defendant from thereafter filing a plea to the jurisdiction, on the ground that the cause of action, being one against a mutual benefit association, is, by the terms of the contract under which plaintiff became a member, to be adjusted by the supreme lodge of

also been held in a long line of cases that such matter cannot be pleaded after the granting of a general imparlance.[19]

b. In Equity. In chancery, matter in abatement should be presented as a preliminary question.[20]

c. Under the Codes. Under the rule established by the codes such matter must be set up by demurrer or answer, or in some way insisted on before trial on the merits, or it will be deemed waived.[21]

the order rather than in the civil courts. See also Deane *v.* Echols, 2 App. Cas. (D. C.) 522, wherein it was held that a plea in abatement may be interposed after the overruling of a demurrer as a matter of grace.

19. *Arkansas.*— Watkins *v.* Brown, 5 Ark. 197.

District of Columbia.— Deane *v.* Echols, 2 App. Cas. (D. C.) 522.

Illinois.— Archer *v.* Claflin, 31 Ill. 306.

Kentucky.— Rives *v.* Rives, 4 J. J. Marsh. (Ky.) 533.

Maine.— Otis *v.* Ellis, 78 Me. 75, 2 Atl. 851; Cook *v.* Lothrop, 18 Me. 260; Barker *v.* Norton, 17 Me. 416.

Maryland.— Tyler *v.* Murray, 57 Md. 418; Young *v.* Citizens' Bank, 31 Md. 66; Eschbach *v.* Bayley, 28 Md. 492; Chapman *v.* Davis, 4 Gill (Md.) 166.

Massachusetts.— Cole *v.* Ackerman, 7 Gray (Mass.) 38; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Coffin *v.* Jones, 5 Pick. (Mass.) 61; Campbell *v.* Stiles, 9 Mass. 217; Martin *v.* Com., 1 Mass. 347.

Pennsylvania.— Ralph *v.* Brown, 3 Watts & S. (Pa.) 395; Chamberlin *v.* Hite, 5 Watts (Pa.) 373; Witmer *v.* Schlatter, 15 Serg. & R. (Pa.) 150; Fritz *v.* Thompson, 3 Clark (Pa.) 401, 5 Pa. L. J. 423; Coates *v.* McCamm, 2 Browne (Pa.) 173; McCarney *v.* McCamp, 1 Ashm. (Pa.) 4.

Tennessee.— State *v.* Faust, 7 Coldw. (Tenn.) 109; Shaw *v.* Bowen, 1 Overt. (Tenn.) 248.

West Virginia.— Valley Bank *v.* Berkeley Bank, 3 W. Va. 386.

England.— Buddle *v.* Willson, 6 T. R. 369; Doughty *v.* Lascelles, 4 T. R. 520; Jenkes *v.* Lyon, 2 Show. 145; Baron *v.* Hayne, 2 Rolle 59; Lloyd *v.* Williams, 2 M. & S. 484; Barnes *v.* Ward, 1 Sid. 29; Unston *v.* Milner, 1 Show. 49; Neave *v.* Nelson, 1 Lev. 54; Wentworth *v.* Squib, 1 Lutw. 20.

Special imparlance.—In Chamberlin *v.* Hite, 5 Watts (Pa.) 373, it was held that after a general imparlance a plea in abatement cannot be interposed, but the right to interpose such plea can be preserved only by asking a special imparlance and having the reservation entered on the record. See also Robbins *v.* Hill, 12 Pick. (Mass.) 569, wherein it was held that under a statute providing that if the principal defendant in a trustee process shall be absent from the commonwealth when such writ shall be served the court shall continue the action two terms, defendant may plead in abatement at the third term, since such continuances will be deemed in the nature of special imparlance saving defendant's rights.

20. Hertell *v.* Van Buren, 3 Edw. (N. Y.) 20; Anderson *v.* Piercy, 20 W. Va. 282, wherein it was held that an objection to a suit in a chancery court, that another chancery suit was pending in the same court for the same cause of action, presented as an incident among other matters in an answer on the merits, would not avail.

21. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.—Blankenship *v.* Blackwell, (Ala 1900) 27 So. 551; Hawkins *v.* Armour Packing Co., 105 Ala. 545, 17 So. 16.

Arkansas.— Hickey *v.* Thompson, 52 Ark. 234, 12 S. W. 475; Erb *v.* Perkins, 32 Ark. 428.

California.— Luco *v.* Superior Ct., 71 Cal. 555, 12 Pac. 677.

Colorado.— Smith *v.* District Ct., 4 Colo. 235.

Georgia.— Paulk *v.* Tanner, 106 Ga. 219, 32 S. E. 99; Beall *v.* Rust, 68 Ga. 774; Jernigan *v.* Carter, 51 Ga. 232; Welchel *v.* Thompson, 39 Ga. 559, 99 Am. Dec. 470.

Iowa.— Rush *v.* Frost, 49 Iowa 183.

Kansas.— Reed *v.* Sexton, 20 Kan. 195; Bliss *v.* Burnes, McCahon (Kan.) 91.

Minnesota.— McNair *v.* Toler, 21 Minn. 175.

Missouri.—Johnson *v.* Detrick, 152 Mo. 243, 53 S. W. 891; Lindell Real Estate Co. *v.* Lindell, 133 Mo. 386, 33 S. W. 466; Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267.

Nebraska.— Smith *v.* Spaulding, 40 Nebr. 339, 58 N. W. 952.

New York.— Pyro-Gravure Co. *v.* Staber, 30 Misc. (N. Y.) 658, 64 N. Y. Suppl. 520; Bunker *v.* Langs, 76 Hun (N. Y.) 543, 28 N. Y. Suppl. 210; Peck *v.* Kirtz, 15 N. Y. St. 598; Gardiner *v.* Clark, 6 How. Pr. (N. Y.) 449.

North Carolina.— Montague *v.* Brown, 104 N. C. 161, 10 S. E. 186; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192; Hawkins *v.* Hughes, 87 N. C. 115.

Oklahoma.— Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. 242.

Texas.— Corsicana *v.* Kerr, 75 Tex. 207, 12 S. W. 982; Graham *v.* McCarty, 69 Tex. 323, 7 S. W. 342; Allen *v.* Read, 66 Tex. 13, 17 S. W. 115; Hartford F. Ins. Co. *v.* Shook, (Tex. Civ. App. 1896) 35 S. W. 737.

In Indiana, under the statute (Horner Rev. Stat. § 368) an answer in abatement should precede an answer to the merits. Moore *v.* Harmon, 142 Ind. 555, 41 N. E. 599; Black *v.* Thompson, 136 Ind. 611, 36 N. E. 643; Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; Field *v.* Malone, 102 Ind. 251, 1 N. E. 507; Dwiggins *v.* Clark, 94 Ind. 49, 48 Am. Rep. 140; Sanders *v.* Hartge, 17 Ind. App. 243, 46 N. E. 604.

In Oregon, under the code, the common-law rule is followed, and answers in the na-

d. Time Limited by Statute or Rule of Court — (I) *In General.* In jurisdictions where the time within which matter in abatement may be interposed is limited by statute or rule of court, a defendant must interpose such matter within the time so limited or it will be deemed waived,[22] unless the failure so to do is caused by the misconduct of plaintiff[23] or the fault of the court.[24] It has been held that even ignorance of the existence of the facts constituting grounds of abatement will not justify the filing of a plea in abatement after the time limited therefor, if by the use of ordinary diligence they could have been ascertained.[25]

(II) *Discretion of Court.* In some jurisdictions, however, the court may, in its discretion, permit a plea in abatement to be filed after the time for filing such a plea has expired,[26] if the defendant has done nothing indicating an intention to waive the matter in abatement.[27]

2. Grounds Arising Subsequent to Commencement of Action. Matter of abatement arising subsequent to the commencement of the action should be pleaded at the first opportunity after the happening of the facts on which it is founded.[28]

ture of pleas in abatement must be interposed before answering to the merits. Fiore *v.* Ladd, 29 Oreg. 528, 46 Pac. 144; Derkeny *v.* Belfils, 4 Oreg. 258; Hopwood *v.* Patterson, 2 Oreg. 49; Winter *v.* Norton, 1 Oreg. 42.

22. *Connecticut.*— Witter *v.* Mott, 2 Conn. 67.

Illinois.— Thomas *v.* Lowy, 60 Ill. 512; Archer *v.* Claflin, 31 Ill. 306.

Kentucky.—Wickliffe *v.* Carroll, 14 B. Mon. (Ky.) 169; Pendleton *v.* State Bank, 1 T. B. Mon. (Ky.) 171; Simpson *v.* Shannon, 5 Litt. (Ky.) 322.

Maine.— Delcourt *v.* Whitehouse, 92 Me. 254, 42 Atl. 394; Richardson *v.* Rich, 66 Me. 249; Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529; Snell *v.* Snell, 40 Me. 307; Nickerson *v.* Nickerson, 36 Me. 417; Pattee *v.* Lowe, 35 Me. 121; Shorey *v.* Hussey, 32 Me. 579.

Maryland.— Yoe *v.* Gelston, 37 Md. 233; State *v.* Gittings, 35 Md. 169.

Massachusetts.— Joyner *v.* School Dist. No. 3, 3 Cush. (Mass.) 567; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Thompson *v.* Hatch, 3 Pick. (Mass.) 512; Cleveland *v.* Welsh, 4 Mass. 591.

New Hampshire.— Crawford *v.* Crawford, 44 N. H. 428; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

Pennsylvania.— Daniels *v.* Sanderson, 22 Pa. St. 443; Harrison *v.* Tillinghast, 3 Kulp (Pa.) 270; Williams *v.* Etzell, 4 Clark (Pa.) 38, 6 Pa. L. J. 294.

Vermont.— Jennison *v.* Hapgood, 2 Aik. (Vt.) 31.

West Virginia.— Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Carey *v.* Burruss, 20 W. Va. 571, 43 Am. Rep. 790; Hinton *v.* Ballard, 3 W. Va. 582.

United States.— Brooklyn White Lead Co. *v.* Pierce, 4 Cranch C. C. (U. S.) 531, 4 Fed. Cas. No. 1,940.

Entry of a special appearance does not dispense with the necessity of complying with a rule of court providing that pleas in abatement must be filed within two days after entry of the action. Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529.

Motion to quash writ.— A motion to quash the writ on a ground also appropriate for a plea in abatement must be made within the time limited for filing pleas in abatement. Nickerson *v.* Nickerson, 36 Me. 417; Shorey *v.* Hussey, 32 Me. 579; Trafton *v.* Rogers, 13 Me. 315; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

23. State Bank *v.* Hervey, 21 Me. 38, wherein it was held that where plaintiff wrongfully withheld a writ from the files until after the expiration of the time within which, under the rules of court, defendant might plead in abatement, defendant may thereafter and on the inspection of the writ move in abatement.

24. Brunswick First Nat. Bank *v.* Lime Rock F. & M. Ins. Co., 56 Me. 424, wherein it was held that a plea in abatement filed on the third day of the term, no judge having appeared on the first day, is in time.

25. Huntley *v.* Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71; James *v.* Morgan, 36 Conn. 348; Hastings *v.* Bolton, 1 Allen (Mass.) 529.

26. Massey *v.* Steele, 11 Ala. 340; Cobb *v.* Miller, 9 Ala. 499; Charter Oak Bank *v.* Reed, 45 Conn. 391; Hurst *v.* Fisher, 1 Watts & S. (Pa.) 438; Riddle *v.* Stevens, 2 Serg. & R. (Pa.) 537. See also Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634, wherein it was held that it was within the discretion of the court to permit defendant, at the close of the trial, to amend his answer by setting up the pendency of another action involving the same cause of action.

27. Hawkins *v.* Armour Packing Co., 105 Ala. 545, 17 So. 16; Vaughan *v.* Robinson, 22 Ala. 519.

28. *Georgia.*— Mott *v.* Hall, 41 Ga. 117.

Maryland.— Cruzen *v.* McKaig, 57 Md. 454; Young *v.* Citizens' Bank, 31 Md. 66; Eschbach *v.* Bayley, 28 Md. 492; Chapman *v.* Davis, 4 Gill (Md.) 166.

Mississippi.— Simmons *v.* Thomas, 43 Miss. 31, 5 Am. Rep. 470.

Pennsylvania.— Stoever *v.* Gloninger, 6 Serg. & R. (Pa.) 63.

Tennessee.— Yancey *v.* Marriott, 1 Sneed (Tenn.) 28.

Virginia.— May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

3. WITHDRAWAL OF PLEA IN BAR AND INTERPOSITION OF PLEA IN ABATEMENT. In some states the court may in its discretion permit defendant to withdraw a plea in bar and thereafter interpose a plea in abatement.[29]

E. Hearing and Determination of Grounds — 1. TIME OF HEARING AND DETERMINATION. Regularly issues in abatement should be tried and disposed of before issues on the merits.[30] It has been held, however, that the trial of issues on the merits, first, in an attachment action where defendant has pleaded in abatement and in bar, is not of itself reversible error.[31]

2. BURDEN OF PROOF. Upon a plea in abatement the burden of proof is on defendant.[32]

3. ISSUES DETERMINABLE. The merits of plaintiff's case are not the subject of inquiry on the trial of a plea in abatement.[33] The only issue determinable is the matter of abatement.[34]

4. PROVINCE OF COURT AND JURY. An issue of law raised by a plea in abate-

Reasonable time.— In James *v.* Morgan, 36 Conn. 348, it was held that matter of abatement arising after the commencement of the action should be pleaded within a reasonable time after the facts on which it is based arose.

29. Harrison *v.* Tillinghast, 3 Kulp (Pa.) 270; Sandback *v.* Quigley, 8 Watts (Pa.) 460; Myers *v.* Wogan, 5 Pa. Co. Ct. 266; Eden *v.* Osborne, 14 Tex. Civ. App. 314, 37 S. W. 182; Kern *v.* Huidekoper, 103 U. S. 485, 26 L. ed. 354; Eberly *v.* Moore, 24 How. (U. S.) 147, 16 L. ed. 612; Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902. But see Lycoming F. Ins. Co. *v.* Bush, 1 Marv. (Del.) 181, 40 Atl. 947, wherein it was held that an objection that plaintiff corporation had ceased to exist cannot be interposed after pleas to the merits by withdrawing the pleas in bar. See also Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615, wherein it was held that under Ind. Rev. Stat. 1881, § 365, which provides that answers in abatement must precede, and cannot be pleaded with, an answer in bar, when a party files an answer in bar he cannot afterward file an answer in abatement, even though by leave of court the plea in bar was withdrawn. To same effect is Brink *v.* Reid, 122 Ind. 257, 23 N. E. 770.

Abuse of discretion.— It is an abuse of discretion to permit defendant, after waiting four years and until the cause is barred by the statute of limitations, to withdraw an answer to the merits and interpose an objection that the amount in controversy is beneath the jurisdiction of the court. Eden *v.* Osborne, 14 Tex. Civ. App. 314, 37 S. W. 182.

30. *Illinois.*— White *v.* Thompson, 1 Ill. 72.

Kansas.— Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15.

Louisiana.— Flournoy *v.* Flournoy, 29 La. Ann. 737.

Maryland.— Tyler *v.* Murray, 57 Md. 418.

Missouri.— Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139; Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524.

Pennsylvania.— Hummel *v.* Meyers, 26 Wkly. Notes Cas. (Pa.) 279.

Wisconsin.— Brown County *v.* Van Stralen, 45 Wis. 675.

United States.— Fremont *v.* Merced Min. Co., McAll. (U. S.) 267, 9 Fed. Cas. No. 5,095.

As to trial of issue raised by plea of another suit pending see *supra*, II, X, 1-3.

See also Stoever *v.* Gloninger, 6 Serg. & R. (Pa.) 63, wherein it was held that on the removal of a cause to a county created from portions of adjoining counties it is error for the court to which the cause is removed to disregard a plea in abatement alleging the absence of those facts which alone could authorize a removal, and to decide in favor of its own jurisdiction without submitting the issue of fact raised by the plea to the jury.

Discretion of court.— In Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734, it was held that it rested in judicial discretion to permit a plea in abatement, which is to be determined after hearing evidence in support thereof, to be tried as a separate issue and before a trial upon the merits. To same effect see Robertson *v.* Ephraim, 18 Tex. 118.

Distribution of funds pending determination.— While pleas in abatement in attachment suits are undetermined, a distribution of the funds among the attaching creditors should not be made. Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524.

Preservation of status quo.—The court will direct an argument of a plea to the jurisdiction to be made forthwith, and intermediately direct a temporary injunction to issue to keep the parties *in statu quo* until the plea is disposed of. Fremont *v.* Merced Min. Co., McAll. (U. S.) 267, 9 Fed. Cas. No. 5,095.

31. Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

32. Jewett *v.* Davis, 6 N. H. 518; Hart *v.* Kanady, 33 Tex. 720; Robertson *v.* Ephraim, 18 Tex. 118; Hopson *v.* Caswell, 13 Tex. Civ. App. 492, 36 S. W. 312; Gilmer *v.* Grand Rapids, 16 Fed. 708.

As to burden of proof of another suit pending see *supra*, II, X, 4, b.

Jurisdiction over the person.— Where defendant is alleged to be a resident of the county where the suit is brought, and pleads in abatement that he does not reside in that county, but in another, the burden of proof is on defendant. Robertson *v.* Ephraim, 18 Tex. 118.

33. Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877; Sauerwein *v.* Renard Champagne Co., 68 Mo. App. 29.

34. Tyler *v.* Murray, 57 Md. 418.

ment is of course triable to the court.[35] An issue of fact raised by such a plea may be submitted to the jury;[36] but is triable to the court if the parties so agree.[37]

F. Successive Pleas. Successive pleas in abatement of the same general character and setting out matter existing at the time of filing the first plea will not be entertained.[38] It has been held, however, that where a demurrer to a plea in abatement has been sustained for the reason that the plea was not pleaded with sufficient formality, defendant may again be permitted to plead the same matter in abatement.[39]

VI. Waiver of Grounds of Abatement.

A. By Continuance After Interposition of Plea. In some states the continuance of a cause without a disposition of a plea in abatement previously filed is a waiver of such plea.[40] But where the continuance is had by consent[41] or is

35. Dickinson *v.* Noland, 7 Ark. 25, wherein it was held that issues to pleas in abatement for variance between the writ and declaration should be determined by the court upon an inspection of the record and should not be submitted to the jury. See also Gouhenant *v.* Anderson, 20 Tex. 459, wherein it was held that the issue whether or not plaintiff has not sought improperly to bring the cause within the cognizance of the district court is triable by the court without the jury.

Where raised by motion for non pros.— Where the question of jurisdiction over the person is presented by a motion for a *non pros.* the inquiry is made before the court without the intervention of a jury. Tyler *v.* Murray, 57 Md. 418; Gittings *v.* State, 33 Md. 458.

36. McCormick *v.* Blossom, 40 Iowa 256; Enders *v.* Beck, 18 Iowa 86; Tyler *v.* Murray, 57 Md. 418; Stoever *v.* Gloninger, 6 Serg. & R. (Pa.) 63; Robertson *v.* Ephraim, 18 Tex. 118.

37. Tyler *v.* Murray, 57 Md. 418; Anderson *v.* Garrett, 9 Gill (Md.) 120.

38. *Arkansas.*— Denning *v.* Kelly, 9 Ark. 435.

Illinois.— Grand Lodge, etc. *v.* Cramer, 165 Ill. 9, 45 N. E. 165; Cook *v.* Yarwood, 41 Ill. 115.

Kentucky.— Gaines *v.* Conn, 2 Dana (Ky.) 231.

Louisiana.—McAlpine *v.* Jones, 13 La. Ann. 409.

Maine.— Cassidy *v.* Holbrook, 81 Me. 589, 18 Atl. 290.

South Carolina.— Mitchum *v.* Droze, 11 Rich. (S. C.) 196.

Pennsylvania.— Witmer *v.* Schlatter, 15 Serg. & R. (Pa.) 150.

See also Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. 315, wherein it was held that a plea in abatement tried before a former appeal, though submitted with the merits, is not subject to be again tried, though on the former appeal the judgment was reversed on a ground not affecting the decision on the plea in abatement. But see Stoddard *v.* Miller, 29 Ill. 291, wherein it was held that a plea in abatement to an attachment writ will not preclude defendant from afterward moving to dismiss the suit because the declaration was not filed in apt time.

Pleas of non-joinder of parties.—Where defendants have once abated the suit by pleading the non-joinder of other joint contractors, a similar plea cannot thereafter be interposed, though offered by defendants who were not parties at the time of the first abatement of the action. Witmer *v.* Schlatter, 15 Serg. & R. (Pa.) 150.

Plea to jurisdiction.— A plea to the jurisdiction cannot be interposed after the interposition of a dilatory motion. Union Nat. Bank *v.* Centreville First Nat. Bank, 90 Ill. 56. So an objection to the jurisdiction is waived by a motion to require plaintiff to file security for costs. Denning *v.* Kelly, 9 Ark. 435.

Subsequent motion.—After a plea in abatement has been disposed of, a motion based on substantially the same grounds will not be entertained (Grand Lodge, etc. *v.* Cramer, 60 Ill. App. 212; Cassidy *v.* Holbrook, 81 Me. 589, 18 Atl. 290); but where defendant has interposed a plea in abatement and subsequently by motion seeks to dismiss the action on the same grounds as those alleged in his plea in abatement, he will be deemed to have waived his plea and elected to take the objection to the jurisdiction by motion (Gomer *v.* Shiner, 4 Colo. 246).

39. Anderson *v.* Rountree, 1 Pinn. (Wis.) 115.

40. Aldridge *v.* Webb, 92 Tex. 122, 46 S. W. 224; Peveler *v.* Peveler, 54 Tex. 53; Weekes *v.* Sunset Brick, etc., Co., (Tex Civ. App. 1900) 56 S. W. 243; Atchison, etc., R. Co. *v.* Reilly, (Tex. Civ. App. 1894) 30 S. W. 491. But see Parmelee *v.* Tennessee, etc., R. Co., 13 Lea (Tenn.) 600, wherein it was held that a plea of a former suit pending may be filed after a continuance of the cause, with leave to defendant to make defense to the bill and the attachment sued out thereon.

As to waiver by failure to plead see *supra*, V, A.

As to waiver by failure to plead matter in proper manner see *supra*, V, C.

As to waiver by failure to plead matter at proper time see *supra*, V, D.

41. Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735; State *v.* Woodville, 13 Tex. Civ. App. 217, 35 S. W. 861. See also Dorroh *v.* McKay, (Tex. Civ. App. 1900) 56 S. W. 611, wherein it was held that a plea in abatement in a cause continued under an order which recites that it was "continued by agreement without prejudice to the pleas of privilege" is not waived by con-

for the purpose of trying the issues raised by the plea in abatement, the rule in such jurisdictions has been held to be otherwise.[42]

B. By Pleading in Bar after Interposition of Plea — 1. In General. As a general rule the interposition of a plea in bar and proceeding to trial on the merits before a previously filed plea in abatement has been disposed of is a waiver of such plea,[43] even though issue has been joined on a replication to the plea in abatement.[44] It has been held, however, under a rule of court requiring dilatory pleas to be disposed of before the issue on the merits is tried, that on the refusal of the court to try a plea in abatement until the whole case is ready for trial, defendant does not waive his objection by failure to request judgment thereon until after a jury has been impaneled.[45] It has also been held that defendant, by pleading in bar in an action of attachment brought on the ground that he was a non-resident, does not thereby waive his previously interposed objection, based on the ground that he was not a non-resident, to the further maintenance of the attachment.[46]

2. After Overruling of Plea. But a defendant, by pleading in bar of an action after a demurrer has been sustained to his plea in abatement, does not thereby waive his rights under the plea in abatement, if no appeal lies from the

tinuances subsequent to the first, though no reference be made to the plea in abatement.

42. Behrens Drug Co. *v.* Hamilton, 92 Tex. 284, 48 S. W. 5; Howeth *v.* Clark, (Tex. App. 1892) 19 S. W. 433.

43. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Brown *v.* Powell, 45 Ala. 149; Robertson *v.* Lea, 1 Stew. (Ala.) 141; Wilson *v.* Olwer, 1 Stew. (Ala.) 46.

Connecticut.—Prosser *v.* Chapman, 29 Conn. 515.

Illinois.— Gilmore *v.* Nowland, 26 Ill. 200; Fergerson *v.* Rawlings, 23 Ill. 69.

Indiana.— Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; Teagle *v.* Deboy, 8 Blackf. (Ind.) 134.

Iowa.— Hotchkiss *v.* Thompson, Morr. (Iowa) 156; Starr *v.* Wilson, Morr. (Iowa) 438.

Kansas.— Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Bliss *v.* Burnes, McCahon (Kan.) 91.

Kentucky.—Gaines *v.* Park, 3 B. Mon. (Ky.) 223, 38 Am. Dec. 185; Ragland *v.* Allin, 1 A. K. Marsh. (Ky.) 592.

Louisiana.— Phoebe *v.* Vienne, 11 La. Ann. 688; Goldenbow *v.* Wright, 13 La. 371.

Maryland.— Cruzen *v.* McKaig, 57 Md. 454.

Massachusetts.—Clark *v.* Montague, 1 Gray (Mass.) 446; Carlisle *v.* Weston, 21 Pick. (Mass.) 535; Burnham *v.* Webster, 5 Mass. 266.

Mississippi.— Duncan *v.* McNeill, 31 Miss. 704; Alliston *v.* Lindsey, 12 Sm. & M. (Miss.) 656; Webster *v.* Tiernan, 4 How. (Miss.) 352.

Missouri.— Moody *v.* Deutsch, 85 Mo. 237; Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86; Ellis *v.* Lamme, 42 Mo. 153.

New York.— Palmer *v.* Green, 1 Johns. Cas. (N. Y.) 101; Gardiner *v.* Clark, 6 How. Pr. (N. Y.) 449.

North Carolina.— Woody *v.* Jordan, 69 N. C. 189.

Oregon.— Winter *v.* Norton, 1 Oreg. 42.

Pennsylvania.— Potter *v.* McCoy, 26 Pa. St. 458; Utz *v.* Raish, 4 Kulp (Pa.) 375; Chamberlin *v.* Hite, 5 Watts (Pa.) 373.

Rhode Island.— Gardner *v.* James, 5 R. I. 235.

Tennessee.— Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650; Epperson *v.* State, 5 Lea (Tenn.) 291; Morgan *v.* McCarty, 3 Humphr. (Tenn.) 146; Chambers *v.* Haley, Peck (Tenn.) 159.

Texas.— Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73; Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167; Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636; Jolly *v.* Pryor, 12 Tex. Civ. App. 149, 33 S. W. 889; Waco Ice, etc., Co. *v.* Wiggins, (Tex. Civ. App. 1895) 32 S. W. 58; Creswell Ranche, etc., Co. *v.* Waldstein, (Tex. Civ. App. 1894) 28 S. W. 260.

Wisconsin.— Goodrich *v.* Compound School Dist. No. 5, 2 Wis. 102.

United States.— Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Sheppard *v.* Graves, 14 How. (U. S.) 505, 14 L. ed. 518; Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328; Fenwick *v.* Grimes, 5 Cranch C. C. (U. S.) 603, 8 Fed. Cas. No. 4,734; Adams *v.* White, 2 Pittsb. (Pa.) 21, 1 Fed. Cas. No. 68.

Another action pending.—An answer to the merits constitutes a waiver of a previously interposed objection to the jurisdiction of the court on the ground of another action pending. Mix *v.* His Creditors, 39 La. Ann. 624, 2 So. 391; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636.

44. Cruzen *v.* McKaig, 57 Md. 454.

45. Hartford F. Ins. Co. *v.* Shook, (Tex. Civ. App. 1896) 35 S. W. 737. See also State *v.* Woodville, 13 Tex. Civ. App. 217, 35 S. W. 861.

46. Chattanooga Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267. See also Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139 [*overruling* Green *v.* Craig, 47 Mo. 90; Cannon *v.* McManus, 17 Mo. 345; Hatry *v.* Shuman, 13 Mo. 547; Fugate *v.* Glasscock, 7 Mo. 577; Houghland *v.* Dent, 52 Mo. App. 237; Audenreid *v.* Hull, 45 Mo.

action of the court in sustaining the demurrer.[47] The rule is otherwise, however, in jurisdictions where an appeal may be so taken. In such jurisdictions defendant, to avail himself of the advantage of a plea in abatement, must abide by it and decline to plead over or appear to the merits.[48]

3. EFFECT OF STIPULATION. Effect will be given to a stipulation providing that defendant, by going to trial on the merits, does not waive a plea in abatement previously filed.[49]

ABATER. In Law French, a verb spelled also "*Abatre*" or "*Abbatre*," meaning "to ABATE,"[1] *q. v.* (See also ABATOR.)

ABATOR or ABATER. One who abates a nuisance, or who enters into a house or land vacant by the death of the former possessor and not yet taken possession of by his heir or devisee.[2]

ABATRE. See ABATER.

ABATUDA or ABATUDE. Anything diminished.[3]

ABATUS. Beaten; thrown down; abated; quashed.[4]

App. 202], wherein it was held, under Mo. Rev. Stat. 1889, § 561, providing that the truth of an attachment affidavit may be denied by a plea in the nature of a plea in abatement, that defendant, by pleading to the merits of the main action, did not thereby waive his previously interposed denial of the truth of the attachment affidavit.

47. Grand Lodge, etc. *v.* Cramer, 164 Ill. 9, 45 N. E. 165; Weld *v.* Hubbard, 11 Ill. 573; Delahay *v.* Clement, 4 Ill. 201 [*overruling*, on rehearing, 3 Ill. 575]; Galveston City R. Co. *v.* Hook, 40 Ill. App. 547; Union Mut. Acc. Assoc. *v.* Riel, 38 Ill. App. 414; Ames *v.* Winsor, 19 Pick. (Mass.) 247; Rathbone *v.* Rathbone, 4 Pick. (Mass.) 89; Cleveland *v.* Welsh, 4 Mass. 591; Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237. See also Goldstein *v.* Goldsmith, 28 Misc. (N. Y.) 569, 59 N. Y. Suppl. 677, wherein it was held that where defendant, on the return-day of a summons, appeared specially and objected to the jurisdiction of the court on the ground that there had been no service of the process on him, and, on such objections being overruled for want of proper proof, asked for time within which to answer, he will be deemed to have waived the objection.

In equity the rule appears to be otherwise. Railway Pass., etc., Mut. Aid, etc., Assoc. *v.* Robinson, 38 Ill. App. 111.

In justice's court.— Defendant in an action in a justice's court, by pleading to the merits after his objection in abatement has been overruled, does not waive his right to urge the objection on appeal to the county court. Dorroh *v.* McKay, (Tex. Civ. App. 1900) 56 S. W. 611. See also Knoff *v.* Puget Sound Co-operative Colony, 1 Wash. 57, 24 Pac. 27.

Saving of exception.— In Norvell *v.* Porter, 62 Mo. 309, it was held that in attachment actions, where defendant seasonably interposes a plea in abatement and it is overruled by the trial court and an exception is reserved by defendant, he does not, by subsequently pleading to the merits, waive the objection so as to make it unavailable on appeal. To same effect see Ellis *v.* Lamme, 42 Mo. 153.

48. Prosser *v.* Chapman, 29 Conn. 515; Union County *v.* Knox County, 90 Tenn. 541, 18 S. W. 254; Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735; Wilson *v.* Scruggs, 7 Lea (Tenn.) 635. See also Rice *v.* Peteet, 66 Tex. 568, 1 S. W. 657, wherein it was held that where defendant pleads to the merits after his motion to dismiss has been overruled he will be deemed to have waived all grounds of abatement other than those on which the motion was based.

49. Murray *v.* Spencer, 46 La. Ann. 452, 15 So. 25; Macon *v.* Willson, 9 La. Ann. 178. See also Sallee *v.* Ireland, 9 Mich. 154, wherein it appeared that defendant interposed a plea in abatement. The magistrate before whom the action was pending desired to take time for the consideration of the motion, and plaintiff stipulated to submit the motion without argument if defendant would plead to the complaint. It was held that defendant, by complying with the stipulation, did not waive his plea in abatement. But see Atchison, etc., R. Co. *v.* Reilly, (Tex. Civ. App. 1894) 30 S. W. 491, wherein it was held that where a cause is continued under a stipulation that the continuance shall not be prejudicial to plaintiff's objection that the action was not brought in the proper county, and is subsequently continued several times by consent but without reference to the stipulation, defendant will be deemed to have waived the stipulation.

Stipulation to plead to merits.— Where defendants, in consideration of an extension of time within which they might answer, stipulated to answer to the merits of the bill, they are precluded from interposing a plea in abatement. Morgan *v.* Corlies, 81 Ill. 72.

Stipulation to waive errors.— A stipulation that defendant should plead at the present term and the cause stand for trial at the succeeding term, and that all errors were waived, constitutes a waiver of defendant's right to plead in abatement. Ward *v.* Crenshaw, 4 Yerg. (Tenn.) 197.

1. Burrill L. Dict.

2. Wharton L. Lex.

3. Jacob L. Dict.; Wharton L. Lex.

Moneta abatuda.— Money clipped or diminished in value. Jacob L. Dict.

4. Burrill L. Dict.

ABBACY. The government of a religious house, and the revenues thereof, subject to an abbot.[5]

ABBAS or **ABBAT.** See ABBOT.

ABBATIS. An ostler.[6]

ABBATRE. See ABATER.

ABBAYANCE. See ABEYANCE.

ABBETTARE or **ABETTARE.** To ABET,[7] *q. v.*

ABBETTATOR or **ABETTATOR.** An ABETTOR,[8] *q. v.*

ABBEY or **ABBY.** A place or house for religious retirement.[9]

ABBOT, ABBAT, or **ABBAS.** A spiritual lord or governor having the rule of a religious house.[10]

ABBREVIATE OF ADJUDICATION. In Scotch law, an abstract of the decree of adjudication, and of the lands adjudged, with the amount of the debt.[11]

ABBREVIATIO. An abbreviation.[12]

ABBREVIATIONS. Short conventional expressions, employed as substitutes for names, phrases, dates, and the like, for the saving of space, etc.[13] (Abbreviations: In Affidavits, see AFFIDAVITS. In Ballots, see ELECTIONS. In Certificate of Record on Appeal, see APPEAL AND ERROR. In Contracts, see CONTRACTS. In Deeds, see DEEDS. In Indictments or Informations, see INDICTMENTS AND INFORMATIONS. In Judgments, see JUDGMENTS. In Names, see NAMES; SIGNATURES. In Negotiable Instruments, see BILLS AND NOTES. In Pleadings, see PLEADING. In Process, see PROCESS. In Public Records, see RECORDS. In Returns, see ATTACHMENT; EXECUTIONS; PROCESS. In Tax Proceedings, see TAXATION. In Wills, see WILLS. In Verdicts, see TRIAL. Judicial Notice of, see EVIDENCE. Parol Evidence to Explain, see EVIDENCE.)

ABBREVIATIONUM ILLE NUMERUS ET SENSUS ACCIPIENDUS EST, UT CONCESSIO NON SIT INANIS. A maxim meaning "in abbreviations that number and that sense is to be taken by which the grant is not rendered void."[14]

ABBREVIATIO PLACITORUM. See PLACITORUM ABBREVIATIO.

ABBREVIATURE. A short draft.[15]

ABBROACH. To forestall a market.[16]

ABBROCHMENT, ABBROACHMENT, ABROACHMENT, or **ABBROCAMENTUM.** The forestalling of a market or fair.[17]

ABBUTTALS. See ABUTTALS.

ABBY. See ABBEY.

ABCARIARE. To carry away.[18]

ABDICATE. To renounce or refuse anything.[19]

ABDICATIO. An ABDICATION,[20] *q. v.*

5. Jacob L. Dict.
6. Jacob L. Dict.
7. Burrill L. Dict.
8. Burrill L. Dict.
9. Wharton L. Lex.

Right of sanctuary.—An abbey was formerly a sanctuary for persons escaping from penalties of infringed law, even murderers. Wharton L. Lex.

10. Wharton L. Lex.
11. Wharton L. Lex.
12. Burrill L. Dict.
13. Abbott L. Dict.

A narrower definition is "a shortened form of a word, obtained by the omission of one or more letters or syllables from the middle or end of the word." Bouvier L. Dict. This definition is too narrow, however, to embrace such signs as "$" (Jackson *v.* Cummings, 15 Ill. 449), "&" (Brown *v.* State, 16 Tex. App. 245), "&c." (Berry *v.* Osborn, 28 N. H. 279), which have been recognized as abbreviations of "dollars," "and," "and so forth," respectively.

14. Burrill L. Dict.; Shrewsbury's Case, 9 Coke 46*b*, 48*a*.
15. Wharton L. Lex.
16. Wharton L. Lex.
17. Jacob L. Dict.
18. Burrill L. Dict.
19. Wharton L. Lex.

In People *v.* Board of Police, 26 Barb. (N. Y.) 487, 501, Clerke, J., quoted from the speech of Lord Somers, delivered in 1688, when James II vacated the throne, as follows: "The word 'abdicate' doth naturally and properly signify entirely to renounce, throw off, disown, relinquish any thing or person, so as to have no further to do with it; and that whether it be done by express words, or in writing, or by doing such acts as are inconsistent with the holding and retaining of the thing."

20. Adams Gloss.

ABDICATION. The renunciation or giving up of an office by a magistrate or person in office before the term of service is expired.[21]

21. Jacob L. Dict.

Distinguished from "resignation."— While "abdication" is frequently confounded with "resignation" it differs from it in that "abdication" is done purely and simply, while "resignation" is in favor of some person. Jacob L. Dict.

Used in sense of "resignation."— In People *v.* Board of Police, 26 Barb. (N. Y.) 487, where the word "abdication" is used in the sense of "resignation," Clerke, J., made use of the following language: "I do not think that a formal notice of an intention to abdicate an office is necessary to constitute a legal resignation. . . . But, nevertheless, whatever may be the manner by which the incumbent of an office indicates his intention of resigning or abdicating it, whether by acts inconsistent with the retention of the office or by a formal renunciation of it, it is never consummated — he is never legally out of office — until his resignation is accepted either expressly or by the appointment of another in his place."

ABDUCTION

By John Lehman

CROSS-REFERENCES

For Enticing Away of:
Apprentices, see APPRENTICES.
Child, see PARENT AND CHILD.
Husband, see HUSBAND AND WIFE.
Servant, see MASTER AND SERVANT.
Ward, see GUARDIAN AND WARD.
Wife, see HUSBAND AND WIFE.
See also KIDNAPPING; SEDUCTION.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

"Abduction" in its broadest legal sense signifies the act of taking and carrying away by force (which may be by fraud, persuasion, or open violence) a child, ward, wife, etc.[1] In its more restricted sense it is confined to the taking of females for the purpose of marriage, concubinage, or prostitution.[2]

II. NATURE AND ELEMENTS OF THE OFFENSE.

A. Not Offense at Common Law. At common law, conspiracy to procure an infant female to have carnal connection with a man,[3] or to induce a woman to

1. Carpenter *v.* People, 8 Barb. (N. Y.) 603; State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518; State *v.* George, 93 N. C. 567; 3 Bl. Comm. 139, 140; Bouvier L. Dict.

2. 4 Steph. Comm. 84 [*cited* in Bouvier L. Dict. (Rawle's ed.)].

Scope of article.— The comprehensive definition first given might include kidnapping or any forcible taking without regard to the purpose for which it is effected. It is intended to treat in this article, however, the taking of females only, and where the purpose of the taking is the doing of some illegal or immoral act, as compelling marriage or defiling, or the commission of other sexual offenses, under the various statutory provisions punishing such acts and defining them to be abduction. Cases are included which involve the taking of females under general statutes punishing the taking without regard to the purpose for which it is effected, where the taking for the immoral or illegal purposes above mentioned is manifestly included in the intention of the statute, and the facts of the particular case justify such classification. See also *infra*, II, C.

3. Reg. *v.* Mears, 2 Den. C. C. 79.

become a prostitute,[4] or to procure a marriage of a daughter, being an heir apparent, was a punishable offense.[5] To this extent the English statutes relating to abduction have been held not to create any new offense, but merely to impose aggravated punishment for the conspiracy.[6] But that the mere abduction of a female for the purposes usually designated in the statutes was not an offense at common law unless accompanied with other circumstances which would of themselves be unlawful or constitute an offense, as conspiracy, there is direct authority,[7] as well as support in other cases in which the question was not directly involved,[8] notwithstanding there is some intimation to the contrary.[9]

4. Reg. *v.* Howell, 4 F. & F. 160, held that the offense was indictable notwithstanding the vocation of prostitution itself was not punishable at common law.

5. Rex *v.* Twisleton, 2 Keb. 432, 1 Lev. 257.

6. Rex *v.* Twisleton, 2 Keb. 432, 1 Lev. 257.

7. State *v.* Sullivan, 85 N. C. 506; Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

Marriage procured by improper practices. — At common law, if a man marries a woman under age, without the consent of her father or guardian, this act of itself is not indictable, but if he takes a child from her parents or guardian, or those intrusted with her care, by deceit, violence, or any corrupt or improper practice, as by intoxication, for the purpose of marrying her, such criminal means will make the act an offense at common law, notwithstanding the parties themselves consented to the marriage. 1 Russ. Crimes 962 [*citing* 1 East P. C. c. 11, § 9, p. 458].

8. In State *v.* Sullivan, 85 N. C. 506, the court refers to a statement in a note in 2 Archb. Crim. Pr. 301, that the abduction, enticing, or carrying away of any person by force or fraud is an indictable offense at common law, and to 1 East P. C. 458, and 1 Russ. Crimes 569, cited to the statement, and points out that instead of giving sanction to such a position the authorities mentioned are rather to the contrary. In East it is only said that by virtue of the chief prohibitory clause of 4 & 5 Ph. & M. c. 8, an indictment for the abduction of a child will lie by the rule of the common law, which rule, as explained, is that where a thing is prohibited from being done by a statute, and a penalty is affixed to it by a separate and distinct clause, the prosecutrix is not bound to pursue the latter remedy, but may proceed under the prior general clause by indictment for a misdemeanor; and no suggestion is made that such an indictment could be maintained by force of the common law alone; that the case of Rex *v.* Grey, 9 St. Tr. 127, cited in Russ. Crimes 569, as the case of a prosecution at common law for an abduction, was not a case of indictment for abduction, but was an information lodged against that lord and five others by which they were charged with a conspiracy the unlawful purpose of which was to induce Lady Henrietta Berkeley to quit her father's house and custody and live in secret adultery.

In Rex *v.* Ossulston, 2 Str. 1107, an information was granted for the taking of a young woman from her guardian and marrying her, though she went voluntarily, because there was a taking within the meaning of 4 & 5 Ph. & M. c. 8, § 3, the offense being a conspiracy. In this case it is said that the information was granted, though "in 4 Mod. 144, it was said not to be an offense at common law." The case referred to is Rex *v.* Marriot, 4 Mod. 144, which was an indictment for keeping an alehouse without a license, and the indictment was quashed upon the ground that where a new offense is created by statute and a particular mode of punishment is prescribed, that method must be pursued, and not the common-law method by indictment. In this case the chief justice, in stating his opinion that the indictment would lie, expressly says, *arguendo*, that the taking of a female from her parent was not an indictable offense at common law.

In like manner may be cited, *arguendo*, Reg. *v.* Mears, 2 Den. C. C. 79; Reg. *v.* Miller, 13 Cox C. C. 179, 14 Moak 633. In the first case the girl in question was a poor orphan out of employment, and upon applying to a public house for a bed for the night, one of the defendants, who was a prostitute, offered her a bed and took the girl to her house without disclosing its character, and afterward the defendants attempted to persuade her to lead a life of prostitution. In this case it was held that conspiracy to procure an infant to have illicit carnal connection with a man was an indictable misdemeanor at common law. In the second case the defendant was indicted in one count under 24 & 25 Vict. c. 100, § 55, for the taking of a girl out of the custody of her father in one count, and the taking her from the lawful care of her master in another count. Under the particular facts it was held that there was no such taking as the statute intended, and that therefore there could be no abduction.

9. In Rex *v.* Delaval, 3 Burr. 1434, it seems that the act of assigning a girl to persons for the purpose of prostitution was considered by Lord Mansfield as *contra bonos mores*, justifying punishment; but the opinion was intimated upon the question of the jurisdiction of the court of king's bench, and the motion for the information was finally granted upon the ground that there was a conspiracy and confederation. And so in Rex *v.* Moor, 2 Mod. 128, it was held that an information would lie in the king's bench under 4 & 5 Ph. & M. c. 8, for the taking of a female as described therein, though the punishing clause prescribed such fine, etc., "as shall be assessed in the star chamber," the court holding that the offense was a common-

B. General Nature under Statutes — 1. In England. From an early day the subject of abduction has been regulated by statute in England.[10]

2. In United States. In the United States 4 & 5 Ph. & M. has in some instances been adopted as a part of the common law of the land,[11] as far as not inconsistent with American institutions,[12] and where statutes of a similar character have not been enacted.[13] In many of the states the statutes in express terms look to the punishment and suppression of the vices which are involved in the sexual acts usually contemplated in the unlawful taking or enticing of females. They are variously directed against the taking of a woman against her will for the purpose of compelling her by force, menace, etc., to marry;[14] against the taking of a female under a designated age, without the consent of her lawful custodian, for the purpose of marriage;[15] against the taking and detaining of any woman against her will, with intent to have carnal knowledge of her, or that another shall have such knowledge;[16] against the inveigling or enticing of an

law one, but adding further that even if it was not an offense at common law, the remedy by information in the court of king's bench was proper, as there were no negative words in the statute restraining the general jurisdiction of that court. To the proposition that the offense was punishable at common law two cases are cited in a note: Rex *v.* Twisleton, 1 Lev. 257, and Rex *v.* Ossulston, 2 Str. 1107,— which cases, however, have been referred to heretofore in this section.

10. English statutes.— 4 & 5 Ph. & M. prohibited the taking away, or causing to be taken, of any maid or woman child, unmarried, within a designated age, out of the possession and against the will of her father, mother, or any person in whose legal custody she is, and the taking away, or causing to be taken away, and deflowering any such maid or woman child as aforesaid, or the marrying of such maid or woman child against the will of her parents, etc.

3 Hen. VII prohibited the taking of women having substances in goods movable and in lands and tenements, or, being heirs apparent, for the lucre of such substances, contrary to their will, and afterward marrying or defiling them. 39 Eliz. c. 9 made the offense defined in 3 Hen. VII a capital offense as against principals, procurers, and accessories before the fact, and it so remained until the act of 1 Geo. IV, c. 115, by which the capital penalty was repealed. Wakefield's Case, 2 Lewin 1 note.

9 Geo. IV, c. 31, § 20, prohibited the taking, etc., of any unmarried girl, under a designated age, out of the possession and against the will of her parents or other lawful custodian. Reg. *v.* Hopkins, C. & M. 254.

These statutes were repealed by 24 & 25 Vict. c. 100, under the various sections of which provision is made against the taking away or detaining, from motives of lucre, any woman having any interest, etc., in any real or personal property, or who shall be a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, with intent to marry or carnally know her, or cause her to be married or carnally known; against the fraudulent luring or taking away of such a woman, who is under the age of twenty-one years, out of the possession and against the will of her father, mother, or other person having the lawful care or charge of her, with the intent above mentioned; against the taking by force, or a detention against her will, of any woman with intent to marry or carnally know her, or cause her to be married or carnally known; against the taking of an unmarried female, under a designated age, out of the possession and against the will of her parents or any person having the lawful care or charge of her.

Aiders and abettors.— In South Carolina, under 4 & 5 Ph. & M. c. 8, § 4, providing a punishment for any person who shall take away or cause to be taken away a maid or woman child against the will of her lawful custodian, and marry her, it was held that one aiding in such marriage could be convicted with and to the same extent as the one who actually married the woman child. State *v.* Tidwell, 5 Strobh. (S. C.) 1. But under 3 Hen. VII, c. 2, where the female was under no restraint at the time of the marriage, those who were present but were ignorant of the previous circumstances were held not to share in the guilt of the abduction. Fulwood's Case, Cro. Car. 488.

11. State *v.* Tidwell, 5 Strobh. (S. C.) 1; State *v.* Findlay, 2 Bay (S. C.) 418; State *v.* O'Bannon, 1 Bailey (S. C.) 144.

12. State *v.* Tidwell, 5 Strobh. (S. C.) 1. See also *infra*, III, A, 1.

13. Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776. See also State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518; and *infra*, II, C, 2, f.

14. Malone *v.* Com., 91 Ky. 307, 15 S. W. 856; Lampton *v.* State, (Miss. 1892) 11 So. 656; State *v.* Maloney, 105 Mo. 10, 16 S. W. 519.

15. Haygood *v.* State, 98 Ala. 61, 13 So. 325; Ala. Crim. Code (1886), § 3744; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712; State *v.* McCrum, 38 Minn. 154, 36 N. W. 102; People *v.* Parshall, 6 Park. Crim. (N. Y.) 129; N. Y. Pen. Code, § 282; Com. *v.* Kaniper, 3 Pa. Co. Ct. 276; U. S. *v.* Zes Cloya, 35 Fed. 493.

16. Malone *v.* Com., 91 Ky. 307, 15 S. W. 856; Huff *v.* Com., (Ky. 1896) 37 S. W. 1046;

unmarried female of previous chaste character into a house of ill fame, assignation, or elsewhere, for the purpose of prostitution or sexual intercourse,[17] or the inveigling of a woman child, under a designated age, into such a place with a like purpose;[18] against the taking of any female from her lawful custodian, without his consent, for the purpose of prostitution or concubinage;[19] against the enticing or taking away of any unmarried female of chaste life and conversation for the purpose of prostitution or concubinage;[20] against the taking of a female, under a designated age, for the purpose of prostitution or sexual intercourse;[21] against the taking of a female, under a designated age, from the custody of her lawful custodian, for the purpose of prostitution or concubinage;[22] or against the taking and seduction of a girl under a designated age.[23] In like manner the receiving, employing, harboring, or causing or procuring the taking for the purposes inhibited by the statute,[24] or aiding or assisting, or concealing, or aiding or abetting in the concealment, for such purposes, are made punishable as in the case of the principal act.[25] Where the taking, for the particular purpose, from the custody of the parent, guardian, etc., is prohibited, it is sometimes provided that consent to the taking by such person having the legal custody, for the purpose mentioned in the statute, shall be punishable as the taking itself.[26]

C. Specific Elements — 1. In General. To constitute the offense under statutes which define it or make punishable the acts embraced in the treatment of this article, an act must contain all the elements defined by statute.[27]

2. The Taking — a. In General. Where the statute provides against the taking away, etc., of a female, the taking as contemplated by the statute is a material ingredient of the offense,[28] and the offense will be as incomplete by sexual

Couch *v.* Com., (Ky. 1895) 29 S. W. 29; Krambiel *v.* Com., (Ky. 1887) 2 S. W. 555.

17. State *v.* McCrum, 38 Minn. 154, 36 N. W. 102; People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111; Beyer *v.* People, 86 N. Y. 369.

18. Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

19. South *v.* State, 97 Tenn. 496, 37 S. W. 210; Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Jenkins *v.* State, 15 Lea (Tenn.) 674.

20. People *v.* Roderigas, 49 Cal. 9; Henderson *v.* People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391; Slocum *v.* People, 90 Ill. 274; Carpenter *v.* People, 8 Barb. (N. Y.) 603.

21. State *v.* Keith, 47 Minn. 559, 50 N. W. 691; State *v.* McCrum, 38 Minn. 154, 36 N. W. 102; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712; Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

22. Ala. Crim. Code (1886), § 3744; State *v.* Round, 82 Mo. 679; State *v.* Feasel, 74 Mo. 524; People *v.* Parshall, 6 Park. Crim. (N. Y.) 129; U. S. *v.* Zes Cloya, 35 Fed. 493.

23. State *v.* Gordon, 46 N. J. L. 432.

24. Beyer *v.* People, 86 N. Y. 369; N. Y. Pen. Code, § 282.

"Procurer" and "enticer" distinguished.— In California it was held that to "procure a female to have illicit carnal connection with any man" was intended to cover only the offense of being a procurer or procuress, and not to extend to a mere enticing and seduction by the enticer. It refers to the act of a person who procures the gratification of the passion of lewdness for another. People *v.* Roderigas, 49 Cal. 9, 11. See also *infra*, II, C, 2, f, (III).

25. State *v.* Terrill, 76 Iowa 149, 40 N. W. 128; Carpenter *v.* People, 8 Barb. (N. Y.) 603; Wis. Laws (1887), c. 214, § 4, in which it was provided that any person, being the owner of any premises, or assisting in the management or control thereof, who influences or knowingly suffers any girl under the age of twenty-one years to resort to or be in or upon the premises for the purpose of being unlawfully and carnally known by any person or persons, shall be punished, etc.

Commission by same and different persons. — The inveigling or enticing of a female to a house of ill fame, and knowingly concealing or assisting or abetting the concealing of such female so enticed, are, under the statute punishing such acts, two separate offenses. They may be committed by the same person in connection with the same female or by different persons with concert of action. State *v.* Terrill, 76 Iowa 149, 40 N. W. 128. But in Carpenter *v.* People, 8 Barb. (N. Y.) 603, it was said that the aid or assistance by the person charged must be rendered to some one who is guilty of the same offense.

26. State *v.* Jamison, 38 Minn. 21, 35 N. W. 712; Minn. Pen. Code, § 240; State *v.* Feasel, 74 Mo. 524; Mo. Rev. Stat. (1879), § 1257.

27. State *v.* O'Bannon, 1 Bailey (S. C.) 144.

28. *Illinois.*— Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

Minnesota.— State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

New York.— People *v.* Parshall, 6 Park. Crim. (N. Y.) 129; People *v.* Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

Pennsylvania.— Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

intercourse where there has been no taking as if there had been a taking without the intention which under the statute makes the act criminal.[29]

b. Force—(I) *Actual Force Unnecessary.* Even under the strictest definition of abduction,—the taking or carrying away of the child of a parent, or the wife of a husband, etc., either by fraud, persuasion, or open violence,—actual manual capture or violence is not necessary,[30] and under many statutes actual force is not required. The commonest provisions are against the taking of young girls, and as in such cases consent on the girl's part is not material,[31] the taking contemplated being from the parent or other person having the legal custody of the female, actual violence is unnecessary.[32] The taking may be accomplished where the girl is merely induced, or yields to the persuasion of defendant to go with him,[33] or is induced to such course by fraud or deception.[34]

(II) *Detention against Will.* Where the statute prohibits the taking or detention of a woman, by force or against her will, with a particular intent, the offense is not complete unless the defendant interposes between the woman and the free exercise of her will. The taking must be with force or against the will,[35] and the detention thus inhibited must be something more than mere per-

England.—Reg. *v.* Olifier, 10 Cox C. C. 402.

The word "take," in the statute against the taking of a female, etc., for the purpose of prostitution, seems to be used to distinguish the act prohibited from those cases where the female is merely received or allowed to follow a life of prostitution without persuasion or inducement by the person. People *v.* Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

Seduction does not mean a taking. People *v.* Parshall, 6 Park. Crim. (N. Y.) 129. See also Lampton *v.* State, (Miss. 1892) 11 So. 656.

29. Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

30. See People *v.* Seeley, 37 Hun (N. Y.) 190.

31. See *infra*, II, C, 2, c.

32. *Kansas.*—State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

New York.—People *v.* Seeley, 37 Hun (N. Y.) 190.

Pennsylvania.—Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

Tennessee.—South *v.* State, 97 Tenn. 496, 37 S. W. 210; Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Tucker *v.* State, 8 Lea (Tenn.) 633.

England.—Reg. *v.* Manktelow, 6 Cox C. C. 143; Rex *v.* Pierson, Andr. 310.

Evidence of threats immaterial.—Under the statute in Missouri forbidding the taking of a female, under a designated age, from her parents, etc., for the purpose of concubinage, it is not material to the defense that there is some evidence that defendant threatened the girl. It seems that defendant in this case claimed that the evidence showed that the offense for which he should have been indicted was rape, but the court held that there was absence of those elements which constitute the latter offense. State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

33. *California.*—People *v.* Demousset, 71 Cal. 611, 12 Pac. 788; People *v.* Marshall, 59 Cal. 386.

Kansas.—State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

Minnesota.—State *v.* Keith, 47 Minn. 559, 50 N. W. 691; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

Missouri.—State *v.* Johnson, 115 Mo. 480, 22 S. W. 463.

Pennsylvania.—Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

England.—Reg. *v.* Hopkins, C. & M. 254.

Direct proposal not necessary.—One cannot evade the statute by artfully avoiding a direct proposal that the female should go away with him, when his conduct is equivalent to such a proposal, and not only suggests it, but is calculated and designed to induce her to go. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487.

Fraud or deception unnecessary.—Under the statute against the taking, using, employing, or causing to be taken, used, or employed, etc., a girl, under a designated age, for immoral purposes mentioned, the taking is sufficient if it is upon the request, advice, or persuasion of the defendant, and no deception or fraud is necessary. People *v.* Seeley, 37 Hun (N. Y.) 190.

As against one who aids or assists.—In Carpenter *v.* People, 8 Barb. (N. Y.) 603, it was held that where a person, by inveigling or persuading, obtains the consent of a female to go away for the purpose of prostitution, and she thereupon, at the request of or by uniting with her seducer, persuades another person to take her away for the same purpose, the latter person may be guilty of aiding or assisting in her abduction. But if the female of her own accord decides to go away for the purpose mentioned, and thereupon, at her request and upon her persuasion, such person furnishes her with the means of going or carries her away, this would not be such assisting.

34. South *v.* State, 97 Tenn. 496, 37 S. W. 210; Reg. *v.* Hopkins, C. & M. 254; Rex *v.* Pierson, Andr. 310.

35. Beaven *v.* Com., (Ky. 1895) 30 S. W. 968; Payner *v.* Com., (Ky. 1892) 19 S. W. 927; Cargill *v.* Com., (Ky. 1890) 13 S. W. 916; Krambiel *v.* Com., (Ky. 1887) 2 S. W. 555; Wilder *v.* Com., 81 Ky. 591; Lamp-

suasion or an exhibition of desire to gratify the animal passion;[36] but it is not necessary that actual physical violence should be used. It is sufficient if the female is induced to go by false representations or by fear induced by threats,[37] or if she is unconscious or incapable of exercising her will, as where she is asleep[38] or of unsound mind.[39] If the detention is effected against the will of the female, it is immaterial whether the intention to carry out the purpose of the detention is by force or persuasion, where the latter is not by statute a material ingredient.[40]

c. Consent. Under a statute prohibiting the taking of a female, under a designated age, from her lawful custodian, or from such person without his consent, it is immaterial whether the act was done with or without the consent of the female, as the gist of the offense is the taking from the custody or without the consent of the person indicated, and consent of the female, therefore, is no defense.[41] But as fraud and violence are equivalent, if a parent is induced by

ton *v.* State, (Miss. 1892) 11 So. 656; State *v.* Maloney, 105 Mo. 10, 16 S. W. 519.

Refusal after consent.— If a woman first consents to her taking away, but subsequently refuses to continue with the offender and is compelled to remain by force, there is a sufficient taking against her consent; and in such case it is not material whether she was married or defiled with her own consent or not. Fulwood's Case, Cro. Car. 488, 493.

"Woman" including "girl."— Under a statute of the nature mentioned in the text, prohibiting the taking and detention of a woman, a girl between the age of thirteen and fourteen years is contemplated. Woman is synonymous with female. Couch *v.* Com., (Ky. 1895) 29 S. W. 29.

36. Cargill *v.* Com., (Ky. 1890) 13 S. W. 916.

37. What constitutes a taking or detention.— Where defendant admittedly went to the house of a woman and falsely represented to her that he had been sent by a relation of hers to notify her to come to the house of said relation on account of sickness in his family, and upon her leaving with defendant he made insulting proposals to her, which she rejected, and, in the language of the woman, "run against me in front and jammed up against me, jammed up against my side and back," it was held that there was a detention within the meaning of the statute. Huff *v.* Com., (Ky. 1896) 37 S. W. 1046.

Where the prosecutrix was induced by false representations on the part of the defendant, upon which she relied, to go to a house for the purpose of securing a situation, which house was of a disreputable character, where the act of defilement was accomplished, it was held that this was a taking against her will within the meaning of the statute. Beyer *v.* People, 86 N. Y. 369.

Where the prosecutrix, who was a foreigner and had been in the United States but a short time, sought employment at a place which was a house of prostitution, but of the character of which she was ignorant, and was kept at the place by the proprietor by being induced to fear that she would be arrested if she left, after which she was compelled to submit herself to be defiled against her will, this is a sufficient taking against her will for the purpose prohibited by the statute. Schnicker *v.* People, 88 N. Y. 192.

Where a confederate of the accused inveigled a girl of fourteen years, having a portion of five thousand pounds, to go with her and a maid-servant in a coach into a park, where the prisoner got into the coach and the confederate got out, and the prisoner detained the girl while the coach took them to a lodging in the Strand, and the next morning prevailed upon her by threats to marry him, this constituted a taking. Brown's Case, Vent. 243; Swendsen's Case, 5 St. Tr. 450.

38. Malone *v.* Com., 91 Ky. 307, 15 S. W. 856; Couch *v.* Com., (Ky. 1895) 29 S. W. 29.

Laying hands upon sleeping child.— The word "take," as used in this statute, means to seize or lay hold upon; and where accused lays his hand upon the person of a female child while asleep, in such manner as to indicate the evil purpose, this is a taking within the meaning of the statute. Couch *v.* Com., (Ky. 1895) 29 S. W. 29.

39. Higgins *v.* Com., 94 Ky. 54, 21 S. W. 231.

40. Payner *v.* Com., (Ky. 1892) 19 S. W. 927.

41. *California.*— People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; People *v.* Demousset, 71 Cal. 611, 12 Pac. 788; People *v.* Cook, 61 Cal. 478.

Kansas.— State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

Missouri.— State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

Tennessee.—Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Tucker *v.* State, 8 Lea (Tenn.) 633.

England.— Reg. *v.* Manktelow, 6 Cox C. C. 143; Reg. *v.* Kipps, 4 Cox C. C. 167; Reg. *v.* Biswell, 2 Cox C. C. 279; Rex *v.* Ossulston, 2 Str. 1107.

Consent of parents.— If the girl goes with the consent of her parents there can be no guilt. Brown *v.* State, 72 Md. 468, 20 Atl. 186.

In Reg. *v.* Primelt, 1 F. & F. 50, it was held that where a mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public-houses, the case did not come within 9 Geo. IV, c. 31, against the unlawful taking of an un-

fraudulent representations to allow his daughter to be taken away, such taking will constitute an abduction or a taking against the will of the father.[42]

d. Taking to Place of Particular Character. Under statutes prohibiting the taking or enticing of a female to a house of ill fame, assignation, or elsewhere, for the purpose of prostitution, the words "or elsewhere" do not neutralize the preceding words of description, but mean any place where prostitution of the character common to houses of ill fame or assignation is practised. Under such a statute the offense is not committed by inveigling or enticing a female to any place without regard to its character and for the mere purpose of sexual intercourse.[43]

e. From Custody of Lawful Custodian — (1) *In General.* Under a statute merely prohibiting the taking of a female, under a designated age, for certain purposes, it is not necessary that the taking should be from her parents or other lawful custodian of her person.[44] But under statutory provisions against the taking of a female from the custody or possession of her parent, guardian, or other person having the legal charge of her person, the rule already stated as to the necessity of a taking, where the statutes make such taking an ingredient of the offense, is applicable, and in order to constitute the offense the defendant must have got the female away from her parents or other lawful custodian by some positive act.[45]

(II) *Sufficiency of Custody.* The father has by nature and by law the legal charge of the persons of his children until they arrive at the age of majority;[46] but where the minor female is in the actual custody of her mother, the

married girl, under a designated age, out of the possession and against the will of her parents, etc., for it could not be said to have happened against the mother's will, although what occurred in this case was unknown to her.

Consent of stepfather is no defense where the child is taken from the custody of its mother. Ratcliff's Case, 3 Coke 37.

Right of custody as between father and mother.— It is no defense that the father had a better right to the custody of the child as between the father and the mother, and gave his consent to the abduction, where the child is taken from the custody of its mother, as the latter is legally in charge of the person of her daughter in such a case. People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110.

Marriage — Continued refusal.— Under 4 & 5 Ph. & M. c. 8, § 4, it is held that there must have been a continued refusal on the part of the parent or guardian to consent to the marriage, for, if he once agree, though afterward he dissent, yet it is an assent within the statute. Calthrop *v.* Axtel, 3 Mod. 168.

Public marriage without enticement.— In Hicks *v.* Gore, 3 Mod. 84, it was held that 4 & 5 Ph. & M. was made to prevent children from being seduced from their parents or guardians by flattery, enticement, promises, or gifts, and married in a secret way, to their disparagement; that it did not apply to a case where one in whose charge a parent had placed his daughter married the child to his own son, the marriage being solemnized in a parish church at a canonical hour and without any attempt at privacy.

42. Reg. *v.* Hopkins, C. & M. 254.

43. Nichols *v.* State, 127 Ind. 406, 409, 26 N. E. 839; Miller *v.* State, 121 Ind. 294, 23 N. E. 94; State *v.* McCrum, 38 Minn. 154, 36 N. W. 102; Carpenter *v.* People, 8 Barb. (N. Y.) 603.

The principle upon which this conclusion is based is that where words of a particular description in the statute are followed by general words, less specific and limited, the general words are to be construed as applicable to persons, things, or cases of like kind to those designated by the words, unless there be a clear manifestation of a contrary purpose. Nichols *v.* State, 127 Ind. 406, 26 N. E. 839.

44. State *v.* Jamison, 38 Minn. 21. 35 N. W. 712; People *v.* Seeley, 37 Hun (N. Y.) 190.

45. *California.*— People *v.* Dolan, 96 Cal. 315, 31 Pac. 107.

Illinois.— Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

Maryland.— Brown *v.* State, 72 Md. 468, 20 Atl. 186.

New York.— People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

Tennessee.—South *v.* State, 97 Tenn. 496, 37 S. W. 210.

England.— Reg. *v.* Manktelow, 6 Cox C. C. 143; Reg. *v.* Kipps, 4 Cox C. C. 167; Reg. *v.* Roob. 4 F. & F. 59; Reg. *v.* Robins, 1 C. & K. 456.

Custodian other than parent or guardian. — In California it was held that under the statutory provision against the taking of a minor female from her father, mother, guardian, or other person having the legal charge of her person, it was not necessary to allege or prove legal custody of the father, mother, or guardian. *Ex p.* Estrado, 88 Cal. 316, 26 Pac. 209.

46. People *v.* Cook, 61 Cal. 478, in which case it was held that if one takes a daughter from the charge of her father for the purpose inhibited by the statute, it is im-

latter is legally in charge of the person of her daughter, within the statutory provision against the taking from the father, mother, or other person having the legal custody of the child, and it is no defense that the father had the better right to the custody as between the father and the mother.[47] Where the want of consent of the father, mother, guardian, or other person having the legal care of the person of the female child, is a necessary ingredient of the offense, it is not contemplated that such person intended to be covered by the words "or other person having the legal charge of her person" shall have all the power and authority over the child possessed by a parent or legally appointed guardian.[48]

(III) *Sufficiency of Taking from Custody.* Whenever a man goes away with a girl within the statutory age from the house and possession of the girl's father, there is a taking away within the meaning of the statute, whether the proposal first emanated from the man or the girl.[49] It is not necessary, however, that the female should be in the actual possession of her custodian at the time of the taking, nor that the defendant should be present at the time of her leaving[50] if the leaving was the result of prior inducement on the part of the defendant;[51] and it is not necessary that the taking or enticing should be to a place distant from the family residence, or that any particular length of time

material whether the defendant knew that the female had a father living. But see *infra*, II, C, 2, e, (III).

Presumption as to custody.— Under the statute against the enticing or taking away of a female, of less than sixteen years of age, from her lawful custodian, for the purpose of prostitution, concubinage, or marriage, it was held that all girls under the age mentioned, and who were not leading depraved lives, were presumed to be in the charge of some one. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487.

Reputed father.— An information has been granted for the taking away of a natural daughter who was living under the care of her reputed father. Rex *v.* Cornforth, 2 Str. 1162, under 3 Hen. VII, c. 2, § 3.

47. People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110.

After second marriage.— Under such a statute the mother retains the guardianship of her child, notwithstanding the mother's subsequent marriage. Ratcliff's Case, 3 Coke 37.

48. **An orphan adopted** into a family without legal guardianship, and a girl abandoned by her parents and given a home by charitable persons, are as much within the reason and intent of the statute as any other female. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487; State *v.* Ruhl, 8 Iowa 447.

Custody permitted by parent.— The offense would be complete if the taking was without the consent of the person who, with the permission of parents, was intrusted with the care and custody of the child. State *v.* Ruhl, 8 Iowa 447.

Ward in chancery.— In Rex *v.* Pierson, Andr. 310, the court was of the opinion that an information lay against persons concerned in inveigling a young lady, under 4 & 5 Ph. & M. against the taking of a woman child, etc., out of the possession and against the will of her father, mother, or such person or persons as shall then happen to have by any lawful ways or means the order, keeping, education, etc., of such woman child, where the girl was a ward of chancery.

49. Reg. *v.* Biswell, 2 Cox C. C. 279.

Where the defendant went to the house of the father, placed a ladder against it for the daughter to descend, whereupon the daughter descended and eloped with the defendant, this was held to be a taking out of the possession of the father under 9 Geo. IV, c. 31, § 20, although the daughter had herself planned the bringing of the ladder as well as the elopement. Reg. *v.* Robins, 1 C. & K. 456.

50. Reg. *v.* Sinclair, 13 Cox C. C. 28, applying the text to a case where the evidence showed that the girl left her home for the purpose of meeting the defendant, as she had often done before, and that while walking with him he induced her to run away, notwithstanding this last meeting was at the solicitation of the female.

In Reg. *v.* Meadows, 1 C. & K. 399, under 9 Geo. IV, c. 31, § 20, it was held that where a girl, who was in service, was asked by the defendant, as she was returning from an errand, if she would go to London to the defendant's mother, who wanted a servant, upon which the two went away together and were apprehended, this was not a taking or causing to be taken. But in Reg. *v.* Kipps, 4 Cox C. C. 167, holding that the consent of the girl abducted is not material under that statute if those in whose lawful possession or control she was did not consent to her departure, and *disapproving* Reg. *v.* Meadows, 1 C. & K. 399, *supra*, the reporter adds a note showing that the real facts in that case did not justify the marginal note, as the defendant and girl alleged to have been abducted were schoolfellows and were about of the same age, and that under the facts of that particular case, if the acts involved had been held to be abduction, any two schoolgirls playing truant in company might have been indicted each for taking the other.

51. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

should pass in order to bring the case within the statute.[52] Whenever a girl is taken from her father's roof and placed in a situation inconsistent with the relation of father and daughter there is a taking from the father against his will under the statute; the girl is in constructive possession as long as she has the intention of returning,[53] though it has been held that there is no obligation to restore, under the statutory provision which inhibits merely the taking, where there was no prior inducement to the leaving.[54]

f. Intent of Taking — (1) *In General.* As hereinbefore stated, the statutes sometimes provide against the taking of females without regard to the purpose for which they are taken.[55] Such statutes, however, seem to contemplate not only the protection of parental rights,[56] but the protection of young persons of this sex,[57] very like the statutes which expressly look to the punishment of the taking with intent to commit sexual offenses.[58]

52. Slocum *v.* People, 90 Ill. 274; South *v.* State, 97 Tenn. 496, 37 S. W. 210.

53. People *v.* Cook, 61 Cal. 478; State *v.* Gordon, 46 N. J. L. 432; Reg. *v.* Timmins, 8 Cox C. C. 401; Reg. *v.* Manktelow, 6 Cox C. C. 143.

54. Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652; Reg. *v.* Olifier, 10 Cox C. C. 402; Reg. *v.* Hibbert, 11 Cox C. C. 246, holding that where the accused met on the street a girl under the age designated, and induced her to go with him, after some persuasion, to a public-house, where he seduced her, there is no guilt unless it is shown that the defendant knew, had reason to know, or believed that the girl was under the care of her father at the time. *Contra*, People *v.* Cook, 61 Cal. 478.

Girl out of custody of master.— Under 24 & 25 Vict. c. 100, § 55, defendant was indicted in two counts, one describing the girl as having been taken out of the custody of her father, and the other alleging that she was under the lawful care of her master. The facts were that she was a girl in service and had obtained permission to leave her master for a visit to her father. Concealing from her father the length of time she was at liberty to remain with him, she left his house before the expiration of her leave of absence, met defendant by appointment, and remained out with him over night. She could still have returned to her master before the expiration of her leave of absence, but did not do so, although she spent no more time alone with defendant. It was held that this was not such a case as the statute was intended to mean; that there was no evidence that the accused had taken the girl out of her father's or her master's possession, and that hence there was no abduction. Reg. *v.* Miller, 13 Cox C. C. 179, 14 Moak 633.

55. See *supra*, II, B.

56. Reg. *v.* Timmins, 8 Cox C. C. 401, wherein it is said that 9 Geo. IV, c. 31, § 20, against the taking of girls under a designated age from the custody of their parents, etc., was intended for the protection of parental rights.

57. Reg. *v.* Kipps, 4 Cox C. C. 167.

In Rex *v.* Pigot, 12 Mod. 516, of the offense of attempting forcibly to carry away a woman of great fortune, Holt, C. J., said that the offense concerned all the people in England who would dispose of their children well.

58. Applications of general statutes.— In Reg. *v.* Tinkler, 1 F. & F. 513, where the prisoner, who was a widower, had married the elder sister of the child alleged to have been abducted, and the child, who was an orphan, had lived in the prisoner's house, and upon the death of his first wife was placed under the care of a guardian, it was held that as it did not appear that the prisoner had any improper motive, but honestly believed that he had a right to the custody of the child, he would be entitled to an acquittal, although, as a matter of law under 9 Geo. IV, c. 37, § 20, he was not justified in the taking. See also Reg. *v.* Timmins, 8 Cox C. C. 401.

In North Carolina the statute is in the nature of a general provision against the taking of children without regard to the purpose of the taking. N. C. Code, §§ 973, 974. But this statute would seem to embrace a prosecution for the taking of a female child under the age designated in the statute, where the purpose of the taking is one of the immoral and inhibited acts usually aimed at in the statutes of other states. Thus in State *v.* Sullivan, 85 N. C. 506, it is held that an indictment for the abduction of a female under the age of fifteen years, with intent to defile her, could not be supported under the statute, which had exclusive reference to the abduction of children under the age of fourteen years; but in State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518, which was a prosecution under this general statute, where the child appeared to have been a female thirteen years old, it was held not to be error to permit the state to prove the character of the house to which the child was taken, as a house of prostitution, as the character of the house was only collaterally involved and was used only for the purpose of showing the intent with which the act was done, as that defendant's object was to prostitute the child.

In Louisiana the statute provided generally against the forcible seizure and carrying of any person from one part of the state to the other, or imprisoning and secreting any person without authority of law, and under it an indictment was sustained for forcibly seizing and carrying a woman to a house of

Under other statutory provisions, however, the taking prescribed must be accompanied with a peculiar intent, as an intent to marry or defile, or to reduce the female to a condition of prostitution or concubinage. Under such provisions the intent becomes a material ingredient of the offense,[59] and a mere taking will not complete the offense unless accompanied with the specific intent mentioned in the statute,[60] any more than mere sexual intercourse, or other act of this character alone, will constitute the offense, unless there had been a taking or enticing for that purpose as required by the statute.[61]

(II) *For Purpose of Prostitution or Concubinage.* Under statutes against the taking of females for the purpose of prostitution, the term "prostitution" means the act or practice of a female offering her body for indiscriminate intercourse with men. Cohabitation with defendant, or acts of sexual intercourse with him alone, will not support an indictment under such a statute.[62] So, if the taking is prohibited for the purpose of concubinage, the purpose must

ill fame, though the intent with which she was seized and carried had no bearing upon the case. The indictment charged that the acts were done with intent to abduct, and in this connection the court said that whether abduction was or was not an offense in that state, the indictment was sufficient because it charged the offense created by the statute in the terms thereof. State *v.* Backarow, 38 La. Ann. 316.

59. *Illinois.*— Bunfill *v.* People, 154 Ill. 640, 39 N. E. 565; Slocum *v.* People, 90 Ill. 274.

Maryland.— Brown *v.* State, 72 Md. 468, 20 Atl. 186.

Minnesota.— State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

Missouri.—State *v.* Gibson, 108 Mo. 575, 18 S. W. 1109.

New York.— People *v.* Platt, 4 N. Y. Crim. 53.

Pennsylvania.— Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

Tennessee.— South *v.* State, 97 Tenn. 496, 37 S. W. 210.

England.— Fulwood's Case, Cro. Car. 484; Reg. *v.* Barratt, 9 C. & P. 387.

Taking for lucre — Real affection between parties.— In Reg. *v.* Barratt, 9 C. & P. 387, under 9 Geo. IV, c. 31, § 19, the court distinguishes between a taking for lucre and a case where there is a previous intimacy between the persons and all inducement to the act arises out of real passion and affection. Under the latter circumstances there is wanting that sordid motive which would justify a conviction.

60. People *v.* Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

61. Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

62. *Alabama.*— Haygood *v.* State, 98 Ala. 61, 13 So. 325.

Illinois.— Bunfill *v.* People, 154 Ill. 640, 39 N. E. 565; Slocum *v.* People, 90 Ill. 274.

Indiana.— Osborn *v.* State, 52 Ind. 526.

Iowa.— State *v.* Ruhl, 8 Iowa 447.

Kansas.— State *v.* Goodwin, 33 Kan. 538, 6 Pac. 899.

Maine.— State *v.* Stoyell, 54 Me. 24, 89 Am. Dec. 716.

Massachusetts.— Com. *v.* Cook, 12 Metc. (Mass.) 93.

Missouri.— State *v.* Gibson, 111 Mo. 92, 19 S. W. 980.

New Hampshire.— State *v.* Brow, 64 N. H. 577, 15 Atl. 216.

New York.— Carpenter *v.* People, 8 Barb. (N. Y.) 603; People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

United States.— U. S. *v.* Zes Cloya, 35 Fed. 493.

Prostitution included in terms used.— Under the statute against taking for the purpose of prostitution, the court, in speaking to the jury of the claim of the people, said that they claim that the girl was taken for the purpose of prostitution, "and for the purpose of sexual connection with a man not her husband." It was held that "prostitution" might include more general acts than would necessarily be within the phrase "sexual connection with a man not her husband," and that the purpose charged in the indictment being prostitution, which was plainly included in the terms used, no harm is done to defendant. People *v.* Brandt, 14 N. Y. St. 419.

Act to prevent occupation of procurers. — Under the statute designed to prevent the occupation of procurers and procuresses for the purpose of prostitution, the intent to cause the female to become a prostitute is the predominant idea of the crime; and the mere fact of the confinement of a female against her will, and, under such circumstances, having improper relations with her, will not constitute guilt. Bunfill *v.* People, 154 Ill. 640, 39 N. E. 565.

Repeated sexual intercourse.— Under a statute providing punishment for one who "fraudulently and deceitfully entices or takes away an unmarried female from her father's house, or wherever else she may be found, for the purpose of prostitution, at a house of ill fame, assignation, or elsewhere," etc., an indictment charging this offense is not supported by proof that defendant persuaded an unmarried female to go with him to a neighboring town, where, having induced partial intoxication, he had repeated sexual intercourse with her. State *v.* Stoyell, 54 Me. 24, 89 Am. Dec. 716.

be to cohabit with the female in sexual commerce without the authority of law or a legal marriage,[63] and while it is not necessary that the illicit intercourse should continue for any indefinite or considerable length of time, so long as there is a fixed determination to cohabit,[64] it seems that the weight of authority supports the rule that a single act of sexual intercourse, or sexual intercourse for a single night, without the fixed purpose of a continued cohabitation, will not constitute the offense.[65] But one or several of such acts may be considered, with other facts and circumstances shown by the evidence, in determining whether or not defendant's purpose was habitual and continued cohabitation with the female.[66] In other cases, however, a broader significance has been given to these terms than that above mentioned.[67]

63. State *v.* Goodwin, 33 Kan. 538, 6 Pac. 899; State *v.* Gibson, 111 Mo. 92, 19 S. W. 980.

Natural as distinguished from legal marriage.—"Concubinage," in the statute, means for the purpose of creating the relation between defendant and the female which comes from a natural marriage as contradistinguished from a legal or civil marriage; that is, for the purpose of an habitual or continued cohabitation. U. S. *v.* Zes Cloya, 35 Fed. 493.

64. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891; U. S. *v.* Zes Cloya, 35 Fed. 493.

65. Slocum *v.* People, 90 Ill. 274; State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; State *v.* Wilkinson, 121 Mo. 485, 26 S. W. 366; State *v.* Gibson, 111 Mo. 92, 19 S. W. 980; State *v.* Gibson, 108 Mo. 575, 18 S. W. 1109.

Under the statute against the taking of a female under the designated age for the purpose of concubinage or prostitution, the taking must have been for one of these purposes. A taking for another purpose, notwithstanding that defendant, after the taking, had improper relations with the female, will not sustain an indictment under the statute. In this case the evidence showed that a son of defendant was responsible for the condition of pregnancy in which the female was found, and that defendant contrived to take her away for the purpose of hiding her disgrace and shielding his own son, and that while in the execution of his purpose he committed the act complained of. State *v.* Gibson, 108 Mo. 575, 18 S. W. 1109.

Unsuccessful attempt at intercourse.—Where it appears that defendant was a married man living with his wife, and the girl was under fourteen years of age, too young and physically too undeveloped, according to her own evidence, to be able to afford defendant the gratification which the presumed motive for such a relation implies, and that upon discovery of this fact in an attempt at such gratification he abandoned its pursuit, there can be no inference of a purpose of concubinage. People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

Harmless error in instruction.—Where the court charged that if defendant's purpose in taking a female away was to cohabit with her "even for a single night," the taking for that purpose would be for the purpose of concubinage within the meaning of the statute, it was held that even if the taking for one act of intercourse, or for one night, did not come within the meaning of the statute, defendant could not complain where the evidence showed that he did actually cohabit with the female on many occasions, and lived with her as his wife for three months at a time. State *v.* Johnson, 115 Mo. 480, 491, 22 S. W. 463.

66. U. S. *v.* Zes Cloya, 35 Fed. 493.

A count for enticing a female for the purpose of concubinage is supported by evidence which shows that the female was induced to leave a parent's house and go to the house of defendant, after which defendant finally succeeded in overcoming her virtue, and had improper relations with her for a number of months, several times during each week, and that defendant solicited the female to live with him under promise of money, etc. Slocum *v.* People, 90 Ill. 274.

Cohabitation while carrying away.—Evidence that defendant, a married man, secretly carried off the daughter of the prosecutor and cohabited with her on his way from the state, is sufficient to establish the purpose of concubinage. Tucker *v.* State, 8 Lea (Tenn.) 633.

67. In Michigan it was held, under a statute against the enticing away of the female, etc., for the purpose of prostitution, concubinage, or marriage, that in enumerating these three purposes it was intended to cover every purpose of unlawful enticement to sexual intercourse; that the word "concubinage" had no settled common-law meaning. People *v.* Bristol, 23 Mich. 118, 126; People *v.* Cummons, 56 Mich. 544, 545, 23 N. W. 215.

In Missouri it was held that intercourse for a single night, and apparently without regard to the purpose of a continued cohabitation without a legal marriage, was sufficient to constitute the offense of taking for the purpose of concubinage. State *v.* Feasel, 74 Mo. 524. This case, however, has been overruled, as will appear from the Missouri cases cited in note 65.

In Kansas one case — State *v.* Overstreet, 43 Kan. 299, 23 Pac. 572 — seems to approve the ruling in State *v.* Feasel, 74 Mo. 524, *supra*. The court, however, expressly states that it was not necessary to go as far as the Missouri case, because it appeared in evidence that the female had in fact been the mistress of defendant for some time past. It was intended by this case, either that the mere act of sexual intercourse was not sufficient, but that there should be

(III) *For Purpose of Sexual Intercourse.* Under a statute against the taking of a female for sexual intercourse it is not necessary that the taking should be for the purpose of sexual intercourse with a person or persons other than the defendant,[68] and on the other hand, under a provision against the procuring, etc., of a female to have sexual intercourse with any person other than himself, it is not necessary that defendant should have had any particular person in mind.[69]

g. Continued Force or Taking. Where a girl is taken from one jurisdiction into another, with intent to commit the offense designated in the statute, and defendant there interposes his will between the girl and the control of her guardian, so as to overcome her intention to return to her home, the abduction is committed in the jurisdiction into which the girl is so brought,[70] and it has been held that where a girl is forced from one county into another, and there married, and at the time of the marriage is in such fear as to be unconscious of her actions, the taking in the first county continues in the second.[71]

3. Station of Female. To constitute the offense of taking away a female having substance, or who is an heir apparent, it must appear that the woman was of such station.[72]

4. Age of Female. As already pointed out, the offense consists, under some statutes, in taking women generally, without regard to their age, for certain purposes, while other statutes relate only to females under a prescribed age. When the age is thus prescribed it is a material ingredient of the offense.[73] The fact that the female is under the age limit is the gist of the offense, and therefore knowledge of her age is not necessary to the guilt of the party committing the

an intention to cohabit, which intent was considered to be sufficiently shown by the facts; or else that the case has been in effect overruled in State *v.* Bussey, 58 Kan. 679, 690, 50 Pac. 891. In this case defendant objected to an instruction upon the definition of "concubinage" to the effect that it was not necessary that the cohabitation should be continuous for any length of time, and that if there is cohabitation on one occasion without lawful marriage it constitutes concubinage. After defining the term "cohabitation" substantially as first defined in this section, the court pointed out that the language used in the instruction did not make one act of sexual intercourse sufficient, but used the term "cohabitation;" and that as cohabitation for a long period of time was not necessary, the fact that the instruction used the expression "one occasion" was not misleading.

Broad use without adjudicating meaning. — The word "prostitution" has been used in the broad sense of a submission by the female to sexual intercourse with the abductor. South *v.* State, 97 Tenn. 496, 37 S. W. 210.

68. Com. *v.* Kaniper, 3 Pa. Co. Ct. 276. But as to the provision against the procuring of a female to have carnal connection with any man, see People *v.* Roderigas, 49 Cal. 9.

69. Stevens *v.* State, 112 Ind. 433, 14 N. E. 251.

70. Taking from one state into another. — State *v.* Gordon, 46 N. J. L. 432; People *v.* Wah Lee Mon, 13 N. Y. Suppl. 767.

Bringing into state and county of father's residence.— Under the statute in Missouri it was held that where the female was temporarily visiting a relative in another state, and was taken away by defendant — under an arrangement between defendant and the female, made before the latter's leaving the state of Missouri — and brought into the state of Missouri and the county of her father's residence, for the purpose of prostitution, defendant was guilty of taking the female from her father and might be indicted in the county of the latter's residence. State *v.* Round, 82 Mo. 679.

Taking from one county into another.— In Com. *v.* Kaniper, 3 Pa. Co. Ct. 276,— under the statute against the taking of a female child under a designated age for the purpose of prostitution or sexual intercourse, or without the consent of her parents, etc., for the purpose of marriage, or the inveigling or enticing such child into a house of ill fame, etc., for the purpose of prostitution or sexual intercourse,— it was held that where the child within this statute consents in the county in which the taking occurs, the courts of another county into which she is taken for the purpose of the intercourse have not jurisdiction; but if a taking with the intent was done in the first county, but the girl did not know of the intention until she came into another county where the act was committed, then the taking was continuous and the court of the county in which the intercourse took place would have jurisdiction.

71. Fulwood's Case, Cro. Car. 488.

72. Fulwood's Case, Cro. Car. 484; Baker *v.* Hall, 12 Coke 100; Wakefield's Case, 2 Lewin 1.

73. Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

act, and ignorance thereof is not a defense,[74] unless under a statute of a different purport.[75] Consequently testimony to prove that the female had told the defendant, previous to the alleged enticement, that she was over the age designated in the statute, is properly excluded.[76]

5. Previous Chaste Character of Female. Where the statute makes the previous chaste life and conversation of the female an ingredient of the offense, the mere taking or enticing of a female for the purpose mentioned in the statute is not sufficient to constitute the offense.[77] But under statutes prohibiting the taking of females under a certain age for purposes designated, without making the previous character of the female an ingredient of the offense, the defendant may be guilty notwithstanding the previous unchastity of the female.[78]

74. *California.*— People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110.

Mississippi.— Riley *v.* State, (Miss. 1895) 18 So. 117.

Missouri.— State *v.* Johnson, 115 Mo. 480, 22 S. W. 463.

New York.— People *v.* Stott, 4 N. Y. Crim. 306 [*affirmed* in 5 N. Y. Crim. 61].

England.— Reg. *v.* Olifier, 10 Cox C. C. 402; Reg. *v.* Robins, 1 C. & K. 456.

Belief as to age.— Defendant cannot avail himself of a *bona fide* belief on his part that the girl was older than the age limit prescribed in the statute. State *v.* Ruhl, 8 Iowa 447; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; Reg. *v.* Prince, 13 Cox C. C. 138.

The reason of this rule is that if defendant enticed the female away for the purpose prohibited by the statute, there existed a criminal or wrong intent notwithstanding that she might have been over the age limit designated in the statute, and therefore evidence in support of such justification would tend merely to show that defendant intended one wrong and by mistake committed another; and in such a case, although the wrong intended is not indictable, if an indictable offense is committed, defendant is liable. State *v.* Ruhl, 8 Iowa 447.

75. As under Wis. Laws (1887), c. 214, § 4, providing that any person, being the owner of any premises, or assisting in the management or control thereof, who induces or knowingly suffers any girl under the age of twenty-one years to resort to or be in or upon the premises for the purpose of being unlawfully and carnally known by any person or persons, shall be punished, etc. Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789.

76. State *v.* Ruhl, 8 Iowa 447.

77. People *v.* Roderigas, 49 Cal. 9; Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652; Slocum *v.* People, 90 Ill. 274; Com. *v.* Whittaker, 131 Mass. 224; Kauffman *v.* People, 11 Hun (N. Y.) 82; Carpenter *v.* People, 8 Barb. (N. Y.) 603. These cases hold that if the woman is of unchaste life and conversation no offense is committed within the meaning of the act.

"Character" and "reputation" distinguished.— In Carpenter *v.* People, 8 Barb. (N. Y.) 603, it was held that previous chaste character is not the same as previous chaste reputation; that reputation may be good evidence of character, but is not the character itself; and that therefore an instruction that if the female was known as a person of chaste character and reputation at the time of the abduction, and that if it should turn out on the trial that she had, previous to the alleged abduction, been guilty of a single act of unchastity, it would constitute no defense, is erroneous, because it might be a logical inference from such a rule that a female perfectly pure in heart and life, but who at the time of the abduction sustained a bad reputation, could not be the subject of the offense. But see State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

"Conversation" and "character."— The words "of chaste life and conversation," used in the statute, are equivalent to "chaste life and previous character," and an instruction upon the presumption of chastity and the onus of overcoming such a presumption by defendant, which uses the latter expression instead of the words employed in the statute, is not erroneous. Bradshaw *v.* People, 153 Ill. 156, 159, 38 N. E. 652.

Effect of subsequent reform of woman.— If, however, the female had previously fallen from virtue, and subsequently reforms and is leading a chaste life at the time of the act complained of, she is a proper subject of the offense declared in the statute. Carpenter *v.* People, 8 Barb. (N. Y.) 603; Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074.

Enticing back into a life of shame is sometimes expressly aimed at by statute. See State *v.* Terrill, 76 Iowa 149, 40 N. W. 128.

78. People *v.* Demousset, 71 Cal. 611, 12 Pac. 788; Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782; State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149 [in effect *overruling* State *v.* Gibson, 111 Mo. 92, 19 S. W. 980, though citing it apparently with approval]; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; People *v.* Stott, 4 N. Y. Crim. 306. *Contra*, Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Jenkins *v.* State, 15 Lea (Tenn.) 674.

Evidence as to previous character, however, has been held to be admissible in such prosecutions, as tending to throw light upon the question of intent on the part of the accused and consent on the part of the parent. Beaven *v.* Com., (Ky. 1895) 30 S. W. 968; Brown *v.* State, 72 Md. 468, 20 Atl. 186. And also as bearing upon the credibility of the female as a witness. State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; People *v.* Stott, 4 N. Y. Crim. 306.

6. When Offense Complete. Under statutes against the taking of a female for certain purposes it is the intention which controls[79] rather than the actual consummation of the act for which the taking is effected. But where the statute provides not only against the taking, but as well against the doing of acts subsequent to the taking, the doing of the latter acts becomes a material ingredient of the offense.[80]

III. Prosecution for the Offense.

A. The Indictment or Information — 1. In General. The material elements of the offense as prescribed by the particular statute must be covered by the allegations in the indictment or information.[81]

Previous acts of illicit intercourse between the parties have been held admissible, on behalf of the prosecution, upon the question of intent to entice. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487.

General submission where evidence inapplicable.— Where a defendant was charged in one count with having taken a woman unlawfully, against her will, and by force, menace, or duress compelled her to be defiled, which was one offense under one statute; and in another count with having inveigled and enticed away an unmarried female of previous chaste character, etc., for the purpose of prostitution, which was an offense under another and different statute,— the first being a felony, and the second a misdemeanor, and the two being entirely different and distinct offenses,— it was held that where there was a conviction under the first count, upon the general submission of the cause to the jury without confining the evidence to the particular count to which it was applicable, the admission of evidence as to the previous chaste character of the female, which could only have been admitted under the second count, constituted a reversible error, as upon the charge in the first count such evidence was only admissible in rebuttal of character evidence. Kauffman *v.* People, 11 Hun (N. Y.) 82.

79. Slocum *v.* People, 90 Ill. 274; Payner *v.* Com., (Ky. 1892) 19 S. W. 927; Malone *v.* Com., 91 Ky. 307, 15 S. W. 856; People *v.* Seeley, 37 Hun (N. Y.) 190.

Offense is therefore complete immediately upon the taking with the intent at that time to accomplish the particular purpose.

Illinois.— Henderson *v.* People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391; Slocum *v.* People, 90 Ill. 274.

Kansas.— State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

Missouri.— State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

New York.— People *v.* Stott, 4 N. Y. Crim. 306.

Pennsylvania.— Com. *v.* Kaniper, 3 Pa. Co. Ct. 276.

United States.— U. S. *v.* Zes Cloya, 35 Fed. 493.

Taking out of jurisdiction.— Under the rule stated in the text, the offense is complete notwithstanding the consummation of the particular immoral act outside of the jurisdiction of the court where the indictment is found. State *v.* Johnson, 115 Mo. 480, 22 S. W. 463.

Lawful marriage contemplated.— Under the statute against the taking of a female under a designated age, etc., for the purpose of prostitution, concubinage, or marriage, it is held that a lawful marriage is contemplated, and that the statute does not apply to a case where an Indian, a married man, who had been put upon a United States military reservation under guard, escaped, carrying with him an Indian girl under the age designated. U. S. *v.* Zes Cloya, 35 Fed. 493.

In Kentucky the statute against the unlawful taking or detaining of any woman against her will, with intent to marry her or have her married to another, or with intent to have carnal knowledge of her or that another shall have such knowledge, was held to be intended to create an offense of a lower grade than rape or attempt to commit rape. Malone *v.* Com., 91 Ky. 307, 15 S. W. 856; Payner *v.* Com., (Ky. 1892) 19 S. W. 927.

80. Lampton *v.* State, (Miss. 1892) 11 So. 656; Baker *v.* Hall, 12 Coke 100; Fulwood's Case, Cro. Car. 484.

De facto marriage is sufficient under the statute against the taking and marrying of a female, etc. Fulwood's Case, Cro. Car. 488, 493.

81. Thus under 3 Hen. VII, against the taking and defiling or marrying a woman who has goods or lands or is an heir apparent, an indictment must allege that the woman was married or defiled, and that she had goods or lands or was an heir apparent, as the enacting clause has reference to the preamble. Fulwood's Case, Cro. Car. 484. But see State *v.* Tidwell, 5 Strobh. (S. C.) 1, under 4 & 5 Ph. & M.

Negativing exceptions — English statute administered in United States.— In South Carolina, where 4 & 5 Ph. & M. was adopted and administered, it was held that negative averments in an indictment, corresponding with the exemption from liability, in the third section of that statute, of him of whom the female abducted should hold lands or tenements by knight-service, and with the exception in the fourth section of a contract of marriage by consent of such as by title of wardship should be entitled to have the marriage of such maid or woman child, were unnecessary, since no such relation arising out of tenure by knight-service or title of wardship existed in that state. State *v.* Tidwell, 5 Strobh. (S. C.) 1.

2. CHARGE IN LANGUAGE OF STATUTE. It is sufficient if the charge in the indictment or information pursues the language of the statute creating the offense and prescribing the elements thereof.[82]

3. ALLEGATION OF TAKING OR DETENTION — a. In General. Where the taking of a female for certain purposes is prohibited in general terms it is not necessary to allege the means by which the abduction was accomplished.[83] But where the statutory inhibition is against the detention of a woman against her will it must be alleged that the detention was thus effected.[84]

b. Taking from Custody. Where the taking of a female for certain purposes is made punishable without regard to the custody from which she is taken or the consent of her parents or other custodian, it is not necessary to allege from whose custody she was taken or that the taking was without the consent of her parents or other custodian,[85] but it is otherwise where the statute prohibits a taking from a parent or other custodian or without the consent of such persons.[86]

c. Taking to Place of Particular Character. Under a provision against the taking and enticing of a female to a house of ill fame, assignation, or elsewhere, for the purpose of prostitution or like acts, it must be charged that the taking was to a house of ill fame, assignation, or to a place of a character similar to such houses and where such acts are practised.[87]

4. ALLEGATION OF INTENT — a. In General. The particular intent which, under statute, characterizes the taking or detention as criminal, must be alleged,[88] but

Forms of indictments or informations, in whole or in part, may be found in the following cases:

Indiana.— Nichols *v.* State, 127 Ind. 406, 26 N. E. 839.

Kansas.— State *v.* Overstreet, 43 Kan. 299, 23 Pac. 572.

Minnesota.— State *v.* Keith, 47 Minn. 559, 50 N. W. 691; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

Missouri.— State *v.* Johnson, 115 Mo. 480; 22 S. W. 463.

New York.— Beyer *v.* People, 86 N. Y. 369; People *v.* Betsinger, 21 N. Y. Suppl. 136; People *v.* Sheppard, 44 Hun (N. Y.) 565; People *v.* Seeley, 37 Hun (N. Y.) 190; People *v.* Brandt, 14 N. Y. St. 419; People *v.* Stott, 4 N. Y. Crim. 306; People *v.* Powell, 4 N. Y. Crim. 585; People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

South Carolina.— State *v.* Tidwell, 5 Strobh. (S. C.) 1.

England.— Wakefield's Case, 2 Lewin 1; Reg. *v.* Hopkins, C. & M. 254; Reg. *v.* Howell, 4 F. & F. 160; Reg. *v.* Mears, 2 Den. C. C. 79.

82. People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110; Higgins *v.* Com., 94 Ky. 54, 21 S. W. 231; Payner *v.* Com., (Ky. 1892) 19 S. W. 927; Cargill *v.* Com., (Ky. 1890) 13 S. W. 916; State *v.* Keith, 47 Minn. 559, 50 N. W. 691.

The exact language of the statute need not be employed; it is sufficient if equivalent terms are used. Nichols *v.* State, 127 Ind. 406, 26 N. E. 839.

83. **Alleging the taking in the general terms of the statute** is enough in such cases. Payner *v.* Com., (Ky. 1892) 19 S. W. 927; Cargill *v.* Com., (Ky. 1890) 13 S. W. 916; State *v.* Keith, 47 Minn. 559, 50 N. W. 691. But see Fulwood's Case, Cro. Car. 484.

Feloniously.— Where the statute does not characterize the crime as a felony it is not necessary, in charging the offense, to allege that it was done "feloniously." Higgins *v.* Com., 94 Ky. 54, 57, 21 S. W. 231. See also INDICTMENTS AND INFORMATIONS.

84. Krambiel *v.* Com., (Ky. 1887) 2 S. W. 555.

"Unlawfully detained" is not sufficient as an allegation that the detention was against the will. Wilder *v.* Com., 81 Ky. 591.

85. State *v.* Keith, 47 Minn. 559, 50 N. W. 691; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

86. Jones *v.* State, 16 Lea (Tenn.) 466. See also State *v.* Johnson, 115 Mo. 480, 486, 22 S. W. 463, holding that an indictment alleging in this connection that defendant "did then and there being one Rosa Price, a female under the age of eighteen years, to wit, seventeen years, unlawfully and feloniously take from one Lewis Price, her father, he the said Lewis Price then and there having the legal charge of the person of said Rosa Price, without the consent and against the will of the said Lewis Price," is sufficient.

87. Miller *v.* State, 121 Ind. 294, 23 N. E. 94; State *v.* McCrum, 38 Minn. 154, 36 N. W. 102.

Insufficient charge — Time for objection. — A mere charge that defendant enticed and took the female to a certain named city of the state, with the felonious intent then and there of rendering the said female a prostitute, was held bad as failing to show a taking to a house of ill fame or other place where prostitution might be accomplished, if objected to by motion to quash, but it was held too late, after verdict, to make the objection on motion in arrest. Nichols *v.* State, 127 Ind. 406, 26 N. E. 839.

88. Jones *v.* State, 16 Lea (Tenn.) 466. Thus, as mere sexual intercourse does not constitute prostitution, an allegation of an enticement for such purpose is not sufficient to charge the offense of enticing for the pur-

a charge in terms equivalent to the language of the statute is sufficient, and need not be in the precise words thereof.[89]

b. Addition of Acts Not Embraced in Statute. An additional allegation of an intent to commit further acts not embraced in terms of the statute may be rejected as superfluous, and will not invalidate an indictment where the intent to commit the acts which are embraced in the terms of the statute is sufficiently charged.[90] But if it is attempted to allege the manner in which the purpose is to be consummated, and the acts so alleged could not, under the law, operate as a consummation of such purpose, the indictment will be bad.[91]

5. Allegation of Previous Character. Under statutes which make the previous chastity of the female an ingredient of the offense, such previous chastity must be alleged in the indictment.[92]

6. Allegation of Age. Where the statute makes it an element of the offense that the taking shall be by a defendant over a designated age, or of a female under a designated age, the defendant as well as the female must be brought within the terms of the statute.[93] But as his ignorance of the age of the female is immaterial,[94] knowledge on the part of defendant that the female was under the age prescribed need not be alleged.[95]

7. Joinder of Counts and Offenses — a. Taking for Several Purposes. Under a statute against the taking of a female, etc., for the purpose of prostitution or concubinage, the takings for these purposes constitute separate and distinct offenses and cannot properly be joined in a single count,[96] but as they are of a like nature,

pose of prostitution. Osborn *v.* State, 52 Ind. 526.

Charging a taking for lucre and a marriage sufficiently shows that the taking was with intent to marry. Fulwood's Case, Cro. Car. 488.

89. "With intent of rendering her a prostitute" was held to be equivalent to and sufficient for the purpose of charging the intent to take "for the purpose of prostitution" as prescribed by the statute. Nichols *v.* State, 127 Ind. 406, 408, 26 N. E. 839.

For the purpose of prostituting.— But in Miller *v.* State, 121 Ind. 294, 23 N. E. 94, it was held that the charge in an indictment that defendant enticed the female "for the purpose of unlawfully and feloniously prostituting her," was not equivalent to the words used in the statute as above indicated.

90. People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

In Kansas it was held that an indictment was sufficient which charged a taking for the purpose of concubinage, but added "by having sexual intercourse with him," the defendant. State *v.* Overstreet, 43 Kan. 299, 305, 23 Pac. 572.

91. Concubinage — Intercourse with three persons.— Under a statute against the taking away of a female for the purpose of concubinage, it was held that a count which charged a taking for the purpose of concubinage, and that a concubinage was to be effected by illicit intercourse with three separate persons, was bad, because, under the definition of "concubinage," it was plainly impossible that several men could each have the same woman for his concubine at the same time. State *v.* Gibson, 111 Mo. 92, 97, 19 S. W. 980.

92. People *v.* Roderigas, 49 Cal. 9.

93. State *v.* O'Bannon, 1 Bailey (S. C.) 144, under 4 & 5 Ph. & M.

Sufficiency of allegation.— Under 4 & 5 Ph. & M. c. 8, making it punishable for anyone over the age of fourteen years to take away an heiress who is within the age of sixteen years, an information sufficiently charges that defendant was above the age of fourteen years by charging that defendant, "being above the age of fourteen," etc., committed the act. Rex *v.* Moor, 2 Mod. 128, 129.

94. See *supra*, II, C, 4.

95. People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110.

96. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891; State *v.* Goodwin, 33 Kan. 538, 6 Pac. 899; Tucker *v.* State, 8 Lea (Tenn.) 633.

Concubinage with several.— Under a statute prohibiting the taking away of a female for the purpose of concubinage or prostitution, a count is bad which, alleging the taking for the purpose of concubinage, charges that the concubinage is to be effected by having illicit sexual intercourse with three separate persons alleged to have committed the taking, because it is impossible that several men could each have the same woman for his concubine; and as the statute defines two separate and distinct offenses which cannot be joined in one count, if it is intended to charge both they should be charged in separate counts. State *v.* Gibson, 111 Mo. 92, 19 S. W. 980.

Contra.— Under the statute in New York against the taking of a female under a designated age for the purpose of prostitution or sexual intercourse, etc., it was held that an indictment charging that defendant took such female for the purpose of prostitution and sexual intercourse was not demurrable upon the ground that it charged two offenses in one count, because the taking for either purpose constituted one offense, and to constitute two offenses there must be two offenses charged;

are punishable alike,[97] and spring from the same facts, they may be joined in separate counts to meet the several phases of the evidence.[98] Even if there could be no conviction for both offenses at the same time, yet there is no error in refusing to compel the state to elect, where, after a verdict of guilty on both counts, a *nolle prosequi* is entered upon one of the counts.[99]

b. Taking or Causing to Be Taken. Under a statute against the taking or causing to be taken of a female it has been held that the indictment alleging both a taking and causing to be taken must charge the offenses conjunctively.[1]

c. One Who Marries and One Who Assists in Abduction. Under 4 & 5 Ph. & M., one aiding in the marriage of a female abducted may be convicted with, and to the same extent as, the one who actually marries her.[2]

d. Abductor and Keeper of House. The persons who entice a woman for the purpose of compelling her to be defiled may be jointly indicted with the keeper of the house to which the woman was enticed, and it is not necessary that a conspiracy between such parties be shown in order to convict of the taking with the particular intent.[3]

e. Enticement and Concealing or Assisting in Concealment. Under a statute against the enticement of a female for a certain purpose, and the concealing or abetting or assisting in the concealment of such enticement, the offenses may be joined in separate counts.[4]

f. Kidnapping and Abduction. Kidnapping and abduction are separate and distinct offenses; but where, under the statute, they are offenses of the same character, differing only in degree, a count for kidnapping and for abducting a female for the purpose of prostitution may be joined in the same indictment.[5]

B. Evidence — 1. Burden of Proof. The burden of proof is on the state to prove the offense charged,[6] by evidence either positive or circumstantial.[7]

that proof of the one taking for either purpose under a charge of one taking for both purposes is admissible. People *v.* Powell, 4 N. Y. Crim. 585. See also People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111.

Allegation in conjunctive form.— Under the statute in New York making it an offense to take a female for the purpose of prostitution, concubinage, or marriage, it was held that an indictment charging a taking for the purpose of "prostitution, concubinage, and marriage," instead of alleging a taking for the purposes in the alternative, would justify a conviction for a taking for either of these purposes. People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

97. Tucker *v.* State, 8 Lea (Tenn.) 633.

98. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

99. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

1. Hence an indictment under 4 & 5 Ph. & M., charging the taking and causing to be taken in the alternative, was held bad on motion in arrest of judgment. State *v.* O'Bannon, 1 Bailey (S. C.) 144.

2. State *v.* Tidwell, 5 Strobh. (S. C.) 1.

3. Beyer *v.* People, 86 N. Y. 369.

4. State *v.* Terrill, 76 Iowa 149, 40 N. W. 128.

In South Carolina it was held, under 4 & 5 Ph. & M. c. 8, that a count on the third section thereof, which prohibited the taking or causing to be taken of any maid or woman child, under a designated age, out of the possession and against the will of her father or mother, or out of the possession and against the will of such person or persons as then happened to have, by any lawful ways or means, the order, keeping, etc., of said woman child; and a count on the fourth section of said statute, against the taking or causing to be taken away as aforesaid and deflowering any such maid or woman child as aforesaid, or contracting marriage with any such maid or woman child against the will of her father, etc., and providing a greater punishment for the latter offense,— were well joined, as the latter offense included the former. State *v.* Tidwell, 5 Strobh. (S. C.) 1.

5. Mason *v.* State, 29 Tex. App. 24, 14 S. W. 71, under the rule that it is not a valid objection to an indictment that it charges separate and distinct offenses in several counts, even where the offenses charged are felonies, if they be of the same character differing only in degree.

6. People *v.* Roderigas, 49 Cal. 9; Com. *v.* Whittaker, 131 Mass. 224; People *v.* Platt, 4 N. Y. Crim. 53.

Defense inconsistent with element of offense.— Where defendant in a prosecution, under the statute, for taking a minor female from the custody of her parents or guardian, for the purpose of prostitution, bases his defense upon the ground that he and the alleged victim were engaged to be married, and that he took her from her mother for that purpose, he is not under the necessity of establishing this defense by a preponderance of evidence, as such a doctrine would deprive him of the benefit of the rule relating to reasonable doubt, and would change the cardinal rule in criminal cases that the burden of proof rests on the prosecution. People *v.* Marshall, 59 Cal. 386.

7. People *v.* Platt, 4 N. Y. Crim. 53, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

2. As to Taking. Under the statute against the taking of a female under a designated age from the custody of her parents, etc., the parent from whose custody she was taken may be permitted to testify that the daughter was taken without the consent of the witness, and to the latter's efforts to find the child;[8] and under a charge of taking a female against her will with intent to compel her to be defiled, actual force not being necessary to constitute the taking, prosecutrix may give evidence as to her reason for going to the house of defendant.[9]

3. As to Taking with Particular Intent — a. In General. When a specific intent is required in order to make an act an offense, the mere doing of the act will not raise the presumption that it was done with the specific intent. Therefore evidence which establishes only a taking, and fails to show that it was for the prohibited purpose, is not sufficient.[10]

b. Inference from Acts Proven. It is not necessary, however, that the particular intent shall be shown by positive evidence on this point, as it may be inferred from acts proved.[11] But the fact that a certain end has been attained is only a fact from which the jury may draw conclusions as to the purpose for which the taking was effected,[12] and such presumptions may be rebutted by showing circumstances inconsistent therewith and consistent with lawful conduct on the part of defendant.[13]

c. Evidence of Other Criminal Acts. Prior acts of sexual intercourse between defendant and prosecutrix have been held admissible in evidence as bearing upon the intention of defendant in the particular taking involved,[14] although the state cannot in the first instance introduce evidence of other criminal acts on the part

8. Mother.— State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

Father — Testimony not prejudicial.— Under an indictment for taking a female under the age designated in the statute from the custody of her father, for the purpose of concubinage, testimony by the father of prosecutrix that he sent to the latter money to enable her to return to her home from the place to which she was taken by defendant is not material to the charge involved, but it is not prejudicial. State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

9. Schnicker *v.* People, 88 N. Y. 192.

10. State *v.* Jamison, 38 Minn. 21, 35 N. W. 712; People *v.* Platt, 4 N. Y. Crim. 53, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

11. May be inferred from end attained. — Thus, under the provision against taking for the purpose of prostitution, concubinage, or defilement, the intent may fairly be inferred from the end attained, and the acts of sexual intercourse or defilement are admissible as evidence of the original intention. State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111; Beyer *v.* People, 86 N. Y. 369; People *v.* Powell, 4 N. Y. Crim. 585.

So under the statutory provision against the enticing of a female for the purpose of prostitution, where it is shown that the female was taken to a house of prostitution, the *prima facie* presumption is that she was taken there for the purpose inhibited by the statute. People *v.* Marshall, 59 Cal. 386; *Ex p.* Estrado, 88 Cal. 316, 26 Pac. 209; Brown *v.* State, 72 Md. 468, 20 Atl. 186.

Testimony of prosecutrix — Res gestae.— Where prosecutrix, a German girl not long in the United States, sought employment in a house of prostitution, being ignorant of the character of the place, and she was there kept by the proprietor, by being induced to fear arrest if she left, after which she was compelled to submit to be defiled against her will, this is a sufficient taking against her will for the purpose prohibited by the statute, and evidence is admissible as to what occurred in the room where the prosecutrix was compelled to submit, as a part of the *res gestæ*. Schnicker *v.* People, 88 N. Y. 192.

12. Henderson *v.* People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111.

13. Rebutting evidence.— Where it appeared that a girl was taken by a man to a bawdy-house kept by defendant, it was held to be competent for defendant to show that prosecutrix had asserted that she was over eighteen years of age; that defendant permitted the girl to remain over night for the purpose of securing her a home in the town; that defendant did actually, on the next day, make an effort to secure such home; and that during the time the girl remained in the house she had no improper relations with anyone,— for the purpose of rebutting the presumption, arising from the character of the house and the youth of the prosecutrix, that the latter was enticed there, and to rebut the presumption arising from the character of the house that the girl was permitted to remain there for the purpose of prostitution. Brown *v.* State, 72 Md. 468, 20 Atl. 186.

14. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487; People *v.* Wah Lee Mon, 13 N. Y. Suppl. 767.

of defendant to support the probability of the evidence that he has committed the particular offense.[15]

4. As to Previous Chaste Character of Female — a. In General. Where the previous chaste character of the female is a material ingredient of the offense such chastity must be established by proof,[16] and while it has been held that such proof cannot be allowed to rest merely upon the legal presumption of chastity, but the fact must be shown by affirmative testimony,[17] it is apprehended that from the nature of the subject the more accurate statement of the rule is that, though it may be necessary to prove the fact, evidence directly upon the point is not necessary, but the fact may be shown *prima facie* by presumption from other facts and circumstances, as that the unmarried female was at the time residing with her parents or guardian or in some respectable household, or by proof of other like circumstances consistent with and the usual concomitants of chaste female character.[18]

b. Specific Acts. Under the rule requiring proof of the woman's chastity on the part of the state, and permitting proof of her unchastity on the part of defendant, it is held that mere proof of reputation to impeach character of the female is not admissible.[19] But on the other hand, where evidence as to unchastity is admissible only for the purpose of affecting the credibility of the prosecutrix, it is held that evidence of individual acts of this character should not be received.[20] So, where evidence of this character is admissible upon the question of the intent of the accused or the consent of the female, facts tending to show her character are admissible,[21] but it is held that specific acts of unchastity are inadmissible in a prosecution for taking and detaining a woman against her will with a particular intent.[22]

15. Cargill *v.* Com., (Ky. 1890) 13 S. W. 916; People *v.* Gibson, 6 N. Y. Crim. 390, 4 N. Y. Suppl. 170.

16. People *v.* Roderigas, 49 Cal. 9; Com. *v.* Whittaker, 131 Mass. 224.

17. Com. *v.* Whittaker, 131 Mass. 224. *Contra*, Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652; Slocum *v.* People, 90 Ill. 274.

Evidence in support of presumption.— On the trial of an indictment for enticing an unmarried female of chaste life and conversation from her parents' house for the purpose of prostitution, etc., under the statute, while it is not necessary for the prosecution in the first instance to offer evidence on the subject of the chaste life and conversation of the female, it is not error to permit the father of the female to testify that prior to her association with defendant she attended Sunday-school and church, was a member of the church, associated with the young people of the neighborhood generally, and was received in their society as other young ladies of the community, as such evidence tends to fortify the presumption of law as to the female's chastity. Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

Evidence of reputation.— In New York, under a statute against the taking, enticing, etc., of a female of previous chaste character, for the purpose of prostitution, the female must be unmarried and chaste at the time of the commission of the offense, and it is held incompetent to prove such chastity by evidence as to the reputation of the female for chastity. Kauffman *v.* People, 11 Hun (N. Y.) 82.

Lewd character of mother or sister.— Evidence as to the lewd character of the mother and sister of the woman is inadmissible to prove the unchaste character of the prosecutrix. Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074.

18. People *v.* Roderigas, 49 Cal. 9. While the Illinois cases cited *contra* in the preceding note hold broadly that chastity will be presumed, they are not inconsistent with the rule last above stated in the text, because in each case the taking was from the home of the parent. The cases themselves, however, do not thus confine the holding, and are in fact decided under statutes against the taking from the custody of the parent or wherever the female may be found.

19. Kauffman *v.* People, 11 Hun (N. Y.) 82.

20. State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149, holding that the better form in which to instruct the jury in such a case is that although they might believe from the evidence that the general reputation of the female for chastity and virtue is bad, want of chastity constitutes no justification to anyone to take her from her father's custody for the purpose of prostitution or concubinage, but should be considered by the jury in weighing her testimony and is admitted for that purpose only.

21. Thus, evidence on behalf of defendant that there were a number of lewd women on the public fair-ground (where the alleged taking and detention occurred) who were plying their trade, and that when defendant saw the woman in question he believed she belonged to that class of women, is admissible to explain the intent of the accused and as tending to exculpate him of the charge that he was taking and detaining her against her will; and defendant may testify to these facts and that he was informed that the prosecutrix was one of the lewd women on the fair-ground. Beaven *v.* Com., (Ky. 1895) 30 S. W. 968.

22. Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, the court alleging, as a reason for the rule, that such evidence might be true with-

5. As to Unchastity after Taking. Evidence of acts of unchastity on the part of the woman after the alleged abduction is not admissible for the purpose of showing her previous unchaste character.[23]

6. As to Age — a. Testimony of Parent. Where the offense in the statute is against the taking of a girl under a designated age, testimony of the parent from whose custody she is taken is the proper testimony by which to prove her age.[24]

b. Personal Appearance of Woman. And where evidence obtained by view is sanctioned in criminal cases, under a statute directed against the owner of premises, or one assisting in the management or control thereof, who induces or knowingly suffers any girl under a designated age to resort thereto for purposes mentioned, the court may allow the jury to determine, from her personal appearance or view only, whether the defendant knew the girl to be under the age prescribed at the time of the alleged offense, where there is other evidence that she was under such age.[25]

7. As to Character of Defendant. In a prosecution under the statute against the taking of a female, under the designated age, for the purpose of sexual intercourse, evidence of the good character of defendant may be taken into consideration by the jury upon the question of reasonable doubt as to the purpose for which the taking was done.[26]

8. Statements and Letters by Defendant. Expressions by the accused which tend to show his motive,[27] or letters written by him to the prosecutrix tending to explain the relations of the parties, are admissible in evidence in a prosecution for the taking of a female.[28]

out tending to show that there had been no detention for the purpose mentioned in the statute.

On behalf of prosecution.— But it has been held that evidence of former illicit acts between prosecutrix and defendant is admissible on behalf of the prosecution as bearing upon the intent of the particular taking. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487; People *v.* Wah Lee Mon, 13 N. Y. Suppl. 767.

23. Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074, in which it was held that the defense that the female was unchaste at the time of the taking cannot be shown by evidence that a certain man had sexual intercourse with her, at her own solicitation, soon after the arrest of defendant, the court saying in effect that evidence of the habits of the girl after the alleged abduction, however lewd, could not in any appreciable degree disclose her previous character for virtue and indicate defendant's innocence of the crime charged, but, on the contrary, the natural tendency of defendant's conduct, if he is guilty as charged, is rather to lead the woman into a life of shame.

24. Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789.

Not a case of pedigree.— Under an indictment for taking a female, under the age designated in the statute, for the purpose of sexual intercourse, where the father of the female is alive, it is incompetent to prove her age by an entry in the family bible as to her birth, as such evidence is hearsay and admissible only in matters of pedigree. This is not a case of pedigree. People *v.* Sheppard, 44 Hun (N. Y.) 565.

25. Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789, in which case the court said that the age prescribed being twenty-one years, and there being evidence that the girl was only sixteen at the time of the offense, the jury was properly allowed to consider her personal appearance, though such evidence would have been more unreliable had the girl been nearer to the age of twenty-one.

26. People *v.* Stott, 4 N. Y. Crim. 306.

Character of examination.— In such a prosecution, upon the question of the reputation of defendant, the evidence in chief can only be that of a general character; and if the state wishes the foundation of such opinion, the witness may be asked for the particulars, but the party proffering the evidence can in no way support the opinion by showing the circumstances upon which it is founded. This principle was applied where the state attempted to rebut the testimony of the witness on behalf of defendant by asking the rebutting witness upon what his opinion was founded. People *v.* Gibson, 6 N. Y. Crim. 390, 4 N. Y. Suppl. 170.

27. **Motives of lucre.**— Expressions by accused respecting the woman's property, as that he had seen a will under which the lady would have a certain income, are admissible upon the question of motive in a prosecution for a taking for motives of lucre. Reg. *v.* Barratt, 9 C. & P. 387.

28. **Purpose of prostitution or concubinage.**— Thus letters written by defendant which tend to explain the feeling existing between defendant and prosecutrix are admissible in evidence in a prosecution for taking for the purpose of prostitution and concubinage. South *v.* State, 97 Tenn. 496, 37 S. W. 210.

Letters written after offense.— But letters written after the alleged commission of the offense, containing threats against the pros-

9. STATEMENTS BY CO-DEFENDANTS. Where several are jointly indicted for abducting a female for certain purposes prohibited by the statute, upon the theory that they were acting in concert, it is proper to show the statements and acts of some of the defendants in the presence of another in carrying forward the plans in furtherance of the scheme to accomplish the illegal purpose.[29]

10. STATEMENTS BY PROSECUTRIX. Where, under the statute, the offense consists in taking a female with a particular intent, it is the intention of the abductor, rather than any intention on the part of the female, which controls, and evidence of statements made by prosecutrix before the abduction, with reference to her intention to leave the custody of the person in whose charge she was living, is inadmissible for any purpose except that of impeaching her.[30]

11. COMPETENCY OF WIFE. It is only where there has been a valid marriage that the wife is excluded from giving evidence against her husband by the common law,[31] and in a prosecution for forcibly taking and marrying a female, testimony of the woman is admissible against defendant, if not upon the theory that her liberty and person are involved,[32] because she is only a wife *de facto* and not *de jure*.[33] In like manner the wife may testify for the husband on the trial of such a charge, though she cohabited with him from the time of the marriage.[34]

12. CORROBORATION OF FEMALE — a. In General. Where the statute requires the corroboration of the female no conviction can be had for abduction upon the unsupported testimony of the female abducted,[35] though it is otherwise where the statute does not require such corroboration.[36]

b. Sufficiency. Such corroborating testimony should tend to show every material fact necessary to the establishment of the commission of the crime,[37] but

ecutrix, are not admissible in the prosecution for a taking with intent to compel marriage. State *v.* Maloney, 105 Mo. 10, 16 S. W. 519.

29. People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111.

30. State *v.* Ruhl, 8 Iowa 447. See also State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

To prove absence of enticement — Hearsay.— Under a statute providing against the enticing and taking away of any unmarried female of chaste life and conversation from her parents' house, for the purpose of prostitution or concubinage, if the female left her father's house of her own accord — that is to say, was not enticed away by the defendant — there can be no guilt; but that fact cannot be proved by evidence as to what the female had said upon the subject, as such evidence is merely hearsay. Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

Conversation between prosecutrix and another.— Under an indictment under N. Y. Pen. Code, § 282, subs. 1, the admission of evidence of a conversation between prosecutrix and another person who took her to the house of defendant (tending only to show how the prosecutrix happened to go to that house), nothing appearing in the conversation which tends to show defendant's guilt, is not erroneous. People *v.* Brandt, 14 N. Y. St. 419.

31. State *v.* Gordon, 46 N. J. L. 432.

Examination on voir dire.— Under a statute for the punishment of abduction and seduction, the female is a competent witness against a defendant charged with this crime, and where defendant objects to the witness upon the ground that she was defendant's wife and therefore incompetent to testify against him, the court may direct that she be examined on her *voir dire* as to the alleged marriage. State *v.* Gordon, 46 N. J. L. 432.

32. In Wakefield's Case, 2 Lewin 279, the court was strongly of opinion that the evidence was admissible upon this ground.

33. Brown's Case, Vent. 243; Wakefield's Case, 2 Lewin 279.

After marriage by consent.— Such evidence is said to be admissible although the actual marriage was by her consent after the forcible abduction; and so, where the marriage was against her will, but she subsequently assented, her testimony is admissible. 1 Russ. Crimes 939; 4 Bl. Comm. 209; 1 East P. C., c. 11, § 5, p. 454.

34. 1 Russ. Crimes 949 [*citing* Perry's Case, Bristol 1794].

35. State *v.* Keith, 47 Minn. 559, 50 N. W. 691; People *v.* Powell, 4 N. Y. Crim. 585; People *v.* Platt, 4 N. Y. Crim. 53; People *v.* Stott, 4 N. Y. Crim. 306.

36. State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

37. People *v.* Platt, 4 N. Y. Crim. 53; People *v.* Powell, 4 N. Y. Crim. 585.

Instruction in terms of statute.— An instruction, in accordance with the terms of the statute, that there could be no conviction upon the testimony of the female "unsupported by other evidence," is not a correct embodiment of the law, because the jury might understand from it that it was enough if the principal witnesses were corroborated in one material matter only. State *v.* Keith, 47 Minn. 559, 561, 50 N. W. 691.

any facts or circumstances which legitimately tend to prove the existence of the material facts may be admitted in corroboration.[38]

C. Province of Court and Jury. On an indictment for abduction for the purpose of prostitution, the meaning of the term "prostitution" is a question of law for the court, and not for the jury,[39] but it is for the jury to determine, upon the evidence of the particular facts, whether defendant was guilty or innocent,[40] and from the facts adduced on the trial it is for the jury to say whether the taking was with the intent which, under the statute, is made to characterize the crime.[41]

38. People *v.* Stott, 4 N. Y. Crim. 306.

Sufficient corroboration — Generally.— Under the statute against the receiving, harboring, employing, etc., of a female for the purpose of prostitution, it is sufficient where the prosecutrix is corroborated: as to the taking, receiving, employing, etc., by defendant and another witness; as to her age, by her parents; as to the purpose of prostitution, by the testimony of a witness that the house was a house of this character; by defendant's testimony that the house had several rooms, and beds in all of them, occupied only by herself, prosecutrix, and another woman; that defendant allowed men and women to go up into the parlors, and that she did not know anything about them after leaving the parlors; that there was a bed in the basement; and that she did not know whether the prosecutrix had had connection with any one in the house or not. People *v.* Brandt, 14 N. Y. St. 419.

As to purpose — Attainment of end.— While the conclusion that the taking was for the purpose of sexual intercourse does not rest upon the single fact that such intercourse was permitted, where the intercourse was the culminating fact and the antecedent acts of defendant with which it could be connected plainly pointed to it, and where the facts of the taking and of the intercourse are corroborated by several witnesses, the purpose may be inferred from all the transactions taken together. People *v.* Powell, 4 N. Y. Crim. 585. See also *supra*, III, B, 3, b.

Testimony of examining physician.— Testimony as to the condition of the female (who was twelve years old), given by a physician who, eight months after the alleged offense, made a personal examination of her, and who testified that such condition might have resulted from sexual intercourse or another cause, should be received as bearing upon the purpose for which defendant took the girl to the place charged, although the act of intercourse was not an essential ingredient of the offense. State *v.* Keith, 47 Minn. 559, 50 N. W. 691.

Corroboration by defendant.— Under an indictment for taking a female of previous chaste character for the purpose of prostitution or sexual intercourse, defendant himself may corroborate the prosecutrix that he did actually have intercourse at the time charged. But the fact that the intercourse was accomplished is only one from which the jury may draw conclusions as to the purpose with which defendant took the female. People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111.

By confederate of defendant.— The female may be corroborated by defendant's confederate. People *v.* Powell, 4 N. Y. Crim. 585.

Insufficient corroboration.— Under a statute against the taking of a female for the purpose of prostitution, where the female goes of her own accord to a place of prostitution and signifies her intention of remaining there, without any inducement on the part of the keeper of the place, and these circumstances are given in evidence with the fact that a physical examination showed that, while sexual intercourse had been attempted, it had not been accomplished, the testimony of the female alone is not corroborated. People *v.* Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

Where the indictment charged an abduction, for the purpose of sexual intercourse and prostitution, committed in 1886, the testimony of a physician as to a physical examination of the female, made by him in 1890, upon which examination he found a broken hymen, is not admissible. People *v.* Betsinger, 21 N. Y. Suppl. 136.

39. Carpenter *v.* People, 8 Barb. (N. Y.) 603.

40. People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111.

It is for the jury to determine whether, under the particular facts proved, defendant knew, or could by the exercise of ordinary judgment have known, that the female was in such a condition as rendered her incapable of consenting to the acts of the accused, which, it is alleged, amounted to a detention under the statute. Beaven *v.* Com., (Ky. 1895) 30 S. W. 968.

41. Huff *v.* Com., (Ky. 1896) 37 S. W. 1046; Brown *v.* State, 72 Md. 468, 20 Atl. 186; People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111; People *v.* Platt, 4 N. Y. Crim. 53, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236.

Where evidence is introduced to show that the prosecutrix asserted that she was over eighteen years of age, and that defendant permitted the girl to remain over night for the purpose of securing her a home, and actually did on the next day make an effort to procure such home, and that the girl had no improper relations with any one during the time she remained in the house, in order to rebut the presumption arising from the character of the house, whether or not the effort to secure a home for the prosecutrix

D. Verdict. Where a defendant is charged with offenses embraced in several sections of the statute, arising out of the same transaction, to meet the different phases of the evidence, a verdict of guilty on one count is equivalent to an acquittal on the others, and the fact that the other counts are left undisposed of is not such an irregularity as to require a reversal.[42] But where different persons are involved in the offenses charged in different counts which charge separate offenses, a verdict of guilty cannot be sustained where the record fails to show upon what count the jury found.[43]

ABEARANCE. Carriage or behavior.[1]

ABEREMURDER or **ABEREMURDRUM.** Plain or downright murder as distinguished from the less heinous crimes of manslaughter or chance-medley.[2]

ABET. To aid, encourage, or promote the commission of an offense.[3]

ABETMENT. An encouraging or instigation.[4]

ABETTARE. See ABBETTARE.

ABETTATOR. See ABBETTATOR.

ABETTOR. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

ABEYANCE or **ABBAYANCE.** Expectation, remembrance, and contemplation

was made in good faith or for the purpose of concealing the real motives of defendant in permitting the girl to remain in her house, are questions for the jury. Brown *v.* State, 72 Md. 468, 20 Atl. 186.

In a prosecution under the statute for taking a female of previous chaste character, for the purpose of prostitution or sexual intercourse, against defendant, who was guilty of the sexual act, jointly with others who participated in the alleged taking for the purpose of aiding in the consummation of the act, a charge that if the first defendant had inveigled or enticed the girl for the purpose of prostitution or sexual intercourse the offense was made out as to him, is sufficiently favorable to defendant, and it is proper to refuse to charge that the jury would not have the right to find from the evidence that defendant personally and alone induced the girl or enticed and inveigled the girl for the purpose of prostitution or sexual intercourse, as it is for the jury to determine the question of fact involved in this request. People *v.* Brown, 71 Hun (N. Y.) 601, 24 N. Y. Suppl. 1111.

42. People *v.* Seeley, 37 Hun (N. Y.) 190. *Contra*, People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

43. In Iowa it was held that the inveigling or enticing of a female, before reputed virtuous, to a house of ill fame, constitutes a complete offense under the statute; and to knowingly conceal, or assist or abet in concealing, such female so deluded or enticed, for the purpose of prostitution or lewdness, constitutes another offense; that the two offenses could be committed by the same person in connection with the same female, or by different persons with concert of action; and that where an indictment charged the commission of these offenses by the same person in one count, their commission by different persons in another count, and by the same and different persons together in another count, and by the same and different persons together in other counts, a general verdict of "guilty as charged in the indictment" could not be sustained where the record failed to show upon what count or counts the jury found. State *v.* Terrill, 76 Iowa, 149, 40 N. W. 128. But see otherwise, under 4 & 5 Ph. & M., State *v.* Tidwell, 5 Strobh. (S. C.) 1.

1. Wharton L. Lex.

Recognizance for good abearance signifies a recognizance for good behavior. 4 Bl. Comm. 256.

2. Jacob L. Dict.

Was declared a capital offense, without fine or commutation, by laws of Canute, c. 93, and Hen. I, c. 13. Jacob L. Dict.

3. Anderson L. Dict.

What acts necessary.— It has been said that no particular acts are necessary to constitute an abetting. Raiford *v.* State, 59 Ala. 106. But in State *v.* Teahan, 50 Conn. 92, where it was held that a purchaser of intoxicating liquor is not an abettor of the offense of illegally selling intoxicating liquors within the meaning of the statute providing for the prosecution, as principals, of persons aiding, abetting, etc., the court, per Carpenter, J., said: "The 'abetting' intended by it [the statute] is a positive act in aid of the commission of the offense — a force, physical or moral, joined with that of the perpetrator in producing it."

Used with "aid."— The word "abet" is generally used with the word "aid," as in the phrase "to aid and abet." Burrill L. Dict.

Synonymous with "aid."— The words "aid" and "abet," in legal phrase, are pretty nearly synonyms of each other. They comprehend all assistance rendered by acts, words of encouragement or support, or by presence, actual or constructive, to render assistance should it become necessary. Raiford *v.* State, 59 Ala. 106.

4. Burrill L. Dict.

in law.[5] The expression is used of a fee simple;[6] of a freehold;[7] of a capture until it has been passed upon by a prize court;[8] of the franchise of a corporation;[9] of a grant of land to charity;[10] of parsonage lands;[11] and of all property rights of a bankrupt until final adjudication.[12]

ABIDE. To await;[13] also to perform, to execute, to conform to.[14] (Agreements or Bonds to Abide Award, Decision, Judgment, or Order, see ARBITRATION AND AWARD; BAIL; RECOGNIZANCES. Costs or Deposits in Court to Abide Event, see COSTS; DEPOSITS IN COURT. Stay of Proceeding or Stipulations to Abide Event of Action, see ACTIONS; STIPULATIONS.)

ABIDING. Settled and fixed.[15]

5. 2 Bl. Comm. 107; Coke Litt. § 646.

Equivalent expressions are: *In gremio legis,*— in the breast of the law (Carter *v.* Barnadiston, 1 P. Wms. 505, 516). *In nubibus,*— in the clouds (Carter *v.* Barnadiston, 1 P. Wms. 505, 517; Coke Litt. § 646; 4 Kent Comm. 258). *In pendenti,*— in suspension (Bracton fol. 19*a* [*cited* in Colthirst *v.* Bejushin, Plowd. 21, 29]).

6. 2 Bl. Comm. 107; Coke Litt. §§ 646, 650.

7. Coke Litt. § 647; Colthirst *v.* Bejushin, Plowd. 21.

8. 1 Kent Comm. 102.

9. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 691, 4 L. ed. 629, wherein Story, J., said: "When . . . the corporation is to be brought into existence by some future acts of the corporators, the franchise remains in abeyance until such acts are done."

10. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 332, 3 L. ed. 735.

11. Weston *v.* Hunt, 2 Mass. 500; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650; 1 Washburn Real Prop. 48.

12. International Bank *v.* Sherman, 101 U. S. 403, 406, 25 L. ed. 866.

13. To "abide by" an award means simply "to await" the award without revoking the submission. It can never be construed to mean that the party should not be at liberty to dispute the validity of any award that might be made. Shaw *v.* Hatch, 6 N. H. 162, 163; Marshall *v.* Reed, 48 N. H. 36.

But in Wilson *v.* State, 7 Tex. App. 38, it was held that a recognizance conditioned that defendant should "await the action of the court of appeals" did not substantially conform to the requirements of a statute providing that defendant should give recognizance "to abide the judgment of the court of appeals."

14. To "abide" a judgment or order is to perform, to execute, to conform to such judgment or order. Jackson *v.* State, 30 Kan. 88, 1 Pac. 317; Erickson *v.* Elder, 34 Minn. 370, 25 N. W. 804; Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294.

To pay or satisfy.— It has been held that a bond given in bastardy proceedings, conditioned that the accused should appear and abide the order of court, obliged defendant to pay such money as the court should order for the maintenance of the child. Jackson *v.* State, 30 Kan. 88, 1 Pac. 317; Corson *v.* Tuttle, 19 Me. 409; Taylor *v.* Hughes, 3 Me. 433; Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294. And in Molton *v.* Hooks, 10 N. C. 342, Taylor, C. J., in construing the condition of a bond given upon obtaining a certiorari, said: "One of the senses in which the word 'abide' is used is 'to bear or support the consequences of a thing;' and had it been used without the adverb 'by' it might be construed that he would bear the consequences of the judgment rendered in the superior court. Succeeded by the adverb it gives it something of an active signification and imports not merely that he would suffer or bear the consequences of the judgment, but that he would likewise defend and support and maintain it; all partaking of the primary sense of the word, 'a firm and steady continuance.' A person who shall promise to abide by a judgment would break his promise by refusing to pay it." But in McGarry *v.* State, 37 Kan. 9, 14 Pac. 491, it was held that the word cannot mean more than a willingness and readiness to have the judgment of the court enforced against defendant; that is, that when final judgment is rendered defendant will surrender himself to the court to give bond to perform such judgment or to be committed to prison. In this case the court said in effect that in Jackson *v.* State, 30 Kan. 88, 1 Pac. 317, and Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294, there was unquestionably a breach of recognizance. Defendant did not wait in court until judgment was rendered and then surrender himself into the custody of the court to endure or suffer the consequences of such judgment. In each case defendant was absent when his presence was required. It is true that in both cases language is used which would go to the extent of saying that the recognizance or bond is not satisfied unless the judgment is paid, but this is at most only *dicta*, and the *dictum* in the case of Hodge *v.* Hodgdon, 8 Cush. (Mass.) 294, was overruled by the supreme court of Massachusetts in the subsequent case of Towns *v.* Hale, 2 Gray (Mass.) 199. See also Griswold's Petition, 13 R. I. 125, 126, to the effect that a bond conditioned to "abide and perform" differs from a bond conditioned to "abide."

15. Hopt *v.* Utah, 120 U. S. 430, 439, 7 S. Ct. 614, 30 L. ed. 708.

Abiding conviction.— In Hopt *v.* Utah, 120 U. S. 430, 439, 7 S. Ct. 614, 30 L. ed. 708, Field, J., in discussing the instruction, "but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would be

ABILITY. In its broadest sense "ability" means the state or condition of being able, power or capacity to do an act in any relation, or competence in any occupation or field of action, from the possession of capacity, skill, means, or other qualification;[16] but as used in statutes relating to abandonment of wife,[17] or divorce,[18] and in Lord Tenterden's Act,[19] it has come to mean rather "pecuniary ability."

ABINDE. From thence; thenceforth.[20]

ABISHERING or **ABISHERSING.** Quit of amercements.[21]

ABJUDICARE. To deprive of a thing by the judgment of a court.[22]

ABJUDICATIO. The depriving of a thing by the judgment of a court; a putting out of court.[23]

ABJURARE. To ABJURE,[24] *q. v.*

ABJURATION. A forswearing or renouncing by oath.[25]

ABJURE. To renounce or abandon by or upon oath.[26]

ABLE. Fit; proper.[27]

ABLE-BODIED. The term does not imply an absolute freedom from all physical ailments, but imports an absence of those palpable and physical defects which evidently incapacitate a person for performing the ordinary duties of a soldier.[28]

willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt," said: "The word 'abiding,' here, has the signification of 'settled and fixed,' a conviction which may follow a careful examination and comparison of the whole evidence."

The expression "an abiding conviction" implies such a degree of certainty as would justify a verdict of guilty in a criminal case. Griffith *v.* State, 90 Ala. 583, 588, 8 So. 812. Such certainty is not required in a civil case. Battles *v.* Tallman, 96 Ala. 403, 11 So. 247.

16. Century Dict.

17. State *v.* Witham, 70 Wis. 473, 35 N. W. 934, where the court, in construing Wis. Laws (1885), c. 422, relating to the abandonment of a wife, held that the words "being of sufficient ability" refer as well to the husband's capacity or skill to earn or acquire money as to property actually owned by him.

18. Washburn *v.* Washburn, 9 Cal. 475, where the court held that the "ability" mentioned in the statute relating to divorce had reference to the possession by the husband of the means in property to provide necessaries, not to his capacity of acquiring such means by labor.

19. The word "ability" in Lord Tenterden's Act, 9 Geo. IV, c. 14, relating to actions brought to charge a person by reason of a representation made as to the ability of another, means pecuniary ability. Lyde *v.* Barnard, 1 M. & W. 101.

20. Adams Gloss.; Bridges *v.* Bedingfield, 2 Mod. 27.

21. Wharton L. Lex.

It originally meant a forfeiture or amercement and is more properly "mishering," "mishersing," or "miskering" according to Spelman. Jacob L. Dict.

It has been termed a liberty or freedom because wherever this word is used in a grant or charter the persons to whom made have their forfeitures and amercements of all others and are themselves free from the control of any within their fee. Jacob L. Dict. [*citing* Termes de la Ley 7].

22. Burrill L. Dict.

23. Adams Gloss.

24. Burrill L. Dict.

25. Jacob L. Dict.

Abjuration of allegiance.— A declaration under oath, before a competent authority, that the party making the oath renounces and abjures all the allegiance and fidelity which he owes to a particular sovereign. This is a formality required of all aliens by the laws of the United States previous to their being naturalized. Burrill L. Dict.

See, generally, ALIENS.

Abjuration of the realm.— The taking an oath to depart from the kingdom and never to return unless by permission. This was a species of sworn or self banishment, formerly allowed to offenders who confessed their crimes after fleeing to a sanctuary, as a means of saving their lives. Burrill L. Dict. This privilege was abolished by 21 Jac. I, c. 28. Jacob L. Dict.; Mead *v.* Hughes, 15 Ala. 141, 50 Am. Dec. 123.

26. Burrill L. Dict.

Implying total abandonment of state.— In Arthur *v.* Broadnax, 3 Ala. 557, 37 Am. Dec. 707, the supreme court of Alabama affirmed that, if the husband has abjured the state and remains abroad, the wife, meanwhile trading as a *feme sole*, could recover on a note which was given to her as such. In Mead *v.* Hughes, 15 Ala. 141, 50 Am. Dec. 123, the court, referring to that case, said: "We must consider the term 'abjure,' as there used, as implying a total abandonment of the state: a departure from the state without the intention of returning; and not a renunciation of one's country, upon an oath of perpetual banishment [see *supra*, note 25], as the term originally implied."

27. Burrill L. Dict., giving as an example, from Y. B. 11 Hen. VI, 13, the expression *ables e'e vend'*.— fit to be sold.

28. Darling *v.* Bowen, 10 Vt. 148.

ABLEGATI. Papal ambassadors of the second rank, who are sent to a country where there is not a nuncio, with a less extensive commission than that of a nuncio.[29]

ABODE. One's fixed place of residence for the time being.[30]

ABOLERE. In old English law, "to obliterate."[31]

ABOLITION. A destroying or effacing. It also means leave given to a criminal accuser to desist from further prosecution.[32]

ABONDANCE. Surplusage.[33]

ABORDAGE. Collision between vessels.[34]

Ability to perform labor not criterion.— In Marlborough *v.* Sisson, 26 Conn. 57, it became an important question to determine whether a certain person residing in the state of Vermont was for one whole year a healthy and able-bodied person within the meaning of a statute of that state, then in force, which provided that every such person residing within the state . . . should be deemed and adjudged to be legally settled, etc.; and it was held that, in determining whether one was healthy and able-bodied within the intent of the statute, the test is not his ability or inability during the time to perform ordinary labor and thereby to support himself and family, but that a person is to be deemed not to have been able-bodied and healthy who during the year received an injury which afterward resulted in permanent disability, although not incapacitating him during the year for ordinary labor.

29. Wharton L. Lex.

30. Vanderpœl *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216.

Personal residence essential.— How a place could be made a place of abode without personal residence it is difficult to imagine. Per Kennedy, J., in Pfoutz *v.* Steel, 2 Watts (Pa.) 409.

Reg. *v.* Hammond, 17 Q. B. 772, holding that a place of business is not one's abode unless one resides there.

31. Burrill L. Dict.

32. Jacob L. Dict.

Corresponds to entry of nolle prosequi.— In the latter sense of the word it corresponds to the entry of a *nolle prosequi.* Burrill L. Dict.

33. Burrill L. Dict.

34. Rapalje & L. L. Dict.

ABORTION

Edited by William H. Hamilton

CROSS-REFERENCES

For Civil Responsibility for Malpractice, see PHYSICIANS AND SURGEONS.
Conspiracy to Produce an Abortion, see CONSPIRACY.
Death Resulting from Abortion or Attempt to Commit Abortion, see HOMICIDE.
General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Abortion is defined to be the delivery or expulsion of the human fœtus prematurely, or before it is yet capable of sustaining life.[1]

II. NATURE AND ELEMENTS OF THE OFFENSE.

A. Defendant's Intent. The defendant's intent to cause or produce an abortion controls and constitutes an essential element of the offense.[2] An intent to produce a miscarriage may exist without absolute knowledge of pregnancy.[3]

B. Means Employed — 1. IN GENERAL. Intent constituting the gravamen of the offense, the means employed to cause or produce the abortion is immaterial; the means adopted may be unusual, provided the intent to produce an abortion exists.[4]

1. Abbott L. Dict.; Abrams *v.* Foshee, 3 Iowa 274, 66 Am. Dec. 77; Butler *v.* Wood, 10 How. Pr. (N. Y.) 222; Belt *v.* Spaulding, 17 Oreg. 130, 20 Pac. 827; Mills *v.* Com., 13 Pa. St. 631.

Abortion as a crime, it has been said, is to be found only in modern treatises and in modern statutes, no trace of it being found in the "ancient common-law writers." State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

Miscarriage distinguished.—The word "miscarriage" is often used as synonymous with and equivalent to "abortion" (Abbott L. Dict.; Century Dict.; Mills *v.* Com., 13 Pa. St. 631), and has been applied to the expulsion of the fœtus at any time during the period of gestation (State *v.* Howard, 32 Vt. 380). But when used with reference to pregnancy, "miscarriage" signifies, in the strict medical sense, an expulsion of the fœtus from the womb within the first six weeks after conception. Abbott L. Dict.

"Miscarriage," as used in an indictment for procuring a miscarriage, does not necessarily include the idea of destroying the life of the fœtus before delivery, nor exclude a case where the functions of life are exercised, briefly, after birth. Abbott L. Dict.; Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

2. *California.*— People *v.* Josselyn, 39 Cal. 393.

Colorado.— Dougherty *v.* People, 1 Colo. 514.

Iowa.— State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; State *v.* Hollenbeck, 36 Iowa 112.

Massachusetts.—Com. *v.* Morrison, 16 Gray (Mass.) 224.

Minnesota.— State *v.* Owens, 22 Minn. 238.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86; State *v.* Drake, 30 N. J. L. 422; State *v.* Murphy, 27 N. J. L. 112.

New York.— People *v.* Lohman, 2 Barb. (N. Y.) 216.

Ohio.— Wilson *v.* State, 2 Ohio St. 319.

Pennsylvania.— Com. *v.* W——, 3 Pittsb. (Pa.) 462.

England.— Rex *v.* Coe, 6 C. & P. 403; Reg. *v.* Titley, 14 Cox C. C. 502; Reg. *v.* Hillman, L. & C. 343; Reg. *v.* Isaacs, L. & C. 220.

Hence one who assaults and beats a pregnant woman and thereby causes her miscarriage is not guilty of producing an abortion, since there was no intent so to do. Slattery *v.* People, 76 Ill. 217.

The woman's intent not to take the drug furnished is not material. Reg. *v.* Hillman, 9 Cox C. C. 386.

3. Powe *v.* State, 48 N. J. L. 34, 2 Atl. 662.

4. Com. *v.* W——, 3 Pittsb. (Pa.) 462, wherein it is held that one who, having control over a pregnant woman, induces her to indulge in violent and excessive exercise with intent thereby to produce a miscarriage, is guilty of abortion.

2. Drugs and Noxious Substances — a. In General. Unlawfully administering or prescribing a drug, medicine, or other noxious thing to or for a woman, with intent to procure her miscarriage, constitutes, by some statutes, an offense.[5]

b. Nature of Substance. The drug or substance administered need not be poisonous in the general acceptation of the term.[6] If the quantity of the substance prescribed is capable of producing a miscarriage, it is a noxious thing within the meaning of the statute.[7] However, under statutes prohibiting the administration of "any drug, medicine, or substance," with intent thereby to cause a miscarriage, it has been held that the substance need not even be actually capable of producing a miscarriage,[8] provided the party administering it believed it would produce a miscarriage.[9]

c. What Constitutes an Administering. The act of administering a drug consists not simply in furnishing or prescribing it, but also in directing and causing it to be taken;[10] but neither a delivery of the drug by the hand of the one alleged to have administered it,[11] nor a taking of the medicine in the presence of defendant, seems to be necessary.[12]

3. Having Means in Possession with Intent to Furnish. One giving a pregnant woman an instrument designed and intended for a lawful purpose, and instructing her how to use it for the purpose of producing an abortion, is not guilty of a violation of a statute providing that any person who has in his possession, with intent to sell, loan, or give away, any medicine, article, or thing designed or intended for procuring an abortion, shall on conviction be punished.[13]

C. Pregnancy. Though quickening may not be,[14] pregnancy of the woman is, as a rule, a necessary ingredient of the offense,[15] and especially when this is the obvious intent of the statute.[16]

5. Eggart *v.* State, 40 Fla. 527, 25 So. 144, and cases cited *infra*, II, B, 2, b, c.

6. Dougherty *v.* People, 1 Colo. 514, holding it to be sufficient if it be shown that the substance be of such a character as would disturb the economy of the female organism. This prosecution was under a statute prohibiting the administration of "any noxious or destructive substance" with intent to produce abortion.

Noxious character of drug.— Evidence that a pregnant woman went to defendant, who informed her that he would give her something "to put her right;" that he thereafter gave her a drug which she took, and which made her sick; and that a miscarriage followed,— is sufficient to support a finding that the substance administered was noxious. Reg. *v.* Hollis, 12 Cox C. C. 463.

7. Reg. *v.* Cramp, 5 Q. B. D. 307.

8. *Iowa.*— State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

Massachusetts.— Com. *v.* Morrison, 16 Gray (Mass.) 224.

Minnesota.— State *v.* Owens, 22 Minn. 238.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86.

Pennsylvania.— Com. *v.* W——, 3 Pittsb. (Pa.) 462.

South Carolina.— State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

England.—Rex *v.* Coe, 6 C. & P. 403.

But *compare* Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424; Williams *v.* State, (Tex. App. 1892) 19 S. W. 897. In these cases it was held that under the Texas statute the substance used must be calculated to produce a miscarriage either by reason of its dangerous character or on account of the quantity administered.

9. Rex *v.* Phillips, 3 Campb. 73, holding that without such belief there could be no intent to produce a miscarriage, without which intent the offense would not be complete.

10. Robbins *v.* State, 8 Ohio St. 131.

Voluntary taking, by a woman, of a drug furnished by another, is a fact tending to show that the drug was administered by such other. State *v.* Hyer, 39 N. J. L. 598.

11. Rex *v.* Harley, 4 C. & P. 369.

Thus the sending of a drug through the mail to a pregnant woman for the purpose of producing a miscarriage was held to constitute an administering. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301.

12. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301; Jones *v.* State, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362, wherein it was held that one who furnished to a pregnant woman medicine calculated to produce an abortion, and by letter directed her to take the same, was guilty of using means for the production of abortion; Reg. *v.* Wilson, Dears. & B. 127; Reg. *v.* Farrow, Dears. & B. 164.

But a taking, in the absence of defendant, of a drug contrary to his expressed wishes, has been held not to constitute an administering. Reg. *v.* Fretwell, L. & C. 161.

13. State *v.* Forsythe, 78 Iowa 595, 43 N. W. 548.

14. See *infra*, II, D.

15. State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. 910; Wilson *v.* State, 2 Ohio St. 319.

16. Com. *v.* Grover, 16 Gray (Mass.) 602,

D. Quickening. At common law it is a criminal offense to cause or procure an abortion upon a woman who has become quick with child,[17] but as to whether a common-law offense is committed by causing or procuring, with the consent of the woman, an abortion before such a quickening, there is a conflict of authority.[18]

under a statute containing the words "any woman pregnant with child."

And under 43 Geo. III, c. 5, § 2, providing that if any person, with intent to procure the miscarriage of any woman not being or not proven to be quick with child, unlawfully and maliciously administer, etc., to her, with intent to procure a miscarriage, he shall be punished, it was held that pregnancy of the woman was necessary. This was based on the theory that the statute was passed to eliminate the distinction theretofore prevailing in the common law, to the effect that a miscarriage produced before quickening was not criminal, and on the theory that the statute presumed that pregnancy in some stage existed. Rex *v.* Scudder, 3 C. & P. 605.

Under some statutes, however, pregnancy of the woman has been held not to be necessary. Com. *v.* Taylor, 132 Mass. 261, under a statute providing that whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her or causes to be taken by her any poisonous drug or other noxious thing, or unlawfully uses any instruments or other means with like intent, shall be punished. Reg. *v.* Goodall, 2 Cox C. C. 41, 1 Den. C. C. 187; Reg. *v.* Goodchild, 2 C. & K. 293; Reg. *v.* Titley, 14 Cox C. C. 502.

Pregnancy may exist, within the meaning of a statute punishing abortion where the woman is pregnant, even though the fœtus be dead. State *v.* Howard, 32 Vt. 380. *Contra,* it seems, Com. *v.* Wood, 11 Gray (Mass.) 85.

Pregnancy ceases on the eviction of the fœtus from the womb, though the umbilical cord be not yet severed; hence acts done thereafter cannot be done to a "pregnant" woman with intent to produce a miscarriage. Com. *v.* Brown, 14 Gray (Mass.) 419; Reg. *v.* Trilloe, C. & M. 650.

But the whole body of the fœtus must be expelled, and the fact that the child has respired does not prove conclusively that the birth was completed. Rex *v.* Poulton, 5 C. & P. 329; Rex *v.* Sellis, 7 C. & P. 850.

17. 1 Bl. Comm. 129; 1 Russ. Crimes 671; State *v.* Hyer, 39 N. J. L. 598; State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248; Evans *v.* People, 49 N. Y. 86.

"Quick with child" and "with quick child" are synonymous terms. State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248 [*citing* Baynton's Case, 14 How. St. Tr. 598, 634; 1 Hale P. C. 368; 4 Bl. Comm. 395]. *Contra,* Reg. *v.* Wycherley, 8 C. & P. 262. The words "big" and "great" are tantamount to the word "quick." State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248 [*citing* 1 Hale P. C. 433; 1 Hawk. bk. 1, c. 31, § 16].

In Evans *v.* People, 49 N. Y. 86, 90, Allen, J., says: "'Quick' is synonymous with 'living,' and both are the opposite of 'dead.' The woman is not pregnant with a living child until the child has become quick. If the child is a living child from the instant of conception, then all the authorities, medical and legal, are sadly at fault in their attempts to distinguish between mere 'pregnancy' and 'pregnancy with a quick child,' and legislators have been laboring under the same hallucination in legislating upon the subject, for all the acts passed in reference to abortion in this country and in England recognize the fact that the child does 'quicken,' that is, becomes endowed with life, at a certain period, longer or shorter, after conception, and that there is a period during gestation when, although there may be embryo life in the fœtus, there is no living child." And to the same effect see Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; Rex *v.* Phillips, 3 Campb. 73.

18. To the effect that such an abortion constitutes no criminal offense are the following authorities:

Iowa.— Hatfield *v.* Gano, 15 Iowa 177; Abrams *v.* Foshee, 3 Iowa 274, 66 Am. Dec. 77.

Maine.— Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

Maryland.— Lamb *v.* State, 67 Md. 524, 10 Atl. 208, 298.

Massachusetts.— Com. *v.* Bangs, 9 Mass. 387; Com. *v.* Wood, 11 Gray (Mass.) 85; Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396.

Michigan.— People *v.* McDowell, 63 Mich. 229, 30 N. W. 68.

New Jersey.— State *v.* Murphy, 27 N. J. L. 112; State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

New York.— Evans *v.* People, 49 N. Y. 86.

But, *contra,* see the following cases:

Arkansas.— State *v.* Reed, 45 Ark. 333.

North Carolina.— State *v.* Slagle, 83 N. C. 630.

Pennsylvania.— Mills *v.* Com., 13 Pa. St. 631; Com. *v.* Reid, 8 Phila. (Pa.) 385; Com. *v.* Demain, 6 Pa. L. J. 29, 3 Clark (Pa.) 487.

In Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396, Shaw, C. J., *following* Com. *v.* Bangs, 9 Mass. 387, said: "The court are of the opinion that at common law no indictment will lie for attempts to procure abortion with the consent of the mother until she is quick with child." And in People *v.* McDowell, 63 Mich. 229, 30 N. W. 68, where defendant was charged by information with manslaughter, setting forth the means employed as an attempted abortion, an instruction was considered proper which charged the jury that in order to warrant a verdict of guilty they must find "that said pregnancy

However, by statutory provisions the necessity of a quickening has generally been done away with so far as making it one of the essential ingredients of the offense.[19]

E. Woman's Consent. Consent of the woman does not affect the criminality of the offense.[20]

F. Woman's Death. The death of the mother is not necessary to the commission of the crime of abortion.[21]

G. Woman's Miscarriage. At common law, as well as under some statutes, an actual abortion must follow the administration of the noxious substance or the use of the instruments, in order to complete the offense;[22] but under statutes prohibiting the administration of any drug or the use of any instrument to "any woman" [or "any pregnant woman"] with intent thereby to produce her miscarriage, a resulting miscarriage is not, as has been pointed out, essential to the commission of the offense.[23]

III. Advising to Commit Abortion.

A. In General. Advising a woman to take a drug with intent to procure a miscarriage may, under the provisions of some statutes, constitute a criminal offense.[24]

B. Actual Taking of Drug. It is not necessary, it seems, to the consummation of this offense that the woman should actually take the drug.[25]

IV. Attempts to Commit Abortion.

A. In General. An attempt to commit the crime of abortion may constitute a punishable offense under some statutes.[26] Merely soliciting a pregnant woman

had so far advanced as to have developed into a live, unborn child, liable to be killed by violence; in other words, had become a quick child."

But in Mills *v.* Com., 13 Pa. St. 631, Coulter, J., *criticising* the rule requiring a quickening as an essential ingredient of the offense, says: "Although it has been so held in Massachusetts and some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere." And to the same effect is the dissenting opinion of Alvey, C. J., in Lamb *v.* State, 67 Md. 524, 10 Atl. 208, 298.

19. State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; Com. *v.* Jackson, 15 Gray (Mass.) 187; Com. *v.* Wood, 11 Gray (Mass.) 85; Wilson *v.* State, 2 Ohio St. 319.

A more severe punishment is often prescribed by statute for the commission of the offense after a quickening. State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

20. State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776; Com. *v.* Snow, 116 Mass. 47; Com. *v.* Wood, 11 Gray (Mass.) 85. See also *infra*, IX, C.

At common law, however, the woman's consent to an operation before she is quick with child was material. Without her consent the offense would be an assault. Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396.

With her consent, it seems, there would be no offense at all. Evans *v.* People, 49 N. Y. 86, and *supra*, II, D.

21. Com. *v.* Adams, 127 Mass. 15, which was a prosecution under a statute making the production of an abortion punishable more severely in case the death of the mother ensues than when it does not. *Compare*, however, State *v.* Springer, 3 Ohio N. P. 120, a case decided under a special statute providing for punishment in case of the death of the mother.

22. Com. *v.* Bangs, 9 Mass. 387; State *v.* Springer, 3 Ohio N. P. 120. The latter case was a prosecution under a statute providing that the administration of drugs or the use of instruments, with intent to produce a miscarriage, shall be punishable in case the death of the mother ensues or an abortion is produced.

23. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301; State *v.* Morrow, 40 S. C. 221, 18 S. E. 853. *Compare*, however, Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424, as to the necessity of an actual abortion in a prosecution under the Texas statute.

24. State *v.* Murphy, 27 N. J. L. 112, under a statute providing that any person who, with intent thereby to procure the miscarriage of a woman, advises her to take any drug or substance, is guilty of an abortion.

25. Eggart *v.* State, 40 Fla. 527, 25 So. 144. *Contra*, People *v.* Phelps, 133 N. Y. 267, 30 N. E. 1012, 61 Hun (N. Y.) 115, 15 N. Y. Suppl. 440, 10 N. Y. Crim. 185.

26. Dougherty *v.* People, 1 Colo. 514; State *v.* Moothart, 109 Iowa 130, 80 N. W. 301; Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424; Williams *v.* State, (Tex. App. 1892) 19 S. W. 897.

to take a drug for the purpose of producing an abortion does not, however, constitute an attempt to commit abortion.[27]

B. Failure of the Attempt. Failure of the attempt has no bearing, in such cases, upon the guilt of the defendant;[28] as the actual production of a miscarriage is unnecessary to the consummation of the offense.[29]

C. Nature of Means Used. Some statutes provide that, to constitute such an attempt a punishable offense, the means used must be such as are calculated to produce a miscarriage.[30]

D. Quickening. At common law an unsuccessful attempt, with the mother's consent, to effect the destruction of an infant quick in its mother's womb, was deemed to be a misdemeanor;[31] but an attempt by the woman to produce her own miscarriage has been held not to constitute an offense unless she was at the time quick with child.[32]

E. Using Means or Taking Drug. It does not even seem to be necessary in such case that the intended means be used or the drug be taken by the woman.[33]

V. Parties to the Offense.

A. As Principals — 1. Married Woman. A married woman is guilty as a principal in the commission of the offense when, in the presence of her husband and acting without coercion by him, she administers a drug or uses an instrument for the purpose of producing a miscarriage of another woman.[34]

2. Person Furnishing Drug. One who prescribes and furnishes the drug to the woman with intent to cause an abortion is principal either in the commission of the abortion[35] or in the attempt to commit it.[36]

3. Woman on Whom Abortion Is Produced. The woman on whom the abortion is produced is not a principal.[37] In some states, however, by statute, the woman is made punishable; but her offense is separable from that of the person administering the drug or performing the operation.[38]

27. Lamb *v.* State, 67 Md. 524, 10 Atl. 208, 298.

28. *Maine.*— Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

Massachusetts.— Com. *v.* Bangs, 9 Mass. 387.

Minnesota.— State *v.* Owens, 22 Minn. 238.

New Jersey.— State *v.* Murphy, 27 N. J. L. 112; State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

Texas.— Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424; Williams *v.* State, (Tex. App. 1892) 19 S. W. 897.

England.— 3 Coke Inst. 50; Russ. Crimes 671.

29. Dougherty *v.* People, 1 Colo. 514; State *v.* Moothart, 109 Iowa 130, 80 N. W. 301, so held under a statute prohibiting the wilful administration of any drug or substance, or the use of any instrument or other means, with intent to produce the miscarriage of a pregnant woman.

30. Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424; Williams *v.* State, (Tex. App. 1892) 19 S. W. 897. In the Willingham case defendant was acquitted because the substance administered was not calculated to produce an abortion. In the Williams case it was held not to be an offense, under such a statute, to administer an insufficient quantity of a substance capable of producing an abortion when administered in sufficient quantities.

31. 3 Coke Inst. 50; 1 Bl. Comm. 129; Russ. Crimes 671; State *v.* Hyer, 39 N. J. L. 598; State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

Actual destruction of the child in the womb, however, in such a case, constituted a high crime. See authorities last above cited. See also *supra*, II, E, and the title Homicide.

32. Hatfield *v.* Gano, 15 Iowa 177; State *v.* Murphy, 27 N. J. L. 112.

33. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301.

34. Tabler *v.* State, 34 Ohio St. 127, holding that the presumption of husband's coercion is rebuttable.

35. State *v.* Murphy, 27 N. J. L. 112; Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

36. Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424, under a statute providing that in case no abortion results the person administering shall be guilty of an attempt.

37. State *v.* Hyer, 39 N. J. L. 598; State *v.* Murphy, 27 N. J. L. 112; Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

38. People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; People *v.* Meyers, 5 N. Y. Crim. 120.

But a statute prohibiting the administration by any person, to any pregnant woman, of any drug or substance with intent to procure her miscarriage, does not make it an offense for a woman to take a drug with in-

B. As Accomplices — 1. In General. One who encourages and acquiesces in the criminal act is an accomplice.[39] But where it is not shown that defendant advised, aided, or assisted in producing the abortion he cannot be considered an accomplice.[40]

2. Person Administering Drug. The person administering the drug is not an accomplice of the woman.[41]

3. Person Furnishing Drug. One who, knowing the purpose for which a drug is intended, furnishes it to one who administers it, is an accomplice.[42]

4. Woman on Whom Abortion Is Produced. In the absence of statutory provisions to the contrary the woman on whom the abortion has been produced is not an accomplice of the person administering the drug or performing the operation, though done with her consent.[43] By statute, however, in some states, a woman who voluntarily takes a drug administered by another for the purpose of producing an abortion is an accomplice.[44]

VI. Venue and Jurisdiction.

Where a resident in one state procures drugs and medicines therein and sends them through the mail to a pregnant woman living in another state, with advice to her to take the same for the purpose of causing a miscarriage, he may be prosecuted for the abortion in the state from which they were sent.[45] The courts of the county where the drug is administered have jurisdiction of the prosecution thereof,[46] though the miscarriage subsequently occurs in another county.[47] Under some statutes the courts of either county have jurisdiction.[48]

tent to produce a miscarriage. Smith *v.* Gaffard, 31 Ala. 45.

39. Watson *v.* State, 9 Tex. App. 237. In this case it was held that where a physician charged with having produced an abortion had informed the woman's father of her condition, and had stated to the father that he could give her a powder and make her all right, to which the father replied, "All right, anything to save my child," the father was an accomplice.

Furnishing a domicile for a pregnant woman and attending her during an illness following the administration to her of a noxious substance by another with intent to procure her miscarriage constitutes one an accessary before the fact. Reg. *v.* Hollis, 12 Cox C. C. 463.

40. Com. *v.* Drake, 124 Mass. 21; People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

41. State *v.* Murphy, 27 N. J. L. 112, wherein the court held that under a statute prohibiting the administration of any drug or substance to a pregnant woman with intent to produce a miscarriage the person administering the drug is not an accomplice of the woman, much less is he an accessary to a crime in which the woman is the principal.

42. Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287; Tex. Pen. Code (1895), art. 642.

In Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471, evidence that a person procured ether which defendant administered to a woman, it not appearing that she knew of the use for which it was intended, was considered insufficient to authorize the court to say, as a matter of law, that she was an accomplice.

43. *Kentucky.*— Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810.

Massachusetts.— Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; Com. *v.* Brown, 121 Mass. 69; Com. *v.* Boynton, 116 Mass. 343; Com. *v.* Wood, 11 Gray (Mass.) 85.

Minnesota.— State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065; State *v.* Owens, 22 Minn. 238.

New Jersey.— State *v.* Hyer, 39 N. J. L. 598.

New York.— People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; People *v.* Vedder, 98 N. Y. 630; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; People *v.* Meyers, 5 N. Y. Crim. 120.

Texas.— Hunter *v.* State, 38 Tex. Crim. 61, 41 S. W. 602; Watson *v.* State, 9 Tex. App. 237; Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424.

Compare, however, People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661, wherein the court speaks of the woman as an accomplice or co-conspirator.

44. Fixmer *v.* People, 153 Ill. 123, 38 N. E. 667; State *v.* McCoy, 52 Ohio St. 157, 39 N. E. 316. Both these cases were decided under general statutes providing that "whoever aids, [abets,] or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

Conviction of principal offender, however, seems to be a prerequisite to the conviction of the woman as an accomplice in such cases. Fixmer *v.* People, 153 Ill. 123, 38 N. E. 667.

45. State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

46. State *v.* Hollenbeck, 36 Iowa 112; Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

47. Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

48. Under Ind. Rev. Stat. (1881), § 1580, providing that where an offense is committed partly in one county and partly in another

VII. LIMITATION OF PROSECUTION.

That the abortion was committed within the period limited by statute for its prosecution must be shown by the state.[49]

VIII. INDICTMENT OR INFORMATION.[50]

A. In General — 1. CONFORMITY TO STATUTE. It is necessary to charge the offense named in the statute,[51] but it is sufficient if it alleges all the facts which the statute requires to constitute the offense.[52]

2. NAMING OFFENSE. It is not necessary that the indictment should name the offense.[53]

3. SURPLUSAGE. Facts alleged which are not necessary to the commission of the offense may be regarded as mere surplusage.[54]

4. VERDICT CURING DEFECTS. Failure to aver that two separate counts of an indictment for producing an abortion were different descriptions of the same offense is cured by a verdict of not guilty and the entry of a *nolle prosequi* as to one of the counts.[55] Where an indictment contains two counts only one of which is good, a general verdict finding the defendant guilty will be sustained.[56]

B. Allegations as to Intent — 1. IN GENERAL. Defendant's evil intent, being the gravamen of the offense, must be alleged.[57]

2. FELONIOUS OR MALICIOUS INTENT. It is not necessary to allege that the acts constituting the offense were done with a felonious or malicious intent, in the absence of statutory provisions making such intent an ingredient of the crime.[58]

the courts of either may take jurisdiction, the courts of the county in which an operation for abortion was performed have jurisdiction, as have also the courts of the county where the woman miscarries or dies. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127.

49. State *v.* Schuerman, 70 Mo. App. 518.

50. See also, generally, INDICTMENTS AND INFORMATIONS.

51. State *v.* Crook, 16 Utah 212, 51 Pac. 1091.

So it has been held that where the statute constitutes the killing of a woman in an attempt to produce an abortion a crime, an indictment will not lie for manslaughter in an attempt to do an unlawful act when it was done in an attempt to produce an abortion. The prosecution must conform the indictment to the offense described by statute. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815.

52. Cochran *v.* People, 175 Ill. 28, 51 N. E. 845; Com. *v.* Jackson, 15 Gray (Mass.) 187; People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

53. Although the indictment gives an erroneous appellation or fails to give any appellation to the offense, if the acts constituting the offense defined by the statute are sufficiently stated, the requirements of the statute are sufficiently complied with. State *v.* Crook, 16 Utah 212, 51 Pac. 1091.

54. Com. *v.* Snow, 116 Mass. 47, wherein it appears that the indictment alleged that defendant assaulted the woman and then committed the acts constituting the abortion. The allegations of assault were considered surplusage.

55. Com. *v.* Holmes, 103 Mass. 440.

56. Com. *v.* Adams, 127 Mass. 15; Crichton *v.* People, 6 Park. Crim. (N. Y.) 363. See *infra*, XI, G, 2.

57. Com. *v.* Hersey, 2 Allen (Mass.) 173.

58. Com. *v.* Thompson, 108 Mass. 461; Com. *v.* Sholes, 13 Allen (Mass.) 554; Com. *v.* Jackson, 15 Gray (Mass.) 187.

In Com. *v.* Thompson, 108 Mass. 461, an indictment which charged that defendant "maliciously and without any lawful justification" administered, etc., was held sufficiently to charge an offense within the meaning of a statute which provided that any one who "unlawfully administers," etc.; but in Com. *v.* Sholes, 13 Allen (Mass.) 554, it was held that charging that the acts were done "unlawfully and with intent," etc., sufficiently negatived any inference that the acts were done under circumstances justifying them, and that an allegation that the acts were committed "maliciously" or "without lawful justification" was unnecessary.

Sufficiency of allegation of felonious intent. — An allegation in an indictment that defendant did feloniously, unlawfully, and wilfully employ and use a certain instrument with intent then and there thereby to produce miscarriage sufficiently alleges the use of the instrument with a felonious intent. Charging that an act was done feloniously and unlawfully is tantamount to charging that it was done with a felonious intent. Holland *v.* State, 131 Ind. 568, 31 N. E. 359. See also State *v.* Thurman, 66 Iowa 693, 24 N. W. 511, which was a prosecution for murder, wherein an indictment charging that the defendant wilfully, maliciously, and feloniously administered a drug with intent then and there to produce a miscarriage was held sufficiently to allege malice aforethought.

3. Intent to Destroy Child. An indictment under a statute making the intent to destroy the child an element of the offense must charge that the drug was administered or the instrument used with intent to destroy such child.[59]

4. Intent to Produce Miscarriage. That the instrument was used or the drug administered "with intent to produce a miscarriage" must be alleged, where the statute makes such intent an ingredient of the offense;[60] and under a statute making it an offense to use any means to procure a miscarriage with intent to cause and procure a miscarriage, the intent to cause and procure must be charged in the conjunctive.[61]

C. Allegations as to Means Used — 1. Certainty and Particularity. The indictment should state the manner of committing the offense with such reasonable particularity as will furnish the accused with such reasonable information as to enable him to rebut or explain away, if he can, the acts or circumstances likely to be adduced against him on the trial.[62] It should state the means by which the abortion was produced with as much certainty as the nature of the evidence adduced before the grand jury will warrant.[63]

2. Charging in the Alternative. An indictment alleging that defendant did administer a certain poison or drug or medicine or noxious thing to the jurors unknown is defective.[64]

3. External Violence. An indictment may charge the production of an abortion by the use of external violence applied to the person of the pregnant woman.[65]

4. Manner of Administering Drug. The manner in which the drug was administered need not be alleged.[66] Alleging that defendant did advise and procure

59. Mitchell *v.* Com., 78 Ky. 204, 39 Am. Rep. 227; Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340, 2 Barb. (N. Y.) 216.

An allegation that defendant introduced an instrument into the womb of a certain person "with intent to cause and procure her to miscarry and bring forth the child of which she was then pregnant and quick" does not charge an intent on the part of defendant to destroy the child. Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

60. Scott *v.* People, 141 Ill. 195, 30 N. E. 329; Com. *v.* Boynton, 116 Mass. 343; State *v.* Drake, 30 N. J. L. 422.

Applications of the rule.— Charging that the defendant inserted an instrument into the womb of a certain pregnant woman, and thereby attempted to produce the miscarriage of such woman (Scott *v.* People, 141 Ill. 195, 30 N. E. 329); or that defendant did thrust an instrument into the womb of a certain pregnant woman, with intent then and there to produce her miscarriage (Howard *v.* People, 185 Ill. 552, 57 N. E. 441); or that defendant thrust an instrument "into the body and womb of one Georgianna Goff, the said Goff being then and there pregnant with child, with intent thereby, then and there, to cause and procure the miscarriage of the said Goff" (Com. *v.* Boynton, 116 Mass. 343),— sufficiently alleges an intent to produce a miscarriage.

For forms of indictments or informations containing allegations of intent to produce a miscarriage see the following cases:

Florida.— Eggart *v.* State, 40 Fla. 527, 25 So. 144.

Indiana.— State *v.* Sherwood, 75 Ind. 15.

Massachusetts.— Com. *v.* Jackson, 15 Gray (Mass.) 187.

New Hampshire.— State *v.* Wood, 53 N. H. 484.

New York.— People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

Pennsylvania.— Mills *v.* Com., 13 Pa. St. 631.

61. State *v.* Drake, 30 N. J. L. 422.

62. State *v.* Rupe, 41 Tex. 33, to the effect that the indictment should allege the manner in which the abortion was, or was attempted to be, produced, whether by force or violence, or by the administration of drugs, or by the use of instruments.

63. Com. *v.* Noble, 165 Mass. 13, 42 N. E. 328.

64. State *v.* Drake, 30 N. J. L. 422, alleging, as a reason for the insufficiency of the indictment, that it does not charge that defendant administered the whole of the prohibited things or any one of them, and does not apprise defendant against what he has to defend himself.

But in State *v.* Owens, 22 Minn. 238, where, under the Minnesota statute, the offense may have been committed by the use of different means, it was held that the indictment may allege in the alternative the different means of committing the offense.

65. Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542, in which case will be found set out an indictment held sufficient, on motion in arrest, as properly charging this method of committing the offense.

66. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301; State *v.* Owens, 22 Minn. 238.

the woman to take a certain medicine is sufficient.[67] It is not necessary to allege that she "swallowed" the drug.[68]

5. Manner of Using Instrument. In charging the commission of an abortion by the use of an instrument it is necessary to allege the manner in which the instrument was used.[69]

6. Naming Instrument or Drug. It is not necessary to allege the name of the instrument used,[70] or the name of the drug or substance administered.[71]

7. Quantity and Quality of Drug. The indictment need not describe the drug administered as being noxious,[72] or allege the quantity or quality administered.[73]

8. Advertising Means. Under a statute prohibiting the advertising or making public of information as to how or where means for the procurement of an abortion can be obtained, an indictment should allege the manner in which the information was published.[74]

67. People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

For forms of indictments containing sufficient allegations as to the administering of the drug see People *v.* Stockham, 1 Park. Crim. (N. Y.) 424; Mills *v.* Com., 13 Pa. St. 631.

68. State *v.* Owens, 22 Minn. 238.

So under a statute providing that if any person or persons, with intent to cause the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing, such person, on conviction thereof, etc., it is not necessary to allege the taking or swallowing of the drug, since the actual taking or swallowing of the drug constitutes no element of the crime. State *v.* Murphy, 27 N. J. L. 112.

69. Cochran *v.* People, 175 Ill. 28, 51 N. E. 845; Baker *v.* People, 105 Ill. 452; Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866; Com. *v.* Corkin, 136 Mass. 429.

Applications of the rule.— An indictment charging that defendant inserted an instrument into the "private parts" of a certain pregnant woman sufficiently alleges the manner of committing the offense. Baker *v.* People, 105 Ill. 452.

An indictment that charges defendant with having feloniously introduced an instrument into the womb of a pregnant woman with the intent to produce a miscarriage is sufficient though it does not allege what kind of a wound it produced or what disease it caused. Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866.

An indictment charging that defendant did "feloniously, maliciously, and unlawfully use a certain instrument, the name of which instrument is to the jurors unknown, which instrument defendant in his hands then and there had and held, by then and there forcing and thrusting the instrument aforesaid into the body and womb of a certain woman, with intent thereby then and there to cause and procure the miscarriage," sufficiently alleges that defendant unlawfully used an instrument with intent to procure a miscarriage, and it sufficiently describes the instrument and the manner in which defendant used it. Com. *v.* Corkin, 136 Mass. 429.

But where an indictment charged in the first count that defendant did administer and use on one Stella Roberts a certain instrument, and in the second count that defendant did use on and administer to one Stella Roberts a certain instrument with intent to produce her miscarriage, it was held that the manner in which the instrument was used was not sufficiently alleged. Cochran *v.* People, 175 Ill. 28, 51 N. E. 845.

For forms of indictments sufficiently alleging the manner of using the instrument see State *v.* Sherwood, 75 Ind. 15; Com. *v.* Jackson, 15 Gray (Mass.) 187; State *v.* Wood, 53 N. H. 484; People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

70. *Arkansas.*—State *v.* Reed, 45 Ark. 333.

Illinois.— Baker *v.* People, 105 Ill. 452.

Massachusetts.— Com. *v.* Noble, 165 Mass. 13, 42 N. E. 328; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Com. *v.* Corkin, 136 Mass. 429; Com. *v.* Jackson, 15 Gray (Mass.) 187.

New Hampshire.— State *v.* Wood, 53 N. H. 484.

New York.— People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

"A certain instrument the name of which is to the jurors unknown" is a sufficient description of the instrument used. Com. *v.* Snow, 116 Mass. 47.

71. *Arkansas.*— State *v.* Reed, 45 Ark. 333.

Colorado.— Dougherty *v.* People, 1 Colo. 514.

Indiana.— State *v.* Vawter, 7 Blackf. (Ind.) 592; Carter *v.* State, 2 Ind. 617.

Iowa.— State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

Missouri.— State *v.* Van Houten, 37 Mo. 357.

New York.— People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

Pennsylvania.— Com. *v.* W——, 3 Pittsb. (Pa.) 462.

Texas.— Cave *v.* State, 33 Tex. Crim. 335, 26 S. W. 503; Watson *v.* State, 9 Tex. App. 237.

72. State *v.* Vawter, 7 Blackf. (Ind.) 592; State *v.* Van Houten, 37 Mo. 357; Watson *v.* State, 9 Tex. App. 237.

73. State *v.* Van Houten, 37 Mo. 357; Com. *v.* W——, 3 Pittsb. (Pa.) 462; Watson *v.* State, 9 Tex. App. 237.

74. Thus an indictment charging defendant with making public by written words in-

D. Allegations as to Physiological Conditions — 1. DEATH OF MOTHER. Under a statute providing that whoever, with intent to procure the miscarriage of a woman, shall do certain acts or use certain means, shall, if the woman dies in consequence, be imprisoned for a certain time, and if the woman do not die in consequence thereof such person shall be punished less severely, the indictment need not allege whether the woman did or did not die, since it charges the lesser offense.[75]

2. GENDER. That the drug was administered or that the operation was performed on a woman may be inferred from the language of the indictment and need not be specifically alleged.[76]

3. MISCARRIAGE. At common law an indictment which alleged the administration of a drug for the purpose of producing an abortion, but which failed to allege that a miscarriage followed the administration of the drug, is defective.[77]

4. QUICKENING AND PREGNANCY. At common law, the indictment should allege that the woman was quick with child,[78] but this rule does not obtain in prosecutions under statutes where quickening is not material to the commission of the offense.[79]

On the other hand, under a statute which makes it a felony to produce an abortion before the period of quickening, an indictment attempting to charge that offense which does not allege that the criminal act was done before the quickening is defective.[80]

In like manner it is unnecessary to allege that the woman was pregnant, where her pregnancy is not an element of the offense as defined by the statute under which the prosecution is instituted,[81] but under a statute prohibiting the

formation as to where advice and medicine might be obtained for the purpose of producing an abortion has been held insufficient, though in the words of the statute, since it should have apprised the defendant of the manner in which it is claimed it was published. State *v.* Fiske, 66 Vt. 434, 29 Atl. 633.

75. Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872; Com. *v.* Thompson, 108 Mass. 461; State *v.* Gedicke, 43 N. J. L. 86. See *supra*, II, F.

But a conviction for administering a drug with intent to cause a miscarriage may be sustained under an indictment charging the administration of a drug with intent to produce a miscarriage "and resulting in the death of the mother." Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340.

76. An indictment which charges that the defendant committed the offense "by then and there forcing and thrusting the instrument aforesaid into the body and womb of one Georgianna Goff, the said Goff being then and there pregnant with child, with intent thereby then and there to cause and procure miscarriage of the said Goff," sufficiently alleges that the act charged was committed on a woman, since the language used necessarily imports such fact. Com. *v.* Boynton, 116 Mass. 343.

77. Com. *v.* Bangs, 9 Mass. 387. See *supra*, II, G.

78. Mitchell *v.* Com., 78 Ky. 204, 39 Am. Rep. 227; Com. *v.* Bangs, 9 Mass. 387. *Contra*, Mills *v.* Com., 13 Pa. St. 631. See also State *v.* Slagle, 83 N. C. 630. See *supra*, II, C, D.

"Big and pregnant."— An indictment alleging that the woman is big and pregnant sufficiently alleges that she is quick with child. Com. *v.* Demain, 3 Clark (Pa.) 487, 6 Pa. L. J. 29.

There is no inconsistency between the averment in the indictment that a woman is pregnant with a quick child and an averment that she is pregnant. Mills *v.* Com., 13 Pa. St. 631.

79. Eggart *v.* State, 40 Fla. 527, 25 So. 144; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, a prosecution under a statute providing that whoever, with intent to procure the miscarriage of a woman, shall do certain acts or use certain means, shall, if the woman dies in consequence, be imprisoned for a certain time, and, if she does not die in consequence thereof, such person shall be punished less severely.

80. State *v.* Reed, 45 Ark. 333.

81. Eggart *v.* State, 40 Fla. 527, 25 So. 144; Com. *v.* Surles, 165 Mass. 59, 42 N. E. 502.

Thus, under Mass. Pub. Stat. (1882), c. 207, § 9, providing that whoever, with intent to procure the miscarriage of a woman, shall do certain acts or use certain means, shall, if the woman dies in consequence, be imprisoned in the state prison not exceeding twenty nor less than five years, and, if the woman do not die in consequence thereof, such person shall be punished less severely, an indictment is not defective though it contains no averment that the woman was in fact pregnant, or that the defendant knew, believed, supposed, or suspected that she was pregnant. Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. 910; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471.

use of any means to produce the miscarriage of "any pregnant woman" the pregnancy must be alleged.[82]

E. Allegations as to Time and Place. The indictment should allege the time and place when and where the drugs were administered or the operation was performed.[83]

F. Defendant's Relation to the Offense. Facts showing defendant's relation to the offense committed, either as principal or accomplice, should be alleged.[84] One may be charged as an accessary of an unknown principal.[85]

G. Duplicity — 1. CHARGING DEFENDANT AS BOTH PRINCIPAL AND ACCOMPLICE. Charging facts showing defendant to be guilty as both principal and accomplice is bad for duplicity.[86]

2. CHARGING MISCARRIAGE AND DEATH. Charging both the miscarriage and death of the woman has been held not to render the indictment bad for duplicity.[87]

3. CHARGING USE OF BOTH DRUGS AND INSTRUMENTS. An indictment which charges that defendant used instruments and administered drugs with intent to cause and produce a miscarriage, does not charge more than one offense.[88]

H. Negativing Exceptions — 1. ADVICE OF PHYSICIAN. Under statutes providing that the administration of drugs or use of instruments with intent to pro-

82. Thus, under a statute making it an offense to use or employ any instruments or other means with intent thereby to produce the miscarriage of any pregnant woman, an indictment which charges that the defendant used an instrument on the body of one P, she being then a woman with child, is sufficient. Eckhardt *v.* People, 83 N. Y. 462, 38 Am. Rep. 462.

For forms of indictments sufficiently charging pregnancy see State *v.* Sherwood, 75 Ind. 15; Com. *v.* Jackson, 15 Gray (Mass.) 187; State *v.* Wood, 53 N. H. 484; People *v.* Stockham, 1 Park. Crim. (N. Y.) 424.

83. Eggart *v.* State, 40 Fla. 527, 25 So. 144; Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

Several dates.— Where an indictment alleges the commission of the offense on a specified date, and the subsequent administration of drugs between that date and another specified date, the allegations as to the subsequent administration of drugs may be treated as surplusage. Eggart *v.* State, 40 Fla. 527, 25 So. 144.

For forms of indictments sufficiently alleging time and place see Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Beasley *v.* People, 89 Ill. 571.

84. Fixmer *v.* People, 153 Ill. 123, 38 N. E. 667; Com. *v.* Adams, 127 Mass. 15.

In Fixmer *v.* People, 153 Ill. 123, 38 N. E. 667, an indictment charging the commission of an offense by one other than defendant, and alleging that defendant feloniously incited, procured, aided, counseled, and commanded such other to perform the operation for the production of an abortion was held to charge defendant as an accessary before the fact, and, where the principal was not convicted, to be insufficient to support a conviction of defendant.

85. Com. *v.* Adams, 127 Mass. 15. In this case it is held that an indictment charging that a person to the grand jury unknown did on a certain day use some unlawful means to the said jurors unknown, with intent to produce the miscarriage of a pregnant woman, and that the woman died in consequence thereof, and "that before the abortion was committed" defendants "did feloniously and maliciously incite, move, etc., and command the said person as aforesaid unknown, the said felony and abortion, in manner and form aforesaid, then and there to do and commit," sufficiently charges that defendants incited and procured the doing of the acts causing the abortion, with intent to cause it.

For form of indictment charging defendant as accessary before the fact see Com. *v.* Adams, 127 Mass. 15.

86. Hence, under Tex. Pen. Code (1895), art. 536, providing that if any person shall designedly administer to a pregnant woman, with her consent, any drug, or shall by any means whatever procure an abortion, he shall be punished by confinement in a penitentiary, and art. 537, providing that any person who furnishes the means for procuring an abortion, knowing the purpose intended, is guilty as an accomplice, an indictment charging that defendant designedly furnished a pregnant woman with an instrument for the purpose, on her part, of procuring an abortion of herself with the instrument so furnished, and that they knew of her purpose and that she did, by means of the instrument so furnished, procure an abortion, is bad for duplicity, since it charges facts in one count which constitute the defendant a principal as well as an accomplice. Wandell *v.* State, (Tex. Crim. 1894) 25 S. W. 27.

87. So held under a statute providing that whoever administers with intent, etc., shall, if the woman miscarries or dies in consequence thereof, be punished, etc. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127; Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866.

88. State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; Com. *v.* Brown, 14 Gray (Mass.) 419; People *v.* Davis, 56 N. Y. 95.

duce an abortion shall be criminal unless advised by a physician [or two physicians] to be necessary to save the mother's life, the indictment should allege that the production of the abortion was not advised by a physician [or physicians, as the case may be] to be necessary for the purpose of saving the mother's life.[89]

2. Necessity of Saving Mother's Life — a. Exception Embodied in Enacting Clause. Under statutes providing that it shall be an offense to produce an abortion unless the production thereof was necessary to save the woman's life, the indictment should allege that the production of the miscarriage was not necessary to save the woman's life.[90] Alleging that "the use of said instrument [or "the administration of said drug," as the case may be] was not necessary to save the life of the woman," does not sufficiently negative the necessity of producing the miscarriage for the purpose of saving the woman's life.[91] Charging that the

89. Hays *v.* State, 40 Md. 633; State *v.* McIntyre, 19 Minn. 93; State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427.

Applications of the rule.—Under a statute prohibiting the production of an abortion, and further providing that it shall not be construed to prohibit the production of an abortion by a physician when, after consulting with one or more respectable physicians, he shall be satisfied that the fœtus is dead or that no other method will save the mother's life, an indictment charging two persons jointly which alleges that neither of them were physicians sufficiently negatives the proviso of the statute. Hays *v.* State, 40 Md. 633.

An allegation that defendant administered a drug to a pregnant woman with intent thereby to destroy such child, not being then and there advised by two physicians that the administration thereof was necessary to preserve the life of the woman, does not sufficiently show that it was not administered on the advice of two physicians, since it is not necessary that the advice should be given at the time and place when and where the medicine, drug, or substance is administered. State *v.* McIntyre, 19 Minn. 93.

For forms of indictments negativing the fact that the abortion was produced under advice of physician see Hays *v.* State, 40 Md. 633; State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

90. *Delaware.*— State *v.* Quinn, (Del. 1899) 45 Atl. 544.

Illinois.— Beasley *v.* People, 89 Ill. 571.

Indiana.— Hauk *v.* State, 148 Ind. 238, 46 N. E. 127; Willey *v.* State, 52 Ind. 246; Bassett *v.* State, 41 Ind. 303.

Iowa.— State *v.* Leeper, 70 Iowa 748, 30 N. W. 501; State *v.* Aiken, 109 Iowa 643, 80 N. W. 1073.

Massachusetts.— Com. *v.* Sholes, 13 Allen (Mass.) 554.

Missouri.— State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223; State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427; State *v.* Schuerman, 70 Mo. App. 518.

Vermont.— State *v.* Stevenson, 68 Vt. 529, 35 Atl. 470.

Wisconsin.— Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

The exception in the statute is sufficiently negatived by alleging "that defendant did unlawfully use an instrument on the woman, so intending to procure the miscarriage of her, the same not being necessary to preserve the life of the said woman" (State *v.* Quinn, (Del. 1899) 45 Atl. 544); or, "that defendant, by means of a certain instrument, produced an abortion, it not being then and there necessary to cause such miscarriage for the preservation of the mother's life" (Beasley *v.* People, 89 Ill. 571); or, "neither the employment of said instrument nor the procurement of said miscarriage being then and there necessary to preserve the life of the said Mary L. Willey" (Willey *v.* State, 52 Ind. 246); or even, in the language of the statute, "that the production of the abortion was not necessary to preserve the life of the woman" (State *v.* Schuerman, 70 Mo. App. 518).

But it has been held that charging that the performance of "said operation was not necessary to preserve the life of the mother" does not sufficiently negative the exception in the statute. State *v.* Stevenson, 68 Vt. 529, 35 Atl. 470; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

For forms of indictments sufficiently negativing necessity of saving mother's life see State *v.* Quinn, (Del. 1899) 45 Atl. 544; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127; State *v.* Sherwood, 75 Ind. 15; Hatchard *v.* State, 79 Wis. 357, 359, 48 N. W. 380.

91. Willey *v.* State, 46 Ind. 363.

Necessity of producing abortion is not sufficiently negatived by charging that the defendant inserted an instrument into the womb of a certain woman with intent then and there and thereby to produce the miscarriage of the woman, the said employment of the said instrument not being then and there necessary to preserve the life of the said woman (Bassett *v.* State, 41 Ind. 303); or, that the defendant administered a drug with intent thereby to procure an abortion and miscarriage, the administering of said medicine and drugs not being then necessary to preserve the life of the woman (State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427; State *v.* Stevenson, 68 Vt. 529, 35 Atl. 470). But see *contra*, State *v.* Leeper, 70 Iowa 748, 30 N. W. 501, wherein it was held that an indictment alleging that certain acts were done with the design and intention to produce a miscarriage, and that the doing of such acts was not necessary to save the life of the wo-

defendant maliciously and without legal justification procured and caused the abortion is not sufficient;[92] but it has been held that charging that the acts constituting the offense were done "unlawfully" and with intent to cause and procure the miscarriage of the woman sufficiently negatives any inference that the act was done for the purpose of saving the woman's life.[93]

b. Exception Not Embodied in Enacting Clause. Where the exception is not contained in the enacting clause of the statute defining the offense, but is embodied in a subsequent paragraph, the indictment need not allege that the abortion was not necessary to save the mother's life. It is a matter of defense to be taken advantage of by the answer.[94]

I. Joinder of Counts. It is proper to join in one indictment several counts where the offenses described in them are similar in their nature, mode of trial, and punishment;[95] hence, the allegation, in different counts of an indictment, of the use of different means of producing an abortion, does not constitute a misjoinder.[96]

IX. Defenses.

A. Advice of Physician. Under statutes prohibiting abortions unless the same shall have been advised by two physicians to have been necessary to save the mother's life, the fact that the abortion was actually advised by two physicians to be necessary to save the mother's life will of course constitute a valid defense;[97] but the fact that one of the defendants, being a physician, deemed it necessary to perform an abortion to save the woman's life, is no defense.[98] Under a statute providing that it shall be an offense to produce an abortion unless necessary to preserve the life of the mother, or unless it shall have been advised by a physician to be necessary for that purpose, the existence of the necessity, or the fact that it was so advised by a physician, each constitute an adequate defense, and it is not essential that the necessity and the advising that it was necessary should both exist.[99]

B. Coercion of Husband. It is a good defense for a married woman charged with the production of an abortion to show that it was committed by her under the coercion of her husband.[1]

C. Consent of Woman. The consent of the woman to the production of the abortion is no defense to a prosecution of the person producing or attempting to produce it.[2]

man, sufficiently negatived the necessity of producing the miscarriage for the purpose of saving the woman's life.

92. State *v.* Stokes, 54 Vt. 179.

93. Com. *v.* Sholes, 13 Allen (Mass.) 554.

94. State *v.* Rupe, 41 Tex. 33. See *infra*, IX, G.

95. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163.

Thus a count in an indictment charging defendant with administering poison with intent to kill the mother may be joined with a count charging defendant with administering a drug with intent to cause and procure the miscarriage of the mother, since each of the counts of the indictment charge a misdemeanor at common law and are punishable in the same manner. State *v.* Slagle, 82 N. C. 653. To the same effect see Eggart *v.* State, 40 Fla. 527, 25 So. 144.

Separate operations on two women.—The performance of an operation on two women on separate occasions may be joined in separate counts of a single indictment. Com. *v.* Brown, 121 Mass. 69.

96. Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

Separate acts on different days.—The charging in different counts of the doing of separate acts on different days with intent to produce a miscarriage does not constitute a misjoinder. Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; Com. *v.* Adams, 127 Mass. 15; Com. *v.* Brown, 14 Gray (Mass.) 419.

Several means.—The joinder of a count alleging an abortion to have been produced by drugs with another count charging its production by means of instruments does not constitute a misjoinder. Beasley *v.* People, 89 Ill. 571; People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

97. State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

98. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

99. State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223.

1. Tabler *v.* State, 34 Ohio St. 127.

2. State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776; Com. *v.* Snow, 116 Mass. 47; Com.

D. Death of Fœtus. Showing that the fœtus had lost its vitality, so that it could never have matured into a living child, may constitute a defense in prosecutions for abortion under some statutes.[3]

E. Desire to Avoid Disgrace. The desire of defendant to screen the woman and himself from disgrace constitutes no defense.[4]

F. Former Acquittal. A plea of former acquittal has been held to be properly interposed to a subsequent indictment for abortion, where it appears that the offense charged in the second indictment is the same referred to in the first indictment, to which the court sustained a demurrer without directing a resubmission to the grand jury.[5]

G. Necessity of Saving Mother's Life. That the production of the abortion was necessary to save the mother's life can always be shown by way of defense;[6] but that it was produced to prevent the mother from committing suicide is not a defense.[7]

X. Evidence.[8]

A. Admissibility — 1. Declarations of Accomplices — a. In General. Declarations of an accomplice showing knowledge of the woman's pregnancy, made before the operation, are admissible against defendant,[9] but not declarations to the effect that declarant was in the habit of producing abortions;[10] nor should such evidence be received before the conspiracy is proven or the defendant connected with the commission of the offense.[11]

b. Of the Woman, a Co-Conspirator. A pregnant woman who actively promotes and adopts means for the performance of an abortion on her person is a co-conspirator with the person who actually performs the operation, in such a sense as will make her acts and declarations in the furtherance of that object admissible against defendant.[12] But statements made by her subsequent to the

v. Wood, 11 Gray (Mass.) 85; People *v.* Abbott, 116 Mich. 263, 74 N. W. 529.

3. So held in Com. *v.* Wood, 11 Gray (Mass.) 85, which was a prosecution under a statute providing that whoever, with intent to cause the miscarriage of a woman "then pregnant with child," shall administer to her any drug with intent to produce her miscarriage, shall, etc. But under a later statute providing that whoever shall administer to "any woman" any drug, etc., with intent to produce a miscarriage, shall be punished, it was held not to be a defense to show that the fœtus had lost its vitality. Com. *v.* Surles, 165 Mass. 59, 42 N. E. 502.

4. Com. *v.* Wood, 11 Gray (Mass.) 85.

5. State *v.* Crook, 16 Utah 212, 51 Pac. 1091, wherein it appears that the first indictment charged defendant with procuring an abortion by the administration of drugs, and that the second indictment charged him with procuring an abortion by means of a drug and the use of an instrument.

6. Beasley *v.* People, 89 Ill. 571; State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223; State *v.* Rupe, 41 Tex. 33.

7. That the mother had threatened to commit suicide unless she could be relieved of the child with which she was pregnant does not present such a necessity for the performance of the operation to save the mother's life as is contemplated by the statute. The statute was intended to apply only to a case where the death of the mother might reasonably be anticipated to result from natural causes unless the fœtus was destroyed. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

8. See also, generally, Criminal Law.

9. Hays *v.* State, 40 Md. 633, wherein it is held that evidence of declarations of a person jointly indicted with defendant, made prior to the operation, are admissible against defendant for the purpose of showing that the declarant knew that the woman was pregnant, when accompanied with an offer to follow such evidence with proof of a conspiracy to produce the abortion.

10. Thus, on trial of one accused of having procured another to perform an operation, evidence of declarations of the person who performed the operation, to the effect that she "was in the habit of performing operations for the purpose of producing abortions," is inadmissible against defendant, as such evidence is mere hearsay. People *v.* Abbott, 116 Mich. 263, 74 N. W. 529.

11. Hays *v.* State, 40 Md. 633, wherein it is held that where defendant and another were jointly indicted, a note written by such other, directing the woman at what time to leave home and where to meet such other for the apparent purpose of going to a place where the abortion was to be performed, is inadmissible against defendant where no proof showing a conspiracy between the parties jointly indicted has been given and defendant has in no way been connected with the commission of the offense.

12. Solander *v.* People, 2 Colo. 48.

production of the abortion are not admissible, since not made in furtherance of the common object.[13]

2. Declarations of Defendant. Defendant's declarations of his willingness and ability to produce an abortion, made prior to the commission of the offense charged, are admissible,[14] as is also evidence that such declarations were brought to the woman's knowledge.[15] Declarations of the defendant tending to show his intention to produce an abortion are admissible,[16] as is also his failure to deny the woman's accusation that he had caused her to miscarry.[17]

3. Declarations of Woman — a. In General — (I) *Made at Time of Operation.* Declarations of the woman, made at the time of visiting defendant, as to the object of her visit, are admissible as a part of the *res gestæ*.[18]

(II) *Made before or after Operation.* Statements made by the woman either before or after the acts with which defendant is charged, in regard to his acts or his connection with the offense, are inadmissible,[19] since such evi-

13. State *v.* Young, 55 Kan. 349, 40 Pac. 659; People *v.* Davis, 56 N. Y. 95.

14. Cards found in the possession of defendant and calculated to impart the information of his willingness to produce abortions are admissible in evidence. Com. *v.* Barrows, (Mass. 1900) 56 N. E. 830.

Circular issued by defendant three years previous to the commission of the alleged offense, wherein he advertised his willingness to produce unlawful abortions, is admissible for the purpose of showing the commission of the offense by him and the intent with which the abortion was performed. Weed *v.* People, 56 N. Y. 628, 3 Thomp. & C. (N. Y.) 50.

Statements made by defendant prior to the alleged operation, to the effect that she, defendant, had instruments and knew how to perform operations to produce abortions, are admissible. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

15. Com. *v.* Holmes, 103 Mass. 440.

16. Thus, where defendant refers, in a letter written by him to the woman, to a certain proposition made by him to her, it is competent for her to show by parol that it was a proposition that she submit to an operation. It is a declaration of the defendant and is admissible as such. Lamb *v.* State, 66 Md. 285, 7 Atl. 399.

17. Com. *v.* Brown, 121 Mass. 69, wherein it was held that statements by a woman on whom an abortion has been performed, made in the presence of defendant, to the effect that he, defendant, had performed an operation for the production of an abortion on her, and not denied by him, are admissible in evidence, and this notwithstanding defendant is under arrest at the time and asked the woman if she had not been previously operated on by another person.

Declarations of defendant's agent.— In a prosecution for abortion, evidence of statements made by defendant's father to the woman's father, that defendant had telephoned from the place where the girl was, to the effect that she was sick and wanted her mother to come and see her, is admissible as a part of the *res gestæ* where the theory of the prosecution is that the defendant had gotten the woman with child and then enticed her away for the purpose of procuring an abortion. People *v.* McDowell, 63 Mich. 229, 30 N. W. 68.

18. Solander *v.* People, 2 Colo. 48; State *v.* Howard, 32 Vt. 380; State *v.* Dickinson, 41 Wis. 299.

At time of departure for defendant's house. — Declarations made by a woman at the time of her departure for defendant's house for the purpose of having an abortion performed are admissible as a part of the *res gestæ*. State *v.* Howard, 32 Vt. 380; State *v.* Dickinson, 41 Wis. 299.

19. *Illinois.*— Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

Indiana.— Hauk *v.* State, 148 Ind. 238, 46 N. E. 127.

Kansas.— State *v.* Young, 55 Kan. 349, 40 Pac. 659.

Massachusetts.— Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Com. *v.* Felch, 132 Mass. 22.

Michigan.— People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

New Hampshire.— State *v.* Wood, 53 N. H. 484.

New York.— People *v.* Davis, 56 N. Y. 95; Maine *v.* People, 9 Hun (N. Y.) 113.

Oregon.— State *v.* Clements, 15 Oreg. 237, 14 Pac. 410.

Application of the rule, generally.— Declarations by the woman on whom an alleged operation has been performed, made several days before the operation with which defendant is charged, purporting to recite that she had attempted to operate on herself, are inadmissible. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127. And so also her declarations, not made in the presence of the defendant, on her return from the place where it is alleged the operation was performed, and purporting to state what was done at such place, are inadmissible. State *v.* Wood, 53 N. H. 484; People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661; People *v.* Davis, 56 N. Y. 95; Maine *v.* People, 9 Hun (N. Y.) 113.

In a prosecution for producing a miscarriage resulting in the death of the woman, evidence of statements made by her to the effect that she was pregnant by a certain person and that if such person did not perform an operation to procure a miscarriage or get someone else to do so she should perform the operation on herself, is inadmissible. Com. *v.* Felch, 132 Mass. 22.

dence is merely hearsay,[20] and not a part of the *res gestæ*.[21] For the same reason statements made to her physician, by a woman on whom an operation has been performed, as to matters which had occurred before his being called to attend her, are inadmissible.[22]

(III) *To Show Pregnancy.* Statements made by a woman to her physician are admissible for the purpose of showing that she was pregnant,[23] as are also statements made by her to others.[24]

(IV) *To Show Present Pain.* Declarations of a woman on whom it is alleged an operation has been performed, indicating present pain or suffering, are admissible to prove her physical condition at the time of making such statements.[25]

b. Dying Declarations — (I) *Inadmissible as a Rule.* In a prosecution for producing an abortion, dying declarations of the woman are not admissible though her death is a result of the acts done;[26] though in some states such evidence is made admissible by statute.[27]

(II) *Qualification of Rule* — (A) *Where Death Is the Gravamen of the Offense.* Where, however, the death of the woman is the gravamen of the offense and the subject of the charge, her dying declarations are admissible.[28]

(B) *Must Be Made In Extremis.* Dying declarations, to be admissible, in any event, must have been made by the woman under a belief that she was about

As to instrument used.— Statements of a woman upon whom an abortion has been performed, to the effect that defendant had used instruments on her, are inadmissible. State *v.* Clements, 15 Oreg. 237, 14 Pac. 410.

As to medicine used.— Statements made by the woman after the birth of the child, regarding certain medicine which she claimed defendant had induced her to take a few days previous to the making of such statements, are inadmissible. People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

As to time of operation.— Declarations of one on whom an operation has been performed, not made at the time of the operation, are inadmissible for the purpose of showing when and by whom the operation was performed. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

20. Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Com. *v.* Felch, 132 Mass. 22; State *v.* Clements, 15 Oreg. 237, 14 Pac. 410.

21. Maine *v.* People, 9 Hun (N. Y.) 113; People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661; People *v.* Davis, 56 N. Y. 95.

22. Hays *v.* State, 40 Md. 633.

23. State *v.* Gedicke, 43 N. J. L. 86.

24. State *v.* Glass, 5 Oreg. 73.

25. Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866; Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

26. *Georgia.*— Wooten *v.* Wilkins, 39 Ga. 223.

Massachusetts.— Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872.

New Jersey.— State *v.* Meyer, (N. J. 1900) 45 Atl. 779.

New York.— People *v.* Davis, 56 N. Y. 95; Wilson *v.* Boerem, 15 Johns. (N. Y.) 286.

Ohio.— State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596.

Pennsylvania.— Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314; Com. *v.* Keene, 7 Pa. Super. Ct. 293.

England.— Rex *v.* Lloyd, 4 C. & P. 233; Reg. *v.* Hind, 8 Cox C. C. 300; Rex *v.* Mead, 2 B. & C. 605; Rex *v.* Hutchinson, 2 B. & C. 608 note.

27. Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872 [*citing* Mass. Stat. (1889), c. 100]; Maine *v.* People, 9 Hun (N. Y.) 113 [*citing* N. Y. Laws (1875), c. 352].

28. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815; Peaples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; State *v.* Dickinson, 41 Wis. 299. See also Traylor *v.* State, 101 Ind. 65; Clarke *v.* People, 16 Colo. 511, 27 Pac. 724, where such evidence seems to have been received without objection.

Applications of the rule.— Under a statute providing that whoever administers a drug with intent to produce a miscarriage shall, if the woman die, be punished, the dying declarations of the woman are admissible to prove what was done at the time of the commission of the unlawful act which caused the death, but not to prove what occurred before or afterward. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815.

So, under a statute providing that in case the death of the woman ensues defendant shall be deemed guilty of manslaughter, dying declarations of a woman on whom an abortion has been performed are admissible for the purpose of showing whether or not defendant had anything to do with the producing of the abortion, where the death of the woman resulted from the abortion and is the subject of inquiry. State *v.* Dickinson, 41 Wis. 299.

But under a statute providing that defendant shall be guilty of a felony in case the death of the mother results from an attempt to produce an abortion, dying declarations are not admissible, since homicide is not the subject of the charge, and the death of the child or mother, or of both, merely augments the punishment. People *v.* Davis, 56 N. Y. 95. To the same effect substantially see State *v.* Meyer, (N. J. 1900) 45 Atl. 779.

to die;[29] and declarations of the deceased, not made *in extremis*, contradictory of statements made by her when *in extremis*, are not admissible for the purpose of disproving the latter declarations.[30]

(c) *Subject-Matter of the Declaration.* When admissible, dying declarations must relate to facts and not to mere matters of opinion or belief,[31] and must also be confined to the circumstances connected with the act resulting in death.[32]

4. Defendant's Good Character. Evidence of defendant's good character is admissible.[33]

5. Illicit Sexual Intercourse. Evidence showing a motive for making an attempt to produce an abortion is admissible, and for that purpose evidence tending to show that defendant had had illicit sexual intercourse with the woman is admissible,[34] also that one jointly indicted with defendant had had intercourse with her,[35] but not that a third person had such intercourse.[36]

6. Medical Works. Medical books cannot be read to the jury,[37] as affirmative proof, unless they have been first read to medical experts and by them testified to accord with their observations in practice.[38] But medical books may be read to the jury to contradict testimony of an expert who testified that his opinion was based on the teachings of such book, and to show that the book does not promulgate the theory advanced.[39]

7. Opportunity to Commit Offense. Evidence tending to show that defendant had an opportunity to commit the offense is admissible.[40]

8. Other Abortions or Attempts. Acts of the defendant tending to show his knowledge of the woman's pregnancy and his intention to commit an abortion upon her may be proved whether they were prior or subsequent to the particular act charged in the indictment;[41] hence evidence of other operations performed by defendant before the operation charged is admissible for the purpose of showing

29. Maine *v.* People, 9 Hun (N. Y.) 113, holding also that it is no objection to such evidence that the declarations were obtained by means of leading questions and under earnest solicitation.

30. Maine *v.* People, 9 Hun (N. Y.) 113.

31. Hence, declarations to the effect "that he [defendant] is the cause of my death; he is my murderer; they abused me terribly," are inadmissible, since mere expressions of opinion. State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297.

So a declaration of a person *in extremis*, to the effect that the operation was performed for the purpose of producing an abortion, is not admissible. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815.

But a statement by the woman that defendant had operated on her is a statement of a substantive fact and not an expression of an opinion. Maine *v.* People, 9 Hun (N. Y.) 113.

32. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815; Maine *v.* People, 9 Hun (N. Y.) 113.

In the Indiana case just cited it is held that what occurs before or after the act has been done does not constitute a part of the *res gestæ* although the interval of separation may be very brief. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815. See also *supra*, X, A, 3.

33. Holland *v.* State, 131 Ind. 568, 31 N. E. 359. See *infra*, XI, F, 6.

34. Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

35. People *v.* Josselyn, 39 Cal. 393, holding that, pregnancy being a necessary fact to be shown, evidence of the woman's cohabitation with one jointly indicted with defendant is admissible as tending to show that fact.

36. Crichton *v.* People, 1 Abb. Dec. (N. Y.) 467.

37. Eggart *v.* State, 40 Fla. 527, 25 So. 144; Com. *v.* Brown, 121 Mass. 69; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Collier *v.* Simpson, 5 C. & P. 73.

38. Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

39. Eggart *v.* State, 40 Fla. 527, 25 So. 144.

40. Hays *v.* State, 40 Md. 633; Com. *v.* Mitchell, 6 Pa. Super. Ct. 369.

Applications of the rule.— In a prosecution of a physician for producing an abortion, under a claim that it was done at a certain hotel, evidence that the woman had written defendant a letter, and that she had also sent him a telegram to meet her on a certain train, is admissible as tending to show that the meeting was prearranged and for a purpose. Com. *v.* Mitchell, 6 Pa. Super. Ct. 369.

The time, place, and circumstances under which a crime was committed are always admissible. That the house where an abortion was performed was a house of ill fame is admissible as bearing on the question of whether the crime could be there committed without fear of detection. Such evidence is not introduced as an attack on the character of defendant. Hays *v.* State, 40 Md. 633.

41. Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

the intent with which the act charged was done,[42] as is also evidence of a subsequent attempt.[43] But in a prosecution of a man and woman for producing an abortion evidence of a previous attempt made by the man alone is inadmissible, such previous attempt constituting a separate and distinct offense.[44] And so, in a prosecution for producing an abortion, evidence that one other than the person whom it is alleged defendant procured to produce the abortion had prescribed for the woman is inadmissible where it is not shown that the prescription was used.[45]

9. Relating to Means of Commission — a. Character and Effect of Drug. Evidence that the substance administered is popularly supposed to be an abortive is admissible for the purpose of showing the intent with which it was administered,[46] as is also evidence respecting the effect of the medicine prescribed by defendant.[47]

b. Possession of Instruments. Evidence that instruments adapted to the performance of operations were found in the possession of defendant is admissible against him.[48]

10. Subsequent Condition of the Woman — a. Mental Condition. In a prosecution for an assault with intent to produce an abortion, evidence of acts of the woman occurring after the time of the alleged assault, and indicating fear of the defendant, is admissible as tending to prove that an assault had been committed.[49]

b. Physical Condition. Evidence of the physical condition and appearance of the woman at a time subsequent to the time when it is alleged the operation was performed is admissible.[50] Evidence of subsequent sexual intercourse is admissible where the woman is shown to be *enceinte* at a time subsequent to the alleged miscarriage.[51]

42. Com. *v.* Corkin, 136 Mass. 429.

Two operations on separate days.— Under an indictment charging the commission of an offense with an instrument the state may give evidence of two separate operations with an instrument on separate days. King *v.* State, 35 Tex. Crim. 472, 34 S. W. 282.

43. Thus, in a prosecution for attempting to produce an abortion by the administration of drugs, a letter written by defendant to the woman subsequent to the alleged attempt, wherein he advised her to use an instrument which he had previously furnished her for the production of an abortion, has been held to be admissible for the purpose of showing the intent with which the drug was administered. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301. And to the same effect see Lamb *v.* State, 66 Md. 285, 7 Atl. 399.

44. Baker *v.* People, 105 Ill. 452.

45. State *v.* Gunn, 106 Iowa 120, 76 N. W. 510, wherein it is held that evidence that a woman presented to a druggist a prescription for drugs calculated to produce a miscarriage, and that such prescription was signed by a physician other than the physician whom it is charged defendant procured to produce the abortion, is inadmissible where it is shown that such prescription was not filled by the druggist.

46. Carter *v.* State, 2 Ind. 617.

47. People *v.* Van Zile, 73 Hun (N. Y.) 534, 26 N. Y. Suppl. 390.

48. Com. *v.* Blair, 126 Mass. 40; Com. *v.* Brown, 121 Mass. 69; Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

Reason for the rule.— In a prosecution for producing a miscarriage, evidence that defendant, five months previous to the time the operation is alleged to have been performed, had in his possession an instrument adapted to the performance of an operation, is admissible, since it tends to show that the defendant was knowingly in the possession of the means of committing such a crime. Com. *v.* Blair, 126 Mass. 40.

As showing intent.— Evidence that defendant procured another to make an instrument adapted to the performance of an operation about the time the operation was performed is admissible to show the intent with which he acted, though he never got the instrument. Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

49. State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

50. Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; Com. *v.* Fenno, 134 Mass. 217; Com. *v.* Wood, 11 Gray (Mass.) 85; People *v.* Olmstead, 30 Mich. 431.

Subsequent death of the mother is admissible as bearing upon the effect and purpose of the acts done by defendant. People *v.* Van Zile, 73 Hun (N. Y.) 534, 26 N. Y. Suppl. 390.

Weakness of the woman, as shown by her declarations made shortly after the time at which it is alleged an operation for the production of an abortion was performed on her, is admissible. Such evidence is admissible as tending to show the performance of the operation. Com. *v.* Fenno, 134 Mass. 217.

51. Testimony of the woman that defendant had sexual intercourse with her after the alleged abortion is admissible to rebut the inference that no operation had been performed, arising from testimony tending to show that she was *enceinte* at a time subsequent to the alleged abortion. Com. *v.* Wood, 11 Gray (Mass.) 85.

11. To Rebut Presumption Arising from Delay in Prosecution. Evidence is admissible to explain why a prosecution has been long delayed and to rebut any unfavorable inferences arising from failure to institute a prosecution.[52]

12. To Show Animus of Prosecution. Evidence that the prosecuting witness had offered not to prosecute in case defendant paid a certain sum of money is admissible for the purpose of showing the animus of the prosecution.[53]

13. Want of Knowledge of Pregnancy. Lack of knowledge of pregnancy may be given in evidence by defendant for the purpose of showing that there was no intent to produce a miscarriage.[54]

B. Burden of Proof — 1. As to Advice of Physician. The burden of proof rests on defendant to show that it was performed on the advice of one or more physicians, as the case may be.[55]

2. As to Character of Substance Administered. In a prosecution for administering a noxious substance with intent to produce an abortion, the burden of proof rests upon the state to show that the substance administered was noxious, where a miscarriage did not ensue.[56]

3. As to Necessity of Saving Mother's Life. The burden of proof rests upon the state to show that the production of the miscarriage was not necessary for the purpose of saving the mother's life.[57] Such burden is complied with, however, where no evidence is introduced to the contrary, by the presumption that it was not necessary to save her life.[58]

C. Presumptions — 1. As to Mother's Consent. There is no presumption that an operation was performed with the mother's consent.[59]

2. As to Necessity of Saving Mother's Life. Where the performance of an abortion is shown, it will be presumed, in the absence of evidence to the contrary, that it was not necessary to save the mother's life.[60]

3. As to Wife's Acts in Husband's Presence. The presumption that a criminal act performed by a married woman in the presence of her husband was done under his constraint and coercion is only *prima facie* and may be rebutted.[61]

D. Variance. A fatal variance does not arise where the evidence discloses

52. People *v.* Lohman, 2 Barb. (N. Y.) 216.

53. Watson *v.* State, 9 Tex. App. 237.

54. Powe *v.* State, 48 N. J. L. 34, 2 Atl. 662. See also *supra*, II, C.

55. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380. See *supra*, IX, A.

Reason for rule.— While it is necessary for the state to produce some evidence that the abortion was unnecessary to save the life of the mother, the burden of showing that it was advised by a physician to be necessary for that purpose is on defendant, since, from the very nature of the case, knowledge of such fact resting exclusively with the defendant could be easily produced by him, though impossible of production by the prosecution. State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427.

56. State *v.* Gedicke, 43 N. J. L. 86. See also *supra*, II, B, 2, b.

57. *Connecticut.*— State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

Iowa.— State *v.* Aiken, 109 Iowa 643, 80 N. W. 1073.

Missouri.— State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427.

New York.— People *v.* Meyers, 5 N. Y. Crim. 120. *Contra*, People *v.* McGonegal, 17 N. Y. Suppl. 147.

Ohio.— Moody *v.* State, 17 Ohio St. 111.

Oregon.— State *v.* Clements, 15 Oreg. 237, 14 Pac. 410; State *v.* Glass, 5 Oreg. 73.

See *supra*, IX, G.

New York rule.— It is not necessary, it seems, in New York, for the state, in order to secure a conviction where an instrument has been used, to show that its use was not necessary to preserve the life of the mother or of the child,—in other words, to prove that the cause is one not excepted by the provisions of the statute. This is on the theory that the facts lie peculiarly within defendant's knowledge. Bradford *v.* People, 20 Hun (N. Y.) 309. See also New York cases cited *supra*, this note.

58. State *v.* Lee, 69 Conn. 186, 37 Atl. 75. See also *infra*, X, C, 2, as to the presumption regarding the necessity of saving the mother's life.

59. Com. *v.* Reid, 8 Phila. (Pa.) 385. See *supra*, IX, C.

60. State *v.* Lee, 69 Conn. 186, 37 Atl. 75; State *v.* Schuerman, 70 Mo. App. 518. See *supra*, IX, G; X, B, 3.

61. Tabler *v.* State, 34 Ohio St. 127. See *supra*, IX, B.

Thus, where an indictment charges that an abortion was performed by a husband and wife acting jointly, evidence of offers made by the wife, not in the presence of her husband, to perform the operation, is admissible for the purpose of rebutting the presumption. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

that the abortion was produced by means of the same general nature as the means alleged.[62]

E. Weight and Sufficiency — **1. In General.** The cases furnish many illustrations of facts which, when properly shown in evidence, have been held to be sufficient to sustain a conviction of the offense of abortion or of attempting to commit the same.[63]

62. *Maine.*— State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

Michigan.— People *v.* Abbott, 116 Mich. 263, 74 N. W. 529.

New York.— Crichton *v.* People, 1 Abb. Dec. (N. Y.) 467.

Texas.— Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

England.— Rex *v.* Phillips, 3 Campb. 73.

Applications of rule.— Where an indictment alleges that the abortion was caused by the use of a specified metallic instrument it is not necessary that the proof should show that it was done by that particular instrument. It will be sufficient if proved to have been done by some other instrument if the nature of the violence and the kind of death occasioned by it be the same as alleged. State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578. Where an indictment charges that certain acts for the production of an abortion were done with force and violence, proof that they were done with the mother's consent does not constitute a variance, since the mother's consent was immaterial. People *v.* Abbott, 116 Mich. 263, 74 N. W. 529. Where an indictment alleges that defendant advised a certain woman, she being then and there pregnant, to take certain pills known as "Dr. James Clark's Female Pills," and the evidence is that he bought a bottle of said pills and told her to take them, there is no variance between the proof and the allegations. Crichton *v.* People, 1 Abb. Dec. (N. Y.) 467. Where an indictment charged an abortion to have been produced by a certain instrument, evidence that defendant also used another instrument to open up the parts operated on does not constitute a variance. Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287. Where the indictment charges the administration of a decoction, proof of the administration of an infusion does not constitute a variance. Rex *v.* Phillips, 3 Campb. 73.

63. To convict of abortion, generally.—Evidence that an unmarried woman, apparently in good health, and who was able to perform her duties as stenographer, called on defendant, a practising physician, and had a consultation with him; that thereafter she went to defendant's house, taking with her a night-dress and articles indicating an intention to stay there a greater or less length of time; that she was admitted by defendant and directed to a room, and that defendant afterward sent a meal to her; that thereafter she went to defendant's office and remained alone there with the physician for twenty or thirty minutes; that she suffered hemorrhage of the private parts and gave evidence of pain: that defendant visited her in her room and subsequently again took her to his office, where she remained alone with him for a like period of time; that she thereafter manifested grave functional disorders, with discharges of blood and water; that defendant took her in his carriage to her boarding-house and left her on the porch in an enfeebled condition; and that a subsequent examination showed that an abortion had been produced,— was held sufficient to support a conviction. Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

Evidence that a woman was *enceinte* by defendant; that she informed him of her condition; that she was a servant in his family; and that he thereafter gave her certain drugs which made her sick,— is sufficient to support a conviction, though he testified that he did not know that she was pregnant. State *v.* Montgomery, 71 Iowa 630, 33 N. W. 143.

Evidence showing that a miscarriage was effected by violence; that witness and the woman on whom the operation is alleged to have been performed went to defendant's house for the purpose of procuring the abortion; that the pregnant woman disclosed her condition to defendant and was alone with her for some fifteen minutes, the witness being sent out of the room; that on the night following the woman suffered great pain; that two days thereafter they went to defendant's, where they remained two or three days, the woman being under defendant's care,— defendant testifying that the woman had never been in her house, and this testimony being conclusively proven to be false,— was held sufficient to support a conviction. Com. *v.* Drake, 124 Mass. 21.

Evidence that defendant had had sexual intercourse with a woman; that she informed him that she was pregnant; that he told her he would give her some medicine which would relieve her; that he gave her a drug which would produce an abortion; that she took it and it made her sick and a miscarriage followed,— it being also shown that defendant had asked a physician to produce an abortion; that he had refused; and that the woman herself had done nothing to produce the miscarriage,— was held sufficient to support a conviction. State *v.* McLeod, 136 Mo. 109, 37 S. W. 828.

Evidence that defendant administered to the pregnant woman powerful abortive medicines, and also performed an operation on her for the purpose of producing a miscarriage, is sufficient to support a conviction, though the miscarriage did not occur until an unusually long time after the administration of the drug and the performance of the operation, during which time the woman was subjected to violent physical exercises and fatigue. Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

To convict of attempting to commit.— Evidence that defendant administered ergot to

2. **Animus or Interest of Witness.** While the woman is not technically an accomplice, the fact that she voluntarily submitted to the production of the abortion involves her in the moral turpitude of the offense and tends to weaken the weight of her testimony.[64]

3. **Circumstantial Evidence.** By reason of the secret nature of the offense, circumstantial evidence must be relied upon to a considerable extent to prove its commission; and in fact such evidence alone may support a conviction;[65] so also the absence of a necessity of producing the abortion in order to save the mother's life may be shown by circumstantial evidence.[66]

a pregnant woman, and that it would, under certain conditions, produce a miscarriage, is sufficient to sustain a conviction of an attempt to produce an abortion. Hunter *v.* State, 38 Tex. Crim. 61, 41 S. W. 602.

To convict of being accessary.— That defendant, knowing that a woman was *enceinte*, received her into her house as a boarder and for the purpose of having an operation, and procured a physician to perform an operation for abortion, is sufficient to support a verdict finding defendant to be an accessary before the fact to the abortion. Com. *v.* Adams, 127 Mass. 15.

To convict of procuring one to commit.— Evidence that the woman had been seduced and was *enceinte* by defendant; that she had attempted to produce an abortion on herself and had lacerated the cervix of her womb, and that pus and septic matter had formed there; that, after an unsuccessful attempt to produce her own miscarriage, defendant had an interview with her and then went to a neighboring city and had an interview with a physician; that a few days thereafter the woman left her home for the city to which defendant had previously journeyed and was met on the train by defendant; that in the evening of that day defendant took the woman to the office of the physician whom he had previously interviewed; that she remained with the doctor for over an hour, later went to a hotel and registered under a fictitious name; that defendant had an interview with the physician after she had left the latter's office, and that defendant then returned to his own home; that he afterward returned to the city, and, after again seeing the physician, returned with her on the train a part of the distance to her home; that a few days thereafter she miscarried and subsequently died of peritonitis due to septic poisoning; that an instrument passing through the cervix of the womb, covered with pus, would be liable to collect septic substance and introduce it into the womb, where it would be absorbed by the fallopian tubes into the peritoneum, causing peritonitis; and that physicians usually produced abortion by introducing an instrument into the womb,— was held sufficient to convict defendant of procuring the physician to produce an abortion. Cook *v.* People, 177 Ill. 146, 52 N. E. 273.

Defendant wrote and asked a certain woman, whom it is shown committed the offense, to treat a female friend. He subsequently took the woman, who was pregnant by him, to the house where the abortion was produced, and left her there. He gave directions as to her care and comfort and paid the bills. It was held that the evidence was sufficient to support a verdict finding him guilty of counseling and procuring the commission of the offense. Com. *v.* Thompson, 108 Mass. 461.

64. Com. *v.* Boynton, 116 Mass. 343; Com. *v.* Wood, 11 Gray (Mass.) 85; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; Frazer *v.* People, 54 Barb. (N. Y.) 306; Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424; Wandell *v.* State, (Tex. Crim. 1894) 25 S. W. 27; Watson *v.* State, 9 Tex. App. 237. See also *supra*, V, B, 4.

Hence an instruction that if the jury find that defendant performed the operation at the request of the woman, they should carefully consider her connection with those acts in reference to her testimony, and should scrutinize her statements with particular care on that account, is not erroneous. Com. *v.* Boynton, 116 Mass. 343.

But *compare* Com. *v.* Brown, 121 Mass. 69, wherein it was held not to be error to refuse to instruct that the testimony of a woman who has been operated upon by the defendant is to be taken with great circumspection, caution, and discredit.

65. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; State *v.* Lilly, (W. Va. 1900) 35 S. E. 837, also holding it to be unnecessary to show that it was beyond the power of any person other than defendant to commit the crime.

66. Howard *v.* People, 185 Ill. 552, 57 N. E. 441; State *v.* Aiken, 109 Iowa 643, 80 N. W. 1073; Bradford *v.* People, 20 Hun (N. Y.) 309.

Applications of the rule.— Evidence that the woman was unmarried and apparently in good health; that she worked up to the time the operation is alleged to have been performed and then went to defendant's house with articles indicating an intention to stay there some time; and that she was about four and a half months advanced in pregnancy,— is sufficient to support a finding that the production of the abortion was not necessary to save the woman's life. Howard *v.* People, 185 Ill. 552, 57 N. E. 441. So evidence that a woman, being five or six months advanced in pregnancy, went to the office of defendant, a physician, and that the operation was successfully performed, there being no evidence as to whether or not she was married, and nothing to indicate the condition of her health except that she walked to defendant's office two or three times, was held not to constitute *prima facie* evidence that

4. Defendant's Confession. A voluntary confession of the defendant is insufficient to support a conviction unless corroborated by evidence tending to prove the *corpus delicti*.[67]

5. Manner of Obtaining Dying Declarations. That dying declarations were elicited by leading questions and under pressure and earnest solicitation is proper for the consideration of the jury as affecting their weight.[68]

6. Necessity of Proving Facts Alleged — a. In General. It is not necessary to prove every fact alleged in the indictment or information if the facts proven embrace all the elements of the offense.[69]

b. Corpus Delicti. The alleged unlawful procurement of the miscarriage constitutes the *corpus delicti* and must be proven beyond a reasonable doubt, and mere proof of premature birth under suspicious circumstances is not sufficient.[70]

7. Testimony of Accomplices — a. Necessity of Corroboration — (I) *In General.* Although, at common law, it does not seem to be necessary, in order to render a conviction for abortion valid, that the testimony of an accomplice should be corroborated by other evidence,[71] in some states it is provided by statute that a conviction cannot be had on the uncorroborated testimony of an accomplice.[72]

(II) *Corroborating Woman's Testimony.* While a woman on whom an abortion has been performed is not an accomplice so as to require corroboration of her testimony, within the rule requiring evidence in corroboration of an accomplice's testimony[73] in order to convict, some statutes provide that a conviction shall not be had on the uncorroborated testimony of the woman.[74]

the procurement of the miscarriage was necessary to save the life of the mother. State *v.* Aiken, 109 Iowa 643, 80 N. W. 1073.

67. Dougherty *v.* People, 1 Colo. 514.

Evidence corroborating confession.— Where the evidence showed that defendant applied to several persons for information as to what would produce an abortion; that he had been having illicit sexual intercourse with the woman; that he afterward obtained a medicine and stated to another that he had given it to the woman; that it contained boneset, but did not have the desired effect; that a *post mortem* examination showed that the woman had been pregnant and that a miscarriage had occurred,— it was held that defendant's confession was sufficiently corroborated to prove the pregnancy of the woman and the administration of the drug with intent to produce a miscarriage, and hence was sufficient to support a conviction. Dougherty *v.* People, 1 Colo. 514.

68. Maine *v.* People, 9 Hun (N. Y.) 113.

69. Thus, where an indictment charges that an attempt has been made to produce a miscarriage with several different instruments, it is not necessary to prove that defendant used all of the instruments described. The indictment will be sustained by proving that one of the instruments was used as alleged. Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

So it has been held that it is not necessary to a conviction that the evidence should show the nature of the instrument used to produce the miscarriage, or the time of its use. State *v.* Lilly, (W. Va. 1900) 35 S. E. 837.

70. Traylor *v.* State, 101 Ind. 65. In this case defendant was shown to have had illicit sexual relations with the mother, an unmarried woman, for about a year preceding the alleged abortion; that on the afternoon of the day when the miscarriage occurred they took a buggy ride together and were absent for about two hours, returning about dark; that about five hours thereafter the mother was delivered of a fœtus indicating about seven months' advance in pregnancy. The physician who attended her saw nothing to indicate that improper means had been used to induce the miscarriage. The mother on her deathbed denied that defendant had done anything to produce a miscarriage. It was held insufficient to prove that an abortion had been committed.

71. Reg. *v.* Boyes, 1 B. & S. 311, also holding that it is nevertheless a rule of general and usual practice for the trial court, in its discretion, to advise the jury not to convict upon the testimony of an accomplice alone.

72. Wandell *v.* State, (Tex. Crim. 1894) 25 S. W. 27; Watson *v.* State, 9 Tex. App. 237.

73. Com. *v.* Wood, 11 Gray (Mass.) 85; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; People *v.* Meyers, 5 N. Y. Crim. 120; Willingham *v.* State, 33 Tex. Crim. 98, 25 S. W. 424; Watson *v.* State, 9 Tex. App. 237.

Contra, however, now in Texas. Wandell *v.* State, (Tex. Crim. 1894) 25 S. W. 27, wherein it is held that a woman who voluntarily submits to the performance of an operation for the production of an abortion, though not indictable for the offense, is an accomplice within the purview of Tex. Code Crim. Proc. (1895), § 741, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect defendant with the offense committed.

74. People *v.* Josselyn, 39 Cal. 393 [*citing* Crimes Act, § 45]; State *v.* Owens, 22 Minn. 238 [*citing* Laws (1875), p. 49]; Com. *v.* Keene, 7 Pa. Super. Ct. 293 [*citing* P. L. (1895), 387].

b. Sufficiency of Corroboration. It seems to be enough that the evidence in corroboration satisfies the jury that the accomplice testified to the truth,[75] but it has been held, under a statute requiring the woman's testimony to be corroborated, that the corroborative evidence should not merely tend to prove that an offense has been committed, but should also tend to identify the defendant as the criminal or to show his connection with the offense.[76]

F. Witnesses — 1. Experts — a. Qualifications. A physician may give his opinion as an expert on a subject concerning which he has had no practical experience and his knowledge of which is derived from study alone.[77] He is not disqualified to testify as to conditions which he found on a *post mortem* examination, merely because he made the examination without authority.[78]

b. Questioned Hypothetically. Hypothetical questions, assuming facts concerning which evidence has been introduced, may be propounded to experts.[79]

c. Their Opinions — (I) *In General.* Experts may testify to matters within the scope of their special knowledge and experience, and which are beyond the range of general knowledge.[80]

(II) *As Showing an Abortion and the Manner of Its Production.* A physician who has examined one on whom an abortion is alleged to

75. Reg. *v.* Boyes, 1 B. & S. 311, also holding that it is not necessary that there should be corroborative evidence as to the very act charged.

Applications of the rule.— That an accomplice who resided in another city was able to describe the entrance to defendant's house where it is alleged the operation was performed, and that a hack-driver had driven the accomplice and the woman on whom the operation had been performed to a point near the defendant's house, are corroborative of the testimony of the accomplice to the effect that an operation had been performed at the defendant's house, where the defendant denies that either the accomplice or the woman on whom the operation is alleged to have been performed were ever in her house, since their visit to defendant's house is a material fact. Com. *v.* Drake, 124 Mass. 21.

That defendant employed a reputable physician to attend a woman at the time of her giving birth to the child is not corroborative of testimony tending to show that a few months prior thereto he had been instrumental in attempting to procure an abortion. Frazer *v.* People, 54 Barb. (N. Y.) 306.

76. Testimony of a woman that a physician used an instrument on her is not corroborated by evidence of others showing the fact of pregnancy, that she visited the office of the defendant, and that there was a miscarriage. People *v.* Josselyn, 39 Cal. 393.

In a prosecution for advising the procurement of an abortion there was evidence tending to show that instruments adapted to the performance of an operation were found in the office of the person who it was alleged performed the operation. It was held to be error to refuse to instruct that such evidence was not corroborative of the woman's testimony to the effect that defendant had advised the performance of such operation. People *v.* Vedder, 34 Hun (N. Y.) 280.

Corroboration of woman's dying declarations.— Under Pa. P. L. (1895), 387, making dying declarations admissible in prosecutions for producing abortion, but providing that a conviction shall not be had on the uncorroborated testimony of the woman, it is not necessary that every detail of the woman's *ante-mortem* statement shall be established by independent proof, or that the evidence shall be sufficient to convict without the aid of the statement. The corroborative evidence should relate to some portion of the testimony which is material to the issue, but need not extend to every material fact. It should not merely tend to prove that an offense has been committed, but should also tend to identify defendant as the criminal, or to show his connection with the offense. Com. *v.* Keene, 7 Pa. Super. Ct. 293.

77. Medical witnesses may testify as to the effects of poisons on the human system, from information derived by them from medical books. Carter *v.* State, 2 Ind. 617; State *v.* Wood, 53 N. H. 484.

78. Com. *v.* Taylor, 132 Mass. 261.

79. Thus, where evidence has been introduced tending to prove the facts embraced in the question, it is not error to ask a physician whether, in his opinion, a woman on whom an operation has been performed could continue to perform her duties as a stenographer without her associates noticing her condition. Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

So, where evidence has been introduced strongly tending to show that an operation with instruments has been performed, it is not error to permit hypothetical questions assuming such fact to be propounded to medical experts. Cook *v.* People, 177 Ill. 146, 52 N. E. 273.

80. Application of the rule.— Medical experts may testify that certain instruments shown to them and found in the possession of defendant are adapted to the performance of operations for the production of an abortion, such matter being within the scope of their special experience and beyond the range of general knowledge. Com. *v.* Brown, 121 Mass. 69; Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542.

have been performed may testify as to whether or not, in his opinion, an abortion has been performed,[81] and the manner in which, in his opinion, it was produced.[82] Such evidence is not admissible, however, when based in part on statements, made to the witness by the woman, as to what had been done.[83]

(III) *As Showing Pregnancy.* An expert may testify as to whether or not, in his opinion, the woman was pregnant, and, in case of her death, may give his opinion as to the cause thereof.[84]

2. Non-Experts and Their Opinions. Opinions of persons not shown to be experts are inadmissible.[85] A non-expert may, however, testify to facts which tend to rebut the opinions of experts.[86]

3. Woman as a Witness — a. In General. A woman on whom an abortion has been produced, with her consent, is a competent witness against the person producing it.[87]

b. Against Husband. A wife on whom an abortion has been produced is a competent witness against her husband, charged therewith.[88]

XI. TRIAL.[89]

A. Opening Statement to Jury. In opening, the prosecuting attorney should state the charge against defendant and the evidence which he expects to present to prove that the offense has been committed and that defendant committed it.[90]

81. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; State *v.* Glass, 5 Oreg. 73.

82. State *v.* Wood, 53 N. H. 484.

83. People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661.

84. State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

85. Illustrations of the rule.— A non-expert who has observed the physical condition of the woman subsequent to the time when it is alleged the operation had been performed should not be allowed to state her opinion as to whether or not the woman had been delivered of a fœtus. People *v.* Olmstead, 30 Mich. 431.

In a prosecution for producing an abortion by means of an assault and external violence the woman should not be permitted to testify that the abortion was the result of the violence, since such evidence is proper subject-matter for expert testimony and the witness should have been allowed to state only the physical facts and symptoms experienced by her. Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542.

Testimony of the woman that defendant killed the child and came very near killing her is inadmissible, since it is merely the expression of her opinion. King *v.* State, 35 Tex. Crim. 472, 34 S. W. 282.

86. Thus, where, in a prosecution for producing an abortion, expert testimony is introduced for the purpose of showing that certain acts could not have been performed by the woman on herself, it has been held that testimony of a person not an expert is admissible for the purpose of showing that the witness had performed such an act on herself. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163.

87. People *v.* Josselyn, 39 Cal. 393; State *v.* Dyer, 59 Me. 303; People *v.* Lohman, 2 Barb. (N. Y.) 216; People *v.* Costello, 1 Den. (N. Y.) 83; Com. *v.* Reid, 8 Phila. (Pa.) 385.

88. State *v.* Dyer, 59 Me. 303; Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542.

Cross-examination tending to incriminate husband.— Where, in an abortion case, the woman on whom the operation is alleged to have been performed testifies to the acts causing the abortion, she cannot be compelled to answer, on cross-examination, questions which tend to incriminate her husband, merely because sustaining her objections would be violative of her oath to tell the whole truth. Com. *v.* Reid, 8 Phila. (Pa.) 385.

In a prosecution against husband and a third person for the producing of a miscarriage of the wife, the latter is a competent witness as against the person who performed the operation at the solicitation of her husband. State *v.* Dyer, 59 Me. 303; Com. *v.* Reid, 8 Phila. (Pa.) 385.

In prosecution against third person.— In State *v.* Briggs, 9 R. I. 361, 11 Am. Rep. 270, it is held that a wife on whom an abortion has been produced is competent to testify against a third person, whom her husband has procured to produce the abortion, where no use can thereafterward be made of such testimony in direct proceedings against the husband, but that, if the witness object, such evidence cannot be compelled.

89. See also, generally, Criminal Law.

90. Hence a statement by the prosecuting attorney, in his opening, that defendant had been jointly indicted with another, and on the trial of such other the defendant became a witness for the latter; that the indictment on which such other had been tried contained but one count charging that the abortion had been committed by mechanical means, but that on the trial it was disclosed that defendant had given a prescription which was

B. Argument to Jury. Where cards, claimed to be advertisements of his willingness to produce abortions, are found in the possession of defendant, it is not error to permit the prosecuting attorney to argue their meaning to the jury, when they are couched in suggestive language.[91]

C. Election between Counts. Under an indictment charging in one count the commission of the offense by use of drugs, and in another count by use of an instrument, the state will not be required to elect as to which count it will proceed under, where but one offense is charged.[92]

D. Order of Proof. Proof that an abortion has been committed should precede any evidence tending to connect defendant with its commission.[93]

E. Questions for Jury. The character and capabilities of a drug alleged to have been used in the production of an abortion;[94] the degree of credit to be given to the testimony of a witness;[95] and whether or not a certain person is an accomplice,—are respectively questions for the determination of the jury.[96]

F. Instructions — 1. Must Be Construed Together. The instructions should be construed together as a whole. Hence, an error in one instruction may be cured by other instructions.[97]

2. Relating to Death of Woman. It is not error to refuse to instruct that a conviction cannot be had unless the death of the woman resulted, where the statute makes the offense complete in case her death or miscarriage results.[98]

3. Relating to Method of Producing Abortion. Where one count of an indictment charged the destruction of the fœtus by the use of drugs, and another count charged its destruction by the use of an instrument, it is not error to refuse

to aid in producing the abortion; that it had become necessary to reindict defendant; and that now he was charged in two counts with having brought about the abortion by means of mechanical appliances and also for giving a prescription for that purpose, and that the attempt was successful,—is not erroneous. People *v.* Van Zile, 73 Hun (N. Y.) 534, 26 N. Y. Suppl. 390.

91. Com. *v.* Barrows, (Mass. 1900) 56 N. E. 830.

92. Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

93. Traylor *v.* State, 101 Ind. 65, assigning as a reason for this rule the fact that the production of the miscarriage, being the *corpus delicti*, should be first shown.

94. Dougherty *v.* People, 1 Colo. 514.

95. As to alibi.—Where defendant in a prosecution proves that he was not at the place where the abortion was alleged to have been performed at the time testified to by the state's witnesses, the effect of such fact is one for the determination of the jury, and it is not error to refuse to instruct that if the jury are satisfied defendant did not commit the act on that day they cannot convict. Com. *v.* Snow, 116 Mass. 47.

Dying declarations.—The degree of credit to be given to dying declarations is to be determined by the jury; hence it is not error to refuse to instruct "that the declarations of deceased are not to be received with the same credit as though she had testified to the same under oath upon examination." State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

Testimony of accomplice.—The degree of credit to be given to the testimony of an accomplice is wholly a question for the jury. Maine *v.* People, 9 Hun (N. Y.) 113.

Testimony of woman.—The degree of credit to be attributed to the testimony of a woman who has been operated on, because of her complicity in the unlawful act, is one for the determination of the jury and not properly a subject for direction by the court. Com. *v.* Brown, 121 Mass. 69.

96. Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471.

97. Cook *v.* People, 177 Ill. 146, 52 N. E. 273, in which it is held that an instruction defining the relation of one who advises, assists, or encourages the production of an operation, which assumes that an operation was performed, is not erroneous where other instructions were given to the effect that the jury had no right to assume that an operation had been performed, but that such fact must be proven beyond all reasonable doubt.

So, also, it has been held that the inclusion by the court, in giving instructions to the jury, in the hypothesis on which the jury were instructed to find defendant not guilty, of the absence of the fact that the defendant did not aid or assist in the abortion, is not erroneous. Cook *v.* People, 177 Ill. 146, 52 N. E. 273.

98. Thus, in a prosecution under Burns' Rev. Stat. Ind. (1894), § 1996, providing that whoever administers to any pregnant woman any drug or substance with intent thereby to procure the miscarriage of such woman, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be fined, etc., it is not error to refuse to instruct that it is necessary, in order to convict, to show that the woman had died. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127.

to charge that if the abortion was not solely the result of one or the other of the causes named there could be no conviction under the indictment.[99]

4. Relating to Necessity of Saving Mother's Life. An instruction that defendant should be found guilty unless the abortion was produced to save the life of the mother on the advice of a physician is erroneous, since the necessity alone would justify the act.[100]

5. Requiring Different Degrees of Proof. An instruction should not require a different degree of proof as to any one fact the existence of which is essential to the commission of the abortion.[101]

6. Withdrawing Evidence from Jury. An instruction withdrawing material evidence from the consideration of the jury, such as evidence of defendant's good character, is erroneous.[102]

G. Verdict — 1. Conformity to Indictment. A verdict finding defendant guilty of a lesser offense under an indictment charging a greater is sufficient, provided the facts constituting the lesser are included in the commission of the greater offense.[103]

2. Form of Verdict. A general verdict finding defendant guilty without specifying the offense may be sufficient where the indictment for abortion con-

99. Tabler *v.* State, 34 Ohio St. 127.

100. Thus, in a prosecution under Mo. Rev. Stat. (1879), § 1241, providing that the production of an abortion shall be criminal unless the same shall be necessary to preserve the life of the mother or shall have been advised by a physician to be necessary for that purpose, an instruction authorizing the jury to find defendant guilty unless the act was done for the purpose of saving the life of the mother on the advice of a physician that it was necessary to perform the operation to save the life of the mother, is erroneous. State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223.

101. Thus an instruction that if the fact of the pregnancy of the woman was fully and clearly proven, and the fact that defendant administered to the woman some drug or substance with the intent to produce the miscarriage, or that he used some instrument with intent to procure her miscarriage, is proven beyond a reasonable doubt, then the jury should find defendant guilty, is erroneous in that it does not require them to find the fact of pregnancy to have been proven beyond a reasonable doubt. State *v.* Stewart, 52 Iowa 284, 3 N. W. 99.

102. Thus, in a prosecution where evidence of good character has been given in behalf of defendant, an instruction that if the jury find from all the evidence in the cause, independent of the evidence of defendant's good character, that there is a reasonable doubt as to his guilt, then they should give him the benefit of his good character and acquit him; and that if they should find from all the evidence given in the cause, independent of the evidence of previous good character, that the defendant did commit the crime, evidence of previous good character would not avail him anything, and they should find him guilty,— is erroneous as excluding from the consideration of the jury the evidence of defendant's good character. Holland *v.* State, 131 Ind. 568, 31 N. E. 359. See also *supra*, X, A, 4.

Hence, in a prosecution for producing an abortion, it is not error to refuse to charge that if the jurors were not convinced beyond a reasonable doubt that the accused took the woman to the office of the person who it is alleged performed the operation, for the purpose of having an abortion procured, they must acquit him unless it appears that after he arrived at the office he in some way aided and assisted in the procurement of the abortion, since Ind. Rev. Stat. (1894), § 1857, provides that every person who shall aid or abet in the commission of a felony, or who shall counsel, encourage, hire, or command, or otherwise procure a felony to be committed, may be charged as if he were the principal, as such instruction eliminated the counseling, encouraging, hiring, or commanding of the commission of the felony, prohibited by the statute. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127.

103. State *v.* Watson, 30 Kan. 281, 1 Pac. 770; Com. *v.* Adams, 127 Mass. 15.

Applications of the rule.— Where the statute makes the administration of any drug or substance to a pregnant woman quick with child, with intent thereby to destroy such child, manslaughter in the second degree, and by another section it is provided that the administration of any drug or substance to a pregnant woman, with intent thereby to procure the miscarriage of such woman, a misdemeanor, a verdict finding defendant guilty of the latter offense under an indictment charging the former is not erroneous, since the facts constituting the former necessarily include the latter. State *v.* Watson, 30 Kan. 281, 1 Pac. 270. So, where an indictment charges an abortion and that the woman died as a consequence thereof, the court may, on motion of the prosecuting attorney and with defendant's consent, nol. pros. so much of the indictment as charges the death as a consequence, where the jury return into court and state that they have agreed that defendants are guilty as accessories before the fact, but are not agreed as to whether or not the death resulted from the abortion, and such verdict may be received. Com. *v.* Adams, 127 Mass. 15.

tains more than one count.[104] But if the verdict attempts to find the facts, it should find either the name of the woman on whom the attempt was made, or that she was the person named in the indictment;[105] but it need not find the ingredients, kinds, quality, or quantity of the drug administered.[106]

3. RECEPTION IN DEFENDANT'S ABSENCE. A verdict finding one guilty of an attempt to produce an abortion may be received in the absence of defendant.[107]

ABORTIVE TRIAL. A term descriptive of a trial where the case has gone off and no verdict has been pronounced without the fault, contrivance, or management of the parties, but not where there has been a verdict, though that has been set aside.[1]

ABORTUS. The fruit of an abortion; a child born before the proper time.[2]

ABOUT. The word "about" is a relative term which may indicate one thing when applied to one state of facts, and another under different circumstances.[3] It is an ordinary word, however, of no artificial meaning or technical signification, and should receive the rendering which is given to it in common parlance.[4] It commonly denotes nearness or proximity in degree,[5] quality,[6] quantity,[7] performance,[8] place,[9] or time;[10] making preparation to do a thing, or being actually engaged in doing something;[11] round.[12] The use of the word "about" gives a

104. Armstrong *v.* People, 37 Ill. 459, holding that such a verdict will be presumed to refer to the offense alleged in the indictment. See *supra*, VIII, A, 4.

Hence, where one count of an indictment charged the destruction of the fœtus by means of an instrument, and another count charged its destruction by the use of a drug, a verdict finding the defendant guilty is not bad for repugnancy. Tabler *v.* State, 34 Ohio St. 127.

105. Thus a verdict finding defendant guilty of having used and employed certain instruments upon the person of a pregnant woman, with intent thereby to procure the miscarriage of such woman, which does not specify the name of the woman or that she is the woman named in the indictment, is insufficient to support a conviction under an indictment charging the defendant with using instruments on the person of a certain designated woman with intent to produce her miscarriage. Cobel *v.* People, 5 Park. Crim. (N. Y.) 348.

106. State *v.* Owens, 22 Minn. 238, wherein it is held that it is not necessary that the jury should be able to determine the ingredients, kinds, quality, or quantity of whatever thing is prescribed, procured, or provided with intent to produce an abortion, and that the statement in the verdict that the ingredients, kinds, quality, and quantity of the thing which defendant procured the woman to take with the guilty intent are unknown to the jury, did not affect their finding that he did procure her to take something with intent then and there thereby to cause premature labor.

107. Holliday *v.* People, 9 Ill. 111, assigning as a reason for this rule that the offense is a misdemeanor, and in misdemeanor cases defendant's presence is not essential.

1. Croker *v.* Orpen, Jebb & B. 43, 51.

2. Century Dict.

A synonymous term is "abortion," which is applied alike to the crime and to the fruit thereof. Abbott L. Dict.

3. Per Waite, C. J., in Von Lingen *v.* Davidson, 4 Fed. 346, 350, 1 Fed. 178.

It has a more uncertain meaning than the words "almost," "nearly," "well-nigh." Von Lingen *v.* Davidson, 1 Fed. 178, 186.

4. Myers *v.* Farrell, 47 Miss. 281, 283.

5. Hockspringer *v.* Ballenburg, 16 Ohio 304, 312.

6. Hockspringer *v.* Ballenburg, 16 Ohio 304, 312.

7. Indianapolis Cabinet Co. *v.* Herrman, 7 Ind. App. 462, 467, 34 N. E. 579.

8. Myers *v.* Farrell, 47 Miss. 281, 283; Jackson *v.* Burke, 4 Heisk. (Tenn.) 610, 614 [*citing* Webster Dict.].

9. State *v.* McManus, 89 N. C. 555, 558, holding that a weapon concealed "about" the person is "concealed near, in close proximity to him, and within his convenient control and easy reach."

Moving with the person.—Warren *v.* State, 94 Ala. 79, 10 So. 838, holding that where a weapon was concealed in a small handbag hung over the shoulder, "manifestly the weapon was being carried 'about' the person, in the sense of moving with the person."

10. Hockspringer *v.* Ballenburg, 16 Ohio 304, 312; Alabama G. S. R. Co. *v.* Arnold, 84 Ala. 159, 168, 4 So. 359, 5 Am. St. Rep. 354, where in each count of the complaint it was averred that "plaintiff attempted to descend the steps when the train was about arriving," and it was held that "'about,' in the connection here used, means 'nearly,'—'not far from,'—that is, near—not far from the arrival of the train."

11. Myers *v.* Farrell, 47 Miss. 281, 283; Hockspringer *v.* Ballenburg, 16 Ohio 304, 312.

"About" equivalent to "will."—An affidavit in attachment proceedings that a debtor "will" convert, etc., has been held equivalant to "about" to convert, etc. Frere *v.* Perret, 25 La. Ann. 500.

12. Rex *v.* Culkin, 5 C. & P. 121, holding, of an allegation in an indictment for homicide, that "about the breast might mean only near the breast, but about the neck means round it."

margin for a moderate excess in, or diminution of, the quantity mentioned[13] and negatives the idea that exact precision is intended.[14] It imports that the actual quantity is a near approximation to that mentioned,[15] and, when the context limits and restrains its meaning, does not materially impair the certainty of a description.[16] (For Construction of the Word "About:" In Contracts, see CONTRACTS; SALES; SHIPPING; VENDOR AND PURCHASER. In Deeds, see DEEDS. In Entry of Lands, see PUBLIC LANDS. In Statutes Relating to — Attachment, see ATTACHMENT; Carrying Weapons, see WEAPONS; Sales of Liquor to Be Drunk About Premises, see INTOXICATING LIQUORS.)

ABOUTIR. To ABUT,[17] *q. v.*

ABOUTISSEMENT. An abutment or ABUTTAL,[18] *q. v.*

ABOVE. Higher, superior;[19] excess.[20]

ABOVE-CITED or **ABOVE-MENTIONED.** Quoted above.[21]

ABRADERE. To scrape off; to erase.[22]

ABRASIO. A scraping off; an erasure.[23]

ABRIDGE. To epitomize; to reduce; to contract.[24]

ABRIDGMENT. An epitome of another and larger work.[25] To constitute a true abridgment the whole of the original work must be preserved in sense;[26] yet it is original in its nature,[27] and intellectual labor and judgment must be bestowed thereon,[28] so that it may with propriety be called a new book.[29] An abridgment is

13. Reuter *v.* Sala, 4 C. P. D. 239, 244.

14. Cutts *v.* King, 5 Me. 482, 486; Purinton *v.* Sedgley, 4 Me. 283, 286.

"Say about."—In McConnel *v.* Murphy, L. R. 5 P. C. 203, 217, the court said: "There is not merely the word 'about,' which in itself creates some uncertainty, but 'say about.' These two words used together seem to be employed for the purpose of showing that nothing absolute or definite in the way of allegation of quantity was intended on the part of the vendor."

15. Baltimore Permanent Bldg. Soc. *v.* Smith, 54 Md. 187, 39 Am. Rep. 374; Sample *v.* Pickard, 74 Mich. 416, 421, 42 N. W. 54; Stevens *v.* McKnight, 40 Ohio St. 341.

16. Adams *v.* Harrington, 114 Ind. 66, 72, 14 N. E. 603; Corey *v.* Swagger, 74 Ind. 211, 213; Jones *v.* Plummer, 2 Litt. (Ky.) 161; Purinton *v.* Sedgley, 4 Me. 283, 286.

17. Burrill L. Dict.

18. Burrill L. Dict.

19. Burrill L. Dict.

20. Williams *v.* McDonald, 42 N. J. Eq. 392, 395, 7 Atl. 866, construing the expression "above all encumbrances."

21. Wharton L. Lex.

A figurative expression taken from the ancient manner of writing books on scrolls, where whatever is mentioned or cited before in the same roll must be above. Encycl. Lond.

22. Burrill L. Dict.

23. Adams Gloss.

24. Story *v.* Holcombe, 4 McLean (U. S.) 306, 310, 23 Fed. Cas. No. 13,497.

25. Bouvier L. Dict.

"Abridgment" and "digest" are used as synonyms. D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, 301. And the term "digest" has now supplanted that of "abridgment." Black L. Dict. [*citing* Sweet Dict.].

Distinction between "abridgment" and "compilation."— In Story *v.* Holcombe, 4 McLean (U. S.) 306, 314, 23 Fed. Cas. No. 13,497, the court said: "Between a 'compilation' and an 'abridgment' there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former can not be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former can not adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged."

26. Story *v.* Holcombe, 4 McLean (U. S.) 306, 314, 23 Fed. Cas. No. 13,497; Newbery's Case, Lofft 775.

27. D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, 301.

28. Lawrence *v.* Dana, 4 Cliff. (U. S.) 1, 79, 2 Am. L. T. Rep. N. S. 402, 15 Fed. Cas. No. 8,136; Folsom *v.* Marsh, 2 Story (U. S.) 100, 107, 9 Fed. Cas. No. 4,901.

Facile use of scissors not sufficient.— In Folsom *v.* Marsh, 2 Story (U. S.) 100, 107, 9 Fed. Cas. No. 4,901, Story, J., said: "What constitutes a fair and *bona fide* abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work."

29. Newbery's Case, Lofft 775; Gyles *v.* Wilcox, 2 Atk. 141, 143, "because not only the paper and print, but the invention, learning, and judgment of the author is shown in them."

a meritorious work in that it renders the original less expensive and more convenient,[30] but abridgments are not to be considered as absolute authorities.[31] (See also COPYRIGHT; LITERARY PROPERTY.)

ABROACHMENT. See ABBROCHMENT.

ABROAD. In English chancery law, BEYOND THE SEAS,[32] *q. v.*

ABROGATE. To annul by an authoritative act; to repeal.[33]

ABROGATION. The act of abrogating; the annulment or repeal of a law by authority of the legislative power.[34]

ABSCOND. To go in a clandestine manner out of the jurisdiction of the courts;[35] to absent one's self clandestinely;[36] or to lie concealed in order to avoid the process of the courts.[37] The word is not synonymous with "remove,"[38] for one may be about to remove from the state publicly and not in a clandestine manner, as is meant by the word "abscond."[39]

ABSCONDING or ABSENT DEBTOR. One who lives without the state, or who has intentionally concealed himself from his creditors or withdrawn himself from the reach of their suits, with intent to frustrate their just demands.[40] (Absconding Debtor: Arrest of, see ARREST. Attaching Property of, see ATTACHMENT. Bankruptcy Proceedings against, see BANKRUPTCY. Insolvency Proceedings against, see INSOLVENCY. Suspension of Statute of Limitations against, see LIMITATIONS OF ACTIONS.)

ABSENCE. In common usage, a state of being away from, or at a distance from, not in company with.[41] Primarily the word imported prior presence,[42] and

30. Newbery's Case, Lofft 775.

Useful to practical men.— In D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, 301, where "abridgment" and "digest" are used synonymously, they are said to be "of great use to practical men, though not so, comparatively speaking, to students."

31. Far *v.* Denn, 1 Burr. 362, 364; Palmer's Case, 5 Coke 24*b*; Wyndham *v.* Chetwynd, 1 W. Bl. 95, 101; Stevens *v.* Tyrrell, 2 Wils. C. P. 1.

32. Anderson L. Dict.

33. Burrill L. Dict.

34. Burrill L. Dict.

35. Bouvier L. Dict. [*quoted* in Malvin *v.* Christoph, 54 Iowa 562, 7 N. W. 6; Norman *v.* Zieber, 3 Oreg. 197, 205].

36. Thompson *v.* Newton, 2 La. 411, 413; Stouffer *v.* Niple, 40 Md. 477, 482; Gandy *v.* Jolly, 34 Nebr. 536, 539, 52 N. W. 376; Bennett *v.* Avant, 2 Sneed (Tenn.) 152, 153.

But see Conard *v.* Conard, 17 N. J. L. 154, to the effect that a statute requiring that an affidavit for attachment should state that the debtor "absconds" from his creditors is not satisfied by stating that he "absents" himself from them.

37. Malvin *v.* Christoph, 54 Iowa 562, 7 N. W. 6; Gandy *v.* Jolly, 34 Nebr. 536, 539, 52 N. W. 376; Norman *v.* Zieber, 3 Oreg. 197, 205; Bennett *v.* Avant, 2 Sneed (Tenn.) 152, 153.

Equivalent to "conceal."— The term "abscond" has been considered as equivalent to the term "conceal." Thompson *v.* Newton, 2 La. 411, 413; Wallis *v.* Wallace, 6 How. (Miss.) 254, 256.

Departure from the state unnecessary.—A party may abscond, and subject himself to the operation of the attachment laws against absconding debtors, and still not depart from the limits of the state. Field *v.* Adreon, 7 Md. 209, 213.

The word "absconded," used in Kan. Gen. Stat. (1897), c. 95, § 15, relating to limitation of actions, refers to acts of the party within the state of Kansas. Myers *v.* Center, 47 Kan. 324, 27 Pac. 978; Hoggett *v.* Emerson, 8 Kan. 262.

38. *In re* Proctor, 27 Vt. 118, holding that a certificate that the subscribing authority is not of the opinion that a debtor is about to "abscond" is not sufficient to meet an affidavit that he is about to "remove."

39. Mandel *v.* Peet, 18 Ark. 236, 243; Boardman *v.* Bickford, 2 Aik. (Vt.) 345, 348; Dunlop *v.* Harris, 5 Call (Va.) 16, 47.

Equivalent to "remove privately."— An affidavit that one is "about to abscond himself and his property out of the state" is equivalent to the assertion that he is "about to remove himself and property out of the state privately." Ware *v.* Todd, 1 Ala. 199.

40. Fitch *v.* Waite, 5 Conn. 117, 121; Burrichter *v.* Cline, 3 Wash. 135, 28 Pac. 367.

One shut up from his creditors in his own house is an absconding debtor. Ives *v.* Curtiss, 2 Root (Conn.) 133.

One who has removed himself from his home to avoid process is an absent debtor. Hodges *v.* Deaderick, 1 Yerg. (Tenn.) 125, 135.

The term "absent debtor" applies equally to non-residents and residents. Cochran *v.* Fitch, 1 Sandf. Ch. (N. Y.) 142.

41. Paine *v.* Drew, 44 N. H. 306, 317.

Not necessarily outside of state.— "We find no reason to interpret 'absence' as meaning 'out of the state' only." James *v.* Townsend, 104 Mass. 367, 371.

Constructive absence.— One may be constructively absent though actually present, as where a judge, though on the bench, does not sit in the cause and is taken as absent in contemplation of law. Bingham *v.* Cabbot, 3 Dall. (U. S.) 19, 36, 1 L. ed. 491; Byrne *v.* Arnold, 24 N. Brunsw. 161, 164.

42. Paine *v.* Drew, 44 N. H. 306, 317.

still does so under certain circumstances,[43] although under others it has been held equivalent to "non-residence."[44] It has also been held the equivalent of non-appearance,[45] and also applied to all cases of default without service of process.[46] (Absence: Of Accused from Examination or Trial, see CRIMINAL LAW. Of Counsel as Ground for — Continuance, see CONTINUANCES, CRIMINAL LAW; New Trial, see CRIMINAL LAW, NEW TRIAL; Opening Default, see JUDGMENTS. Of Debtor as Ground for — Attachment, see ATTACHMENT; Bankruptcy Proceedings, see BANKRUPTCY; Insolvency Proceedings, see INSOLVENCY. Of Judge, see JUDGES. Of Juryman, see JURIES. Of Justice of Peace, see JUSTICES OF THE PEACE. Of Party as Ground for — Continuance, see CONTINUANCES; New Trial, see NEW TRIAL; Opening Default, see JUDGMENTS. Of Witness — Accounting for, see CRIMINAL LAW, TRIAL; As Ground for Continuance, see CONTINUANCES, CRIMINAL LAW; As Ground for New Trial, see CRIMINAL LAW, NEW TRIAL; Taking and Using Depositions in, see DEPOSITIONS; Using Former Testimony in, see EVIDENCE. Presumption of Death Arising from, see DEATH. Suspension of Statute of Limitations During, see LIMITATIONS OF ACTIONS. See also ABSENTEES.)

ABSENT. As a verb, to make absent;[47] as an adjective, not in a certain place at a given time.[48] In general the word imports a prior presence,[49] a cessation of,

43. Snoddy *v.* Cage, 5 Tex. 106, holding that the word "absence," in the statute of limitations, imports former residence.

44. State *v.* Superior Ct., 6 Wash. 352, 355, 33 Pac. 827, holding that the word "absence," as used in Wash. Laws (1887–8), p. 26, § 5, does not mean simply being away from a usual place of residence or not being within the county when an action is pending, but that it is equivalent to non-residence.

Contra, Croxall *v.* Hutchings, 12 N. J. L. 97, holding that in attachment it is not sufficient for plaintiff to swear "that the debtor absconds from his creditors and is not at this time within the state," etc., but that he must swear that the debtor is not resident in the state. "Absence and non-residence are not convertible terms. The latter is required."

45. Covart *v.* Haskins, 39 Kan. 571, 574, 18 Pac. 522, wherein the court said: "'Absence' is the opposite of 'appearance at a specified time.' We hold that 'absence,' as used in Kan. Comp. Laws (1879), c. 81, § 114, relating to judgments rendered in a justice's court against a defendant in his absence, means a failure of the parties to appear at the trial upon which a judgment is rendered."

Strine *v.* Kaufman, 12 Nebr. 423, 11 N. W. 867, where, in considering the meaning of "absence" in the code provision relating to setting aside a judgment in a justice's court rendered in the absence of defendant, it was held equivalent to non-appearance to the action. "In this we are supported by Worcester, who, in his unabridged dictionary, adopting the definition of Burrill, says: 'Absence,' in law, means 'non-appearance.'"

Phillips *v.* Phillips, L. R. 1 P. & D. 169, holding that absence means non-appearance in the suit, and not absence without knowledge or notice of the suit.

46. James *v.* Townsend, 104 Mass. 367, 371, discussing the use of the word in Mass. Gen. Stat. c. 146, § 21, concerning petitions for writs of review.

47. Century Dict.

To remove from United States.— In *In re* Davison, 4 Fed. 507, it was held that "absented himself," as used in U. S. Rev. Stat. (1878), § 1342, relating to courts-martial, means an absence from the jurisdiction of the military courts; that is, from the United States.

48. Century Dict.

49. Wheeler *v.* Wheeler, 35 Ill. App. 123 [*citing* Snoddy *v.* Cage, 5 Tex. 106; Buchanan *v.* Rucker, 9 East 192], holding that in statutes other than of limitations the word "absent" must be taken to apply only to persons who had been present.

Buchanan *v.* Rucker, 9 East 192, wherein Lord Ellenborough, C. J., said: "By persons 'absent from the island' must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction."

Distinction between verb and adjective.— In Paine *v.* Drew, 44 N. H. 306, 317, the court said: "The word 'absent,' when used as a verb, as in the sentence 'to absent himself,' implies prior presence . . . And the word 'absent,' when used as an adjective in common and ordinary use, simply means 'not present' and refers only to the condition or situation of the person or thing spoken of at the time of speaking, without any allusion or reference to any prior situation or condition of the same person or thing."

"Absent" distinguished from "non-resident."— In Curd *v.* Letcher, 3 J. J. Marsh. (Ky.) 443, 445, Underwood, J., distinguishing between an absent and non-resident defendant, said: "A man may be a citizen of Kentucky and yet a non-resident, and he may be a resident and yet an absent defendant."

But in Wash *v.* Heard, 27 Miss. 400, 406, it is said that the word "absent," in Hutchinson's Code, 756, § 20, includes non-residents.

and probability or possibility of returning presence.[50] One who is dead is not absent.[51]

ABSENT DEBTOR. See ABSCONDING DEBTOR.

ABSENTE. Being absent.[52]

50. Wheeler *v.* Wheeler, 35 Ill. App. 123; Wash *v.* Heard, 27 Miss. 400, 405, holding that "absent," in Hutchinson's Code, 764, § 5, relating to service by publication on absent defendants, does not embrace non-resident defendants, but has reference to parties resident in the state but temporarily absent.

51. Rockland *v.* Morrill, 71 Me. 455, 457; Redfern *v.* Rumney, 1 Cranch C. C. (U. S.) 300, 20 Fed. Cas. No. 11,627.

52. Burrill L. Dict.

Frequently used in old reports in such an expression as "All the three justices, *absente* North, Chief Justice, were clear of opinion that," etc. Williamson *v.* Hancock, 2 Mod. 14.

ABSENTEES

Edited by Archibald C. Boyd

CROSS-REFERENCES

For Other Matters Relating to Absentees, as:
Attachment against Property of, see ATTACHMENT.
Confiscation of Property of, During War, see WAR.
Representation of Absent Heirs, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.
Representation of Absent Parties, see EQUITY; PARTIES.
Service of Process on, see PROCESS.
For Temporary Administration of Estates of Absent Persons, see EXECUTORS AND ADMINISTRATORS.

I. DEFINITION.[1]

An absentee is a person who has resided in the state and has departed without leaving anyone to represent him.[2] An absentee has also been

1. **Scope of article.**—The law of absentees as here considered is confined almost exclusively to the state of Louisiana and is governed entirely by statutory provisions. Merrick's Rev. Civ. Code La. (1900), art. 47 *et seq.* The Texas statute, which was similar to that of Louisiana, is no longer in force. Thouvenin *v.* Rodrigues, 24 Tex. 468; Mills *v.* Alexander, 21 Tex. 154; Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309, 13 Tex. 524.

2. Bartlett *v.* Wheeler, 31 La. Ann. 540; Morris *v.* Bienvenu, 30 La. Ann. 878; Lasere *v.* Rochereau, 21 La. Ann. 205; Samory *v.* Montgomery, 19 La. Ann. 333; State *v.* Second Dist. Ct. Judge, 16 La. Ann. 390; Farrell *v.* Klumpp, 13 La. Ann. 311; Guillemin's Succession, 2 La. Ann. 634; State *v.* Parish Ct. Judge, 15 La. 81; Hill *v.* Bowman, 14 La. 445; Voorhies' Rev. Civ. Code La. (1875), art. 3556.

Departure after arrest.—One who, after having been arrested and given bond to remain, departs from the state, is an absentee. Loughery *v.* Crooks, 5 La. Ann. 484; McMicken *v.* Smith, 12 La. 155.

Departure after service of citation and before service of petition.—A person who departs from the state after service of citation and before service of petition upon him is an absentee. Zacharie *v.* Blandin, 4 La. 154.

Absence on public business, as being temporarily absent from the state in attendance on congress, has been held sufficient to constitute one an absentee. Ramsay *v.* Livingston, 6 Mart. N. S. (La.) 15.

Mere temporary absence from the state may not constitute one an absentee. Dreville *v.* Cucullu, 18 La. Ann. 695.

Proof of absence.—The return of the sheriff to the effect that a person had removed from

defined to be one who has never been domiciled in the state and who resides abroad.[3]

II. Statutes Construed.

A. In General. Statutory provisions empowering the courts to decide upon the rights of absentees, being in derogation of the general principles of jurisprudence, must be strictly construed and every formality complied with.[4]

B. Separate Provisions. The several statutory provisions relating to absentees must be construed together.[5]

III. Representatives of Absentees.

A. Curators — 1. Definition. A curator is a person appointed to administer the estate of an absentee.[6]

2. Appointment — a. When Authorized. A curator may be appointed to administer the estate of an absentee if the latter be possessed of either movable or immovable property within the state and has left no agent to take care of it, or when the agent who has been appointed dies or is unwilling or unable to continue the administration.[7]

b. Who May Be Appointed. A woman other than the wife of the absentee cannot be his curatrix.[8]

c. Preferences in Appointment. The wife of an absentee is to be preferred to his presumptive heirs, the presumptive heirs to the other relatives, the relatives to strangers, and creditors to those who are not otherwise interested.[9]

d. Demand by Petition. The person seeking to be appointed curator must make a demand by petition addressed to the judge of the jurisdiction in which the estate is situated.[10]

e. Curator's Oath. The curator must take oath to fulfill the duties of his administration.[11]

3. Powers, Duties, and Liabilities — a. Administration of Estate — (1) *In General.* The only power possessed by the curator is that of administering the estate.[12] He must do this in the way a prudent administrator would do, and is responsible for damages resulting from maladministration ;[13] and the absentee

his domicile at a certain street where previous notices had been served upon him, and that he could not be found after diligent search in the neighborhood and among his acquaintances, does not justify the assumption of absence where it is shown that the person is actually residing with a relative in another part of the city. Farrell *v.* Klumpp, 13 La. Ann. 311.

Effect of leaving representative.— In State *v.* Second Dist. Ct. Judge, 16 La. Ann. 390, it was held that one who left at his dwelling a person of suitable age and discretion, upon whom service could be made, or one who left a duly authorized agent to represent him, could not be considered an absentee.

Death of the agent appointed to represent one who has departed from the state constitutes the latter an absentee, where no other agent has been appointed. Dixey *v.* Irwin, 23 La. Ann. 426.

3. Penn *v.* Evans, 28 La. Ann. 576; Guillemin's Succession, 2 La. Ann. 634; Dreville *v.* Cucullu, 18 La. Ann. 695; State *v.* Parish Ct. Judge, 15 La. 81; Hill *v.* Bowman, 14 La. 445; George *v.* Fitzgerald, 12 La. 604; Zacharie *v.* Blandin, 4 La. 154; Voorhies' Rev. Civ. Code La. (1875), art. 3556.

Temporary residence.— In Morris *v.* Bienvenu, 30 La. Ann. 878, it was held that a resident of another state, who had a temporary domicile in Louisiana, which he occupied a portion of the time, was nevertheless an absentee.

4. Farrell *v.* Klumpp, 13 La. Ann. 311; Hill *v.* Barlow, 6 Rob. (La.) 142.

5. Dupuy *v.* Hunt, 2 La. Ann. 562; Dreville *v.* Cucullu, 18 La. Ann. 695.

6. Voorhies' Rev. Civ. Code La. (1875), art. 47.

7. Wilson *v.* Smith, 14 La. Ann. 368; Merrick's Rev. Civ. Code La. (1900), art. 963; Voorhies' Code Pr. La. (1882), art. 963.

8. Carraby *v.* Carraby, 7 Mart. N. S. (La.) 466.

9. Rust *v.* Randolph, 4 Mart. (La.) 370; Merrick's Rev. Civ. Code La. (1900), art. 48.

10. Merrick's Rev. Civ. Code La. (1900), art. 1114; Voorhies' Code Pr. La. (1982), art. 966.

11. Merrick's Rev. Civ. Code La. (1900), art. 49.

12. Merrick's Rev. Civ. Code La. (1900), art. 50.

13. Merrick's Rev. Civ. Code La. (1900), arts. 50, 337.

has a mortgage on the curator's property as security for a proper administration of the estate.[14]

(II) *Alienation of Estate.* The curator cannot alienate or mortgage the estate.[15]

b. Recovery of Legacies. The curator may accept or recover any legacy or inheritance to which the absentee may be entitled; but before receiving any portion thereof he must give security therefor.[16]

c. Inventory, Appraisement, and Bond. The curator must cause to be made a faithful inventory and appraisement of the estate and give good and sufficient security to the amount of the inventory.[17]

d. Accounts. The curator must file annual accounts, and also one at the termination of his curatorship.[18]

e. Substitution of Other Person. The curator cannot, after having refused the appointment, substitute someone else in his place.[19]

f. Appearance in Suits. In suits against the absentee upon the appointment of a curator *ad hoc*, the curator must cause himself to be substituted for the curator *ad hoc*.[20]

g. Advances. The curator has a mortgage upon the estate of the absentee for advances made.[21]

4. Termination of Curatorship. The curatorship is terminated when the absentee appoints an attorney in fact for the administration of his estate,[22] or when, after a certain time without hearing of the absentee, his heirs cause themselves to be put into possession of his estate.[23] The curator may be removed by the court which appointed him, for cause shown.[24]

5. Compensation. The curator is entitled to a commission of ten per cent. on the annual revenues of the property intrusted to his charge.[25]

B. Curators Ad Hoc — 1. Definition. A curator *ad hoc* is a person appointed to represent an absentee in a suit instituted against him.[26]

2. Appointment — a. When Authorized — (I) *In General.* If a suit be instituted against an absentee who has no known agent in the state, or in the administration of whose property no curator has been appointed, a curator *ad hoc* may be appointed to represent him in such suit.[27] The suit must be one

14. Brownson *v.* Baker, 11 La. 409; Merrick's Rev. Civ. Code La. (1900), art. 3314.

Unauthorized interference.— Any person who without authority intermeddles in the administration of an absentee's estate is liable therefor, and the law gives a mortgage on the intermeddler's estate in favor of the absentee. Ward *v.* Brandt, 11 Mart. (La.) 331, 13 Am. Dec. 352.

15. Merrick's Rev. Civ. Code La. (1900), art. 50.

16. Dolhonde *v.* Lemoine, 32 La. Ann. 251.

17. Merrick's Rev. Civ. Code La. (1900), art. 49.

18. Merrick's Rev. Civ. Code La. (1900), arts. 54, 59.

19. Cestia *v.* Ferrandon, 18 La. Ann. 730.

20. Taylor *v.* Graham, 18 La. Ann. 656, 89 Am. Dec. 699.

21. Merrick's Rev. Civ. Code La. (1900), art. 3314.

22. Merrick's Rev. Civ. Code La. (1900), art. 52.

23. Merrick's Rev. Civ. Code La. (1900), art. 52.

24. Merrick's Rev. Civ. Code La. (1900), art. 1158; Voorhies' Code Pr. La. (1882), art. 1013.

25. Merrick's Rev. Civ. Code La. (1900), arts. 56, 349.

26. Merrick's Rev. Civ. Code La. (1900), art. 56; Black L. Dict.

Attorney ad litem is a name sometimes applied to a curator *ad hoc;* the two terms are synonymous. Bienvenu *v.* Factors', etc., Ins. Co., 33 La. Ann. 209; Dixey *v.* Irwin, 23 La. Ann. 426; Hall *v.* Laurence, 21 La. Ann. 692; Hooke *v.* Hooke, 6 La. 472.

27. Merrick's Rev. Civ. Code La. (1900), arts. 116, 962, 963.

Prior to the adoption of the codes the appointment of a curator *ad hoc* was unauthorized. State *v.* Parish Ct. Judge, 15 La. 81.

Construction of word "suit."— Under the old code a curator *ad hoc* could not be appointed to represent an absentee in a suit instituted directly against such absentee, but only in cases where a suit which involved the interests of the absentee was pending. Astor *v.* Winter, 8 Mart. (La.) 171; Holliday *v.* McCulloch, 3 Mart. N. S. (La.) 176. The new code, however, provides for the appointment of a curator *ad hoc* "if a suit be against an absentee;" hence the decisions in the cases above cited are obsolete. Ramsay *v.* Livingston, 6 Mart. N. S. (La.) 15.

Existence of special attorney.— In Taylor *v.* Graham, 18 La. Ann. 656, 89 Am. Dec. 699, it was held that the appointment of a curator *ad hoc* was authorized although a special

which may be lawfully instituted, and which is pending before the judge who makes the appointment.[28] The appointment should be made with caution, in the cases clearly designated by statute, and then only in the manner prescribed by statute.[29] It is essential, moreover, to the validity of the appointment, that the absentee is the owner of property in the state or at least within the jurisdiction of the court.[30]

(II) *In Personal Actions.* The institution of a purely personal action against an absentee will not authorize the appointment;[31] and the only effect of such an appointment would be to give notice as far as possible to the absentee of the pendency of the suit.[32]

(III) *In Proceedings Relating to Specific Property.* When the proceeding or suit relates to specific property within the jurisdiction of the court, — such as petitory actions to establish title to land;[33] applications for orders of seizure and sale of property of absent mortgagors;[34] applications for the dissolution of a sale of immovable property coupled with a demand for possession;[35] suits to annul a donation of land;[36] to annul judgments relating to land;[37] to enforce paving claims against particular property;[38] to cancel contracts for the sale of land;[39] to compel partition of property in which absent minors have an interest;[40] to have specific performance of agreements to exchange land;[41] to define the status of realty and determine the validity of liens thereon;[42] to determine title to and partition of realty;[43] to enforce a mortgage and vendor's privi-

attorney to represent the absentee had been appointed, it not being shown that such attorney had power to represent the absentee in the suit.

Sufficiency of representation.— The substitution, by an attorney in fact who has refused to act, of another person in his place, is without effect, and, the absentee being unrepresented, a curator *ad hoc* may be appointed in a suit against the absentee. Cestia *v.* Farrandon, 18 La. Ann. 730.

28. Dupuy *v.* Hunt, 2 La. Ann. 562, in which it is also held that no power is conferred to bring the absentee into court on the simple demand of a creditor.

29. Holbrook *v.* Bronson, 25 La. Ann. 51; Gates *v.* Gaither, 46 La. Ann. 286, 15 So. 50, in which case the appointment was void.

30. Field *v.* New Orleans Delta Newspaper Co., 19 La. Ann. 36; Hedrick *v.* Banister, 10 La. Ann. 208; Stephens *v.* Graves, 9 La. Ann. 239; Prindle *v.* Williams, 9 La. Ann. 34; Peterson *v.* McRae, 3 La. Ann. 101; Dupuy *v.* Hunt, 2 La. Ann. 562.

In Laughlin *v.* Louisiana, etc., Ice Co., 35 La. Ann. 1184, and Bracey *v.* Calderwood, 36 La. Ann. 796, it was held — *following* Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565 — that except in actions affecting personal status, or in those partaking of the nature of proceedings *in rem*, the appointment of a curator *ad hoc* was unauthorized unless property in the state belonging to the absentee was brought under the control of the court by process adapted to that purpose; in effect reversing the former decisions of the supreme court (George *v.* Fitzgerald, 12 La. 604; State *v.* Parish Ct. Judge, 15 La. 81; Jelks *v.* Smith, 5 La. Ann. 674; Ackley *v.* Lyons, 6 La. Ann. 648) which had held that the appointment was authorized in suits against absentees, even though they had no property within the state.

In Augusta Ins., etc., Co. *v.* Morton, 3 La. Ann. 417, which was a suit against a husband and wife, who were absentees, on notes secured by mortgages on realty belonging to the separate estate of the wife, it was held that a curator *ad hoc* to represent the husband could not be appointed, no property of his being under control of the court.

But see McDonald *v.* Vaughan, 13 La. Ann. 405 [*distinguishing* Dupuy *v.* Hunt, 2 La. Ann. 562], wherein it was held that a curator *ad hoc* could be appointed to represent an absentee, his property having been subjected to the jurisdiction of the court by sequestration.

31. Bracey *v.* Calderwood, 36 La. Ann. 796; Laughlin *v.* Louisiana, etc., Ice Co., 35 La. Ann. 1184; Pagett *v.* Curtis, 15 La. Ann. 451; Walker *v.* Sanchez, 13 La. Ann. 505; Tudor *v.* Thayer, 6 La. Ann. 27; Reynolds *v.* Horn, 4 La. Ann. 187; Flowers *v.* Foreman, 23 How. (U. S.) 132, 16 L. ed. 405.

32. Pagett *v.* Curtis, 15 La. Ann. 451; Smith *v.* McWaters, 7 La. Ann. 145.

33. Beaumont *v.* Covington, 6 Rob. (La.) 189.

34. State *v.* Second Dist. Ct. Judge, 16 La. Ann. 390; Thayer *v.* Tudor, 2 La. Ann. 1010; Millaudon *v.* Beazley, 2 La. Ann. 916.

35. McKenzie *v.* Bacon, 38 La. Ann. 764.

36. Wunstel *v.* Landry, 39 La. Ann. 312.

37. Ferguson *v.* Thomas, 6 La. Ann. 218.

38. O'Hara *v.* Booth, 29 La. Ann. 817.

39. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108.

40. Crawford *v.* Binion, 46 La. Ann. 1261, 15 So. 693.

41. Mason *v.* Benedict, 43 La. Ann. 397, 8 So. 930.

42. Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555.

43. Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941; Morris *v.* Bienvenu, 30 La. Ann. 878.

lege;[44] to enforce a pledge on certain stock;[45] to enforce the transfer of an interest in a judgment;[46] to quiet title;[47] to recover the value of improvements;[48] to remove an apparent encumbrance;[49] to rescind a sale;[50] to set aside a sale of property by an insolvent;[51] to subject to seizure property in which the absentee has an interest,[52]—the appointment of a curator *ad hoc* is authorized.

b. Time of Appointment. The suit must have been commenced before the appointment can be made;[53] but it is not necessary that service of citation be had prior to the appointment.[54]

c. Proceedings for Appointment—(I) *Showing Cause.* The person asking for the appointment must show absence or other sufficient cause;[55] but need not make oath of the fact of such absence or produce authentic proof thereof.[56] Nor is it necessary that he should presume that the general agent of the absentee has power to represent the absentee in the suit.[57]

(II) *Affidavit.* The affidavit may be made by the agent of the party seeking appointment.[58]

(III) *Petition.* The petition or motion for appointment should generally allege the existence in the state of property belonging to the absentee and subject to the jurisdiction of the court;[59] but where the property has already been subjected to the jurisdiction of the court by proper proceedings the averment of absence and non-residence is sufficient.[60]

(IV) *Order.* The disqualification of the judge after the appointment for a cause existing at the time of the appointment does not render the order of appointment invalid.[61] Nor is the order signed by a person other than the judge of itself invalid.[62]

d. Oath. A curator *ad hoc* need not be sworn.[63]

e. Notification. Service of citation and petition amounts to a notification of appointment.[64]

f. Acceptance. It must appear that the appointment has been accepted.[65]

g. Effect as a Citation. The appointment of a curator *ad hoc* supplies the place of a citation to the absentee.[66]

3. Powers, Duties, and Liabilities—a. Powers Generally. The powers of a curator *ad hoc* are confined to the performance of such acts as tend to the defense of the rights and interests of the absentee.[67] He cannot, by any informality in his

44. Bartlett *v.* Wheeler, 31 La. Ann. 540.
45. Dwight *v.* Bellocq, 18 La. Ann. 209.
46. Young *v.* Upshur, 42 La. Ann. 362, 7 So. 557, 21 Am. St. Rep. 381.
47. Bartels *v.* Souchon, 48 La. Ann. 783, 19 So. 941.
48. Seymour *v.* Cooley, 9 La. 72.
49. Pasley *v.* McConnell, 38 La. Ann. 470.
50. Derepas *v.* Shallus, 15 La. 371.
51. Brown *v.* Ferguson, 4 La. 257.
52. Adler *v.* Wolff, 36 La. Ann. 169.
53. Seymour *v.* Cooley, 9 La. 78.

Appointment pendente lite will raise the presumption that a vacancy existed by death or otherwise. Beaumont *v.* Covington, 6 Rob. (La.) 189.

54. Gillis *v.* Cuny, 21 La. Ann. 462.
55. Farrell *v.* Klumpp, 13 La. Ann. 311.
56. Frost *v.* McLeod, 19 La. Ann. 80.
57. Taylor *v.* Graham, 18 La. Ann. 656, 89 Am. Dec. 699.
58. Seymour *v.* Cooley, 9 La. 72.
59. In Rogay *v.* Juilliard, 25 La. Ann. 305 [*distinguishing* Field *v.* New Orleans Delta Newspaper Co., 19 La. Ann. 36], it was held that a simple averment of absence, and non-residence without alleging the existence of property within the state was insufficient.
60. Hall *v.* Laurence, 21 La. Ann. 692.
61. Fellows *v.* Reid, 6 La. Ann. 724.
62. Cavaroc *v.* Fournet, 28 La. Ann. 587, stating, as a reason for this rule, the fact that a new order may subsequently be made by the proper person.
63. Woolverton *v.* Stevenson, 52 La. Ann. 1147, 27 So. 674; Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941; Thayer *v.* Tudor, 2 La. Ann. 1010.
64. Carpenter *v.* Beatty, 12 Rob. (La.) 540; Hill *v.* Barlow, 6 Rob. (La.) 142, also holding that until service of citation the curator has no capacity to act.
65. Tucker *v.* Agricultural Bank, 2 La. Ann. 446.
66. Brown *v.* Ferguson, 4 La. 257.
67. Carpenter *v.* Beatty, 12 Rob. (La.) 540; Hill *v.* Barlow, 6 Rob. (La.) 142.

Contract by curator ad hoc.—In an action to rescind a contract for a sale of land on the ground of non-payment of purchase-price, the curator *ad hoc* of the vendee entered into an agreement with the attorney of the vendor, by which agreement the vendor waived all claim for rents and revenues which had or might have accrued during the occupancy of the vendee, and the vendor waived all

pleadings, invest the court with the jurisdiction which the subject-matter of the suit does not give;[68] nor can he waive any of the legal rights of his absentee.[69]

b. Particular Powers and Duties. While a curator has no power to waive service of citation;[70] to abandon a plea taken by him;[71] to dispense with the production of legal evidence or with any of the forms required by law in the taking thereof;[72] to submit a case to the decision of the court in vacation;[73] or to enter a joint denial or demand a joint trial,[74] — he has power to acknowledge in writing service of citation on him, and by such action bind the absentee;[75] to enter a demurrer;[76] to appoint an attorney;[77] and to sign an appeal bond[78] for the absentee.

c. Performance of Duty Presumed. It must be presumed that the curator *ad hoc* performed his duty, nothing to the contrary appearing.[79]

d. Neglect of Duty. A curator *ad hoc* is responsible to his absentee for neglect of duty.[80]

4. Termination of Curatorship. The curatorship does not terminate[81] until the cause has been passed upon by the court of last resort, except when terminated by death of the curator *ad hoc*,[82] or by his discharge by the court upon sufficient cause shown.[83] Having accepted the appointment the curator *ad hoc* cannot resign the trust so as to defeat the action.[84]

5. Compensation — a. When Allowed. Compensation to the curator *ad hoc* may be allowed in the discretion of the court,[85] but only for defending the interests of his absentee.[86]

b. Amount of Allowance. But one fee will be allowed for representing several absentees unless application is made for an increase in proportion to the services rendered.[87]

c. Against Whom Taxed. No fee can be taxed against a plaintiff who has succeeded in the suit.[88]

d. Order or Judgment Allowing. An *ex parte* summary order for a fee against the absentee is invalid;[89] and the judgment entered without the consent of the curator allowing him a fee, and which he never ratifies, is not binding on him.[90]

right to any claim for the repayment of any part of the purchase-price already paid. It was held that the curator had no authority to enter into such a contract. George *v.* Knox, 23 La. Ann. 354.

68. Bush *v.* Visant, 40 Ark. 124; Walker *v.* Sanchez, 13 La. Ann. 505.

69. Carpenter *v.* Beatty, 12 Rob. (La.) 540; Hyde *v.* Craddick, 10 Rob. (La.) 387; Hill *v.* Barlow, 6 Rob. (La.) 142; Collins *v.* Pease, 17 La. 116.

70. Ticknor *v.* Calhoun, 28 La. Ann. 258; Hill *v.* Barlow, 6 Rob. (La.) 142.

71. Bienvenu *v.* Factors', etc., Ins. Co., 33 La. Ann. 209.

72. Edmonson *v.* Mississippi, etc., R. Co., 13 La. 282.

73. Clacor *v.* Lane, 5 La. Ann. 499.

74. Bush *v.* Visant, 40 Ark. 124.

75. Bartlett *v.* Wheeler, 31 La. Ann. 540; Millaudon *v.* Beazley, 2 La. Ann. 916.

76. Henry *v.* Blackburn, 32 Ark. 445, held, however, that such an act does not amount to entering an appearance for the absentee.

77. Cooley *v.* Beauvais, 9 La. 85.

78. Bach *v.* Ballard, 13 La. Ann. 487, also holding it to be the duty of the curator *ad hoc* to appeal on behalf of his absentee whenever in his opinion it is best to do so.

79. Story *v.* Jones, 14 La. Ann. 73; Cooley *v.* Seymour, 9 La. 274; Beaumont *v.* Covington, 6 Rob. (La.) 189.

80. Cooley *v.* Seymour, 9 La. 274.

But see Cobb *v.* Richardson, 30 La. Ann. 1228, where, upon the dissolution of an injunction issued at the instance of the curator *ad hoc*, damages were not allowed to be assessed against either the absentee or the curator *ad hoc*, it appearing that the latter, acting without the scope of his authority, had done so conscientiously.

81. Bach *v.* Ballard, 13 La. Ann. 487.

82. Greig *v.* Muggah, 11 La. 357, in which case it was held that no subsequent proceedings could be had in the case until after the appointment of another curator *ad hoc*.

83. Thayer *v.* Tudor, 2 La. Ann. 1010.

84. Thayer *v.* Tudor, 2 La. Ann. 1010.

85. Hiriart *v.* Morgan, 5 La. 43.

86. Whitney *v.* O'Bearne, 11 La. 266, denying an allowance where plaintiff suffered a nonsuit.

87. Taylor *v.* Simpson, 12 La. Ann. 587.

88. Hewet *v.* Wilson, 7 La. 71; Pontalba *v.* Pontalba, 2 La. 466. Otherwise, however, where defendant succeeds, as was held in Bowie *v.* Davis, 33 La. Ann. 345, wherein the curator *ad hoc*, after filing an answer asking that his fee be taxed as costs against plaintiff, proved the value of his services and judgment was entered for defendant against plaintiff for the fee.

89. Cooley *v.* Beauvais, 9 La. 85.

90. Gilbert *v.* Neal, 2 La. Ann. 904.

IV. PROPERTY AND CONVEYANCES.

A. Provisional Possession by Heirs. Where an absentee does not appear at the place of his residence for five years and has not been heard of, his presumptive heirs may be put in possession of his estate and may enjoy a portion of the revenues on condition of their giving security for their administration.[91]

B. Mortgages. The same formalities must be observed with respect to mortgages on property of the absentee as are prescribed for mortgages on property of residents.[92] But a mortgage in favor of an absentee is valid, though not accepted by him.[93]

V. ACTIONS.

A. How Prosecuted. All suits in which an absentee is interested must be prosecuted by or against his curator.[94]

B. Conditions Precedent — 1. APPOINTMENT OF CURATOR AD HOC. Before suit can be commenced against an absentee, an application must be made for the appointment of a curator *ad hoc* if no other representative exists.[95]

2. DEMAND. A demand is not necessary in a suit against an absent mortgagor.[96]

C. Jurisdiction. A probate court has no jurisdiction of a suit against an absentee represented by a curator *ad hoc*.[97]

D. Service of Citation and Petition — 1. NECESSITY FOR. Service should be made on the curator or curator *ad hoc*, and is binding on the absentee.[98] If, however, the absentee has an attorney in fact, service should be made upon him.[99]

2. MANNER OF SERVICE. Service may be made by delivery in person or by leaving a copy at the curator's domicile.[100] It is immaterial that the citation is addressed to the absentee if it is served upon the curator *ad hoc*.[101] When addressed to the curator *ad hoc* it should be in his official capacity, and it should be so stated in the citation.[102] It is not necessary to post the citation on the door of the court-house.[103]

E. Waiver of Defects in Citation. A curator *ad hoc* does not waive defects in a citation by filing an answer.[104]

F. Reconventional Demand. A demand in reconvention may be instituted against an absentee.[105]

G. Communication with Absentee. Sufficient time should be allowed the curator *ad hoc* in which to communicate with his absentee.[106]

H. Pleading. A petition in an action against an absentee which enables the curator *ad hoc* to answer, and which authorizes judgment against the absentee if

91. Westover *v.* Aime, 11 Mart. (La.) 443; Merrick's Rev. Civ. Code La. (1900), art. 57.

92. Levasseur *v.* Martin, 11 La. Ann. 684; Merrick's Rev. Civ. Code La. (1900), art. 3302.

93. Millaudon *v.* Allard, 2 La. 547; Lamkin *v.* Maxwell, Mann. Unrep. Cas. (La.) 322; Hill *v.* Barlow, 6 Rob. (La.) 142.

But in McLean *v.* Pargoud, Mann. Unrep. Cas. (La.) 264, it was held that a mortgage given by a person owning property jointly with an absentee was not binding on the absentee.

94. Merrick's Rev. Civ. Code La. (1900), art. 51; Voorhies' Code Pr. La. (1882), art. 108.

95. Moore *v.* Nicholls, 5 La. 488.

96. Millaudon *v.* Beazley, 2 La. Ann. 916.

97. Soulie *v.* Soulie, 5 La. 26.

98. O'Hara *v.* Booth, 29 La. Ann. 817; Hall *v.* Laurence, 21 La. Ann. 692; Byrne *v.* Marshall, Mann. Unrep. Cas. (La.) 196; Derepas *v.* Shalus, 15 La. 371; Seymour *v.* Cooley, 9 La. 78; Copley *v.* Berry, 12 Rob. (La.) 79.

99. Voorhies' Code Pr. La. (1882), art. 196.

100. Morris *v.* Bienvenu, 30 La. Ann. 878.

101. Cooper *v.* Polk, 2 La. Ann. 158; Byrne *v.* Marshall, Mann. Unrep. Cas. (La.) 196.

102. Galoche *v.* Grivot, 18 La. Ann. 481.

In McDonald *v.* Vaughan, 13 La. Ann. 405, it was held that a citation addressed to the representative of an absentee under the name of an advocate, when he should have been styled curator *ad hoc*, was bad.

103. Morris *v.* Bienvenu, 30 La. Ann. 878.

104. Galoche *v.* Grivot, 18 La. Ann. 481.

105. Woolfolk *v.* Ship Graham's Polly, 18 La. Ann. 693.

106. Weil *v.* Hillbron, Mann. Unrep. Cas. (La.) 218; Thomas *v.* Mahone, 9 Bush (Ky.) 111, holding, however, that the fact that an absentee's attorney was unable to communicate with him will not render the judgment void; Brown *v.* Early, 2 Duv. (Ky.) 372.

the facts alleged therein are found to be true, cannot be objected to as being too special.[107]

I. Issues Joined. Issue must be joined, or judgment by default regularly taken, before the cause can be tried.[108]

J. Evidence. In a suit on a written instrument against an absentee represented only by a curator *ad hoc*, the signature of the absentee thereto must be proved with the same strictness as though it had been specially denied in person.[109]

K. Judgment against Absentee — 1. VALIDITY AND EFFECT. The judgment must show on its face an intent to bind the absentee,[110] and must be restricted to the property of the absentee subject to the jurisdiction of the court.[111]

2. BY DEFAULT. Where the curator *ad hoc*, after exceptions overruled, fails to file an answer, a judgment by default is proper.[112]

L. Appeal. An appeal by an attorney appointed to represent an absentee, which alleges that an error in the judgment is to the prejudice of the absentee, is the appeal of the absentee, not of the attorney.[113]

ABSENTIA. ABSENCE,[1] *q. v.*

ABSOILE or **ASSOILE.** To ABSOLVE,[2] *q. v.*

ABSOLUTA. ABSOLUTE,[3] *q. v.*

ABSOLUTA SENTENTIA EXPOSITORE NON INDIGET. A maxim meaning "an absolute sentence or proposition needs not an expositor."[4]

ABSOLUTE. The term "absolute" has no fixed, unvarying meaning,[5] but it has various significations which it receives in popular use;[6] as, certain; clear;[7] complete;[8] exclusive;[9] final;[10] finished;[11] independent;[12] perfect;[13]

107. Moore *v.* Nicholls, 5 La. 488.

108. Schnaufer *v.* Schnaufer, 4 La. Ann. 355.

109. Ticknor *v.* Calhoun, 29 La. Ann. 277.

110. Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555.

111. George *v.* Le Grand, 3 La. Ann. 652, also holding that the judgment, not being a personal one, cannot, on being recorded, operate as a judicial mortgage upon the other property belonging to the absentee.

In Smith *v.* McWaters, 7 La. Ann. 145, it was held that a judgment rendered against an absent warrantor represented by a curator *ad hoc* has no force outside of the state, unless the absentee has authorized the curator to defend the suit.

112. Story *v.* Jones, 14 La. Ann. 73.

113. Kraeutler *v.* U. S. Bank, 12 Rob. (La.) 456.

1. Burrill L. Dict.

2. Kelham Dict.

3. Burrill L. Dict.

4. Burrill L. Dict. [*citing* 2 Inst. 533].

5. Miller, J., in Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 450, who further said: "When used in connection with an interest in property it is not always synonymous with 'unqualified.' Used in connection with 'estate' it means an estate in lands not subject to or defeasible upon any condition. Burrill L. Dict. It may be quite as often and as pertinently used in contradistinction to 'contingent' or 'conditional' as to 'qualified' or 'encumbered.'"

6. Walker, J., in Johnson *v.* Johnson, 32 Ala. 637, 640.

7. People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33.

8. *Alabama.*— Johnson *v.* Johnson, 32 Ala. 637, 640 [*citing* Webster Dict.; Johnson Dict.].

California.— People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33 [*citing* Webster Dict.].

Illinois.— Campbell *v.* Campbell, 130 Ill. 466, 477, 22 N. E. 620.

South Carolina.— Fuller *v.* Missroon, 35 S. C. 314, 330, 14 S. E. 714 [*citing* Rapalje & L. L. Dict.].

Vermont.— Matter of Reed, 21 Vt. 635, 638.

In its signification of "complete," "not limited," it is used to distinguish an estate in fee from an estate in remainder. Walker, J., in Johnson *v.* Johnson, 32 Ala. 637, 640.

"By the term 'absolute' I do not mean that the lien is unconditional, but that it is complete and perfect." Matter of Reed, 21 Vt. 635, 638.

9. Johnson *v.* McIntosh, 8 Wheat. (U. S.) 543, 588, 5 L. ed. 681, where Marshall, C. J., said: "An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it." And in Johnson *v.* Johnson, 32 Ala. 637, 641, Walker, J., said: "We doubt whether the word 'absolute' is ever used in a sense which would import an exclusion of the marital rights."

10. Fuller *v.* Missroon, 35 S. C. 314, 330, 14 S. E. 714 [*citing* Rapalje & L. L. Dict.].

11. People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33 [*citing* Webster Dict.].

12. Johnson *v.* Johnson, 32 Ala. 637, 641, where Walker, J., said: "In its sense of 'independent of anything extraneous' it is used in algebra to designate any pure number standing without the conjunction of literal characters."

13. *California.*— People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33 [*citing* Webster Dict.].

positive;[14] total;[15] unconditional;[16] uncontrolled;[17] unlimited;[18] unrelated;[19] and vested.[20] The word has the effect in some cases of an intensive.[21] (Absolute Conviction or Moral Certainty, Instructions as to, see CRIMINAL LAW. Absolute Ownership or Property in Fire Insurance, see FIRE INSURANCE. Absolute Total Loss in Marine Insurance, see MARINE INSURANCE.)

ABSOLUTELY. Completely; wholly; without qualification; without reference to, or dependence upon, any other person, thing, or event;[22] utterly.[23] The word also has the effect of an intensive.[24] (See also ABSOLUTE.)

ABSOLUTION. In canon law, a judgment of the clergy that the sins of the

Illinois.— Campbell *v.* Campbell, 130 Ill. 466, 477, 22 N. E. 620.

New York.— Converse *v.* Kellogg, 7 Barb. (N. Y.) 590, 597 [*citing* Bouvier L. Dict.]; Williams *v.* Lande, 74 Hun (N. Y.) 425, 428, 26 N. Y. Suppl. 703.

South Carolina.— Fuller *v.* Missroon, 35 S. C. 314, 330, 14 S. E. 714 [*citing* Rapalje & L. L. Dict.].

Vermont.— Matter of Reed, 21 Vt. 635, 638.

14. People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33.

15. People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33; Campbell *v.* Campbell, 130 Ill. 466, 477, 22 N. E. 620.

16. *Alabama.*— Johnson *v.* Johnson, 32 Ala. 637, 641.

California.— People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33 [*citing* Webster Dict.].

Maryland.— Miller, J., in Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 450 [*citing* Burrill L. Dict.].

New York.—Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491, 498; Lott *v.* Wykoof, 2 N. Y. 355, 357; Converse *v.* Kellogg, 7 Barb. (N. Y.) 590, 597 [*citing* Bouvier L. Dict.]; Williams *v.* Lande, 74 Hun (N. Y.) 425, 428, 26 N. Y. Suppl. 703.

Pennsylvania.— Greenawalt *v.* Greenawalt, 71 Pa. St. 483, 487.

South Carolina.— Fuller *v.* Missroon, 35 S. C. 314, 330, 14 S. E. 714 [*citing* Rapalje & L. L. Dict.].

In its signification of "unconditional" it describes a bond or conveyance or estate without condition. Johnson *v.* Johnson, 32 Ala. 637, 640.

An absolute conveyance, an absolute right, an absolute estate, an absolute sale is that which cannot be defeated or changed by any condition, restriction, or limitation. So in an absolute petition. Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491, 498.

"'Absolute' is not a word used legally to distinguish a fee from a life estate, but to distinguish a qualified or conditional from a simple fee." Sharswood, J., in Greenawalt *v.* Greenawalt, 71 Pa. St. 483, 487.

17. People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33 [*citing* Webster Dict.]; Williams *v.* Vancleave, 7 T. B. Mon. (Ky.) 388, 393.

"Absolute [property] means [property which is] free, not controlled by others." Williams *v.* Vancleave, 7 T. B. Mon. (Ky.) 388, 393.

18. Johnson *v.* Johnson, 32 Ala. 637, 640.

19. People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33 [*citing* Webster Dict.].

In its signification of "not relative" it describes the rights of man in a state of nature as contradistinguished from those which pertain to him in his social relations. Johnson *v.* Johnson, 32 Ala. 637, 641. "By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it." People *v.* Berberrich, 20 Barb. (N. Y.) 224, 229 [*citing* 1 Bl. Comm. 123].

20. Loventhal *v.* Home Ins. Co., 112 Ala. 108, 116, 20 So. 419, 57 Am. St. Rep. 17, 36 L. R. A. 258; Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 375, 31 Am. Rep. 732.

21. People *v.* Davis, 64 Cal. 440, 1 Pac. 889, where the court said: "A philologist may be able to say that the word 'absolute,' in the instruction requested and rejected, adds no force to the words 'moral certainty.' But the word suggests a degree of certainty greater than that moral certainty, which can be reached upon such evidence as is securable in courts of justice."

People *v.* Ferry, 84 Cal. 31, 34, 24 Pac. 33, where the following language was used, to wit: "Is there any difference between 'conviction' and 'absolute conviction'? Do they mean the same? . . . We think there is a difference, and absolute conviction means conviction beyond a possibility of doubt, which the law does not require a jury to attain to render a verdict against a defendant.

22. Burrill L. Dict.

23. In the expression "absolutely void" the word means "utterly" and is not used as contrasted with "relatively." Pearsoll *v.* Chapin, 44 Pa. St. 9, 14.

24. "While, in a general sense, it may be said that the word 'necessary,' like the word 'perfect,' implies the superlative degree, and that, therefore, when a thing is declared to be necessary, it is essential, and *ex vi termini* implies all that would be expressed by the words 'absolutely necessary,' still, the word 'absolutely' is not unfrequently used to emphasize the degree of necessity when it is intended to express an extreme case. This latter use is sanctioned by custom, and it can not be said to be either improper or meaningless." State *v.* Tetrick, 34 W. Va. 137, 11 S. E. 1002.

penitent are remitted; in civil law, a decree declaring the innocence of the accused.[25]

ABSOLUTUM ET DIRECTUM DOMINIUM. Absolute and direct ownership.[26]

ABSOLVE. To acquit of a crime; to pardon or set free from excommunication.[27]

ABSOLVITOR. In Scotch law, an acquittal or a decree in favor of defendant in any action.

ABSQUE. Without.[29]

ABSQUE HOC. Literally, "without this." In pleading these were technical words of denial used in pleading by way of special traverse.[30]

ABSQUE TALI CAUSA. Literally, "without such cause." In pleading these were technical words used in the now obsolete replication *de injuria*.[31]

ABSTRACT. As a noun the word "abstract" denotes a less quantity containing the virtue and force of a greater quantity.[32] It ordinarily means a mere brief, and not a copy of that from which it is taken,[33] although sometimes used in the sense of copy.[34] As a verb the word "abstract" signifies to take or withdraw from.[35] (Abstract: Of Judgment, Recording, see JUDGMENTS. Of Record — as Evidence, see EVIDENCE; On Appeal or Error, see APPEAL AND ERROR. Of Title, see ABSTRACTS OF TITLE.)

ABSTRACT OF A FINE. See NOTE OF A FINE.

25. Brown L. Dict.

26. Burrill L. Dict. [*citing* 2 Bl. Comm. 105; Coke Litt. 1*b*].

27. Wharton L. Lex.

28. Wharton L. Lex.

29. Stimson L. Gloss.

30. Burrill L. Dict.; Stephen Pl. 165.

31. Wharton L. Lex.

32. McCracken *v.* Graham, 14 Pa. St. 209; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278, 283.

33. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 413.

Distinguished from transcript.— A transcript is generally defined as a copy and is more comprehensive than an abstract. Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278, 283.

34. Wilhite *v.* Barr, 67 Mo. 284.

35. U. S. *v.* Harper, 33 Fed. 471, 479; U. S. *v.* Northway, 120 U. S. 327, 334, 7 S. Ct. 580, 30 L. ed. 664.

Has no technical meaning.— The term "abstract," as used in U. S. Rev. Stat. (1878), § 5209, has no technical meaning like "embezzle;" but it is employed in the statute, and is to be understood, in its ordinary and popular sense, as "taking" or "withdrawing from," so that to abstract the moneys, funds, credits, and assets of a bank is to take or withdraw them. U. S. *v.* Harper, 33 Fed. 471, 479; U. S. *v.* Northway, 120 U. S. 327, 334, 7 S. Ct. 580, 30 L. ed. 664.

ABSTRACTS OF TITLE

EDITED BY JOHN S. WILKES
Associate Justice Supreme Court of Tennessee

CROSS-REFERENCES

For Matters Relating to:

Admissibility of Abstracts of Title in Evidence, see DEEDS; EVIDENCE; LOST INSTRUMENTS.

For Matters Relating to — (*continued*)
Examination of Records by Abstracter, see RECORDS.
Furnishing Abstract and Its Effect in Particular Cases, see EJECTMENT; MORTGAGES; TRESPASS TO TRY TITLE; VENDOR AND PURCHASER.
Limitation of Actions against an Abstracter, see LIMITATIONS OF ACTIONS.
Right to Copyright Abstract Books, see COPYRIGHT.

I. DEFINITION.

An abstract of title is a memorandum or concise statement of the conveyances and encumbrances which appear on the public records affecting the title to real property.[1]

II. OBJECT.

The object of an abstract of title is to enable the purchaser, or his counsel, to pass readily upon the validity of the title in question.[2]

III. REQUISITES.

A. In General. The abstract should contain whatever concerns the source and condition of the title.[3] It should contain a note of all conveyances and transfers or other facts relied on as evidences of the title, together with all such facts appearing of record as may impair the title.[4] But just how full or minute a description of the instruments abstracted should be given is, to a certain extent, a matter for the abstracter himself to decide,[5] although it has been held that material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which touch the title, and also liens and encumbrances of every nature, should be set forth.[6]

B. Legal Effect of Instruments Abstracted. The abstract need not state the legal effect of any instrument noted therein.[7]

C. Inconsistency in Descriptions of Premises. It is not necessary to state in the abstract that the descriptions of the premises in the various instruments are inconsistent.[8]

1. Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Union Safe Deposit Co. *v.* Chisholm, 33 Ill. App. 647; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 413. In Banker *v.* Caldwell, 3 Minn. 94, the court quoted with approval the following definition from Burrill L. Dict.: "An abstract or summary of the most important parts of the deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order. . . . It also contains a statement of all charges, encumbrances, liens, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised."

Epitome of facts.—In Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75, the court said: "We understand an abstract, in a legal sense, to be a summary or an epitome of the facts relied on as evidence of title."

2. Taylor *v.* Williams, 2 Colo. App. 559, 31 Pac. 504; Kane *v.* Rippey, 22 Oreg. 296, 23 Pac. 180; Burnaby *v.* Equitable Reversionary Interest Soc., 54 L. J. Ch. 466, 52 L. T. Rep. N. S. 350.

Avoids reference to deeds.— In Banker *v.* Caldwell, 3 Minn. 94, the court quoted with approval a definition from Burrill L. Dict., which states that the abstract of title is "intended to show the origin, course, and incidents of the title, without the necessity of referring to the deeds themselves."

3. Taylor *v.* Williams, 2 Colo. App. 559, 31 Pac. 504; Kane *v.* Rippey, 22 Oreg. 296, 23 Pac. 180.

4. Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75; Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502. See also Peabody Bldg., etc., Assoc. *v.* Houseman, 89 Pa. St. 261, 33 Am. Rep. 757, in which it was held that a recorder of deeds making a certificate of search for one desiring to secure a loan on property could not omit therefrom existing mortgages, on the statement of the party ordering the search that the mortgages would be promptly satisfied.

5. Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

6. Taylor *v.* Williams, 2 Colo. App. 559, 31 Pac. 504; Burnaby *v.* Equitable Reversionary Interest Soc., 54 L. J. Ch. 466, 52 L. T. Rep. N. S. 350, where it was said that the abstract ought to set out every part of the documents abstracted which may affect the judgment of the purchaser, and the purchaser is entitled to consider that no part of the documents which is not set out has any bearing upon the title.

7. Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

8. American Trust Invest. Co. *v.* Nashville Abstract Co., (Tenn. Ch. 1896) 39 S. W. 877.

D. When Prepared for Limited Period or Certain Records. When the abstract is prepared to cover only a limited period[9] or certain records[10] it need not include anything of record outside of such period or such records.

IV. Duties and Liabilities of Abstracter.

A. Must Give Bond. Under some statutes an abstracter of title is required to give a bond, which is designed to secure those who may be damaged through the inefficiency, negligence, or fraud of such abstracter.[11]

B. Must Possess Skill and Exercise Due Care. The undertaking implied by law from engaging in the business of making abstracts of title for compensation is that the abstracter possesses the requisite knowledge and skill, and that he will use due and ordinary care in the performance of his duties.[12]

C. Legal Knowledge Required. It has been said that no professional opinion is required of an abstracter,[13] but abstracters of title are bound to have a sufficient knowledge of law to know what is and what is not a lien upon real estate.[14]

D. Occupies Trust Relation toward Employer. Persons engaged in the business of making abstracts of title occupy a relation of confidence toward those employing them.[15]

E. Does Not Guarantee Title. One who furnishes an abstract of title does not become a guarantor of the title.[16]

F. Must Examine Record. An abstracter, in preparing an abstract of title, must examine the record itself, and is not justified in relying on marginal notes.[17] He is bound to use sufficient diligence to find any encumbrances when properly made matter of record so as to affect all parties interested with notice.[18]

9. Wakefield *v.* Chowen, 26 Minn. 379, 4 N. W. 618, where an abstracter agreed to furnish an abstract of title between certain dates, and it was held that he was under no obligation to note therein an unsatisfied judgment against one of the grantees of the title, which appeared of record only before the first date, although it did not become a lien until within the period covered.

10. Thomas *v.* Carson, 46 Nebr. 765, 65 N. W. 899, where an abstracter certified that he had searched the records of the county clerk, the clerk of the district court, and the county treasurer, and that there were no liens on the property except as mentioned in the abstract, and it was held that he was not liable for the omission of a prior mortgage of record in the office of the register of deeds. The fact that the omission of the former mortgage was the result of a conspiracy between the abstracter and others was held not material, since the certificate of the abstracter imparted notice of the abstracter's engagement and the extent of his liability.

11. Thomas *v.* Carson, 46 Nebr. 765, 65 N. W. 899.

12. *California.*— Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

Illinois.— Chase *v.* Heaney, 70 Ill. 268.

Michigan.— Smith *v.* Holmes, 54 Mich. 104, 19 N. W. 767.

Minnesota.— Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

Missouri.— Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Rankin *v.* Schaeffer, 4 Mo. App. 108.

Tennessee.— American Trust Invest. Co. *v.* Nashville Abstract Co., (Tenn. Ch. 1896) 39 S. W. 877; Dickle *v.* Nashville Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616.

13. Dickle *v.* Nashville Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616.

14. Dodd *v.* Williams, 3 Mo. App. 278.

"That the making of a perfect abstract of the title to a piece of land, with all the encumbrances which affect it, involves a great exercise of legal learning and careful research, I presume no lawyer will dispute. The person preparing such an abstract must understand fully all the laws on the subject of conveyances, descents and inheritances, uses and trusts, devises, and in fact every branch of the law that can affect real estate in its various mutations from owner to owner, sometimes by operation of law and again by act of the parties." Flandrau, J., in Banker *v.* Caldwell, 3 Minn. 94.

15. Vallette *v.* Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502, wherein the court said: "They should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them. Any abuse of such trust and confidence should be met with emphatic rebuke." In this case it was held that where one was engaged, as the result of his employment as an abstracter, to look up certain property and purchase it for a fixed sum for his employer, he was estopped from purchasing it for his own use.

16. Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502; Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Rankin *v.* Schaeffer, 4 Mo. App. 108.

17. Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

18. Dodd *v.* Williams, 3 Mo. App. 278.

G. Liability for Act of Employee. Where one contracts to search for taxes and assessments it is of no consequence whether he employs another; he alone is responsible to his employer for the correctness of his certificate.[19]

H. Injury Must Be Direct. An abstracter is liable only for injuries which result directly from the defects in his abstract.[20]

I. To Whom Liable — 1. In General. By the weight of authority an abstracter is liable only to the person ordering and paying for the abstract;[21] and where this view obtains, the fact that an abstracter has knowledge that his abstract is to be used in a sale or loan to advise a purchaser or person about to lend money does not affect the rule as to his liability.[22]

2. Third Persons. In some jurisdictions, however, the abstracter's liability has been extended to protect those who, relying on the correctness of the abstract, are injured.[23]

J. Limiting Liability. An abstracter cannot limit his liability by an obscure

19. Morange *v.* Mix, 44 N. Y. 315.

20. Roberts *v.* Sterling, 4 Mo. App. 593, appendix, in which it was held that no recovery could be had against an examiner of titles for failure to report in his certificate of examination a judgment lien against the property, where it was shown that at the time of the examination plaintiff had already bought and paid for the property and advanced no money on faith of the examiner's certificate, or where the existence of the lien omitted could be material to the purchaser only on account of an understanding between him and his apparent grantor, of which the examiner had no notice and by reason of which a deed appearing on its face to be absolute was held to be a mortgage.

Failure to avoid consequences of error.— In Roberts *v.* Leon Loan, etc., Co., 63 Iowa 76, 18 N. W. 702, defendant abstracters made an erroneous statement in the abstract whereby plaintiff was led to believe that she had ten days longer to redeem land from a sheriff's sale than the time actually allowed for redemption. The mistake was discovered by plaintiff before the time for redemption expired, and it was held that she could not recover for the error where she had not used ordinary diligence in endeavoring to procure money to redeem after the mistake was discovered, and did not promptly inform defendants of the mistake, so that they might take steps to avoid the consequences of failure to redeem.

Voluntary payment of judgment.— There can be no recovery against an examiner of titles for failure to report in his certificate of examination a judgment lien against the property, where the judgment omitted is voluntarily paid and satisfied of record by the purchaser. Roberts *v.* Stirling, 4 Mo. App. 593, appendix.

Voluntary payment of mortgage.— A purchaser of property on which there was an outstanding mortgage not included in the abstract has no right of action against the abstracter in respect to payments on the mortgage voluntarily made by him after notice of the omission. Brega *v.* Dickey, 16 Grant Ch. (U. C.) 494.

21. *Arkansas.*— Talpey *v.* Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206.

Indiana.— Mechanics Bldg. Assoc. *v.* Whitacre, 92 Ind. 547.

Kansas.— Symns *v.* Cutter, (Kan. App. 1900) 59 Pac. 671; Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99.

Missouri.— Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Clark *v.* Marshall, 34 Mo. 429; Zweigardt *v.* Birdseye, 57 Mo. App. 462.

Nebraska.— Security Abstract of Title Co. *v.* Longacre, 56 Nebr. 469, 76 N. W. 1073.

United States.— National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621; Dundee Mortg., etc., Co. *v.* Hughes, 20 Fed. 39.

A guaranty by an abstracter to the person ordering the search, "his heirs, devisees, and grantees," does not render the abstracter liable for damages, resulting from errors in the abstract, to one who is not an immediate grantee of the promisee, but derives title through a mesne conveyance. Glawatz *v.* People's Guaranty Search Co., 49 N. Y. App. Div. 465, 63 N. Y. Suppl. 691.

22. Zweigardt *v.* Birdseye, 57 Mo. App. 462.

23. Gate City Abstract Co. *v.* Post, 55 Nebr. 742, 76 N. W. 471, where it was held that the object of Nebr. Comp. Stat. (1897), c. 73, §§ 65–69, was to extend the common-law liability of abstracters.

Dickle *v.* Nashville Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616, which held that where an abstracter furnishes the owner of property with an abstract of title for the purpose of enabling such owner to effect a sale, the abstracter is liable to the purchaser, who buys upon the faith of such abstract, for damages resulting from negligence or want of skill in the preparation of such abstract.

National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621, dissenting opinion of Waite, C. J., Swayne and Bradley, JJ.

Abstract furnished to prospective lender.— Where an abstracter furnishes an abstract to a third person, at the request of the owner of lands, and is aware that it will be used by such third person in deciding whether it is safe to make a loan thereon, he will be liable for loss sustained by such third person through defects in the title not disclosed by the abstract. Brown *v.* Sims, 22 Ind. App. 317, 53 N. E. 779.

clause in the certificate appended to the abstract without specially calling it to the attention of the party ordering the abstract.[24]

K. Search by Public Officer — 1. When Authorized. In some of the states it is the practice for the examiner, after having ascertained the chain of title by inspection of the records, to direct written requisitions to the clerks of the various offices for searches for encumbrances or liens of record that may affect the property.[25]

2. Effect of Requesting Search by Particular Clerk. The fact that the plaintiff, in requesting a search by a public officer, requested that it be made by a particular clerk, does not constitute that clerk plaintiff's agent.[26]

3. Information to Be Given Officer. A public officer, when he is called upon to make a search, is entitled to have such information — either by the names of parties or by reference to the records in his office — as will enable him, by examining the indexes, or the record to which he is referred, to ascertain the premises in relation to which he is required to make a search.[27]

4. Liability of Officer — a. In General. Where a public officer is required by statute to make searches he is liable to respond in damages for a false search.[28] But where an officer is not required by statute to make a search, a false certificate creates no civil liability,[29] although it may render the officer subject to indictment for misconduct in office.[30] A public officer who is not required by statute to make

24. Chase *v.* Heaney, 70 Ill. 268.

Where an abstracter does not choose to assume the liability of settling what is or is not an encumbrance, he may easily avoid it by noting in his certificate every question which arises upon the title as to which there can be the slightest doubt in the legal mind, or by giving a list of deeds and encumbrances and refraining from expressing any opinion as to their legal effect. Dodd *v.* Williams, 3 Mo. App. 278.

25. Martindale Abstr. Tit. § 183.

A person is not bound to make a personal search, but may rely upon the official certificate of a public officer, designated by law, to perform the service required. Van Schaick *v.* Sigel, 58 How. Pr. (N. Y.) 211.

26. Van Schaick *v.* Sigel, 58 How. Pr. (N. Y.) 211.

27. Ballinger *v.* Deacon, 44 N. J. L. 559.

Error in names furnished officer.— In Com. *v.* Owen, 2 Wkly. Notes Cas. (Pa.) 200, plaintiff, desiring to purchase real estate of one Louis Talman, had ordered a search for mortgages remaining unsatisfied of record against Louis Tolman. The officer certified that there were no mortgages against Tolman, but that there were three against Talman. Plaintiff, relying on this information, purchased the property and lost his purchase money by reason of a fourth mortgage which the officer had omitted. In an action against the officer plaintiff was nonsuited, and in this case a motion for a rule to take off the nonsuit was dismissed.

Cannot carve out description of lands.— A party desiring a search by the county clerk cannot carve out a description of lands at his will and require the services of the clerk to ascertain the condition of the title. He must furnish the clerk with such information as to the state of the title as will enable him to ascertain the present status thereof by a simple inspection of the records. Ballinger *v.* Deacon, 44 N. J. L. 559.

28. Lusk *v.* Carlin, 5 Ill. 395; Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; McCaraher *v.* Com., 5 Watts & S. (Pa.) 21.

Failure to attach seal to certificate or to require fee.— The fact that the officer making a certificate of judgments neglects to attach a seal thereto, and that there is no proof of payment of his fee, will not exempt him or his sureties from liability for errors in the certificate. The law will not permit him to take advantage of his own negligence in omitting to attach the seal, and his failure to charge for the certificate is his own affair. Ziegler *v.* Com., 12 Pa. St. 227.

For misconstruction of certificate.— In Tripp *v.* Hopkins, 13 R. I. 99, plaintiff received a certificate from a town clerk on a quitclaim deed conveying "all the right and title" of two grantors in certain realty to two grantees, to the effect that the clerk had examined all the records in relation to the premises covered by the deed and found "no encumbrances on the same, and that it now remains in the name of within-named grantees." It was held that this did not imply that the grantees each held an undivided moiety of the whole realty, and, in an action for damages resulting from plaintiff's acting on the assumption that it did, defendant had judgment.

29. Mechanics Bldg. Assoc. *v.* Whitacre, 92 Ind. 547; Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99.

30. State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172, where a register of deeds was indicted for misconduct in office when he certified that he had examined the title to certain land and found no encumbrances thereon, with knowledge that his certificate was false, although it was not his official duty to make such examination.

search may, however, contract to do so, and he will then be liable for a breach of his contract.[31]

b. For Act of Deputy. A public officer is liable for errors in a certificate of search made by his deputies.[32]

c. Where Description Includes Only Part of Premises. Where an officer is called upon for a search, he is under no obligation to certify that a description which he certifies from the record includes only part of the premises described in the order for the search.[33]

d. Only for Direct Consequence of Error. A public officer is not liable for damages resulting from errors in his certificates of search, unless the loss to the party is the direct consequence of such error.[34]

e. Only to Person Who Ordered Search. Whatever liability is incurred in any case by a public officer who makes a search is to the person for whom the search is made, and not to his grantee.[35]

f. Remedy on Official Bond. The remedy against an officer required to make searches is by action on his official bond,[36] and the sureties on the bond are liable for all that the principal is.[37]

V. Action against Abstracter or Examiner.

A. Nature of Action. The action against an abstracter is based on contract, and not on tort.[38]

B. Accrual of Right of Action. The right of action against an abstracter for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered or damages result therefrom.[39]

C. Defenses. The defendant may avail himself of the fact that plaintiff is protected by covenant in his deed against encumbrances,[40] or that a person against whom an omitted judgment was rendered had at the time such judgment was

31. Mechanics Bldg. Assoc. *v.* Whitacre, 92 Ind. 547.

32. Van Schaick *v.* Sigel, 58 How. Pr. (N. Y.) 211. In this case a register of deeds was held liable for errors in a certificate of search made by a deputy duly appointed by him under a statute authorizing such appointment, the deputy not being required to furnish bond, and holding office at the pleasure of the register. The requisition for the search had been addressed to the register, and the fees therefor had been received by him, although the certificate was not signed by him in person.

33. Ballinger *v.* Deacon, 44 N. J. L. 559, wherein it was said: "If he gives the description as it is on the record, with all its qualifications and recitals, it is the province of counsel to advise as to whether the description covers the entire premises."

34. U. S. Wind Engine, etc., Co. *v.* Linville, 43 Kan. 455, 23 Pac. 597; Kimball *v.* Connolly, 3 Keyes (N. Y.) 57, 33 How. Pr. (N. Y.) 247.

35. Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99; Morano *v.* Shaw, 23 La. Ann. 379; Day *v.* Reynolds, 23 Hun (N. Y.) 131; Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Com. *v.* Harmer, 6 Phila. (Pa.) 90, 22 Leg. Int. (Pa.) 76.

Republication to third person.—Where a prothonotary, after making a search for one intending to borrow, was requested by the lender to make a fresh search, but instead of doing so affirmed the correctness of the one already made, such affirmance amounted to a republication of the certificate directly to the lender, and rendered the prothonotary liable to the lender for errors therein. Siewers *v.* Com., 87 Pa. St. 15.

36. Lusk *v.* Carlin, 5 Ill. 395.

37. McCaraher *v.* Com., 5 Watts & S. (Pa.) 21.

Liability cannot be extended.— The liability of sureties cannot be extended beyond the terms of the condition of the bond, and where the bond of a recorder of deeds was merely conditioned "to deliver up the records and other writings belonging to said office whole, safe, and undefaced to his successor," the sureties were not liable for false searches. Com. *v.* Harmer, 6 Phila. (Pa.) 90, 22 Leg. Int. (Pa.) 76.

38. Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381; Knights *v.* Quarles, 4 Moore K. B. 532, 2 B. & B. 102, holding that the action survives to the administrator of the party ordering the abstract.

39. Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545; Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381; Provident Loan Trust Co. *v.* Wolcott, 5 Kan. App. 473, 47 Pac. 8; Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Rankin *v.* Schaeffer, 4 Mo. App. 108.

40. Morange *v.* Mix, 44 N. Y. 315.

paid by plaintiff other unencumbered real estate subject to execution sufficient to pay the same.[41]

D. Pleading — 1. MUST ALLEGE FACTS SHOWING DAMAGE. In an action against an abstracter for damages resulting from an incorrect abstract the plaintiff must allege facts showing that he has been injured.[42]

2. DEFENDANT'S WANT OF CARE. A general allegation of defendant's want of care in his investigations is sufficient.[43]

E. Evidence — 1. IN GENERAL. In an action against a recorder of deeds for furnishing an erroneous abstract, entries in the records of his office of instruments omitted from the abstract are competent evidence of his negligence, whether such entries be in his own handwriting or not.[44]

2. THAT OMITTED MATTER WAS OF RECORD. In an action against an abstracter for failure to show the existence of an execution sale of the land, it is not necessary that plaintiff should prove that at the time the abstract was made such sale was of record, but it will be presumed, in the absence of evidence to the contrary, that the officers conducting the sale made the necessary records thereof.[45]

F. Instructions. The court should instruct the jury that an abstracter who relies on a marginal reference and does not examine the record itself is guilty of negligence, and should not leave the question to the jury.[46]

G. Damages. The measure of damages in an action for failure to note on an abstract an encumbrance on the property is the amount which plaintiff was compelled to expend in removing the cloud cast on the title by the encumbrance.[47]

41. Roberts *v.* Sterling, 4 Mo. App. 593, appendix.

42. Batty *v.* Fout, 54 Ind. 482, where plaintiff applied to defendant for an abstract of title to certain land which he was about to purchase, and in an action for damages resulting from an erroneous abstract it was held that the plaintiff must allege that he purchased the land in question.

U. S. Wind Engine, etc., Co. *v.* Linville, 43 Kan. 455, 23 Pac. 597, where plaintiff brought an action against the clerk of the district court to recover damages resulting from the making of a false certificate as to the nonexistence of liens, it appearing from plaintiff's petition and its exhibits that, at the time such certificate was made, an abstract of title was presented to the clerk, showing a conveyance to plaintiff long before the lien against the property was filed in his office, and that no damage resulted from his certificate, and a demurrer to the petition was sustained.

Puckett *v.* Waco Abstract, etc., Co., 16 Tex. Civ. App. 329, 40 S. W. 812, in which case plaintiff's petition against an abstract company alleged that defendants had omitted from the abstract a deed under which certain persons were claiming land adversely; that plaintiff had litigated the question of title to the land and had judgment for the same, but that on a similar state of facts the appellate court in another case having reversed a similar judgment he released his judgment and conveyed the land in question to the adverse claimant. It was held that a demurrer to the petition was properly sustained, because it did not appear from the averments that the judgment would probably have been set aside or vacated on appeal or otherwise. The date of the judgment and the date of the release not being stated, it did not appear that the adverse party intended to make an appeal, or that at the time the judgment was released the time allowed by statute within which to appeal or sue out a writ of error had not elapsed. *Prima facie* the judgment was valid. Nor did it appear anywhere from the averments that the persons claiming the land had been in adverse possession thereof for five years prior to the time of bringing suit, nor that they had been claiming the land during that time under a deed duly recorded, and had for that time paid the taxes due thereon. These three concurrent facts were necessary to defeat plaintiff's title to the land.

43. Gilman *v.* Hovey, 26 Mo. 280, in which case a general allegation that the defendants "were guilty of neglect and want of due diligence in examining into, and in the investigation of, the situation of said land and the title thereto," was held sufficient to warrant the court in making a finding as to the negligence of defendants in failing to ascertain whether there were judgments which were liens on the land.

44. Smith *v.* Holmes, 54 Mich. 104, 19 N. W. 767.

Burden of proof is on defendant where, in an action to recover damages for negligence in the performance of a search for taxes and assessments, defendant attempts to avail himself of the fact that plaintiff is protected by covenant in plaintiff's deed against encumbrances. Morange *v.* Mix, 44 N. Y. 315.

45. Chase *v.* Heaney, 70 Ill. 268.

46. Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

47. Chase *v.* Heaney, 70 Ill. 268.

Only nominal damages are recoverable where plaintiff, the purchaser of a tax lien, alleges that by reason of the omission from the abstract of a mortgage, and pending suit

ABSURDITY. By an absurdity or nullity is meant not only that which is physically impossible but also that which is morally so.[1]

ABUNDANS CAUTELA NON NOCET. A maxim meaning "extreme caution does no harm."[2]

ABUSE. As a noun the word "abuse" in its largest sense signifies ill use or improper treatment of another,[3] and as a verb it signifies to injure, diminish in value, or wear away, by using improperly.[4] When applied to a woman the word is used with reference to sexual intercourse.[5] (Abuse: Of Children, see INFANTS; MASTER AND SERVANT; PARENT AND CHILD. Of Discretion, see ABUSE OF DISCRETION. Of Female Child, see ASSAULT AND BATTERY; RAPE. Of Process, see ARREST; PROCESS.)

ABUSE OF DISCRETION. An abuse of discretion is merely a discretion exercised to an end or purpose not justified by and clearly against reason and evidence.[6]

to foreclose it, he failed to make the mortgagee a party to his suit to foreclose such tax lien, since the lien for taxes was the superior lien, and the sale under the tax lien and the purchase of the property by plaintiff passed title to him, notwithstanding the mortgagee was not made a party to the foreclosure proceedings, and the averment that plaintiff was compelled to pay out money in order to protect his title was not sustained by the specific facts alleged. Williams *v.* Hanly, 16 Ind. App. 464, 45 N. E. 622.

1. State *v.* Hayes, 81 Mo. 574, 585, where it is further said: "And that is to be regarded as morally impossible, which is contrary to reason, or in other words, which could not be attributed to a man in his right senses."

2. Abbott L. Dict.

Applied to proceedings in practice, adopted in cases of doubt, in order to make sure. Burrill L. Dict. [*citing* 11 Coke 6].

3. Brickell, C. J., in Dawkins *v.* State, 58 Ala. 376, 29 Am. Rep. 754, who further said: "Its proper signification must be ascertained by reference to the subject-matter or the context and the meaning of the words with which it is associated."

Includes "misuse."—The word "abuse" includes "misuse." Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287, 318; Baltimore *v.* Pittsburgh, etc., R. Co., 3 Pittsb. (Pa.) 20, 22.

Abuse and misuse of corporate privileges is defined thus: "Any positive act in violation of the charter, and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation." Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287, 319; Baltimore *v.* Pittsburgh, etc., R. Co., 3 Pittsb. (Pa.) 20, 22.

4. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287, 318, where it is said: "To 'abuse' is compounded of '*ab*' and '*utor;*' and in strictness it signifies to injure, diminish in value, or wear away, by using improperly. Catiline abused the patience of the Roman senate. A man abuses his constitution by excesses which impair its vigor. A judge abuses his office not only by taking bribes, but by misconduct which detracts from its dignity and usefulness. To abuse the freedom of the press, or the right of debate, is a phrase from which we take a perfectly definite idea. We know very well what is meant when it is said that legislative authority or executive power has been abused. Why, then, are we expected not to know that a corporate privilege has been abused, when we see it used as a color and a pretext for that which the law pronounces a wrong and injury to the public?"

Synonym of "injure."—"'Abuse' is stated by Webster to be the synonym of 'injure.'" Brickell, C. J., in Dawkins *v.* State, 58 Ala. 376, 29 Am. Rep. 754.

5. In Matter of Thompson, 6 H. & N. 193, 200, Pollock, C. B., said: "I am not aware that the word 'abuse,' applied to a woman, is ever used except with reference to sexual intercourse. Certainly, in more than one act of parliament the word 'abuse' has had that meaning applied to it, and in my opinion it always imports some offense of that nature."

The verb "abuse" used in section 12 of the criminal code of Nebraska is synonymous with "ravish," and as a noun "abuse" is defined as "violation," "rape." Palin *v.* State, 38 Nebr. 862, 867, 57 N. W. 743 [*citing* Webster Dict.].

In a statute punishing "any person who has carnal knowledge of any female under the age of ten years, or abuses such female," etc., the word "abuse" applies only to injuries to the genital organs in an unsuccessful attempt at rape, and does not include mere forcible or wrongful ill usage. Dawkins *v.* State, 58 Ala. 376, 29 Am. Rep. 754.

6. Sharon *v.* Sharon, 75 Cal. 1, 48, 16 Pac. 345; Murray *v.* Buell, 74 Wis. 14, 19, 41 N. W. 1010.

Bad motive or wrong purpose not essential.—In Murray *v.* Buell, 74 Wis. 14, 19, 41 N. W. 1010, it is said: "The term 'abuse of discretion' exercised in any case by the trial court, as used in the decisions of courts and in the books, implying in common parlance a bad motive or wrong purpose, is not the most appropriate." And in Sharon *v.* Sharon, 75 Cal. 1, 48, 16 Pac. 345, it is said: "Abuse of discretion . . . does not necessarily imply a wilful abuse or intentional wrong." But in People *v.* New York Cent. R. Co., 29 N. Y. 418, 431, Hogeboom, J., in a dissenting opinion, said: "The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion, and especially, gross and palpable

ABUSIVE LANGUAGE. See Disorderly Conduct.

ABUT. To reach; to touch.[7] In a narrow and restricted sense the term is used in reference to that which touches a lot at the end as distinguished from that which adjoins it on the side.[8] The term is not ordinarily used in such restricted sense, however, but refers to that which touches other premises whether at the ends or on the sides.[9]

ABUTMENT. A part of a bridge,[10] consisting of that mass of stone or solid work at the end of the bridge by which the extreme arches or timbers are sustained.[11] The word is sometimes used to designate that which unites one thing to another.[12]

ABUTTALS or ABBUTTALS. The buttings and boundings of lands, east, west, north, or south, with respect to the places by which they are limited and bounded.[13]

ABUTTARE. To Abut,[14] *q. v.*

ABUTTER. One whose property abuts, is contiguous or joins at a border or boundary, as where no other land, road, or street intervenes.[15]

ABUTTING OWNERS. See Adjoining Landowners; Eminent Domain; Fish; Municipal Corporations; Railroads; Street Railroads; Streets and Highways.

AC. Latin, "and."[16]

abuse of discretion, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency."

7. Abbott L. Dict.

Necessity for actual contact.— In Holt *v.* Somerville, 127 Mass. 408, it was held that certain estates were not abutting estates because they did not touch the land laid out by the city. But in Cohen *v.* Cleveland, 43 Ohio St. 190, 196, 1 N. E. 589, the court said: "Doubtless it is true that the words 'bounding' and 'abutting' have no such inflexible meaning as to require the lots assessed or injured to touch the improvement, though the usual meaning of the words is that the things spoken of do actually adjoin. Without entering very much into the origin of the word 'abutting' it is sufficient to say that according to Latham it does not imply that the things spoken of are 'necessarily in contact;' and to the same effect see Webster, Worcester, and Murray. In ascertaining the meaning of such word, of course regard must be had to the intent of the lawmaker, though it will be seen that the usual meaning conveyed is that the things spoken of touch or come together."

And in Wakefield Local Board of Health *v.* Lee, 1 Ex. D. 336, where a person's premises were divided from a street by a small stream, and by two bridges over the stream the premises were connected with it, it was held per Grove and Field, JJ., that such premises abutted upon such street; and per Cleasby, B., hesitating, that the premises adjoined such street.

8. Lawrence *v.* Killam, 11 Kan. 499, 511 [*citing* Bouvier L. Dict.].

9. Springfield *v.* Green, 120 Ill. 269; Lawrence *v.* Killam, 11 Kan. 499, 511.

See also Hughes *v.* Metropolitan El. R. Co., 130 N. Y. 14, 26, 28 N. E. 765, where the court said: "To prevent a misapplication of this rule it will be well to define the term 'abutting lot.' It denotes a lot bounded on the side of a public street in the bed or soil of which the owner of the lot has no title, estate, interest, or private rights except such as are incident to a lot so situated." And Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, 11, 25 N. E. 496, where the court said: "The term 'abutting owner' will be used in this judgment to denote a person having land bounded on the side of a public street and having no title or estate in its bed or soil and no interests or private rights in the street except such as are incident to lots so situated."

10. Board of Chosen Freeholders *v.* Strader, 18 N. J. L. 108, 112; Bardwell *v.* Jamaica, 15 Vt. 438, 442, where it was said that "the abutment is such an immediate connection with the other parts of the bridge that in speaking of a bridge, in connection with the use for which bridges are erected, we can no more exclude the abutment from our minds than the flooring or the framework of the bridge," and where it was held that where a declaration alleged an injury to have been occasioned by the insufficiency of the bridge, and the proof was of a defect in the abutment, there was no such variance as to be a ground for reversing the judgment.

11. Board of Chosen Freeholders *v.* Strader, 18 N. J. L. 108, 112.

12. Board of Chosen Freeholders *v.* Strader, 18 N. J. L. 108, 112 [*citing* Webster Dict.].

13. Jacob L. Dict.

In a narrow sense the limits or boundary lines of lands on the ends, as distinguished from those on the sides. Burrill L. Dict. Well expressed in the phrase "buttals and sidings" in Winckworth *v.* Mayo, Cro. Jac. 183.

14. Burrill L. Dict.

15. Bouvier L. Dict.

16. Burrill L. Dict.

ACADEMY. See Schools and School Districts.

ACC. See Accordant.

ACCEDAS AD CURIAM. Literally, "you go to court." In English practice, a common-law writ to remove a cause from an inferior court not of record, such as a hundred court, or court-baron, into one of the superior courts.[17]

ACCEDAS AD VICECOMITEM. Literally, "you go to the sheriff." In English practice, a writ sent to the coroner, commanding him to deliver a writ to the sheriff, where the latter had a writ called a "pone" delivered to him but suppressed it.[18]

ACCELERATION. The shortening of the time for the vesting in possession of an expectant interest.[19]

ACCEPT. To receive with approval or satisfaction; to receive with intent to retain.[20]

ACCEPTANCE. The taking and accepting of anything in good part, and, as it were, a tacit agreement to a preceding act which might have been defeated and avoided were it not for such acceptance.[21] (Acceptance: Of Abandonment in Marine Insurance, see Marine Insurance. Of Bill of Exchange, see Bills and Notes. Of Charitable Trust or Gift, see Charities. Of Dedication, see Dedication. Of Devise or Legacy, Generally, or in Lieu of Dower or Distributive Share, see Wills. Of Gift, see Gifts. Of Goods within Statute of Frauds, see Frauds, Statute of. Of Order, see Bills and Notes. Of Payment or Performance, see Accord and Satisfaction; Contracts; Payment. Of Service of Process, see Process. Of Tender, see Tender. Of Trust, see Trusts.)

ACCEPTARE. To Accept,[22] *q. v.*

ACCEPTOR. See Bills and Notes.

ACCESS. Approach or means of approach.[23] In law the term is usually employed with reference to sexual intercourse, denoting either its actual occurrence or opportunity therefor.[24] (Access: Of Husband, see Bastards; Evidence. Of Light and Air, see Adjoining Landowners; Easements. To Property, see Easements; Streets and Highways.)

ACCESSARIUS. An accessary.[25]

ACCESSARY. See Criminal Law; Indictments and Informations.

17. Burrill L. Dict.; 3 Bl. Comm. 34; 1 Tidd Pr. 38.

18. Jacob L. Dict.

19. Wharton L. Lex.

20. Abbott L. Dict.

A word of contract.— The terms "accept" and "assent to" are words of contract, and it was by virtue of such and similar terms in the constitution of the United States that the federal government, when it received the sanction of the people and the requisite number of states, became a compact between the parties to it and the federal government and not a mere confederacy or league. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, 130.

"Now the word 'accepted' [in the statute of frauds] imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound." Abbott, C. J., in Tempest *v.* Fitzgerald, 3 B. & Ald. 680, 683.

"Accept" distinguished from "receive."— In Hall *v.* Los Angeles County, 74 Cal. 502, 16 Pac. 313, 315, Hayne, C., said: "But the resolution does not say 'accepted.' It says 'received.' Probably most men have received many invitations and proposals which they never accepted. In popular usage the words certainly differ in meaning. And we are not aware of any technical meaning which they have." In this case it was held that where the board of supervisors of a county accepted the plans of an architect on the condition that a bid by a reliable party was "received" on the basis of such plan, the word "received" was not intended to include an acceptance.

21. Jacob L. Dict.

22. Burrill L. Dict.

Used in the past tense (*acceptavit*,— he accepted) in Ereskine *v.* Murray, 2 Str. 817, and (*non acceptavit*,— he did not accept) in Blake *v.* Beaumont, 4 M. & G. 7.

23. Burrill L. Dict.

24. Abbott L. Dict.

25. Burrill L. Dict.

ACCESSION

Edited by William H. Hamilton

CROSS-REFERENCES

For Additions to:

Personal Property, see Confusion of Goods.

Real Property:

Generally, see Betterments; Fixtures.

By Accretion, see Waters.

By Reliction, see Waters.

For Increase of Animals, see Animals.

I. Definition.

Accession, in its broadest sense, may be defined to be the means by which title to the increments to one's property, movable or immovable, is acquired, whether by natural or artificial means.[1] In the restricted sense in which it is herein treated it is the acquisition of title to the increments to one's personalty, brought about by artificial means, such as labor or the addition of materials, other than the intermixture of goods or things of the same kind. The doctrine of title by accession was recognized by the civil law,[2] and the general principles as there laid down adopted into the common law[3] and applied in the adjudication of cases both in England[4] and in the United States.[5]

II. Title of Owner.

A. As against Trespasser — 1. Inadvertent Trespasser — a. In Case of Change of Species or Identity — (I) *General Rule.* While there is no conflict of authority as to the right of the original owner of a chattel to recover the same from one who has wilfully and wrongfully taken it and converted it into some other thing,[6] there seems to be much uncertainty and conflict among the authori-

1. Anderson L. Dict.; 2 Bl. Comm. 404; Black L. Dict.; Burrill L. Dict.; Century Dict.; 2 Kent Comm. 360; Merrick's Rev. Civ. Code La. (1900), art. 498; Eaton *v.* Munroe, 52 Me. 63; Pulcifer *v.* Page, 32 Me. 404, 54 Am. Dec. 582.

2. Inst. lib. 2, tit. 1, §§ 25, 26, 34.

3. 2 Bl. Comm. 404, 405; Bracton, lib. 2, cc. 2, 3; 2 Kent Comm. 361; 2 Schouler Pers. Prop. § 30.

4. 2 Bl. Comm. 405; Batchellor *v.* Salmon, 2 Campb. 525; Y. B. 5 Hen. VII, 15; Y. B. 12 Hen. VIII, 10; Austin *v.* Baker, F. Moore 17; Lupton *v.* White, 15 Ves. 432.

5. Pulcifer *v.* Page, 32 Me. 404, 54 Am. Dec. 582; Peirce *v.* Goddard, 22 Pick. (Mass.) 559, 33 Am. Dec. 764.

6. See *infra*, II, A, 2.

ties as to the right and title of the original owner of chattels which have been taken under mistake or claim of right and changed or altered in form or increased in value. In the latter case it is true that, as regards the original owner of the thing taken, the person taking it is a trespasser; but it has been contended that, because of the fact that his trespass was without thought of wrongdoing, he should not be deprived of the labor, time, or materials which he has added to or expended upon the thing taken. The weight of authority seems to be that one whose property has been appropriated by another without authority, but under a *bona fide* mistake as to ownership, may follow and reclaim it, even though it has been changed or altered by the addition of labor or materials, so long as it still remains capable of identification.[7]

(11) *What Constitutes Such Change.* In applying this rule the susceptibility of the property to identification becomes the controlling test; but it is difficult of application, and much confusion and difference of opinion arises in determining what does or does not constitute a change in species or identity, both in cases where the rights of inadvertent and in cases where the rights of wilful trespassers are involved, and it seems impossible to lay down a hard and fast rule which can be followed in all cases.[8]

7. *Alabama.*— Riddle *v.* Driver, 12 Ala. 590.

Illinois.— Davis *v.* Easley, 13 Ill. 192.

Indiana.— Ricketts *v.* Dorrel, 55 Ind. 470.

Iowa.— Murphy *v.* Sioux City, etc., R. Co., 55 Iowa 473, 8 N. W. 320, 39 Am. Rep. 175.

Kentucky.— Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251; Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454; Burris *v.* Johnson, 1 J. J. Marsh. (Ky.) 196.

Maine.— Eaton *v.* Munroe, 52 Me. 63.

Massachusetts.— Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680.

Michigan.— Isle Royale Min. Co. *v.* Hertin, 37 Mich. 332, 26 Am. Rep. 520; Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

New York.— Barry *v.* Brune, 8 Hun (N. Y.) 395; Brown *v.* Sax, 7 Cow. (N. Y.) 95; Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

United States.— E. E. Bolles Wooden-ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230.

In Gates *v.* Rifle Boom Co., 70 Mich. 309, and Busch *v.* Fisher, 89 Mich. 192, it was held that a trespasser, however innocent, acquired no property in logs cut from the land of another.

8. Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

Difficulty of establishing rule.— In Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454, which was a suit involving title to certain bricks made from clay on the land of another by a person in temporary possession under a claim of right, the court, in determining the question of change in identity, through Robertson, J., said: "The difficulties of this case result from the various and indefinite characters of the cases which have been excepted from this rule. It is hence very difficult to ascertain any principle of uniform and universal application on which the rule itself is founded. In some authorities it is said that the proper test of the right of the first owner is the identity of the thing or material; in others, its capacity for being reconverted into the original species; in others, the non-accession of adventitious value exceeding that of the original materials, and in others, the retention, by the material, of its specific character, or kind, or qualities."

And in Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307, Ruggles, J., in delivering the opinion of the court, said: "There is great confusion in the books upon the question of what constitutes change of identity. In one case (Y. B. 5 Hen. VII, 15) it is said that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity, and the examples put by way of illustration serve rather to disprove than to establish the rule. The court says that if grain be made into malt it cannot be reclaimed by the owner because it cannot be known. But if clothing be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber they may or may not be capable of identification by the senses merely, and the rule is entirely uncertain in its application; and as to the iron tools it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (Austin *v.* Baker, F. Moore, 17, 20) trees were made into timber and it was adjudged that the owner of the trees might reclaim the timber 'because the greater part of the substance remained.' But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put into books as examples of change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is therefore no definite settled rule on the question."

Converting broad-gage rolling-stock into

b. In Case of Increase in Value. There are also some authorities which hold that where the innocent trespasser, by the addition of materials or labor, increases the value of the thing taken to an amount disproportionate to its original value, he acquires title thereto by accession, and the former owner can recover only its original value.[9]

c. Allowance for Labor or Materials Added. The innocent trespasser should usually be allowed, by way of compensation, the value of the labor or materials he has added to the chattel upon its recovery by the original owner;[10] but this

narrow-gage does not so change its identity as to divest the original owner of his title thereto. So held in Hamlin *v.* Jerrard, 72 Me. 62, which was a case involving title to the property as between mortgagees thereof.

Converting clay into bricks, the bricks being unburned, has been held not to so change the identity of the property as to deprive the owner thereof of title. This decision was based on the theory that the unburned bricks could easily be reconverted into the clay; but it was also held in the same case that title to a portion of the bricks, which had been burned, was in the manufacturer thereof, the identity of the clay having been destroyed, and it being practically impossible to reconvert the bricks into the clay. Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454.

Converting cucumbers into pickles was held not to be such a change in identity as would divest the title of the owner of the cucumbers. Crosby *v.* Baker, 6 Allen (Mass.) 295.

Converting grain into whisky has been held not to be such a change in the identity of the grain as would give title to the person making the change. Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307 [*reversing* 6 Hill (N. Y.) 425, 4 Den. (N. Y.) 332].

Converting standing timber into: coal (Curtis *v.* Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204), cord-wood (Brock *v.* Smith, 14 Ark. 431; Isle Royale Min. Co. *v.* Hertin, 37 Mich. 332, 26 Am. Rep. 520), logs (Firmin *v.* Firmin, 9 Hun (N. Y.) 572; Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491), lumber (Davis *v.* Easley, 13 Ill. 192; Brown *v.* Sax, 7 Cow. (N. Y.) 95), rails and posts (Snyder *v.* Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466), shingles (Betts *v.* Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; Chandler *v.* Edson, 9 Johns. (N. Y.) 362; Rice *v.* Hollenbeck, 19 Barb. (N. Y.) 664), staves (Heard *v.* James, 49 Miss. 236), or ties (Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179; McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210; Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251), will not effect such a change of identity in the timber as to destroy the original owner's title thereto.

The addition to a rifle, which consisted of a pistol stock with a metallic skeleton stock and an under-action lock, of a new wooden stock and an over-action lock, was held, in Comins *v.* Newton, 10 Allen (Mass.) 518, not to be such a change in the identity of the rifle as would divest the title of the owner thereof.

9. Lewis *v.* Courtright, 77 Iowa 190, 41 N. W. 615; Murphy *v.* Sioux City, etc., R. Co., 55 Iowa 473, 8 N. W. 320, 39 Am. Rep. 175; Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251; Burris *v.* Johnson, 1 J. J. Marsh. (Ky.) 196; E. E. Bolles Wooden-ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230.

Accession of mere value is generally not sufficient to transfer title to the operator. There must be the addition of some other material, belonging to the operator, before the product can vest in him; but an exception to this rule occurs where the increase in value is so far beyond the value of the original that to deprive the operator of the fruits thereof would be a gross injustice. Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454.

Relative value.— "No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative value. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundredfold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value." Per Cooley, J., in Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

Bricks.— Converting clay into bricks has been held to so increase the value of the clay as to deprive the owner thereof of any title to the bricks. Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454; Baker *v.* Meisch, 29 Nebr. 227, 45 N. W. 685.

Converting timber into hoops was held to have so changed the value of the timber as to give the operator title to the hoops, where the timber was worth but twenty-five dollars, and the hoops worth seven hundred dollars. Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

There was no such increase in value as to deprive the original owner of his property where a new wooden stock and an over-action lock were added to a rifle which formerly consisted of a pistol stock with a metallic skeleton stock and an under-action lock. Comins *v.* Newton, 10 Allen (Mass.) 518.

10. *Connecticut.*— Swift *v.* Barnum, 23 Conn. 523.

Indiana.— Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367.

Iowa.— Clement *v.* Duffy, 54 Iowa 632, 7 N. W. 85.

Maine.— Cushing *v.* Longfellow, 26 Me. 306.

Michigan.— Winchester *v.* Craig, 33 Mich. 205.

rule does not apply where the labor has not destroyed its identity, converted it into something substantially different, or essentially enhanced its value.[11]

2. WILFUL TRESPASSER. Under the civil law a trespasser who wilfully and maliciously took the property of another and changed its form or increased its value acquired no title thereto, on the theory that he would not be permitted to derive any benefit from his own wilful and malicious acts.[12] This rule has been generally adopted by the courts of this country in cases where it can be shown that the article in question was made from the property or materials so taken; and the original owner may reclaim it without any allowance to the trespasser for the value of the time, money, labor, or materials he has expended thereon.[13]

B. As to Manufactured Articles — 1. WHERE OWNER FURNISHED MATERIALS. Where property or materials out of which an article is to be made are furnished by the person for whom it is to be made, title to the finished article is in him.[14]

2. WHERE MANUFACTURER ADDED MATERIALS. Where, however, other property or materials are added by the manufacturer, the proportion which they bear to the original property or materials governs in determining the title to the finished article. If the bulk of the property or materials is furnished by the manufac-

Mississippi.— Heard *v.* James, 49 Miss. 236.

New York.— Hyde *v.* Cookson, 21 Barb. (N. Y.) 92.

Pennsylvania.— Herdic *v.* Young, 55 Pa. St. 176, 93 Am. Dec. 739.

Wisconsin.— Hungerford *v.* Redford, 29 Wis. 345; Single *v.* Schneider, 24 Wis. 299; Weymouth *v.* Chicago, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763.

United States.— Aborn *v.* Mason, 14 Blatchf. (U. S.) 405, 1 Fed. Cas. No. 19.

Contra, see Gates *v.* Rifle Boom Co., 70 Mich. 309, and Busch *v.* Fisher, 89 Mich. 192, in which it was held that a trespasser, however innocent, acquired no lien on logs cut from the land of another for the value of the labor and the expense of such cutting.

In Moody *v.* Whitney, 38 Me. 174, 61 Am. Dec. 239, which was an action to recover the value of timber wrongfully taken and converted into logs, and hauled to a stream preparatory to floating them, it was held that, the possession of the trespasser having been uninterrupted from the time of the conversion of the timber to the time of its seizure, the owner of the timber could recover only the value thereof when first cut, and not its value at the place where the logs had been hauled preparatory to floating.

11. Isle Royale Min. Co. *v.* Hertin, 37 Mich. 332, 26 Am. Rep. 520.

12. 1 Bell Comm. 277; Civ. L. Dig. lib. 10, tit. 4, c. 12, § 3; Puff. b. 4, c. 7, § 10; Wood Inst. Civ. L. 92.

13. *Alabama.*— Riddle *v.* Driver, 12 Ala. 590.

Arkansas.— Brock *v.* Smith, 14 Ark. 431.

Illinois.— Davis *v.* Easley, 13 Ill. 192.

Indiana.— Ricketts *v.* Dorrel, 55 Ind. 470.

Iowa.— Murphy *v.* Sioux City, etc., R. Co., 55 Iowa 473, 8 N. W. 320, 39 Am. Rep. 175; Clement *v.* Duffy, 54 Iowa 632, 7 N. W. 85.

Kentucky.— Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251; Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454.

Massachusetts.— Peirce *v.* Goddard, 22 Pick. (Mass.) 559, 33 Am. Dec. 764.

Michigan.— Isle Royale Min. Co. *v.* Hertin, 37 Mich. 332, 26 Am. Rep. 520; Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

Minnesota.— Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491.

Mississippi.— Heard *v.* James, 49 Miss. 236.

Nebraska.— Baker *v.* Meisch, 29 Nebr. 227, 45 N. W. 685.

New York.— Chandler *v.* Edson, 9 Johns. (N. Y.) 362; Curtis *v.* Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204; Betts *v.* Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; Brown *v.* Sax, 7 Cow. (N. Y.) 95; Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307 [*reversing* 6 Hill (N. Y.) 425, 4 Den. (N. Y.) 332]; Baker *v.* Wheeler, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; Firmin *v.* Firmin, 9 Hun (N. Y.) 571; Hyde *v.* Cookson, 21 Barb. (N. Y.) 92; Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473; Levy *v.* Barnett, 60 N. Y. Suppl. 991.

North Carolina.— Worth *v.* Northam, 26 N. C. 102.

Pennsylvania.— Snyder *v.* Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466.

Texas.— Missouri, etc., R. Co. *v.* Starr, 22 Tex. Civ. App. 353, 55 S. W. 393.

Wisconsin.— Weymouth *v.* Chicago, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763.

United States.— E. E. Bolles Wooden-ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230.

14. *Connecticut.*— Swift *v.* Barnum, 23 Conn. 523.

Maine.— Eaton *v.* Munroe, 52 Me. 63.

Massachusetts.— Putnam *v.* Cushing, 10 Gray (Mass.) 334; Eaton *v.* Lynde, 15 Mass. 242.

New York.— Pierce *v.* Schenck, 3 Hill (N. Y.) 28; Gregory *v.* Stryker, 2 Den. (N. Y.) 628; Babcock *v.* Gill, 10 Johns. (N. Y.) 287; Foster *v.* Pettibone, 7 N. Y. 433, 57 Am. Dec. 530.

North Carolina.— Worth *v.* Northam, 26 N. C. 102.

Vermont.— Gallup *v.* Josselyn, 7 Vt. 334.

United States.— Aborn *v.* Mason, 14 Blatchf. (U. S.) 405, 1 Fed. Cas. No. 19.

turer, he acquires title to the finished article; but if it is furnished by the person for whom the article is to be made, the title is in such person. The disposition of the title to the property in this manner is based on the theory that the smaller quantity, being merely accessory to the larger, becomes a part thereof by accession.[15]

C. As to Repairs. Ordinary repairs upon a personal chattel become a part thereof by accession,[16] and this rule has been held to apply even where the value of the repairs greatly exceeds the value of the original article,[17] but if they are separable, and easily capable of being distinguished from the article to which they have been added, the rule is otherwise.[18]

III. TITLE OF PURCHASER.

The purchaser of property which has been taken by a trespasser, and changed in form or added to in value, acquires no title thereto as against the original owner, where its identity can be traced or ascertained. This rule is applicable even to the case of a *bona fide* purchaser, and is based on the theory that, the trespasser having no title to give, the purchaser acquires none.[19] But it has been held that if chattels wrongfully taken are innocently purchased by a third person, and by him converted into something else, thereby enhancing their value and destroying their identity, the original owner cannot reclaim them.[20]

ACCESSORIUM. An accessory thing; an incident.[1]

ACCESSORIUM NON DUCIT, SED SEQUITUR, SUUM PRINCIPALE. A maxim meaning "the incident does not draw, but follows, its principal."[2]

15. *Kansas.*— Arnott *v.* Kansas Pac. R. Co., 19 Kan. 95.

Maine.— Pulcifer *v.* Page, 32 Me. 404, 54 Am. Dec. 582.

Massachusetts.— Stevens *v.* Briggs, 5 Pick. (Mass.) 177; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680.

New York.— Mack *v.* Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534; McConihe *v.* New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Hyde *v.* Cookson, 21 Barb. (N. Y.) 92; Gregory *v.* Stryker, 2 Den. (N. Y.) 628; Merritt *v.* Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289.

North Carolina.— Worth *v.* Northam, 26 N. C. 102.

Pennsylvania.— Coursin's Appeal, 79 Pa. St. 220.

Tennessee.— Dunn *v.* Oneal, 1 Sneed (Tenn.) 106, 60 Am. Dec. 140.

16. Clark *v.* Wells, 45 Vt. 4, 12 Am. Rep. 187.

New sails to replace old.— In Southworth *v.* Isham, 3 Sandf. (N. Y.) 448, it was held that new sails replacing old were in the nature of repairs and became part of the vessel by accession.

Repairs on rolling-stock of a railroad were held, in Hamlin *v.* Jerrard, 72 Me. 62, to become a part of the rolling-stock by accession.

Repairs on vessel.— In Coursin's Appeal, 79 Pa. St. 220, it was held that where one repaired his vessel with the materials of another he acquired title thereto by accession, but that if he built his vessel, from the keel up, from the materials of another, the title thereto passed to the owner of the materials, following the civil-law maxim *proprietas totius navis carinæ causam sequitur.*

Repairs on a rifle.— Where a new wooden stock and an over-action lock were added to a rifle in the form of a pistol stock with a metallic skeleton stock and an under-action lock, they were considered as repairs and held to become a part of the rifle. Comins *v.* Newton, 10 Allen (Mass.) 518.

17. Gregory *v.* Stryker, 2 Den. (N. Y.) 628.

18. Fowler *v.* Hoffman, 31 Mich. 215; Clark *v.* Wells, 45 Vt. 4, 12 Am. Rep. 187.

19. *Arkansas.*— McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210.

Kentucky.— Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251.

Maine.— Freeman *v.* Underwood, 66 Me. 229.

Minnesota.— Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491.

New York.— Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473.

Texas.— Missouri, etc., R. Co. *v.* Starr, 22 Tex. Civ. App. 353, 55 S. W. 393.

United States.— E. E. Bolles Wooden-ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230.

Contra, see Lake Shore, etc., R. Co. *v.* Hutchins, 32 Ohio St. 571; Single *v.* Schneider, 30 Wis. 570.

20. Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653; Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

1. Burrill L. Dict.

2. Burrill L. Dict.

Applied in 2 Bl. Comm. 176; Coke Litt. 152*a*; Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654, 656; Cooper *v.* Newland, 17 Abb. Pr. (N. Y.) 342, 344.

ACCESSORIUM NON TRAHIT PRINCIPALE. A maxim meaning "the accessory does not draw the principal." [3]

ACCESSORIUM SEQUITUR NATURAM REI CUI ACCEDIT. A maxim meaning "the accessory follows the nature of the thing to which it relates." [4]

ACCESSORIUM SEQUITUR PRINCIPALE. A maxim meaning "the accessory follows its principal." [5]

ACCESSORIUS. An accessary. [6]

ACCESSORIUS SEQUITUR NATURAM SUI PRINCIPALIS. A maxim meaning "an accessary follows the nature of his principal." [7]

ACCESSORIUS SEQUITUR PRINCIPALEM. A maxim meaning "an accessary follows [depends upon] his principal." [8]

ACCESSORY. As an adjective the word "accessory" means "appurtenant," "belonging to," "incident." [9] As a noun it signifies the incident or thing appurtenant. [10] (Accessory in Criminal Law, see CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.)

ACCESSORY TO ADULTERY. A phrase used in the law of divorce to describe one who directly commands, advises, or procures the commission of adultery. [11]

ACCIDENT. In its most commonly accepted meaning the word "accident" denotes an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency. [12] But accidents (cognizable in actions at law, and distinguished from those peculiarly regarded in

3. Adams Gloss.

Applied in Battle *v.* Coit, 26 N. Y. 404, 406.

4. Stimson L. Gloss.

5. Adams Gloss.

Applied in Turnbull *v.* Cowan, 6 Bell Sc. App. 222; Harding *v.* Pollock, 6 Bing. 25, 63.

In Marshall *v.* Moseley, 21 N. Y. 280, 282, the maxim is written *accessorium sequitur naturam sui principalis*,— an accessory follows the nature of its principal.

6. Burrill L. Dict.

7. Burrill L. Dict. [*citing* 3 Coke Inst. 139].

An application of the maxim results in the proposition that an accessary cannot be guilty of a higher crime than his principal. Broom Leg. Max. 497.

8. Adams Gloss. [*citing* 4 Coke 44].

No principal, no accessary.— The maxim freely translated means that where there is no principal there can be no accessary. Burrill L. Dict.

9. Burrill L. Dict.

An accessory contract is made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgage, and pledge. La. Rev. Civ. Code (1875), art. 1771.

Accessory obligation is one incident to another or principal obligation, as the obligation of a surety. Burrill L. Dict. [*citing* Pothier Oblig. pt. 2, c. 1, § 6; Bell Dict.].

10. Burrill L. Dict.

11. Wharton L. Lex.

Distinguished from "conniver."— The term is to be distinguished from "conniver," which imports one having knowledge of the adultery but abstaining from interference. Wharton L. Lex.

12. Webster Dict.

Alabama.— Grant *v.* Moseley, 29 Ala. 302, 305.

California.— Richards *v.* Travelers' Ins. Co., 89 Cal. 170, 27 Pac. 762, 23 Am. St. Rep. 455.

Indiana.— Supreme Council, etc., *v.* Garrigus, 104 Ind. 133, 140, 3 N. E. 818, 54 Am. Rep. 298; Newman *v.* Railway Officials', etc., Acc. Assoc., 15 Ind. App. 29, 42 N. E. 650.

Iowa.— Feder *v.* Iowa State Traveling Men's Assoc., 107 Iowa 538, 78 N. W. 252, 70 Am. St. Rep. 212, 43 L. R. A. 693.

Louisiana.— Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 640, 21 So. 721.

Maryland.— Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310.

Mississippi.— Fidelity, etc., Co. *v.* Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206.

Missouri.— Lovelace *v.* Travelers' Protective Assoc., 126 Mo. 104, 28 S. W. 877, 47 Am. St. Rep. 638, 30 L. R. A. 209; Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 537, 21 S. W. 214.

Nebraska.— Railway Officials', etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

North Carolina.— State *v.* Lewis, 107 N. C. 967, 978, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; Crutchfield *v.* Richmond, etc., R. Co., 76 N. C. 320, 322.

Pennsylvania.— North American L., etc., Ins. Co. *v.* Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212.

Wisconsin.— Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157.

"In the more popular and common acceptation of the word, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." Withey, J., in Ripley *v.* Railway Passengers' Assur. Co., 20 Fed. Cas. No. 11,854, 2 Big. Ins. Cas. 738.

equitable proceedings) resulting from lawful acts differ in character, and the distinctions and the right use of terms to characterize them have not always been sufficiently appreciated or regarded.[13] Bearing in mind these differences, "accident" may be defined to be an event happening unexpectedly, from the uncontrollable operations of nature alone, and without human agency;[14] or an event resulting undesignedly and unexpectedly from human agency alone;[15] or from the joint operation of both.[16] Whatever may be the difficulties, however, of giving a definition of universal application, it may safely be said that in accident some violence, casualty, or *vis major* is necessarily involved;[17] and the fact that the negligence of the person injured contributed to produce the result will not make it any less an accident.[18] (Accident: Action for Injuries Resulting from, see

13. Morris *v.* Platt, 32 Conn. 75, 85.

14. Morris *v.* Platt, 32 Conn. 75, 85; Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; McGlinchey *v.* Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190.

Inevitable accident.— In this class are included all accidents which are inevitable, or absolutely unavoidable, because effected or influenced by the uncontrollable operation of nature. Morris *v.* Platt, 32 Conn. 75, 85. As the killing of a person by lightning. Here the elementary properties of lightning and its flash are not caused or controlled by human agency; but the fact that the person was struck by unintentionally placing himself within its range is, as to him, accident. Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

In Brown *v.* Kendall, 6 Cush. (Mass.) 292, 296, Shaw, C. J., said: "To make an accident, or casualty, or as the law sometimes states it, 'inevitable accident,' it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

To the same effect see Dygert *v.* Bradley, 8 Wend. (N. Y.) 469, 473.

15. Morris *v.* Platt, 32 Conn. 75, 85; Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; McGlinchey *v.* Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190.

Unavoidable under circumstances.— In this class are included those accidents which result from human agency alone, but were unavoidable under the circumstances. Morris *v.* Platt, 32 Conn. 75, 85. These may be further divided into four classes, to wit:

Accident to person by own agency.— As where one is walking or running and accidentally falls and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it; the fall was therefore accidental. Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

Accident through involuntary agency of third person.— As where one, standing on a scaffold, unintentionally lets a brick fall from his hand, and it strikes a person below. Here the dropping of the brick, as it was not intended by the former and was unforeseen by the latter, is, in the broadest sense, an accident. Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484. See also State *v.* Lewis, 107 N. C. 967, 978, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105.

Accident through intentional agency of third person.— As where one intentionally fires a gun in the air and accidentally shoots another person. Here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun, the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional; but as to the person shot, it was by purely accidental means. Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

Accident through intentional injury by third person.— As where one person intentionally injures another, which was not the result of a rencounter or the misconduct of the latter, but was unforeseen by him. Such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is, as to him, accidental, although inflicted intentionally by the other party. Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

16. Morris *v.* Platt, 32 Conn. 75, 85.

Avoidable accident.— In this class are included those accidents which are avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Morris *v.* Platt, 32 Conn. 75, 85.

17. Sinclair *v.* Maritime Passengers' Assur. Co., 3 E. & E. 478, 107 E. C. L. 478 [*cited* in Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157].

Misfortunes in business are not accidents. Langdon *v.* Bowen, 46 Vt. 512, 516.

18. McCarty *v.* New York, etc., R. Co., 30 Pa. St. 247, 251, where the court said: "If accident and negligence be not opposites, we cannot regard them as identical, without confounding cause and effect. Accident, and its

NEGLIGENCE. As Ground for Equitable Jurisdiction, see EQUITY. As Ground for New Trial, see NEW TRIAL. In Admiralty, see COLLISION. Insurance Against, see ACCIDENT INSURANCE. See also ACT OF GOD.)

ACCIDENTAL. Happening by chance or unexpectedly; taking place not according to the usual course of things; casual; fortuitous.[19]

synonyms casualty and misfortune, may proceed or result from negligence, or other cause known, or unknown."

Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 29, 1 Am. Rep. 157, where it was said: "But the position most strongly urged by the respondent's counsel in this court, was, that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word 'accident,' which has never been established, either in law or common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus, men are injured by the careless use of fire-arms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterward that a little greater care on their part would have prevented it. Yet such injuries, having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers, under the heading, 'accidents through carelessness.' There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result."

19. North American L., etc., Ins. Co. *v.* Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212 [*citing* Webster Dict.]; U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 121, 9 S. Ct. 755, 33 L. ed. 60.

Happening from cause not apparent.— "Where an event takes place, the real cause of which can not be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental." Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404, 411, 14 N. E. 391, 2 Am. St. Rep. 193.

Not happening from negligence.— "It is true that, in strictness, the word accidental may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters." Filliter *v.* Phippard, 11 Q. B. 347, 357, 63 E. C. L. 347 [*cited* in Read *v.* Pennsylvania R. Co., 44 N. J. L. 280].

ACCIDENT INSURANCE

EDITED BY THOMAS A. MORAN

CROSS-REFERENCES

For Indemnity against Loss Occasioned by:
Breakage of Plate Glass, see PLATE-GLASS INSURANCE.
Death of Animals Due to Disease or Accident, see LIVE-STOCK INSURANCE.
Defective Titles, Liens, or Encumbrances, see TITLE INSURANCE.
Default or Dishonesty of Employees, see FIDELITY AND GUARANTY INSURANCE.
Explosions of Boilers, see BOILER INSURANCE.
Failure to Make Prompt Payment of Rent, see RENT INSURANCE.
Fire, see FIRE INSURANCE.
Hail, see HAIL INSURANCE.
Injury or Death of Employees in Service, by Reason of Employers' Liability Therefor, see EMPLOYERS' LIABILITY INSURANCE.
Insolvency of Debtors, see CREDIT INSURANCE.
Lightning, see LIGHTNING INSURANCE.
Perils of the Sea, see MARINE INSURANCE.
Winds, Cyclones, or Tornadoes, see CYCLONE INSURANCE.

For Matters Relating to :
Insurance, Generally, see INSURANCE.
Life Insurance, see LIFE INSURANCE.
Lloyd's Insurance, see LLOYD'S INSURANCE.
Mutual Insurance, see MUTUAL INSURANCE.
For Reformation of Policy, see REFORMATION OF INSTRUMENTS.

I. DEFINITION.

Accident insurance is a contract to pay a fixed sum in case of death resulting from accident, either generally, or limited to accidents of a particular kind. The policy also usually provides for payment of a fixed weekly sum during incapacity caused by an accidental injury.[1]

II. ANALOGY TO OTHER KINDS OF INSURANCE.

By the general weight of authority accident insurance is considered as being akin to life insurance; and essentially the same principles underlie, and the same rules govern, both life and accident insurance.[2]

III. POWER OF INSURER TO INSURE.

A. In General. A corporation chartered for the purpose of publishing a newspaper has no franchise to insure against accidents.[3]

B. Limitations of Power. An accident-insurance company which is restricted by law to the issuance of certain classes of policies has no power to issue policies covering any other kind of insurance.[4]

1. Rapalje & L. L. Dict.
Other definitions may be found in Com. *v.* Wetherbee, 105 Mass. 149; Logan *v.* Fidelity, etc., Co., 146 Mo. 114, 47 S. W. 948; English L. Dict.

2. Bouvier L. Dict.; Brown L. Dict.; Logan *v.* Fidelity, etc., Co., 146 Mo. 114, 47 S. W. 948.
Analogy to life insurance.— In Logan *v.* Fidelity, etc., Co., 146 Mo. 114, 124, 47 S. W. 948, the court, in determining the application of Mo. Rev. Stat. (1889), § 5855, to accident policies, says: "Neither the enlarged provisions covering death from the usual as well as the unusual or accidental causes, as in the ordinary life policy, nor the restricted provisions as in some accident policies, covering liability for death alone from accidental causes, nor the insertion of an indemnity clause, in case of disability, in an accident policy covering death from external, violent, or accidental means, in any wise affect the nature or construction of the provisions which are common to all the policies . . . An examination of the various schemes of accident and life insurance must convince any one that although there are differences, in the results sought, of accomplishment in some particulars, there are many requirements and provisions in common to both, and that the only substantial difference between the two plans of insurance on life is that in the accident contract death must result from a more limited number of causes than is covered by the other and broader contract of insurance on life, called 'life-insurance contracts.'" See also, generally, LIFE INSURANCE.
Analogy to fire insurance.— In 7 Am. L. Rev. 587, the writer of an article on accident insurance says that it is more analogous to fire insurance than to any other branch of insurance, for the reason that it is a contract for indemnity, except in case of death. See also Niblack Ben. Soc. & Acc. Ins. § 363; and, generally, FIRE INSURANCE.

3. Com. *v.* Philadelphia Inquirer, 15 Pa. Co. Ct. 463, 3 Pa. Dist. 742.

4. Atty.-Gen. *v.* Bay State Beneficiary Assoc., 171 Mass. 455, 50 N. E. 929; Atty.-Gen. *v.* Berkshire Health, etc., Assoc., 171 Mass. 458 note, 50 N. E. 930 [*construing* Mass. Stat. (1890), c. 421, § 1]. In Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765, it was held that an accident-insurance company, organized under a statute limiting its powers to insurance against injuries while traveling, had no power to insure against injuries incurred in any other manner; and that a policy issued in excess of its power was void, although broad enough to cover the injury which it purported to insure against. But it was also held that where the act creating such company had been amended so as to permit it to insure against disabilities resulting from sickness or disease, or from other bodily infirmity, it had power to issue policies covering injuries resulting from external, violent, and accidental means; and that the company could not contend that it had no such power because of the fact that it had not accepted the amendment as provided for by the creative act, that is, to accept in some manner the amendment or wind up its business, when it had done neither.

IV. AGENTS.

A. General Principle as to Substitution. The general principle in the law of agency, that where an authority is conferred requiring skill or discretion on the part of the agent, and no power of substitution is given, the agent must act in person,[5] has no application to the responsibility of an accident-insurance company for the acts of its subagent.[6]

B. Whether Agent for Insurer or Insured — 1. Provision in Application. A provision in the application, that "the agent securing the application shall be deemed the agent of the applicant only," applies only to such an agent as can be the agent of the applicant.[7]

2. Authority — a. How Shown. An agency for the insurer may be shown by the acts of the person claimed to have acted as agent, and by the acquiescence in and acceptance of such acts, or the benefits accruing therefrom, by the insurer.[8]

b. Limitations. A limitation of the agent's authority, of which insured has no notice, is not binding upon him.[9]

3. Knowledge of Agent Knowledge of Insurer. Actual knowledge of an agent is constructive knowledge of the insurer.[10]

V. INSURABLE INTEREST.

A. In General. Every person has an insurable interest in his own life.[11]

5. See, generally, PRINCIPAL AND AGENT.

6. Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221, holding that where a subagent of such a company sells an accident-insurance ticket, the contract is that of the company.

7. Bushaw *v.* Women's Mut. Ins., etc., Co., 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 423, holding that this provision will apply to an insurance broker or soliciting agent, but not to an agent of the company.

8. Thus in Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878, it was held that where a certain person, who was in the office of the general manager of the company and had charge of the claim of insured, wrote to the company with reference to the matter, signing the name of the manager, adding his own initials, and the company replied to the manager, and this person received the letter and communicated to the insured the contents thereof, consisting of a denial of full liability under the claim, the authority of such person to act for the company was sufficiently established.

One who has ceased to be the regular agent of the insurer, but continues to solicit and take renewals from persons whom he had previously insured, taking a commission from the premiums paid, the insurer accepting the renewals, will be deemed the agent of the insurer and not of the insured. Back *v.* Employers' Liability Assur. Corp., 93 Fed. 930.

Relationship and circumstances.— Where insured was injured and rendered utterly helpless in a strange and distant country, with no relation near him except his brother, and it was important that the business in relation to the insurance should be settled before removing insured to his home, it was held that the agency of his brother to act for him in relation to all matters connected with the insurance would be implied. Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

A special adjuster, when occupying the office and performing the duties of a chief adjuster, comes within the scope of his apparent authority in contracting to pay the policy on certain conditions, notwithstanding secret limitations to the contrary. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

9. Travelers' Ins. Co. *v.* Ebert, (Ky. 1898) 47 S. W. 865, 866. In this case an accident-insurance ticket was issued to a woman, pursuant to an oral contract with the agent to insure her against loss of time, the ticket being paid for at the rate of such insurance. The ticket stipulated for an indemnity both for loss of time and for death, but contained this clause: "Except that this ticket insures females against death only." It was held that the company was bound for the indemnity for loss of time by accident.

Secret instructions to an agent will not bind the insured who has no knowledge of such instructions. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

10. Follette *v.* U. S. Mutual Acc. Assoc., 110 N. C. 377, 14 S. E. 923; Back *v.* Employers' Liability Assur. Corp., 93 Fed. 930; New York Acc. Ins. Co. *v.* Clayton, 59 Fed. 559, 19 U. S. App. 304, 8 C. C. A. 213; Pac. Mut. L. Ins. Co. *v.* Snowden, 58 Fed. 342, 12 U. S. App. 704, 7 C. C. A. 264; Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 19 U. S. App. 266, 7 C. C. A. 444, 22 L. R. A. 325.

11. Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236; Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668; Tucker *v.* Mutual Ben. L. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505,—holding that, having such an insurable interest, one may take out an accident policy payable to any person he may name therein as beneficiary.

B. As between Husband and Wife. One living with a person as his wife, though she is not such, has an insurable interest in him;[12] but a statute creating an insurable interest in the "life" of a person in favor of his wife has been held to have no application to accident insurance.[13]

C. As between Parent and Child. Under 14 Geo. III, c. 48, § 1, it seems that a son has no insurable interest in the life of his father.[14]

VI. Change of Beneficiaries.

The insured may, with the consent of the insurer, substitute a new beneficiary for the one originally designated in the policy.[15]

VII. Commencement and Duration of Risk.

A. Commencement — 1. Before Issuance and Delivery of Policy — a. In General. The contract of insurance having been agreed upon, the execution and delivery of the policy is not essential to its taking effect, in the absence of an express stipulation to the contrary in the contract.[16]

b. After Acceptance of Application. Generally the contract of insurance is complete when the application is accepted and credit given for the premium,[17] and any act on the part of the insurer which leads the applicant to believe that his application has been accepted, in consequence of which he neglects to take out other insurance, will be deemed sufficient;[18] but mere intention to accept is not sufficient.[19]

12. Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040. *Compare* Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

13. Steinhausen *v.* Preferred Mut. Acc. Assoc., 59 Hun (N. Y.) 336, 13 N. Y. Suppl. 36 [*construing* N. Y. Laws (1840), c. 80].

14. This statute provided that no insurance should be made on lives or any other event wherein the person for whose benefit the policy was made should have no beneficial interest. In Shilling *v.* Accidental Death Ins. Co., 1 F. & F. 116, construing this statute, it was held that a son could not insure the life of his father against accident.

15. Hoffman *v.* Manufacturers' Acc. Indemnity Co., 56 Mo. App. 301; Steinhausen *v.* Preferred Mut. Acc. Assoc., 59 Hun (N. Y.) 336, 13 N. Y. Suppl. 36; Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825,— assigning as a reason for this rule the fact that the beneficiary has at most only an inchoate interest in the policy.

16. Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986.

An oral agreement for present insurance, made by an agent of the insurer, has been held to be a binding contract at once, and the insurer is liable thereon, although the application contains a provision, unknown to the applicant, that the insurer incurs no liability prior to the receipt and acceptance of the application and membership fee by its designated officer, and the policy subsequently issued bears date later than the oral agreement, since the applicant relies on the oral agreement between himself and the agent, who, under the statutory provision, was presumed to have the power to make such agreement. Mathers *v.* Union Mut. Acc. Assoc., 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83 [*construing* Wis. Rev. Stat. (1898) § 1977, relating to general agent of insurance companies]. But *compare* Fowler *v.* Preferred Acc. Ins. Co., 100 Ga. 330, 28 S. E. 398, cited *infra*, note 20.

17. Dailey *v.* Preferred Masonic Mut. Acc. Assoc., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

Provision for acceptance by general manager.— Where the application, which was expressly made a part of the policy, stated that the insured was not to be liable until the receipt and acceptance of the application and membership fee by the general manager of the insurer, it was held that the contract was not complete until such acceptance, and the insurer was not estopped to deny its liability for a death occurring prior to such acceptance merely because it had received the application and retained the membership fee. Coker *v.* Atlas Acc. Ins. Co., (Tex. Civ. App. 1895) 31 S. W. 703.

18. So held in a case where an insurance company received and accepted an application for insurance, though not in the usual and formal way, and received and retained the cash premium accompanying the application, but delayed the issuance of the policy to the applicant until an accounting could be had with its agent in respect to the premium; and in the meantime another agent of the company, whose duty it would have been to receive the policy if issued, and deliver it to the insured or to receive back from the company the premium paid upon the application in case it was rejected, and to return it to the applicant, informed him that his application had been accepted and that a policy would presently be issued to him; and such applicant relied upon such statements, and, because thereof, failed to take out other insurance. Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986.

19. Allen *v.* Massachusetts Mut. Acc. Assoc., 167 Mass. 18, 44 N. E. 1053, the reason for the rule being that the insurer has a

2. Upon Issuance and Delivery of Policy. Where the policy provides for the payment of a certain sum on its delivery, and for the payment of a further sum without specifying when it is to be paid, the policy takes effect upon the payment of the sum required on its delivery.[20] A policy bearing a given date and insuring for the future only will not permit a recovery for a loss occurring prior to such date.[21]

B. Duration. Where the policy insured against accidents for twelve calendar months from a certain date, the effect of the word "from" is to exclude the date of the policy from the period of insurance.[22]

VIII. Payment of Premiums and Assessments.

A. In General — 1. May Be Regulated in Policy. The payment of premiums may be regulated by express provision in the policy.[23]

2. Diligence Required of Insured. Insured should exercise diligence to pay premiums when due.[24]

right to change its intention and refuse to accept the application or issue a policy thereon.

20. Bushaw *v.* Women's Mut. Ins., etc., Co., 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 423.

Thus a mere verbal assurance by an agent of the insurer, made to the applicant, to the effect that he is insured from the date of his application, coupled with a receipt purporting to be for the first quarterly premium, will not constitute a contract of insurance on which an action can be maintained, where the application states that the basis of the contract between the insurer and the applicant shall be the application and a premium paid by the applicant; that no statements made by the solicitor of the application shall bind the insurer unless written on the application; that the application shall not be binding on the insurer unless accepted by its secretary; and that the policy shall not be in force until actually issued from the home office of the insurer,— since the verbal assurance made by the agent becomes merged in the written agreement, which in this case is the application. Fowler *v.* Preferred Acc. Ins. Co., 100 Ga. 330, 28 S. E. 398. But *compare* Mathers *v.* Union Mut. Acc. Assoc., 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83, cited *supra*, note 16.

21. Fowler *v.* Preferred Acc. Ins. Co., 100 Ga. 330, 28 S. E. 398.

Relating back.— In Gordon *v.* U. S. Casualty Co., (Tenn. Ch. 1899) 54 S. W. 98, where an indorsement on the back of the policy stated that the insurance was to take effect on a certain date, and the policy itself contained a provision that it was to take effect on the same date, but contained a further provision that it was not to take effect until issued and delivered, it was held that the contract became complete only upon its issuance and delivery, but that, having once been delivered, it would relate back to the particular date mentioned in the indorsement and policy, and where an injury was received subsequent to such date, but before the delivery of the policy, a liability arose.

In Rogers *v.* Equitable Mut. L., etc., Assoc., 103 Iowa 337, 72 N. W. 538, it was held that where the agent of a mutual accident company had no authority to accept memberships, and was required to send all applications therefor to the company for acceptance, the acceptance of the application and issuance of a certificate by the company did not make such certificate relate back to the time when the application was made to the agent, in the absence of anything in the application binding the company in the meantime; and in case of an injury to the applicant after the application has been made, but before the issuance of the certificate, the company was not liable therefor, although the application was made a part of the certificate.

22. South Staffordshire Tramways Co. *v.* Sickness, etc., Assur. Assoc., [1891] 1 Q. B. 402.

23. Simpson *v.* Accidental Death Ins. Co., 2 C. B. N. S. 257, 89 E. C. L. 257, 3 Jur. N. S. 1079, where, by the terms of the policy, the insurer was given the option of accepting or refusing premiums after a certain time.

24. Cronkhite *v.* Accident Ins. Co. of North America, 35 Fed. 26.

Delegation of performance of duty to another.— The general agent, upon issuing a policy to the insured, gave him until a certain time to pay the premium. On that day, in company with the soliciting agent, who had conducted the negotiations and was authorized to collect the premium, insured went to the general agent's office to make the payment, but was informed by the person who had acted as general agent at the time the policy was issued that he was no longer such agent, and that his successor was absent. Thereupon insured and the soliciting agent went out, the latter promising insured that he would return in the afternoon, pay the premium, and look to insured for the same. The soliciting agent did call at the office of the general agent two or three times during that afternoon, but was unable to find him and the premium was not paid. It was held that insured had not exercised sufficient diligence to avoid a forfeiture for non-payment, since at the time when the premium became due he should have paid the same to the soliciting agent, who was authorized to receive pay-

3. MADE TO AGENT. Payment of premium to a local agent, who in turn pays it over to the general agent, has been held to constitute payment to the insurer.[25]

4. NOTICE REQUIRING PAYMENT BEFORE DUE. Payment of assessment before due under the contract or by-laws cannot be required. Notice demanding such payment is unavailing as against insured.[26]

5. EFFECT OF FAILURE TO PAY. A policy cannot be avoided for non-payment of an assessment notice of which has not been given to the insured as required by the contract of insurance,[27] nor does a failure to pay an assessment within the time stipulated for its payment deprive the certificate-holder of his membership in the association, but does suspend his right to indemnity for an injury received after the assessment becomes due and before its payment.[28]

6. WAIVER OF PAYMENT. Waiver of payment of premium, as to time and manner of making, may be made by an agent who has the authority to do so.[29]

B. By Giving Notes. Where promissory notes are accepted in payment of premiums, it seems a policy cannot be avoided for non-payment of such a note, even under a provision to that effect, where the non-payment is due to the fault of the insurer rather than of the insured.[30]

C. By Giving Order on Employer[31] — 1. DUTY OF INSURED. The duty of

ment, when he found that the general agent was absent. Cronkhite *v.* Accident Ins. Co. of North America, 35 Fed. 26.

25. Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986. In this case the premium was paid to a local agent of the insurer, who forwarded it, together with the application, to the general agent, who in his turn forwarded the application to the insurer, but retained the premium. The insurer received and retained the application, awaiting a settlement with the general agent, without notifying the applicant of its reason for so doing.

26. In U. S. Mutual Acc. Assoc. *v.* Mueller, 151 Ill. 254, 37 N. E. 882, the by-laws of an accident society provided that assessments were to be paid within thirty days from the date of the notice thereof. It was held that such provision meant that assessments were to be paid within thirty days from the date of the service of the notice, and not from the date of the notice itself, and that where insured received a notice of an assessment on November 30 requiring him to pay the same December 28, he was not required to do so, but was entitled to thirty days from November 30.

27. Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 57 N. W. 1063. In this case the agreement was to the effect that the insurance should cease whenever insured should fail to make a payment of the assessment levied upon him; that a notice mailed, postage prepaid, to his last address given, should be a sufficient notification of the making of the assessment; and that one calendar month should be allowed for the payment of any such assessment. The envelope in which insured received his certificate contained a notice, indorsed thereon, that the first premium was payable Feb. 1, 1892. Assessment was made upon insured on Jan. 1, 1892, notice of which was mailed to his last address given, but was never received by him. Insured was injured on Jan. 30, 1892. The association set up the defense that the certificate had been forfeited because of a non-payment of the premium. It was held that insured, never having received the notice of the assessment of Jan. 1, 1892, was justified in assuming that the first assessment which could be made against him would become due on Feb. 1, 1892, and that he would then have thirty days from that date in which to pay such assessment.

28. National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466.

Injury received while member resulting in death while not member.— Where the certificate insures against death resulting from injuries within ninety days after the accident, the association is not relieved from liability for the death of a member who dies within ninety days after an accident because before his death he ceased to be a member by reason of a default in paying an assessment falling due after the accident. Burkheiser *v.* Mutual Acc. Assoc., 61 Fed. 816, 18 U. S. App. 704, 10 C. C. A. 94, 26 L. R. A. 112.

29. Standard Acc., etc., Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88; Kerlin *v.* National Acc. Assoc., 8 Ind. App. 628, 35 N. E. 39; Gordon *v.* U. S. Casualty Co., (Tenn. Ch. 1899) 54 S. W. 98, where it is held that a policy will be deemed to have taken effect, notwithstanding the fact that the policy itself provides that it is not to take effect until the payment of the premium, where such payment has been waived.

30. Equitable Acc. Ins. Co. *v.* Van Etten, 40 Ill. App. 232, where it appeared that it was customary to collect the notes from insured wherever he might be, and that the unpaid note was in the hands of an agent for collection, but was not presented for payment, no notice given to insured, or his attention called to the fact that it was unpaid.

31. It is customary with some companies to accept from the insured an order upon his employer, in lieu of a cash premium. See cases cited in notes *infra*, 32–40.

insured in such cases is usually fully performed if he leaves a sufficient amount in the hands of his employer to meet the instalments as they fall due.[32]

2. Duty of Insurer. It devolves upon the insurer to present the orders for payment as the instalments fall due,[33] and also to notify insured of their non-payment;[34] but notice of non-payment is not necessary where insured has drawn all his wages and left nothing in his employer's hands with which to pay the instalments,[35] and in such a case it cannot be contended that the order has been paid.[36]

3. Periods Covered by Order. Where, in such cases, it is agreed that the instalments specified in the order, payable at stated intervals, shall apply only to the payment of premiums for corresponding insurance periods, and that there shall be no liability for personal injuries occurring in any period for which the instalment shall not have been paid, no recovery can be had for an injury happening in one of the periods for which the instalment remains unpaid.[37] Nor is it incumbent on the insurer in such a case, in order to escape liability, to return the order to the insured and notify him that the contract is at an end.[38] It is the duty

32. Lyon *v.* Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354; Fidelity, etc., Co. *v.* Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206; Eury *v.* Standard L., etc., Ins. Co., 89 Tenn. 427, 14 S. W. 929, 10 L. R. A. 534.

33. Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506, holding that a failure to present an order for payment estops the insurer from setting up non-payment.

34. Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675, holding that a failure on the part of the insurer to give this notice will prevent a forfeiture for non-payment.

Mistake of employer.— In National Ben. Assoc. *v.* Jackson, 114 Ill. 533, 2 N. E. 414, this rule was held to be applicable even where the installment had not been paid through mistake on the part of the employer.

35. Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675; Landis *v.* Standard L., etc., Ins. Co., 6 Ind. App. 502, 33 N. E. 989; McMahon *v.* Travelers' Ins. Co., 77 Iowa 229, 42 N. W. 179.

But see Travelers' L., etc., Ins. Co. *v.* Cash, 14 Ind. App. 3, 42 N. E. 246. In that case the policy recited that it was issued in consideration of an order on the employer, and provided that in the case of a just claim before the first premium should be due, if the sum due insured should be less than the sum of all the payments called for by the order, it should be credited thereon, but if greater the order should be receipted in full and the balance paid to insured. Insured's wages were due from his employer on the eighteenth of the month after they had been earned; the day before the policy went into effect, but after its delivery, insured left his employer, drawing all the wages that were then due him. It was held that, notwithstanding the fact that there was no money in the hands of his former employer with which to pay the premium when due, insured was entitled to recover, since the policy contemplated the happening of a contingency whereby insured might not be entitled to enough money to pay the premium, and provided that in such an event it should be carried over.

36. McMahon *v.* Travelers' Ins. Co., 77 Iowa 229, 42 N. W. 179; Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869.

37. McMahon *v.* Travelers' Ins. Co., 77 Iowa 229, 42 N. W. 179; Bane *v.* Travelers' Ins. Co., 85 Ky. 677, 4 S. W. 787,— holding this to be the correct rule, even though at the time of the injury the insured had due him sufficient wages, subsequently earned, since the insurance covered only the periods for which instalments had been paid.

In Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869, a policy was issued in consideration of an order on insured's employer, directing the payment of a certain sum for each of four consecutive months, and reciting that the first payment made the policy good for two months, the second for four months, the third for seven months, and the fourth for twelve months from the date of the order. The policy declared that the premiums specified in the order were for the consecutive periods of two, three, and five months, and that each should apply only to its corresponding insurance period, and that the insurer would not be liable for any injuries sustained by insured during any period for which its respective premium had not been paid. It was held that the policy was not a contract of insurance for an entire period of a year, but for separate periods; that, the employer having, after making two of the payments, returned the order to the insurer with refusal of payment, stating that insured had left its employment and nothing was due him that month, the policy ceased to operate from the expiration of the periods for which premiums had been paid, and that it was immaterial that insured re-entered the employment of the employer, so that wages were due him for the next month.

38. Bane *v.* Travelers' Ins. Co., 85 Ky. 677, 4 S. W. 787; Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869,— holding that by the very terms of the contract the insurance was to cease at the end of any period if the succeeding period's premium was not paid.

of the insured, if he desires to continue the policy, to pay the instalments as they fall due, and his failure to do so terminates the liability of the company.[39]

4. Deduction of Wages without Consent of Insurer. A deduction by an employer, from the wages of an employee, of dues to an employees' relief association, has been held not to amount to an acceptance of the employee's application to become a member of the association, it not appearing that the employer had been officially notified by the association that the employee had been admitted to membership.[40]

D. Reinstatement. The receipt and retention, by the association, of an assessment remitted by a member after an accident, does not so reinstate the member as to make the certificate relate back to the time of the accident;[41] but where the policy has lapsed and the insurer writes insured that he will be reinstated if he remits a check, the reinstatement takes effect from the day insured mails his check.[42]

E. Renewals. A renewal of the policy may be effected without the actual payment of the renewal premium, where an agent, according to the usual course of business, delivers the renewal receipt to the insured.[43]

IX. The Policy in General.

A. General Rules of Interpretation — 1. Liberal Construction. As a general rule the policy should be liberally construed,[44] and the terms thereof should be understood in their plain, ordinary, and popular sense.[45]

2. Interpretation of Conditions, Exceptions, and Provisions — a. Against Insurer and in Favor of Insured. All provisions, conditions, or exceptions which in any way tend to work a forfeiture of the policy should be construed most strongly against those for whose benefit they are inserted, and most favorably toward those against whom they are meant to operate,[46] this rule being

39. Bane *v.* Travelers' Ins. Co., 85 Ky. 677, 4 S. W. 787.

40. Baltimore, etc., Employees' Relief-Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44. In this case the constitution and by-laws of the association authorized the employer to deduct dues to the association from the wages of his employees who were also members of the association.

41. National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466.

42. Colvin *v.* U. S. Mutual Acc. Assoc., 66 Hun (N. Y.) 543, 21 N. Y. Suppl. 734, holding that "remit" means to send back, and in the absence of any specific direction as to the mode of sending the check there will be implied a direction to send it in the usual way, which is by mail.

43. Fidelity, etc., Co. *v.* Willey, 80 Fed. 497, 39 U. S. App. 599, 25 C. C. A. 593 [*affirming* 77 Fed. 961], where it was held that where the insurer had forwarded to its agent a renewal receipt and had charged him with the premium represented thereby, such being the usual course of dealing, and the agent had countersigned the receipt and delivered it to the policy-holder, such charge against the agent and delivery of the policy or premium receipt to the assured might be treated as a transfer of the assured's indebtedness to the agent, and consequently a payment as between the former and the company, or as an estoppel of the company against setting up the stipulation for prepayment of the premium in avoidance of the policy; the court adding: "We are not called on to consider the reasonableness of this rule; it has become a part of the law of insurance. Companies can avoid it by avoiding the facts on which it rests, but in no other way."

44. Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474.

45. U. S. Mutual Acc. Assoc. *v.* Newman, 84 Va. 52, 3 S. E. 805.

46. *California.*— Berliner *v.* Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 66 Am. St. Rep. 49.

Illinois.— Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486; Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 25 Am. St. Rep. 664, 10 L. R. A. 383; Healey *v.* Mutual Acc. Assoc., 133 Ill. 556, 25 N. E. 52, 23 Am. St. Rep. 637, 9 L. R. A. 371.

Indiana.— Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105; McElfresh *v.* Odd Fellows Acc. Co., 21 Ind. App. 557, 52 N. E. 819.

Maine.— Young *v.* Travelers Ins. Co., 80 Me. 244, 13 Atl. 896; McGlinchey *v.* Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190.

Michigan.— Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

Missouri.— McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436; Cunningham *v.* Union Casualty, etc., Co., 82 Mo. App. 607.

applicable to purely benefit accident policies as well as to the ordinary accident policy;[47] and any provision, condition, or exception which is uncertain or ambiguous in its meaning[48] or is capable of two constructions should receive that construction which is most favorable to the insured.[49] At the same time the language of the contract should be construed as a whole and should receive a reasonable interpretation, and it should not be extended beyond what is fairly within the terms of the policy;[50] and the language of the provision, condition, or exception should, if possible, be given its legal effect.[51]

b. Effect of Judicial Construction. Where the insurer continues to issue, without change, policies, clauses of which have been judicially construed unfavorably to its contention, it will be considered as issuing them with that construction placed upon them.[52]

B. Application as Part of the Policy — 1. In General. The application of the insured usually constitutes a part of the insurance contract or policy,[53] especially where the latter contains an express provision to that effect.[54]

2. Statements in Application — a. As to Effect of Policy. Statements in the application expressing the applicant's understanding of what will be the effect of the insurance cannot control the legal construction of a policy.[55]

New York.— Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758; Neill *v.* Order of United Friends, 78 Hun (N. Y.) 255, 28 N. Y. Suppl. 928.

Vermont.— Duran *v.* Standard L., etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637.

Virginia.— Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

United States.— Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

47. Matthes *v.* Imperial Acc. Assoc., (Iowa 1900) 81 N. W. 484.

48. Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140; Cook *v.* Benefit League, 76 Minn. 382, 79 N. W. 320; Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474.

49. *Colorado.*— Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

Illinois.— Railway Officials, etc., Acc. Assoc. *v.* Coady, 80 Ill. App. 563.

Kentucky.— American Acc. Co. *v.* Reigart, 94 Ky. 547, 23 S. W. 191, 42 Am. St. Rep. 374.

Michigan.— Utter *v.* Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913.

Missouri.— Hoffman *v.* Manufacturers' Acc. Indemnity Co., 56 Mo. App. 301.

New York.— Sneck *v.* Travelers' Ins. Co., 88 Hun (N. Y.) 94, 34 N. Y. Suppl. 545; Neill *v.* Order of United Friends, 78 Hun (N. Y.) 255, 28 N. Y. Suppl. 928.

Pennsylvania.— Humphreys *v.* National Ben. Assoc., 139 Pa. St. 264, 20 Atl. 1047, 11 L. R. A. 564, 27 Wkly. Notes Cas. (Pa.) 357; Burkhard *v.* Travellers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205; Spicer *v.* Commercial Mut. Acc. Co., 16 Pa. Co. Ct. 163, 4 Pa. Dist. 271.

Clerical error.— In Commercial Travelers' Mut. Acc. Assoc. *v.* Fulton, 79 Fed. 423, 424, 45 U. S. App. 578, 24 C. C. A. 654, a clause in the policy provided that the insurance should "not extend to or cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, vertigo, somnambulism, or disease in any form, or while effected thereby." It was held, following the rule that where an ambiguity or obscurity exists it should be resolved in favor of the insured, that the word "effected," which through a clerical error had been inserted in the clause, would be construed to mean "affected," although the clause as it stood was without meaning.

50. Duran *v.* Standard L., etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637.

Thus, in Merrill *v.* Travelers' Ins. Co., 91 Wis. 329, 64 N. W. 1039, it was held that some particular operation, effect, and meaning should be given to each sentence, phrase, and word used; and, that this might fairly and properly be done, no part of the language used should be rejected as superfluous and unmeaning, and that hence the rule that where reasonably intelligent men would honestly differ as to the meaning of the policy, the doubt should be resolved against the insurer, could not be applied where the doubt would be raised by a disregard of the rule as first stated.

51. Young *v.* Travelers' Ins. Co., 80 Me. 244, 13 Atl. 896.

52. Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474.

53. Reynolds *v.* Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831.

54. Travelers Ins. Co. *v.* Lampkin, 5 Colo. App. 177, 38 Pac. 335; Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

Application annexed to or indorsed upon policy.— Where the policy contains a clause to the effect that it is issued "in consideration of the warranties and agreements contained in the application indorsed hereon," the application is "indorsed" where a copy thereof is attached to the back of the policy. Reynolds *v.* Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831.

55. Accident Ins. Co. of North America *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed.

b. As to Warranties. Statements in the application will not be construed as warranties unless the application and the policy, taken together, leave no room for any other construction.[56]

c. Estoppel to Deny. Accepting and retaining without objection a policy and the application attached thereto has been held to operate as an estoppel, against both insured and his beneficiary, from asserting that the answers of the insured were incorrectly inserted in the application without his knowledge.[57]

d. Inconsistency between Application and Policy. In case of any inconsistency between the application and the policy, the latter will control.[58]

C. By-Laws and Constitution as Part of the Policy. A by-law not made a part of the policy has no effect in determining the rights of the parties.[59] But the constitution of a fraternal association becomes a part of the contract of insurance under a stipulation to that effect in the application.[60]

D. Clauses in Blank. A policy containing blank clauses for two kinds of accident insurance, one clause of which, providing for the payment of a weekly indemnity in case of injury, is properly filled out, and the other clause of which, providing for the payment of a fixed sum in case of death, is left blank and unfilled, operates only as to the injury clause, not as to the death clause.[61]

E. Substituted Policies — 1. In General. A mistake made in the policy may be corrected by the issuance of a new policy.[62]

740 [*affirming* 27 Fed. 40]. In this case the rule stated in the text was upheld, notwithstanding the application itself warranted the facts therein stated to be true, and the policy in terms was expressed to have been made in consideration of the warranties made in the application. But *compare* Reynolds *v.* Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831, cited *infra,* note 57.

56. Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826. See also Travelers Ins. Co. *v.* Lampkin, 5 Colo. App. 177, 38 Pac. 335.

57. Reynolds *v.* Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831, stating, as a reason for this rule, that the insured in such case must be deemed to have approved of the application and accepted it as correctly stating his answers contained therein. But *compare* Accident Ins. Co. of North America *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740, cited *supra,* note 55.

58. Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530, assigning as a reason for this rule that the policy, being the later expression of the minds of the parties, and indeed the only expression of those matters upon which their minds have finally met, should control.

59. Mutual Acc., etc., Assoc. *v.* Kayser, 14 Wkly. Notes Cas. (Pa.) 86, assigning as a reason for this rule the fact that the policy in mutual accident insurance constitutes the agreement between the parties.

By-laws amended subsequently to issuance of policy.— A by-law of a benefit association in force at the time of the issuance of its policy controls, and not a by-law amended subsequent to the issuance thereof. Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 16 Utah 145, 51 Pac. 259.

In Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306, the constitution of the association, at the time the certificate was issued to insured, provided for indemnity whenever the death of a member occurred from "accidental cause." As afterward amended, the articles of incorporation and by-laws limited the indemnity to injuries effected "through or by external, violent, or accidental means." The power of the association to amend the laws was limited to matters not provided for in the constitution. Nothing in the constitution authorized the association to amend, and thereby bind a member to any change in the contract without his assent, and the amended articles did not purport to change existing contracts. It was held that the articles and by-laws as amended could not be given a retroactive effect, and the certificate was not affected by such amendment.

60. Hutchinson *v.* Supreme Tent, etc., 68 Hun (N. Y.) 355, 22 N. Y. Suppl. 801.

61. Hall *v.* American Employers Liability Ins. Co., 96 Ga. 413, 23 S. E. 10.

In Rosenberry *v.* Fidelity, etc., Co., 14 Ind. App. 625, 43 N. E. 317, the insured died within twenty-four hours after the injury. The personal representative was not even allowed to recover the entire amount of weekly indemnity to which insured would have been entitled had he lived and become totally disabled.

In Dawson *v.* Accident Ins. Co. of North America, 38 Mo. App. 355, the insured was almost instantly killed. His personal representative waited a certain number of weeks and then sued for the indemnity on the theory that insured, having been killed, was totally disabled within the meaning of the policy, and, as such, entitled to indemnity for the number of weeks mentioned therein. It was held that the action could not be maintained.

62. Ford *v.* U. S. Mutual Acc. Relief Co., 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700, where the mistake consisted of a misstatement of the occupation of insured.

2. Of New Company. Where a company issues its own policies free of charge to the policy-holders of an insolvent company, stipulations in the substituted policies, and not those in the old, will control.[63]

X. Misrepresentations in Application Avoiding Policy.

A. False Statements of Applicant. False representations material to the risk, made by an applicant in his application,[64] such as misrepresentations concerning his mental or physical condition [65] or as to his occupation [66] will avoid the

63. Brown *v.* U. S. Casualty Co., 88 Fed. 38.

64. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668, holding, however, that false representations not material to the risk will not avoid the policy.

Representations are distinguishable from warranties; the latter must be literally fulfilled, whereas the former need not be. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

65. *Indiana.*— Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105.

Michigan.—Ketcham *v.* American Mut. Acc. Assoc., 117 Mich. 521, 76 N. W. 5.

Nebraska.— Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826.

New York.— Brink *v.* Guaranty Mut. Acc. Assoc., 55 Hun (N. Y.) 606, 7 N. Y. Suppl. 847.

United States.— Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620; Bernays *v.* U. S. Mutual Acc. Assoc., 45 Fed. 455; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

Health.— In Ketcham *v.* American Mut. Acc. Assoc., 117 Mich. 521, 76 N. W. 5, the policy was avoided for misrepresentations as to applicant's health. But in Brink *v.* Guaranty Mut. Acc. Assoc., 55 Hun (N. Y.) 606, 7 N. Y. Suppl. 847, it was held that applicant had not misrepresented his physical condition by a statement to the effect that he had no disease and was not subject to fits, etc., which would render him liable to accidental injuries, several persons, who had known him for years, having testified that he was strong and robust and that they had never known him to have an ailment, notwithstanding it was also shown that he had several times been thrown from his buggy, receiving injuries and in some instances had remained unconscious for a while, and upon one occasion had fallen down without apparent cause and acted strangely.

Mental and bodily infirmities, generally.— It seems that a statement that applicant never had, and has not then, any bodily or mental infirmity, will not be construed to mean that he has always been, and is at the time of making such warranty, free from every ailment that flesh is heir to. Bernays *v.* U. S. Mutual Acc. Assoc., 45 Fed. 455.

Heart disease unknown to applicant, although existing at the time of the application, will not constitute a breach of representation that applicant "is free from bodily or mental infirmity." Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826. An anæmic murmur indicating no structural defect of the heart, but arising simply from mere temporary disability or weakened condition of the body, is not a "bodily or mental infirmity." Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620.

Near-sightedness is not a bodily infirmity within the meaning of a warranty to the effect that the applicant was not possessed of or subject to any bodily infirmity. Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

Physical injuries.— In Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105, it was held that a statement by applicant that he had never been physically injured did not mean that he had never received any physical injury, but merely that at the time of the application he was free from serious physical injury, and that any injuries which he might have sustained previously had disappeared and left no trace behind which would render him an unfit subject for accident insurance.

66. *Arkansas.*— Standard L., etc., Ins. Co. *v.* Ward, 65 Ark. 295, 45 S. W. 1065.

Illinois.— High Court, etc. *v.* Schweitzer, 70 Ill. App. 139.

New York.— Cram *v.* Equitable Acc. Assoc., 58 Hun (N. Y.) 11, 11 N. Y. Suppl. 462.

Wisconsin.— Murphey *v.* American Mut. Acc. Assoc., 90 Wis. 206, 62 N. W. 1057.

England.— Perrins *v.* Marine, etc., Ins. Soc., 2 E. & E. 317, 105 E. C. L. 317 [*affirmed* in 6 Jur. N. S. 627].

Thus statements that one's occupation was that of "an ice-dealer and proprietor of transportation company, office work only," where it appeared that he was engaged in the cattle business (Standard L., etc., Ins. Co. *v.* Ward, 65 Ark. 295, 45 S. W. 1065); or that one was "an oil producer" and his duties were those of "supervision only," whereas in fact he was a lessee of oil lands, operating several wells, and performing every part of the work himself (Cram *v.* Equitable Acc. Assoc., 58 Hun (N. Y.) 11, 11 N. Y. Suppl. 462),— constitute misrepresentations.

But in High Court, etc. *v.* Schweitzer, 70 Ill. App. 139, it was held that a statement by applicant that he was "managing a restaurant," etc., it appearing that he was employed in a restaurant as a barkeeper, was not such a misrepresentation.

Omitting to state the occupation of the applicant in an application containing a provision requiring such a statement to be made was not allowed to avoid the policy where the premium which insured paid was the same as would have been payable by him

policy. So also it has been held that false representations as to other insurance are material to the risk and will avoid the policy.[67]

B. False Statements Inserted by Agent — 1. In General. If by fraud, mistake, or inadvertence a false statement is inserted in the application by the agent, it will not have the effect of avoiding the policy.[68]

2. At the Request of Applicant. If, however, an untrue statement is inserted in the application by an agent at the request of the applicant, it constitutes a misrepresentation which will avoid the policy.[69]

C. Waiver — 1. In General. The right to avoid a policy for false representations in the application may be waived.[70]

2. Knowledge of Insurer. Knowledge of the insurer waives an omission or misrepresentation in the application,[71] and actual knowledge by an agent of the falsity of an answer to a question in the application will be imputed to the insurer.[72]

had he described his occupation and been insured as such, notwithstanding the fact that the policy contained a provision "that if any statement or allegation contained in the aforesaid declaration or proposal be untrue, or if this policy has been obtained or shall hereafter be continued through any misrepresentation, concealment, or untrue averment whatsoever, . . . then this policy shall be void." Perrins *v.* Marine, etc., Ins. Soc., 2 E. & E. 317, 318 [*affirmed* in 6 Jur. N. S. 627].

67. Union Casualty, etc., Co. *v.* Bailey, (Kan. App. 1900) 61 Pac. 452.

Misstatement as to the relationship of beneficiary to the insured is neither a warranty nor a representation material to the risk. Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105, the reason for this being that it is merely an indication of the person to whom the policy is payable.

In Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040 [*distinguishing* Travelers Ins. Co. *v.* Lampkin, 5 Colo. App. 177, 38 Pac. 335], part of the application was as follows: "Write policy payable, in case of death under the provisions of the policy, to Mrs. Lou Lampkin, whose relationship to me is that of wife." It was held that such a statement was not a warranty that the beneficiary was insured's wife, or a material representation, but a mere description of the person to whom the policy was to be paid in case of the death of insured. To the same effect is Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

68. Howe *v.* Provident Fund Soc., 7 Ind. App. 586, 34 N. E. 830; Brink *v.* Guaranty Mut. Acc. Assoc., 55 Hun (N. Y.) 606, 7 N. Y. Suppl. 847, 28 N. Y. St. 921; Wilder *v.* Preferred Mut. Acc. Assoc., 14 N. Y. St. 365; Sawyer *v.* Equitable Acc. Ins. Co., 42 Fed. 30. Thus, where the applicant, in answer to a question, states the fact fully, and the agent writes down the answer in accordance with his interpretation of the facts stated, no misrepresentation such as will avoid the policy can be said to have been made. Whitney *v.* National Masonic Acc. Assoc., 57 Minn. 472, 59 N. W. 943; Bushaw *v.* Women's Mut. Ins., etc., Co., 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 423; Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 44 U. S. App. 694, 22 C. C. A. 499.

As to age of applicant.— In Brink *v.* Guaranty Mut. Acc. Assoc., 55 Hun (N. Y.) 606, 7 N. Y. Suppl. 847, 28 N. Y. St. 921, it was held that a mistake as to the age of insured, made in writing it down after it had been correctly given, would not avoid the policy.

As to income of applicant.— In Sawyer *v.* Equitable Acc. Ins. Co., 42 Fed. 30, it was held that where, after insured had signed an application for an accident policy, the statements in which were warranted, an agent of the insurance company, without his knowledge, inserted a statement that applicant's income was not less than a hundred dollars a week, and such statement appeared in a different handwriting from the rest of the application, the company would be liable on the policy, although insured was practically insolvent and his income much less than that stated in the application.

69. Wilder *v.* Preferred Mut. Acc. Assoc., 14 N. Y. St. 365.

70. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

71. Bayley *v.* Employers' Liability Assur. Corp., 125 Cal. 345, 58 Pac. 7 [*reversing* 56 Pac. 638], where the waiver was as to a failure of applicant to state that he had received compensation for previous injuries; Emlaw *v.* Travelers' Ins. Co., 108 Mich. 554, 66 N. W. 469; Dailey *v.* Preferred Masonic Mut. Acc. Assoc., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171,— where the waiver was as to misrepresentations concerning other insurance.

72. Follette *v.* U. S. Mutual Acc. Assoc., 110 N. C. 377, 14 S. E. 923; Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500.

But see Ketcham *v.* American Mut. Acc. Assoc., 117 Mich. 521, 76 N. W. 5, where it was held that misstatements in the application as to the health of the applicant would avoid the policy, even though the agent of the insurer had knowledge thereof; and Cook *v.* Standard L., etc., Ins. Co., 84 Mich. 12, 47 N. W. 568, where, under a policy providing that none of the conditions therein could be waived by any agent of the insurer, it was

3. SUBSEQUENT PROVISION IN POLICY. A clause in the policy to the effect that, if the insured engages in other business or vocation and is injured, he will be indemnified according to a schedule of prices fixed by the rules of the insurer governing such cases, is not a waiver of the breach of warranty that the callings named in the application are the callings engaged in at the time of the making thereof.[73]

XI. ACCIDENTS AND RISKS INSURED AGAINST.

A. Accidental Injuries — 1. TERM "ACCIDENT" DEFINED. The term "accident" has been variously defined.[74]

2. "EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS." The policy usually insures only against injuries effected through "external, violent, and accidental means." Under such a provision it is not essential that the injury, but only the means which cause the injury, should be external.[75] This provision is not enlarged by an additional clause in the policy excluding modes of violent injury or death;[76] but it seems that if the cause of the injury or death can be shown to be due to accidental means it follows that such injury or death is due to external and violent means.[77]

3. WHAT ARE ACCIDENTAL INJURIES. An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means.[78] This rule has been applied to death or injuries caused by or resulting from carrying heavy baggage,[79] contact with a poisonous substance,[80]

held that the fact that an agent knew that insured's representations as to the use of intoxicants were false would not affect the right of the insurer to avoid the policy for misrepresentations.

Receipt of an unpaid premium, after death of insured, by an agent who has knowledge of facts which might be pleaded in avoidance of the policy, has been held to amount to a waiver of such defense. Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

73. Standard L., etc., Ins. Co. *v.* Ward, 65 Ark. 295, 45 S. W. 1065, wherein it was held that such a clause would operate merely as a sanction of the future pursuit of other callings than those named in the application.

74. See ACCIDENT, *ante*, p. 227.

75. So held in American Acc. Co. *v.* Reigart, 94 Ky. 547, 23 S. W. 191, 42 Am. St. Rep. 374, where it was held that the death of insured caused by the accidental lodging of a piece of meat in the windpipe was caused by external, violent, and accidental means.

76. Southard *v.* Railway Pass. Assur. Co., 34 Conn. 574, holding that the injury or death must still be caused by "violent and accidental means."

77. Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758. See also cases cited *infra*, notes 78–99, 1–9.

78. *Connecticut.*— Southard *v.* Railway Pass. Assur. Co., 34 Conn. 574.

Georgia.— Cobb *v.* Preferred Mut. Acc. Assoc., 96 Ga. 818, 22 S. E. 976.

Iowa.— Feder *v.* Iowa State Traveling Men's Assoc., 107 Iowa 538, 78 N. W. 252, 70 Am. St. Rep. 212.

Kentucky.— American Acc. Co. *v.* Carson, (Ky. 1895) 30 S. W. 879.

Mississippi.— Fidelity, etc., Co. *v.* Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206.

New York.— Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 25 N. E. 399, 20 Am. St. Rep. 748 [*reversing* 44 Hun (N. Y.) 599, 607].

United States.— Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653; Taliaferro *v.* Travelers' Protective Assoc., 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494; Dozier *v.* Fidelity, etc., Co., 46 Fed. 446, 13 L. R. A. 114.

England.— Sinclair *v.* Maritime Pass. Assur. Co., 3 E. & E. 478; Clidero *v.* Scottish Acc. Ins. Co., 29 Sc. L. Rep. 303.

79. Cobb *v.* Preferred Mut. Acc. Assoc., 96 Ga. 818, 22 S. E. 976, wherein it appears that insured, while in an emaciated and feeble condition, after safely alighting from a train, carried his baggage, weighing sixty or eighty pounds, a distance of about fifty yards, and in so doing received an injury in some way, so that soon after putting the baggage down a defect in the vision of one of his eyes became apparent, which finally resulted in a total loss of the sight of that eye, though he did not fall or receive a blow, jar, or shock of any kind, and there was nothing unusual in his manner of carrying the baggage or in his method of walking while so doing. The court said that even if the plaintiff's injury was attributable to the carrying of the baggage, it was not effected by "external, violent, or accidental means" within the meaning of the policy.

80. Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 25 N. E. 399, 20 Am. St. Rep. 748 [*reversing* 44 Hun (N. Y.) 599, 607], wherein the death of insured was caused by the infliction on a portion of the body of a putrid animal substance, producing a malignant pustule.

hanging by mob,[81] jumping from railroad car,[82] resisting arrest,[83] rupture of blood-vessel,[84] stooping,[85] sunstroke,[86] or sustained by insured while in the commission of an assault.[87]

Where, however, the effect is not the natural and probable consequence of the means which produce it,— an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of the means, or an effect which the actor did not intend to produce, and which he cannot be charged with a design of producing,— it is produced by accidental means.[88] This rule has been applied to death or injuries caused by or resulting from accidental

81. Fidelity, etc., Co. *v.* Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206.

82. Southard *v.* Railway Pass. Assur. Co., 34 Conn. 574, wherein it appeared that an internal injury was brought about by hastily jumping from a railroad car and running a considerable distance, such action having been voluntarily undertaken and nothing unforeseen, accidental, or involuntary having occurred. But see *infra,* note 97.

83. American Acc. Co. *v.* Carson, (Ky. 1895) 30 S. W. 879.

84. Feder *v.* Iowa State Traveling Men's Assoc., 107 Iowa 538, 78 N. W. 252, 70 Am. St. Rep. 212 (where the rupture was caused in an attempt to close the shutters of a window); McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682 (where the rupture was caused by using Indian clubs in the ordinary way). But see *infra,* note 99.

85. Clidero *v.* Scottish Acc. Ins. Co., 29 Sc. L. Rep. 303. In this case insured, who had just gotten out of bed, while stooping over in the act of putting on his stockings, was injured by the displacement of the colon or large intestine, causing a great distention and obstruction of the intestines, which, with the resultant pressure on the heart, caused his death. But see *infra,* note 4.

86. Dozier *v.* Fidelity, etc., Co., 46 Fed. 446, 13 L. R. A. 114; Sinclair *v.* Maritime Pass. Assur. Co., 3 E. & E. 478. But see *infra,* note 14, and *compare* Railway Official, etc., Acc. Assoc. *v.* Johnson, (Ky. 1900) 58 S. W. 694.

87. Taliaferro *v.* Travelers' Protective Assoc., 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494, where insured was shot in a quarrel in which he was the aggressor. But see *infra,* notes 2, 8.

88. *Alabama.*— Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267.

Arkansas.— Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49.

California.— Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455.

Georgia.— Atlanta Acc. Assoc. *v.* Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188.

Illinois.— Healey *v.* Mutual Acc. Assoc., 133 Ill. 556, 25 N. E. 52, 23 Am. St. Rep. 637, 9 L. R. A. 371 [*reversing* 35 Ill. App. 17]; Mutual Acc. Assoc. *v.* Tuggle, 39 Ill. App. 509.

Indiana.— Peele *v.* Provident Fund Soc., 147 Ind. 543, 44 N. E. 661.

Iowa.— Meyer *v.* Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. Rep. 374; Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485.

Kentucky.— Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; American Acc. Co. *v.* Carson, 99 Ky. 441, 36 S. W. 169, 59 Am. St. Rep. 473, 34 L. R. A. 301; Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

Maine.— McGlinchey *v.* Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190.

Michigan.— Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

Missouri.— Lovelace *v.* Travelers' Protective Assoc., 126 Mo. 104, 28 S. W. 877, 47 Am. St. Rep. 638, 30 L. R. A. 209; Collins *v.* Fidelity, etc., Co., 63 Mo. App. 253, 1 Mo. App. Rep. 773; Phelan *v.* Travelers' Ins. Co., 38 Mo. App. 640.

New Mexico.— Rodey *v.* Travelers' Ins. Co., 3 N. Mex. 316, 9 Pac. 348.

New York.— Wehle *v.* U. S. Mutual Acc. Assoc., 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598; Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758 [*affirming* 45 Hun (N. Y.) 313]; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; De Van *v.* Commercial Travelers' Mut. Acc. Assoc., 92 Hun (N. Y.) 256, 36 N. Y. Suppl. 931 [*affirmed* in 157 N. Y. 690, 51 N. E. 1090]; Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738; Tucker *v.* Mutual Ben. L. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505; Hill *v.* Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187.

Ohio.— U. S. Mutual Acc. Assoc. *v.* Hubbell, 56 Ohio St. 516, 47 N. E. 544; Interstate Casualty Co. *v.* Bird, 18 Ohio Cir. Ct. 488.

Pennsylvania.— Pickett *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661, 28 Wkly. Notes Cas. (Pa.) 456 [*distinguishing* Pollock *v.* U. S. Mutual Acc. Assoc., 102 Pa. St. 230, 48 Am. Rep. 204]; North American L., etc., Ins. Co. *v.* Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212.

Tennessee.— Union Casualty, etc., Co. *v.* Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873; Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723.

Virginia.— U. S. Mutual Acc. Assoc. *v.* Newman, 84 Va. 52, 3 S. E. 805.

United States.— Accident Ins. Co. of North America *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740 [*affirming* 27 Fed. 40]; Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653; Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825; Manu-

and unintentional taking of poison,[89] blood-poisoning,[90] blows,[91] discharge of loaded gun,[92] eating dangerous food,[93] falls,[94] fright,[95] involuntary drown-

facturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620. But see Bayless *v.* Travellers' Ins. Co., 14 Blatchf. (U. S.) 143, 2 Fed. Cas. No. 1,138.

England.— Lawrence *v.* Accidental Ins. Co., 7 Q. B. D. 216; Winspear *v.* Accident Ins. Co., 6 Q. B. D. 42; Hamlyn *v.* Crown Accidental Ins. Co., [1893] 1 Q. B. 750; Martin *v.* Travellers' Ins. Co., 1 F. & F. 505; Reynolds *v.* Accidental Ins. Co., 22 L. T. Rep. N. S. 820.

89. Healey *v.* Mutual Acc. Assoc., 133 Ill. 556, 25 N. E. 52, 23 Am. St. Rep. 637, 9 L. R. A. 371 [*reversing* 35 Ill. App. 17]; Mutual Acc. Assoc. *v.* Tuggle, 39 Ill. App. 509; Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306.

In Hill *v.* Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187, it was held that death caused by accidentally taking poison was a death caused by "accidental means," but not through "external and violent means."

Taking morphine.—In Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306, it was held that where the death of insured was caused by his taking more morphine than he intended, his death was due to an accidental cause; but that where his death was caused by his taking morphine knowing at the time how much he was taking, but not knowing that such an amount would cause death, his death was not due to an accidental cause.

Taking overdose of opiate prescribed by physician.— In Bayless *v.* Travellers' Ins. Co., 14 Blatchf. (U. S.) 143, 2 Fed. Cas. No. 1,138, it was held that death caused by an overdose of an opiate which had been prescribed for the insured by his physician for the purpose of allaying a nervous disorder was not a death effected through "external, violent, and accidental means."

90. Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 233, 40 L. R. A. 653, wherein it appears that the death was caused by blood-poisoning resulting from an abrasion of the skin on a toe, due to wearing new shoes.

91. Stout *v.* Pacific Mut. L. Ins. Co., (Cal. 1900) 62 Pac. 732; Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; Atlanta Acc. Assoc. *v.* Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; Owens *v.* Travelers' Ins. Co., (Ind. 1883) 12 Ins. L. J. 75; Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738.

Blow by third person.— See Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455, where it was held that even though it was doubtful whether the death of insured was caused by a fall or a blow given by a third person it was nevertheless caused by accidental means.

Falling of heavy weight.— In Owens *v.* Travelers' Ins. Co., (Ind. 1883) 12 Ins. L. J. 75, insured, while engaged in severe manual labor, was injured by a heavy weight falling on a very sensitive portion of the body, which resulted in his death. There was no laceration of the parts injured, his clothing having protected him at the time of the injury. It was held that the injury was accidental.

Inflammation caused by blow.— In North American L., etc., Ins. Co. *v.* Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212, insured, who formerly had been a farmer, while pitching hay in the field of a relative whom he was visiting, received an injury caused by the handle of a pitchfork, which he was using, slipping through his hand and striking him in the bowels, producing peritoneal inflammation resulting in death. It was held that the death resulted from an injury occasioned by accident.

Rupture caused by striking blow.— In Atlanta Acc. Assoc. *v.* Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188, a blacksmith, a hale and hearty man, in striking a slanting blow with a sledge-hammer, suddenly felt a severe pain in the lower part of his abdomen; the injury proved to be a rupture, producing hernia, which resulted in a few days in death. It was held that his death was caused by accidental means.

92. Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765, wherein it seems insured was shot through the wrist while cleaning a shot-gun, handling it in the usual way, and believing it to be unloaded.

93. Miller *v.* Fidelity, etc., Co., 97 Fed. 836, where it appeared that insured sustained bodily injuries by swallowing certain hard, pointed, and resistant substances of food, which accidentally, by reason of the weakened condition of his intestinal tissues, caused by an illness from which he had afterward recovered, and which weakened condition was unknown to him, so perforated and wounded the intestinal canal as to cause his death.

94. Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267; Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; Meyer *v.* Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. Rep. 374; Interstate Casualty Co. *v.* Bird, 18 Ohio Cir. Ct. 488; Lawrence *v.* Accidental Ins. Co., 7 Q. B. D. 216.

Fall due to a temporary and unexpected physical disorder.— It has been held that injury caused by a fall due to temporary and unexpected physical disorder was caused by external violence and accidental means. Meyer *v.* Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. Rep. 374; Interstate Casualty Co. *v.* Bird, 18 Ohio Cir. Ct. 488.

Falling from platform of station in fit.— In Lawrence *v.* Accidental Ins. Co., 7 Q. B. D. 216 [*following* Winspear *v.* Accident Ins. Co., 6 Q. B. D. 42], insured, while standing on the platform of a railway station, was suddenly seized with a fit and fell from the platform across the tracks, where he was run over and killed by a passing train. It was held that his death was caused by accident.

95. McGlinchey *v.* Fidelity, etc., Co., 80

ing,[96] jumping from moving train,[97] lifting,[98] rupture of blood-vessel,[99] rupture of tympanum of ear,[1] shooting,[2] sting of insect,[3] stooping,[4] strain,[5] suicide while insane,[6] unintentional inhalation of gas,[7] and injuries sustained while engaged in an affray,[8] as well as injuries inflicted by a third person without fault of insured.[9]

Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190, where death was caused by the fright incident to being run away with by a horse.

96. *Indiana.*— Peele *v.* Provident Fund Soc., 147 Ind. 543, 44 N. E. 661.

New York.— Wehle *v.* U. S. Mutual Acc. Assoc., 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; De Van *v.* Commercial Travelers Mut. Acc. Assoc., 92 Hun (N. Y.) 256, 36 N. Y. Suppl. 931 [*affirmed* in 157 N. Y. 690, 51 N. E. 1090]; Tucker *v.* Mutual Ben. L. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505.

Ohio.— U. S. Mutual Acc. Assoc. *v.* Hubbell, 56 Ohio St. 516, 47 N. E. 544.

United States.— Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620.

England.— Reynolds *v.* Accidental Ins. Co., 22 L. T. Rep. N. S. 820; Winspear *v.* Accident Ins. Co., 6 Q. B. D. 42; Trew *v.* Railway Pass. Assur. Co., 6 H. & N. 839 [*reversing* 5 H. & N. 211].

97. U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60. But see *supra*, note 82.

98. Martin *v.* Travellers' Ins. Co., 1 F. & F. 505, holding that an injury caused by lifting a heavy burden is occasioned by external causes.

99. Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49; McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682. But see *supra*, note 84.

Exercising with Indian clubs.— In McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682, it was held that where the death of insured is alleged to have occurred by reason of a rupture of a blood-vessel sustained while exercising with Indian clubs, if while engaged in such exercise there occurred any unforeseen accidental or involuntary movement of the body of insured which, in connection with the use of the clubs, brought about the injury; or if there occurred any unforeseen or unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain, or wrenching by means of which the injury was occasioned,— then such injury was due to accidental means.

Sudden wrench of the body while removing a heavy cylinder-head from an engine caused a rupture of a blood-vessel which resulted in death. This was held to be death through external, violent, and accidental means. Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49.

1. Rodey *v.* Travelers' Ins. Co., 3 N. Mex. 316, 9 Pac. 348, where a rupture of tympanum of ear was caused by diving from a plank into water six or seven feet deep.

2. Lovelace *v.* Travelers' Protective Assoc., 126 Mo. 104, 28 S. W. 877, 46 Am. St. Rep. 638, 30 L. R. A. 209; Union Casualty, etc., Co. *v.* Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873; Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723. In Lovelace *v.* Travelers' Protective Assoc., 126 Mo. 104, 28 S. W. 877, 47 Am. St. Rep. 638, 30 L. R. A. 209, death of insured was caused by being shot while attempting to put another out of the office of a hotel at which insured was a guest. In Union Casualty, etc., Co. *v.* Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873, insured was shot by a fellow employee. At the time the injury was inflicted insured was advancing upon his adversary in a threatening manner and using abusive language; he did not know that his adversary was armed. It was held that his death was accidental, because it would be presumed that insured thought that if a fight occurred it would be without the use of a deadly weapon. But see Taliaferro *v.* Travelers' Protective Assoc., 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494, cited *supra*, note 87; and *compare infra*, note 8.

3. Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413.

4. Hamlyn *v.* Crown Accidental Ins. Co., [1893] 1 Q. B. 750, where insured sustained an injury to the cartilage of his knee by a wrench in stooping forward to pick up an object from the floor. But see *supra*, note 85.

5. Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738; Ætna L. Ins. Co. *v.* Hicks, (Tex. Civ. App. 1900) 56 S. W. 87; McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682.

6. Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Accident Ins. Co. of North America *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740 [*affirming* 27 Fed. 40].

7. Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758 [*affirming* 45 Hun (N. Y.) 313]; Pickett *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661, 28 Wkly. Notes Cas. (Pa.) 456 [*distinguishing* Pollock *v.* U. S. Mutual Acc. Assoc., 102 Pa. St. 230, 48 Am. Rep. 204]; U. S. Mutual Acc. Assoc. *v.* Newman, 84 Va. 52, 3 S. E. 805; Sinclair *v.* Maritime Pass. Assur. Co., 3 E. & E. 478.

8. In Supreme Council, etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, it was contended that insured was injured while "engaged in an affray," and that therefore the injury was not accidental. It was held that the injury having occurred in Kentucky, where there is no statutory definition of an "affray," the word would be given its common-law definition, which does not involve an agreement to fight, and that hence the injury might have been received in an affray and still be accidental.

9. *California.*— Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455.

B. "External and Visible Signs of Injury." The external and visible sign or mark required by the proviso that the policy will not cover "any injury, fatal or otherwise, of which there is no visible mark upon the body," need not necessarily be a bruise, contusion, laceration, or broken limb; it may be any visible evidence of an internal strain.[10] Nor is it necessary that such evidence be present immediately after the happening of the accident.[11] A proviso, however, to the effect that the risk is not to extend "to any bodily injury of which there shall be no external and visible signs upon the body of the insured," will, it seems, refer only to those injuries which are non-fatal;[12] and where the proviso is that the policy does not insure against death or disablement from accidents that shall bear "no external and visible marks," it does not mean that there must be external and visible marks on the body of insured, but only that there must be some external and visible evidence that the death or disablement was accidental.[13]

C. Injuries Sustained While in Discharge of Duty. That the insured was injured while "actually engaged in the discharge of his duties" is all that is necessary to satisfy a provision for insurance against injuries sustained by insured while in the discharge of his duty.[14]

D. Risks of Occupation[15] — **1. In General — a. Term "Occupation."** The

Iowa.— Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485.

Kentucky.— American Acc. Co. *v.* Carson, 99 Ky. 441, 36 S. W. 169, 59 Am. St. Rep. 473, 34 L. R. A. 301; Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

Missouri.— Collins *v.* Fidelity, etc., Co., 63 Mo. App. 253; Phelan *v.* Travelers' Ins. Co., 38 Mo. App. 640.

Tennessee.— Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723.

United States.— Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825; Ripley *v.* Railway Pass. Assur. Co., 2 Big. Ins. Cas. 738, 20 Fed. Cas. No. 11,854.

10. Thayer *v.* Standard L., etc., Ins. Co., 68 N. H. 577, 578, 41 Atl. 182; Gale *v.* Mutual Aid, etc., Assoc., 66 Hun (N. Y.) 600, 21 N. Y. Suppl. 893; U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60.

Ascertainment of injury by application of hand.— In Gale *v.* Mutual Aid, etc., Assoc., 66 Hun (N. Y.) 600, 21 N. Y. Suppl. 893, the physicians testified that they could feel the injury complained of by applying the hand externally to the parts claimed to be injured; there was no external sign of the injury. It was held that the proviso was sufficiently complied with if the injury could be ascertained by applying the hand to the exterior of the body.

Discoloration of the arm and shoulder of insured satisfies this provision. Thayer *v.* Standard L., etc., Ins. Co., 68 N. H. 577, 41 Atl. 182.

11. Thayer *v.* Standard L., etc., Ins. Co., 68 N. H. 577, 41 Atl. 182; Pennington *v.* Pacific Mut. L. Ins. Co., 85 Iowa 468, 52 N. W. 482, 39 Am. St. Rep. 306, holding it to be sufficient if such external and visible mark or sign of injury be apparent shortly after the happening of the accident and in consequence thereof.

12. McGlinchey *v.* Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 2 N. E. 347, 8 Am. St. Rep. 758 [*affirming* 45 Hun (N. Y.) 313]; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Eggenberger *v.* Guarantee Mut. Acc. Assoc., 41 Fed. 172.

13. **Signs of death by drowning.**— In Wehle *v.* U. S. Mutual Acc. Assoc., 11 Misc. (N. Y.) 36, 31 N. Y. Suppl. 865, it was held that where, after taking the body of insured from the water, it was found filled with water, which ran from the mouth, there was sufficient visible and external signs of accidental death by drowning.

Signs of death by inhalation of gas.— In Menneiley *v.* Employers' Liability Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 51 Am. St. Rep. 716, 31 L. R. A. 686, there were no external visible signs upon insured's body, but the room was full of gas, and, upon resorting to artificial respiration, the emanation of the gas from the body could be perceived. It was held that there were sufficient external and visible signs of death by accidental means.

14. Thus a recovery was properly allowed in a case in which it appeared that insured, a railway employee, was killed on his way home, a few minutes after leaving his work, while crossing a track in his employer's railway yards (Kinney *v.* Baltimore, etc., Employes' Relief Assoc., 35 W. Va. 385, 14 S. E. 18, 15 L. R. A. 142), as well as in a case where it appeared that insured, a railway signalman, while attempting to prevent a train accident, received such a nervous shock as to incapacitate him from work (Pugh *v.* London, etc., R. Co., [1896] 2 Q. B. 248).

Death from sunstroke received while in the line of insured's duty was held to be a case warranting a recovery, notwithstanding the policy contained a clause reducing the liability of the insurer in case of death by sunstroke while not suffered in the line of insured's duty. Railway Official, etc., Acc. Assoc. *v.* Johnson, (Ky. 1900) 58 S. W. 694.

15. **The provision in the policy.**— The policy usually insures against injuries or death incurred while engaged in a certain oc-

word "occupation," as it is generally used in accident policies, refers to the vocation, profession, trade, or calling in which insured is engaged for hire or profit.[16]

b. What Risks Are Included. Under such a provision it will be assumed that the parties to the contract contemplate that the insured will be exposed to the dangers incident to his occupation,[17] and the insured will not be precluded from doing such acts and performing such duties as are simply incident to and connected with the daily life of men engaged in any and all occupations,[18] nor will he be prevented from engaging in any mere acts of exercise, diversion, or recreation.[19] To entitle the insurer to avoid the policy on the ground that the

cupation or employment. See cases cited *infra*, notes 16–28.

16. Berliner *v.* Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 66 Am. St. Rep. 49; Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383; Star Acc. Co. *v.* Sibley, 57 Ill. App. 315; Travellers Preferred Acc. Assoc. *v.* Kelsey, 46 Ill. App. 371; Eaton *v.* Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048. See also cases cited *infra*, notes 17–28.

17. Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626.

18. *California.*— Berliner *v.* Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 66 Am. St. Rep. 49.

Illinois.— Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383; Star Acc. Co. *v.* Sibley, 57 Ill. App. 315; Travellers Preferred Acc. Assoc. *v.* Kelsey, 46 Ill. App. 371; National Acc. Soc. *v.* Taylor, 42 Ill. App. 97.

Iowa.— Holiday *v.* American Mut. Acc. Assoc., 103 Iowa 178, 72 N. W. 448, 64 Am. St. Rep. 170.

Kansas.— Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651.

Kentucky.— Kentucky L., etc., Ins. Co. *v.* Franklin, (Ky. 1897) 43 S. W. 709.

Maine.— Eaton *v.* Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048.

Michigan.— Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440; Hess *v.* Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196, 70 N. W. 460.

New Jersey.— Stone *v.* U. S. Casualty Co., 34 N. J. L. 371.

Wisconsin.— Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366.

United States.— Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 44 U. S. App. 694, 22 C. C. A. 499.

This rule has been applied to one designated, with respect to his occupation, as:

"Agricultural superintendent." Travellers Preferred Acc. Assoc. *v.* Kelsey, 46 Ill. App. 371, where insured was temporarily acting as police superintendent of a state fair.

"Banker." Hess *v.* Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196, 70 N. W. 460, where insured, a banker, while in a sawmill for the purpose of having some boards sawed with which to make a cabinet, operated the saw himself for the purpose of sawing off some blocks for handles, and lost his hand.

"Merchant." Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366, wherein it was held that insured had not changed his occupation of merchant to that of a "grocer delivering goods," which occupation was classified as more hazardous, from the fact that he sometimes, but not usually, delivered goods, and especially where it was shown that he was injured by falling from his wagon while at the depot engaged in receiving goods.

"Proprietor of a bar and billiard-room not tending bar." Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 44 U. S. App. 694, 22 C. C. A. 499, wherein it was held that insured, so classified, did not change his occupation to that of "bartender" merely because he occasionally relieved his bartender during meal hours.

"Secretary of a grocery company." Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440, where it was held that the mere fact that insured, so classified, owned a farm on which he resided only a part of the time, did not make him a farmer, so as to preclude his recovery on the ground that at the time of his injury he was engaged in an occupation other than that in which he was classified.

"Supervising farmer." National Acc. Soc. *v.* Taylor, 42 Ill. App. 97, wherein it was held that a supervising farmer, within the meaning of the term as used in an accident policy classifying insured as such, is one who has the care and oversight of a farm, and who does such things as may be required for keeping it in order, and that the term does not preclude the doing of any work whatever.

"Teacher." Stone *v.* U. S. Casualty Co., 34 N. J. L. 371, wherein it was held that where insured, a teacher, was killed by falling from the second story of a barn which he was having built, it could not be said that he had changed his occupation to that of a contractor.

19. This rule has been applied to persons injured or killed while hunting for pleasure, where it did not appear that the insured was engaged in or following the business of hunting as an occupation. Holiday *v.* American Mut. Acc. Assoc., 103 Iowa 178, 72 N. W. 448, 64 Am. St. Rep. 170 (insured being a bookkeeper); Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651 (insured being a barber and restaurant-keeper); Kentucky L., etc., Ins. Co. *v.* Franklin, (Ky. 1897) 43 S. W. 709 (insured being a grocer). See also Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383.

But in Knapp *v.* Preferred Mut. Acc. Assoc., 53 Hun (N. Y.) 84, 6 N. Y. Suppl. 57, it was

injury to or death of insured was incurred in some other occupation or employment than that which he was pursuing at the time of the insurance, the policy must expressly provide that there shall be no liability in case of injuries or death so incurred.[20]

2. Occupations Classified as More Hazardous — a. Validity of Such Classification. The parties to the contract may provide that a forbidden hazard shall make the policy void, or that the amount of the insurance shall be diminished in proportion in case the hazard is increased;[21] and the classification of the applicant in an occupation in which he is not actually engaged, with the understanding that he is thereafter to engage in it, is valid;[22] but where insured is injured in an occupation other than the one in which he was classed, the insurer cannot, after the injury, place such occupation in any special class.[23]

b. Duty of Insurer to Ascertain Facts. In the classification of a risk, if the insurer requires anything more definite as to the occupation, it is its duty to ascertain such facts by proper inquiries.[24]

c. Insurer Bound by Classification of Agent. Where the applicant makes a true and full statement of his occupation to the insurer's agent, the company is bound, after loss, by the classification given him by the agent.[25]

held that the operation of a buzz-saw for pleasure merely was not incident to the occupation of a "retired gentleman," and that no recovery could be had for injuries sustained thereby.

20. Provident L. Ins. Co. *v.* Fennell, 49 Ill. 180.

Representation that applicant is engaged in a certain occupation does not amount to a covenant that he will do nothing not connected with such occupation, or that he will not engage in a different one. Provident L. Ins. Co. *v.* Fennell, 49 Ill. 180, in which the insured, represented in the application as a switchman, met his death while acting as a brakeman.

Change in occupation may be made by a notification thereof to the insuring company and an acceptance thereof by it; and it is as effectual as though the change had actually been written in the policy. Fox *v.* Masons' Fraternal Acc. Assoc., 96 Wis. 390, 71 N. W. 363.

21. Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105.

Occupation not mentioned in the manual of classification used by the insurer cannot be said to be non-insurable. Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626.

22. Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508.

23. In Bushaw *v.* Women's Mut. Ins., etc., Co., 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 423, insured was classified as a "jobber and contractor." The by-laws of the association divided the risks into five classes, the occupation of a jobber and contractor being placed in the second class. Insured was injured while working as a farm-hand, and the insurer claimed that hence he was entitled to indemnity only at third-class rates, by reason of a clause in the application that rates and classifications should conform to the latest editions of the manual, which, however, were neither brought to plaintiff's knowledge nor put in evidence. Nothing was introduced to show that farm-hands were graded in the third class, and it was held that the insurer could not, after the injury, in pursuance of its undivulged scale of rating, change the class or rate of pay.

24. So held where the applicant stated his occupation to be that of a "livery-stable proprietor, not working." Brink *v.* Guaranty Mut. Acc. Assoc., 7 N. Y. Suppl. 847, 28 N. Y. St. 921.

Special classification.—In Schmidt *v.* American Mut. Acc. Assoc., 96 Wis. 304, 305, 71 N. W. 601, insured, in his application, stated that he was a "bakery and confectionery proprietor, supervising," and that he was working for himself. The insurer classified him as a "bakery and confectionery proprietor." There was also another classification of "baker working," for which the indemnity was less. It was held that the insurer had a sufficient knowledge of the facts and had made a special classification in regard to insured, and that it would be liable for the indemnity under such classification.

25. Emlaw *v.* Travelers' Ins. Co., 108 Mich. 554, 66 N. W. 469; Travelers' Ins. Co. *v.* Snowden, (Nebr. 1900) 83 N. W. 66; New York Acc. Ins. Co. *v.* Clayton, 19 U. S. App. 304, 59 Fed. 559, 8 C. C. A. 213; Pacific Mut. L. Ins. Co. *v.* Snowden, 12 U. S. App. 704, 58 Fed. 342, 7 C. C. A. 264.

But see Employers' Liability Assur. Corp. *v.* Back, 102 Fed. 229, where insured was classified as an "importer and dealer in Chinese merchandise and contractor for Chinese labor." He was killed while working as foreman of a gang of Chinese laborers. At the time the classification was made the insurer's agent knew that insured was engaged in or intended to engage in such employment. It was held that this knowledge by the agent did not affect the right of the company to limit the amount recoverable in accordance with the provision in the application and policy.

Although wrongly classified, the fact that insured certified to an understanding of the

d. Effect of Such Classification — (I) *In General.* If the injury to or death of insured occurs while he is engaged in a more hazardous occupation, then no recovery can be had, or, if a recovery can be had, it can be only for the amount provided for injuries or death incurred while engaged in such hazardous occupation;[26] but it must always appear that the insured, when injured, was actually engaged in an occupation classified as more hazardous.[27]

(II) *Does Not Waive Specially Excepted Risks.* A provision classifying occupations will not operate to waive risks elsewhere specially excepted in the policy.[28]

E. Risks of Travel — **1. What Risks Included.** The provision limiting the risks covered[29] includes only accidents received while traveling as a passenger in the kind of conveyance designated,[30] and does not extend to accidents sustained

insurer's classification of risks, and that he belonged to the class given, is immaterial, since the only means he has of understanding such classification is through the representations. Pacific Mut. L. Ins. Co. *v.* Snowden, 12 U. S. App. 704, 58 Fed. 342, 7 C. C. A. 264.

26. *Kentucky.*— American Acc. Co. *v.* Carson, (Ky. 1895) 30 S. W. 879, where insured was classified as a "dealer" and sustained injuries while acting as a deputy sheriff.

Maine.— Eaton *v.* Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048, holding that insured, while riding home on his bicycle from a friend's funeral, taking a more circuitous route in going home than was necessary, was engaged in "amateur bicycling."

Massachusetts.—Aldrich *v.* Mercantile Mut. Acc. Assoc., 149 Mass. 457, 21 N. E. 873, where insured, classified as a "conductor," was injured while acting as a brakeman on a freight train.

New York.— Moore *v.* Citizens' Mut. L. Ins. Assoc., 75 Hun (N. Y.) 262, 26 N. Y. Suppl. 1014, where the extra-hazardous occupation was that of a "yard-conductor" or "yard-master."

Texas.— Standard L., etc., Ins. Co. *v.* Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781, where insured, classified as a "blacksmith," was killed while acting as a "switchman and car-coupler," which occupations were classed as more hazardous than blacksmithing.

United States.—Employers' Liability Assur. Corp. *v.* Back, 102 Fed. 229, cited *supra*, note 25.

27. *Illinois.*— Union Mut. Acc. Assoc. *v.* Frohard, 134 Ill. 228, 25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383; National Acc. Soc. *v.* Taylor, 42 Ill. App. 97, holding that the driving of piles by means of an ax or sledge did not constitute the more hazardous occupation of "pile-driver."

Minnesota.— Miller *v.* Travelers' Ins. Co., 39 Minn. 548, 40 N. W. 839; Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626, holding that the work of pointing, cleaning, and repairing brick walls was a part of the trade or occupation of a brick-mason, and that insured, who was injured while engaged in such work, could recover under the classification of a "brick-mason."

Missouri.— Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221.

New Jersey.— Stone *v.* U. S. Casualty Co., 34 N. J. L. 371.

New York.— Neafie *v.* Manufacturers' Acc. Indemnity Co., 55 Hun (N. Y.) 111, 8 N. Y. Suppl. 202 (holding that "iceman, proprietor," covers not merely a proprietor who conducts a general ice business, but also an iceman who might be a deliverer of ice and at the same time the owner and proprietor of the business); Tucker *v.* Mutual Ben. L. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505 (holding that one classified as a "farmer," attempting to rescue the crew of a wrecked steamer, was not "engaged in wrecking"); Baldwin *v.* Fraternal Acc. Assoc., 21 Misc. (N. Y.) 124, 46 N. Y. Suppl. 1016 (holding that one who was injured while riding a bicycle for pleasure was not a "professional bicyclist." But *compare* Eaton *v.* Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048, cited *supra*, note 26).

Wisconsin.— Fox *v.* Masons' Fraternal Acc. Assoc., 96 Wis. 390, 71 N. W. 363.

28. Yancey *v.* Ætna L. Ins. Co., 108 Ga. 349, 33 S. E. 979; Miller *v.* Travelers' Ins. Co., 39 Minn. 548, 40 N. W. 839.

29. The provision in policy.— A form of accident policy frequently used is that which insures against accidents incurred while "traveling in a public conveyance provided by a common carrier," or "while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power." See cases cited *infra*, notes 30–36.

30. After alighting from train.— Under such a provision it has been held that where insured, while on a journey, alights from the train at a station, with the intent of getting on again and continuing his journey, he remains a passenger, and the fact that he is killed when attempting to board the train while it is in motion will not preclude a recovery. Tooley *v.* Railway Pass. Assur. Co., 3 Biss. (U. S.) 399, 24 Fed. Cas. No. 14,098. But in Hendrick *v.* Employers' Liability Assur. Corp., 62 Fed. 893, insured, a passenger in a public conveyance provided by a common carrier, after having alighted from the train at a station from which he intended to continue his journey by a later train, attempted to speak to the engineer of the train about a matter having no connection with the continuation of his journey or his condition as a passenger, and, while crossing the platform

or received while not a passenger, as where insured died from injuries sustained in falling from the hay-loft of a livery barn.[31]

2. DOUBLE INDEMNITY CLAUSE. Where the policy provides for a double indemnity for injury sustained through accidental means while riding as a passenger in any passenger conveyance, an accidental injury sustained by insured while attempting to alight from a moving electric street car will entitle him to such double indemnity.[32] But an injury sustained while riding on the platform of a railway car will not entitle insured to such double indemnity.[33]

3. REQUIRING COMPLIANCE WITH CARRIER'S RULES. Under a provision in the policy requiring insured to comply with all the rules and regulations of the carrier, in order to constitute an act of insured a violation of a rule of a railroad company the rule alleged to have been violated must be one which is known to insured and in force at the time of the alleged violation.[34] It is not necessary for insured to make himself acquainted with all the rules of the carrier,[35] but a violation of a known rule will preclude a recovery.[36]

of the car for this purpose, fell therefrom and was injured. It was held that he could not recover under the policy, since he had ceased to be a passenger.

Walking from one conveyance to another. — In Northrup *v.* Railway Pass. Assur. Co., 43 N. Y. 516, 3 Am. Rep. 724 [*reversing* 2 Lans. (N. Y.) 166], insured, in the course of her journey, had to change from a steamboat to a railway train. The railway station was some little distance from the steamboat landing, but it was the general custom for passengers to walk from the steamboat landing to the railway station, though there were hacks at the landing, on the night of the accident, which could have been hired. Insured started to walk the distance, but slipped and fell on the sidewalk, receiving injuries from which she afterward died. It was held that her death was covered by a policy insuring against accidents while traveling by public or private conveyance, since she was walking in the actual prosecution of her journey; and that the fact that hacks could have been hired for the purpose of transporting her from the landing to the station was immaterial.

While getting on or off trains persons may be considered passengers; hence injuries received by insured under such circumstances are covered by the policy. Tooley *v.* Railway Pass. Assur. Co., 3 Biss. (U. S.) 399, 24 Fed. Cas. No. 14,098; Theobald *v.* Railway Pass. Assur. Co., 10 Exch. 45.

While riding on engine.—A passenger who, at the request of an official of the road, alights from the coach and rides in the engine, does not by such act cease to be a passenger, and a recovery can be had for his death. Berliner *v.* Travelers' Ins. Co., 121 Cal. 458, 66 Am. St. Rep. 49, 53 Pac. 918.

31. Fidelity, etc., Co. *v.* Teter, 136 Ind. 672, 36 N. E. 283.

Traveling on foot is not traveling by a public or private conveyance within the meaning of a policy insuring against accidents while traveling by public or private conveyance. So held in Ripley *v.* Railway Pass. Assur. Co., 2 Big. Ins. Cas. 738, 20 Fed. Cas. No. 11,854, where insured was waylaid and beaten into insensibility by robbers while walking from a village to his home, a distance of about twelve miles. But *compare* Northrup *v.* Railway Pass. Assur. Co., 43 N. Y. 516, 3 Am. Rep. 724 [*reversing* 2 Lans. (N. Y.) 166], cited *supra*, note 30.

32. King *v.* Travelers Ins. Co., 101 Ga. 64, 28 S. E. 661, 65 Am. St. Rep. 288, wherein it was held that a clause in an accident policy providing that it did not cover injuries occasioned by "entering, or trying to enter, or leaving a moving conveyance using steam as a motive power (except cable and electric street cars)" had no reference to the amount to be paid, but was merely an enumeration of cases in which there was to be no liability, and therefore had no relation to a clause providing that if injuries are sustained while riding as a passenger in any conveyance using steam, cable, or electricity as a motive power, the amount payable shall be double the sum otherwise specified, and that hence, where insured was injured while attempting to alight from a moving electric street car, he could recover the double indemnity.

33. Ætna L. Ins. Co. *v.* Vandecar, 86 Fed. 282, 57 U. S. App. 446, 30 C. C. A. 48.

In Van Bokkelen *v.* Travelers' Ins. Co., 34 N. Y. App. Div. 399, 54 N. Y. Suppl. 307, the policy provided that if insured was injured while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid should be double the sum specified in the clause in the policy under which the claim is made. Insured fell from the platform of a railroad car and was killed. It did not appear by what means or from what cause insured fell or was thrown from the platform. It was held that the double indemnity could not be recovered, since the clause covered only injuries sustained while riding "in" such conveyance.

34. In Marx *v.* Travelers' Ins. Co., 39 Fed. 321, it was held that where a rule forbidding passengers on a railroad train to ride on the platform of a car was generally disregarded by both passengers and trainmen, it could not be said that so to ride was a violation of a rule of a corporation within the meaning of a policy excluding injuries sustained in "a violation of a rule of the railroad company."

35. Tooley *v.* Railway Pass. Assur. Co., 3 Biss. (U. S.) 399, 24 Fed. Cas. No. 14,098.

36. Bon *v.* Railway Pass. Assur. Co., 56 Iowa 664, 10 N. W. 225, 41 Am. Rep. 127.

XII. Accidents and Risks Excepted.

A. Validity of the Exception. The insurer may, in its policy, make a special exception as to a class of injuries; and it does not matter how general the description of the class may be, provided the description so designates it as to distinguish it from other classes of injuries.[37]

B. Intentional Injuries — 1. Usually Considered Accidental. Intentional injuries inflicted on the person of insured are usually considered "accidental" and as coming within the proviso that the insurance shall extend to injuries sustained through "external, violent, and accidental means."[38]

2. The Provision in Policy and Its Effect. Where, however, the policy provides that it shall not extend to injuries or death resulting from "intentional injuries inflicted by the insured or any other person," such provision is valid and binding,[39] and no recovery can be had for injuries or death so inflicted.[40]

3. What Constitutes Such an Injury — a. Consent of Insured as an Element. It is not necessary that the injury be inflicted with the consent or knowledge, or at the instance or procurement, of the insured.[41]

b. Intent of Person Inflicting Injury as an Element. The existence of an intent on the part of the person inflicting the injury is necessary, and this intent must be to inflict the injury actually inflicted.[42]

c. Effect of Insanity or Intoxication of Inflicting Party. Where it is

37. Metropolitan Assur. Assoc. *v.* Taylor, 71 Ill. App. 132, holding sufficient a designation which permits the identification of a particular case as falling or not falling within the exception.

38. See *supra*, XI, A.

39. Travellers' Ins. Co. *v.* Houston, 3 Tex. App. Civ. Cas. § 429.

40. Orr *v.* Travelers Ins. Co., 120 Ala. 647, 24 So. 997; American Acc. Co. *v.* Carson, (Ky. 1895) 30 S. W. 879; De Graw *v.* National Acc. Soc., 51 Hun (N. Y.) 142, 4 N. Y. Suppl. 912. See also cases cited *infra*, notes 41–45.

Where the word "death" is omitted from the provision, it seems that the exception will not include non-fatal injuries. American Acc. Co. *v.* Carson, 99 Ky. 441, 36 S. W. 169, 59 Am. St. Rep. 473, 34 L. R. A. 301.

Where the words "inflicted by insured or other person" were omitted from the provision, but the words "intentional injuries" were preceded and followed by a long list of injuries imputing more or less of intent, consent, or participation on the part of the insured, a recovery for which is excluded because of such intent, etc., the exception does not cover intentional injuries inflicted by a third person which as to the insured are accidental. Button *v.* American Mut. Acc. Assoc., 92 Wis. 83, 65 N. W. 861, 53 Am. St. Rep. 900.

41. *Alabama.*— Orr *v.* Travelers Ins. Co., 120 Ala. 647, 24 So. 997. *Compare* Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267, where the injury was not deemed intentional within the exception.

California.— Fischer *v.* Travelers' Ins. Co., 77 Cal. 246, 19 Pac. 423, 1 L. R. A. 572.

Colorado.—Travelers' Ins. Co. *v.* McCarthy, 15 Colo. 351, 25 Pac. 713, 22 Am. St. Rep. 410, 11 L. R. A. 297.

Kentucky.— Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

Texas.— Johnson *v.* Travelers' Ins. Co., 15 Tex. Civ. App. 314, 39 S. W. 972.

Wisconsin.— Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811. But *compare* Button *v.* American Mut. Acc. Assoc., 92 Wis. 83, 65 N. W. 861, 53 Am. St. Rep. 900, cited *supra*, note 40.

United States.— Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. ed. 308.

42. *Alabama.*— Orr *v.* Travelers Ins. Co., 120 Ala. 647, 24 So. 997.

California.— Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455.

Illinois.—Railway Officials, etc., Acc. Assoc. *v.* McCabe, 61 Ill. App. 565.

Kentucky.— Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

Michigan.— Utter *v.* Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913.

Missouri.— Phelan *v.* Travelers' Ins. Co., 38 Mo. App. 640.

Nebraska.— Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

New York.— De Graw *v.* National Acc. Soc., 51 Hun (N. Y.) 142, 4 N. Y. Suppl. 912.

Wisconsin.— Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811.

In Hutchcraft *v.* Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484, it was held that the exception included only those injuries which were intentionally directed against the person injured, and did not include injuries received at the hands of third persons attempting to do mischief generally, or attempting to injure a particular individual other than the insured. But see Matson

attempted to show that the infliction of an injury by a third person is unintentional by reason of insanity or intoxication, the insanity or intoxication must be such as to deprive the insane or intoxicated person of capacity to understand the nature of the act and its results.[43]

d. Qualification as to Injuries Inflicted by Burglars, etc. Where the proviso excepts injuries received while in the act of defending one's person, family, or property from the assaults of burglars, robbers, thieves, or pickpockets, it must be shown that the injuries were so received.[44]

e. Waiver of Exception. The condition excepting from insurance the risk of death by intentional injury may be waived.[45]

C. Resulting from Exposure to Unnecessary Danger — 1. The Provision in Policy. The policy often contains a proviso excepting from risk injury or death caused by "voluntary exposure to unnecessary danger."[46] In some policies this proviso is varied by the use of the terms "wilful and wanton exposure,"[47]

v. Travellers' Ins. Co., 93 Me. 469, 45 Atl. 518, where it was held that no recovery could be had, although the injury sustained was not precisely the one intended, there being an intent to inflict some injury.

Illustrations of insufficient intent.— It was held that there was such a lack of intent on the part of the inflicting party as to take the case out of the exception relating to intentional injuries in Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455, where the blow was not intended to kill, but unfortunately and undesignedly caused death; in Utter *v.* Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, where insured was killed by a deputy sheriff in an attempt to arrest him, it not being shown that the deputy was aware of the identity of insured when he killed him; in Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562, where it appeared that the death of insured resulted from a gun-shot wound inflicted by a robber, it not appearing that the shooting of insured was the robber's intentional act [but see De Graw *v.* National Acc. Soc., 51 Hun (N. Y.) 142, 4 N. Y. Suppl. 912, cited *infra*, this note].

Illustrations of sufficient intent.— It was held that there was sufficient intent on the part of the inflicting party to constitute an injury intentional within the meaning of the exception in Orr *v.* Travelers Ins. Co., 120 Ala. 647, 24 So. 997, where insured, being unable to gain admittance to his wife's room through the door, went into the yard near a window of the room, whereupon a man who was in the room fired through the window, the bullet killing insured; in American Acc. Co. *v.* Carson, (Ky. 1895) 30 S. W. 879, where the death of insured was caused by his being shot by a prisoner resisting arrest; in Phelan *v.* Travelers' Ins. Co., 38 Mo. App. 640, where the injuries were inflicted on insured in a preconcerted attempt to assassinate him; in De Graw *v.* National Acc. Soc., 51 Hun (N. Y.) 142, 4 N. Y. Suppl. 912, where the injuries were inflicted upon insured by a third person attempting to rob him [but see Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562, cited *supra*, this note]; in Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811, where it appeared that insured was shot by a person unknown, the evidence showing that the murderer knew his victim when he fired, and that he fired with intent to kill him.

Murder of insured has been held to be within the proviso excepting from the risk injuries or death resulting from intentional injuries inflicted by insured or any other person. Railway Officials, etc., Acc. Assoc. *v.* McCabe, 61 Ill. App. 565; Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. ed. 308; Brown *v.* U. S. Casualty Co., 88 Fed. 38; Travelers' Protective Assoc. *v.* Langholz, 86 Fed. 60, 52 U. S. App. 643, 29 C. C. A. 628.

43. Travellers' Ins. Co. *v.* Houston, 3 Tex. App. Civ. Cas. § 429; Berger *v.* Pacific Mut. L. Ins. Co., 88 Fed. 241.

44. Ging *v.* Travelers Ins. Co., 74 Minn. 505, 77 N. W. 291.

45. Henderson *v.* Travelers' Ins. Co., 65 Fed. 438. In this case the general agents had authority to receive and pass upon applications and complete contracts without referring them to the company; and on application for a policy they were informed that the applicant was in danger of being attacked and killed, and that he desired a policy which would protect his family in that event. The agents assured applicant that the policy to be issued, which was received and accepted by the applicant without reading it, contained a condition to the effect that it should be good if insured came to his death by intentional injuries inflicted by another person. Upon renewing the policy insured again inquired if it would be good in case he was killed, and the agents assured him that it would. It was held that a condition as to death by intentional injury was waived, and that the policy should be reformed by omitting such condition.

46. See cases cited *infra*, notes 47–58.

See also *infra*, XVI, C, 4, as to the effect of negligence of insured as a defense to an action on the policy.

47. Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310; Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157.

"exposure to obvious risk of injury," [48] or exposure to "unnecessary danger, hazard, or perilous adventure." [49]

2. What Constitutes Such Exposure — a. Conscious, Intentional Exposure. The words "voluntary exposure to unnecessary danger" imply a conscious, intentional exposure,— something of which one is consciously willing to take the risk; [50] hence something more than ordinary negligence is necessary: there must be a design or intention on the part of insured to expose himself to danger.[51] The injury or death must, however, result from such conscious exposure.[52]

48. Cornish *v.* Accident Ins. Co., 23 Q. B. D. 453; Lovell *v.* Accident Ins. Co., (Q. B. 1874) 3 Ins. L. J. 877.

49. Travelers' Ins. Co. *v.* Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; Neill *v.* Travelers' Ins. Co., 12 Can. Supreme Ct. 55.

50. *Alabama.*— Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267.

Illinois.— Fidelity, etc., Co. *v.* Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359 [*affirming* 79 Ill. App. 245].

Iowa.— Matthes *v.* Imperial Acc. Assoc., (Iowa 1900) 81 N. W. 484.

Kansas.—Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331.

Kentucky.— Travelers' Ins. Co. *v.* Clark, (Ky. 1900) 59 S. W. 7.

Massachusetts.— Tuttle *v.* Travellers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316.

Michigan.— Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440.

Missouri.— Collins *v.* Fidelity, etc., Co., 63 Mo. App. 253.

New York.— Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620, 36 N. Y. St. 928.

North Dakota.— Cornwell *v.* Fraternal Acc. Assoc., 6 N. Dak. 201, 69 N. W. 191, 66 Am. St. Rep. 601.

Ohio.— U. S. Mutual Acc. Assoc. *v.* Hubbell, 56 Ohio St. 516, 47 N. E. 544.

Pennsylvania.— De Loy *v.* Travelers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108, 50 Am. St. Rep. 787, 37 Wkly. Notes Cas. (Pa.) 239.

Tennessee.— Union Casualty, etc., Co. *v.* Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873; Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765.

Virginia.— Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

Wisconsin.— Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618; Pierce *v.* Travelers' L. Ins. Co., 34 Wis. 389.

United States.— Ashenfelter *v.* Employers' Liability Assur. Corp., 87 Fed. 682, 59 U. S. App. 479, 31 C. C. A. 193.

England.— Cornish *v.* Accident Ins. Co., 23 Q. B. D. 453; Lovell *v.* Accident Ins. Co., (Q. B. 1874) 3 Ins. L. J. 877.

Substantial character of danger.—In Travelers' Ins. Co. *v.* Randolph, 78 Fed. 754, 47 U. S. App. 260, 24 C. C. A. 305, it was said that the words "voluntary exposure to unnecessary danger," literally interpreted, would embrace every exposure of insured not actually required by the circumstances of his situation or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his [insured's] part; but that the words "might fairly be interpreted" as referring only to dangers of a real, substantial character which insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending, at the time, to assume all the risks thereof.

51. Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201; Commercial Travelers Mut. Acc. Assoc. *v.* Springsteen, 23 Ind. App. 657, 55 N. E. 973; Williams *v.* U. S. Mutual Acc. Assoc., 82 Hun (N. Y.) 268, 31 N. Y. Suppl. 343; Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

In Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157, it was held that if insured were to be prevented from recovering for an injury merely because he had contributed thereto by his own carelessness or negligence, the proviso that the insurance should not extend to injuries happening by reason of a wilful and wanton exposure to unnecessary danger would be meaningless.

Actual knowledge of danger has been held to be not always essential. Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500.

52. Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331; Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896; Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618; Pierce *v.* Travelers' L. Ins. Co., 34 Wis. 389.

In Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485, insured was shot immediately after leaving a bawdy-house. It was held that his death was not caused by a voluntary exposure to unnecessary danger, since it could not be said that the shooting followed as a natural consequence of, or that it was the result of, going into the bawdy-house.

Voluntary exposure sufficient to bring the death or injury within the exception has been held to exist where the insured was injured or came to his death while:

Attempting in broad daylight to cross the main line of a railway in front of an approaching train, there being nothing to show that insured was near-sighted or deaf, the place where the accident happened not being a proper crossing and there being no obstruction preventing a person about to cross from seeing an approaching train. Cornish *v.* Accident Ins. Co., 23 Q. B. D. 453.

Attempting on a dark night to drive over a network of railway tracks in a station-yard at a place where there was no roadway

b. Reckless or Wanton Conduct. Reckless or wanton conduct, under certain

for carriages. Neill *v.* Travelers' Ins. Co., 12 Can. Supreme Ct. 55.

Attempting to climb between two freight cars, which comprised a part of a freight train standing on the crossing, where insured did not attempt to ascertain whether the engine was attached to the train or where he could have gone around it. Bean *v.* Employers' Liability Assur. Corp., 50 Mo. App. 459.

Attempting to cross a railroad track between the cars of a freight train at a place where there was no implied invitation by the company to cross, and when the train was in readiness to be moved, of which fact insured was aware, although he thought he had time to get across in safety. Willard *v.* Masonic Equitable Acc. Assoc., 169 Mass. 288, 47 N. E. 1006, 61 Am. St. Rep. 285.

Attempting to pass from one car to another. Sawtelle *v.* Railway Pass. Assur. Co., 15 Blatchf. (U. S.) 216, 21 Fed. Cas. No. 12,392.

Falling off the platform of moving car while standing thereon. Sawtelle *v.* Railway Pass. Assur. Co., 15 Blatchf. (U. S.) 216, 21 Fed. Cas. No. 12,392.

Jumping from moving train. Smith *v.* Preferred Mut. Acc. Assoc., 104 Mich. 634, 62 N. W. 990, wherein it appeared that the train had left the station.

Jumping on a dark night from a rapidly moving freight train without any reasonable cause therefor. Shevlin *v.* American Mut. Acc. Assoc., 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52.

Putting arm out of window of railroad car. Morel *v.* Mississippi Valley L. Ins. Co., 4 Bush (Ky.) 535.

Attempting to walk across a trestle on a dark and rainy night, insured's arms being encumbered with packages. Travelers' Ins. Co. *v.* Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270.

Attempting to walk across a railroad trestle on a dark night, there being no railings and nothing to walk on but ties ten inches apart. Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78.

Running along track in front of train. Tuttle *v.* Travellers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316.

Sitting on the track. Metropolitan Acc. Assoc. *v.* Taylor, 71 Ill. App. 132.

Walking on a railroad track on a rainy night, at a time when insured knew that trains were likely to pass. Lovell *v.* Accident Ins. Co., (Q. B. 1874) 3 Ins. L. J. 877.

Attempting to escape from arrest. Shaffer *v.* Travelers' Ins. Co., (Ill. 1889) 22 N. E. 589 [*affirming* 31 Ill. App. 112].

Fighting, where insured provoked the difficulty. Collins *v.* Fidelity, etc., Co., 63 Mo. App. 253; Union Casualty, etc., Co. *v.* Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873.

Voluntary exposure insufficient to bring the death or injury within the exception has been held not to exist where insured was injured or came to his death while:

Attempting to board moving train. Fidelity, etc., Co. *v.* Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359 [*affirming* 79 Ill. App. 245]; Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157, where the train was moving at a slow rate of speed.

Slipping and falling against a moving train. Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267.

Standing on platform of car. Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618 (where insured, while asleep and unconscious, involuntarily arose and walked out upon the platform); Marx *v.* Travelers' Ins. Co., 39 Fed. 321 (where insured, overcome by heat and suffering from nausea, went out upon the platform of a moving train).

Stepping on railroad track without noticing an approaching train. Lehman *v.* Great Eastern Casualty, etc., Co., 7 N. Y. App. Div. 424, 39 N. Y. Suppl. 912 [*affirmed* in 158 N. Y. 689, 53 N. E. 1127]. But see Williams *v.* U. S. Mutual Acc. Assoc., 133 N. Y. 366, 31 N. E. 222, where, under the facts, it was held that insured had exposed himself voluntarily and unnecessarily.

Crossing a railroad track at a point where thousands of persons crossed daily. Keene *v.* New England Mut. Acc. Assoc., 161 Mass. 149, 36 N. E. 891, this being true notwithstanding insured was carrying an umbrella which obstructed his view.

Sitting on a railroad track. Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896, it appearing in this case that insured, on being warned of the approach of the train, started up, and, on reaching for his bag, was killed.

Crossing a slough in a public road. U. S. Mutual Acc. Assoc. *v.* Hubbell, 56 Ohio St. 516, 47 N. E. 544, where it appeared that the injury was a result incident to travel.

Driving in a carriage. Schilling *v.* Accidental Death Ins. Co., 1 F. & F. 116, notwithstanding insured was an old and very feeble man.

Climbing a high bank with loaded gun in hand. Cornwell *v.* Fraternal Acc. Assoc., 6 N. Dak. 201, 69 N. W. 191, 66 Am. St. Rep. 601.

Handling gun without knowledge of its being loaded. Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765.

Hunting for game in the ordinary way. Cornwell *v.* Fraternal Acc. Assoc., 6 N. Dak. 201, 69 N. W. 191, 66 Am. St. Rep. 601.

Fishing in a boat on a dark night without knowing of the presence of snags in the river. Collins *v.* Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 728, 59 Am. St. Rep. 367.

Fighting, where the difficulty was brought on without the fault or expectation of insured. Collins *v.* Fidelity, etc., Co., 63 Mo. App. 253.

Slipping and falling against a saw. Hess

circumstances, may be sufficient to constitute an exposure to unnecessary danger within a proviso excepting from risks injuries or death caused by exposure.[53]

c. Danger Apparent to Ordinary Prudence. If the danger is one that a reasonably prudent man ought to know, voluntary exposure thereto will come within the exception.[54] If, however, the danger or hazard is such as would not be visible to an ordinarily prudent person, then there is no voluntary exposure to unnecessary danger.[55]

d. Distinction between Necessary and Unnecessary Danger. The term "voluntary exposure to unnecessary danger" does not include a voluntary exposure to necessary danger,— as where one is injured in attempting to rescue others in supposed danger,[56] or in the performance of a necessary duty.[57]

e. Distinction between Voluntary Act and Voluntary Exposure. There is a clear distinction between a voluntary act and a voluntary exposure to danger. The act may be voluntary and the exposure involuntary, as where one approaches an unknown and unexpected danger.[58]

D. Resulting from Bodily Infirmities or Disease[59] — **1. "Bodily Infirmity" and "Disease" Defined.** The words "bodily infirmity or disease"

v. Van Auken, 11 Misc. (N. Y.) 422, 32 N. Y. Suppl. 126.

Accustomed situation.— In Matthes *v.* Imperial Acc. Assoc., (Iowa 1900) 81 N. W. 484, it was held that where insured, a house-painter accustomed to work at great heights, was injured while using a rope sling some thirty feet above his barn floor by the breaking of a truck supporting it, and it was shown that before using the sling he had examined it carefully, he was not guilty of a voluntary or unnecessary exposure to danger or obvious risk.

53. *Georgia.*— Travelers' Ins. Co. *v.* Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270.

Illinois.— Metropolitan Acc. Assoc. *v.* Taylor, 71 Ill. App. 132.

Iowa.— Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78.

Massachusetts.— Willard *v.* Masonic Equitable Acc. Assoc., 169 Mass. 288, 47 N. E. 1006, 61 Am. St. Rep. 285.

Michigan.— Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440.

Missouri.— Bean *v.* Employers' Liability Assur. Corp., 50 Mo. App. 459.

South Carolina.— Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500.

Wisconsin.— Shevlin *v.* American Mut. Acc. Assoc., 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52.

United States.— Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620.

England.— Cornish *v.* Accident Ins. Co., 23 Q. B. D. 453.

Canada.— Neill *v.* Travelers' Ins. Co., 12 Can. Supreme Ct. 55.

54. *Illinois.*— Fidelity, etc., Co. *v.* Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359 [*affirming* 79 Ill. App. 245].

Pennsylvania.— De Loy *v.* Travellers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108, 50 Am. St. Rep. 787; Burkhard *v.* Travellers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205.

South Carolina.— Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500.

Virginia.— Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

England.— Cornish *v.* Accident Ins. Co., 23 Q. B. D. 453; Lovell *v.* Accident Ins. Co., (Q. B. 1874) 3 Ins. L. J. 877.

55. Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620; Cornwell *v.* Fraternal Acc. Assoc., 6 N. Dak. 201, 69 N. W. 191, 66 Am. St. Rep. 601; Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

56. Williams *v.* U. S. Mutual Acc. Assoc., 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 728; Tucker *v.* Mutual Ben. L. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505.

57. National Ben. Assoc. *v.* Jackson, 114 Ill. 533, 2 N. E. 414; Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310.

58. In Fidelity, etc., Co. *v.* Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359 [*affirming* 79 Ill. App. 245], the court said that the term "voluntary exposure" does not mean simply that the act was voluntary or was consciously and intentionally performed, but also that insured was conscious of the danger to which he then exposed himself, and voluntarily assumed it, or that the danger was so apparent that a man of ordinary intelligence would, under the circumstances, necessarily have known it. One may voluntarily do an act exposing himself to great danger, which danger he does not apprehend and which is not obvious. In such a case it cannot be said that he voluntarily exposed himself to danger.

In Burkhard *v.* Travellers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205, it was held that where insured stepped off a railway train which had stopped on a drawbridge at night, and fell through a concealed hole in the bridge, and was killed, he had not been guilty of a voluntary exposure to unnecessary danger so as to preclude a recovery for his death.

59. The provision in policy.— The policy usually provides that the insurer shall not be liable where the death of insured is caused by a "bodily infirmity or disease." In some policies this provision is varied somewhat, and the construction often depends upon the form of the provision. See cases cited *infra*, notes 60–66.

are practically synonymous, and refer only to an ailment or disease of a settled character,[60] but they do not include insanity.[61]

2. Due Solely to Accident. The rule is that if the injury or death is due to an accident, without the intervention of any diseased condition of the body, it will not fall within the exception;[62] otherwise, of course, when the death or injury happened in consequence of the disease or bodily infirmity and not of the accident.[63]

3. Due to Combined Effects of Accident and Disease. If the death is not the result of the accident alone, but is due to both the accident and the disease, the case falls within the exception.[64]

60. Meyer *v.* Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. Rep. 374, holding that a temporary disorder arising from some sudden or unexpected disarrangement of the system, producing unconsciousness, cannot be considered a "disease" or "bodily infirmity."

Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620, holding that a fainting-spell produced by indigestion or a lack of proper food for a number of hours, being merely a temporary disturbance or enfeeblement, is not a bodily infirmity or disease.

Apoplexy has been held to be a bodily disease or infirmity. Travelers' Ins. Co. *v.* Selden, 78 Fed. 285, 42 U. S. App. 253, 24 C. C. A. 92.

Malignant pustule.—In Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 25 N. E. 399, 20 Am. St. Rep. 748, it was held that the death of insured, resulting from a malignant pustule, caused by the infliction on the body of a certain kind of animal substance or contact with diseased or putrid animal matter, was the effect of "disease."

Sunstroke or heat prostration is a disease. Dozier *v.* Fidelity & Casualty Co., 46 N. Y. 446; Sinclair *v.* Maritime Pass. Assur. Co., 3 E. & E. 478.

61. **Distinguished from "insanity."**—"Bodily infirmity or disease" does not include insanity. Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

In Accident Ins. Co. of North America *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740 [*affirming* 27 Fed. 40], it was held that although insanity or unsoundness of mind often is, if not always, accompanied by or results from disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases; that in the phrase "bodily infirmities or disease" the word "bodily" grammatically applies to disease as well as to infirmities, and cannot but be so applied without disregarding the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who framed them; and that the prefix of "bodily" hardly affects the meaning of infirmities, and that it would be difficult to conjecture any purpose in inserting it in the proviso other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend.

62. Ætna L. Ins. Co. *v.* Hicks, (Tex. Civ. App. 1900) 56 S. W. 87, where insured, though ill at the time, was killed while unnecessarily taking a trip by rail against the advice of his physician, during which he sustained an accident entirely independent of his weak condition, and one which might have happened to a man in good health.

Lawrence *v.* Accidental Ins. Co., 7 Q. B. D. 216, where insured, while standing on a railway platform, was seized with a fit and fell from the platform across the track and was run over and killed by a passing train.

Winspear *v.* Accident Ins. Co., 6 Q. B. D. 42, where insured, while fording a stream, was seized with an epileptic fit, fell into the stream, and was drowned. See, however, Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620, cited *infra*, note 63.

63. Sharpe *v.* Commercial Travelers' Mut. Acc. Assoc., 139 Ind. 92, 37 N. E. 353, where it was shown that a fall which it was claimed caused the death of insured was not the cause of death, but that death was due entirely to a fatty degeneration of the heart and brain.

Travelers' Ins. Co. *v.* Selden, 78 Fed. 285, 42 U. S. App. 253, 24 C. C. A. 92, wherein it appears that insured, a stout and apparently healthy man, while engaged in a piece of work which required him to assume a stooping position, was suddenly taken with violent pains in the head and died some days thereafter, his attending physician testifying that he died of apoplexy.

Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620, where insured, while in a fit, fell into the water and was drowned. But see Winspear *v.* Accident Ins. Co., 6 Q. B. D. 42, cited *supra*, note 62.

Smith *v.* Accident Ins. Co., L. R. 5 Exch. 302, where insured accidentally cut his foot against the broken side of an earthenware pan and died shortly thereafter from intervening erysipelas.

64. Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826; Commercial Travelers' Mut. Acc. Assoc. *v.* Fulton, 79 Fed. 423, 45 U. S. App. 578, 24 C. C. A. 654; Cawley *v.* National Employers' Acc., etc., Assur. Assoc., Cab. & El. 597; Anderson *v.* Scottish Acc. Ins. Co., 17 Sc. Sess. Cas. 4th ser. 6,— the theory upon which this rule is based being that the accident alone

4. Special Proviso as to Hernia. A provision in the policy that the insurance shall not cover injuries or death resulting from or due to hernia or rupture will not prevent a recovery for the death of insured caused by rupture or hernia accidentally produced.[65]

5. Special Proviso Limiting General Proviso. A special provision enumerating certain infirmities which are excepted from the risk will not limit the general provision that the death must result from bodily injuries effected through external, violent, and accidental means independently of all other causes.[66]

E. Resulting from Inhaling Gas. Where the policy contains a proviso excepting the insurer from liability for death by inhaling gas, the term "inhaling gas" must be taken to contemplate a voluntary and intelligent act on the part of insured, and not an involuntary and unconscious act; and hence the death of insured, caused by the accidental inhalation of gas which has escaped into his room, does not come within the proviso; and the rule is the same[67] even where the proviso is to the effect that the insurance shall not cover death resulting from "anything accidentally or otherwise taken, administered, absorbed, or inhaled."[68]

would not have caused the death, but that it merely aggravated the effect of the disease, both the accident and the disease contributing to the result.

In National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 36 U. S. App. 658, 20 C. C. A. 3, under a policy excluding a recovery for death resulting from disease or bodily infirmity, it was held that the insurer was not liable if, at the time of the accident, insured was suffering from a pre-existing disease or bodily infirmity, and that the accident would not have caused his death if he had not been so affected, but he died because the accident aggravated the effect of the disease, or the disease aggravated the effect of the accident.

In Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, insured died of peritonitis localized in the region of the liver, induced by a fall; he had previously had peritonitis in the same part, which rendered him liable to a recurrence of it. It was held that if at the time of the accident insured was suffering from the disease there could be no recovery.

65. Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; Atlanta Acc. Assoc. *v.* Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; Miner *v.* Travelers' Ins. Co., 2 Ohio N. P. 103, 3 Ohio Dec. 289.

In Fitton *v.* Accidental Death Ins. Co., 17 C. B. N. S. 122, it was held that death from hernia, caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving insured, was not within such an exception.

66. In Hubbard *v.* Travelers' Ins. Co., 98 Fed. 932, the policy insured against death only when "resulting from bodily injuries . . . through external, violent, and accidental means . . . independently of all other causes," and provided that the insurance should not cover death "resulting wholly or partly, directly or indirectly, from any of the following causes: . . . disease or bodily infirmity, hernia, fits, vertigo, sleep-walking." It was held that the phrases "all other causes, . . . disease or bodily infirmity," etc., were not limited by the subsequent enumeration of specific diseases or infirmities, and that the policy did not cover a death resulting from rupture of the heart caused in part by its diseased condition and in part by a fall on a slippery pavement.

67. Menneiley *v.* Employers' Liability Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 51 Am. St. Rep. 716, 31 L. R. A. 686 [*reversing* 72 Hun (N. Y.) 477, 25 N. Y. Suppl. 230]; Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758 [*affirming* 45 Hun (N. Y.) 313]; Pickett *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661, 28 Wkly. Notes Cas. 456 [*distinguishing* Pollock *v.* U. S. Mutual Acc. Assoc., 102 Pa. St. 230, 48 Am. Rep. 204]; Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474 [*affirmed* in 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450].

But see Richardson *v.* Travelers' Ins. Co., 46 Fed. 843 [*disapproving* Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. Rep. 758], where it was held that under a policy which exempted the insurer from liability in case of death caused by inhaling gas no recovery could be had for the death of insured caused by the inhalation of illuminating gas, where it was uncertain whether the death was the result of an accident or of suicide.

68. Menneiley *v.* Employers' Liability Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 51 Am. St. Rep. 716, 31 L. R. A. 686 [*reversing* 72 Hun (N. Y.) 477, 25 N. Y. Suppl. 230]; Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474.

In Fidelity, etc., Co. *v.* Waterman, 161 Ill. 632, 636, 44 N. E. 283, 32 L. R. A. 654, it was held that the proviso meant no more than if it actually read "anything accidentally or otherwise, consciously and by an act of volition, drawn into the system by inspiration."

The word "absorbed," in Fidelity, etc., Co. *v.* Waterman, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654, was held to refer only to the process of absorption by sucking up or imbibing through the pores of the body.

F. Resulting from Lifting or Over-Exertion — 1. INJURIES WITHIN THE EXCEPTION. Where the policy contains a clause relieving the insurer from liability for injuries or death caused by "lifting or over-exertion," in order to bring the injury or death of insured within this clause the lifting or over-exertion must be a voluntary and unnecessary act upon the part of insured.[69]

2. INJURIES NOT WITHIN THE EXCEPTION. An act of lifting, however, which is apparently reasonable and is performed in the line of duty, is not within the exception.[70] Nor is an effort to lift, or an over-exertion put forth in an emergency of danger, within the exception.[71]

G. Resulting from Medical or Surgical Treatment. Where the policy excepts death or injury resulting from "medical or surgical treatment," death caused by an overdose of an opiate prescribed by a physician for the purpose of allaying another disease,[72] or by suffocation due to the administration of chloroform preliminary to the performance of a surgical operation, is within the exception.[73]

H. Resulting from Poison.[74] The weight of authority seems to be that the taking of poison by accident or mistake is included in the proviso.[75] The phrase

The words "or otherwise" are used merely in connection with the preceding word "accidentally" and mean an injury of a kindred character, and do not qualify the act of inhaling. Lowenstein *v.* Fidelity, etc., Co., 88 Fed. 474.

69. Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738, 17 N. Y. St. 337, holding that the lifting or over-exertion must be a voluntary and unnecessary act from which injury might reasonably be anticipated, and which might, in the exercise of reasonable care, have been avoided.

Thus no recovery can be had under a policy excluding liability occasioned by "lifting or over-exertion" where it appears that insured was injured while attempting to alter the position of a pump-stock in a wall by lifting it, it not being shown that the injury was sustained in any other way. Metropolitan Acc. Assoc. *v.* Bristol, 69 Ill. App. 492.

"Voluntary over-exertion" has been defined to be a conscious or intentional over-exertion, or a reckless disregard of consequences likely to ensue from great physical effort. Rustin *v.* Standard L., etc., Ins. Co., 58 Nebr. 792, 79 N. W. 712.

Disability caused by hemorrhage of the lungs brought on by lifting a heavy iron or stone manhole-covering of a sewer is a case within this exception. Rose *v.* Commercial Mut. Acc. Co., 12 Pa. Super. Ct. 394.

70. Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49; Rustin *v.* Standard L., etc., Ins. Co., 58 Nebr. 792, 79 N. W. 712, where the over-exertion consisted of the slight elevation of a three-hundred-pound weight by a strong man accustomed to lifting. But *compare* Rose *v.* Commercial Mut. Acc. Co., 12 Pa. Super. Ct. 394, cited *supra*, note 69.

Death ensuing from a rupture caused by a sudden wrench of the body while removing a heavy cylinder-head from an engine, it being a part of the duties of insured, who was a machinist, to lift cylinder-heads in this way when necessary, is not within this exception. Standard L., etc., Ins. Co. *v.* Schmaltz 66 Ark. 588, 53 S. W. 49.

71. Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738, 17 N. Y. St. 337, where an injury to insured, a bridge-builder, was caused while he was employed, with his men, in raising the bent of a bridge, by being struck on the side by a pike-pole which he was using, or by being subjected to a strain of great severity caused by the sudden slipping of the bent.

72. Bayless *v.* Travellers' Ins. Co., 14 Blatchf. (U. S.) 143, 2 Fed. Cas. No. 1,138, holding that the fact that an overdose was taken was immaterial, since the opiate was prescribed for the cure of a disease and was taken for that purpose.

73. Westmoreland *v.* Preferred Acc. Ins. Co., 75 Fed. 244. But see Fitton *v.* Accidental Death Ins. Co., 17 C. B. N. S. 122, cited *supra*, note 65.

74. The modern policy often contains a proviso to the effect that the risk shall not extend to "death by poison," "death from poison," "death resulting from poison," "death by taking poison," "death from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." See cases cited *infra*, notes 75, 76.

75. *Michigan.*— Early *v.* Standard L., etc., Ins. Co., 113 Mich. 58, 71 N. W. 500, 67 Am. St. Rep. 445.

New York.— Hill *v.* Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187.

Pennsylvania.— Pollock *v.* U. S. Mutual Acc. Assoc., 102 Pa. St. 230, 48 Am. Rep. 204.

United States.— McGlother *v.* Provident Mut. Acc. Co., 89 Fed. 685, 60 U. S. App. 705, 32 C. C. A. 318.

England.— Cole *v.* Accident Ins. Co., 61 L. T. Rep. N. S. 227.

Contra, Travelers' Ins. Co. *v.* Dunlap, 160 Ill. 642, 643, 43 N. E. 765, 52 Am. St. Rep. 355.

Absorption of poison.— In Kasten *v.* Interstate Casualty Co., 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651, it was held that no recovery could be had for the death of insured by blood-poisoning from absorption of septic

"in any way taken" has been held to refer to the manner of taking the poison, not to the intent with which it is taken.[76]

I. Suicide or Self-Inflicted Injuries[77] — **1. Effect of Words "Sane or Insane."** Where the proviso contains the additional phrase "sane or insane" it precludes a recovery for the death of insured caused by suicide while insane;[78] otherwise where the proviso does not contain these additional words.[79]

2. Extent of the Exception — a. In General. A clause in the policy which provides that no profits shall be paid for self-inflicted injuries includes all classes of benefits.[80]

b. In Case of Accidental Self-Infliction. The death of insured cannot be attributed to self-inflicted injuries where they are incurred unconsciously and without knowledge or realization thereof.[81]

J. While Entering or Leaving Conveyance — 1. The Exception and Its Validity. A clause excepting liability for accident or death sustained while entering or trying to enter or leave a moving conveyance is valid, and no recovery can be had for injuries or death so incurred.[82]

2. Necessity of Design on Part of Insured. Where, however, the provision is to the effect that no benefit shall be payable where the disability is caused by

poison evolved by germs in cotton inserted by a dentist into wounds caused by the removal of teeth, to stop a hemorrhage, under a policy containing a condition that the liability of the insurer should not extend to "injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." But in Bacon *v.* U. S. Mutual Acc. Assoc., 44 Hun (N. Y.) 599, the death of insured was caused by the infliction, upon a portion of his body, of a putrid animal substance which produced "malignant pustule," a disease invariably produced by the infliction of animal substance upon the body, and usually communicated from the skins or bodies of animals which were suffering from that disease. It was held that the death of insured did not come within a provision of the policy excepting from the risk death or disability caused wholly or in part by poison in any manner or form.

Death from blood-poison caused by the sting of an insect has been held not to be the result of poison in any form or manner, or of contact with poisonous substances, within the meaning of such a provision in the policy. Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413.

76. Metropolitan Acc. Assoc. *v.* Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359.

77. The provision in policy.— Accident policies usually contain a proviso that the risk shall not be extended to death caused by "suicide or self-inflicted injuries." This proviso is similar to the one contained in life policies. Some policies, instead of the phrase "suicide or self-inflicted injuries," substitute the terms "shall die by his own hand," "shall commit suicide," or "shall die by suicide." All these phrases, however, mean substantially the same thing. Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486. See also cases cited *infra*, notes 78–81.

Effect of statutory provision.—A statutory provision that it shall be no defense to an action on a policy of life insurance that insured committed suicide, unless it is shown that at the time of making the application insured contemplated suicide, applies equally to accident policies. Logan *v.* Fidelity, etc., Co., 146 Mo. 114, 47 S. W. 948 [*construing* Mo. Rev. Stat. (1899), § 5855].

78. Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. ed. 308.

Taking carbolic acid.— In Cotter *v.* Royal Neighbors of America, 76 Minn. 518, 79 N. W. 542, it was held that an accident certificate which in effect read that if the member should "die by any means or act which, if used or done by such member while in possession of all natural faculties, would be deemed self-destruction," then the certificate should be void, precluded a recovery for the death of insured caused by taking a quantity of carbolic acid sufficient to cause death, administered by insured's own hand, not by accident, but while insane.

79. Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740 [*affirming* 27 Fed. 40],— holding that in such case the exception does not cover suicide while insane.

80. Weber *v.* Home Benev. Soc., 21 Ind. App. 345, 52 N. E. 462, where the policy divided the benefits to be paid into several classes, and provided that no benefits should be paid for self-inflicted injuries.

81. So held in Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618, where insured, who was traveling by rail, walked onto the platform of the car, while in a dazed and unconscious condition, and fell therefrom and was injured.

82. Miller *v.* Travelers' Ins. Co., 39 Minn. 548, 40 N. W. 839; Travelers Ins. Co. *v.* Snowden, 45 Nebr. 249, 63 N. W. 392. *Compare* King *v.* Travelers Ins. Co., 101 Ga. 64, 28 S. E. 661, 65 Am. St. Rep. 288, cited *supra*, note 32.

insured's jumping on any moving car, unless it shall be established by positive proof that the injury was caused by external, violent, and accidental means not the result of design on the part of insured, a recovery can be had if the means of the injury were not the result of design.[83]

3. Qualification as to Railroad Employees. A qualification excepting railroad employees from the operation of this provision is valid; hence a recovery may be had by such an employee injured while attempting to board or leave a moving train;[84] and even without such qualification it has been held that an insured railroad employee will not be precluded from recovering where it is shown that the insurer had knowledge that he was a railroad employee and that it was part of his duty to get on and off trains while in motion;[85] and this is particularly true where insured's occupation is so stated in the application, specifically made a part of the policy, as to give this information to the insurer.[86]

K. While Engaged in Violation of Law.[87] To bring the injury or death within the terms of this exception there must be a clear violation of some criminal law;[88] and this rule, it seems, applies to violations of city ordi-

83. Travelers' Preferred Acc. Assoc. *v.* Stone, 50 Ill. App. 222.

84. Dailey *v.* Preferred Masonic Mut. Acc. Assoc., 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171 [*affirming* 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171]; Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506 (where insured, a baggage-checker of a transfer company, was killed while attempting to board a moving train); Accident Ins. Co. of North America *v.* McFee, 7 Montreal Q. B. 255.

Even after employee has left the employ of the railroad company he has been allowed to recover for such an injury, it appearing that he had paid the higher premium for insurance against such risk. Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869, where insured at the time of his injury had ceased to be a railroad employee and had become a farmer.

85. Accident Ins. Co. of North America *v.* McFee, 7 Montreal Q. B. 255, where a policy was issued to a superintendent of a railway stipulating against liability for injuries resulting from getting on or off trains while in motion, it appearing that the insurer knew him to be a superintendent whose duty required him to get on and off trains while in motion.

86. Dailey *v.* Preferred Masonic Mut. Acc. Assoc., 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171 [*affirming* 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171], wherein insured stated his occupation as that of conductor of a passenger train. The application contained no restriction against boarding moving conveyances, but the policy did.

87. The provision in policy.— A proviso is usually inserted in the policy to the effect that the risk shall not cover injuries or death sustained "while engaged in an unlawful and vicious act," or "while in violation of the law." See cases cited *infra*, notes 88–92.

88. *Iowa.*— Matthes *v.* Imperial Acc. Assoc., (Iowa 1900) 81 N. W. 484; Collins *v.* Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 59 Am. St. Rep. 367.

Maine.— Eaton *v.* Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048.

New York.— Johanns *v.* National Acc. Soc., 16 N. Y. App. Div. 104, 45 N. Y. Suppl. 117; Lehman *v.* Great Eastern Casualty, etc., Co., 7 N. Y. App. Div. 424, 39 N. Y. Suppl. 912 [*affirmed* in 158 N. Y. 689, 53 N. E. 1127].

North Dakota.— Cornwell *v.* Fraternal Acc. Assoc., 6 N. Dak. 201, 69 N. W. 191, 66 Am. St. Rep. 601.

Tennessee.— Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723.

Texas.— Morris *v.* Travelers' Ins. Co., (Tex. Civ. App. 1897) 43 S. W. 898.

Vermont.— Duran *v.* Standard L., etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637.

Fighting.— In Morris *v.* Travelers' Ins. Co., (Tex. Civ. App. 1897) 43 S. W. 898, it was held that no recovery could be had where insured came to his death from a pistol-shot while engaged in a fight brought on by himself and in open violation of law.

Fishing.— In Collins *v.* Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 59 Am. St. Rep. 367, it was held that in view of § 2 of an act which makes it lawful to catch fish with hook or line it was not a violation of law (under § 6 of the same act, prohibiting the placing across any body of water of a trot-line so as to prevent the free passage of fish up, down, or through such water) to place a trot-line across a stream, unless so placed as to prevent the free passage of the fish.

Killing prairie-chickens.— In Cornwell *v.* Fraternal Acc. Assoc., 6 N. Dak. 201, 69 N. W. 191, 66 Am. St. Rep. 601, it was held that the fact that insured, when injured, had started out with a loaded gun with the intention of killing prairie-chickens at a time when it was unlawful to do so, did not make him guilty either of the offense of killing prairie-chickens out of season, or of the attempt to do so, since he had done no overt act leading to the commission of the offense.

Violation of Sunday law.— In Duran *v.* Standard L., etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637, it

nances.[89] A mere breach of some obligation of morality or rule of policy is insufficient.[90] The injury or death must be shown to have resulted from the act which is claimed to be unlawful,[91] or at least to have had a causative connection therewith.[92]

L. While Engaged in Violation of Rules of Employment. Where the policy excepts injuries resulting directly or indirectly from a violation of the rules of insured's employment, it is not the duty of the insurer to inform insured of the existence of such rules.[93]

M. While Fighting or Provoking Assault. In order to bring the injury or death within the exception in the policy as to injury or death occurring "while engaged in fighting," it is generally necessary that the fight or quarrel shall be one from which bodily injury or death might reasonably be expected.[94] It is not

was held that no recovery could be had where insured was injured by slipping upon a frozen plowed field across which he was returning home from a combined hunting and visiting expedition on Sunday, since he was in violation of the law both as to hunting and traveling on the Sabbath. But in Eaton *v.* Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048, it was held that riding to and from a friend's funeral on a bicycle, or riding a bicycle for health and exercise, was not a violation of Me. Rev. Stat. c. 124, § 20, relating to the observation of the Lord's Day, and hence an injury received while so engaged was not received while in violation of law. And in Matthes *v.* Imperial Acc. Assoc., (Iowa 1900) 81 N. W. 484, it was held that where insured was injured on Sunday in an attempt to procure pigeons from his barn for food, a claim that he was injured while violating the law by working on Sunday could not be sustained, it not being shown that the work was not one of necessity.

Walking on railroad track.— In Lehman *v.* Great Eastern Casualty, etc., Co., 7 N. Y. App. Div. 424, 39 N. Y. Suppl. 912 [*affirmed* in 158 N. Y. 689, 53 N. E. 1127], it was held that where a railroad company permitted the public to go over its tracks, at a place not a street crossing, for a sufficient length of time to create a license, a person crossing the track at such place was not guilty of violating the law within the clause of an accident policy exempting the insurer from liability for injuries received while violating the law, although N. Y. Laws (1892), c. 676, § 53, provides that no person shall walk on or along a railroad track except where the same shall be laid across or along streets or highways.

89. Violation of city ordinance.—In Johanns *v.* National Acc. Soc., 16 N. Y. App. Div. 104, 45 N. Y. Suppl. 117, it was held that a city ordinance providing that no passenger should be allowed on the front platform of a street car when in operation, except that such front platform could be used for ingress or egress of passengers at stoppages, had no application to the case of an injury to insured while attempting to board a slowly moving car, and did not bring such injury within a clause of the policy which provided that it should not cover or extend to disability happening to insured "while violating the law."

90. Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723, wherein it was held that fornication, although immoral, was not a misdemeanor unless attended with such circumstances as give it publicity and notoriety, and was not therefore an unlawful act.

91. *Indiana.*— Conboy *v.* Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154, 43 N. E. 1017.

Iowa.— Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485 (where insured was killed while engaged in a difficulty soon after leaving a bawdy-house and while he was carrying concealed weapons, it not appearing that his death was the natural result of either his visit to the house or the act of carrying the weapon); Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601 (where the accident was caused while on a hunting-trip on Sunday, it appearing that the accident happened at the house of a friend several hours after the hunting-trip had been finished).

Michigan.— Utter *v.* Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, where insured, who was a deserter from the army, was killed by an officer who had been instructed to arrest him, it not being shown that he was engaged in an unlawful act at the time he was killed.

Tennessee.— Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723.

United States.— Travellers' Ins. Co. *v.* Seaver, 19 Wall. (U. S.) 531, 22 L. ed. 155 (where insured was killed while engaged in violating the Vermont statute making racing for money a misdemeanor); Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 44 U. S. App. 694, 22 C. C. A. 499 (where insured was killed shortly after having engaged in a game of dice with the person by whom he was killed,— such gaming being made a misdemeanor by a statute of the State,— it appearing that the shooting was not brought on by any quarrel or dispute incident to the game or in any way connected with it).

92. Conboy *v.* Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154, 43 N. E. 1017.

93. Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530, holding that it will be presumed that insured is aware of the existence of such rules.

94. Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723. In Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825, it was held that the death of in-

essential that insured should be the aggressor.[95] The fact that the other party to the quarrel or fight was insane is not material if insured willingly engaged therein.[96]

N. While Intoxicated. A proviso that the insurance shall not extend to injuries or death happening to insured while intoxicated, "or in consequence of his having been under the influence of intoxicating drinks," covers all injuries while intoxicated,[97] and it is not necessary that the intoxication contribute to the injury,[98] since the proviso relates to the condition of insured and not to the cause which produced the injury or death.[99]

O. While Riding in Conveyance Not Provided for Passengers. Under a policy excepting liability for injuries sustained while in a conveyance not provided for the transportation of passengers, riding on an engine drawing a passenger train has been held not to come within the exception.[1]

P. While Riding on Platform of Moving Conveyance. Some policies provide that there shall be no liability for injury or death incurred while riding on the steps or platform of a moving conveyance.[2] Railroad employees in the performance of their duty are, however, often excepted from the operation of this provision.[3]

Q. While Walking on Railroad[4] — 1. What is a Walking on the Road-Bed.[5]

sured, who was shot by a third person while engaged in an altercation with him, insured being at the time unarmed and having made no menacing or threatening gestures, was not a death resulting from or caused by fighting.

95. U. S. Mutual Acc. Assoc. *v.* Millard, 43 Ill. App. 148.

96. Gresham *v.* Equitable Acc. Ins. Co., 87 Ga. 497, 13 S. E. 752, 27 Am. St. Rep. 263, 13 L. R. A. 838.

97. Shader *v.* Railway Pass. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65 [*affirming* 3 Hun (N. Y.) 424]; Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530; Hester *v.* Fidelity, etc., Co., 69 Mo. App. 186.

The phrase "under the influence of intoxicating drinks," as used in accident policies, has come to mean that "insured must have drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition," or, in other words, that the influence must in reality amount to intoxication; and hence that there is no material difference between an application which stipulates that the policy to be issued "will not cover any accidental injury which may happen to me, either while under the influence of narcotics or intoxicating drinks, or in consequence of having been under the influence of either," and the policy issued thereunder which contained the proviso that "this insurance does not cover . . . death or disablement happening to the insured while intoxicated, or in consequence of his having been under the influence of any narcotic or intoxicating drink whatsoever." Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 437, 10 So. 530.

98. Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530; Shader *v.* Railway Pass. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65 [*affirming* 3 Hun (N. Y.) 424].

In Flint *v.* Travelers' Ins. Co., (Tex. Civ. App. 1898) 43 S. W. 1079, it was held that no recovery could be had for the death of insured, who became intoxicated and, when far toward *delirium tremens*, was taken to a sanitarium for treatment, where several hypodermic injections of morphine were administered, from the immediate effects of which he died.

99. Shader *v.* Railway Pass. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65 [*affirming* 3 Hun (N. Y.) 424].

1. Berliner *v.* Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 66 Am. St. Rep. 49, on the theory that "the locomotive is part of the 'conveyance' provided for the transportation of passengers."

2. **Being upon platform for a temporary and necessary purpose** will not, however, preclude a recovery for an injury sustained while there, under a policy containing such an exception. Standard L., etc., Ins. Co. *v.* Thornton, 100 Fed. 582, 40 C. C. A. 564.

3. Hull *v.* Equitable Acc. Assoc., 41 Minn. 231, 42 N. W. 936, in which case, however, it was held that no recovery could be had by insured for an injury sustained by him while riding on the platform of a train on his way home from his employment, since he was not in the performance of any duty.

4. **The provision in policy.**— The policy may exclude from the risk injury or death incurred while "walking or being on the road-bed or bridge of any railway." See cases cited *infra*, notes 5–10.

5. **The term "road-bed,"** as used in such an exception, will not be construed to mean the entire right of way, nor even that part of it which has been leveled off and constructed for the purpose of putting a track thereon. De Loy *v.* Travelers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108, 50 Am. St. Rep. 787, 37 Wkly. Notes Cas. (Pa.) 239, wherein it was held that it is evidently intended only to exempt the insurer from accidents to insured incurred while walking upon the tracks or ties, or, at least, while so near thereto that he would be likely to be hit by trains passing or repassing on the tracks.

In Standard L., etc., Ins. Co. *v.* Langston,

The phrase "walking on the road-bed of any railroad" includes not only walking thereon, but also running, using the road-bed as a foot-path, and even stopping on it in the course of such use;[6] but the mere crossing of a railroad track,[7] especially at a well-recognized and long-used crossing, is not within the exception.[8]

2. QUALIFICATION AS TO RAILWAY EMPLOYEES. Railway employees in the performance of their duties are, however, usually excepted from the operation of this provision,[9] and in such cases the term "railway employee" refers to a person employed to work on and about a railroad.[10]

XIII. EXTENT OF INJURY AS AFFECTING INSURER'S LIABILITY.

A. "Total Disability"[11] — 1. TERMS NOT DEFINABLE. No general definition seems to have been given by the courts to the words "total disability;"[12] and what is or is not a total disability depends largely upon the circumstances of each case.[13]

2. CONSTRUCTION AND EFFECT OF PARTICULAR WORDS USED. "Total disability," "totally disabled," or words of like import as used in accident-insurance policies, are often accompanied by certain words or clauses which define the meaning of or restrict the application of such terms, as clauses restricting the total disability to such a disability as will prevent the insured from following "any occupation

60 Ark. 381, 30 S. W. 427, it was held that the phrase "road-bed," as used in a clause excluding recovery for injuries while "walking or being on the road-bed of any railway," meant the bed or foundation on which the superstructure of the railway rested, and that the superstructure was the sleepers or ties, rails and fastenings, and included the side-tracks which formed a part of the railway; but that it did not include the ends of ties of unusual and extraordinary length, extending to a place where there could be no possible collisions with trains, and where persons standing or sitting would be beyond reach of passing trains.

In Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427, it was held that the term "road-bed" meant that part of the railroad company's right of way which was occupied by the ties and rails constituting the railroad track, and did not include the entire space of such right of way, and that a space of ten feet between the two tracks was not part of the road-bed within the meaning of the term in an accident policy providing that it does not cover accidents on a railroad bridge, trestle, or road-bed.

6. Metropolitan Acc. Assoc. *v.* Taylor, 71 Ill. App. 132.

Stumbling and falling against the steam-chest on the side of the engine of a passing train, while running toward the train, is not within the clause of the policy. Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267.

Stepping off a railway train, which had stopped at a drawbridge at night, and falling through a concealed hole in the bridge, is not within the exception, since the clause merely implies that insured must not be on the road-bed or bridge for any length of time, and was not for the purpose of guarding against injuries resulting from defects, but against liability for injury from passing trains. Burkhard *v.* Travellers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205.

Use of road-bed by many people.— In Piper *v.* Mercantile Mut. Acc. Assoc., 161 Mass. 589, 37 N. E. 759, it was held that under such a policy no recovery could be had for the death of insured while walking between the tracks of a railroad, when parallel to the tracks was a sidewalk which he could have used; and that the fact that the road-bed was used by many people was immaterial.

7. Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620, 36 N. Y. St. 928.

8. Dougherty *v.* Pacific Mut. L. Ins. Co., 154 Pa. St. 385, 25 Atl. 739; Travelers, etc., Acc. Co. *v.* Wagley, 74 Fed. 457, 45 U. S. App. 39, 20 C. C. A. 588, wherein it was held that the phrase "walking or being on the road-bed" of a railroad was not to be construed with absolute literalness, and did not obligate insured not to cross a railroad track at the place provided for the public to cross it on a public thoroughfare.

9. See cases cited *infra*, note 10.

10. Yancey *v.* Ætna L. Ins. Co., 108 Ga. 349, 33 S. E. 979; Pacific Mut. L. Ins. Co. *v.* Howell, 13 Ind. App. 519, 41 N. E. 968.

11. **The provision in policy.**— The policy usually provides for the payment of a weekly indemnity for accidents or injuries which result in a total disability. The form of this provision is often varied by an additional clause limiting the disability to some form of occupation or employment. See cases cited *infra*, notes 12–22.

12. Lobdill *v.* Laboring Men's Mut. Aid Assoc., 69 Minn. 14, 71 N. W. 696, 65 Am. St. Rep. 542, 38 L. R. A. 537.

13. McMahon *v.* Supreme Council, etc., 54 Mo. App. 468; Hutchinson *v.* Supreme Tent, etc., 68 Hun (N. Y.) 355, 22 N. Y. Suppl. 801; Wolcott *v.* United L., etc., Ins. Assoc., 55 Hun (N. Y.) 98, 8 N. Y. Suppl. 263.

whereby he can obtain a livelihood," [14] "his usual occupation," [15] "his usual or other occupation," [16] "his usual or some other occupation," [17] or as will prevent insured from transacting "all kinds of business," [18] or "any and every kind of business pertaining to his occupation." [19] Where the phrase "total inability to

14. Occupation whereby livelihood can be obtained.— Where the clause "permanently disabled from following his or her usual or other occupation" is restricted by a clause defining the total disability to be such as prevents insured "from following any occupation whereby he or she can obtain a livelihood," no recovery can be had for a disability which, although it disables insured from following his usual occupation, does not prevent him from earning a living by some other means. Albert *v.* Order of Chosen Friends, 34 Fed. 721. See, however, McMahon *v.* Supreme Council, etc., 54 Mo. App. 468, wherein the insured was totally disabled from following any occupation whereby he could obtain a livelihood.

15. Usual occupation.—Inability to do substantially all kinds of accustomed labor to some extent is essential to satisfy a provision requiring the insured to be totally disabled from following his usual occupation. Sawyer *v.* U. S. Casualty Co., (Mass. 1869) 8 Am. L. Reg. N. S. 233, holding that where insured, after the accident, is able to do some parts of the work he has been accustomed to do, though only for a short time and with great difficulty, he cannot recover, although, if he is unable to do certain portions of his work at all, he can recover.

In Smith *v.* Supreme Lodge, etc., (Kan. 1900) 61 Pac. 416, it was held that insured, a druggist, who accidentally lost his arm, could not recover as for a total disability, under a policy containing such a provision.

In Neafie *v.* Manufacturers' Acc. Indemnity Co., 55 Hun (N. Y.) 111, 8 N. Y. Suppl. 202, 28 N. Y. St. 55, it was held that insured, who was classified in the policy as an "iceman, proprietor" was totally disabled from attending to his occupation, where his injuries were such that he was unable to deliver ice, although capable of giving directions to those who took his place.

In Hooper *v.* Accidental Death Ins. Co., 5 H. & N. 546, 7 Jur. N. S. 73, the policy provided that in case the accident did not cause the death of insured immediately, but caused any bodily injury to insured so serious as wholly to disable him from following his usual business, occupation, or pursuits, the insurer would pay compensation in money at a certain rate per week during the continuance of such disability. Insured, a solicitor and registrar of a county court, sprained his ankle severely and was unable to get downstairs for some weeks; thus he was prevented from passing his accounts as registrar, and from attending various places in the interests of his clients, but he was able to write letters and give directions to a clerk. It was held that he was totally disabled from following his usual occupation, business, or pursuits, within the meaning of the policy.

16. The words "or other occupation" have been construed not to mean "or other occupation of the same kind." So held in Albert *v.* Order of Chosen Friends, 34 Fed. 721, where the provision was for a benefit to any member of the order becoming "permanently disabled from following his or her usual or other occupation."

17. Usual or some other occupation.— A provision for payment in case of disability arising from "following his usual 'or some other' occupation" has been held not to mean that the insured must be unable to follow his "usual 'and all other' occupations." Neill *v.* Order of United Friends, 78 Hun (N. Y.) 255, 28 N. Y. Suppl. 928, construing a policy containing such a provision and holding that if, by reason of his injury, the insured is prevented from following his usual occupation, he is entitled to recover.

18. Transacting all kinds of business.— Under a policy insuring against a total disability preventing the transaction of all kinds of business, no recovery can be had unless the disability is such as to prevent insured from doing work in any and all kinds of business. Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631.

19. Transacting all business pertaining to occupation.— To constitute a total disability to transact any and every kind of business pertaining to one's occupation it is not necessary that the disability should be of such a character as to prevent insured from transacting any kind of business pertaining to his occupation. It is sufficient if it prevents him from doing all the substantial acts required of him in his business. Thus the mere fact that insured is able occasionally to perform some single act connected with some kind of business pertaining to his occupation will not render his disability partial instead of total.

Indiana.— Commercial Travelers Mut. Acc. Assoc. *v.* Springsteen, 23 Ind. App. 657, 55 N. E. 973.

Maine.— Young *v.* Travelers Ins. Co., 80 Me. 244, 13 Atl. 896.

Michigan.— Hohn *v.* Inter State Casualty Co., 115 Mich. 79, 72 N. W. 1105; Turner *v.* Fidelity, etc., Co., 112 Mich. 425, 70 N. W. 898, 67 Am. St. Rep. 428, 38 L. R. A. 529.

Minnesota.— Lobdill *v.* Laboring Men's Mut. Aid Assoc., 69 Minn. 14, 71 N. W. 696, 65 Am. St. Rep. 542, 38 L. R. A. 537.

New Hampshire.— Thayer *v.* Standard L., etc., Ins. Co., 68 N. H. 577, 41 Atl. 182.

New York.— Baldwin *v.* Fraternal Acc. Assoc., 21 Misc. (N. Y.) 124, 46 N. Y. Suppl. 1016; Wolcott *v.* United L., etc., Ins. Assoc., 55 Hun (N. Y.) 98, 8 N. Y. Suppl. 263.

But see Saveland *v.* Fidelity, etc., Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863 (where, under a policy providing for the payment of indemnity in case of injury which should wholly disable and prevent insured

labor" is used, it is more inclusive and means a total disability to earn a livelihood at any employment.[20] Where the policy insures against the "total loss of such business time as may result from his injuries"[21] it is not necessary that insured should be totally disabled from performing any and all kinds of business, but only that he should be totally disabled from performing the duties of his own particular occupation.[22]

3. **Double Occupation.** Where insured is classified as being engaged in two occupations, in order to entitle him to recover he must show a total disability preventing him from engaging in either.[23]

4. **Provision for Payment of Half of Total Amount.** Where the policy pro-

"from the prosecution of any and every kind of business pertaining to his occupation" for a period "of continuous total disability not exceeding twenty-six weeks," it was held that no recovery could be had unless insured had, by reason of his injury, been wholly disabled and prevented "from the prosecution of any and every kind of business pertaining to his occupation," and then only for a "period of continuous total disability not exceeding the amount stipulated;" and that an instruction that insured was entitled to recover for such time as by reason of his injury "he was rendered wholly unable to do his accustomed labor,—that is, to do substantially all kinds of his accustomed labor to some extent,"—was erroneous); U. S. Mutual Acc. Assoc. *v.* Millard, 43 Ill. App. 148 (where it was held that insured, a lawyer who was able to attend to his business during his injury, could not recover under a policy insuring against injuries which wholly and continuously disabled him from transacting any and every kind of business pertaining to his occupation); and Knapp *v.* Preferred Mut. Acc. Assoc., 53 Hun (N. Y.) 84, 6 N. Y. Suppl. 57 (where it was held that no recovery could be had by insured, who was classified as a retired gentleman, for a total disability caused by an injury to the hand which deprived him of its use to a greater or less extent during a period of some months).

And it has been held that a total disability exists if insured's injuries are of such a character that common prudence requires him to desist from his labors and rest so long as it is reasonably necessary to effect a speedy cure. Young *v.* Travelers Ins. Co., 80 Me. 244, 13 Atl. 896; Lobdill *v.* Laboring Men's Mut. Aid Assoc., 69 Minn. 14, 71 N. W. 696, 65 Am. St. Rep. 542, 38 L. R. A. 537.

But an inability to transact some parts of his business, however, is not sufficient to constitute a total disability under such a policy.

Iowa.— McKinley *v.* Banker's Acc. Ins. Co., 106 Iowa 81, 75 N. W. 670.

Kansas.— Smith *v.* Supreme Lodge, etc., (Kan. 1900) 61 Pac. 416.

Minnesota.— Lobdill *v.* Laboring Men's Mut. Aid Assoc., 69 Minn. 14, 71 N. W. 696, 65 Am. St. Rep. 542, 38 L. R. A. 537.

Pennsylvania.— Spicer *v.* Commercial Mut. Acc. Co., 16 Pa. Co. Ct. 163, 4 Pa. Dist. 271.

Texas.— Fidelity, etc., Co. *v.* Getzendanner, 93 Tex. 487, 56 S. W. 326 [*reversing* 55 S. W. 179, and *affirming* 22 Tex. Civ. App. 76, 53 S. W. 838]. In this case the policy insured against bodily injuries sustained through external, violent, and accidental means which, independently of all other causes, should immediately, continuously, and wholly disable and prevent insured from performing any and every kind of duty pertaining to his occupation. The occupation of insured was that of visiting yards and ranches, buying and selling cattle not in transit. While driving cattle insured fell from his horse and sustained injuries from which he afterward became insane. It was held that an instruction that insured would be entitled to recover if the injury immediately and continuously disabled him from performing any and every kind of duty materially essential to his occupation, in a manner reasonably as effective as it would have been performed if the injury had not been sustained, was erroneous.

Wisconsin.— Merrill *v.* Travelers' Ins. Co., 91 Wis. 329, 64 N. W. 1039.

20. Hutchinson *v.* Supreme Tent, etc., 68 Hun (N. Y.) 355; 22 N. Y. Suppl. 801; Baltimore, etc., Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44, holding that if, in such a case, insured is able to earn a living at an employment other than the one in which he was injured, he cannot recover.

21. The meaning of these words is that insured shall only be totally disabled from performing the duties of his own particular occupation. Pennington *v.* Pacific Mut. L. Ins. Co., 85 Iowa 468, 52 N. W. 482, 39 Am. St. Rep. 306.

22. Pennington *v.* Pacific Mut. L. Ins. Co., 85 Iowa 468, 52 N. W. 482, 39 Am. St. Rep. 306.

23. Ford *v.* U. S. Mutual Acc. Relief Co., 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700. In this case the policy described insured as a "leather-cutter and merchant," and provided that he should receive a certain weekly indemnity if he should be wholly disabled from pursuing his occupation by an accident. It also recited that he was insured under "classification, medium," and that engaging in a more hazardous occupation should increase the indemnity proportionately, and that he should not be entitled to indemnity beyond the money value of his time. The back of the policy contained a "classification of risks," the preferred class including "merchant," and the medium class providing for less indemnity, but not in terms including a "leather-cutter." It was held that, in order to recover an indemnity under the policy, insured must show a disability both as a leather-cutter and as a merchant.

vides for the payment of half of the total amount of the policy in case of a total and permanent disability at the option of the insurer, the provision is not binding where the insurer has not exercised its option.[24]

B. Immediate Disability. The word "immediately," as used in a policy insuring against loss of time resulting from bodily injuries incurred which, independently of other causes, immediately, wholly, and continuously disables insured from transacting any kind of business pertaining to his occupation, is a word of time, and does not mean within a reasonable time, but presently and without any substantial interval.[25]

C. Permanent Disability. Where the policy provides that the injury must be permanent as well as total, no recovery can be had for an injury which is but temporary.[26]

D. Loss of Member of Body. Where the policy provides for the payment of an indemnity for the "loss of one entire hand or foot," or the "loss of two entire hands or feet," it is not necessary, in order to recover thereunder, that there should be an actual physical severance of the member from the body. Any loss which renders it practically useless is sufficient.[27] But where the policy provides for the payment of a certain sum for the "loss of one entire hand and one entire foot, or two entire hands or two entire feet," it shows a distinct purpose to stipu-

24. Atty.-Gen. *v.* Bay State Beneficiary Assoc., 171 Mass. 455, 50 N. E. 929.

25. Merrill *v.* Travelers' Ins. Co., 91 Wis. 329, 64 N. W. 1039, holding that for the reason stated in the text, where a space of time intervenes between the injury and the total disability, during which insured is able to attend to his business, occupation, or employment, no recovery can be had.

In Preferred Masonic Mut. Acc. Assoc. *v.* Jones, 60 Ill. App. 106, it was held that no recovery could be had under a policy where insured, who was injured while passing through a cellar door by accidentally and violently striking his head on the casing overhead, was able, after a space of five days, to continue his business before he was wholly disabled.

In Williams *v.* Preferred Mut. Acc. Assoc., 91 Ga. 698, 17 S. E. 982, it was held that such a policy did not cover a claim for loss of time resulting from an injury where it appeared that insured, for a month after the date of the injury, was able to be in his store every day, giving more or less attention to his business during that time, since the word "immediately," being preceded by the words "independently of all other causes," refers to the time of disablement and not to the cause and the period of time indicated thereby, and is not the same as would be indicated by the phrase "reasonable time."

Rule applied in case of additional injuries. — This rule is applicable to a case where, after the accident, insured is able to attend to his business for some time and then becomes totally disabled on receiving additional injuries which aggravate the original injury, it not appearing that the original injury would have produced a total disability. Rhodes *v.* Railway Pass. Ins. Co., 5 Lans. (N. Y.) 71.

26. In Hollobaugh *v.* Peoples' Ins. Assoc., 138 Pa. St. 595, 22 Atl. 29, a certificate of membership in a mutual accident association stipulated for the payment of weekly relief in the event of accidental injury to the member permanently disabling him, totally or partially. It also contained an indorsement to the effect that a payment of weekly relief for periods scheduled should be in satisfaction of all claims where the injuries were totally or partially disabling. The schedule specified certain injuries with a period of relief for each, and stated that the injuries not specified would be adjusted on the merits. It was held that no recovery could be had for an injury which was but temporary, since the stipulation and the indorsement must be construed as applying to such injuries only as are within the terms of the contract found in the body of the certificate, which include only the injuries which, while they may be total or partial, must be permanent.

27. Sneck *v.* Travelers' Ins. Co., 88 Hun (N. Y.) 94, 34 N. Y. Suppl. 545; Gahagan *v.* Morrisey, 3 Lack. Leg. N. (Pa.) 168, 19 Pa. Co. Ct. 238, 6 Pa. Dist. 135; Lord *v.* American Mut. Acc. Assoc., 89 Wis. 19, 61 N. W. 293; 46 Am. St. Rep. 815, 26 L. R. A. 741; Sheanon *v.* Pacific Mut. L. Ins. Co., 77 Wis. 618, 46 N. W. 799, 20 Am. St. Rep. 151, 9 L. R. A. 685, in which case insured was accidentally shot in the spine, thereby causing paralysis of the lower limbs, by reason of which he was entirely deprived of the use thereof.

But see Stevers *v.* Peoples Mut. Acc. Ins. Assoc., 150 Pa. St. 132, 24 Atl. 662, 16 L. R. A. 446, 30 Wkly. Notes Cas. (Pa.) 358, in which, the policy providing for the payment of a certain sum for partial permanent disability, namely, the loss of one hand or foot, insured, by reason of an injury to his spine, was unable to use one leg and foot without the use of a mechanical contrivance called a plaster jacket, though by using this jacket he was able to move about nearly as well as ever. It was held that he was not entitled to recover.

late for the loss of two and not one limb, or part of two limbs, before a liability can accrue.[28] Under a policy providing for the payment of a certain sum for the "complete and irrevocable loss of sight in both eyes" the insurer is liable to insured, a one-eyed man, who loses the sight of his remaining eye.[29]

E. Limitation of Amount of Liability by Provisions of Policy. A limitation of the amount of indemnity recoverable for an accident to a certain length of time applies only to the amount recoverable for any one accident, and will not prevent a recovery of indemnity for a second accident occurring during the life of the policy.[30] Where the policy provides for the payment of an indemnity for a total permanent disability, and also for a temporary disability, a further provision that the indemnity will be allowed only for such time as the person injured is under the care of a physician or surgeon, or, in case of an amputation, until it is healed, refers only to cases of temporary total disability.[31]

XIV. PROXIMATE CAUSE.

A. Application of Doctrine. As applied to contracts of accident insurance the doctrine of proximate cause is clearly distinguished from its application to a case of ordinary negligence.[32]

B. What Constitutes. The phrase "proximate cause," as used in accident-insurance policies, has been held to mean that cause which directly produces the effect, as distinguished from the remote cause,[33] — the cause which sets in motion

28. Gentry *v.* Standard L., etc., Ins. Co., 6 Ohio Dec. 114, 5 Ohio N. P. 331.

29. Thus, under a policy which provides for the payment of a certain sum in case of permanent disability by the "total and permanent loss of the sight of both eyes" from accidental bodily injuries, insured, who had lost the sight of one eye previous to his taking out the policy in suit, is entitled to recover for the loss of sight in his remaining eye, since he has incurred a total loss of sight, the insurer having knowledge of the fact, through its general agent, that insured had but one eye at the time he took out the policy; and this is so although the policy makes no provision for indemnity for loss of one eye, and although the risk is greater by reason of insured's having but one eye. Humphreys *v.* National Ben. Assoc., 139 Pa. St. 264, 20 Atl. 1047, 11 L. R. A. 564, 27 Wkly. Notes Cas. (Pa.) 357; Bawden *v.* London, etc., Assur. Co., [1892] 2 Q. B. 534.

30. Crenshaw *v.* Pacific Mut. L. Ins. Co., 63 Mo. App. 678.

31. In Cook *v.* Benefit League, 76 Minn. 382, 79 N. W. 320, the policy provided for indemnity against loss of time for injuries which totally and permanently disabled insured from prosecuting any and every kind of business pertaining to his occupation, by the payment of a certain sum per week not exceeding fifty-two weeks. It also provided for indemnity at the same rate per week for loss of time caused by a temporary total disability, or by sickness caused by disease. The application and by-laws provided that benefits would be allowed only while insured was under the care of a physician or surgeon, or, in the case of an amputation, until it healed. Insured, by reason of having the fingers of both hands amputated, was totally and permanently disabled from prosecuting any and every kind of business pertaining to his occupation. It was held that the provisions in the application and by-laws did not apply to such a case as this, but only to cases of temporary total disability and to cases of sickness from disease, and that insured was entitled to recover for the whole fifty-two weeks, although the amputation healed before the end of that time.

32. Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 U. S. App. 547, 12 C. C. A. 544, 27 L. R. A. 629, holding that in accident-insurance contracts the liability is measured by the contract, and the doctrine of proximate cause is applicable only in determining whether or not a fatal result is caused solely by the act or accident against which indemnity is given; in ordinary negligence cases the proximate cause determines the existence of the liability.

33. So held in McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682, wherein the policy provided that in order to bring the death of insured within the terms of the policy it must result directly from the accidental injury, or that the accidental injury must be the proximate and sole cause of the death.

Illustrations of "proximate cause" may be found in the following cases:

Colorado.— Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

Iowa.— Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601.

Kentucky.— Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413.

Massachusetts.— Mogé *v.* Société de Bienfaisance St. Jean Baptiste, 167 Mass. 298, 45 N. E. 749, 35 L. R. A. 736; Freeman *v.* Mer-

a train of events which brings about a result without the intervention of any force operating and working actively from a new and independent source;[34] but this does not necessarily mean the cause or condition nearest in time or place to the result.[35]

XV. Notice and Proof of Death or Injury.

A. Provision for, in Policy — 1. Within Specified Time — a. Necessity of Giving. Where the policy contains a stipulation that, in order to entitle insured or his beneficiary to recover thereunder, a notice of the accident or injury, containing full particulars thereof, must be furnished the insurer within a certain time, such stipulation is valid and must be complied with before a recovery can be had on the policy,[36] except where not made a condition precedent to such right of recovery[37] or where impossible of performance.[38] Such a condition, however,

cantile Mut. Acc. Assoc., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753.

New York.— Martin *v.* Manufacturers' Acc. Indemnity Co., 151 N. Y. 94, 45 N. E. 377; Martin *v.* Equitable Acc. Assoc., 61 Hun (N. Y.) 467, 16 N. Y. Suppl. 279; Peck *v.* Equitable Acc. Assoc., 52 Hun (N. Y.) 255, 5 N. Y. Suppl. 215.

Ohio.— Miner *v.* Travelers' Ins. Co., 2 Ohio N. P. 103, 3 Ohio Dec. 289.

United States.— Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653; Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 U. S. App. 547, 12 C. C. A. 544, 27 L. R. A. 629; Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620.

England.— Isitt *v.* Railway Pass. Assur. Co., 22 Q. B. D. 504.

Canada.— Young *v.* Accident Ins. Co. of North America, 6 Montreal Super. Ct. 3 [*overruled* in 20 Can. Supreme Ct. 280, on another point].

Illustrations of remote cause may be found in Harris *v.* Travelers' Ins. Co., (Chicago 1868) 8 Alb. L. J. 86; Hubbard *v.* Mutual Acc. Assoc., 98 Fed. 930; McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682.

34. Miner *v.* Travelers' Ins. Co., 2 Ohio N. P. 103, 3 Ohio Dec. 289.

35. Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 353, 30 N. E. 1013, 17 L. R. A. 753, in which case it is held that "the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence in view of the existing circumstances and conditions." Thus "an injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes."

36. United Ben. Soc. *v.* Freeman, (Ga. 1900) 36 S. E. 764; Kimball *v.* Mason's Fraternal Acc. Assoc., 90 Me. 183, 38 Atl. 102 (holding that the act of March 17, 1893, (Me. Pub. Laws (1893) c. 223, as amended, Pub. Laws (1895) c. 46), limiting to thirty days the time within which notice of accident, injury, or death shall be given to accident-insurance companies, did not apply to a policy written previous to the passage of the act and stipulating for a notice of ten days); Heywood *v.* Maine Mut. Acc. Assoc., 85 Me. 289, 27 Atl. 154; Cawley *v.* National Employers' Acc., etc., Assur. Assoc., Cab. & El. 597.

37. Stoneham *v.* Ocean, etc., Acc. Ins. Co., 19 Q. B. D. 237.

Provision considered subsequent.— In Brown *v.* Fraternal Acc. Assoc., 18 Utah 265, 55 Pac. 63, where the provision concerning notice was considered a condition subsequent, it was held that it must receive a reasonable and liberal construction in favor of the beneficiary under the contract.

38. United Ben. Soc. *v.* Freeman, (Ga. 1900) 36 S. E. 764.

Claimant unknown.—In Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 630, 45 N. E. 563, 54 Am. St. Rep. 486, the provision of the policy was as follows: "Unless claimant gives home office, . . . within seven days, written notice, . . . and within thirty days from date of death verified written proof thereof, all claims therefor shall be forfeited." The policy was payable, in case of death of insured, to his legal representative, and insured died on the seventh day after he was injured. Within thirty days after his death plaintiff caused "verified written proof thereof" to be sent to defendant at its home office. It was held that plaintiff did not become the "claimant" until she had taken out letters of administration, and there was consequently no claimant within seven days from the date of the injury, the court saying, "It is clear that this provision for notice within seven days cannot apply to her. It is applicable to the insured only, and not to his legal representative. No other construction of it is reasonable."

Death not occurring within time.—In Hoffman *v.* Manufacturers' Acc. Indemnity Co., 56 Mo. App. 301, it was held that a provision that a notice of death must be given within ten days from the date of an accident causing

should be strictly construed against the insurer,[39] although the fact that death was caused instantaneously has been held not to render such notice unnecessary.[40]

b. When Time for Serving Notice Begins to Run — (I) *In General.* Where, in view of the facts, it is impossible to be certain that death has ensued,[41] or to be aware of the particulars of the accident, the time for serving notice begins to run from the date of the discovery of death or of such particulars.[42]

(II) *Where Existence of Policy Was Unknown.* Where the existence of the policy was unknown to the beneficiary, a notice forwarded by him as soon as he discovered the existence thereof is sufficient within the provision requiring notice as soon as possible after the injury or death.[43]

c. Place of Giving Notice. A clause in the policy which provides that claims are payable at the home office of the insurer does not require the notice and proof of loss to be made there.[44]

d. Persons Who May Give Notice — (I) *In General.* A provision in the policy requiring insured or his representatives to give notice of injury or death

death, being impossible of performance where insured does not die until after ten days from the date of the accident, was void, and a notice given within ten days after his death was sufficient.

39. Thus, where the stipulation provided for written notice of an accident or injury to be given within ten days from the date thereof, and that there should be no claim for disability unless such disability occurred within thirty days from the date of the accident, of which the insurer shall have had notice within ten days, and that there should be no claim for the death of insured unless such death results within ninety days from the date of the accident, of which the insurer shall have had notice within ten days, a notice of an accident which does not immediately disable insured from pursuing his occupation, and which does not, within ten days, give rise to a claim for indemnity or death, need not be given within ten days. Odd Fellows Fraternal Acc. Assoc. *v.* Earl, 70 Fed. 16, 34 U. S. App. 285, 16 C. C. A. 596.

40. Patton *v.* Employers' Liability Assur. Corp., 20 Ir. L. 93; Gamble *v.* Accident Assur. Co., 4 Ir. R. C. L. 204, where it was held that the provision was not discharged by reason of the fact that, owing to the act of God, the accident was of so sudden and fatal a character that it was impossible to have given the required notice within seven days after the accident, inasmuch as the terms of the policy were such as to negative any presumption bringing it within the class of cases in which it has been held that, in the nature and import of the contract itself, there was that which involved the implied condition that the destruction of the person or thing with which the contract dealt should have absolved from its performance.

41. Insured killed by drowning.— In Peele *v.* Provident Fund Soc., 147 Ind. 543, 44 N. E. 661, it was held that where insured came to his death by drowning under circumstances which made it impossible to determine the cause of his death until the finding of a coroner's jury had been made known, a notice of the death given five days after such finding, but eleven days after the death of insured, was sufficient under a policy requiring a notice with full particulars within ten days after the injury or death.

Insured killed by fall of building.— In Trippe *v.* Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432 [*affirming* 3 Misc. (N. Y.) 445, 23 N. Y. Suppl. 173] the insured was killed by the fall of a building, and his body was not found until three days after, until which time it was not known that he was dead. The certificate contained a provision that notice of an accident for which a claim is to be made must be given in writing within ten days from its occurrence, stating the full particulars of the accident, and that failure to give such notice would invalidate all claim. Notice was served on the insurer within ten days from the discovery of the body, but more than ten days after the accident. Such notice was held sufficient.

42. Phillips *v.* U. S. Benevolent Soc., 120 Mich. 142, 79 N. W. 1, holding that where the policy required notice of an accident to be given within five days thereafter, a notice given within five days after insured ascertained that an accident was the cause of the injury was sufficient.

Insured in delirium during period.— In Manufacturers' Acc. Indemnity Co. *v.* Fletcher, 5 Ohio Cir. Ct. 633, it was held that a failure to give a written notice within the time required by the policy was excused where insured, during such time, was in a state of delirium.

Loss of sight.— A notice of an accident causing the loss of the sight of one eye need not be given until it has become reasonably certain that the sight of the eye has been lost, the claim being for such loss. Peoples Mut. Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. Rep. 870.

43. Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236.

44. Pennington *v.* Pacific Mut. L. Ins. Co., 85 Iowa 468, 52 N. W. 482, 39 Am. St. Rep. 306, in which it was held that where insured furnished the notice and proofs of injury to a person representing himself to be the general agent of the insurer, and who had examined insured, it was sufficient.

in writing to the insurer does not require such notice to be given by the legal personal representatives of insured.[45]

(II) *Personal Representatives.* It is not essential that the personal representative of insured furnish the proofs of death, but he may rely upon those furnished by a third person.[46]

2. Immediate Notice — a. Necessity of Giving — (I) *In General.* Some policies require an immediate notice of the injury or death of insured to be given, and such a provision has been held to be valid.[47] A provision of this character should receive, however, a liberal and reasonable construction in favor of the beneficiary.[48]

(II) *In Case of Successive Injuries.* Where the policy provides for the giving of an immediate notice of injury a new notice must be given for each successive injury.[49]

b. What Constitutes. In such policies "immediate" notice is usually held to mean a notice given within a reasonable time in view of all the circumstances of the case.[50]

45. Patton *v.* Employers' Liability Assur. Corp., 20 Ir. L. 93, holding that the notice may be given by any person appointed by insured for that purpose, or by any person acting on his behalf or on behalf of the persons interested in the policy.

46. Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626.

47. Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631.

48. McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436, wherein the policy provided for immediate notice in case of injury causing total disability, and, in case such injury caused death, for notice to be given "in like manner." It was held that where the injury caused death, but did not at the time totally disable insured from working, it was unnecessary to give notice at the time of the accident, the policy failing to provide for notice in such case.

See also Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653, wherein the policy provided that in case of "any accident or injury for which any claim shall be made under this certificate, or in case of death resulting therefrom, immediate notice shall be given in writing," with full particulars of the accident, and that a failure to give such notice should invalidate the claim. It was held that there were two classes of notices intended,— one an immediate notice of the accident or injury when not resulting in death, and the other an immediate notice of death resulting from accident or injury, the latter to be given by the beneficiary; and that a notice so given in the latter case was sufficient, though no notice of the inquiry was given before death.

49. Spicer *v.* Commercial Mut. Acc. Co., 16 Pa. Co. Ct. 163, 4 Pa. Dist. 271.

50. *Illinois.*— Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499; Sun Acc. Assoc. *v.* Olson, 59 Ill. App. 217.

Indiana.— Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460.

Louisiana.—Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 21 So. 721.

Missouri.— McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436.

Ohio.— Crane *v.* Standard L., etc., Ins. Co., 6 Ohio Dec. 118; Manufacturers' Acc. Indemnity Co. *v.* Fletcher, 5 Ohio Cir. Ct. 633; Coldham *v.* Pacific Mut. L. Ins. Co., 2 Ohio Dec. 314.

Pennsylvania.— Peoples Mut. Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 16 Atl. 605, 12 Am. St. Rep. 870, 24 Wkly. Notes Cas. (Pa.) 33.

Wisconsin.— Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934.

Death of insured unknown.— In Kentzler *v.* American Mut. Acc. Assoc., 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934, insured, a tugboat engineer, disappeared in November, and his body was not found until the ice broke up the following April. His beneficiary did not learn of his death and the finding of the body until May, when she immediately notified the company, and in July furnished proofs of death. The company denied liability on the ground that the notice and proofs of loss had not been furnished as required by the policy, but it was held that the notice and proofs of death furnished were sufficient.

Existence of policy unknown.— In Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 21 So. 721, insured died, and the beneficiary was unaware of the existence of the policy until some time thereafter, but upon its discovery the notice of death was given. It was held that the failure to give an immediate notice was sufficiently excused.

In American Acc. Co. *v.* Card, 13 Ohio Cir. Ct. 154, insured failed to notify any one of the existence of the policy, and upon his death the beneficiary did not discover it until over four months thereafter. Notice was given immediately after its discovery, and it was held that the failure of insured to advise some one of the existence of the policy was not such negligence as would release the insurer from liability; and also that the notice given immediately after the discovery of the policy was sufficient.

Post-mortem examination necessary.— In Sun Acc. Assoc. *v.* Olson, 59 Ill. App. 217, the

c. Persons Who May Give Notice. Where the notice required is simply a written one, and there is no requirement as to the person by whom it must be made, the insured is not required to furnish such notice himself, but it may be given by some one on his behalf.[51]

B. Sufficiency of Notice — 1. In General. Notice should state the accident and its cause,[52] but it is not necessary that the notice should contain every detail of the accident.[53]

2. Mere Knowledge of Agent Insufficient. The fact that a local agent of the insurer knew of the death of insured is not such a notice to the company as is contemplated by the policy.[54]

3. Copy of Report of Autopsy in Lieu of Physician's Certificate. Where the blank proofs furnished by the insurer contain a blank certificate to be filled out and signed by the attending physician, and the proofs are returned with an indorsement to the effect that the attending physician refuses to sign the blank certificate, but a copy of the report of the autopsy is furnished in its place, such proofs are sufficient.[55]

4. Disclosure of Facts Available as Defense. A disclosure, in the proofs of death, of facts which might be available as a defense to an action on the policy, will not affect their sufficiency.[56]

5. Failure to Disclose Subsequent Injuries. Failure to disclose injuries happening subsequent to the accident, by which the original injury is aggravated, is not the suppression of a material fact within the meaning of a stipulation requiring a notice of an injury containing full particulars without suppression of any material fact.[57]

physician attending insured, whose death was caused by falling from a lumber pile, and who was also the physician of the insurer, claimed that there was no liability. Thereupon a *post-mortem* examination was held, and the notice was given eighteen days after the death of insured. It was held that it was given within a reasonable time.

In Ewing *v.* Commercial Travelers' Mut. Acc. Assoc., 55 N. Y. App. Div. 241, 66 N. Y. Suppl. 1056, it was held that where an autopsy had been made, and the body interred, but the cause of death was unknown until after the autopsy, and hence plaintiff had no knowledge as to whether insured died from accidental injury within the terms of the policy, a notice sent promptly on the day after receipt of the report of the chemist who made an analysis was sufficient.

Thirteen months' delay is too great, even where the insured fell upon an icy sidewalk and died two days thereafter from the effect of the fall, and the beneficiary made every effort to find the person or persons who witnessed the accident, but without success until thirteen months thereafter. Coldham *v.* Pacific Mut. L. Ins. Co., 2 Ohio Dec. 314.

Thirty-eight days' delay fatal.— In Accident Ins. Co. of North America *v.* Young, 20 Can. Supreme Ct. 280 [*reversing* 6 Montreal Super. Ct. 3] notice sent April 29 of an accident occurring March 21 was held too late.

Twenty-nine days' unexplained delay fatal. — In Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833, the beneficiary did not give notice until twenty-nine days after learning of the accident which caused the death of insured, and it was held that it was not given within a reasonable time.

Six days' delay was held fatal in Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460, where there was an agent of the insurer at the place where insured was injured, no excuse having been shown for the delay.

51. Brown *v.* Fraternal Acc. Assoc., 18 Utah 265, 55 Pac. 63, where it was said that this was so because the object of the clause requiring immediate notice is to enable the insurer to inquire into the facts and circumstances surrounding the accident while they were fresh in the memory of witnesses, in order to determine whether or not there was a liability under the policy, and that such object could be accomplished as well where the notice was sent by a person other than insured.

52. Simons *v.* Iowa State Traveling Men's Assoc., 102 Iowa 267, 71 N. W. 254.

53. American Acc. Co. *v.* Card, 13 Ohio Cir. Ct. 154; Brown *v.* Fraternal Acc. Assoc., 18 Utah 265, 65 Pac. 63.

In McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436, the policy required immediate notice of an injury, giving the full name, occupation, and address of insured, with full particulars of the accident, and further required, in case of death, an immediate notice "in like manner." It was held that the words "in like manner" referred to the method of giving the notice, and not to the information to be given.

54. American Acc. Co. *v.* Card, 13 Ohio Cir. Ct. 154.

55. Sun Acc. Assoc. *v.* Olson, 59 Ill. App. 217.

56. Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331.

57. Rhodes *v.* Railway Pass. Ins. Co., 5 Lans. (N. Y.) 71.

6. Misstatements — a. In General. A misstatement in the notice of the accident, made without any improper motive on the part of insured, will not affect its sufficiency.[58]

b. Conclusiveness. The former rule seems to have been that misstatements in the notice and proofs of loss were conclusive, upon insured and his beneficiary, of the facts therein contained;[59] but this rule seems to have been modified so that now it may be stated generally that such misstatements are conclusive only in cases where the insurer has been prejudiced thereby.[60]

C. Waiver — 1. May Be Waived. A failure to furnish the notice or proofs of accident within the required time, or defects in those furnished, may be waived by the insurer or its general agent,[61] and the waiver may be temporary merely and capable of subsequent revocation.[62]

2. What Constitutes. Waiver consists of some act on the part of the insurer inconsistent with its claim that the policy has become inoperative through failure to furnish notice of accident or proofs of loss within the time required, or because of defects in those furnished; as, furnishing blanks;[63] receiving and retaining proofs furnished without objection, and demanding further information or additional proofs;[64] refusal to furnish required

58. Young *v.* Travelers Ins. Co., 80 Me. 244, 13 Atl. 896, holding that a misstatement as to the date of the accident under such circumstances did not invalidate it.

59. Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331.

Ignorance of how injury occurred.— In Mutual Acc. Assoc. *v.* Simons, 69 Ill. App. 94, it was held that where the notice of injury stated that insured did not know how the injury had been incurred it could not afterward be shown that it was caused by being violently thrown to the ground by the sudden starting of a cable car while attempting to alight therefrom.

60. *Kansas.*— Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651; Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331.

Kentucky.— Prudential Ins. Co. *v.* Breustle, (Ky. 1897) 41 S. W. 9.

Michigan.— Phillips *v.* U. S. Benevolent Soc., 120 Mich. 142, 79 N. W. 1.

Pennsylvania.— North American L., etc., Ins. Co. *v.* Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212.

Wisconsin.— Jarvis *v.* Northwestern Mut. Relief Assoc., 120 Wis. 546, 78 N. W. 1089, 72 Am. St. Rep. 895.

Have effect of admissions against interest. —Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 U. S. App. 547, 12 C. C. A. 544, 27 L. R. A. 629, wherein it was held that, after the company had received notice of the mistake and that claimant would endeavor to show that death was the result of a different cause from that stated in his proofs, the proof had the probative force of solemn admissions against interest, but were not conclusive.

61. Owens *v.* Travelers Ins. Co., (Ind. 1883) 12 Ins. L. J. 75; American Acc. Co. *v.* Fidler, (Ky. 1896) 35 S. W. 905. See also Traveler's Ins. Co. *v.* Harvey, 82 Va. 949, 5 S. E. 553, where it was held that a clause in the policy denying insured's right to claim a waiver of forfeiture by reason of any acts of any agent of the insurer, unless such waiver was specially authorized in writing by the president or secretary of the insurer, was confined to those provisions and conditions in the policy which entered into and formed a part of the contract of insurance, and which were essential to make it a binding contract, and did not extend to those stipulations which were to be performed after the loss had occurred, such as giving notice and furnishing proofs of death.

62. Allibone *v.* Fidelity, etc., Co., (Tex. Civ. App. 1895) 32 S. W. 569, where it was held that a communication from the insurer to claimant's attorney, to the effect that it had received no formal notice of the claim beyond a request for a claim blank, but that it did not consider it necessary that formal proofs be made, as insurer could do this in the course of the investigation if considered necessary, was not a present final waiver of such proofs, but only a temporary waiver which might subsequently be revoked.

63. Crenshaw *v.* Pacific Mut. L. Ins. Co., 71 Mo. App. 42, holding that where the insurer furnished blanks for proof of disability it waived failure to furnish a notice of the accident, but that this did not tend to show that four months' additional time should be allowed in which to make the proofs.

64. *Illinois.*— National Acc. Soc. *v.* Taylor, 42 Ill. App. 97.

Kansas.— Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651; Standard L., etc., Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856.

Maine.— Peabody *v.* Fraternal Acc. Assoc., 89 Me. 96, 35 Atl. 1020.

Massachusetts.— Moore *v.* Wildey Casualty Co., (Mass. 1900) 57 N. E. 673.

Michigan.— Hohn *v.* Inter State Casualty Co., 115 Mich. 79, 72 N. W. 1105.

New York.— Martin *v.* Manufacturers' Acc. Indemnity Co., 151 N. Y. 94, 45 N. E. 377; Trippe *v.* Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432; De Van *v.* Commercial Travelers' Mut. Acc. Assoc., 92 Hun (N. Y.) 256, 36 N. Y. Suppl. 931; Brink *v.* Guaranty Mut. Acc.

blanks;[65] requiring insured, or the claimant under the policy, to do some act or incur some expense or trouble inconsistent with a claim of forfeiture;[66] sending medical director, after oral notice, to examine wound;[67] treating an agent as having authority to receive proofs;[68] or by a denial of liability on other grounds.[69] Mere silence on the part of the insurer, however, is not sufficient to constitute a waiver, nor will a suggestion that the proofs of loss be furnished where the insurer expressly reserves its right to declare the forfeiture.[70]

XVI. ACTIONS.

A. Right of Action — 1. Conditions Precedent — a. In General. Where the policy expressly stipulates that it is to be subject to the several provisions

Assoc., 55 Hun (N. Y.) 606, 7 N. Y. Suppl. 847, 28 N. Y. St. 921; Bushaw *v.* Women's Mut. Ins., etc., Co., 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 423; Guldenkirch *v.* U. S. Mutual Acc. Assoc., 5 N. Y. Suppl. 428.

65. Hoffman *v.* Manufacturers' Acc. Indemnity Co., 56 Mo. App. 301; Manufacturers' Acc. Indemnity Co. *v.* Fletcher, 5 Ohio Cir. Ct. 633.

Refusal unless claimant signed prejudicial stipulation.— In American Acc. Ins. Co. *v.* Norment, 91 Tenn. 1, 18 S. W. 395, it was held that a failure to furnish the affirmative proofs of death required was waived where the insurer refused to furnish the necessary blanks unless the claimant signed a stipulation which might have prejudiced him or prevented a recovery.

Refusal where preliminary blanks were furnished.— In Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49, the beneficiary notified the company of the death of insured and requested it to furnish blanks. The company sent a blank notice of death, informing the beneficiary that it would furnish the other blanks necessary, and, by its acts and communications, induced him to rely on it to furnish the necessary blanks until after the time for furnishing the proofs of death had expired. It was held that the company could not take advantage of such actions and defeat a recovery on the grounds that the proofs of death had not been furnished within the specified time.

66. Trippe *v.* Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432; American Acc. Ins. Co. *v.* Norment, 91 Tenn. 1, 18 S. W. 395.

But see Sharpe *v.* Commercial Travelers' Mut. Acc. Assoc., 139 Ind. 92, 37 N. E. 353, wherein it was held that the fact that the claimant had been put to considerable expense in obtaining the proofs of loss would not estop the insurer from avoiding the policy, where it had not requested such proofs and had continually denied its liability.

Requiring several physical examinations.— Where, at the request of the company, insured submitted to several examinations by its physicians, and, after the time for furnishing proofs had expired, procured and sent to the company, at its request, a statement of his family physician showing his condition, it was held that there was a waiver of the formal proofs of loss entitling insured to the full sum. Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

67. Martin *v.* Equitable Acc. Assoc., 61 Hun (N. Y.) 467, 16 N. Y. Suppl. 279.

68. Travellers' Ins. Co. *v.* Edwards, 122 U. S. 457, 7 S. Ct. 1249, 30 L. ed. 1178 [*affirming* 20 Fed. 661]. See also American Acc. Ins. Co. *v.* Norment, 91 Tenn. 1, 18 S. W. 395, where it was held that the requirement of an immediate notice of injury was waived where a verbal notice was given to the local agent, who communicated the same to the home office in writing, and the company participated in an examination of the case before and after death.

69. *Colorado.*— Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

Illinois.— Metropolitan Acc. Assoc. *v.* Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359; Chicago, etc., R. Co. *v.* Garner, 83 Ill. App. 118.

Indiana.— Railway Officials Acc. Assoc. *v.* Armstrong, 22 Ind. App. 406, 53 N. E. 1037.

Kentucky.— Standard L., etc., Ins. Co. *v.* Thomas, (Ky. 1891) 17 S. W. 275.

Michigan.— Phillips *v.* U. S. Benevolent Soc., 120 Mich. 142, 79 N. W. 1.

Missouri.— Crenshaw *v.* Pacific Mut. L. Ins. Co., 71 Mo. App. 42.

New York.— Hutchinson *v.* Supreme Tent, etc., 68 Hun (N. Y.) 355, 22 N. Y. Suppl. 801.

Ohio.— Manufacturers' Acc. Indemnity Co. *v.* Fletcher, 5 Ohio Cir. Ct. 633.

Tennessee.— Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136.

Texas.— Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133.

United States.— Unthank *v.* Travelers' Ins. Co., 4 Biss. (U. S.) 357, 28 Fed. Cas. No. 16,795.

But see Lyon *v.* Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354, where it was held that a denial of liability because of the non-payment of the premium did not estop the insurer from setting up any other defense it might have; and Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869, wherein it was held that a denial of liability by the insurer, made after the time within which the notice and proof of accident could have been furnished under the policy, did not constitute a waiver of the failure to furnish them within such time.

70. Meech *v.* National Acc. Soc., 50 N. Y. App. Div. 144, 63 N. Y. Suppl. 1008.

thereinafter contained and the conditions and stipulations thereon indorsed, which are to be conditions precedent to the right of insured to recover, such conditions are conditions precedent not only to the right of insured to recover, but also to the right of his legal personal representative.[71]

b. Execution and Delivery of Policy. Where the execution and delivery of the policy is not essential to the taking effect of the insurance contract, insured may bring an action upon the policy before its issuance, a loss having occurred in the meantime.[72]

c. Furnishing Proof of Character of Injury. Under a policy providing that no claim shall be made by insured in respect to any injury unless the same shall be caused by some outward or visible means of which satisfactory proof can be furnished, the insured is not required to furnish such proof before bringing suit.[73]

d. Good Standing of Member. It is only necessary that the insured be in good standing at the time of the injury, where the certificate provides that a member must be in good standing in order to enable him to recover for a disability.[74]

e. Release of Claim against Railroad. A release of all claims for damages against a railroad company, by the person legally entitled to such damages, is necessary where the constitution of a railroad relief association provides for such release before the association will pay the beneficiary of a member killed the amount of benefits due.[75]

f. Submission of Claim to Arbitration. A condition in the policy that all claims thereunder shall, or may on demand, be submitted to arbitration before any action can be brought thereon, is usually held void as constituting an attempt to oust the courts of jurisdiction;[76] but, whether considered void or not, it is not generally considered a condition precedent to the right of recovery,[77] although

71. Cawley *v.* National Employers' Acc., etc., Assur. Assoc., Cab. & El. 597. See also *supra*, XV, A, 1, a.

72. Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986.

73. Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460.

74. McMahon *v.* Supreme Council, etc., 54 Mo. App. 468.

75. Fuller *v.* Baltimore, etc., Employes' Relief Assoc., 67 Md. 433, 10 Atl. 237, where the constitution of the association contained such a provision and insured had designated his mother as his beneficiary, but, having been killed while a member of the association and an employee of the railroad company, his wife and minor child sued the railroad company for damages resulting from his death and recovered therefor. It was held that the provision in the constitution of the association was valid and that, the wife and child not having released the railroad, the beneficiary could not recover.

76. *Indiana.*— Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Iowa.— Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601.

Minnesota.— Whitney *v.* National Masonic Acc. Assoc., 52 Minn. 378, 54 N. W. 184.

New York.— Baldwin *v.* Fraternal Acc. Assoc., 21 Misc. (N. Y.) 124, 46 N. Y. Suppl. 1016; Keeffe *v.* National Acc. Soc., 4 N. Y. App. Div. 392, 38 N. Y. Suppl. 854.

Wisconsin.— Fox *v.* Masons' Fraternal Acc. Assoc., 96 Wis. 390, 71 N. W. 363.

Reference pending action.— In Sanford *v.* Commercial Travelers' Mut. Acc. Assoc., 147 N. Y. 326, 41 N. E. 694 [*affirming* 86 Hun (N. Y.) 380, 33 N. Y. Suppl. 512], it was held that an agreement in the certificate that the issues in any action on the policy should, on demand, be referred to a referee to be appointed by the court in which the action is brought, was void.

77. Badenfeld *v.* Massachusetts Mut. Acc. Assoc., 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466; Kinney *v.* Baltimore, etc., Employes' Relief Assoc., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142; Smith *v.* Preferred Masonic Mut. Acc. Assoc., 51 Fed. 520.

Submission with provision for appeal to advisory committee.— In Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477, it was held that a rule of a railroad relief association, requiring all claims or controversies to be submitted to the determination of the superintendent of the association, whose decision was to be final and conclusive, subject to the right of appeal to the advisory committee, whose opinion was to be final and conclusive upon all parties without exception or appeal, did not make it necessary, as a condition precedent to a right of action, that insured should appeal from the decision of the superintendent.

Compare Albert *v.* Order of Chosen Friends, 34 Fed. 721, wherein it is held that a subordinate council of an association cannot, by a provision of this character, prevent insured from resorting to the court to enforce his claim.

decisions to the contrary are not lacking,[78] and the condition may be waived by a denial of any liability under the policy[79] or by a failure on the part of the insurer to make request for arbitration and an expression of its willingness to test the matter in the courts.[80]

g. Tender or Payment Back of Amount Received. Where insured, through excusable mistake and negligence, has executed a release in full for his claim for disability, and has received therefor a sum much less in amount than he is entitled to under his claim for total disability, he will not be required, as a condition precedent to bringing an action, to tender or pay back the amount so received, since it can be credited against the amount he is entitled to recover.[81]

2. Time to Sue, and Limitations — a. Accrual of Right of Action. Where the policy provides for the payment of a certain sum in case of death, the right of action does not accrue until death;[82] but under a policy providing for the payment of a weekly indemnity not to exceed a specified sum for loss of time, or for the payment of the money value of insured's time for a period during which he is continuously and totally disabled, not to exceed, however, a certain number of weeks from the time of the accident, insured, after giving satisfactory proof of the injury received, is entitled to a weekly indemnity, and need not wait until his disability has ceased, or until the end of the period limiting the time for which indemnity can be recovered, before bringing his action for his loss of time.[83]

b. Limitation in Policy — (I) *Validity.* A provision in the policy limiting the time within which an action thereon can be brought is valid,[84] but if the limitation is contained in a by-law which has not been made a part of the contract of insurance it is of no effect.[85]

(II) *Time from Which Period Begins to Run* — (A) *Date of Filing Proofs.* Where the policy provides that no action shall be brought until a certain time after the date of filing proofs, nor at all unless brought within a certain period, the period of limitation has been held in some cases to begin at the expiration of such time after the filing of proofs,[86] while in others it has been held to run from the date of the receipt of proofs.[87]

(B) *Date of Death.* A limitation in a policy against accidental death, providing that the action must be brought within a certain period from the date of the happening of the alleged injury, begins to run from the death of insured.[88]

(III) *Waiver.* The limitation may be waived by acts of the insurer causing insured or claimant under the policy to delay bringing suit until after the time

78. Eighmy *v.* Brotherhood of Railway Trainmen, (Iowa 1900) 83 N. W. 1051; Rood *v.* Railway Pass., etc., Mut. Ben. Assoc., 31 Fed. 62.

Submission with provision for appeal to supreme council.— In McMahon *v.* Supreme Council, etc., 54 Mo. App. 468, where the by-laws of the society provided that all claims should be proved by a committee, whose decision should be final unless reversed on appeal by the supreme council, and that the claimant might appeal to such council, it was held that before any action could be brought on any claim the claimant must first have appealed from the decision of the committee to the supreme council, but that such a requirement was waived by the act of the supreme council in passing on the decision of the committee of its own motion.

79. Baldwin *v.* Fraternal Acc. Assoc., 21 Misc. (N. Y.) 124, 46 N. Y. Suppl. 1016.

80. Gnau *v.* Masons' Fraternal Acc. Assoc., 109 Mich. 527, 67 N. W. 546.

81. Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

82. Knowlton *v.* Equitable Acc. Assoc., (Mass. 1900) 55 N. E. 890.

83. Kentucky L., etc., Ins. Co. *v.* Franklin, (Ky. 1897) 43 S. W. 709.

84. Provident Fund Soc. *v.* Howell, 110 Ala. 508, 18 So. 311; Law *v.* New England Mut. Acc. Assoc., 94 Mich. 266, 53 N. W. 1104; Lowe *v.* U. S. Mutual Acc. Assoc., 115 N. C. 18, 20 S. E. 169.

85. Mutual Acc., etc., Assoc. *v.* Kayser, 14 Wkly. Notes Cas. (Pa.) 86.

86. Standard L., etc., Co. *v.* Davis, 59 Kan. 52, 53 Pac. 856; Allibone *v.* Fidelity, etc., Co., (Tex. Civ. App. 1895) 32 S. W. 569.

87. Provident Fund Soc. *v.* Howell, 110 Ala. 508, 18 So. 311; Ritch *v.* Masons' Fraternal Acc. Assoc., 99 Ga. 112, 25 S. E. 191.

88. Cooper *v.* U. S. Mutual Ben. Assoc., 132 N. Y. 334, 30 N. E. 833, 28 Am. St. Rep. 581, 16 L. R. A. 138 [*affirming*, on other grounds, 57 Hun (N. Y.) 407, 10 N. Y. Suppl. 748]; McFarland *v.* Railway Officials, etc., Acc. Assoc., 5 Wyo. 126, 38 Pac. 347, 677, 63 Am. St. Rep. 29.

provided for in the policy,[89] by denial of liability,[90] or by refusing to settle except upon illegal and prejudicial conditions;[91] but mere negotiations for a settlement will not constitute a waiver.[92]

(IV) *What Constitutes Commencement of Action.* Where a petition is filed, and a non-resident notice served within the time required by the policy, the action is brought within such time, although the citation is not served until after the lapse thereof. The issuance of summons is the commencement of suit, and stops the running of the statute of limitations.[93]

3. Who May Sue. The person designated as payee therein may maintain an action on the policy.[94] A widow may waive her right as beneficiary and sue as administratrix of her deceased husband's estate.[95]

B. Form of Action. An action at law lies to recover a sum insured, to be realized by assessment.[96] A cause of action in equity for the specific performance of the contract to issue the policy may be joined with a cause of action on the contract of insurance where the execution and delivery of the policy were not necessary to the taking effect of the contract of insurance.[97]

C. Defenses — 1. Effect of Waiver in Policy. No defense except that of suicide can be made where the policy expressly waives all others.[98]

2. Another Suit Pending. It is no defense to an action, brought by a substituted beneficiary, that another action on the same policy is pending, brought by the original beneficiary in another state, in which the substituted beneficiary has intervened and been nonsuited.[99]

3. Assignment of Interest of Heir of Distributee. Where an accident policy contained a clause forbidding an assignment of the policy, it is no objection to a recovery that an heir of one of the distributees of the fund has sold his interest therein after suit brought.[1]

4. Contributory Negligence — a. In General. Since one of the chief objects of an accident policy is to protect the insured against his own carelessness or negligence, the general rule of law regarding contributory negligence does not apply,[2] and the mere fact that insured was guilty of negligence contributing to the injury will not prevent a recovery[3] unless the policy in terms exempts the insurer from liability for injuries so caused.[4] But the insertion of a clause requiring insured to use due diligence for his safety and protection does not necessitate the exercise of a higher degree of diligence or care than prudent persons are accustomed habitually to use.[5]

89. Turner *v.* Fidelity, etc., Co., 112 Mich. 425, 70 N. W. 898, 67 Am. St. Rep. 428, 38 L. R. A. 529; Harold *v.* People's Mut. Acc. Ins. Assoc., 12 Pa. Co. Ct. 454, 2 Pa. Dist. 503.

90. Phillips *v.* U. S. Benevolent Soc., 120 Mich. 142, 79 N. W. 1.

91. American Acc. Ins. Co. *v.* Norment, 91 Tenn. 1, 18 S. W. 395.

92. Metropolitan Acc. Assoc. *v.* Clifton, 63 Ill. App. 152.

93. Standard L., etc., Ins. Co. *v.* Askew, 11 Tex. Civ. App. 59, 32 S. W. 31, where it appeared that plaintiff promptly tried to bring defendant into court and continued his efforts to do so until he finally succeeded.

Suing out summons is the beginning of the action. Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472.

94. American Employers' Liability Ins. Co. *v.* Barr, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51; Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825.

95. Enright *v.* Standard L., etc., Ins. Co., 91 Mich. 238, 51 N. W. 928.

96. Covenant Mut. L. Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966; Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738.

97. Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986.

98. Travelers' Ins. Co. *v.* Nicklas, 88 Md. 470, 41 Atl. 906.

99. Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825.

1. Knickerbocker Casualty Ins. Co. *v.* Jordan, 7 Cinc. L. Bul. 71, 8 Ohio Dec. (Reprint) 313.

2. Rhodes *v.* Railway Pass. Ins. Co., 5 Lans. (N. Y.) 71.

3. Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310; Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 55 N. W. 626; Schneider *v.* Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157.

4. Pratt *v.* Travellers' Ins. Co., (N. Y. 1871) 7 Am. L. Rev. 595; Travelers' Ins. Co. *v.* Randolph. 78 Fed. 754, 47 U. S. App. 260, 24 C. C. A. 305.

5. Kentucky L., etc., Ins. Co. *v.* Franklin, (Ky. 1897) 43 S. W. 709.

Thus in Stone *v.* U. S. Casualty Co., 34

b. What Constitutes — (I) *Running or Walking on Railroad Track.* Running or walking on a railroad track has been held sufficient negligence on the part of insured to prevent a recovery.[6]

(II) *Sleeping on Railroad Track.* Sleeping on a railroad track is such negligence as will bar a recovery under the policy.[7]

(III) *Standing on Platform of Moving Car.* The mere fact that insured was standing upon the rear platform of a moving street car does not, of itself, show such want of care as will defeat a recovery.[8]

5. Facts Available as Defense Apparent from Proofs of Death. That the proofs of death show the existence of facts which might be made available as a defense to the action, or which might lead the insurer to refuse payment, will not bar the right of action.[9]

6. Forfeiture of Policy. A forfeiture of the policy may be set up as a defense, but it must rest upon a clear and definite provision, more particularly so when the forfeiture relied upon is in language selected and employed by the insurer.[10] The forfeiture may be waived, as by the acceptance of a premium with knowledge that insured was killed while engaged in an act prohibited by the policy,[11] or by an offer of a sum of money in settlement of the claim under such circumstances.[12]

7. Fraud in Obtaining Policy. Where there is indorsed on the policy a provision that it is not to take effect until issued and delivered, but it is held to take effect from an earlier date stated on its face, the fact that insured, having sustained an injury after such earlier date, but before a delivery of the policy, called for and secured the same without mentioning his injury, but without making any misrepresentation to secure the policy, will not make him guilty of fraud so as to bar an action thereon.[13]

8. No Examination of Body. That no examination of the body of insured has been made by the medical examiner of the insurer, under a clause in the policy providing that it might be done at any time, is no defense to an action on the policy where no request was made for such an examination within a reasonable time after death.[14] But if, after the expiration of such time, circumstances or

N. J. L. 371, it was held that insured had not violated the clause requiring him to use all due diligence for his personal safety and protection, where it appeared that he was killed by falling from the second story of a barn in consequence of the breaking of a joist having a hidden defect.

6. Tuttle *v.* Travellers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316 (holding that insured was not in the use of that due diligence for his personal safety and protection required by a clause in the policy, where he was killed by being struck by a train while running along the track in front of it for the purpose of getting on a train approaching in an opposite direction on a parallel track); Hoffman *v.* Travellers' Ins. Co., (N. Y. 1873) 7 Am. L. Rev. 594 (where insured was walking on a railroad track, and, upon a signal being given by an approaching engine when quite a distance from him, stepped off the track on the side, and then, when the engine had almost reached him, stepped onto the track again, and was struck by the engine and killed).

7. Standard L., etc., Ins. Co. *v.* Langston, 60 Ark. 381, 30 S. W. 427.

8. Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453.

9. Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331.

10. Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140.

11. Morris *v.* Travelers' Ins. Co., (Tex. Civ. App. 1897) 43 S. W. 898.

12. Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651.

13. Gordon *v.* U. S. Casualty Co., (Tenn. Ch. 1899) 54 S. W. 98.

14. **A delay of some weeks** after burial and then demanding examination of widow instead of beneficiary is unreasonable. American Employers' Liability Ins. Co. *v.* Barr, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51.

A delay of nearly a month after the burial is unreasonable, where, immediately after death, an autopsy had been made under direction of the coroner, and the organs affected were removed from the body and not subsequently replaced. Ewing *v.* Commercial Travelers' Mut. Acc. Assoc., 55 N. Y. App. Div. 241, 66 N. Y. Suppl. 1056.

A delay of ten days is unreasonable where, immediately after the death of insured, which was caused by drowning, notice of his death had been forwarded to the insurer, and the body was not interred until an interval of five days had elapsed, it not being shown that insurer had any reason to believe that death was caused by a means excepted from the risk. Wehle *v.* U. S. Mutual Acc. Assoc., 153

facts coming to the knowledge of insurer warrant a reasonable belief that death was caused by means or causes excepted from the contract, the insurer is justified in insisting upon an exhumation of the body and a dissection of it.[15]

9. Release. A release of all claims on account of an injury received, made by insured on the honest representations of both his own and the insurer's physician that he has recovered from the injury, bars any recovery for a further loss of time or for death resulting from the same injury, either on the old or a substituted policy.[16] Such a release cannot be avoided on the ground that the representations were untrue, where it is not shown that they were not honestly made.[17] But where insured, through excusable mistake or negligence, signs a release for all claims to which he is entitled under the policy, he is not bound thereby.[18]

10. Rumor That Insured Has Absconded. A rumor that insured is not dead, but has absconded for the purpose of defrauding the company, will not justify a refusal to pay the loss.[19]

11. Time of Death or Disability. Where the policy provides that no recovery can be had for the death of insured unless it results within a certain time after the injuries sustained, no recovery can be had if the insured dies after that time, but before the expiration of the term of the policy.[20]

D. Venue. An association which pays its benefits by assessments, being an insurance company, may be sued in any county in the state in which the injuries are sustained.[21]

E. Service of Process. A statute providing that, in an action on a life policy or certificate issued by a fraternal society, service of process may be had on the chief officer, or, in his absence, on the secretary of any subordinate lodge of

N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598.

15. Wehle *v.* U. S. Mutual Acc. Assoc., 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598 [*affirming* 11 Misc. (N. Y.) 36, 31 N. Y. Suppl. 865].

16. Wood *v.* Massachusetts Mut. Acc. Assoc., 174 Mass. 217, 54 N. E. 541.

In case of alternative indemnities, however, provided for in the policy, for the loss of limb or sight or continued disability, it was held in Cunningham *v.* Union Casualty, etc., Co., 82 Mo. App. 607, that a release as to "a continued disability" would not bar a second claim for "loss of entire eyesight," it appearing that insured sent in a claim for continued disability within thirty days, and afterward, within ninety days as stipulated in the policy, gave notice of loss of sight.

17. Wood *v.* Massachusetts Mut. Acc. Assoc., 174 Mass. 217, 54 N. E. 541.

18. Shearon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878, where an agent of the insurer procured the signature of insured to a claim for weekly indemnity, which was paid to him; and a receipt taken from him releasing the company from all further claim. Insured, by reason of his total disability, was entitled to a much greater sum than that which he received, and it was held that he was not bound by the release given by him and could recover a further sum.

19. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

20. So held in Brown *v.* U. S. Casualty Co., 95 Fed. 935, wherein the policy provided for the payment of a weekly indemnity to insured for loss of time resulting from bodily injuries sustained through external, violent, and accidental means, and also provided for the payment, to a beneficiary named, of a specified sum if death resulted from such injuries alone within ninety days of the event causing such injuries.

"Such injuries alone."—In Moore *v.* Wildey Casualty Co., (Mass. 1900) 57 N. E. 673, the policy provided for the payment of an indemnity for bodily injury effected during the life of the certificate, through external, violent, and accidental means, and also for the payment of a stated amount if the death of insured should result from such injuries alone within ninety days from the date of the accident. It was held that the words "such injuries alone" referred to the kind of injury which furnished the basis of indemnity, namely, bodily injury effected during the life of the certificate through external, violent, and accidental means.

21. Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601, holding such an association to be an insurance company under Iowa Code § 2584.

Where, however, the association is not an insurance company or subject to the laws governing insurance companies, as in the case of an association organized under the Illinois statutes for the purpose of furnishing accident or permanent disability indemnity to its members, without allowing such members to receive any of the profits, an action cannot be begun against such association in any county in the state other than that in which the association has its principal place of business. Union Mut. Acc. Assoc. *v.* Riel, 38 Ill. App. 414.

such society in the state, applies to an action to recover an indemnity for the death of insured by accidental means.[22]

F. Pleading — 1. Time for Pleading in Abatement. A provision in the policy that no action can be maintained thereon until a certain time after the proofs of loss have been given, being in abatement of the action merely, a plea in abatement, filed after pleading to the merits, is too late.[23]

2. Complaint, Declaration, or Petition — a. In General. A complaint alleging in substance that all the conditions and requirements of the policy have been complied with by insured is sufficient.[24]

b. Particular Averments — (I) *Accidental Character of Injury.* The complaint should allege that the injury or death was caused by accidental means;[25] but a failure to do so is cured by an averment of such fact in the answer.[26]

(II) *Denial of Liability by Insurer.* A complaint alleging that, from the time of the death of insured, the insurer first denied and continues to deny its liability, sufficiently shows a continuous denial of liability from the time of the death of insured.[27]

(III) *Disability of Insured* — (A) *Language of Policy.* Stating the disability of insured in the language of the policy is generally sufficient.[28]

(B) *Bodily Injury.* A complaint alleging that insured received an injury while engaged in a lawful vocation, which caused a total and permanent loss of his right eye, is sufficient, it not being necessary in such case to allege the existence of a bodily injury.[29]

(C) *Existence of Marks on Body.* Where the complaint alleges that the death of insured was caused by means which sufficiently imply the existence of physical marks on the body, it is not necessary to allege the existence of physical marks, although the policy provided that such marks should be visible.[30]

(IV) *Insurable Interest.* Insurable interest need not be alleged and shown by the plaintiff when he is the person designated as payee in the policy.[31]

22. Travelers' Protective Assoc. *v.* Gilbert, 101 Fed. 46, holding that Ark. Acts (1895) p. 188, applied to an action to recover an indemnity for death by accident, and also holding that Ark. Acts (1897) p. 31, providing for a different method of service in actions on insurance policies generally, did not repeal the prior act.

23. American Acc. Co. *v.* Fidler, (Ky. 1896) 35 S. W. 905.

24. Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.

For forms of complaints or declarations on accident policies, see Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477; Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460; Costikyan *v.* Travelers' Ins. Co., 59 Hun (N. Y.) 616, 12 N. Y. Suppl. 413 (held sufficient against the objection that it stated more than one cause of action); Farrell *v.* American Employers' Liability Ins. Co., 68 Vt. 136, 34 Atl. 478; Bickford *v.* Travelers Ins. Co., 67 Vt. 418, 32 Atl. 230.

25. Newman *v.* Railway Officials, etc., Acc. Assoc., 15 Ind. App. 29, 42 N. E. 650.

Sufficient allegations.— In Richards *v.* Travelers Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455, it was held that a complaint which averred that insured sustained bodily injuries effected through external, violent, and accidental means, and that his death was caused by such injuries alone, was sufficient. And in Railway Officials Acc. Assoc. *v.* Armstrong, 22 Ind. App. 406, 53 N. E. 1037, where the policy insured against injury or death only where such injury or death was the direct and immediate result of physical bodily injury undoubtedly proceeding from external, violent, and accidental means, it was held that a complaint alleging that the death of insured resulted solely from physical bodily injuries proceeding from and inflicted by external, violent, and accidental means, producing immediate death, sufficiently showed an accidental death.

26. Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

27. Railway Officials Acc. Assoc. *v.* Armstrong, 22 Ind. App. 406, 53 N. E. 1037.

28. McElfresh *v.* Odd Fellows Acc. Co., 21 Ind. App. 557, 52 N. E. 819.

29. Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 16 Utah 145, 51 Pac. 259, 67 Am. St. Rep. 602.

30. Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133, where the complaint alleged that insured was killed by falling houses and flying timbers produced by a cyclone, and it was held that it was not necessary to allege the existence of physical marks on the body.

31. Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825; American Employers' Liability Ins. Co. *v.* Barr, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51.

(v) *Negativing Conditions or Exceptions.* It is not necessary that the complaint should negative any of the conditions or exceptions contained in the policy, these being matters of defense.[32]

(vi) *Occupation of Insured.* Under a policy providing for the payment of a reduced sum in case insured is killed in an occupation classified by the company as more hazardous than that of insured at the time the policy is issued, a beneficiary who sues for the full amount of the policy must allege and prove that insured was not killed in a more hazardous occupation.[33] But if it appears in the policy attached to the petition that the occupation in which insured was engaged at the time the policy was issued to him is stated in the application therefor, and such application is alleged to be in the hands of the insurer, it is not necessary for the petition to allege the occupation of insured at such time.[34]

(vii) *Right of Employer to Sue as Trustee.* Where an employer is insured as trustee for the benefit of any employee who may be injured, no action can be maintained by the employer on such a policy unless it is shown that he sues, not in his own right, but as trustee for the employee or his legal representatives, and in such case the existence of legal representatives must be averred.[35]

(viii) *Service or Waiver of Notice and Proofs.* The plaintiff should allege and prove a compliance with a clause in the policy requiring notice and proofs of loss,[36] or allege and prove facts showing a waiver, estoppel, or excuse sufficient to authorize a recovery notwithstanding a non-compliance with such provision,[37] although evidence of such waiver has been held admissible without a special allegation thereof in the complaint.[38]

c. Effect of Policy as Exhibit. Where the policy is attached to the petition as an exhibit, recitals of description in the policy become matters of averment, and no material variance arises because such descriptive and additional recitals are not fully averred in the pleading.[39]

32. *Indiana.*— National Ben. Assoc. *v.* Bowman, 110 Ind. 355, 11 N. E. 316.

Iowa.— Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485.

Nebraska.— Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

New York.— Whitlatch *v.* Fidelity, etc., Co., 71 Hun (N. Y.) 146, 24 N. Y. Suppl. 537.

Texas.— Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869; Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133.

In Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477, it was held that a complaint which set out the contract and rules of the company, and alleged that the injury was received without any fault or negligence on the part of insured, and that he had complied with all the terms of the policy, was sufficient to negative the idea that any of the conditions precedent contained in the rules had been violated.

33. American Acc. Co. *v.* Carson, 99 Ky. 441, 36 S. W. 169, 59 Am. St. Rep. 473, 34 L. R. A. 301.

34. Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133.

35. American Employers' Liability Ins. Co. *v.* Sloss Iron, etc., Co., 100 Ga. 679, 28 S. E. 458.

36. Meech *v.* National Acc. Soc., 50 N. Y. App. Div. 144, 63 N. Y. Suppl. 1008.

37. Commercial Travelers Mut. Acc. Assoc. *v.* Springsteen, 23 Ind. App. 657, 55 N. E. 973; Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460; Meech *v.* National Acc. Soc., 50 N. Y. App. Div. 144, 63 N. Y. Suppl. 1008.

Sufficient allegation of waiver.— In Railway Officials Acc. Assoc. *v.* Armstrong, 22 Ind. App. 406, 53 N. E. 1037, the policy required satisfactory proofs of death within seven months, but did not indicate what proofs would be satisfactory. An allegation in the complaint was held sufficient which showed that the insurer, on being notified and requested to furnish information as to the proofs necessary, failed to furnish them or to indicate what further proofs would be required in time for them to be secured within the period limited; and a further allegation that, upon the death of insured, an immediate satisfactory notice thereof was given to the insurer, but that further proofs of death were not given because waived by the insurer, and that more than ninety days had elapsed since such waiver, and that after the expiration of the ninety days, and before suit, demand was made and liability denied, sufficiently averred that the waiver of further proofs was made at the time the notice of the death was given, and that the denial of insurer's liability occurred within the seven months within which the policy required a satisfactory proof of death.

38. Owens *v.* Travelers' Ins. Co., (Ind. 1883) 12 Ins. L. J. 75; Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

39. Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133.

3. Answer or Plea — a. Act of Agent Unauthorized. Where defendant relies on the fact that, by reason of an unauthorized act of one of its agents and its failure to assent to such act, the contract of insurance has not been completed, it must allege knowledge of such excess of authority on the part of the insured.[40]

b. Contributory Negligence. An answer setting up contributory negligence must allege the facts constituting such negligence, and not state mere conclusions.[41]

c. Denial of Accidental Means. An answer denying the accidental character of an injury must do so directly and not argumentatively.[42]

d. Denial of Existence of Marks on Body. Where the complaint alleges that the death of insured was caused by accidental injuries, leaving visible marks upon his body, it is not necessary, in the answer, specially to deny this allegation, since a general denial is sufficient to allow proof of falsity of such allegation.[43] If the answer admits the death of insured from erysipelas, ensuing upon the accidental cutting and laceration of one of his fingers, a subsequent allegation that there is no visible mark of said accidental injury upon the body of insured is repugnant to the admission.[44]

e. Failure to Serve Notice and Proofs. To take advantage of a failure to serve the notice or proofs of injury as required by the policy, such failure must be specially pleaded,[45] and if it is denied that affirmative proofs of injury were served, facts showing such failure must be alleged.[46]

f. False Representations. Where false representations are relied on as a defense, the particulars must be stated.[47]

g. Injury Caused by Excepted Risk — (1) *In General.* Where defendant relies on the fact that insured came to his death through some means which are excepted from the risk, such defense should be specially pleaded,[48] as where the defendant claims that the injury was received by insured while engaged in a more hazardous class of employment than that under which he was insured,[49] that death was due to intentional injuries,[50] or intoxication,[51] or suicide.[52]

40. American Employers' Liability Ins. Co. *v.* Barr, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51.

41. Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

42. In Bernays *v.* U. S. Mutual Acc. Assoc., 45 Fed. 455, 456, an answer averring that by its terms the policy was not to "extend to or cover death resulting from or caused by poison, . . . or contact with poisonous substances," and that "said alleged injury was caused by poison and by contact with poisonous substances," was held bad, as being merely an argumentative denial of the allegation in the petition that insured, a physician, while examining a patient, "accidentally cut and lacerated one of his fingers with forceps then being used, and by reason and means of said accidental injuries to his finger . . . became thereupon afflicted with the disease of erysipelas, and died . . . within thirty days after the time of said injury, and that death resulted alone from said injury."

43. Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105.

44. Bernays *v.* U. S. Mutual Acc. Assoc., 45 Fed. 455.

45. Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508; Coburn *v.* Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604.

46. Bean *v.* Travelers Ins. Co., 94 Cal. 581, 29 Pac. 1113, where an answer admitting that insured furnished what purported to be affirmative proofs of injury, but denying that they amounted to affirmative proofs of the duration of the disability, was held bad as stating a legal conclusion.

47. Allibone *v.* Fidelity, etc., Co., (Tex. Civ. App. 1895) 32 S. W. 569; American Employers' Liability Ins. Co. *v.* Barr, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51.

Concealment of disease.— Where the petition alleges that insured's death was caused by a disease due to the accidental laceration of a portion of the body, an answer which avers that insured had warranted that he never had, and had not then, any bodily or mental infirmity, and which also avers that insured had, on various occasions prior thereto, been afflicted, and was then afflicted, with the disease mentioned in the petition, and that said disease caused his death, but which fails to show that said disease was an infirmity which would increase the risk in the event of an accident, is bad. Bernays *v.* U. S. Mutual Acc. Assoc., 45 Fed. 455.

48. Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530; Hester *v.* Fidelity, etc., Co., 69 Mo. App. 186.

49. Globe Acc. Ins. Co. *v.* Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

50. Coburn *v.* Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604.

51. National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 36 U. S. App. 658, 20 C. C. A. 3.

52. National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 36 U. S. App. 658, 20 C. C. A. 3.

(II) *Unlawful Act.* Where defendant relies on the fact that insured met his death while engaged in an unlawful act, if such act is a statutory offense the answer must set out all the statutory elements thereof, and the omission of any essential element makes the answer bad;[53] and it is further necessary for the answer to allege a causative connection between the offense and the injury sustained.[54]

(III) *Voluntary Exposure to Unnecessary Danger.* An answer alleging that the death of insured was caused by a voluntary exposure to unnecessary danger is insufficient where it does not show that insured had knowledge of the danger and voluntarily exposed himself thereto.[55]

h. Limitation — (I) *As to Amount Recoverable.* Where the policy provides that insured shall not be entitled to indemnity in excess of his salary or the money value of his time, in order to take advantage of such provision the answer must specially allege it.[56]

(II) *As to Time of Suing.* The fact that the action is not brought within the time limited by the policy, to be available as a defense, must be specially pleaded.[57]

i. Policy Issued for Unauthorized Amount. The fact that tickets have been issued for an amount in excess of that which the agents had power to issue may be specially pleaded or shown under the general issue.[58]

j. Setting Out By-Laws. Where defendant relies upon rules and by-laws of the association they must be set out in the answer, and it is not sufficient merely to allege that they have been violated.[59]

4. Replication. The replication must sufficiently deny the material parts of the plea.[60]

53. National Ben. Assoc. *v.* Bowman, 110 Ind. 355, 11 N. E. 316; Conboy *v.* Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154, 43 N. E. 1017, where the insurer claimed that insured was drowned while unlawfully seining in a river. The answer alleged such fact, but did not state that the waters in which insured was seining were "above tide-waters," it being necessary to the statutory offense that the seining should be "above tide-waters."

54. National Ben. Assoc. *v.* Bowman, 110 Ind. 355, 11 N. E. 316.

55. National Ben. Assoc. *v.* Bowman, 110 Ind. 355, 11 N. E. 316; Conboy *v.* Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154, where the answer which was held insufficient alleged that insured, who could not swim, was seining, at the time of his death, in a river in which there were sink-holes, and that he stepped into one of such holes and was caught and drowned, but did not allege that insured knew of the danger or voluntarily exposed himself thereto.

56. Crenshaw *v.* Pacific Mut. L. Ins. Co., 71 Mo. App. 42.

57. Harold *v.* Peoples Mut. Acc. Ins. Assoc., 12 Pa. Co. Ct. 454, 2 Pa. Dist. 503.

An answer is insufficient where the policy provides that there can be no recovery "unless action is begun within six months from the date when the society shall have received proofs of the injury," and the answer merely sets up as a defense that the policy provides that "no suit or proceeding at law or in equity shall be brought to recover any sum hereby provided for unless the same is commenced within one year from the date of the accident." Keeffe *v.* National Acc. Soc., 4 N. Y. App. Div. 392, 38 N. Y. Suppl. 854.

58. Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136.

59. Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477.

60. Denying want of due diligence.— In Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530, which was an action on a policy covering injuries resulting from dangers incident to the occupation of insured, but not those resulting from negligence or want of care in the performance of his customary duties, the plea averred that insured failed to use due diligence for his personal safety and protection, but "contributed directly and proximately to his own injury and death by getting off an engine in motion, in the nighttime, with his back toward the direction in which said engine was going, which was an unsafe and dangerous way of alighting from it." The replication, alleging "that said insured was a railroad switchman, was insured as such, and met the accident which caused his death while in the discharge of his customary duties as such switchman," was held demurrable in that it did not sufficiently deny the allegation in the plea.

Denial of release by parties entitled to damages.— In Fuller *v.* Baltimore, etc., Employés' Relief Assoc., 67 Md. 433, 10 Atl. 237, where the plea averred that certain parties entitled to damages on account of the accident to insured have brought suit against the railroad company and have recovered damages and have not released the company, a replication which alleges that the accident

G. Evidence — 1. Presumptions — a. As to Accidental Character of Injury. On an issue as to whether the injury to or death of insured was caused by accidental means or by some cause excepted by the policy the legal presumption is against the insanity of insured,[61] intentional injuries by third persons,[62] lack of due care and diligence,[63] self-inflicted injuries,[64] and suicide.[65] These presumptions may be overcome, however, by facts and circumstances establishing the contrary.[66]

b. As to Payment. The payment of an indemnity to insured will not raise a presumption that all the instalments of a premium payable in instalments have been paid.[67]

2. Burden of Proof — a. As to Character or Cause of Injury. The burden of proof is on plaintiff to show that the injury or death was due to accidental or other means specified in the policy,[68] and the introduction of the defense of sui-

was not the result of any negligence on the part of the company, and that the parties were not entitled to damages unless there was such negligence, does not sufficiently negative the material parts of the plea.

61. Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

62. *New York.*— Peck *v.* Equitable Acc. Assoc., 52 Hun (N. Y.) 255, 5 N. Y. Suppl. 215.

Tennessee.— Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723.

Utah.— Warner *v.* U. S. Mutual Acc. Assoc., 8 Utah 431, 32 Pac. 696, 22 Ins. L. J. 704, where it was held that the presumption of law, in the absence of evidence to the contrary, would be that the death of insured was not due to murder.

Wisconsin.— Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811; Cronkhite *v.* Travelers Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184.

United States.— Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. ed. 308, where insured was found dead with a pistol-bullet wound through his heart, and it was held that there would be no presumption from the mere fact of death that he had been murdered.

63. Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427, where it was shown that insured, a man fifty-nine years of age and of business habits, left a railroad depot for the purpose of boarding a freight train standing at the station, and was soon afterward found dead on the track, and it was held that it would be presumed, in the absence of other evidence, that his death was due to accident and not to a lack of due care and diligence.

64. Peck *v.* Equitable Acc. Assoc., 52 Hun (N. Y.) 255, 5 N. Y. Suppl. 215; Cronkhite *v.* Travelers Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184.

65. *Georgia.*— Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Illinois.— Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499; Star Acc. Co. *v.* Sibley, 57 Ill. App. 315.

Indiana.— Travelers' Ins. Co. *v.* Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110.

Iowa.— Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306.

Kentucky.— Couadeau *v.* American Acc. Co., 95 Ky. 280, 25 S. W. 6.

Louisiana.— Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 21 So. 721.

Maryland.— Travelers' Ins. Co. *v.* Nicklas, 88 Md. 470, 41 Atl. 906.

New York.— Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; De Van *v.* Commercial Travelers' Mut. Acc. Assoc., 92 Hun (N. Y.) 256, 36 N. Y. Suppl. 931 [*affirmed* in 157 N. Y. 690, 51 N. E. 1090]; Washburn *v.* National Acc. Soc., 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 366.

Ohio.— Knickerbocker Casualty Ins. Co. *v.* Jordan, 7 Cinc. L. Bul. 71, 8 Ohio Dec. (Reprint) 313.

Tennessee.— Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723.

Utah.— Warner *v.* U. S. Mutual Acc. Assoc., 8 Utah 431, 32 Pac. 696, 22 Ins. L. J. 704.

United States.— Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. ed. 308.

England.— Macdonald *v.* Refuge Assur. Co., 17 Sc. Sess. Cas. 4th ser. 955.

66. Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723; Johns *v.* Northwestern Mut. Relief Assoc., 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587, where it was said that while it was undoubtedly correct that when the dead body of insured was found under circumstances and with such injuries that death might have resulted from negligence, accident, or suicide, the presumption would be against suicide as contrary to the general conduct of humanity; yet that where, as in the case in hand, it was shown that insured went to bed as usual, and in the morning was found drowned in a cistern, the presumption of suicide was raised so as to defeat a recovery on the policy.

67. Melin *v.* Accident Ins. Co. of North America, 70 Wis. 579, 36 N. W. 258.

68. *Georgia.*— Travelers Ins. Co. *v.* Wyness, 107 Ga. 584, 34 S. E. 113.

Indiana.— Sharpe *v.* Commercial Travelers' Mut. Acc. Assoc., 139 Ind. 92, 37 N. E. 353.

Iowa.— Taylor *v.* Pacific Mut. L. Ins. Co., (Iowa 1900) 82 N. W. 326; Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 68 Am. St. Rep. 306, 76 N. W. 683.

cide does not shift the burden, although the presumption in favor of sanity, in the absence of countervailing proof, is sufficient in itself to establish *prima facie* that death occurred otherwise than by self-destruction.[69]

b. As to Conditions or Exceptions. The burden rests on the defendant to show that the policy has been avoided by reason of a breach of some condition precedent,[70] or that the injury or death was caused by some act which is made an exception to the risk in the policy,[71] or that the action was not brought within the

Michigan.— Merrett *v.* Preferred Masonic Mut. Acc. Assoc., 98 Mich. 338, 57 N. W. 169.

Missouri.— Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427.

New York.— Larkin *v.* Inter-State Casualty Co., 43 N. Y. App. Div. 365, 60 N. Y. Suppl. 205.

United States.— Ætna L. Ins. Co. *v.* Vandecar, 86 Fed. 282, 57 U. S. App. 446, 30 C. C. A. 48; National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 36 U. S. App. 658, 20 C. C. A. 3; McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682.

Suicide while insane.— Where plaintiff contends that insured took his life while insane, thus bringing his death within the risks insured against, the burden of establishing such fact is on him. Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

69. Fidelity, etc., Co. *v.* Weise, 182 Ill. 496, 55 N. E. 540 [*reversing* 80 Ill. App. 499]; Whitlatch *v.* Fidelity, etc., Co., 149 N. Y. 45, 43 N. E. 405.

70. Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 57 N. W. 1063; Gordon *v.* U. S. Casualty Co., (Tenn. Ch. 1899) 54 S. W. 98, wherein it was held that the burden was on the insurer to show that a representation in the application was false.

71. *Michigan.*— Hess *v.* Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196, 70 N. W. 460.

Missouri.— Hester *v.* Fidelity, etc., Co., 69 Mo. App. 186.

Nebraska.— Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

Ohio.— Interstate Casualty Co. *v.* Bird, 18 Ohio Cir. Ct. 488.

Wisconsin.— Cronkhite *v.* Travelers Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184.

United States.— Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

Contributory negligence.— In the following cases it has been held that the burden of proof is on the insurer to show that the death of insured was due to contributory negligence on his part, and failure to use diligence for his personal safety and protection. Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453; Keene *v.* New England Mut. Acc. Assoc., 161 Mass. 149, 36 N. E. 891; Badenfeld *v.* Massachusetts Mut. Acc. Assoc., 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; Freeman *v.* Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372; Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

Disease.— The burden of proof is on insurer to show that death of insured was caused by disease. McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682.

Intentional injuries.— In the following cases it has been held that the insurer has the burden of showing that the death of insured was caused by intentional injuries:

Colorado.— Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

Georgia.— Travelers Ins. Co. *v.* Wyness, 107 Ga. 584, 34 S. E. 113.

Iowa.— Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485.

New York.— Guldenkirch *v.* U. S. Mutual Acc. Assoc., 5 N. Y. Suppl. 428.

Wisconsin.— Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811.

Intoxication.— The burden of proof is on the insurer to show that the injury was caused by the intoxication of insured. Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453.

Suicide.— In the following cases it has been held that the burden of proof is on the insurer to show that the death of insured was caused by suicide:

Illinois.— Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499.

Indiana.— Travelers' Ins. Co. *v.* Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110.

Maryland.— Travelers' Ins. Co. *v.* Nicklas, 88 Md. 470, 41 Atl. 906.

New York.— Williams *v.* U. S. Mutual Acc. Assoc., 82 Hun (N. Y.) 268, 31 N. Y. Suppl. 343; Whitlatch *v.* Fidelity, etc., Co., 71 Hun (N. Y.) 146, 24 N. Y. Suppl. 537.

United States.— Standard L., etc., Ins. Co. *v.* Thornton, 100 Fed. 582, 40 C. C. A. 564; Supreme Lodge, etc. *v.* Beck, 94 Fed. 751, 36 C. C. A. 467.

Canada.— Wright *v.* Sun Mut. L. Ins. Co., 29 U. C. C. P. 221.

Violation of law.— The burden of proof is on insurer to show that the accident was the result of a violation of law by insured. Conboy *v.* Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154.

Voluntary exposure to unnecessary danger. — The burden of proof is on the insurer to show that insured came to his death in consequence of a voluntary exposure to unnecessary danger.

Indiana.— Conboy *v.* Railway Officials, etc., Acc. Assoc., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154.

time required by the policy.[72] The fact that the complaint unnecessarily negatives a breach of the condition will not shift the burden of proof.[73] Nor, it seems, will the burden of proof be shifted by the fact that plaintiff introduces in evidence proofs of death containing statements tending to show that insured was killed or injured in the breach of some condition or while within a risk excepted in the policy.[74]

c. As to Payment of Premiums. The burden of proof is on the insurer to show forfeiture for non-payment of assessments.[75]

d. As to Sum Realized from Assessment. Where the policy provides that the insurer shall not be liable in an amount greater than that realized on an assessment of its members, the burden of proof is on it to show that the amount realized from the assessment is less than the amount claimed.[76]

3. Admissibility — a. As to Cause of Injury — (I) *In General* — (A) *Contributory Negligence of Insured.* Evidence that insured made a practice of jumping on and off trains while in motion is inadmissible to prove contributory negligence.[77] In rebuttal of evidence tending to show contributory negligence on the part of insured, plaintiff may introduce evidence tending to establish the fact that it was physically impossible for insured to have done the act constituting such alleged contributory negligence.[78]

(B) *Effect of Instantaneous Death.* The testimony of a physician as to the effect on the body of instantaneous death is admissible on an issue of whether death was caused by accident or by suicide.[79]

Iowa.— Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78.

Massachusetts.— Anthony *v.* Mercantile Mut. Acc. Assoc., 162 Mass. 354, 38 N. E. 973, 44 Am. St. Rep. 367, 26 L. R. A. 406; Keene *v.* New England Mut. Acc. Assoc., 161 Mass. 149, 36 N. E. 891; Badenfeld *v.* Massachusetts Mut. Acc. Assoc., 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263.

Missouri.— Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427.

New York.— Williams *v.* U. S. Mutual Acc. Assoc., 82 Hun (N. Y.) 268, 31 N. Y. Suppl. 343.

72. Allibone *v.* Fidelity, etc., Co., (Tex. Civ. App. 1895) 32 S. W. 569.

73. Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485; Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

74. Supreme Lodge, etc. *v.* Beck, 94 Fed. 751, 36 C. C. A. 467, wherein the fact that plaintiff introduced in evidence proofs of death containing statements that insured committed suicide, and the verdict of a coroner's jury to the same effect, was held not to shift the burden of proof so as to require plaintiff to prove by a preponderance of evidence that the death of insured resulted from other causes, even though such evidence, standing alone, would establish the fact of suicide *prima facie.*

But see Prudential Ins. Co. *v.* Breustle, (Ky. 1897) 41 S. W. 9, where the proofs of death showed that insured came to his death by his own hand and act, and it was held that no recovery could be had on a policy excluding a recovery for death by suicide unless some satisfactory explanation of such proof was given, or until it had been withdrawn; and that where it was averred that the proofs were furnished merely as evidence of death and for no other purpose, the burden of proof was on the claimant to establish such fact where it had been denied by a rejoinder.

75. Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 57 N. W. 1063 (for the reason that forfeitures are not favored in law); Farrell *v.* American Employers' Liability Ins. Co., 68 Vt. 136, 34 Atl. 478 (in which it was held that where the policy provides that it shall not continue in force unless the amount of an order on insured's employer, a railroad company, is left with the paymaster of the company, it is incumbent upon the plaintiff to prove that such amount has been so left).

76. Gnau *v.* Masons' Fraternal Acc. Assoc., 109 Mich. 527, 67 N. W. 546, the reason being that such fact is peculiarly within the knowledge of the insurer.

77. Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

78. Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650, where, insured having been killed by a railroad train, it was shown, on the issue of contributory negligence, that he was found between the rails of the track, and it was held permissible to show in rebuttal the space between the cars and the track, since it tended to establish the fact that it was a physical impossibility for insured to have been between the cars and the track without being more badly crushed.

79. Washburn *v.* National Acc. Soc., 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 366, where, on such an issue, the body of insured having been found lying on the ground with a bullet-hole in his head, the right hand lying at the right side unclinched, and a pistol with an empty chamber lying between the legs, a physician's testimony to the effect that, in cases of instantaneous death, there is an involuntary and immediate rigidity of the mus-

(c) *Facts Developed at Autopsy.* Facts developed at an autopsy on the body of insured are admissible for the purpose of showing the cause of death.[80]

(d) *Intentional Injury by Third Person*—(1) In General. Any evidence is admissible which tends to show that the injury was intentional, or which constitutes a link in the chain of proof necessary to establish such fact.[81]

(2) Homicide. To show that insured was intentionally killed by a third person, circumstantial evidence is admissible,[82] but neither the indictment of such third person for the murder of insured[83] nor the record of his pardon[84] is admissible to show such facts.

(e) *Intoxication of Insured.* Evidence of acts committed by insured when intoxicated on former occasions is not admissible to show that insured met his death while intoxicated.[85] A physician who saw insured at a hospital cannot testify as to whether he noticed anything about insured's breath indicating intoxication, where it is not shown at what time he saw insured;[86] but a witness may testify as to whether or not insured had the appearance of being intoxicated, such statement being one of fact.[87]

(f) *Opinions of Attendants and Relatives.* Attendants and relatives who are not experts cannot testify as to the cause of death of insured.[88]

(g) *Previous Health of Insured.* Testimony showing the health of insured from his infancy until his last sickness is admissible to show whether his death was caused by accident or disease,[89] as is evidence that insured had been continuously at work prior to the accident, to show his habits, health, vigor, and ability to perform continuous hard labor up to the time thereof,[90] and evidence of the physical and mental condition of insured just prior to the accident, to show that insured was in fair condition at the time of the accident, and not a confirmed invalid;[91] but evidence that insured appeared to be in good health is inadmissible.[92]

(h) *Violation of Company's Rules.* Evidence of a custom or usage of people generally to cross a railroad track at the point where insured was killed is admissible on an issue as to whether insured was killed while violating the rules of defendant company against crossing railroad tracks.[93]

cles which would cause the hand to clutch the pistol and render it impossible for insured, after shooting himself, to have placed it where found, was held admissible.

80. Sun Acc. Assoc. *v.* Olson, 59 Ill. App. 217, holding that such evidence is admissible notwithstanding the fact that the insurer was not notified of the time and place of holding such autopsy, there being no provision in the policy requiring such notification.

81. Ætna L. Ins. Co. *v.* Vandecar, 86 Fed. 282, 57 U. S. App. 446, 30 C. C. A. 48.

82. Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684 (where evidence that a person who was alleged to have killed insured surrendered himself to the officer within half an hour after insured's death, and near his house, stating that he had killed insured while retreating, and evidence that such third person and insured had disputed previously over business transactions, was held admissible); Standard L., etc., Ins. Co. *v.* Askew, 11 Tex. Civ. App. 59, 32 S. W. 31 (where it was contended that insured was intentionally killed by a third person, and evidence that the sheriff made a search for such third person after the death of insured, and could not find him, was held admissible as tending to show that such third person did the killing).

83. Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684; Standard L., etc., Ins. Co. *v.* Askew, 11 Tex. Civ. App. 59, 32 S. W. 31.

84. Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

85. Traveler's Ins. Co. *v.* Harvey, 82 Va. 949, 5 S. E. 553, where insured was found dead in front of a house, and evidence that previously, when intoxicated, he had attempted to jump from the window was held inadmissible.

86. Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453.

87. Cook *v.* Standard L., etc., Ins. Co., 84 Mich. 12, 47 N. W. 568.

88. American Acc. Co. *v.* Fidler, (Ky. 1896) 35 S. W. 905.

89. McCarthy *v.* Traveler's Ins. Co., 8 Biss. (U. S.) 362, 15 Fed. Cas. No. 8,682.

90. Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

91. Ten Broeck *v.* Traveler's Ins. Co., 6 N. Y. St. 100.

92. Sharpe *v.* Commercial Travelers' Mut. Acc. Assoc., 139 Ind. 92, 37 N. E. 353.

93. Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620, 36 N. Y. St. 928 [*affirmed* in 129 N. Y. 622, 29 N. E. 1029].

(II) *Proof Required by Policy.* In some policies it is provided that the policy will not extend to a case of personal injury unless by direct and positive proof it is established that the injury or death was caused by external violence and accidental means, and under such a policy it is incumbent on plaintiff to show that the injury or death was so caused;[94] yet the ordinary rules of evidence cannot be changed by such a provision,[95] and evidence sufficient to satisfy a jury that the accident or death resulted from one of the causes insured against is sufficient,[96] although it may involve an inference of a main fact from other facts.[97] The use of the words "affirmative proof" does not mean that there must be direct and positive proof of the accident or death.[98]

b. As to Character of Injury—(I) *Acts Done by Insured.* Evidence that insured, a physician, wrote a number of prescriptions during the time of his alleged total disability, without charge, is inadmissible to rebut evidence in regard to the permanent character of his injury.[99]

(II) *Testimony of Insured.* Insured may testify as to his ability to work after the accident.[1]

(III) *Testimony of Physician.* A physician may testify as to the physical condition of insured at the date of the trial, as bearing on the question of permanent disability; but a written report of the physician concerning the physical condition of insured, made for the purpose of furnishing the insurer with information to aid it in determining whether to allow or reject the claim, is not admissible to show claimant's condition at the time of the action.[2]

c. As to Concealment of Material Facts. Evidence of a conversation between insured and an officer of the insurer, upon a matter wholly unconnected with the contract of insurance, is inadmissible to show a fraudulent concealment of a material fact which would vitiate the policy.[3] But where it is contended that insured has suppressed facts as to his bodily condition, it is competent to show that the agent who took the application of insured knew of this defect, although, in his application, insured stated that he was free from any bodily infirmity.[4]

94. Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. ed. 308.

95. Utter *v.* Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738.

96. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Larkin *v.* Inter-State Casualty Co., 43 N. Y. App. Div. 365, 60 N. Y. Suppl. 205; Preferred Acc. Ins. Co. *v.* Barker, 93 Fed. 158, 35 C. C. A. 250.

97. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 16 S. W. 723, where it was held that an instruction that the jury might find any fact proven which might rightfully and reasonably be inferred from the evidence was proper, since the nature, cause, or manner of the death of insured was directly and positively established where it was shown that he was found dead with a pistol-shot wound through the heart.

98. Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 21 So. 721; Preferred Acc. Ins. Co. *v.* Barker, 93 Fed. 158, 35 C. C. A. 250.

Eye-witnesses unnecessary.— The testimony of eye-witnesses as to the cause of the accident or death is not required. Preferred Acc. Ins. Co. *v.* Barker, 93 Fed. 158, 35 C. C. A. 250; Wright *v.* Sun Mut. L. Ins. Co., 29 U. C. C. P. 221.

99. Preferred Acc. Ins. Co. *v.* Gray, (Ala. 1899) 26 So. 517.

1. Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631.

2. McMahon *v.* Supreme Council, etc., 54 Mo. App. 463.

3. Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410. In this case the defense was that insured was guilty of a fraudulent concealment of material facts which vitiated the policy. It appeared that some time previous to the issuance of the policy insured had been a canvasser for applications for insurance with insurer; that in a conversation with the president of the insurer he stated that he could procure a great number of applications; and that the president then told him that he must be cautious, as the company did not wish to insure insane persons. It also appeared that some years previous insured had been insane and had been sent to an asylum for about three months and had been discharged as cured, and had been sane ever since. It was held that this conversation was inadmissible as tending to show that there was a fraudulent misrepresentation of material facts.

4. Follette *v.* U. S. Mutual Acc. Assoc., 107 N. C. 240, 12 S. E. 370, 22 Am. St. Rep. 878, 12 L. R. A. 315.

d. As to Customs and Usages — (I) *Of Insurer.* Testimony of a witness that he heard an agent of an accident company say that the company took orders on employers for the payment of premiums and held them until the employee had money to his credit is inadmissible to show a custom of insurer to take such orders, it not being shown that such agent, at the time of making the statement, was acting as agent of the company in question.[5]

(II) *Of Particular Occupation.* Insured may show the common practice among people of a certain occupation, where, under the policy, he is permitted to do the acts customary in such occupation.[6]

e. As to Death or Disappearance of Insured. Evidence that insured and his wife lived happily together up to the time of his disappearance is admissible on an issue as to whether he is dead or has disappeared merely;[7] but the fact that insured's family recognize his death, testimony of a witness that there is nothing to lead her to believe that insured is alive, or evidence as to character of the wife, is inadmissible on such issue.[8]

f. As to Identity of Beneficiary. Where the name of the beneficiary and his relationship to the insured is stated in the policy, and a person bearing such name and claiming such relationship exists, parol evidence that a person having the same name, but bearing a different relationship to insured, was intended as a beneficiary, is inadmissible.[9]

g. As to Membership in Relief Association. On an issue as to claimant's membership in a relief association, an agent, officer, or servant of the association may testify that claimant had never been accepted as a member.[10]

h. As to Payment of Premium. Where the policy recites that the premium has been paid, proof that it has not is inadmissible,[11] except in case of fraud in obtaining the policy.[12] That insured continued to work for his employer, a railroad company, is not evidence tending to show that he left the amount of an order on his employer in the hands of the paymaster of the company.[13]

i. To Avoid Release — (I) *Insured's Ignorance of Language.* Insured

5. Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675.

6. Pacific Mut. L. Ins. Co. *v.* Snowden, 12 U. S. App. 704, 58 Fed. 342, 7 C. C. A. 264, where insured was permitted by his policy to attend cattle in transit on cars and to do whatever was customary among reasonably prudent cattle-dealers under like circumstances, and evidence of this character was held admissible in an action for injuries received while looking after cattle at a way-station.

7. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, where this evidence was held admissible on the theory that, there being nothing unhappy in the domestic life of insured, he would be more likely to return, if he had disappeared, than if his domestic life had been unhappy.

8. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

9. Standard L., etc., Ins. Co. *v.* Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781.

10. Baltimore, etc., Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44, where, on such an issue, testimony of a medical examiner of the association was held admissible; but, it being claimed that such membership was established from the fact that a part of claimant's wages had been deducted from the amount due him from his employer, a railroad company, in payment of the dues required by the association, the declarations of the paymaster of the railroad company that a deduction had been made from claimant's wages for dues owing to the association were held inadmissible, the paymaster having no express authority to make such declarations or to make the deduction, he not being an agent, officer, or servant of the association, even though the constitution and by-laws of the association authorized the company to deduct dues from members.

11. Provident L. Ins. Co. *v.* Fennell, 49 Ill. 180.

12. In Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88, it was held that a policy, signed and delivered to insured by an agent of the company, which read that the policy, "in consideration of the representations in the application . . . and of thirty-seven dollars and fifty hundredths, does hereby insure," etc., imputed the payment of the premium prior to its delivery as the consideration therefor, and could be impeached only by showing that it had been obtained improperly or fraudulently in such a manner as to negative the fact of its legal and voluntary delivery by the company.

13. Farrell *v.* American Employers' Liability Ins. Co., 68 Vt. 136, 34 Atl. 478, where the policy required the insured to leave money in the hands of the company's paymaster to satisfy an order on the company accepted in lieu of a cash premium.

may show by parol evidence that he can neither read nor write the English language, for the purpose of avoiding a release of claims signed by him in ignorance of their contents.[14]

(II) *Letters of Insured and Agent.* A letter written by insured to an agent of the company, inquiring as to his right to recover for a total disability, and the agent's reply stating that he thought the company would not allow the claim, but that he would forward it, and would be glad if the company would allow it, are admissible in evidence on the question as to whether effect shall be given to a release.[15]

j. Admission of Company in Answer. Where the answer admits due proof of death, but desires that such proofs establish that death was caused by accident, the plaintiff may read the admissions to the jury without reading the denial.[16]

k. By-Laws. Where the loss is payable by assessments, the articles and by-laws of the association may be introduced in evidence for the purpose of showing the amount assessable against each member and the method of collecting such assessments.[17] But where a statute requires a copy of the by-laws to be attached to the policy or application, the by-laws cannot be put in evidence, over plaintiff's objection, when not so attached.[18]

l. Conversation between Insured and Officer of Company. Evidence of an alleged conversation between insured and the secretary of the insurer, in which insured claimed to have given a verbal notice of his injury, is admissible under an allegation in the complaint of a waiver of the condition requiring written notice of the injury to be given to the secretary of the insurer at the home office.[19]

m. Declarations — (I) *Of Insured* — (A) *As to Cause of Injury* — (1) In General. Declarations or statements of insured, made at or near the time or place of the injury, are admissible as a part of the *res gestæ*.[20] Usually such declarations or statements must be contemporaneous with the accident or injury,[21] but it has been said that under certain circumstances they may form a part of the *res gestæ*, although made some time after the occurrence of the accident or injury.[22] Even if they are not admissible as a part of the *res gestæ*, yet where the insurer introduces them in evidence it cannot claim that the introduction by the claimant of the same declarations made to other parties is erroneous.[23]

(2) To Physician. Statements by insured as to the cause of the injury, made to his physician in the course of his professional treatment, are admissible as part of the *res gestæ*.[24]

(B) *As to Present Condition.* Declarations by insured as to his present condition, ills, pains, and symptoms, to whomsoever made, are competent.[25]

14. Lord *v.* American Mut. Acc. Assoc., 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L. R. A. 741.

15. Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

16. Jones *v.* U. S. Mutual Acc. Assoc., 92 Iowa 652, 61 N. W. 485.

17. Columbian Acc. Co. *v.* Sanford, 50 Ill. App. 424.

18. Pickett *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661, 28 Wkly. Notes Cas. (Pa.) 453.

19. Commercial Travelers Mut. Acc. Assoc. *v.* Springsteen, 23 Ind. App. 657, 55 N. E. 973.

20. Ten Broeck *v.* Traveler's Ins. Co., 6 N. Y. St. 100; Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437; North American Acc. Assoc. *v.* Woodson, 64 Fed. 689, 24 U. S. App. 364, 12 C. C. A. 392.

21. Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486; Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366; National Masonic Acc. Assoc. *v.* Shryock, 73 Fed. 774, 36 U. S. App. 658, 20 C. C. A. 3.

22. Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437.

23. Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826.

24. Equitable Mut. Acc. Assoc. *v.* McCluskey, 1 Colo. App. 473, 29 Pac. 383; Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; Dabbert *v.* Travelers' Ins. Co., 2 Cinc. Super. Ct. (Ohio) 98. *Contra*, Globe Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486 [*affirming* 61 Ill. App. 140].

25. Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486 [*affirming* 61 Ill. App. 140]; Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366; Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437.

(c) *As to Physical Ailments.* Declarations of insured as to his physical ailments, made subsequent to the issuance of the policy, are admissible against the beneficiary.[26]

(d) *Of Intention to Commit Suicide.* The declarations of insured, made within a short time preceding his death, which tend to show an intent to commit suicide, are admissible.[27]

(ii) *Of Insurer.* Declarations made by the insurer to a third person, denying liability on the policy, are admissible to show a waiver of the notice required by the policy.[28]

(iii) *Of Third Person*—(a) *In General.* Where it is contended on the one hand that insured is dead, and on the other that he has disappeared merely, declarations and acts of third persons, who were with insured at the time of his death or disappearance, are admissible as a part of the *res gestæ*, but statements made after they have abandoned their search for his body are not so admissible.[29]

(b) *As to Killing Insured.* Evidence as to what a certain person said the day after insured's death, as to his having killed him, is inadmissible as being too remote.[30]

(c) *Of Intention to Kill Insured.* Declarations of a third person, made on the night insured was killed, to the effect that he intended to kill insured if he found him at his house, are admissible to show an intentional killing of insured, where insured was found dead near the house of the defendant.[31]

n. Mortality Tables. Mortality tables are inadmissible to show the amount of weekly benefits recoverable on account of an inability to work.[32]

o. Policy without Application. A policy attached to the petition is admissible in evidence without the application on which it was issued, although the policy refers to such application and makes it a part thereof, and although the application contains matters not in the policy which are declared therein to be warranties.[33]

p. Proofs of Injury or Death. Proofs of injury or death are admissible in evidence for no purpose other than to show their sufficiency, or that they have been furnished as required. They are not evidence of any facts stated therein, such as the cause of death.[34]

In Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366, where the question was whether a fall from a wagon was the sole cause of death, it was held that a statement, "It was a hard one," made by insured to a witness when getting up after having fallen from the wagon, and meaning that he was badly hurt, and also a statement made by insured to a customer at his store the same evening, "I am feeling badly," and a statement to his wife, made on returning home, that "his head was terrible," were admissible as part of the *res gestæ*.

26. Steinhausen *v.* Preferred Mut. Acc. Assoc., 59 Hun (N. Y.) 336, 13 N. Y. Suppl. 36.

27. Rens *v.* Northwestern Mut. Relief Assoc., 100 Wis. 266, 75 N. W. 991.

28. Employer's Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869.

29. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, where it was shown that insured and two of the witnesses were on a hunt; that the witnesses left insured to go down the river in a boat while they went by land, and that one witness shortly after heard a gunshot, and, on running to the boat, found that insured had disappeared, whereupon he called the other witness and they both began to search for insured. It was held that the spontaneous declarations of the first witness to the other, when informing him of the disappearance of insured, and also while prosecuting the search, and evidence that first witness looked "wild and excited," were admissible as a part of the *res gestæ*.

30. Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

31. Standard L., etc., Ins. Co. *v.* Askew, 11 Tex. Civ. App. 59, 32 S. W. 31.

32. Baltimore, etc., Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

33. Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

34. *Georgia.*— Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Maryland.— Travelers' Ins. Co. *v.* Nicklas, 88 Md. 470, 41 Atl. 906.

Michigan.— Cook *v.* Standard L., etc., Ins. Co., 84 Mich. 12, 47 N. W. 568.

Missouri.— Crenshaw *v.* Pacific Mut. L. Ins. Co., 63 Mo. App. 678.

Pennsylvania.— Peoples Mut. Assoc. *v.* Smith, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. Rep. 870, 24 Wkly. Notes Cas. (Pa.) 33.

Wisconsin.— Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

q. Receipt for Benefits. The knowledge of insured as to the meaning of the phrase "total disability to labor" cannot be shown by receipts for benefits given by insured when a former member of the association.[35]

r. Written Statement of Family Physician. The statement of insured's family physician as to insured's physical condition, procured and sent to the insurer at its request, is admissible in evidence to show a waiver by the insurer of the formal proofs of loss entitling insured to the full amount of the policy for the loss of both legs.[36]

4. Weight and Sufficiency. The plaintiff is not required to make out his case by evidence establishing it beyond a reasonable doubt. A fair preponderance of evidence is sufficient to show either that death was the result of accident;[37] that the policy was duly executed;[38] that the proofs of loss required by the policy have been forwarded;[39] or the occupation of insured.[40] The same rule is applicable to a defense put forward by the insurer,[41] as that the policy has been cancelled,[42]

35. Baltimore, etc., Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

36. Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

37. Death result of accident.— Thus in the following cases there was held to be sufficient evidence to show that death was caused by accidental means:

Stout *v.* Pacific Mut. L. Ins. Co., (Cal. 1900) 62 Pac. 732, where insured came to his death in an overturned boat, and his son, who was with him at the time, testified that, as the boat turned over, his father was struck a blow on the head, which experts testified might cause death, even though the coroner's inquest resulted in a verdict of death from heart disease.

Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601, where insured broke his leg, which turned black, the discoloration extending finally to the whole body, insured being in great pain at the time of his death.

Standard L., etc., Ins. Co. *v.* Thomas, (Ky. 1891) 17 S. W. 275, where insured, a well and strong man, became sick immediately after his injury and never recovered from the sickness or the wound, although the physicians attending him testified that he died of typhoid fever, which could not be produced by a bruise, and his nurse, while stating that he did not have typhoid fever, admitted that he had some other fever which it was admitted might be produced by a bruise.

Landon *v.* Preferred Acc. Ins. Co., 43 N. Y. App. Div. 487, 60 N. Y. Suppl. 188, where insured, having started for a certain place to do some collecting, disappeared and was never seen again until his dead body was found floating in the water.

Ætna L. Ins. Co. *v.* Hicks, (Tex. Civ. App. 1900) 56 S. W. 87, where insured, having had symptoms of typhoid fever, and having taken a railroad trip, contrary to the advice of his physician, and hurt his back, suffered the following day from internal symptoms and died two days afterward, two physicians testifying that there were no symptoms of typhoid fever after the accident, and that death was caused wholly by the injury.

Fidelity, etc., Co. *v.* Egbert, 84 Fed. 410, 55 U. S. App. 200, 28 C. C. A. 281, where the insured, being in good health, took his pistol and left the house before daylight in his night-shirt, telling his wife that he was going down to settle those dogs, and his dead body was found in a lot near the gate with two pistol-shot or gunshot wounds, around which his shirt was burned with powder.

Mere hypothesis of medical expert insufficient.— The mere hypothesis of a medical expert that the death of insured, which occurred some time after the alleged injury, was indirectly caused thereby, is insufficient to establish the fact that death was so caused. Thurber *v.* Commercial Travelers' Mut. Acc. Assoc., 32 N. Y. App. Div. 636, 52 N. Y. Suppl. 1071.

38. Due execution of policy.— Thus in Bickford *v.* Travelers Ins. Co., 67 Vt. 418, 32 Atl. 230, under a rule of court providing that, in an action on an instrument purporting to have been signed by defendant, no proof of its execution is necessary unless defendant denies such execution by filing notice, it was held that in the absence of such denial the possession of a policy was *prima facie* proof of its execution.

39. That proofs of loss were forwarded.— Thus in Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040, it was held that the testimony of plaintiff that the proofs of loss required by the policy had been forwarded made a *prima facie* case on that issue.

40. Occupation of insured.— In Murphey *v.* American Mut. Acc. Assoc., 90 Wis. 206, 62 N. W. 1057, where insured testified that at the time he was "cutting cord-wood," and that afterward he was "framing timbers — framing sets and caps," and other witnesses testified that he was not a carpenter, the evidence was held insufficient to sustain a finding that such was his occupation.

41. Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811; New York Acc. Ins. Co. *v.* Clayton, 19 U. S. App. 304, 59 Fed. 559, 8 C. C. A. 213.

42. Cancellation of policy.— But a receipt for indemnity giving the number of the policy and stating that it is in full satisfaction and final settlement of any and all claims for loss resulting from injuries received on a certain date under the policy, "which is hereby surrendered," is not sufficient to show

or that death resulted from disease,[43] intentional injury,[44] intoxication,[45] suicide,[46] or voluntary exposure to unnecessary danger.[47]

H. Trial — 1. Nonsuit. A nonsuit on the ground of forfeiture should not be granted.[48]

a cancellation thereof. Martin *v.* Manufacturers' Acc. Indemnity Co., 151 N. Y. 94, 45 N. E. 377 [*affirming* 60 Hun (N. Y.) 535, 15 N. Y. Suppl. 309].

43. Death resulting from disease.— Thus in Tennant *v.* Travellers' Ins. Co., 31 Fed. 322, where insured, who was subject to epileptic fits, was found in a plunge-bath in an almost standing position, the water having a temperature of about one hundred degrees, with an abrasion between his eyes and a bruise on one side of his head, testimony of his physician that the entrance into the bath of one in his then condition would be likely to result in an epileptic attack, and that the fall or blow which caused the abrasion or bruise was not sufficient to have caused death, is sufficient to show that death was not caused by external, violent, or accidental means. But evidence of sudden deafness immediately preceding a fall does not conclusively show that the fall was caused by fits or vertigo. Interstate Casualty Co. *v.* Bird, 18 Ohio Cir. Ct. 488. Nor does evidence that just prior to the fall deceased was seen to stagger. Meyer *v.* Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. Rep. 374. And a defense that the hernia which caused death existed previous to the accident is not established by testimony of insured's physician that the insured stated to him, after the accident, that he never before to his knowledge had a rupture or any such trouble, but that he had "noticed a little lump there" at times for about eight years back, where the insured's mother and brother testify that they had never seen any indication of hernia on insured, and the weight of evidence is clearly against the possibility of his having been afflicted with hernia previous to the injury. Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

44. Death from intentional injury.— Thus in Butero *v.* Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811, the evidence was held sufficient to show that insured was murdered, and that the murderer knew his victim when he fired, where it appeared that insured was shot from behind and from so near as to burn his clothes while working on a dark night with two lights burning near him.

45. Death from intoxication.— In Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601, however, the evidence was insufficient to show that the injury resulted from intoxication, where it appeared that insured and two companions started on a hunting-trip with a quart bottle of whisky; that each drank some of the whisky, but that there was some left in the bottle when they returned home; that insured drank two glasses of wine at the house of a friend, but that he did not appear to be intoxicated.

46. Suicide.— Thus in Rens *v.* Northwestern Mut. Relief Assoc., 100 Wis. 266, 75 N. W. 991, the evidence was held sufficient to show suicide where it showed that insured frequently threatened to kill himself when intoxicated, and that the day prior to his death, being intoxicated, he attempted to cut his throat, saying to his mother "Good-bye, for the last time;" that on the following day he attempted to borrow firearms, but, failing, purchased a revolver, which he took to his home, saying that he would never see another sun rise; that he resisted an attempt to take the revolver from him, and shortly afterward was found dead. But the mere fact that insured was found dead with a pistol-shot wound is not sufficient to establish the fact of suicide. Travelers' Ins. Co. *v.* Nicklas, 88 Md. 470, 41 Atl. 906.

47. Voluntary exposure to danger.— In De Greayer *v.* Fidelity, etc., Co., (Cal. 1899) 58 Pac. 390, the evidence was held insufficient to establish the fact that insured voluntarily exposed himself to unnecessary danger, it appearing that he, on being overtaken by a policeman while driving, was shot and killed in a quarrel which ensued; that after being shot he fired his pistol at the policeman, it not being positively shown that he took the pistol from his pocket until after he had been shot, one witness testifying that he saw insured take something from his pocket, and another testifying that he saw nothing in insured's hand.

Evidence is insufficient to justify the conclusion that the insured was engaged at the time of the injury in a more hazardous occupation, where it is merely shown that insured classified as an extra conductor and was performing work as a brakeman. Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133.

Evidence that the insured continued to work for his employer after the period the instalment for which remained unpaid has been held to be insufficient to show that he had left sufficient money with his employer to pay the instalment. Farrell *v.* American Employers' Liability Ins. Co., 68 Vt. 136, 34 Atl. 478.

Evidence is sufficient which shows that the death was caused in some other way than that alleged, where the effect of the injury as shown by the evidence is much the same as would have resulted from the injury alleged. Ætna L. Ins. Co. *v.* Hicks, (Tex. Civ. App. 1900) 56 S. W. 87.

Prima facie evidence of payment of premium is shown by the possession of the policy by the insured. Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

48. Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500, holding that such a nonsuit would be erroneous, even though

2. INSTRUCTIONS — a. In General. An instruction asked upon the trial of an action on an accident-insurance policy, as in other trials, may be erroneous as being argumentative, confusing, and misleading,[49] as being too sweeping in its terms,[50] or as relating to questions not raised by the evidence in the case.[51] Likewise the refusal to give a proper instruction may constitute a harmless error.[52]

b. As to Accidental or Intentional Injury. Whether the wound causing death was inflicted accidentally or intentionally being a matter of inference from equivocal circumstances, it is proper to instruct that a recovery can be had unless the killing of insured was the intentional act of another.[53] And the court may properly cite instances of death by the accidental discharge of a gun to illustrate the meaning of accidental death.[54] Where the jury has been charged that the burden of proof is on the plaintiff to satisfy them, by a fair preponderance of evidence, that insured's death was accidental, and that if the evidence did not fairly and reasonably satisfy them of that fact their verdict should be for the insurer, it is not error to refuse an instruction that if, upon the whole case, they find the evidence evenly balanced, they must find for the insurer.[55]

plaintiff's evidence tended to show the forfeiture of the policy, as in any case he would have been entitled to introduce further evidence showing a waiver of forfeiture on the part of the insurer.

49. Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 10 So. 530, where insured, while in the discharge of his duties, was killed while attempting to descend from a moving engine in the night-time, an instruction that it was the duty of insured to exercise a greater degree of care in getting off a moving engine at night than is necessary by day is bad as being argumentative, confusing, and misleading.

50. Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650, where an instruction that there can be no recovery if insured, by any act of negligence, contributed to his death, is erroneous as being too sweeping in its terms.

51. Thus in Cram *v.* Equitable Acc. Assoc., 58 Hun (N. Y.) 11, 11 N. Y. Suppl. 462, the certificate provided that the association would pay to the heirs of insured "the principal sum, not exceeding four thousand dollars, realized upon an assessment," in accordance with the provisions of the by-laws as printed on the back of the certificate. In an action on the certificate it was held that in the absence of evidence showing what amount would have resulted from the making of an assessment in accordance with the by-laws, an instruction to find in favor of plaintiff for the full amount was erroneous.

As to agent's knowledge of insured's occupation.— Where insured is killed while engaged in a different calling from that followed at the time of insurance, an instruction that if the agent knew that insured did other things, and the proof fails to show any wilful intention on the part of insured to conceal the same from him, the amount recoverable under the policy will not be reduced, is erroneous. Standard L., etc., Ins. Co. *v.* Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781.

As to contributory negligence of insured.— An instruction as to the contributory negligence of insured is properly refused where there is no evidence of the cause of insured's fall or of his acts proximate to his death. Badenfeld *v.* Massachusetts Mut. Acc. Assoc., 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263.

As to delay in giving notice of injury.— Where no excuse is shown for a delay in giving the notice of injury required by the policy, an instruction that the jury may consider circumstances excusing such delay is improper. Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460.

As to violation of rules of company.— The rule of the company which it is claimed has been violated not being in evidence, an instruction is improper which states that if insured received injuries which caused his death while in the act or attempt to violate the rules of any company or corporation knowingly, then the defendant is not liable. Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

52. Freeman *v.* Travelers Ins. Co., 144 Mass. 572, 12 N. E. 372, wherein it was held that the refusal of an instruction that there was not sufficient evidence to warrant the jury in finding that insured used due diligence for his personal safety and protection is harmless, since the burden of proof is on the insurer to show such fact.

53. Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

Manner of use of weapon.— In Travelers Ins. Co. *v.* Wyness, 107 Ga. 584, 34 S. E. 113, the issue was as to whether or not insured had been intentionally killed by a third person. It was held that an instruction to the effect that the use of a weapon likely to produce death raised a presumption that he who used it upon another intended to kill, was properly refused, since in order to create such a presumption the weapon must have been used in a manner calculated to cause death.

54. Fidelity, etc., Co. *v.* Egbert, 84 Fed. 410, 55 U. S. App. 200, 28 C. C. A. 281.

55. Fidelity, etc., Co. *v.* Egbert, 84 Fed. 410, 55 U. S. App. 200, 28 C. C. A. 281.

c. As to Voluntary Exposure to Unnecessary Danger. An instruction that the question of whether the circumstances of a particular accident bring it within one of the exceptions by which the company has guarded itself against an accident resulting from voluntary exposure to unnecessary danger is not a question whether the person insured has exercised reasonable care and caution, or whether he has been guilty of negligence or of unlawful acts, but is a question whether or not the insurance company has shown that insured voluntarily exposed himself to unnecessary danger, and that the death resulted in consequence thereof, is proper.[56] Such instruction should point out the necessity of knowledge of, and reasonable cause to apprehend, danger on the part of insured.[57]

3. Questions of Law and Fact — a. Cause of Accident — (I) *In General.* Where the evidence is conflicting it is for the jury to determine whether the injury was caused by accidental or other means.[58]

(II) *Proximate Cause of Death.* The question of the proximate cause of death is usually one for the jury,[59] unless from an admitted state of facts the same conclusion would be arrived at by reasonable men, when it becomes a question for the court.[60]

(III) *Excepted Risk.* It is for the jury to decide whether the injury resulted from some cause excepted in the policy,[61] as that insured had not exercised due diligence for his personal safety and protection,[62] had voluntarily exposed himself

56. De Greayer *v.* Fidelity, etc., Co., (Cal. 1899) 58 Pac. 390.

57. Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500. See also Union Casualty, etc., Co. *v.* Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873, where, the defense being that insured came to his death by a voluntary exposure to unnecessary danger, it was held that an instruction that if insured approached the person who shot him, cursing him, and that such person retreated, but that insured continued to advance with threatening demonstrations, although warned not to approach, and that then such person shot insured, his death was not covered by the policy, was erroneous, since it ignored the hypothesis presenting the element of knowledge or reasonable apprehension by insured of the fact that such person was armed and on his continued approach would shoot to kill.

58. *Georgia.*— Atlanta Acc. Assoc. *v.* Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188.

Illinois.— Railway Officials, etc., Acc. Assoc. *v.* Coady, 80 Ill. App. 563.

Missouri.— Hester *v.* Fidelity, etc., Co., 69 Mo. App. 186.

New York.— Williams *v.* U. S. Mutual Acc. Assoc., 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 728; Washburn *v.* National Acc. Soc., 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 366; Thurber *v.* Commercial Travelers' Mut. Acc. Assoc., 32 N. Y. App. Div. 636, 52 N. Y. Suppl. 1071; Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620; Bailey *v.* Interstate Casualty Co., 8 N. Y. App. Div. 127, 40 N. Y. Suppl. 513 [*affirmed* in 158 N. Y. 723, 53 N. E. 1123]; Guldenkirch *v.* U. S. Mutual Acc. Assoc., 5 N. Y. Suppl. 428.

United States.— Standard L., etc., Ins. Co. *v.* Thornton, 100 Fed. 582, 40 C. C. A. 564; Commercial Travelers' Mut. Acc. Assoc. *v.* Fulton, 93 Fed. 621, 35 C. C. A. 493; Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620.

England.— Trew *v.* Railway Pass. Assur. Co., 6 H. & N. 839 [*reversing* 5 H. & N. 211].

59. Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826; Martin *v.* Equitable Acc. Assoc., 61 Hun (N. Y.) 467, 16 N. Y. Suppl. 279. See also Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 U. S. App. 547, 12 C. C. A. 544, 27 L. R. A. 629, where, insured having accidentally shot himself in the foot, the wound resulting in tetanus or lockjaw, and on the eighteenth day after the accident having been found with his throat cut and a scalpel in his hand, having also evidently been in the embrace of tetanic spasms causing intense agony at the time of his death, there being evidence that either the tetanic spasms or the cut would have sufficed to cause insured's death, and experts differing as to which did cause it, it was held to be a question for the jury to determine.

60. Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 27 U. S. App. 547, 12 C. C. A. 544, 27 L. R. A. 629.

61. Myler *v.* Standard L., etc., Ins. Co., 92 Fed. 861, 63 U. S. App. 352, 35 C. C. A. 55.

62. *Illinois.*— Columbian Acc. Co. *v.* Sanford, 50 Ill. App. 424.

Kentucky.— Kentucky L., etc., Ins. Co. *v.* Franklin, (Ky. 1897) 43 S. W. 709.

New Jersey.— Stone *v.* U. S. Casualty Co., 34 N. J. L. 371.

New York.— Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620, 36 N. Y. St. 928; Pratt *v.* Travelers' Ins. Co., (N. Y. 1871) 8 Alb. L. J. 88, 7 Am. L. Rev. 595.

United States.— Travelers, etc., Acc. Co. *v.* Wagley, 74 Fed. 457, 45 U. S. App. 39, 20 C. C. A. 588.

to unnecessary danger,[63] or had been injured while violating the law,[64] while intoxicated,[65] or while engaged in an occupation other or more hazardous than that in which he was engaged when insured.[66] But where the question of voluntary exposure arises on a demurrer to the evidence it is for the trial judge to determine.[67]

b. Extent of Disability. The question as to whether insured has suffered a total or partial disability[68] or the loss of a member is for the jury.[69]

c. Materiality and Truth of Statements in Application. The materiality and truth of the statements in the application is usually a question for the jury to determine.[70]

d. Time of Receiving Assessment. The question whether an assessment has been received by the insurer before or after the happening of an injury is one for the jury.[71]

e. Waiver of Notice and Proofs of Accident. Whether or not there has been a waiver of a clause requiring notice and proofs of accident within a certain time is a question for the jury.[72]

f. Whether Notice Given in Proper Time. Whether or not the notice of injury or death has been furnished within the time prescribed by the policy is a question for the jury;[73] as is also, where the policy requires immediate notice, the question whether or not such a notice has been given within a reasonable time,[74] unless the facts are not in dispute and the inferences certain,[75] or the delay has

63. *Illinois.*— Fidelity, etc., Co. *v.* Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359 [*affirming* 79 Ill. App. 245]; Columbian Acc. Co. *v.* Sanford, 50 Ill. App. 424.

Iowa.— Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78.

Nebraska.— Rustin *v.* Standard L., etc., Ins. Co., 58 Nebr. 792, 79 N. W. 712.

New York.— Keeffe *v.* National Acc. Soc., 4 N. Y. App. Div. 392, 38 N. Y. Suppl. 854; Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 13 N. Y. Suppl. 620, 36 N. Y. St. 928; Hess *v.* Van Auken, 11 Misc. (N. Y.) 422, 32 N. Y. Suppl. 126.

United States.— Ashenfelter *v.* Employers' Liability Assur. Corp., 87 Fed. 682, 59 U. S. App. 479, 31 C. C. A. 193; Travelers' Ins. Co. *v.* Randolph, 78 Fed. 754, 47 U. S. App. 260, 24 C. C. A. 305; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

64. Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 44 U. S. App. 694, 22 C. C. A. 499.

65. Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78; Couadeau *v.* American Acc. Co., 95 Ky. 280, 25 S. W. 6; De Van *v.* Commercial Travelers' Mut. Acc. Assoc., 92 Hun (N. Y.) 256, 36 N. Y. Suppl. 931 [*affirmed* in 157 N. Y. 690, 51 N. E. 1090]; Johanns *v.* National Acc. Soc., 16 N. Y. App. Div. 104, 45 N. Y. Suppl. 117.

66. Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105; Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440; Fox *v.* Masons' Fraternal Acc. Assoc., 96 Wis. 390, 71 N. W. 363; Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366; Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 44 U. S. App. 694, 22 C. C. A. 499.

67. Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

68. Sneck *v.* Travelers' Ins. Co., 88 Hun (N. Y.) 94, 34 N. Y. Suppl. 545.

69. Lord *v.* American Mut. Acc. Assoc., 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L. R. A. 741.

70. Fidelity, etc., Co. *v.* Alpert, 67 Fed. 460, 28 U. S. App. 393, 14 C. C. A. 474; Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620.

71. National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466.

72. American Acc. Co. *v.* Fidler, (Ky. 1896) 35 S. W. 905; Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738, 17 N. Y. St. 337.

73. Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310; Moore *v.* Wildey Casualty Co., (Mass. 1900) 57 N. E. 673; McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436; Brown *v.* Fraternal Acc. Assoc., 18 Utah 265, 55 Pac. 63.

74. *Illinois.*— Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499.

Iowa.— Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631.

Maryland.— Providence L. Ins., etc., Co. *v.* Martin, 32 Md. 310.

Ohio.— American Acc. Co. *v.* Card, 13 Ohio Cir. Ct. 154; Crane *v.* Standard L., etc., Ins. Co., 6 Ohio Dec. 118; Manufacturers' Acc. Indemnity Co. *v.* Fletcher, 5 Ohio Cir. Ct. 633.

Pennsylvania.— Peoples Mut. Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. Rep. 870, 24 Wkly. Notes Cas. (Pa.) 33.

Wisconsin.— Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

Contra, McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436.

75. Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

been so great that, as a matter of law, it can be said to be unreasonable, in which cases it is a question of law for the court.[76]

g. Whether Refusal or Delay of Payment Vexatious. The question whether there has been a vexatious refusal or delay on the part of the insurer in the payment of a loss should be submitted to the jury.[77]

I. Amount Recoverable — 1. Under Special Provision of Policy — a. In General. The amount of weekly benefits recoverable for inability to labor, being fixed by the charter or by-laws of the association, is not a question of what the jury may deem just.[78]

b. Amount Limited by Income. Where the policy stipulates that the amount of indemnity to which insured shall be entitled "shall be governed and paid in the same ratio that my weekly income bears to the amount of weekly indemnity insured for," the amount of indemnity recoverable is limited to the weekly income of insured, and the fact that the agent of the insurer stated insured's income to be greater than it actually was will not affect the rule.[79]

c. Amount Proportioned on Death or Injury. Under a policy providing for the payment of a certain sum in the event of death, and of a proportionate part of the whole in case of injury, insured is entitled to recover for the expense and suffering occasioned by the injury, but not for his loss of time or profit.[80]

d. Injury Leaving No Visible Mark. Where the policy provides for the payment of a certain sum for injuries or death caused by external, violent, and accidental means leaving a visible mark upon the body, and in an independent paragraph for the payment of one tenth of the face of the policy for injuries or death leaving no visible external mark upon the body, or for injury or death resulting from the intentional act of any person other than insured,— where the death of insured is caused by an injury inflicted by the intentional act of a third person, leaving its visible mark upon his body, the face value of the policy is recoverable.[81]

e. Relating to Assessment. Under a policy stipulating for the payment of a sum dependent upon the amount raised by an assessment upon members of the association, the insurer, where the right to recover has been shown, is *prima facie* bound to pay the maximum amount of its liability as specified by the policy.[82]

f. Weekly Indemnity — (I) *And Loss of Foot.* Where the policy provides for the payment of a weekly indemnity in case of disability, and for the payment of a certain sum for the loss of a foot, insured is entitled to recover not only the weekly indemnity for disability, but also the sum for the loss of his foot.[83]

(II) *Benefit Accruing after Action Commenced.* In *assumpsit* to recover weekly benefits for inability to labor no recovery can be had for benefits accruing after the commencement of the action.[84]

(III) *Dependent on Money Value of Time.* Under a policy providing for the payment of a weekly indemnity for loss of time, not to exceed the money value of insured's time, it is not essential that insured prove the money value of his time in the occupation named in the policy. He may recover the money

76. Peoples Mut. Acc. Assoc. *v.* Smith, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. Rep. 870, 24 Wkly. Notes Cas. (Pa.) 23.

77. Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221.

78. Baltimore, etc., Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

79. Howe *v.* Provident Fund Soc., 7 Ind. App. 586, 595, 34 N. E. 830.

80. Theobald *v.* Railway Pass. Assur. Co., 10 Exch. 45.

81. Stephens *v.* Railway Officials, etc., Acc. Assoc., 75 Miss. 84, 21 So. 710.

82. *Arkansas.*— Masons' Fraternal Acc. Assoc. *v.* Riley, 65 Ark. 261, 45 S. W. 684.

Iowa.— Matthes *v.* Imperial Acc. Assoc., (Iowa 1900) 81 N. W. 484; Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508.

Missouri.— McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436.

Nebraska.— Modern Woodman Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826.

United States.— U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60.

83. Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508.

84. Baltimore, etc., Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

value of his time, not to exceed the stipulated sum, in the occupation in which he was engaged at the time of the accident, provided such occupation is not more hazardous than the one he was insured in.[85]

(iv) *Injury Not Fatal in Ninety Days.* Where the policy provides for the payment of a certain sum for injuries occasioning death within ninety days from the date of the accident, and for the payment of a certain sum per week not to exceed twenty-six weeks "for any single accident by which the assured shall sustain any personal injury which shall not be fatal," the weekly indemnity is recoverable for an accidental injury which does not occasion death within ninety days, although it finally proves fatal.[86]

(v) *No Recovery for Death.* No recovery can be had for the death of insured under a policy which provides only for the payment of a weekly indemnity.[87]

2. Upon Vexatious Refusal to Pay Claim. If, upon a full consideration of all the facts and circumstances, the jury conclude that a refusal to pay a loss is unjustifiable and vexatious, the law authorizes them to assess damages therefor,[88] and, it being the duty of the insurer, when a liability has accrued, to pay the same upon receiving the proper notification thereof, interest is payable thereon from the time of the refusal to pay it.[89]

3. Deductions and Offsets — a. Allowance for Injury. Under a certificate providing that sums paid on account of disability resulting from an accident shall be deducted from the principal sum payable in case of death, all allowances made to insured for an injury sustained should be deducted from the amount recoverable in case of death.[90]

b. Wages Received by Insured. Where insured has sustained an injury he is entitled to recover the money value of his loss of time without any deduction for wages paid him by his employer during his disability.[91]

4. Effect of Filing Final Proof of Claim. Where the final proof of claim is filed before the expiration of the time for which indemnity can be recovered under the policy, insured cannot recover for any loss of time after the claim is filed.[92]

J. Verdict and Special Finding. A general verdict for plaintiff, with a special finding that death was caused by a bullet penetrating the heart, is conclusive that death was due to violent and accidental means.[93]

K. Decree Directing Payment of Assessment. A decree, requiring the officers of an accident association, who have not been made parties to the action, to collect and pay an assessment adjudged to be due, is not improper, since it

85. Bean *v.* Travelers Ins. Co., 94 Cal. 581, 29 Pac. 1113.

86. Perry *v.* Provident L. Ins., etc., Co., 103 Mass. 242.

87. Dawson *v.* Accident Ins. Co. of North America, 38 Mo. App. 355.

88. Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221.

89. Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221.

90. Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601.

91. Globe Acc. Ins. Co. *v.* Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

92. Thus in Bickford *v.* Travelers' Ins. Co., 67 Vt. 418, 32 Atl. 230, the policy required proof of insured's claim to be filed within seven months after the injury, and the limited time for which insured could recover was fixed at twenty-six consecutive weeks, and it was held that where the final proof of claim was made before the expiration of the twenty-six weeks, no recovery could be had for any time after the claim was filed. But see Hohn *v.* Inter-State Casualty Co., 115 Mich. 79, 72 N. W. 1105, where it was held that the fact that the proofs of disability covered a period of five weeks only would not prevent a recovery for nine weeks, where the additional proofs were sent long before the expiration of the term within which proofs of duration of disability could be furnished, and the insurer had denied all liability.

93. Warner *v.* U. S. Mutual Acc. Assoc., 8 Utah 431, 32 Pac. 696, 22 Ins. L. J. 704.

Special finding that whether insured was killed by a shot fired by himself or by an assassin was unknown must be construed to refer to accidental and not a suicidal shot by insured. Warner *v.* U. S. Mutual Acc. Assoc., 8 Utah 431, 32 Pac. 696, 22 Ins. L. J. 704.

adds nothing to the force and effect thereof, being merely directory, as to the manner in which the amount found due shall be raised.[94]

L. Appeal. In determining the sufficiency of the complaint the policy cannot be considered as a part thereof when it is not filed therewith and is used only as evidence on the trial, and the evidence is not made a part of the record by bill of exceptions.[95]

ACCIDERE. To come to hand.[1]

ACCOMENDA. A contract whereby a person intrusts property to the master of a vessel to be sold for their joint profit.[2]

ACCOMMODATION. In mercantile language "accommodation" is used for a loan of money.[3] It also signifies a friendly agreement or composition of differences.[4]

ACCOMMODATION LANDS. Lands bought by a builder or speculator who erects houses thereon, and then leases portions thereof, upon an improved ground-rent.[5]

ACCOMMODATION PAPER. See BILLS AND NOTES.

ACCOMMODATION WORKS. Works which a railway company is required to make and maintain for the accommodation of the owners or occupiers of land adjoining the railway, such as gates, culverts, etc.[6]

ACCOMMODATUM. A loan for use without pay where the thing is to be returned *in specie*.[7] (See also BAILMENTS.)

ACCOMPLIAMENTUM. In old English pleading, an accomplishment.[8]

ACCOMPLICES. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

ACCORD. See ACCORD AND SATISFACTION; ACCORDANT.

94. Prader *v.* National Masonic Acc. Assoc., 95 Iowa 149, 63 N. W. 601.

95. Travelers' Protective Assoc. *v.* Gilbert, 101 Fed. 46.

1. Anderson L. Dict.

Used in the expressions *quando acciderent* (Wilson *v.* Hurst, Pet. C. C. (U. S.) 441, 442, note, 30 Fed. Cas. No. 17,809) and *quando acciderint* (Greer *v.* Willis, 67 Ga. 43, 49; Trimmier *v.* Thomson, 19 S. C. 247, 251),— when they come to hand.

2. Wharton L. Lex.

3. Rice *v.* McLarren, 42 Me. 157, 163 [*citing* Webster Dict.].

"Terms to be accommodating."— By the use of the expression "terms to be accommodating," in a contract for the sale of an article, it is to be understood that the purchase money, or some part of it, should be permitted to remain in the purchaser's hands, as if a loan, for his convenience. Rice *v.* McLarren, 42 Me. 157, 163.

4. Abbott L. Dict.

5. Wharton L. Lex.

6. Wharton L. Lex. [*citing* 8 Vict. c. 20, § 68].

7. Anderson L. Dict.

8. Burrill L. Dict. [*citing* Coke Entr. 227].

ACCORD AND SATISFACTION

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CROSS-REFERENCES

For the Discharge of Contracts or the Satisfaction of Claims by:
Arbitration, see ARBITRATION AND AWARD.
Composition Agreements, see COMPOSITIONS WITH CREDITORS.
Compromise, see COMPROMISE AND SETTLEMENT.
Release, see RELEASE.
Stated Account, see ACCOUNTS AND ACCOUNTING.
Substitution of New Contract, see NOVATION.
Tender, see TENDER.

I. GENERAL NATURE AND EFFECT.

A. Definition. An "accord" is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is or considers himself entitled to; and "satisfaction" is the execution of such agreement.[1]

1. In Hennessy *v.* St. Paul City R. Co., 65 Minn. 13, 67 N. W. 635, it is held that an accord and satisfaction is the discharge of a contract or cause of action or a disputed claim arising either from a contract or from a tort by the substitution of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim, and the execution of that agreement.

For other definitions see 3 Bl. Comm. 15; Rapalje & L. L. Dict.; Black L. Dict.; and the following cases:

B. Bars Action on Original Claim. Where an accord has been executed it operates as a complete bar to an action on the original claim,[2] in the absence of fraud, mistake,[3] or duress.[4] If parties accept something different from what they are entitled to they are bound by the acceptance;[5] and a subsequent promise by the debtor to perform or give anything further in satisfaction of the claim is without consideration and void.[6]

An accord and satisfaction does not, however, operate as a bar in regard to matters not contemplated by the agreement.[7]

Connecticut.— Bull *v.* Bull, 43 Conn. 455.
Illinois.— Ætna Ins. Co. *v.* Stevens, 48 Ill. 31.
Iowa.— Hall *v.* Smith, 10 Iowa 45.
Missouri.— Swofford Bros. Dry Goods Co. *v.* Goss, 65 Mo. App. 55.
New York.— Foersch *v.* Blackwell, 14 Barb. (N. Y.) 607; City Sav. Bank *v.* Stevens, 59 N. Y. Super. Ct. 549, 15 N. Y. Suppl. 139; Elkan *v.* Hitchcock, 15 Misc. (N. Y.) 218, 36 N. Y. Suppl. 788.
Pennsylvania.— Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52.
United States.— Way *v.* Russell, 33 Fed. 5.

Distinguished from compromise.— Defendants, who were owners of timber land, made a contract with certain persons for cutting the timber. Subsequently the contractors assigned their interest in the contract to plaintiff, who proceeded with the work. After he had been engaged thereon for some time defendants claimed that he was violating the contract in such manner as to entitle them to rescind, and they took possession of the land by force. Plaintiff, on the other hand, claimed that he was pursuing his contract rights, and in turn he forcibly ousted defendants. The parties then came together and agreed upon a settlement, put its terms into writing, and partly carried it out. It was held that such an agreement was not an accord, but a compromise, and was a binding contract. Flegal *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162.

Distinguished from payment or performance.— Payment implies the delivery of value and that it is the value called for by the engagement to be discharged. Abbott L. Dict. Herein it differs from accord and satisfaction, for the latter transaction is a discharge of the obligation by the giving and acceptance of something else than that which the creditor or claimant is entitled to. For cases illustrating this difference see Carter *v.* Sheriff, 8 N. C. 483; City Sav. Bank *v.* Stevens, 59 N. Y. Super. Ct. 549, 15 N. Y. Suppl. 139. Accord and satisfaction differs from performance in the same particulars. The latter implies a discharge of the obligation by an exact fulfilment thereof. Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170.

2. *Colorado.*— Guldager *v.* Rockwell, 14 Colo. 459, 24 Pac. 556.
Georgia.— Glaze *v.* Western, etc., R. Co., 67 Ga. 761; Byrd *v.* Byrd, 44 Ga. 258.
Kansas.—Kansas City, etc., R. Co. *v.* Hicks, 30 Kan. 288, 1 Pac. 396.
Massachusetts.— Alden *v.* Thurber, 149 Mass. 271, 21 N. E. 312; Curley *v.* Harris, 11 Allen (Mass.) 112.
Michigan.— Allison *v.* Connor, 36 Mich. 283.
New Jersey.— Oliver *v.* Phelps, 20 N. J. L. 180.
New York.— Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444.
Pennsylvania.— Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52; Currier *v.* Bilger, 149 Pa. St. 109, 24 Atl. 168; Miller *v.* Second Jefferson Bldg. Assoc., 50 Pa. St. 32; Hisa *v.* Lucas, 14 Serg. & R. (Pa.) 209.
United States.— Morris's Case, 14 Ct. Cl. 354.
England.— Lane *v.* Applegate, 1 Stark. 78; Nicklin *v.* Williams, 10 Exch. 259; Rideal *v.* Great Western R. Co., 1 F. & F. 706.

3. Guldager *v.* Rockwell, 14 Colo. 459, 24 Pac. 556; Curley *v.* Harris, 11 Allen (Mass.) 112.

4. See *infra*, VII.

5. Onderdonk *v.* Gray, 19 N. J. Eq. 65.

6. Phelps *v.* Dennett, 57 Me. 491; Mason *v.* Campbell, 27 Minn. 54, 6 N. W. 405; Stafford *v.* Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366 [*affirmed* in 2 Hill (N. Y.) 353].

Thus, where there has been an accord and satisfaction by the payment and acceptance of a smaller sum (composition with an insolvent debtor), a note given by the debtor to one of the creditors is void for want of consideration. Grant *v.* Porter, 63 N. H. 229.

7. *Illinois.*— St. Louis, etc., R. Co. *v.* Hurst, 25 Ill. App. 98.
New York.— Bates *v.* Cobb, 5 Bosw. (N. Y.) 29; Littell *v.* Ellison, 17 N. Y. Suppl. 294.
Vermont.— Rowell *v.* Marcy, 47 Vt. 627.
United States.— Scully *v.* Delamater, 28 Fed. 114.
England.— See also Roberts *v.* Eastern Counties R. Co., 1 F. & F. 460.

Matters not contemplated in agreement.— A contract of services between plaintiff and decedent provided that if plaintiff and his wife did certain work and spent a certain amount of money in improving decedent's farm he would deed or will the farm to plaintiff. Six months before decedent's death the parties exchanged receipts "in full of all claims, debts, and demands of every name and nature up to this date," and in which plaintiff accepted a lease of the dwelling-house on the farm for four months from that date. It was held that this transaction did not include plaintiff's claim to have the farm on the testator's death, because the time had not elapsed during which that agreement was by its terms to be performed on the part of deceased, and no claim for damages for its

C. Waiver of Condition of Accord. A condition of an accord or agreement may, like that of any other contract, be waived by the parties.[8]

II. Subject-Matter.

A. Actions Arising Ex Contractu — 1. In General. An accord and satisfaction is a good plea in actions upon simple contracts,[9] or in debt for rent upon a lease for years.[10]

2. Judgments. The authorities are conflicting as to whether accord and satisfaction is a good plea to an action on a judgment. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt;[11] and, *a fortiori*, a parol accord and satisfaction would not be a good plea. This has been either held or said in a number of decisions.[12] But by 4 Anne, c. 16, § 12, the common-law rule was changed. Under the statute, payment of a debt of record might be pleaded in bar of an action thereon, and it is said that accord and satisfaction also might be so pleaded.[13]

In a number of states it is now held that a parol accord and satisfaction of a judgment is good. In most of these decisions no statutory authorization is mentioned,[14] but in one the court seems to have adopted the English statute as a part of the common law of the state.[15] So it has been said in a recent decision, "The rule has been much broken in upon by statutes and by decisions upon equitable grounds in modern times."[16]

3. Obligations under Seal. An obligation under seal, where such obligation is required to be under seal, can be dissolved only by an instrument of equal dignity; hence a parol accord and satisfaction of such obligation is bad.[17] But

non-performance had arisen. Littell *v.* Ellison, 17 N. Y. Suppl. 294.

8. Cary *v.* McIntyre, 7 Colo. 173, 2 Pac. 916. In this case it is held that where a contract to deliver lumber has been broken, and a new agreement is entered into founded upon sufficient consideration, the party who is to deliver the lumber may waive performance, on the part of the party who is to accept it, of some of the conditions of the new agreement.

9. See, generally, *infra*, V, A, B, C.

10. Oliver *v.* Phelps, 20 N. J. L. 180; Com. Dig. tit. Accord, 196; Peytoe's Case, 9 Coke 77*b*.

11. See Boffinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649.

12. Weber *v.* Couch, 134 Mass. 26, 45 Am. Rep. 274; Riley *v.* Riley, 20 N. J. L. 114; Mitchell *v.* Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec. 260; Garvey *v.* Jarvis, 54 Barb. (N. Y.) 179.

13. Boffinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649.

14. *Indiana.*— Jones *v.* Ransom, 3 Ind. 327.

Maryland.— McCullough *v.* Franklin Coal Co., 21 Md. 256.

Pennsylvania.— See Mason *v.* Wickersham, 4 Watts & S. (Pa.) 100.

Vermont.— Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

Wisconsin.— Reid *v.* Hibbard, 6 Wis. 175.

15. Savage *v.* Everman, 70 Pa. St. 315, 10 Am. Rep. 676.

16. Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396. In this case it appeared that an oral agreement was made in open court between counsel that if plaintiff's attorney, who had indorsed the writ, would allow an indorser for costs to be ordered, he should be relieved when the order was passed. The order was subsequently made with a nonsuit as an alternative, but the attorney was not released of record or his name stricken from the writ, and a new suit was afterward granted. It was held, in an action where the original defendant, the attorney, recovered costs, that the plaintiff could not rely on the nonsuit and repudiate the agreement; that the agreement formed a good defense to the action by way of accord and satisfaction, though by parol.

17. *Arkansas.*— Levy *v.* Very, 12 Ark. 148; Miller *v.* Hemphill, 9 Ark. 488.

Indiana.— Milnes *v.* Vanhorn, 8 Blackf. (Ind.) 198; Woodruff *v.* Dobbins, 7 Blackf. (Ind.) 582.

Kentucky.— McWaters *v.* Draper, 5 T. B. Mon. (Ky.) 494. But *compare* Savage *v.* Carter, 2 B. Mon. (Ky.) 512.

Maryland.— Harper *v.* Hampton, 1 Har. & J. (Md.) 622.

Massachusetts.— Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201.

North Carolina.— Smith *v.* Brown, 10 N. C. 580; Cabe *v.* Jameson, 32 N. C. 193, 51 Am. Dec. 386; State *v.* Cordon, 30 N. C. 179; Ligon *v.* Dunn, 28 N. C. 133; State Bank *v.* Littlejohn, 18 N. C. 563.

England.— Rogers *v.* Payn, 2 Wils. C. P. 376; Snow *v.* Franklin, 1 Lutw. 358; Neal *v.* Sheaffield, Cro. Jac. 254; Noyes *v.* Hopgood, Cro. Jac. 649; Alden *v.* Blague, Cro. Jac. 99; Preston *v.* Christmas, 2 Wils. C. P. 86; Worthington *v.* Wigley, 3 Bing. N. Cas. 454; Spence *v.* Healey, 8 Exch. 668; West *v.* Blakeway, 2 Man. & G. 729; Berwick-upon-Tweed *v.* Oswald, 1 E. & B. 295, 72 E. C. L. 295; Kaye *v.* Waghorn, 1 Taunt. 428;

after a breach of the covenant has accrued, an accord executed is a good plea in discharge of the damages accruing by reason of the breach.[18] Where, however, money is due by the condition of the instrument, and defendant has by statute a right to be discharged by bringing the principal and interest into court, an accord and satisfaction by parol is good.[19] So a parol accord and satisfaction has been held good where it has induced the breach for which plaintiff seeks to recover. He will not be permitted to recover on a technical fraud thus produced.[20] It has also been held that although such an agreement is not operative at law it would nevertheless be enforceable in equity[21] on the ground that in a court of equity the agreements of parties are respected without regard to their being under seal or not,[22] and that it will constitute a good defense in an action at law, in jurisdictions where, by virtue of statutory authorization, equitable defenses may be pleaded in actions at law.[23]

B. Actions Arising Ex Delicto. An accord and satisfaction is a good plea in all actions founded upon torts,— actions in which damages only are sought to be recovered,[24] as in actions of trespass,[25] mayhem,[26] conspiracy,[27] maintenance,[28] libel,[29] detinue,[30] or ravishment of ward.[31]

C. Real Actions. Accord and satisfaction is no plea in a real action where

Parker *v.* Ramsbottom, 3 B. & C. 257; Lowe *v.* Eginton, 7 Price 604; Cordwent *v.* Hunt, 8 Taunt. 596; Covill *v.* Geffery, 2 Rolle 96.

Canada.— Robison *v.* Flanigan, 22 U. C. Q. B. 417; Prindle *v.* McCann, 4 U. C. Q. B. 228.

Compare Barelli *v.* O'Conner, 6 Ala. 617.

See also, generally, RELEASE.

Deed only can be pleaded in accord and satisfaction to a bond. Levy *v.* Very, 12 Ark. 148; Ligon *v.* Dunn, 28 N. C. 133.

Note under seal.— If an intestate at his death is indebted on a note under seal, and the administrator renews the note, signing his name "A. B., Administrator of C. D., Dec'd.," the renewed note is an accord and satisfaction of the old note, and the debt becomes the debt of the administrator. The latter note, being under seal, is of as high dignity as the former. Erwin *v.* Carroll, 1 Yerg. (Tenn.) 145.

The rule in New York.— The rule stated in the text does not seem to obtain in New York. It is there held that an executed parol agreement upon a sufficient consideration may operate to discharge the stipulations of a contract under seal. Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Lawrence *v.* Barker, 9 Daly (N. Y.) 140; Townsend *v.* Empire Stone Dressing Co., 6 Duer (N. Y.) 208. See also Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528.

18. *Arkansas.*— Levy *v.* Very, 12 Ark. 148.

Illinois.— Capital City Mut. F. Ins. Co. *v.* Detwiler, 23 Ill. App. 656.

Indiana.— Cutler *v.* Cox, 2 Blackf. (Ind.) 178, 18 Am. Dec. 152.

Kentucky.— Payne *v.* Barnet, 2 A. K. Marsh. (Ky.) 312.

Maryland.— Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170; Harper *v.* Hampton, 1 Har. & J. (Md.) 622.

New Hampshire.— Moody *v.* Leavitt, 2 N. H. 171.

New Jersey.— Neldon *v.* Smith, 36 N. J. L. 148.

New York.— Mitchell *v.* Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec. 260.

North Carolina.— Smith *v.* Brown, 10 N. C. 580; Cabe *v.* Jameson, 32 N. C. 193, 51 Am. Dec. 386; State *v.* Cordon, 30 N. C. 179.

United States.— Boffinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649.

England.— Alden *v.* Blague, Cro. Jac. 99; Kaye *v.* Waghorn, 1 Taunt. 428; Snow *v.* Franklin, 1 Lutw. 358.

Canada.— Boyard *v.* Partridge, Taylor (U. C.) 406; Greene *v.* Harris, 24 N. Brunsw. 496. *Compare* McIntyre *v.* Kingston, 4 U. C. Q. B. 471.

Actions against sureties on bond.— Accord and satisfaction may be pleaded to the damages in an action against the surety on an employee's bond for faithful performance of duty (Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100), or in an action against the surety on an appeal bond (Boffinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649).

19. Keeler *v.* Salisbury, 33 N. Y. 648 [*affirming* 27 Barb. (N. Y.) 485]; Strang *v.* Holmes, 7 Cow. (N. Y.) 224.

20. Leavitt *v.* Savage, 16 Me. 72; Herzog *v.* Sawyer, 61 Md. 344.

21. Smitherman *v.* Kidd, 36 N. C. 86; Steeds *v.* Steeds, 22 Q. B. D. 537.

22. Smitherman *v.* Kidd, 36 N. C. 86.

23. Steeds *v.* Steeds, 22 Q. B. D. 537.

24. Andrew *v.* Boughey, 1 Dyer 75*b*; Peytoe's Case, 9 Coke 77*b*.

25. Oliver *v.* Phelps, 20 N. J. L. 180; Andrew *v.* Boughey, 1 Dyer 75*b*; Peytoe's Case, 9 Coke 77*b*.

Ejectment.— Accord and satisfaction is a good plea in ejectment. "The trespass and ejectment are so woven and mixed together that they cannot be severed." Peytoe's Case, 9 Coke 77*b*, 78*b*.

26. Peytoe's Case, 9 Coke 77*b*.

27. Andrew *v.* Boughey, 1 Dyer 75*b*; Peytoe's Case, 9 Coke 77*b*.

28. Andrew *v.* Boughey, 1 Dyer 75*b*; Peytoe's Case, 9 Coke 77*b*.

29. Boosey *v.* Wood, 3 H. & C. 484.

30. Peytoe's Case, 9 Coke 77*b*.

31. Peytoe's Case, 9 Coke 77*b*.

the inheritance or freehold is to be recovered, although the satisfaction is of as high a nature as the right of freehold.[32]

D. Writs of Error. An accord and satisfaction has been held to be a good plea in bar of a writ of error.[33]

III. Elements and Requisites.

A. The Agreement. As is the case with other contracts an accord and satisfaction requires an agreement — an *aggregatio mentium.*[34] If the obligation sought to be extinguished arises from contract it requires the substitution of a new agreement in place of the old one,[35] and if the obligation arises in tort, the substitution of an original agreement in its place. The agreement may be either express or implied.[36]

B. Consideration — 1. Necessity. A consideration is necessary to render the accord and satisfaction valid. Without consideration it is *nudum pactum.*[37]

2. Sufficiency. The consideration may present itself in many different shapes, but in some form or other it must be found. There must be some advantage, or presumed or assumed advantage, accruing to the party who yields his claim, or some detriment to the other party.[38] If, however, there is a new consideration, the

32. Vernon's Case, 4 Coke 1*a*; Peytoe's Case, 9 Coke 77*b*.

33. Salmon *v.* Pixlee, 2 Day (Conn.) 242 [four judges dissenting]; Atlanta, etc., R. Co. *v.* Blanton, 80 Ga. 563, 6 S. E. 584. *Compare* Potter *v.* Smith, 14 Johns. (N. Y.) 444, 445, in which it is said "it is doubtful at least whether an accord and satisfaction can be pleaded in bar of a writ of error, notwithstanding the case of Salmon *v.* Pixlee, 2 Day (Conn.) 242."

34. Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Hennessy *v.* St. Paul City R. Co., 65 Minn. 13, 67 N. W. 635.

A compromise is not a necessary element of an accord and satisfaction. Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881.

See, generally, Compromise and Settlement.

35. Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613]; Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Darnall *v.* Morehouse, 36 How. Pr. (N. Y.) 511. See also Bidder *v.* Bridges, 37 Ch. D. 406.

36. Griffin *v.* Petty, 101 N. C. 380, 7 S. E. 729; Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 86, 7 S. W. 695, wherein the court say: "That an accord may be based on an implied contract we do not doubt, but before a right will be deemed to have been so surrendered the implication must be one necessarily arising."

37. *Alabama.*— Logan *v.* Austin, 1 Stew. (Ala.) 476.

Arkansas.— Levy *v.* Very, 12 Ark. 148.

Connecticut.—Goodrich *v.* Stanley, 24 Conn. 613.

Florida.— Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373; May *v.* Gamble, 14 Fla. 467.

Georgia.— Richmond, etc., R. Co. *v.* Walker, 92 Ga. 485, 17 S. E. 604.

Indiana.— Ritenour *v.* Mathews, 42 Ind. 7; Stone *v.* Lewman, 28 Ind. 97; Bright *v.* Coffman, 15 Ind. 371, 77 Am. Dec. 96.

Kentucky.—Wriston *v.* Lacy, 7 J. J. Marsh. (Ky.) 219; Commonwealth Bank *v.* Letcher, 3 J. J. Marsh. (Ky.) 195; Davis *v.* Noaks, 3 J. J. Marsh. (Ky.) 494.

Massachusetts.— Bragg *v.* Danielson, 141 Mass. 195, 4 N. E. 622; Stevens *v.* Hathorne, 12 Allen (Mass.) 402.

Michigan.— Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

New York.— Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613]; Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Foersch *v.* Blackwell, 14 Barb. (N. Y.) 607.

Pennsylvania.— Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 859; Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Mt. Holly Water Co. *v.* Mt. Holly Springs, 10 Pa. Super. Ct. 162.

Rhode Island.— Rose *v.* Daniels, 8 R. I. 381.

South Carolina.— Smith *v.* Keels, 15 Rich. (S. C.) 318.

Vermont.— French *v.* Raymond, 39 Vt. 623.

United States.— Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968.

England.— White *v.* Bluett, 23 L. J. Exch. 36.

Thus, if one wrongfully dispossesses another of his chattels and land, and then restores them on a promise from the other that he will not bring action, the promise will not be binding, as it is without consideration. Foersch *v.* Blackwell, 14 Barb. (N. Y.) 607. To the same effect see Smith *v.* McCall, 48 Vt. 422; Keeler *v.* Neal, 2 Watts (Pa.) 424.

38. Davis *v.* Noaks, 3 J. J. Marsh. (Ky.) 494; Keeler *v.* Neal, 2 Watts (Pa.) 424; Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968; Andrew *v.* Boughey, 1 Dyer 75*a*.

New consideration held sufficient.— Where a deed made in consideration of an existing debt is void for undue influence, such debt and further advances are a sufficient consideration to support an agreement of accord and satisfaction made between the grantee and the

court will in no case inquire into its reasonableness [39] or undertake to interfere with the estimate of the value placed on the consideration by the parties themselves.[40] Mere inadequacy of consideration constitutes no ground of impeachment more than in other classes of contracts. It is enough if it appears that the creditor receives any distinct benefit from the substituted contract which otherwise he would not have had.[41]

C. Giving and Acceptance in Satisfaction. To constitute a valid accord and satisfaction it is also essential that what is given or agreed to be performed should be offered as a satisfaction and extinction of the original demand; that the debtor shall intend it as a satisfaction of such obligation,[42] and it is equally essential that the creditor should have accepted it with the intention that it should operate as a satisfaction.[43] Both the giving and acceptance in satisfac-

grantor's heirs after her death. German Sav., etc., Soc. *v.* De Lashmutt, 83 Fed. 33. So an agreement by a debtor, at a creditor's request and for his accommodation, to give new notes for smaller sums, so as to enable the creditor to sue before a justice of the peace, operates as an accord and satisfaction of the original note for which they were exchanged and is supported by sufficient consideration. *In re* Dixon, 2 McCrary (U. S.) 556. For other specific instances in which the consideration was held sufficient see *infra*, V.

39. *Alabama.*— Singleton *v.* Thomas, 73 Ala. 205.

Connecticut.— Bull *v.* Bull, 43 Conn. 455.

Maryland.— Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Pennsylvania.— Tucker *v.* Murray, 2 Pa. Dist. 497.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91; Williams *v.* Phelps, 16 Wis. 80.

England.— Pinnel's Case, 5 Coke 117*a*; Curlewis *v.* Clark, 3 Exch. 375. *Contra*, Cumber *v.* Wane, 1 Str. 426.

Canada.— Weldon *v.* Vaughan, 18 N. Brunsw. 70.

40. Singleton *v.* Thomas, 73 Ala. 205.

41. Pope *v.* Tunstall, 2 Ark. 209; Palmer *v.* Yager, 20 Wis. 91.

42. *California.*— Hogan *v.* Burns, (Cal. 1893) 33 Pac. 631.

Indiana.— Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; Dupay *v.* Robbins, 1 Blackf. (Ind.) 473.

Kentucky.— Com. *v.* Miller, 5 T. B. Mon. (Ky.) 205.

Maine.— Cushing *v.* Wyman, 44 Me. 121.

Massachusetts.— Rindge *v.* Coleraine, 11 Gray (Mass.) 157; Howe *v.* Mackay, 5 Pick. (Mass.) 44.

Ohio.— Detroit F. & M. Ins. Co. *v.* Commercial Ins. Co., 1 Clev. L. Rec. 81.

Rhode Island.— Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333.

South Carolina.— Watson *v.* Owens, 1 Rich. (S. C.) 111.

Vermont.— Preston *v.* Grant, 34 Vt. 201.

United States.— Maze *v.* Miller, 1 Wash. (U. S.) 328, 16 Fed. Cas. No. 9,362.

England.— Paine *v.* Masters, 1 Str. 573; Graham *v.* Gibson, 4 Exch. 768.

43. *Arkansas.*— Ballard *v.* Noaks, 2 Ark. 45; Blunt *v.* Williams, 27 Ark. 374.

California.— Hogan *v.* Burns, (Cal. 1893) 33 Pac. 631.

Colorado.— Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757.

Georgia.— Georgia R. Co. *v.* Olds, 77 Ga. 673.

Illinois.—American *v.* Rimpert, 75 Ill. 228; Allen *v.* Breusing, 32 Ill. 505.

Indiana.— Frick *v.* Algeier, 87 Ind. 255; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Jones *v.* Mills, 14 Ind. 436.

Iowa.— Jones *v.* Fennimore, 1 Greene (Iowa) 134.

Kentucky.— Reed *v.* Hipple, (Ky. 1897) 40 S. W. 251; Donnelly *v.* Pepper, 91 Ky. 363, 15 S. W. 879; McDonald *v.* Patton, Ky. Dec. 295; Payne *v.* Barnet, 2 A. K. Marsh. (Ky.) 312; Peace *v.* Stennet, 4 J. J. Marsh. (Ky.) 449; Com. *v.* Miller, 5 T. B. Mon. (Ky.) 205; Haggin *v.* Williamson, 5 T. B. Mon. (Ky.) 8.

Maine.— Young *v.* Jones, 64 Me. 563; Cushing *v.* Wyman, 44 Me. 121.

Massachusetts.— Weddigen *v.* Boston Elastic Fabric Co., 100 Mass. 422; Rindge *v.* Coleraine, 11 Gray (Mass.) 157; Howe *v.* Mackay, 5 Pick. (Mass.) 44.

Minnesota.— Duluth Chamber of Commerce *v.* Knowlton, 42 Minn. 229, 44 N. W. 2; Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863; Washburn *v.* Winslow, 16 Minn. 33.

Mississippi.— Burrus *v.* Gordon, 57 Miss. 93.

Missouri.— Wilkerson *v.* Bruce, 37 Mo. App. 156; Shaw *v.* Burton, 5 Mo. 478.

Nebraska.—Van Housen *v.* Broehl, 58 Nebr. 348, 78 N. W. 628.

New Hampshire.— Gowing *v.* Thomas, 67 N. H. 399, 40 Atl. 184; Brown *v.* Spaulding, 63 N. H. 622, 4 Atl. 394; Watson *v.* Elliott, 57 N. H. 511; Clark *v.* Dinsmore, 5 N. H. 136.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

New York.— Elkan *v.* Hitchcock, 15 Misc. (N. Y.) 218, 36 N. Y. Suppl. 788; Levenson *v.* Gillen Pub. Co., 30 Misc. (N. Y.) 454, 62 N. Y. Suppl. 472; Platts *v.* Walrath, Lalor (N. Y.) 59.

North Carolina.— State Bank *v.* Littlejohn, 18 N. C. 563.

Ohio.— Detroit F. & M. Ins. Co. *v.* Commercial Ins. Co., 1 Clev. L. Rec. 81.

Pennsylvania.— Krauser *v.* McCurdy, 174 Pa. St. 174, 34 Atl. 518; Stone *v.* Miller, 16 Pa. St. 450; Tucker *v.* Murray, 2 Pa. Dist.

tion are essential elements, and if they be lacking there can be no accord and satisfaction.[44]

D. Execution of the Accord — 1. NECESSITY. To constitute a bar to an action on the original claim or demand the accord must be fully executed[45] unless the agreement or promise, instead of the performance thereof, is accepted in sat-

497; Spruneberger *v.* Dentler, 4 Watts (Pa.) 126.

Rhode Island.— Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333.

South Carolina.— Smith *v.* Keels, 15 Rich. (S. C.) 318; Watson *v.* Owens, 1 Rich. (S. C.) 111.

Texas.— Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695; Erath County *v.* Robinson, 30 Tex. 435.

Vermont.— Miller *v.* Holden, 18 Vt. 337.

Washington.— Rogers *v.* Spokane, 9 Wash. 168, 37 Pac. 300.

West Virginia.— Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Arkansas City First Nat. Bank *v.* Leech, 94 Fed. 310; Maze *v.* Miller, 1 Wash. (U. S.) 328, 16 Fed. Cas. No. 9,362.

England.— Hardman *v.* Bellhouse, 9 M. & W. 596; Emes *v.* Widdowson, 4 C. & P. 151; Drake *v.* Mitchell, 3 East 251; Paine *v.* Masters, 1 Str. 573; Hall *v.* Flockton, 20 L. J. Q. B. 208, 16 Q. B. 1039.

Presumption as to acceptance in satisfaction.— The security for the debt, given by different parties for a different sum, will, in the absence of proof of intention of the parties, be presumed to be accepted only as collateral security and not in satisfaction of the debt. Jones *v.* Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760.

44. See *supra*, cases cited in the two preceding notes.

45. *Alabama.*— Smith *v.* Elrod, (Ala. 1898) 24 So. 994; Cobb *v.* Malone, 86 Ala. 571, 6 So. 6.

Arkansas.— Heaslet *v.* Spratlin, 54 Ark. 185, 15 S. W. 461; Pope *v.* Tunstall, 2 Ark. 209; Ballard *v.* Noaks, 2 Ark. 45.

California.—Simmons *v.* Oullahan, 75 Cal. 508, 17 Pac. 543; Simmons *v.* Hamilton, 56 Cal. 493.

Connecticut.— Francis *v.* Deming, 59 Conn. 108, 21 Atl. 1006; Scutt's Appeal, 43 Conn. 108.

Florida.— Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373; May *v.* Gamble, 14 Fla. 467.

Georgia.— Chamblee *v.* Davie, 88 Ga. 205, 14 S. E. 195; Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; English *v.* Reid, 55 Ga. 240; Molyneaux *v.* Collier, 13 Ga. 406.

Illinois.— Jacobs *v.* Marks, 183 Ill. 533, 56 N. E. 154; Harding *v.* Commercial Loan Co., 84 Ill. 251; Spire *v.* Lovell, 17 Ill. App. 559; Irwin *v.* Atkins, 7 Ill. App. 17.

Indiana.— Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125; Eichholtz *v.* Taylor, 88 Ind. 38; Jackson *v.* Olmstead, 87 Ind. 92; Deweese *v.* Cheek, 35 Ind. 514; Coquillard *v.* French, 19 Ind. 274; Harbor *v.* Morgan, 4 Ind. 158; Woodruff *v.* Dobbins, 7 Blackf. (Ind.) 582.

Iowa.— Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623; Merry *v.* Allen, 39 Iowa 235; Woodward *v.* Willard, 33 Iowa 542; Hall *v.* Smith, 10 Iowa 45; Prentress *v.* Markle, 2 Greene (Iowa) 553; Jones *v.* Fennimore, 1 Greene (Iowa) 134.

Kentucky.— Elliott *v.* Dazey, 3 T. B. Mon. (Ky.) 268; Groshon *v.* Grant, Ky. Dec. 268.

Maine.— White *v.* Gray, 68 Me. 579; Young *v.* Jones, 64 Me. 563; Dudley *v.* Kennedy, 63 Me. 465; Webb *v.* Stuart, 59 Me. 356; Mansur *v.* Keaton, 46 Me. 346; Cushing *v.* Wyman, 44 Me. 121.

Maryland.— Flack *v.* Garland, 8 Md. 188.

Massachusetts.— Field *v.* Aldrich, 162 Mass. 587, 39 N. E. 288; Herrmann *v.* Orcutt, 152 Mass. 405, 25 N. E. 735; Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499; Stults *v.* Newhall, 118 Mass. 98; Costello *v.* Cady, 102 Mass. 140; Cary *v.* Bancroft, 14 Pick. (Mass.) 315, 25 Am. Dec. 393; Dehon *v.* Stetson, 9 Metc. (Mass.) 341.

Michigan.— Browning *v.* Crouse, 43 Mich. 489, 5 N. W. 664.

Minnesota.—Marion *v.* Heimbach, 62 Minn. 214, 64 N. W. 386; Cannon River Manufacturers' Assoc. *v.* Rogers, 46 Minn. 376, 49 N. W. 128.

Mississippi.— Burrus *v.* Gordon, 57 Miss. 93; Whitney *v.* Cook, 53 Miss. 551; Guion *v.* Doherty, 43 Miss. 538; Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65; Barnes *v.* Lloyd, 1 How. (Miss.) 584; Starling *v.* Wyatt, (Miss. 1900) 27 So. 526.

Missouri.— Goff *v.* Mulholland, 28 Mo. 397; Barton *v.* Hunter, 59 Mo. App. 610; Giboney *v.* German Ins. Co., 48 Mo. App. 185.

Nebraska.— Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30.

New Hampshire.— Kidder *v.* Kidder, 53 N. H. 561; Kenniston *v.* Bartlett, 46 N. H. 517; Woodward *v.* Miles, 24 N. H. 289; Ranlett *v.* Moore, 21 N. H. 336; Clark *v.* Dinsmore, 5 N. H. 136.

New Mexico.— Armijo *v.* Abeytia, 5 N. Mex. 533, 25 Pac. 777; Frick *v.* Joseph, 2 N. Mex. 138.

New York.— Osborn *v.* Robbins, 37 Barb. (N. Y.) 481; Mitchell *v.* Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec. 260; Campbell *v.* Hurd, 74 Hun (N. Y.) 235, 26 N. Y. Suppl. 458; Smith *v.* Cranford, 84 Hun (N. Y.) 318, 32 N. Y. Suppl. 375; Panzerbeiter *v.* Waydell, 21 Hun (N. Y.) 161; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528; Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386; Brooklyn Bank *v.* De Grauw, 23 Wend. (N. Y.) 342; Daniels *v.* Hallenbeck, 19 Wend. (N. Y.) 408; Hawley *v.* Foote, 19 Wend. (N. Y.) 516; Russell *v.* Lytle, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537; Day *v.* Roth. 18 N. Y. 448; Clough *v.* Murray, 3 Rob. (N. Y.) 7.

Ohio.— Frost *v.* Johnson, 8 Ohio 393; Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534.

Pennsylvania.— Hosler *v.* Hursh, 151 Pa.

isfaction.[46] An accord without satisfaction is no bar, because there is no consideration and no mutuality to support it; the creditor has no means of obtaining satisfaction by enforcing it, and of course derives no satisfaction directly or indirectly from it.[47]

2. Sufficiency — a. In General. An accord is executory so long as something remains to be done in the future.[48] It is sufficiently executed only when all is done which the party agrees to accept in satisfaction of the pre-existing obligation.[49] All that is required, however, is that the debtor should have executed the new contract to that point where it was to operate as a satisfaction of the pre-existing liability.[50] The precise thing agreed to be accepted in satisfaction must be performed. Performance of something not contemplated by the agreement will not suffice.[51]

b. Time of Performance. If no time is fixed for performance, performance within a reasonable time will be sufficient.[52] If time of performance is fixed by the agreement it must be performed at that time;[53] if not, suit may be brought on the original demand[54] unless the time of performance be enlarged by consent of the creditor.[55]

c. Readiness to Perform or Tender of Performance. Mere readiness to perform is insufficient;[56] and while there are a few decisions which seemingly hold

St. 415, 25 Atl. 52; Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811; Kerr *v.* O'Connor, 63 Pa. St. 341; Keen *v.* Vaughan, 48 Pa. St. 477; Schilling *v.* Durst, 42 Pa. St. 126; Blackburn *v.* Ormsby, 41 Pa. St. 97; Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Reed *v.* Martin, 29 Pa. St. 179; Brenner *v.* Herr, 8 Pa. St. 106; Ellison *v.* Jones, 1 Kulp (Pa.) 273; Alderfer *v.* Boyer, 7 Montg. Co. Rep. (Pa.) 53; Hieskell *v.* O'Donnell, 12 Phila. (Pa.) 306; Sprunebergeer *v.* Dentler, 4 Watts (Pa.) 126; Lance *v.* Ashton, 2 Wkly. Notes Cas. (Pa.) 305; Philadelphia *v.* Devine, 1 Wkly. Notes Cas. (Pa.) 358.

Rhode Island.— Pettis *v.* Ray, 12 R. I. 344; Clarke *v.* Hawkins, 5 R. I. 219.

Texas.— Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556; Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695; Overton *v.* Conner, 50 Tex. 113; McGehee *v.* Shafer, 15 Tex. 198.

Utah.— Whitney *v.* Richards, 17 Utah 226, 53 Pac. 1122.

Vermont.— Rising *v.* Cummings, 47 Vt. 345; Gleason *v.* Allen, 27 Vt. 364.

Washington.— Rogers *v.* Spokane, 9 Wash. 168, 37 Pac. 300.

Wisconsin.— Ball *v.* McGeoch, 81 Wis. 160, 47 N. W. 610; Sieber *v.* Amunson, 78 Wis. 679, 47 N. W. 1126; Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243; Otto *v.* Klauber, 23 Wis. 471; Palmer *v.* Yager, 20 Wis. 91.

United States.— Way *v.* Russell, 33 Fed. 5; U. S. *v.* Clarke, Hempst. (U. S.) 315, 24 Fed. Cas. No. 14,812; Latapee *v.* Pecholier, 2 Wash. (U. S.) 180, 14 Fed. Cas. No. 8,101.

England.— Evans *v.* Powis, 1 Exch. 601; Heathcote *v.* Crookshanks, 2 T. R. 24; Allen *v.* Harris, 1 Ld. Raym. 122; Lynn *v.* Bruce, 2 H. Bl. 317; Andrew *v.* Boughey, 1 Dyer 75*a*; Cock *v.* Honeychurch, T. Raym. 203, 2 Keb. 690; Case *v.* Barber, T. Raym. 450; Bree *v.* Sayler, 2 Keb. 332; Reeves *v.* Hearne, 1 M. & W. 323; Balston *v.* Baxter, Cro. Eliz. 304; Stracy *v.* Bank of England, 6 Bing. 754.

See 1 Cent. Dig. tit. "Accord and Satisfaction," §§ 116–122.

Application of rule.— The defense of accord and satisfaction is not made out by showing that plaintiff promised to accept, for labor performed by him, a deed of land from a third person in satisfaction, the deed being executed but not delivered. Burgess *v.* Denison Paper Mfg. Co., 79 Me. 266, 9 Atl. 726. So where, pending an action of replevin, it was agreed between the parties that plaintiff should dismiss the suit and defendant should deliver to plaintiff certain property in controversy therein, it was held that the agreement did not amount to an accord and satisfaction which would bar the action until delivery was actually made. Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730.

46. As showing that the promise itself may be accepted in satisfaction see *infra*, V, D. See also Coit *v.* Houston, 3 Johns. Cas. (N. Y.) 243; White *v.* Gray, 68 Me. 579; Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52, — to the effect that where a new promise or agreement has been accepted in satisfaction of the original claim, a tender of performance of such new promise or agreement is a sufficient execution of the accord to constitute satisfaction in such a case.

47. Bryant *v.* Gale, 5 Vt. 416.

See 1 Cent. Dig. tit. "Accord and Satisfaction," § 123.

48. Bragg *v.* Pierce, 53 Me. 65.

49. Therasson *v.* Peterson, 2 Keyes (N. Y.) 636; Babcock *v.* Hawkins, 23 Vt. 561. See also Edwards *v.* Bryan, 88 Ga. 248, 14 S. E. 595.

50. Babcock *v.* Hawkins, 23 Vt. 561.

51. Clark *v.* Rowling, Lalor (N. Y.) 105. See also Rising *v.* Cummings, 47 Vt. 345.

52. Jones *v.* Peet, 1 Swan (Tenn.) 293.

53. Makepeace *v.* Harvard College, 10 Pick. (Mass.) 298; Piper *v.* Kingsbury, 48 Vt. 480; Robertson *v.* Campbell, 2 Call (Va.) 421.

54. Piper *v.* Kingsbury, 48 Vt. 480.

55. Robertson *v.* Campbell, 2 Call (Va.) 421.

56. Dudley *v.* Kennedy, 63 Me. 465; Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Blackburn *v.* Ormsby, 41 Pa. St. 97; Thomas *v.* Mallory, 6 U. C. Q. B. 521.

that an accord with tender of performance and refusal to accept is equivalent to satisfaction, and may be so pleaded in bar of the action on the original claim,[57] the great weight of authority is directly to the contrary. The majority of decisions are to the effect that tender of performance is in no case equivalent to performance, and therefore not a satisfaction of the original obligation. This rule, however, would not apply in a case where the new agreement or promise, instead of the performance thereof, is accepted in satisfaction, as has been pointed out above in speaking of the necessity of an execution of the accord.[58]

d. Part Performance. Accord and part performance do not constitute a satisfaction.[59] It is merely executory so long as by its terms something remains to be done in the future.[60]

e. Part Performance, Readiness to Perform, or Tender of Performance of Balance. Performance of part and readiness to perform the balance,[61] or per-

57. Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65. *Compare* also Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233, in which it does not appear from the facts set out in the report of the case whether the agreement referred to was itself accepted in satisfaction, or whether the performance of the agreement was to be accepted in satisfaction.

Where debtor uses property after tender.— Where a creditor offers to receive payment in cotton at a certain price, and the debtor tenders it accordingly, and the tender is refused by the creditor, and the debtor retains it and disposes of it as his own, there is no satisfaction. Mayfield *v.* Cotton, 21 Tex. 1.

58. *Illinois.*— Spire *v.* Lovell, 17 Ill. App. 559.

Indiana.— Harbor *v.* Morgan, 4 Ind. 158.

Kentucky.—McKean *v.* Reed, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

Maine.— White *v.* Gray, 68 Me. 579; Young *v.* Jones, 64 Me. 563.

Massachusetts.— Clifton *v.* Litchfield, 106 Mass. 34.

Minnesota.— Cannon Rivers Manufacturers' Assoc. *v.* Rogers, 46 Minn. 376, 49 N. W. 128.

Missouri.— Giboney *v.* German Ins. Co., 48 Mo. App. 185.

New York.— Noe *v.* Christie, 51 N. Y. 270; Day *v.* Roth, 18 N. Y. 448; Hammond *v.* Christie, 5 Rob. (N. Y.) 160; Tilton *v.* Alcott, 16 Barb. (N. Y.) 598; Smith *v.* Cranford, 84 Hun (N. Y.) 318, 32 N. Y. Suppl. 375; Brooklyn Bank *v.* De Grauw, 23 Wend. (N. Y.) 342; Russell *v.* Lytle, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537.

North Carolina.— State Bank *v.* Littlejohn, 18 N. C. 563.

Pennsylvania.— Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52; Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Klett *v.* Claridge, 31 Pa. St. 106.

Rhode Island.— Clarke *v.* Hawkins, 5 R. I. 219.

South Dakota.— Carpenter *v.* Chicago, etc., R. Co., 7 S. D. 584, 64 N. W. 1120.

Texas.— Southern Nat. Bank *v.* Curtis, (Tex. Civ. App. 1896) 36 S. W. 911.

Vermont.— Gleason *v.* Allen, 27 Vt. 364; Bryant *v.* Gale, 5 Vt. 416.

Canada.— Stewart *v.* Hawson, 7 U. C. C. P. 168.

Application of the rule.— Where the creditor agrees with the debtor to accept a horse in satisfaction of his claim, but refuses to accept the horse when tendered by the debtor, this does not amount to an accord and satisfaction. Harbor *v.* Morgan, 4 Ind. 158. So an agreement by a creditor to accept stone in satisfaction of his claim is only an accord without satisfaction where he refuses to accept the stone tendered. Gleason *v.* Allen, 27 Vt. 364.

Specific performance not decreed.— Where a tender is made under the terms of an accord, but the creditor refuses acceptance, equity will not decree specific performance. McKean *v.* Reed, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

But as to the rights of the parties as under a contract generally see CONTRACTS.

59. *Georgia.*— Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84.

Kentucky.— Patteson *v.* Garret, 7 J. J. Marsh. (Ky.) 112.

Maine.— Bragg *v.* Pierce, 53 Me. 65.

New York.— Kromer *v.* Heim, 75 N. Y. 574, 31 Am. Rep. 491; Oliwill *v.* Verdenhalven, 15 N. Y. Suppl. 94; Van Allen *v.* Jones, 10 Bosw. (N. Y.) 369; Brennan *v.* Ostrander, 50 N. Y. Super. Ct. 426.

Vermont.— Bryant *v.* Gale, 5 Vt. 416.

United States.— Memphis *v.* Brown, 20 Wall. (U. S.) 289, 22 L. ed. 264 [*reversing* 1 Flipp. (U. S.) 188, 16 Fed. Cas. No. 9,415].

England.— Peytoe's Case, 9 Coke 77*b*; Rayne *v.* Orton, Cro. Eliz. 305.

Complete extinguishment of debt necessary. — To constitute an accord and satisfaction there must be a satisfaction of the entire debt so as to completely extinguish it. Line *v.* Nelson, 38 N. J. L. 358.

Effect of receiving part performance.— Receiving part of the articles agreed to be delivered in satisfaction of a claim is not a waiver *per se* of a right to such as were never offered. Patteson *v.* Garret, 7 J. J. Marsh. (Ky.) 112.

60. Bragg *v.* Pierce, 53 Me. 65.

Application of the rule.— Where, under an agreement to discontinue a suit and release a cause of action in consideration of defendant's paying costs and the fees of plaintiff's counsel, if such fees are paid and a tender of costs made this is a simple unexecuted accord and satisfaction. Noe *v.* Christie, 51 N. Y. 270.

61. Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Brown *v.* Wade, 2 Keb. 851.

formance in part and tender of performance of the balance, are likewise insufficient to constitute a satisfaction.[62]

3. Effect of Unexecuted Accord. An unexecuted accord is not enforceable by action,[63] and inasmuch as there is no satisfaction of the original obligation it remains in force and the creditor's remedy is by action to enforce it.[64]

E. Legality of Subject-Matter. While an accord and satisfaction may be founded on an untenable claim if demanded in good faith and with color of right,[65] it cannot be founded upon an illegal agreement or claim [66] or one in contravention of public policy.[67]

IV. Persons between Whom Made.

A. In General. As regards the power to enter into contracts of accord and satisfaction it is apprehended that there is nothing in the nature of this class of contracts which differentiates them from any other kind of contracts. In other words, any person possessing contractual capacity may enter into a contract of this character.[68]

B. Satisfaction by Stranger — 1. In General. A number of the earlier decisions, both English and American, lay down the rule without qualification that satisfaction moving from a stranger cannot be pleaded in bar of the debtor's obligation.[69] At the present time this is not the law, either in England or in those

62. Kromer *v.* Heim, 75 N. Y. 574, 31 Am. Rep. 491; Shepard *v.* Lewis, T. Jones 6; Hall *v.* Seabright, 2 Keb. 534.

63. Brennan *v.* Ostrander, 50 N. Y. Super. Ct. 426; Reeves *v.* Hearne, 1 M. & W. 323.

64. Piper *v.* Kingsbury, 48 Vt. 480; Crow *v.* Kimball Lumber Co., 69 Fed. 61, 30 U. S. App. 354, 16 C. C. A. 127; Clark *v.* Bowen, 22 How. (U. S.) 270, 16 L. ed. 337; Reeves *v.* Hearne, 1 M. & W. 323.

Applications of rule.— Where there is an agreement to give and accept a smaller sum in satisfaction of a note, provided the claimant would perform certain conditions precedent, and the claimant performs the conditions precedent and the debtor repudiates the agreement, the claimants have the right to treat the agreement as rescinded and sue on the note. Wilson *v.* Wilson, 30 Ohio St. 365.

It was agreed between a portion of the members of a partnership and their creditors that the former should assign to a trustee and should confess judgment for the creditors, who would thereupon give a receipt in full and cancel the firm's notes. All this was done except the canceling of the notes. Subsequently a solvent partner, who was absent and joined in neither the assignment nor confession, had the judgment vacated as to himself for want of authority in the copartners to bind him by the confession. Afterward the judgment was vacated as to all, and the property was taken from the assignee by a prior claim. It was held that, the whole arrangement having been annulled, the creditor might sue on the notes. Clark *v.* Bowen, 22 How. (U. S.) 270, 16 L. ed. 337.

65. Fisher *v.* May, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881; Wilder *v.* St. Johnsbury, etc., R. Co., 65 Vt. 43, 25 Atl. 896.

66. *Georgia.*— Penitentiary Co. No. 2 *v.* Gordon, 85 Ga. 159, 11 S. E. 584; Gordon *v.* Mitchell, 68 Ga. 11.

Iowa.— Smith *v.* Grable, 14 Iowa 429.

Kentucky.— Martin *v.* U. S., 4 T. B. Mon. (Ky.) 487.

Massachusetts.— Walan *v.* Kerby, 99 Mass. 1.

New Hampshire.— Kidder *v.* Blake, 45 N. H. 530.

New York.— Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881.

Wisconsin.— Rettinghouse *v.* Ashland, (Wis. 1900) 82 N. W. 555.

England.— See Edgcombe *v.* Rodd, 5 East 294.

67. Barber *v.* State, 24 Md. 383.

68. Accord operative only between parties. — Where the grantor and grantee in a conveyance of land agree that a deduction shall be made from the purchase-price if paid within a certain time, and the grantee conveys the land subject to the debt, the agreement relating to the deduction does not enure to the benefit of his grantee. Harding *v.* Commercial Loan Co., 84 Ill. 251.

Settlement between owner and bailee for injuries to a third person.— The right of action by the owner of a chattel for injuries done to it while in the bailee's possession is not barred by a settlement between the owner and bailee accompanied by an agreement that the bailee may bring a suit in the owner's name, but at his own risk and expense and for his own benefit. Rindge *v.* Coleraine, 11 Gray (Mass.) 157.

69. *Kentucky.*— Groshon *v.* Grant, 2 Ky. Dec. 268; Owsley *v.* Thurman, 5 J. J. Marsh. (Ky.) 127; Stark *v.* Thompson, 3 T. B. Mon. (Ky.) 296.

Maine.— See Brown *v.* Chesterville, 63 Me. 241.

Missouri.— See Armstrong *v.* School Dist. No. 3, 28 Mo. App. 169.

New York.— Blum *v.* Hartman, 3 Daly (N. Y.) 47; Clow *v.* Borst, 6 Johns. (N. Y.) 37; Bleakley *v.* White, 4 Paige (N. Y.) 654;

states where the decisions were made. It cannot be doubted that if what is given by the stranger is accepted in satisfaction by the creditor and his act is authorized or subsequently ratified by the debtor, there will be a complete accord and satisfaction of the debt or demand.[70]

2. Ratification of Stranger's Act. But in order that the act of the stranger operate as a satisfaction of the debt or demand it must have been authorized by the debtor or subsequently ratified by him.[71] As regards the sufficiency of the ratification it has been held that ratification, even subsequent to the commencement of the suit[72] or at the time of the trial,[73] is sufficient. Any act by which a debtor evinces an intention to ratify will be sufficient. A formal adoption of the third person's act is not necessary. The mere act of setting up by plea a stranger's act as a satisfaction is of itself a ratification.[74]

C. Satisfaction by One of Several Joint Wrongdoers — 1. Statement of the Rule. As a person who has received an injury from the wrongful act of others is entitled to receive but one satisfaction therefor,[75] it necessarily follows that an accord and satisfaction from one of several joint wrongdoers is a satisfaction as to all.[76]

Daniels *v.* Hallenbeck, 19 Wend. (N. Y.) 408; Russell *v.* Lytle, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537.

England.— Grymes *v.* Blofield, Cro. Eliz. 541; Edgcombe *v.* Rodd, 5 East 294.

See 1 Cent. Dig. tit. "Accord and Satisfaction," § 22.

Injunctive relief.— An accord and satisfaction moving from a stranger is not pleadable at law, but may constitute ground for injunction and relief in equity. Stark *v.* Thompson, 3 T. B. Mon. (Ky.) 296.

Right of stranger who has paid debt.— A voluntary payment of another's debt by a stranger will give no right of action in the name of the stranger against the debtor. Brown *v.* Chesterville, 63 Me. 241.

70. *Alabama.*— Webster *v.* Wyser, 1 Stew. (Ala.) 184.

Indiana.— Ritenour *v.* Mathews, 42 Ind. 7.

Iowa.— Harvey *v.* Tama County, 53 Iowa 228, 5 N. W. 130.

Kentucky.— Woolfolk *v.* McDowell, 9 Dana (Ky.) 268.

Minnesota.— Schmidt *v.* Ludwig, 26 Minn. 35, 1 N. W. 803.

New York.— Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Fowler *v.* Moller, 10 Bosw. (N. Y.) 374; Rusk *v.* Soutter, 67 Barb. (N. Y.) 371.

Ohio.— Leavitt *v.* Morrow, 6 Ohio St. 71, 67 Am. Dec. 334.

Rhode Island.— Bennett *v.* Hill, 14 R. I. 322.

West Virginia.— Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

United States.— Snyder *v.* Pharo, 25 Fed. 398.

England.— Simpson *v.* Eggington, 10 Exch. 845; Belshaw *v.* Bush, 11 C. B. 191; Jones *v.* Broadhurst, 9 C. B. 173, 67 E. C. L. 173; Welby *v.* Drake, 1 C. & P. 557.

Canada.— Lynch *v.* Wilson, 22 U. C. Q. B. 226.

See also, supporting this doctrine, *infra*, V. A, 1, b, (IV), (IX).

71. *Ohio.*— Leavitt *v.* Morrow, 6 Ohio St. 71, 67 Am. Dec. 334.

United States.— Snyder *v.* Pharo, 25 Fed. 398.

England.—James *v.* Isaacs, 22 L. J. C. P. 73; Kemp *v.* Balls, 10 Exch. 607; Goodwin *v.* Cremer, 22 L. J. Q. B. 30; Simpson *v.* Eggington, 10 Exch. 845.

72. Belshaw *v.* Bush, 11 C. B. 191.

73. Simpson *v.* Eggington, 10 Exch. 845.

74. Leavitt *v.* Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Bennett *v.* Hill, 14 R. I. 322; Snyder *v.* Pharo, 25 Fed. 398.

75. Stevens *v.* Hathorne, 12 Allen (Mass.) 402; Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368; Barrett *v.* Third Ave. R. Co., 45 N. Y. 628.

76. *Alabama.*— Cobb *v.* Malone, 86 Ala. 571, 6 So. 6; Smith *v.* Gayle, 58 Ala. 600.

California.— Urton *v.* Price, 57 Cal. 270; Ransom *v.* Farish, 4 Cal. 386.

Connecticut.— Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154.

Georgia.— Donaldson *v.* Carmichael, 102 Ga. 40, 29 S. E. 135.

Illinois.— Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Wagner *v.* Union Stock Yards, etc., Co., 41 Ill. App. 408.

Iowa.— Metz *v.* Soule, 40 Iowa 236.

Maine.— Lunt *v.* Stevens, 24 Me. 534.

Massachusetts.— Goss *v.* Ellison, 136 Mass. 503; Stevens *v.* Hathorne, 12 Allen (Mass.) 402; Brown *v.* Cambridge, 3 Allen (Mass.) 474.

Missouri.— Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368.

New Jersey.— Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346, 28 Atl. 582.

New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Sistare *v.* Olcott, 15 N. Y. St. Rep. 248; Comstock *v.* Hopkins, 61 Hun (N. Y.) 189, 15 N. Y. Suppl. 908; Merchants' Bank *v.* Curtiss, 37 Barb. (N. Y.) 317; Knickerbacker *v.* Colver, 8 Cow. (N. Y.) 111; Strang *v.* Holmes, 7 Cow. (N. Y.) 224.

Ohio.— Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534.

Tennessee.— Brown *v.* Kencheloe, 3 Coldw. (Tenn.) 192; Snyder *v.* Witt, 99 Tenn. 618, 42 S. W. 441.

2. Extent and Limits of the Rule. This rule is in no way affected by the fact that it is agreed between the parties that the discharge shall be operative only as to the party from whom the satisfaction moved.[77] The person injured and one of the joint wrongdoers cannot make any agreement impairing the legal rights of the others.[78] In order to discharge all the wrongdoers, however, the consideration accepted from one must be accepted in full satisfaction of the injury (so far as he is concerned).[79]

Acceptance of a partial satisfaction from one, and a receipt or release to that extent, while available to the other wrongdoers as partial satisfaction,[80] is available only as such.[81]

So the rule that satisfaction by one of two or more joint wrongdoers discharges all has no application where the person from whom the satisfaction as a joint wrongdoer moves is not in fact liable.[82] Nor does it apply where the person injured is an infant.[83]

D. Satisfaction by One of Several Joint Obligors. An accord and satisfaction by one of several joint obligors is good;[84] but a release of one joint obligor must be a technical release and be under seal, where such releases are required to be sealed, in order to effect a discharge of the others.[85]

E. Satisfaction of One of Several Joint Creditors. Accord and satisfaction with one of several plaintiffs or joint creditors is a complete extinction of the claim,[86] and is a good accord and satisfaction without showing that the one

Vermont.— Eastman *v.* Grant, 34 Vt. 387; Brown *v.* Marsh, 7 Vt. 320.

Virginia.— Ruble *v.* Turner, 2 Hen. & M. (Va.) 38.

England.— Dufresne *v.* Hutchinson, 3 Taunt. 117; Thurman *v.* Wild, 11 A. & E. 453.

Application of the rule.— Payment of a sum of money "in full payment and satisfaction for all claim for damages and costs," in a suit against a corporation for an injury sustained by plaintiff by reason of falling into a trench alleged to have been dug by its servant in the public highway, bars a subsequent action for the same injury against the town which was bound to keep the highway in repair. Brown *v.* Cambridge, 3 Allen (Mass.) 474.

77. Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368; Brown *v.* Kencheloe, 3 Coldw. (Tenn.) 192; Ruble *v.* Turner, 2 Hen. & M. (Va.) 38.

78. Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534.

79. Smith *v.* Gayle, 62 Ala. 446, 58 Ala. 600; Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Wagner *v.* Union Stock Yards, etc., Co., 41 Ill. App. 408.

Thus, where a person who is injured by the negligence of two or more persons accepts a sum in consideration of his agreement not to sue the party paying, not in satisfaction of the damages, but only in part payment thereof, the transaction is not an accord and satisfaction and does not bar a suit against the other parties. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271.

80. Merchants' Bank *v.* Curtiss, 37 Barb. (N. Y.) 317.

81. Smith *v.* Gayle, 58 Ala. 600.

82. Wagner *v.* Union Stock Yards, etc., Co., 41 Ill. App. 408; Turner *v.* Hitchcock, 20 Iowa 310. See also Sieber *v.* Amunson, 78 Wis. 679, 47 S. W. 1126. In this case it was held that where, through the fault of the owner of a team and not that of the driver, a collision occurs, and the owner gives the attorney of the person injured five dollars, and agrees to give fifty dollars which he owes the driver, but never does so, there is no accord and satisfaction so as to bar an action for the injury. It was said that even if the fifty dollars had been paid it would have been a mere gratuity, since the driver was not a joint wrongdoer.

83. Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

84. Strang *v.* Holmes, 7 Cow. (N. Y.) 224, 2 Chitty Contr. (11th Am. ed.) p. 113.

85. See, generally, Release.

86. *Kentucky.*— Morrow *v.* Starke, 4 J. J. Marsh. (Ky.) 367.

Mississippi.— State *v.* Story, 57 Miss. 738.

New York.— Austin *v.* Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376.

Pennsylvania.— Salmon *v.* Davis, 4 Binn. (Pa.) 375.

Tennessee.— Erwin *v.* Rutherford, 1 Yerg. (Tenn.) 169.

England.— Wallace *v.* Kelsall, 7 M. & W. 264; Husband *v.* Davis, 10 C. B. 645.

Effect of death of creditor making agreement.— Where one of four partners in trade accepts a surrender of land by the debtor to the partnership in satisfaction of a debt due the partnership, and he dies, the other partners cannot maintain an action for the recovery of such debt; it not being alleged on the part of defendant that the deceased partner had authority to do what he did, and on the other hand there being no allegation on the part of plaintiffs that there was any fraud in the transaction. Crowe *v.* Lysaght, 12 Ir. C. L. 481.

who made the settlement had authority from the others to do so.[87] Nevertheless, to render the transaction a bar to any further action on the demand, what was given must have been accepted as satisfaction of the whole demand; a settlement with one plaintiff or joint creditor for his share only will not suffice.[88]

F. Persons Acting in a Representative Capacity — 1. Administrator. Payment of a sum to a person before his appointment as administrator, in satisfaction of a claim for damages for the wrongful death of his intestate, and his release of such claim, cannot be pleaded as an accord and satisfaction thereof.[89]

2. Agent or Attorney. Delivery of what is agreed to be accepted as satisfaction to one whom the claimant has appointed to receive it is a good accord and satisfaction. An act done by or to the agent of a party, of a matter resting *in pais*, is equivalent to its being done by or to the principal.[90] But an attorney at law, as such, has no authority to settle his client's claim by an accord and satisfaction.[91] Express authorization or subsequent ratification by the client after a full knowledge of the facts is necessary to render the transaction binding.[92]

3. Next Friend. An infant is not bound by an accord and satisfaction of his claim accepted by his next friend.[93]

V. Methods of Accord and Satisfaction.

A. Part Payment — 1. Of Liquidated Debt — a. Necessity of New Consideration — (I) *Statement of General Rule.* Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given.[94]

87. State *v.* Story, 57 Miss. 738; Wallace *v.* Kelsall, 7 M. & W. 264.

88. Clark *v.* Dinsmore, 5 N. H. 136.

89. Stuber *v.* McEntee, 142 N. Y. 200, 36 N. E. 878.

90. Anderson *v.* Highland Turnpike Co., 16 Johns. (N. Y.) 86.

Right to withdraw satisfaction from agent. — After what is agreed to be accepted in satisfaction is, in accordance with the terms of the agreement, delivered to a third person for the creditor, the debtor has no right to withdraw his authority from such person to deliver the property to the creditor. Creager *v.* Link, 7 Md. 259.

Satisfaction with revenue collector. — In an action by the United States on a bond given to secure revenue a plea of accord with the collector and delivery to him of whisky in satisfaction is not a defense, as the collector has no authority to make any such agreement. Martin *v.* U. S., 4 T. B. Mon. (Ky.) 487.

91. Jones *v.* Ransom, 3 Ind. 327; Maddux *v.* Bevan, 39 Md. 485; Rohr *v.* Anderson, 51 Md. 205; Barrett *v.* Third Ave. R. Co., 45 N. Y. 628.

92. Maddux *v.* Bevan, 39 Md. 485.

Express authorization sufficient. — An accord and satisfaction entered into by an expressly authorized attorney is good. Small *v.* Sumner, 6 Gray (Mass.) 239.

Ratification by accepting benefit of agent's act. — Where the principal, with full knowledge of all the facts, receives and appropriates the avails of a transaction made on his behalf by the agent, he cannot afterward be permitted to repudiate the transaction by denying the authority of the agent. Reid *v.* Hibbard, 6 Wis. 175.

93. Burt *v.* McBain, 29 Mich. 260.

94. *Alabama.*—Holloway *v.* Talbot, 70 Ala. 389; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Pearson *v.* Thomason, 15 Ala. 700, 50 Am. Dec. 159. [This rule has been partially abrogated by statute. See *infra*, V, A, 1, a, (IV)].

Arkansas.— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377; Cavaness *v.* Ross, 33 Ark. 572; Pope *v.* Tunstall, 2 Ark. 209.

California.— Rued *v.* Cooper, 119 Cal. 463, 51 Pac. 704. [The rule is to some extent modified by statute. See *infra*, V, A, 1, a, (IV)].

Colorado.— Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757.

Connecticut.—Mitchell *v.* Wheaton, 46 Conn. 315, 33 Am. Rep. 24; Scutt's Appeal, 43 Conn. 108; Warren *v.* Skinner, 20 Conn. 559; Williams *v.* Stanton, 1 Root (Conn.) 426.

Georgia.— Stovall *v.* Hairston, 55 Ga. 9; Molyneaux *v.* Collier, 13 Ga. 406. [The rule is to some extent modified by statute. See *infra*, V, A, 1, a, (IV)].

Illinois.— Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 222, 1 L. R. A. 303; Flaningham *v.* Hogue, 59 Ill. App. 315; Heintz *v.* Pratt, 54 Ill. App. 616; Titsworth *v.* Hyde, 54 Ill. 386; Martin *v.* White, 40 Ill. App. 281; Curtiss *v.* Martin, 20 Ill. 557.

Indiana.— Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132; Fletcher *v.* Wurgler, 97 Ind. 223; Longworth *v.* Higham, 89 Ind. 352; Smith *v.* Tyler, 51 Ind. 512; Markel *v.* Spitler, 28 Ind. 488; Stone *v.* Lewman, 28 Ind. 97; Sheets *v.* Russell, 12 Ind. App. 677, 40 N. E. 30; Swope *v.* Bier, 10 Ind. App. 613, 38 N. E. 340; Jennings *v.* Durflinger, 23 Ind. App. 673, 55 N. E. 979; Hodges *v.* Truax, 19 Ind. App. 651, 49 N. E. 1079.

Iowa.—Bryan *v.* Brazil, 52 Iowa 350;

Payment of a less amount than is due operates only as a discharge of the amount paid, leaving the balance still due, and the creditor may sue therefor notwith-

Works *v.* Hershey, 35 Iowa 340; Myers *v.* Byington, 34 Iowa 205; Rea *v.* Owens, 37 Iowa 262; Sullivan *v.* Finn, 4 Greene (Iowa) 544; Keller *v.* Strong, 104 Iowa 585, 73 N. W. 1071.

Kansas.— St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421; American Bridge Co. *v.* Murphy, 13 Kan. 35.

Kentucky.— Robert *v.* Barnum, 80 Ky. 28; Akers *v.* Central Kentucky L. Asylum, 10 Ky. L. Rep. 817; Rackers *v.* National Bank, 9 Ky. L. Rep. 400; Newman *v.* Evans, 5 Ky. L. Rep. 603; De Coursey *v.* Dicken, 1 Ky. L. Rep. 260; Williams *v.* Langford, 15 B. Mon. (Ky.) 566; Bryant *v.* Proctor, 14 B. Mon. (Ky.) 451; Vance *v.* Lukenbill, 9 B. Mon. (Ky.) 249; Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596; Tomlin *v.* McChord, 6 J. J. Marsh. (Ky.) 1; Jones *v.* Bullitt, 2 Litt. (Ky.) 49; Fenwick *v.* Phillips, 3 Metc. (Ky.) 87; Cox *v.* Adelsdorf, (Ky. 1899) 51 S. W. 616.

Maine.— Lee *v.* Oppenheimer, 32 Me. 253 [the rule now is entirely abrogated by statute. See *infra*, V, A, 1, a, (IV)]; White *v.* Jordan, 27 Me. 370; Bailey *v.* Day, 26 Me. 88.

Maryland.— Rohr *v.* Anderson, 51 Md. 205; Maddux *v.* Bevan, 39 Md. 485; Booth *v.* Campbell, 15 Md. 569; Campbell *v.* Booth, 8 Md. 107; Jones *v.* Ricketts, 7 Md. 108; Hardey *v.* Coe, 5 Gill (Md.) 189; Geiser *v.* Kershner, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566.

Massachusetts.— Lathrop *v.* Page, 129 Mass. 19; Smith *v.* Bartholomew, 1 Metc. (Mass.) 276, 35 Am. Dec. 365; Twitchell *v.* Shaw, 10 Cush. (Mass.) 46, 57 Am. Dec. 80.

Michigan.— Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597.

Minnesota.— Sage *v.* Valentine, 23 Minn. 102; Johnson *v.* Simmons, 76 Minn. 34, 78 N. W. 863.

Missouri.—Swofford Bros. Dry Goods Co. *v.* Goss, 65 Mo. App. 55; Helling *v.* United Order of Honor, 29 Mo. App. 309; Wetmore *v.* Crouch, 150 Mo. 671, 51 S. W. 738.

Nebraska.— McIntosh *v.* Johnson, 51 Nebr. 33, 70 N. W. 522.

New Hampshire.— Fisher *v.* Willard, 20 N. H. 421; Blanchard *v.* Noyes, 3 N. H. 518; Colburn *v.* Gould, 1 N. H. 279.

New Jersey.— Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564; Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Watts *v.* Frenche, 19 N. J. Eq. 407; Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Chambers *v.* Niagara F. Ins. Co., 58 N. J. L. 216, 33 Atl. 283; Line *v.* Nelson, 38 N. J. L. 358.

New York.— Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606; Keeler *v.* Salisbury, 33 N. Y. 648; Von Gerhard *v.* Lighte, 13 Abb. Pr. (N. Y.) 101; Brooks *v.* Moore, 67 Barb. (N. Y.) 393; Howard *v.* Norton, 65 Barb. (N. Y.) 161; Garvey *v.* Jarvis, 54 Barb. (N. Y.) 179; Beardsley *v.* Davis, 52 Barb. (N. Y.) 159; Blum *v.* Hartman, 3 Daly (N. Y.) 47; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Williams *v.* Irving, 47 How. Pr. (N. Y.) 440; Scott *v.* Hunt, 2 How. Pr. (N. Y.) 58; Seymour *v.* Minturn, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; Albrecht *v.* Johnson, 2 N. Y. City Ct. 350; Dean *v.* Gilmore, 30 Misc. (N. Y.) 783, 62 N. Y. Suppl. 757; Elkan *v.* Hitchcock, 15 Misc. (N. Y.) 218, 36 N. Y. Suppl. 788; Bradt *v.* Scott, 18 N. Y. Suppl. 507; Bunge *v.* Koop, 5 Rob. (N. Y.) 1 [*affirmed* in 48 N. Y. 225, 8 Am. Rep. 546]; Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

North Carolina.— Mitchell *v.* Sawyer, 71 N. C. 70; Hayes *v.* Davidson, 70 N. C. 573; Bryan *v.* Foy, 69 N. C. 45; McKenzie *v.* Culbreath, 66 N. C. 534; Gunn *v.* McAden, 37 N. C. 79. [The rule is abrogated by statute. See *infra*, V, A, 1, a, (IV)].

Ohio.— Toledo *v.* Sanwald, 13 Ohio Cir. Ct. 496.

Pennsylvania.— Com. *v.* Cummins, 155 Pa. St. 30, 25 Atl. 996; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 859; Brockley *v.* Brockley, 122 Pa. St. 1, 15 Atl. 646; Laird *v.* Campbell, 92 Pa. St. 470; Tucker *v.* Murray, 2 Pa. Dist. 497; Mt. Holly Water Co. *v.* Mt. Holly Springs, 10 Pa. Super. Ct. 162; Mechanics' Bank *v.* Huston, 11 Wkly. Notes Cas. (Pa.) 389; Rice *v.* Morris, 4 Whart. (Pa.) 249.

South Carolina.— Hope *v.* Johnston, 11 Rich. (S. C.) 135; McElwee *v.* Hutchinson, 10 S. C. 436; Eve *v.* Mosely, 2 Strobh. (S. C.) 203.

Texas.— Bowdon *v.* Robinson, 4 Tex. Civ. App. 626, 23 S. W. 816; Clifton *v.* Foster, (Tex. Civ. App. 1892) 20 S. W. 1005.

Vermont.— Bowker *v.* Harris, 30 Vt. 424; Wheeler *v.* Wheeler, 11 Vt. 60; Shaw *v.* Clark, 6 Vt. 507, 27 Am. Dec. 578.

Virginia.— Smith *v.* Phillips, 77 Va. 548; Lee *v.* Harlow, 75 Va. 22; Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142; Seymour *v.* Goodrich, 80 Va. 303. [The rule is abrogated by statute. See *infra*, V, A, 1, a, (IV)].

Wisconsin.— Otto *v.* Klauber, 23 Wis. 471; Palmer *v.* Yager, 20 Wis. 91.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860; U. S. *v.* Bostwick, 94 U. S. 53, 24 L. ed. 65; Murdock *v.* District of Columbia, 22 Ct. Cl. 464; Baldwin's Case, 15 Ct. Cl. 297; Latapee *v.* Pecholier, 2 Wash. (U. S.) 180, 14 Fed. Cas. No. 8,101.

England.— Thomas *v.* Heathorn, 2 B. & C. 477; Pinnel's Case, 5 Coke 117*a*; Steinman *v.* Magnus, 11 East 390; Fitch *v.* Sutton, 5 East 230; Adams *v.* Tapling, 4 Mod. 88; Cumber *v.* Wane, 1 Str. 426.

Canada.— Holmes *v.* McDonell, 12 U. C. Q. B. 469; Ritchey *v.* Montreal Bank, 4 U. C. Q. B. 222.

Absence of agreement to accept as payment. — If payment of a less sum for a debt already due is no satisfaction although the creditor has agreed to accept it as such, still less will it operate as a satisfaction when he has not so agreed to accept it. People *v.* Hamilton County, 56 Hun (N. Y.) 459, 10 N. Y. Suppl. 88.

standing the agreement.[95] A court of equity has no power to enjoin collection of the balance.[96]

(II) *Reason for Rule.* The reason for the rule is that the agreement is without consideration and void,[97] as the debtor is under an obligation to pay the whole debt at the time and the creditor is entitled to receive the whole.[98] This doctrine has been freely criticised in most of the courts which have had occasion to consider it; but with one exception[99] they have nevertheless adhered to it, unless, as is the case in some jurisdictions, it has been abrogated by express statutory provisions.[1]

(III) *Extent of Rule.* The general rule is not affected by the fact that the debtor has a surety and that the debt is due by bond,[2] nor by the fact that payment of a less sum is made by depositing it in the bank and giving a check thereon, as this does not change the character of the payment or give it an effect other than if the money had been paid directly.[3] So, also, the rule is not affected by the fact that the debt is a judgment debt.[4] The desire of the parties to avoid trouble and contention is not recognized as constituting a legal consideration for such agreement.[5] Neither does the fact that the debtor borrowed the money to make the settlement at the creditor's request affect the rule.[6]

Executory agreement.— Nor is an executory agreement of this character binding and enforceable. Makepeace *v.* Harvard College, 10 Pick. (Mass.) 298; Pettis *v.* Ray, 12 R. I. 344; Arkansas City First Nat. Bank *v.* Leech, 94 Fed. 310.

95. Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132; Vance *v.* Lukenbill, 9 B. Mon. (Ky.) 249; Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597; Goodwin *v.* Follett, 25 Vt. 386; Wheeler *v.* Wheeler, 11 Vt. 60.

96. Vance *v.* Lukenbill, 9 B. Mon. (Ky.) 249.

97. *Georgia.*— Stovall *v.* Hairston, 55 Ga. 9; Molyneaux *v.* Collier, 13 Ga. 406.

Kentucky.— Jones *v.* Bullitt, 2 Litt. (Ky.) 49.

Massachusetts.— Curran *v.* Rummell, 118 Mass. 482; Smith *v.* Bartholomew, 1 Metc. (Mass.) 276, 35 Am. Dec. 365.

Minnesota.— Sonnenberg *v.* Riedel, 16 Minn. 83.

New York.— Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Pennell *v.* Bucki, 84 Hun (N. Y.) 432, 32 N. Y. Suppl. 407; Foersch *v.* Blackwell, 14 Barb. (N. Y.) 607.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860; Ramsdell's Case, 2 Ct. Cl. 508.

See 1 Cent. Dig. tit. "Accord and Satisfaction," § 61.

98. Jones *v.* Bullitt, 2 Litt. (Ky.) 49.

99. In Mississippi the court in a very recent decision has broken away from the long-established rule and holds that the payment of a less sum of money for a liquidated debt, and acceptance as satisfaction of the whole, operates to extinguish the whole debt. The holding as applied to the precise facts of the case was that the acceptance from the maker, by the payee of a note, of a sum less than the amount due, with an agreement that it be received as full satisfaction, accompanied by the surrender of the note, extinguishes the whole debt. Clayton *v.* Clark, 74 Miss. 499, 21 So. 565, 22 So. 189, 60 Am. St. Rep. 521, 37 L. R. A. 771 [expressly *overruling* Burrus *v.* Gordon, 57 Miss. 93, and *disapproving* the *dicta* in Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136; Pulliam *v.* Taylor, 50 Miss. 251].

1. See *infra*, V, A, 1, a, (IV).

2. Bryan *v.* Foy, 69 N. C. 45.

3. Tucker *v.* Murray, 2 Pa. Dist. 497.

4. Coblentz *v.* Wheeler, etc., Mfg. Co., 40 Ark. 180; Deland *v.* Hiett, 27 Cal. 611, 87 Am. Dec. 102; Fletcher *v.* Wurgler, 97 Ind. 223. See also Tucker *v.* Murray, 2 Pa. Dist. 497.

Contra, Reynolds *v.* Pinhowe, Cro. Eliz. 429, and *compare* Clay *v.* Hoysradt, 8 Kan. 74, in which it was held [Judge Brewer delivering the opinion] that where the right to appeal from a judgment has not lapsed, and the debtor is in a condition and about to take such appeal, but at the instance of the creditor, and with money borrowed from third parties, with the knowledge and at the request of the creditor, pays him a portion of the amount of the judgment under an agreement that it shall be in full, the entire judgment is satisfied.

Agreement as affecting right to collect interest on judgment.— An agreement between a judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor the residue by installments the creditor will not take any proceedings on the judgment, is without consideration and does not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest from the judgment. Foakes *v.* Beer, 9 App. Cas. 605.

5. Fletcher *v.* Wurgler, 97 Ind. 223.

6. Bunge *v.* Koop, 5 Rob. (N. Y.) 1 [*affirmed* in 48 N. Y. 225, 8 Am. Rep. 546]; Albrecht *v.* Johnson, 2 N. Y. City Ct. 350. *Compare* Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884, in which it was held that where, by a new agreement, a creditor was paid a portion of his debt out of a fund otherwise unattainable,— an amount bor-

(IV) *Statutory Exceptions to Rule.* In a number of jurisdictions the rule discussed in the preceding sections[7] has been either entirely abrogated or materially modified by statute.[8]

(V) *Rule, How Affected by Giving Receipt in Full.* In the absence of statute providing otherwise[9] the rule is settled, except in one state,[10] that the

rowed for the express purpose of paying the claim,— the agreement is supported by a sufficient consideration.

7. See V, A, 1, a, (I)-(III).

8. **In Alabama** the statute [Code (1876), § 3039] provides that "all receipts, releases, and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties to the same." Under this statute acceptance of less than the full amount of a debt liquidated and due may amount to a full satisfaction. Cowan *v.* Sapp, 74 Ala. 44, 50. But it does not have this effect where a receipt in full was executed under mistake or misapprehension. McArthur *v.* Dane, 61 Ala. 539. Nor can it operate to convert the indorsement of a creditor of a check given him by the debtor into a receipt in full by implication, and give it effect as such, where the indorsement was made only for the purpose of collecting the check as a partial payment and without any intention that it should operate as a receipt in full. Hodges *v.* Tennessee Implement Co., (Ala. 1899) 26 So. 490.

The California statute [Code (1899), § 1524] provides that part performance of an obligation, either before or after a breach thereof, and expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing to that purpose, though without any new consideration, extinguishes the obligation. Under this statute an obligation cannot be extinguished by part payment unless accepted in writing in satisfaction. Dobinson *v.* McDonald, 92 Cal. 33, 27 Pac. 1098.

The Georgia statute [Code, § 2881] providing that an agreement for less than the amount of the debt cannot be pleaded as an accord and satisfaction unless it be actually executed by payment of the money, an executed agreement to receive less than the amount of the debt due, by actual payment of the money agreed, can be pleaded as an accord and satisfaction. Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494; Rogers *v.* Ball, 54 Ga. 15. But the agreement must be executed in order to be binding. Negotiations for that purpose are inadmissible to show satisfaction. English *v.* Reid, 55 Ga. 240. Part performance is likewise insufficient. Troutman *v.* Lucas, 63 Ga. 466. The Georgia statute is apparently a declaration of the rule on this subject laid down in the early decision of Evans *v.* Pollock, Ga. Dec. Pt. I, 33.

The Maine statute [Rev. Stat. (1871), c. 82, § 38] provides that no action shall be maintained on a demand settled by a creditor or his attorney intrusted to collect it, in full discharge of it, by the receipt of money or other valuable consideration, however small. Under this statute the settlement or discharge of a demand or claim by the payment of any sum less than the amount due thereon is binding unless vitiated by fraud. Bisbee *v.* Ham, 47 Me. 543; Fogg *v.* Sanborn, 48 Me. 432; Weymouth *v.* Babcock, 42 Me. 42; Phelps *v.* Dennett, 57 Me. 491. But in order to render payment of part an extinguishment of the whole debt under this statute, both parties must concur in the understanding that the amount paid is paid and received as and for the whole debt. Part payment of a debt with an agreement that the debtor shall have his own time to pay the balance is not within the statute. Mayo *v.* Stevens, 61 Me. 562; Austin *v.* Smith, 39 Me. 203.

The North Carolina statute [Code (1883), § 574] provides that acceptance of a less amount than that claimed in satisfaction thereof is a complete discharge of the same. This statute completely abrogates the common-law rule (Fickey *v.* Merrimon, 79 N. C. 585; Tiddy *v.* Harris, 101 N. C. 589, 8 S. E. 227), and is operative where a person has accepted a check marked in full for services, although he attempted to qualify the acceptance by writing over his signature on the back thereof, "Accepted for one month's services." Kerr *v.* Sanders, 122 N. C. 635, 29 S. E. 943.

Tennessee.— It has been held at circuit that the Tennessee statute [Code, §§ 3789, 3790] providing that all compositions with creditors and releases of all contracts shall operate according to the intention of the parties abolishes the common-law rule. Memphis *v.* Brown, 1 Flipp. (U. S.) 188, 16 Fed. Cas. No. 9,415.

In Virginia the statute [Code (1887), § 2858] provides that part performance of an obligation or undertaking, either before or after breach, when accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, will extinguish such obligation, promise, or undertaking. So far as the reports show there has been no construction of this statute by the court of last resort.

9. For a discussion of the Alabama statutes relating to receipts in full see *supra*, V, A, 1, a, (IV).

10. **In Connecticut** a receipt in full, given upon a part payment of a debt, in the absence of any impeachment of it for fraud or mistake, is valid in discharge of the whole debt. In this case the court said: "The general principle laid down with regard to receipts in full has long been the settled law in this state, whatever it may be elsewhere." Aborn *v.* Rathbone, 54 Conn. 444, 446, 8 Atl. 677. To the same effect see Ford *v.* Hubinger, 64 Conn. 129, 29 Atl. 129.

giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a satisfaction thereof though accepted as such;[11] and it is immaterial that the debtor knew that there was error or fraud.[12]

(VI) *Rule, How Affected by Release under Seal.* A less sum may constitute a satisfaction of a greater sum presently due if the balance is released by a formal instrument which must be under seal, except, of course, in those jurisdictions where the distinction between sealed and unsealed instruments has been abolished;[13] but the terms of the instrument must so provide.[14] So it has been held that payment and acceptance of less than the face value of a note in full satisfaction thereof, and surrender of the note to the debtor for cancellation, amount to an accord and satisfaction, as a surrender is equivalent to a release under seal.[15]

b. Sufficiency of New Consideration — (I) *In General.* While, as already shown in the preceding sections, payment of part of a debt presently due does not extinguish the debt, although it is agreed that the payment shall so operate, any new consideration moving from the debtor toward the creditor will take the agreement out of the operation of this rule. In other words, if the debtor, in addition to payment of a part of the debt, gives the creditor anything which in judgment of law may be considered a benefit to him, there will be a sufficient consideration to support the agreement to accept the lesser sum in full payment, and the transaction will constitute a valid accord and satisfaction.[16] It is enough

11. *Kansas.*— St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

Maryland.— Jones *v.* Ricketts, 7 Md. 108.

Massachusetts.— Walan *v.* Kerby, 99 Mass. 1; Harriman *v.* Harriman, 12 Gray (Mass.) 341; Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

Missouri.— Riley *v.* Kershaw, 52 Mo. 224.

New Jersey.— Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564.

New York.—Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Miller *v.* Coates, 66 N. Y. 609; Ryan *v.* Ward, 48 N. Y. 204, 8 Am. Rep. 539; Williams *v.* Irving, 47 How. Pr. (N. Y.) 440; Forest *v.* Davis, 20 Misc. (N. Y.) 1, 44 N. Y. Suppl. 907; Jones *v.* Rice, 19 Misc. (N. Y.) 357, 43 N. Y. Suppl. 491; Howe *v.* Robinson, 13 Misc. (N. Y.) 256, 34 N. Y. Suppl. 85; Albrecht *v.* Johnson, 2 N. Y. City Ct. 350.

United States.— Baldwin's Case, 15 Ct. Cl. 297; Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 35 C. C. A. 120.

See 1 Cent. Dig. tit. "Accord and Satisfaction," §§ 92–95.

12. Ryan *v.* Ward, 48 N. Y. 204, 8 Am. Rep. 539.

13. *Arkansas.*— Gordon *v.* Moore, 44 Ark. 349, 51 Am. Rep. 606.

Massachusetts.— Blake *v.* Blake, 110 Mass. 202.

New York.— Von Gerhard *v.* Lighte, 13 Abb. Pr. (N. Y.) 101; Inman *v.* Griswold, 1 Cow. (N. Y.) 199; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

Pennsylvania.— Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52.

England.— Adams *v.* Tapling, 4 Mod. 88.

Failure to pay at designated time.— An agreement under seal that on payment, by a given day, of a less sum than the real debt mentioned in the condition of a bond and warrant of attorney to confess judgment, the bond shall be void, does not operate as a discharge of the debt where the less sum is not paid on the stipulated day. Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

14. Blake *v.* Blake, 110 Mass. 202.

15. *Minnesota.*— Stewart *v.* Hidden, 13 Minn. 43, in which case the court reached the same conclusion but assigned another reason.

Mississippi.— See also Clayton *v.* Clark, 74 Miss. 499, 21 So. 565, 22 So. 189, 60 Am. St. Rep. 521, 37 L. R. A. 771.

New Jersey.— Silvers *v.* Reynolds, 17 N. J. L. 275.

New York.— Babcock *v.* Bonnell, 44 N. Y. Super. Ct. 568.

Vermont.— Draper *v.* Hitt, 43 Vt. 439, 5 Am. Rep. 292; Ellsworth *v.* Fogg, 35 Vt. 355.

16. *Indiana.*— Fletcher *v.* Wurgler, 97 Ind. 223.

New York.— Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606; Douglass *v.* White, 3 Barb. Ch. (N. Y.) 621.

Vermont.— Bowker *v.* Harris, 30 Vt. 424.

England.— Bidder *v.* Bridges, 37 Ch. D. 406; Curlewis *v.* Clark, 3 Exch. 375.

Acceptance of bills of exchange and goods. — An agreement to accept payment of a smaller sum in place of a larger one, payable partly in bills of exchange, partly in goods on hand, and partly in goods to be manufactured by defendant for that purpose, is supported by a sufficient consideration. Rose *v.* Hall, 26 Conn. 392, 68 Am. Dec. 402.

Acceptance of note payable unconditionally in place of a note for a larger sum payable only on a certain contingency constitutes a good accord and satisfaction. Winslow *v.* Hardin, 3 Dana (Ky.) 543.

to take the case out of the rule, that something substantial which one party is not bound by law to do has been done by him, or that something which he has the right to do he abstains from doing at the request of the other party.[17] Any additional consideration, however small, will support a promise to accept payment of a less sum for a greater sum already due.[18] Such additional consideration may consist of anything which might be a burden to the one party or a benefit to the other.[19]

(II) *Payment before Due.* Payment and acceptance in satisfaction of a lesser sum for a greater liquidated sum not yet due constitutes an accord and satisfaction.[20] The payment of a debt or any part of a debt before it is due is what the debtor is not under legal obligation to do, and therefore is a legal consideration for a contract by the creditor, which contract may be to release or cancel his debt as well as any other contract.[21] The creditor has his advantage in the earlier payment of the money.[22]

(III) *Payment at Another Place.* It has been held that payment of a less sum for a greater liquidated sum already due may constitute an accord and satisfaction when the payment is made at a place other than that at which the debtor was legally bound to make payment.[23]

Agreement not to take advantage of bankrupt laws.— An agreement by a debtor not to go into bankruptcy and thereby be discharged from a certain debt or at least impair its collection furnishes a sufficient consideration to support a contract by the creditor to take less for the debt than the full amount thereof. Dawson *v.* Beall, 68 Ga. 328. To the same effect see Hinckley *v.* Arey, 27 Me. 362.

Supposed insolvency of debtor's estate.— Where it is supposed that the estate of an intestate is insolvent and a judgment creditor accepts a less amount in full satisfaction, there is sufficient consideration for such accord and satisfaction though it turns out that the estate is not insolvent. Rice *v.* London, etc., Mortg. Co., 70 Minn. 77, 72 N. W. 826.

17. Watson *v.* Elliott, 57 N. H. 511; Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Bowker *v.* Harris, 30 Vt. 424.

18. Fletcher *v.* Wurgler, 97 Ind. 223.

19. Maddux *v.* Bevan, 39 Md. 485.

20. *Arkansas.*— *Dictum* in Cavaness *v.* Ross, 33 Ark. 572; Pope *v.* Tunstall, 2 Ark. 209.

Indiana.— Hutton *v.* Stoddart, 83 Ind. 539.

Iowa.— Boyd *v.* Moats, 75 Iowa 151, 39 N. W. 237.

Kansas.— *Dictum* in St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

Kentucky.— Bryant *v.* Proctor, 14 B. Mon. (Ky.) 451; *dictum* in Arnold *v.* Park, 8 Bush (Ky.) 3; Ricketts *v.* Hall, 2 Bush (Ky.) 249; Waller *v.* Martin, 7 Ky. L. Rep. 587; Jones *v.* Bullitt, 2 Litt. (Ky.) 49; *dictum* in Fenwick *v.* Phillips, 3 Metc. (Ky.) 87.

Massachusetts.— Bowker *v.* Childs, 3 Allen (Mass.) 434; Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

Minnesota.— Schweider *v.* Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; Sonnenberg *v.* Riedel, 16 Minn. 83.

Mississippi.— Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

Missouri.— *Dictum* in Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884.

North Carolina.— *Dictum* in McKenzie *v.* Culbreth, 66 N. C. 534; *dictum* in Smith *v.* Brown, 10 N. C. 580.

Pennsylvania.— Mullen *v.* Second Jefferson Bldg. Assoc., 50 Pa. St. 32.

Texas.— Kirchoff *v.* Voss, 67 Tex. 320, 3 S. W. 548.

Vermont.— *Dictum* in Wheeler *v.* Wheeler, 11 Vt. 60.

Virginia.— *Dictum* in Seymour *v.* Goodrich, 80 Va. 303.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860.

England.— Smith *v.* Trowsdale, 3 E. & B. 83; Adams *v.* Tapling, 4 Mod. 88.

Payment by assignee.— Payment of part in satisfaction of the whole by an assignee to whom the debtor has assigned his assets for payment of his debts, and who is acting as his agent to procure his discharge from them, is payment by a third person within the rule. Pettigrew Mach. Co. *v.* Harmon, 45 Ark. 290.

21. Bryant *v.* Proctor, 14 B. Mon. (Ky.) 451; Wheeler *v.* Wheeler, 11 Vt. 60; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860.

22. Palmer *v.* Yager, 20 Wis. 91.

Necessity of execution.— Where a party having a debt payable to him in three years gives a debtor a written agreement to accept a less sum in satisfaction if paid within sixty days, this will be a mere option or privilege to the debtor which, to be availed of, must be promptly complied with. Harding *v.* Commercial Loan Co., 84 Ill. 251.

23. Cavaness *v.* Ross, 33 Ark. 572; Pope *v.* Tunstall, 2 Ark. 209; Fenwick *v.* Phillips, 3 Metc. (Ky.) 87; Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136; McKenzie *v.* Culbreth, 66 N. C. 534; Smith *v.* Brown, 10 N. C. 580.

Application of the rule.— A contract to pay $1,500 in New York in discharge of the sum of $2,000 payable in Mississippi is a

(IV) *Payment by Third Person.* Payment by a third person of a sum less than the amount due, with the understanding that it should be in full satisfaction thereof, is a valid accord and satisfaction,[24] and no action will lie against the debtor to recover the balance.[25] In such case there is a new consideration from a new party, and the general rule that the receipt of a smaller sum is not a good accord and satisfaction of a larger one does not apply.[26]

(V) *Abandonment of Defense.* Payment of a smaller sum with an agreement to abandon a defense and pay costs may be pleaded in satisfaction of a larger demand, whether liquidated or unliquidated.[27]

(VI) *Payment of Principal without Interest.* Payment and acceptance of the principal of a debt without the interest due thereon, if received by the creditor in full satisfaction, is a good accord and satisfaction,[28] and it is immaterial whether the debt be past due or running to maturity.[29]

(VII) *Payment of Less Sum and Costs.* Where suit is brought upon a liquidated debt, an agreement to accept a less sum and payment of costs in satisfaction and the performance thereof is a valid accord and satisfaction. The payment of costs is a sufficient additional consideration for the agreement.[30]

(VIII) *Composition of Creditors with Insolvent Debtor* — (A) *Statement of Rule.* The rule that payment of a less sum in satisfaction of a greater liquidated sum is no satisfaction thereof, though accepted as such, has no application in the case of composition agreements between the debtor and his creditors. Where a composition deed is entered into between a debtor and his creditors, whereby they agree to receive, and do receive, in money or effects or in securities from third persons, a part of the whole debt, there is a valid accord and satisfaction of such debt,[31] and it is not essential that the agreement between the

sufficient consideration to bind the creditor if an offer was made to perform the contract in New York before notice of the withdrawal of the proposition reached the debtor. Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

24. *Arkansas.*— Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766; Pettigrew Mach. Co. *v.* Harmon, 45 Ark. 290; Gordon *v.* Moore, 44 Ark. 349, 51 Am. Rep. 606; Pope *v.* Tunstall, 2 Ark. 209.

Kentucky.— Ricketts *v.* Hall, 2 Bush (Ky.) 249.

Minnesota.— Clark *v.* Abbott, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577.

New Hampshire.— Grant *v.* Porter, 63 N. H. 229; Blanchard *v.* Noyes, 3 N. H. 518.

Pennsylvania — Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744.

Virginia.— Seymour *v.* Goodrich, 80 Va. 303.

25. Clark *v.* Abbott, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577.

26. Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744.

27. Connecticut River Lumber Co. *v.* Brown, 68 Vt. 239, 35 Atl. 56; Cooper *v.* Parker, 15 C. B. 822, 80 E. C. L. 822.

Thus, withdrawal by defendant of the plea of infancy, whether true or false, is a sufficient consideration on the part of plaintiff to accept a smaller sum in consideration of a greater sum. Cooper *v.* Parker, 14 C. B. 118, 78 E. C. L. 118.

28. Wescott *v.* Waller, 47 Ala. 492; Johnston *v.* Brannan, 5 Johns. (N. Y.) 268; Tenth Nat. Bank *v.* New York, 4 Hun (N. Y.) 429.

In Johnston *v.* Brannan, 5 Johns. (N. Y.) 268, 271, it was said that in many cases interest is uncertain damages and ought not to be considered as a part of the debt within the purview of that "rather unreasonable rule of the old law."

29. Wescott *v.* Waller, 47 Ala. 492.

30. Mitchell *v.* Wheaton, 46 Conn. 315, 33 Am. Rep. 24; Baum *v.* Bantyn, 62 Miss. 110.

31. *Illinois.*— Gillfillan *v.* Farrington, 12 Ill. App. 101.

Indiana.— Pontious *v.* Durflinger, 59 Ind. 27; Devou *v.* Ham, 17 Ind. 472.

Iowa.— Murray *v.* Snow, 37 Iowa, 410.

Kentucky.— Robert *v.* Barnum, 80 Ky. 28; Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596.

Massachusetts.— Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Bigelow *v.* Baldwin, 1 Gray (Mass.) 245; Tuckerman *v.* Newhall, 17 Mass. 581. See also Curran *v.* Rummell, 118 Mass. 482.

Minnesota.— Sage *v.* Valentine, 23 Minn. 102.

Missouri.— Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702; Mullin *v.* Martin, 23 Mo. App. 537.

New Hampshire.— Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264; Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183; Allen *v.* Cheever, 61 N. H. 32.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

North Carolina.— Hayes *v.* Davidson, 70 N. C. 573; McKenzie *v.* Culbreth, 66 N. C. 534.

Ohio.— Way *v.* Langley, 15 Ohio St. 392.

Pennsylvania.— Laird *v.* Campbell, 92 Pa. St. 470.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574; Wheeler *v.* Wheeler, 11 Vt. 60.

England.— Steinman *v.* Magnus, 11 East

debtor and his creditors, whereby the latter agree to thus receive a part of the whole debt, be under seal.[32]

(B) *Reasons for Rule.* The consideration which supports the agreement of each creditor is the undertaking of the creditors to release their common debtor from a portion of their respective claims. The agreement of each creditor with the other creditors of the common debtor constitutes a good and valid consideration.[33] After a creditor has thus agreed to relinquish part of his claim and induced others to become parties to the composition it would be a fraud on them to annul the agreement and collect the full amount of his claim.[34]

(C) *Extent and Limits of Rule.* So where a debtor assigns and delivers his property to trustees for the use of his creditors, under an agreement signed by the creditors whereby they accept the property in full satisfaction and discharge of their several demands, there is a valid accord and satisfaction,[35] and a creditor who joins in the composition will be barred though he refuses to accept his dividend from the assignee.[36]

Mutuality between the creditors as respects the consideration is essential to the validity of the agreement of composition. The creditors must join together;[37] but it is not necessary to the validity of the composition that all the creditors should have joined in it, unless it was so stipulated in the composition. Not even a majority, or any particular number more than two, need sign it to make it binding on all who sign it.[38]

390; Norman *v.* Thompson, 4 Exch. 755; Bradley *v.* Gregory, 2 Campb. 383; Boothbey *v.* Sowden, 3 Campb. 174.

See also COMPOSITIONS WITH CREDITORS.

Acceptance, by a creditor, of a dividend under a voluntary assignment made by the debtor without the concurrence of the creditor, and without an agreement by him to accept the assignment in satisfaction of his debt, is no bar to an action for the balance of the debt. It is a mere agreement to pay the debts of the insolvent as far as his property will go, taking out the expenses of converting it into money. Allen *v.* Roosevelt, 14 Wend. (N. Y.) 100.

32. Paddleford *v.* Thacher, 48 Vt. 574; Steinman *v.* Magnus, 11 East 390.

33. *California.*— Pierson *v.* McCahill, 21 Cal. 123.

Kentucky.— Robert *v.* Barnum, 80 Ky. 28.

Massachusetts.— Bigelow *v.* Baldwin, 1 Gray (Mass.) 245.

Minnesota.— Sage *v.* Valentine, 23 Minn. 102.

New Hampshire.— Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

Pennsylvania.— Laird *v.* Campbell, 92 Pa. St. 470.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

England.— Good *v.* Cheesman, 2 B. & Ad. 328; Norman *v.* Thompson, 4 Exch. 755.

34. *Illinois.*— Gillfillan *v.* Farrington, 12 Ill. App. 101.

Kentucky.— Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596.

New Hampshire.— Allen *v.* Cheever, 61 N. H. 32.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

North Carolina.— Hayes *v.* Davidson, 70 N. C. 573.

Pennsylvania.— Laird *v.* Campbell, 92 Pa. St. 470.

Vermont.— Wheeler *v.* Wheeler, 11 Vt. 60.

England.— Steinman *v.* Magnus, 11 East 390.

35. *Massachusetts.*— Eaton *v.* Lincoln, 13 Mass. 424; Bigelow *v.* Baldwin, 1 Gray (Mass.) 245.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

New York.—Therasson *v.* Peterson, 2 Keyes (N. Y.) 636.

United States.— Bartlett *v.* Rogers, 3 Sawy. (U. S.) 62, 2 Fed. Cas. No. 1,079.

England.— See Good *v.* Cheesman, 2 B. & Ad. 328.

36. Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

Assignment not in accordance with agreement.— Where the assignment differs from that provided for by the composition (as by reserving to the debtor the surplus of the estate after payment of creditors instead of conveying it unconditionally to the trustees) it does not operate as a satisfaction. Clark *v.* Rowling, Lalor (N. Y.) 105.

37. Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596; Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Sage *v.* Valentine, 23 Minn. 102.

Thus an agreement of a creditor with his debtor to accept a certain percentage of the debt in full satisfaction thereof, provided that no other creditor shall receive more than the same percentage of his claim, is void for want of consideration. To support such agreement there should be a mutual agreement between the creditors. Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103.

38. *Illinois.*— Gillfillan *v.* Farrington, 12 Ill. App. 101.

Indiana.— Devou *v.* Ham, 17 Ind. 472.

Prior payment in full of some of the creditors will not affect the validity of the composition if made with knowledge of all the creditors.[39] A composition agreement between debtor and creditor does not, unless it is performed, discharge the debtor from the residue of the debt,[40] and if the debtor has procured creditors to accept the composition by fraudulent representations as to his situation it is not binding.[41] If a creditor who signs a composition agreement, and thereby induces others to sign it, makes any private bargain the effect of which is to place himself in a better situation than the other creditors, he commits a fraud upon them and the private bargain is void.[42]

(IX) *GIVING NEW SECURITY* — (A) *In General.* Acceptance of a less sum secured in satisfaction of the whole debt is a good accord and satisfaction. Where the creditor is given security for part of an unsecured debt, or new and better security for part of a secured debt, there is a sufficient consideration on which to base a release of the balance.[43] Nevertheless the acceptance of a new security for an existing debt does not operate as a payment unless so intended by the parties.[44]

Massachusetts.— Eaton *v.* Lincoln, 13 Mass. 424.

Pennsylvania.— Laird *v.* Campbell, 92 Pa. St. 470.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

England.— Constantein *v.* Blache, 1 Cox Ch. 287; Lewis *v.* Jones, 4 B. & C. 506; Norman *v.* Thompson, 4 Exch. 755.

39. Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183.

40. *Illinois.*— McMannomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712.

Michigan.— Harrison *v.* Gamble, 69 Mich. 96, 36 N. W. 682.

Missouri.— Mullin *v.* Martin, 23 Mo. App. 537.

New York.— Clark *v.* Rowling, Lalor (N. Y.) 105.

Vermont.— Wheeler *v.* Wheeler, 11 Vt. 60.

England.— Heathcote *v.* Crookshanks, 2 T. R. 24.

Where creditors of an insolvent debtor agree to accept a composition of three shillings in the pound, payable by instalments at three, six, and twelve months, and that the security of a third person should be accepted for the whole composition, and joint and several notes of the debtor and the third person were given the creditors, and receipts signed expressed to be "in discharge of their debts," it was held that the mere giving of the notes without payment was not satisfaction within the terms of the resolution or the receipt, and that, the notes having been presented at maturity and dishonored, the creditors were remitted to their right to sue for the original debt. Edwards *v.* Hancher, 1 C. P. D. 111.

Conditional execution of composition.— Where an insolvent debtor assigns his property to a trustee for the benefit of creditors who shall execute the assignment and thereby release their demands, a creditor may execute it upon a condition precedent which, if not performed, will render the execution inoperative. Thus, where a creditor executed a deed of assignment on condition that the property assigned has not been attached by any valid trustee process, it was held that the trustee process served upon the assignee as trustee, in which there was a misnomer as to his christian name, was nevertheless a valid trustee process, and that consequently the signature of the creditor was not operative. American Bank *v.* Doolittle, 14 Pick. (Mass.) 123.

41. Richards *v.* Hunt, 6 Vt. 251, 27 Am. Dec. 545; Cooling *v.* Noyes, 6 T. R. 263.

42. Lewis *v.* Jones, 4 B. & C. 506. See also Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37], where such a composition, in its entirety, was held to be invalid as to the other creditors.

43. *Arkansas.*— Pope *v.* Tunstall, 2 Ark. 209.

Illinois.— Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Kemmerer *v.* Kokendifer, 65 Ill. App. 31.

Maryland.— Booth *v.* Campbell, 15 Md. 569.

Minnesota.— Schmidt *v.* Ludwig, 26 Minn. 85, 1 N. W. 803.

Mississippi.— Pulliam *v.* Taylor, 50 Miss. 251.

New Hampshire.— Colburn *v.* Gould, 1 N. H. 279.

New Jersey.— Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

New York.— Howard *v.* Norton, 65 Barb. (N. Y.) 161.

North Carolina.— Gunn *v.* McAden, 37 N. C. 79.

England.— Steinman *v.* Magnus, 11 East 390.

See 1 Cent. Dig. tit. "Accord and Satisfaction," §§ 88–91.

Execution in favor of debtor against third person.— The delivery and acceptance of an execution in favor of the debtor against a third person in satisfaction of a draft accepted by the debtor operates as an accord and satisfaction. Thatcher *v.* Dudley, 2 Root (Conn.) 169.

44. Kemmerer's Appeal, 102 Pa. St. 558.

Thus the acceptance, by the holder of a protested note, from the maker, of a note with a new indorser, on the express agreement that it shall be additional security only and

(B) *Note of Third Person.* The acceptance, by a creditor, of the note of a third person, in full satisfaction of an existing debt, is an extinguishment of the original indebtedness though the note so taken is for a less sum than the whole debt.[45] The mere acceptance of such note, however, will not have this effect unless there is an express agreement that it shall so operate.[46] The agreement must be fully executed.[47]

(C) *Bills of Exchange, Drafts, Checks, and Orders on Third Person.* The acceptance of bills of exchange[48] or checks of a third person[49] for a less amount than that due, in satisfaction thereof, operates as an accord and satisfaction. So the giving and acceptance of an order on a third person for less than the amount due, which order is duly paid, operates as an accord and satisfaction.[50] Otherwise where such third person refuses to honor the order.[51] So, also, it has been held that the acceptance of a draft for less than the amount of the debt may be good as an accord and satisfaction thereof.[52] But the acceptance of a draft from the agent of the debtor in satisfaction of the claim does not render the transaction a good accord and satisfaction on the ground that the consideration was paid by a third person.[53]

(D) *Note of Debtor Indorsed by Third Person.* If a debtor gives his note, indorsed by a third person, as security for a part of the debt, which is accepted

shall not release the parties liable on the original note, does not operate to release the indorser on the original note. Kemmerer's Appeal, 102 Pa. St. 558.

45. *Alabama.*— Brasselle *v.* Williams, 51 Ala. 349; Pearson *v.* Thomason, 15 Ala. 700, 50 Am. Dec. 159; Abercrombie *v.* Mosely, 9 Port. (Ala.) 145.

Arkansas.— Pettigrew Mach. Co. *v.* Harmon, 45 Ark. 290.

Illinois.— Gillfillan *v.* Farrington, 12 Ill. App. 101.

Indiana.— Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537; Jones *v.* Ransom, 3 Ind. 327.

Iowa.— Bower *v.* Metz, 54 Iowa 394, 6 N. W. 551.

Kentucky.— Hardesty *v.* Graham, (Ky. 1887) 3 S. W. 909; Woolfolk *v.* McDowell, 9 Dana (Ky.) 268; Letcher *v.* Commonwealth Bank, 1 Dana (Ky.) 82.

Maine.— Varney *v.* Conery, 77 Me. 527, 1 Atl. 683; Lee *v.* Oppenheimer, 32 Me. 253.

Massachusetts.— Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

New Hampshire.— Wright *v.* First Crockery Ware Co., 1 N. H. 281.

New York.— Howard *v.* Norton, 65 Barb. (N. Y.) 161; Bliss *v.* Schwarts, 64 Barb. (N. Y.) 215; Conkling *v.* King, 10 Barb. (N. Y.) 372; Roberts *v.* Brandies, 44 Hun (N. Y.) 468; Booth *v.* Smith, 3 Wend. (N. Y.) 66; Webb *v.* Goldsmith, 2 Duer (N. Y.) 413; Kellogg *v.* Richards, 14 Wend. (N. Y.) 116; Frisbie *v.* Larned, 21 Wend. (N. Y.) 450.

North Carolina.— Currie *v.* Kennedy, 78 N. C. 91.

Rhode Island.—Smith *v.* Ballou, 1 R. I. 496.

West Virginia.— Dryden *v.* Stephens, 19 W. Va. 1.

England.— Lewis *v.* Jones, 4 B. & C. 506; Curlewis *v.* Clark, 3 Exch. 375.

Canada.— Hanscombe *v.* Macdonald, 4 U. C. C. P. 190.

Invalid note.— A being indebted to B, the latter agreed to receive and did receive the note of a third person, an infant, in satisfaction of the debt. It was held that, the note received being of no value, the agreement to receive it in satisfaction was void. Wentworth *v.* Wentworth, 5 N. H. 410.

Note of third person for larger amount.— Where the note of a third person for a larger amount than the account sued on is accepted in satisfaction thereof, it will operate as a valid accord and satisfaction if no false representations were made concerning it, and it is immaterial that the note turned out to be worthless. Carriere *v.* Ticknor, 26 Ala. 571.

Note of third person in satisfaction of judgment.— A judgment may be discharged by the receipt of a third person's notes for a less amount than the judgment in satisfaction thereof. Jones *v.* Ransom, 3 Ind. 327; Sanders *v.* Branch Bank, 13 Ala. 353.

46. Hunter *v.* Moul, 98 Pa. St. 13, 42 Am. Rep. 610; Darnall *v.* Morehouse, 36 How. Pr. (N. Y.) 511; *infra*, V, D.

47. Arkansas City First Nat. Bank *v.* Leech, 94 Fed. 310.

Agreement to accept if paid at maturity.— If a creditor receives the note of a third person upon an agreement that it shall be a full satisfaction of a larger debt if paid at maturity, but not otherwise, and he accepts payment of it when overdue, it is a discharge of the original debt. Conkling *v.* King, 10 N. Y. 440 [*affirming* 10 Barb. (N. Y.) 372].

48. Thompson *v.* Percival, 5 B. & Ad. 925.

49. Guild *v.* Butler, 127 Mass. 386; Bidder *v.* Bridges, 37 Ch. D. 406.

50. Nevins *v.* Depierries, 1 Edm. Sel. Cas. (N. Y.) 196.

51. Geiser *v.* Kershner, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566; Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243. See also Hawley *v.* Foote, 19 Wend. (N. Y.) 516.

52. Reid *v.* Hibbard, 6 Wis. 175.

53. Bliss *v.* Schwarts, 65 N. Y. 444 [*reversing* 64 Barb. (N. Y.) 215, 7 Lans. (N. Y.) 186].

by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt.[54]

(E) *Note of Debtor Secured by Mortgage.* Where a debtor gives his creditor notes for one half of the debt, secured by chattel mortgage on his property, on an agreement that the creditor will accept the same in full satisfaction, there is a sufficient consideration to support this agreement and it constitutes an accord and satisfaction.[55]

(F) *Individual Note of One of Several Joint Debtors.* The acceptance in satisfaction, by a creditor, of an individual note of one of several joint debtors, for a less amount than the whole debt, operates as a valid accord and satisfaction,[56] because the sole liability of one of several joint debtors may be more beneficial than the general liability of all, either in respect to the solvency of the parties or the convenience of the remedy,[57] or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry.[58]

(X) *Unsecured Note of Debtor.* According to a number of decisions the acceptance by the creditor of the debtor's unsecured negotiable note for a less sum than due does not operate as a satisfaction of the debt, though accepted as such;[59] but other decisions maintain the contrary view.[60]

2. Of Unliquidated or Disputed Claims — a. Sufficiency of Payment and Acceptance of Smaller Sum than Demanded. Where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction,[61] as the rule that the receiving of a part of

54. *Alabama.*— Singleton *v.* Thomas, 73 Ala. 205.

Connecticut.— Argall *v.* Cook, 43 Conn. 160.

Kentucky.— See also Hanson *v.* Cowan, 7 T. B. Mon. (Ky.) 574.

Maine.— Jenness *v.* Lane, 26 Me. 475.

Minnesota.— Mason *v.* Campbell, 27 Minn. 54, 6 N. W. 405.

New York.— Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606; Van Etten *v.* Troudden, 1 Hun (N. Y.) 432; Boyd *v.* Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247.

Canada.— Watts *v.* Robinson, 32 U. C. Q. B. 362.

The statute of frauds has no application to a transaction of this character. Singleton *v.* Thomas, 73 Ala. 205.

55. Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710 [*reversing* 48 Hun (N. Y.) 500, 1 N. Y. Suppl. 814]. See also Allen *v.* Alexander, 11 U. C. C. P. 541.

56. Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606; Ludington *v.* Bell, 77 N. Y. 138, 33 Am. Rep. 601; Lytle *v.* Ault, 7 Exch. 669; Thompson *v.* Percival, 5 B. & Ad. 925 [*criticising* Lodge *v.* Dicas, 3 B. & Ald. 611; David *v.* Ellice, 5 B. & C. 196]. But see Waydell *v.* Luer, 5 Hill (N. Y.) 448.

57. Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606.

58. Thompson *v.* Percival, 5 B. & Ad. 925.

Agreement to accept necessary.— A note for a debt of a firm, given by one partner after dissolution, is not an extinguishment or satisfaction of the original debt so as to discharge the other partner, unless such was the agreement when the note was given, and this is a fact for the determination of a jury. Mason *v.* Wickersham, 4 Watts & S. (Pa.) 100.

59. Jenness *v.* Lane, 26 Me. 475; Person *v.* Civer, 29 How. Pr. (N. Y.) 432. *Dicta* in Conkling *v.* King, 10 Barb. (N. Y.) 372; Booth *v.* Smith, 3 Wend. (N. Y.) 66; Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

60. Tucker *v.* Murray, 2 Pa. Dist. 497; Mechanics' Bank *v.* Huston, 11 Wkly. Notes Cas. (Pa.) 389; Sibree *v.* Tripp, 15 M. & W. 23.

Reason for contrary view.— In support of this holding it was said by Judge Sharswood: "The acceptance of a collateral thing without regard to its value is a good accord and satisfaction. The promissory note of a debtor is such a collateral thing. It is a decided advantage in the creditor in two ways: First, the greater facility of a recovery upon it. It requires no evidence of consideration in the first instance. It imports *prima facie* a sufficient consideration. Second, it may be disposed of in the market at once before it falls due, and the *bona fide* purchaser of it takes it clear of all equities between the original parties. Thus the creditor may often find that such a note for part of his debt [is] of great and immediate advantage to him by raising the money upon it." Mechanics' Bank *v.* Huston, 11 Wkly. Notes Cas. (Pa.) 389, 390.

Acceptance of debtor's check.— A, being indebted to B to the extent of £125, gave B a check drawn by himself for £100 payable on demand, which B accepted in satisfaction. This was held a good accord and satisfaction. Goddard *v.* O'Brien, 9 Q. B. D. 37 [*following* the reasoning in Sibree *v.* Tripp, 15 M. & W. 23].

61. *Arkansas.*— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377.

Colorado.— Union Pac. R. Co. *v.* Anderson, 11 Colo. 293, 18 Pac. 24.

the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply where the plaintiff's claim

Connecticut.— Gates *v.* Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; Potter *v.* Douglass, 44 Conn. 541; Bull *v.* Bull, 43 Conn. 455.

Florida.— Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373; Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Georgia.— Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494; *dictum* in Molyneaux *v.* Collier, 13 Ga. 406.

Illinois.— Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74; Nichols *v.* Bradsby, 78 Ill. 44; Martin *v.* White, 40 Ill. App. 281; Capital City Mut. F. Ins. Co. *v.* Detweiler, 23 Ill. App. 656.

Indiana.— Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460; Ogborn *v.* Hoffman, 52 Ind. 439; Bateman *v.* Daniels, 5 Blackf. (Ind.) 71.

Iowa.— Keck *v.* Hotel Owners' Mut. F. Ins. Co., 89 Iowa 200, 56 N. W. 438; Shaw *v.* Chicago, etc., R. Co., 82 Iowa 199, 47 N. W. 1004; Potts *v.* Polk County, 80 Iowa 401, 45 N. W. 775; Evarts *v.* Rose Grove Dist. Tp., 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264; Cool *v.* Stone, 4 Iowa 219; Wapello County *v.* Sinnaman, 1 Greene (Iowa) 413.

Kansas.— Storch *v.* Dewey, 57 Kan. 370, 46 Pac. 698.

Kentucky.— Pepper *v.* Aiken, 2 Bush (Ky.) 251.

Maryland.— Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Massachusetts.— Stimpson *v.* Poole, 141 Mass. 502, 6 N. E. 705; Simmons *v.* Almy, 103 Mass. 33; Barry *v.* Goodrich, 98 Mass. 335; Donohue *v.* Woodbury, 6 Cush. (Mass.) 148; Barlow *v.* Ocean Ins. Co., 4 Metc. (Mass.) 270.

Michigan.— Tanner *v.* Merrill, 108 Mich. 58, 65 N. W. 664, 62 Am. St. Rep. 687, 31 L. R. A. 171; Nash *v.* Manistee Lumber Co., 75 Mich. 346, 42 N. W. 840; Perry *v.* Cheboygan, 55 Mich. 250, 21 N. W. 333.

Minnesota.— Neibles *v.* Minneapolis, etc., R. Co., 37 Minn. 151, 33 N. W. 332; Truax *v.* Miller, 48 Minn. 62, 50 N. W. 935.

Mississippi.— State *v.* Story, 57 Miss. 738; McCall *v.* Nave, 52 Miss. 494.

Missouri.— Brink *v.* Garland, 58 Mo. App. 356; Maack *v.* Schneider, 51 Mo. App. 92; Deutmann *v.* Kilpatrick, 46 Mo. App. 624; Helling *v.* United Order of Honor, 29 Mo. App. 309.

Nebraska.— Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834; Slade *v.* Swedeburg Elevator Co., 39 Nebr. 600, 58 N. W. 191.

New Hampshire.— Hilliard *v.* Noyes, 58 N. H. 312; Watson *v.* Elliott, 57 N. H. 511.

New York.— Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613]; Fuller *v.* Kemp, 138 N. Y. 231, 23 N. E. 1034, 20 L. R. A. 785; Howard *v.* Norton, 65 Barb. (N. Y.) 161; Brett *v.* First Universalist Soc., 63 Barb. (N. Y.) 610; Powell *v.* Jones, 44 Barb. (N. Y.) 521; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243; Harris *v.* Story, 2 E. D. Smith (N. Y.) 363; Neary *v.* Bostwick, 2 Hilt. (N. Y.) 514; O'Conor *v.* Philipsen, 74 Hun (N. Y.) 68, 26 N. Y. Suppl. 359; Lesson *v.* Massachusetts Ben. Assoc., 3 Misc. (N. Y.) 415, 23 N. Y. Suppl. 294; Komp *v.* Raymond, 42 N. Y. App. Div. 32, 58 N. Y. Suppl. 909; Wisner *v.* Schopp, 34 N. Y. App. Div. 199, 54 N. Y. Suppl. 543.

North Carolina.— Mathis *v.* Bryson, 49 N. C. 508.

Pennsylvania.— Harlow *v.* Wilkinsburg, 189 Pa. St. 443, 42 Atl. 135; Brockley *v.* Brockley, 122 Pa. St. 1, 15 Atl. 646.

South Carolina.— McElwee *v.* Hutchinson, 10 S. C. 436.

Tennessee.— Hussey *v.* Crass, (Tenn. Ch. 1899) 53 S. W. 986; State *v.* Crutchfield, 3 Head (Tenn.) 113.

Texas.— Jennings *v.* Ft. Worth, 7 Tex. Civ. App. 329, 26 S. W. 927.

Utah.— Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

Vermont.— Wilder *v.* St. Johnsbury, etc., R. Co., 65 Vt. 43, 25 Atl. 896.

Virginia.—American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466.

Wisconsin.—Woodford *v.* Marshall, 72 Wis. 129, 39 N. W. 376; Harris *v.* Kennedy, 48 Wis. 500, 4 N. W. 651; Turner *v.* Burnell, 48 Wis. 221, 4 N. W. 30; Massing *v.* State, 14 Wis. 502; Pulling *v.* Columbia County, 3 Wis. 337.

United States.— Murphy *v.* U. S., 104 U. S. 464, 26 L. ed. 833; Baird *v.* U. S., 96 U. S. 430, 24 L. ed. 703; Brice *v.* U. S., 32 Ct. Cl. 23; Oliver *v.* Vernon, 4 Mason (U. S.) 275, 18 Fed. Cas. No. 10,501.

England.— Wilkinson *v.* Byers, 1 A. & E. 106; Watters *v.* Smith, 2 B. & Ad. 889; Longridge *v.* Dorville, 5 B. & Ald. 117.

Canada.— Lane *v.* Kingsmill, 6 U. C. Q. B. 579.

See 1 Cent. Dig. tit. "Accord and Satisfaction," § 67.

Application of rule.—The rule stated in the text has been applied to the following claims:

Claims against municipalities, including villages (Perry *v.* Cheboygan, 55 Mich. 250, 21 N. W. 333), counties (People *v.* Cayuga County, 17 N. Y. Suppl. 314 [*affirming* 16 N. Y. Suppl. 254]; Wapello County *v.* Sinnaman, 1 Greene (Iowa) 413; Brick *v.* Plymouth County, 63 Iowa 462, 19 N. W. 304; People *v.* Cayuga County, 63 Hun (N. Y.) 625, 17 N. Y. Suppl. 314; Pulling *v.* Columbia County, 3 Wis. 337 [the rule of course not applying where there has been no acceptance in satisfaction (People *v.* Hamilton County, 56 Hun (N. Y.) 459, 10 N. Y. Suppl. 88); and where a claim against a county is allowed in part, a mere acceptance of the part allowed creates no presumption of an acceptance in full satisfaction where the claimant had no knowledge that the balance of his claim had been rejected (Fulton *v.* Monona County, 47 Iowa 622)]), and cities (Callahan *v.* New York, 6 Daly (N. Y.) 230;

is disputed or unliquidated.[62] In such case the concession made by one is a good consideration for the concession made by the other.[63] The fact that the creditor was not legally bound to make any abatement of his claim,[64] or that the amount accepted was much less than the creditor was entitled to receive and would have recovered had he brought action,[65] does not in any way affect the rule. And where two persons, being doubtful as to facts, compromise their rights, the mere fact that they were in error as to the facts does not entitle the party whose duty it was to have known and furnished the other with the exact facts to alter the compromise agreement.[66] Within the rule stated, payment to a person to whom the creditor owes money will operate as a satisfaction.[67]

b. Necessity of Acceptance, and What Constitutes. In order that the payment of a smaller sum than demanded shall operate as a satisfaction of the claim it must be accepted as such.[68] Where a person accepts a tender, but not in full

Harlow *v.* Wilkinsburg, 189 Pa. St. 443, 42 Atl. 135; Evans *v.* Olmstead, 31 Misc. (N. Y.) 692, 66 N. Y. Suppl. 63).

Claims against states. Massing *v.* State, 14 Wis. 502; Calkins *v.* State, 13 Wis. 389; Sholes *v.* State, 2 Pin. (Wis.) 499, 2 Chand. (Wis.) 182; Hemingway *v.* Stansell, 106 U. S. 399, 1 S. Ct. 473, 27 L. ed. 245. Thus, where an act of the legislature makes an appropriation as in full payment of a demand some portion of which was controverted or disallowed, the acceptance of the money bars further claim on account of the payment except where there was fraud, accident, or mistake. Massing *v.* State, 14 Wis. 502.

Claims against the federal government. Merrick *v.* Giddings, 115 U. S. 300, 6 S. Ct. 65, 29 L. ed. 403; Murphy *v.* U. S., 104 U. S. 464, 26 L. ed. 833; U. S. *v.* Martin, 94 U. S. 400, 24 L. ed. 128 [*affirming* 10 Ct. Cl. 276]; Cruger's Case, 11 Ct. Cl. 766; Case's Case, 11 Ct. Cl. 712; Gilman's Case, 8 Ct. Cl. 520; Rush's Case, 2 Ct. Cl. 167; Chouteau *v.* U. S., 95 U. S. 61; Sweeny *v.* U. S., 17 Wall. (U. S.) 75, 21 L. ed. 575; Mason *v.* U. S., 17 Wall. (U. S.) 67, 21 L. ed. 564; U. S. *v.* Justice, 14 Wall. (U. S.) 535, 20 L. ed. 753; U. S. *v.* Clyde, 13 Wall. (U. S.) 35, 20 L. ed. 479; U. S. *v.* Adams, 7 Wall. (U. S.) 463, 19 L. ed. 249. The law governing this class of cases is well expressed as follows in a recent federal decision: "There is a group of decisions of the United States supreme court where claimants for supplies furnished to the government were held foreclosed by receipt in full and acceptance of part of their original claims. It should be remembered that the United States treasury pays only out of appropriations and upon audit. There being many claims for military stores furnished during the civil war, congress created a special board to pass upon their validity and amount. No one was required to bring his claim before such board, but, if he did, payment was at once secured to him of whatever amount the board might find due out of a special appropriation made for the purpose. Payment on all these claims out of the ordinary appropriations had been suspended by order of the treasury department. From the time the secretary issued his order suspending the payment . . . they must be regarded as claims disputed (that is, the whole claim) by the government, and, unless the board had been constituted, could have been adjusted only by congress or the court of claims. U. S. *v.* Adams, 7 Wall. (U. S.) 463, 19 L. ed. 249. In all these cases the amounts paid in settlement were unliquidated, since, but for the finding of the board, the government could have liquidated them all in good faith, and, in giving up resort to the court, at the same time going to the expense of constituting a special tribunal to adjust the claims and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlements." Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 977.

Claims for personal injuries. Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 114; Hinkle *v.* Minneapolis, etc., R. Co., 31 Minn. 434, 18 N. W. 275; Jennings *v.* Ft. Worth, 7 Tex. Civ. App. 329, 26 S. W. 927.

Claims for the destruction of property. Neibles *v.* Minneapolis, etc., R. Co., 37 Minn. 151, 33 N. W. 332.

Giving check for smaller sum in payment of notes.— The giving and acceptance of a check for a less sum than the face value of notes of third persons held by the seller is a good accord and satisfaction. The notes were not necessarily worth the precise amount indicated on their face, and therefore there is no prevailing inference that the larger sum was attempted to be satisfied by the payment of a smaller. Rockwell *v.* Taylor, 41 Conn. 55.

62. Cool *v.* Stone, 4 Iowa 219; Shaw *v.* Chicago, etc., R. Co., 82 Iowa 199, 47 N. W. 1004; People *v.* Buffalo State Asylum, 96 N. Y. 640; Palmerton *v.* Huxford, 4 Den. (N. Y.) 166; McDaniels *v.* Lapham, 21 Vt. 222; Baird *v.* U. S., 96 U. S. 430, 24 L. ed. 703.

63. Harland *v.* Staples, 79 Ill. App. 72; Truax *v.* Miller, 48 Minn. 62, 50 N. W. 935; Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613]; Lestienne *v.* Ernst, 5 N. Y. App. Div. 373, 39 N. Y. Suppl. 199. See also McElwee *v.* Hutchinson, 10 S. C. 436.

64. Taylor *v.* Nussbaum, 2 Duer (N. Y.) 302.

65. Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

66. Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

67. Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204.

68. *Arizona.*— Simms *v.* Hampson, (Ariz. 1887) 12 Pac. 686.

Georgia.— McLendon *v.* Wilson, 52 Ga. 41.

of all demands, this acceptance will not conclude him from claiming more.[69] The nature of the offer or tender by the debtor is an important consideration in determining whether there has been an acceptance and satisfaction. To constitute an accord and satisfaction it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions.[70] The mere fact

Illinois.—Economy Coal, etc., Co. *v.* Bracewell, 78 Ill. App. 335; Richelieu Hotel Co. *v.* International Military Encampment Co., 41 Ill. App. 268; Higgins *v.* Halligan, 46 Ill. 173.

Indiana.— Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460.

Iowa.— Fulton *v.* Monona County, 47 Iowa 622.

Louisiana.— See Albert *v.* Citizens' Bank, 5 La. Ann. 720.

Massachusetts.— Grinnell *v.* Spink, 128 Mass. 25; Donohue *v.* Woodbury, 6 Cush. (Mass.) 148; Harriman *v.* Harriman, 12 Gray (Mass.) 341; Tuttle *v.* Tuttle, 12 Metc. (Mass.) 551, 46 Am. Dec. 701.

Minnesota.— Marion *v.* Heimbach, 62 Minn. 214, 64 N. W. 386.

New York.— People *v.* Cortland County, 58 Barb. (N. Y.) 139; People *v.* Cortland County, 40 How. Pr. (N. Y.) 53; Serat *v.* Smith, 61 Hun (N. Y.) 36, 15 N. Y. Suppl. 330.

Vermont.— Preston *v.* Grant, 34 Vt. 201; Willey *v.* Warden, 27 Vt. 655.

United States.— McKeen *v.* Morse, 1 U. S. App. 7, 49 Fed. 253, 1 C. C. A. 237.

Tender back of amount received.— Where the board of supervisors of a county allows a claimant so much in full of his claim, which is tendered to him, and he takes it, but refuses to take it in full, and tenders it back and the board refuses to receive it, there is no accord and satisfaction. People *v.* Cortland County, 40 How. Pr. (N. Y.) 53.

When acceptance a question for jury.— Where, in an action for the balance due on account to which a settlement is pleaded, it appears that plaintiff accepted without objection a draft for the amount which defendant's agent said was due; that he had not then claimed more because he was afraid defendant's agent would hold all the money until he signed a receipt in full; and that, some hours after, the agent did ask for a receipt in full, which was refused,— it was held that a settlement was not conclusively shown and that it was a question for the jury. Sicotte *v.* Barber, 83 Wis. 431, 53 N. W. 697. See also Mortlock *v.* Williams, 76 Mich. 568, 43 N. W. 592.

69. Higgins *v.* Halligan, 46 Ill. 173.

Leaving balance with creditor.— If a person, on being discharged by his employer before the expiration of the period for which he had contracted to serve, asks for a statement of his account; which being furnished to him he draws out the amount due to him up to that time, except a small balance which, under legal advice, he allows to remain, "saying nothing to defendant at the time about said settlement or his reason for leaving said balance, and keeps said account in his possession, this is not a waiver of his rights under the contract; it is not a release, nor an accord and satisfaction." Burkham *v.* Daniel, 56 Ala. 604, 605.

70. *Illinois.*— Kingsville Preserving Co. *v.* Frank, 87 Ill. App. 586; De Kalb Implement Works *v.* White, 59 Ill. App. 171.

Indiana.—Pottlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030.

Iowa.— Fulton *v.* Monona County, 47 Iowa 622.

Michigan.— Cooley *v.* Kinney, 119 Mich. 377, 78 N. W. 332.

Missouri.—Perkins *v.* Headley, 49 Mo. App. 556.

Nebraska.— Beckman *v.* Birchard, 48 Nebr. 805, 67 N. W. 784.

New York.— Kruger *v.* Geer, 26 Misc. (N. Y.) 772, 56 N. Y. Suppl. 1015.

Vermont.— Van Dyke *v.* Wilder, 66 Vt. 579, 29 Atl. 1016; Boston Rubber Co. *v.* Peerless Wringer Co., 58 Vt. 551, 5 Atl. 407; Preston *v.* Grant, 34 Vt. 201; Brigham *v.* Dana, 29 Vt. 1; Gassett *v.* Andover, 21 Vt. 342.

See also McLendon *v.* Wilson, 52 Ga. 41.

Offers held not within the rule.— Where a person sent a draft to another for a less sum than was claimed to be owing, suggesting that the same be accepted in settlement, and stating that if the other returned it he should not trouble himself to send again, it was held that the draft might be accepted for the undisputed portion of the claim and a suit maintained for the balance. In this case the debtor did not expressly state that if the draft were accepted it should be accepted in full satisfaction of the claim. De Kalb Implement Works *v.* White, 59 Ill. App. 171. And where the debtor incloses in a letter a check for the amount which he claims to be due, stating, "We claim this to be in full settlement of account, but admit that you did not allow the claim," and the creditor retains the check and gives the defendant credit on account, there is no satisfaction. Van Dyke *v.* Wilder, 66 Vt. 579, 29 Atl. 1016. Where a debtor, making a tender upon a promissory note, merely said that he tendered the sum offered as the balance due upon the note, it was held that there was nothing in this language that could fairly convey the idea to the party to whom the tender was made that it was offered upon the condition that if he took it he did so in satisfaction of the note. Preston *v.* Grant, 34 Vt. 201.

Failure to dissent from offer to accept as part payment.— If a debtor tenders to his creditor a sum of money in full of all legal

that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not necessarily establish an accord and satisfaction.[71] Where, however, a sum of money is tendered in satisfaction of the claim, and the tender is accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction.[72] This is true although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of his

claims which the creditor may have against him upon account, and the creditor receives the money protesting that it is not sufficient, but saying that he will take it and pass it to the debtor's credit upon the account, and the debtor does not express any dissent to this course, the acceptance of the tender is no bar to the recovery of such sum as may be found due him exceeding the amount of the tender. Gassett *v.* Andover, 21 Vt. 342.

Receipt of money paid into court.— If money paid into court is not accompanied with the condition that it must be accepted in full settlement of the claim in suit, the acceptance of it does not bar the right to prosecute a suit for the balance. Cooley *v.* Kinney, 119 Mich. 377, 78 N. W. 332.

Instructing agent to pay only if receipt given.— Defendants made a deposit in bank, to be placed to plaintiff's credit, saying in their letter: "Don't place this to credit until he sends receipt in full." The bank, nevertheless, placed the amount to plaintiff's credit. The cashier told plaintiff, when he asked for a statement of his account, that defendants required a receipt in full. He declined to give one, insisting that there was more due him. He then drew out his balance. It was held that there was no satisfaction of the debt. Simms *v.* Hampson, (Ariz. 1887) 12 Pac. 686. *Compare* Cole *v.* Champlain Transp. Co., 26 Vt. 87, which on practically the same state of facts reached the opposite conclusion.

71. Perkins *v.* Headley, 49 Mo. App. 556.

72. *Arkansas.*— Springfield, etc., R. Co. *v.* Allen, 46 Ark. 217.

Colorado.— Berdell *v.* Bissell, 6 Colo. 162.

Connecticut.— Potter *v.* Douglass, 44 Conn. 541; Bull *v.* Bull, 43 Conn. 455.

Illinois.— Lapp *v.* Smith, 183 Ill. 179, 55 N. E. 717; Ostrander *v.* Scott, 161 Ill. 339, 43 N. E. 1089.

Indiana.— Hutton *v.* Stoddart, 83 Ind. 539.

Iowa.— Keck *v.* Hotel Owners' Mut. F. Ins. Co., 89 Iowa 200, 56 N. W. 438.

Minnesota.— Truax *v.* Miller, 48 Minn. 62, 50 N. W. 935.

Missouri.—Perkins *v.* Headley, 49 Mo. App. 556; Deutmann *v.* Kilpatrick, 46 Mo. App. 624.

Nebraska.— Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834.

New York.— Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613]; Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Freiberg *v.* Moffett, 91 Hun (N. Y.) 17, 36 N. Y. Suppl. 95; Reynolds *v.* Empire Lumber Co., 85 Hun (N. Y.) 470, 33 N. Y. Suppl. 111; Hills *v.* Sommer, 53 Hun (N. Y.) 392, 6 N. Y. Suppl. 469; Logan *v.* Davidson, 18 N. Y. App. Div. 353, 45 N. Y. Suppl. 961. But see Geary *v.* Page, 9 Bosw. (N. Y.) 290; Vorhis *v.* Elias, 56 N. Y. Suppl. 134; Brown *v.* Symes, 83 Hun (N. Y.) 159, 31 N. Y. Suppl. 629.

Pennsylvania.— Smith *v.* Cohn, 170 Pa. St. 132, 32 Atl. 565; Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553.

Utah.— Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

Vermont.— Childs *v.* Millville Mut. M. & F. Ins. Co., 56 Vt. 609; Bromley *v.* School Dist. No. 5, 47 Vt. 381; Towslee *v.* Healey, 39 Vt. 522; Preston *v.* Grant, 34 Vt. 201; McDaniels *v.* Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406; Cole *v.* Champlain Transp. Co., 26 Vt. 87; McGlynn *v.* Billings, 16 Vt. 329; Vermont State Baptist Convention *v.* Ladd, 58 Vt. 95, 4 Atl. 634.

Canada.— Nash *v.* Dever, 11 N. Brunsw. 404.

Retaining check declared to be in full payment.— According to the weight of authority, where a claim is in dispute and the debtor sends or gives the creditor a check for a less sum, which he declares to be in full payment of all demands, the retention thereof by the creditor constitutes an accord and satisfaction. Ostrander *v.* Scott, 161 Ill. 339, 43 N. E. 1089 [*reversing* 60 Ill. App. 322]; Golden *v.* Bartlett Illuminating Co., 114 Mich. 625, 72 N. W. 622; Eames Vacuum Brake Co. *v.* Prosser, 157 N. Y. 289, 51 N. E. 986; Logan *v.* Davidson, 18 N. Y. App. Div. 353, 45 N. Y. Suppl. 961; Reynolds *v.* Empire Lumber Co., 85 Hun (N. Y.) 470, 33 N. Y. Suppl. 111; Vorhis *v.* Elias, 56 N. Y. Suppl. 134; Brown *v.* Symes, 83 Hun (N. Y.) 159, 31 N. Y. Suppl. 629; Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Hull *v.* Johnson, (R. I. 1900) 46 Atl. 182. (But *compare* Day *v.* McLea, 58 L. J. Q. B. 293, in which it was held that the mere retention of a check sent "in full of all demands" is not conclusive evidence from which an accord and satisfaction is to be presumed; and Robinson *v.* Detroit, etc., R. Co., 84 Mich. 658, 48 N. W. 205, in which it was held that where a party received a check for the amount claimed by the debtor to be due, and receipted for it, but on the same day sent the debtor a protest against the inspection

claim.[73] Where the tender or offer is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such condition.[74] If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary.[75]

3. What Are Liquidated Claims. The word "liquidated" means that the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law.[76] A claim, any part of which is in dispute, cannot be said to be liquidated within the rules governing an accord and satisfaction;[77] and where it

on which the account was based, it was a question for the jury whether there had been a binding settlement.)

So, where the debtor sends a check, stating it to be in full, and asking that it be returned if not satisfactory, and the creditor retains it, there is an accord and satisfaction. Hutton *v.* Stoddart, 83 Ind. 539; Freiberg *v.* Moffett, 91 Hun (N. Y.) 17, 36 N. Y. Suppl. 95; Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Nash *v.* Dever, 11 N. Brunsw. 404; and where the debtor sends a check which he says is "in full settlement of all demands to date. If this is refused by you we shall make the tender in a legal way," and the creditor retains the check, this will constitute an accord and satisfaction. Connecticut River Lumber Co. *v.* Brown, 68 Vt. 239, 35 Atl. 56. So it has been held that where the debtor sends the creditor a check for a sum which he considers to be due, with an unsigned receipt in full, and requests that he sign and return the voucher, the offer of payment is to be deemed made upon the demand of its acceptance in satisfaction of the debt. Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613].

Indorsing draft for collection.— Where a claim is in dispute and the debtor tenders a draft to the creditor to be taken by him on signing a receipt that such amount was "in full payment and compromise settlement of all claims and demands," the creditor's indorsement of the draft on leaving it with the bank for collection is in effect an acceptance thereof upon the condition under which it was tendered, although the receipt was not signed. Keck *v.* Hotel Owners' Mut. F. Ins. Co., 89 Iowa 200, 56 N. W. 438.

Reservation of right to apply for reconsideration of claim.— Where a claim is in dispute and the debtor tenders a less amount, which is accepted and a receipt in full given, this constitutes an accord and satisfaction, although at the time of such transaction the creditor asked if he might apply to the full board of the debtor's directors for a further allowance, and was told that he might. Green *v.* Rochester Iron Mfg. Co., 1 Thomps. & C. (N. Y.) 5.

Conditional acceptance.— Where a debtor offers a certain sum in full satisfaction, which was taken by one of the creditors to be accepted as full payment if his partner approved, otherwise to be returned, and the creditor retains the money, only crediting it as part payment, there is nevertheless an accord and satisfaction and an extinguishment of the claim. Bernard *v.* Henry Werner Co., 19 Misc. (N. Y.) 173, 43 N. Y. Suppl. 220.

Acceptance of part of consideration tendered.— Where the debtor offers a check and notes in satisfaction of a disputed claim, acceptance by the creditor of the check carries with it the acceptance of the notes. The creditor cannot retain the check and return the notes, and sue for the balance of his claim. Lapp *v.* Smith, 183 Ill. 179, 55 N. E. 717 [*reversing* 83 Ill. App. 203].

73. *Connecticut.*— Potter *v.* Douglass, 44 Conn. 541.

Minnesota.— Truax *v.* Miller, 48 Minn. 62, 50 N. W. 935.

Nebraska.— Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834.

New York.— Callahan *v.* New York, 6 Daly (N. Y.) 230; Freiberg *v.* Moffett, 91 Hun (N. Y.) 17, 36 N. Y. Suppl. 95.

Utah.— Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

Vermont.— Bromley *v.* School Dist. No. 5, 47 Vt. 381.

Inattention of creditor to terms of offer.— Where the creditor accepts the sum which the debtor declares to be in full payment of his claim, the acceptance is a full discharge of the demand, although the words spoken by the debtor are not heard by the creditor through inattention or carelessness, provided they were so spoken that with ordinary care they might have been heard by him. Donohue *v.* Woodbury, 6 Cush. (Mass.) 148.

74. Bull *v.* Bull, 43 Conn. 455; Deutmann *v.* Kilpatrick, 46 Mo. App. 624; Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834; Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

75. Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834.

76. Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834.

Amount ascertained by arithmetical calculation.— If the amount due can be ascertained by arithmetical calculation it cannot be said to be unliquidated. Cincinnati *v.* Cincinnati St. R. Co., 6 Ohio N. P. 140.

77. Ostrander *v.* Scott, 161 Ill. 339, 43 N. E. 1089; Tanner *v.* Merrill, 158 Mich. 58, 65 N. W. 664, 62 Am. St. Rep. 687, 31 L. R. A. 171; Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613].

Application of rule, generally.— Where defendant deducted from plaintiff's wages the amount paid by him as railway fare due plaintiff, which sum was claimed by plaintiff, but payment thereof denied by defendant, and plaintiff accepted the amount so paid

is admitted that one of two specific sums is due, but there is a dispute as to what is the proper amount, the demand is regarded as unliquidated within the meaning of that term as applied to the subject of accord and satisfaction.[78]

B. Acceptance of Property in Satisfaction. The principle that a liability cannot be discharged by payment and acceptance of a less sum applies only to a payment in money. A valid accord and satisfaction takes place where some specific article of personal property[79] or a conveyance of real property[80] is accepted in satisfaction of the demand. This is true irrespective of the

and receipted in full therefor, he was precluded from maintaining an action for the amount so deducted. Tanner *v.* Merrill, 108 Mich. 58, 65 N. W. 664, 62 Am. St. Rep. 687, 31 L. R. A. 171.

Controversy as to set-off.— An account cannot be considered as liquidated, so as to prevent the receipt of a less amount as payment from operating as a satisfaction, where there is a controversy over a set-off and amount of the balance. Ostrander *v.* Scott, 161 Ill. 339, 43 N. E. 1089; Pollman, etc., Coal, etc., Co. *v.* St. Louis, 145 Mo. 651, 47 S. W. 563.

78. Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*reversing* 75 Hun (N. Y.) 613].

79. *Alabama.*— Brassell *v.* Williams, 51 Ala. 349.

Arkansas.— Levy *v.* Very, 12 Ark. 148.

California.— Gavin *v.* Annan, 2 Cal. 494.

Connecticut.— Bull *v.* Bull, 43 Conn. 455.

Illinois.— Martin *v.* White, 40 Ill. App. 281.

Indiana.— Bateman *v.* Daniels, 5 Blackf. (Ind.) 71.

Iowa.— Hasted *v.* Dodge, (Iowa 1887) 35 N. W. 462.

Kentucky.— Waller *v.* Martin, 7 Ky. L. Rep. 587; Arnold *v.* Park, 8 Bush (Ky.) 3; Tomlin *v.* McChord, 6 J. J. Marsh. (Ky.) 1; Peace *v.* Stennet, 4 J. J. Marsh. (Ky.) 449.

Maryland.— McCreary *v.* McCreary, 5 Gill & J. (Md.) 147.

Massachusetts.— Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

Missouri.— Griffith *v.* Creighton, 61 Mo. App. 1.

New Jersey.— State Bank *v.* Chetwood, 8 N. J. L. 1.

New York.— Howard *v.* Norton, 65 Barb. (N. Y.) 161; Strang *v.* Holmes, 7 Cow. (N. Y.) 224; Weeks *v.* Zimmerman, 15 Daly (N. Y.) 226, 4 N. Y. Suppl. 609; Gaffney *v.* Chapman, 4 Rob. (N. Y.) 275; Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

Pennsylvania.— Christie *v.* Craige, 20 Pa. St. 430; Tucker *v.* Murray, 2 Pa. Dist. 497.

Tennessee.— Jones *v.* Peet, 1 Swan (Tenn.) 293.

Texas.— Overton *v.* Conner, 50 Tex. 113.

Vermont.— Ridlon *v.* Davis, 51 Vt. 457.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91; Williams *v.* Phelps, 16 Wis. 80.

United States.— Musgrove *v.* Gibbs, 1 Dall. (U. S.) 216, 1 L. ed. 107.

England.— Jones *v.* Sawkins, 5 C. B. 142, 57 E. C. L. 142.

Application of rule, generally.— The principle that personal property, though of less value than the claim, may be accepted in full satisfaction thereof, has been applied in the case of merchandise (Bateman *v.* Daniels, 5 Blackf. (Ind.) 71; Hart *v.* Crawford, 41 Ind. 197; Gaffney *v.* Chapman, 4 Rob. (N. Y.) 275; Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386), horses (Musgrove *v.* Gibbs, 1 Dall. (U. S.) 216, 1 L. ed. 107; Arnold *v.* Park, 8 Bush (Ky.) 3), and other chattels (see cases cited above in this note).

Satisfaction partly in money and partly in property.— A liquidated claim may be satisfied by the giving and acceptance of a sum of money for part and property for the balance. Neal *v.* Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784; Stearns *v.* Johnson, 17 Minn. 142. Thus, where a party pays $100 and gives an ox in satisfaction of a debt of $200, which is accepted as such, this constitutes a good accord and satisfaction. Neal *v.* Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784.

80. Howe *v.* Mackay, 5 Pick. (Mass.) 44; Strang *v.* Holmes, 7 Cow. (N. Y.) 224; Eckford *v.* De Kay, 26 Wend. (N. Y.) 29; Smitherman *v.* Smith, 20 N. C. 89; Savage *v.* Everman, 70 Pa. St. 315, 10 Am. Rep. 676.

Conveyance of equity of redemption.— The release of an equity of redemption in land may be accepted in satisfaction of the demand and may be pleaded as an accord and satisfaction. Bailey *v.* Cowles, 86 Ill. 333. But see Preston *v.* Christmas, 2 Wils. C. P. 86, which holds the contrary doctrine on the singular theory that an equity of redemption is of no value in the eye of the law.

Conveyance of expectant interest.— On appeal from a decree of the probate court distributing one seventh of an estate to plaintiffs, who claimed as children and heirs at law of C, a deceased daughter of the intestate, it appeared that, while the intestate and C were both living, C and her husband executed to the intestate a writing without seal purporting, in consideration of a deed then executed to her and her husband by the intestate, to release her and her heirs' claim to her share in the intestate's estate. It was held that the writing could not operate as an accord and satisfaction, as, when given, C had an expectancy only. Buck *v.* Kittle, 49 Vt. 288.

Mortgage.— A mortgage given and accepted in settlement of a claim on which an action is pending is a good accord and satisfaction. Cobb *v.* Malone, 86 Ala. 571, 6 So. 6.

Effect of invalidity of title.— Where, under an agreement between a debtor and his creditor, the debtor procured a conveyance to the creditor, from a third person, of all his title to lands specified in the deed, and the creditor accepted the same as payment in full, but it subsequently appeared that the debtor

intrinsic value of the property.[81] The fact that the property was of less value than the demand, or that it is of very small value as compared with the claim for which it was accepted, is immaterial.[82] Where other articles than money are received and agreed to be accepted in full satisfaction of a demand, the court will not estimate their value in money's worth[83] or undertake to interfere with the parties' estimate of value.[84] The delivery of something other than money is what the debtor is under no legal obligation to make, and therefore may be a legal consideration for a contract of discharge by the creditor as well as for any other promise he might make.[85] So the fact that after the property has been received and accepted in satisfaction it again comes into the debtor's possession under some other contract with which the debtor has not complied, and that by reason thereof the creditor has derived no benefit, does not make the transaction any the less one of accord and satisfaction.[86] The rule stated has no application where the parties fixed a price on the property given in satisfaction as such, and delivery is in law equivalent to a payment of so much money.[87]

C. Acceptance of Services in Satisfaction. The rule that payment and acceptance of a smaller sum do not extinguish a claim for a larger has no application to an executed agreement whereby the creditor accepts the personal labor of the debtor in satisfaction of his claim.[88] Such an agreement is based on a new consideration and is valid.[89]

D. Acceptance of Promise in Satisfaction. It has been shown in another section that a mere accord which is not followed by execution or satisfaction is, as a general rule, no bar to an action on the original obligation.[90] This rule, however, presupposes that the agreement of the creditor is to accept the performance of the debtor's promise or agreement, and not the promise or agreement itself. There is a well-defined and easily recognized distinction between these two classes of agreements.[91] It is too well settled to admit of doubt that if the

had no title to any such land, it was held that in the absence of fraud on the part of the debtor the claim of the creditor was discharged. Reed *v.* Bartlett, 19 Pick. (Mass.) 273.

81. Griffith *v.* Creighton, 61 Mo. App. 1.

82. *Alabama.*— Brassell *v.* Williams, 51 Ala. 349.

Connecticut.— Bull *v.* Bull, 43 Conn. 455.

Kentucky.— Jones *v.* Bullitt, 2 Litt. (Ky.) 49.

Massachusetts.— Howe *v.* Mackay, 5 Pick. (Mass.) 44; Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

Missouri.— Griffith *v.* Creighton, 61 Mo. App. 1.

New York.— Strang *v.* Holmes, 7 Cow. (N. Y.) 224.

Pennsylvania.— Tucker *v.* Murray, 2 Pa. Dist. 497.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91; Williams *v.* Phelps, 16 Wis. 80.

83. Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

84. Singleton *v.* Thomas, 73 Ala. 205.

85. Wheeler *v.* Wheeler, 11 Vt. 60. See also Jones *v.* Bullitt, 2 Litt. (Ky.) 49.

86. Overton *v.* Conner, 50 Tex. 113.

87. Morrill *v.* Baggott, 157 Ill. 240, 41 N. E. 639; Griffith *v.* Creighton, 61 Mo. App. 1; Howard *v.* Norton, 65 Barb. (N. Y.) 161; Mitchell *v.* Cragg, 10 M. & W. 367. But see Jones *v.* Bullitt, 2 Litt. (Ky.) 49, and Hasted *v.* Dodge, (Iowa 1887) 35 N. W. 462, in each of which cases it appeared that the parties had fixed a definite cash value for the property, and in which the transaction was nevertheless held a good accord and satisfaction.

88. Blein *v.* Chester, 5 Day (Conn.) 359; Molyneaux *v.* Collier, 13 Ga. 406; Merchants' Bank *v.* Davis, 3 Ga. 112; Palmer *v.* Yager, 20 Wis. 91. See also Traphagen *v.* Voorhees, 44 N. J. Eq. 21, 12 Atl. 895.

Acceptance of support in satisfaction.— A father made, as trustee for his minor son, a deposit in a savings bank. After coming of age the son demanded the deposit of his father, who said, "I never want to hear of this matter again. I made the change of investment supposing that it was for the best, but it was not. If you are not satisfied and want the $500, take it and go; but if you remain here I do not want to hear of it again." The son, after this, remained at home and was supported by his father. In an action for the $500, brought by the son against the father's executors, it was held that the facts showed a complete accord and satisfaction. Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48.

Erecting new dam in place of one destroyed.— Where, in constructing a road, a dam has been taken down by the board of public roads, the erection of a new dam by the board, and the acceptance thereof by the party injured in satisfaction of the injury, operates as an accord and satisfaction. Wheeler *v.* Essex Public Road Board, 42 N. J. L. 138.

89. Molyneaux *v.* Collier, 13 Ga. 406.

90. See *supra*, III, D, 1.

91. Bennett *v.* Hill, 14 R. I. 322; Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556.

promise or agreement itself, and not the performance thereof, is accepted in satisfaction of the demand, and the agreement to accept is based on a sufficient consideration, the demand is extinguished and cannot be the foundation of an action.[92] Under these circumstances there is a valid accord and satisfaction even though the promise or agreement is not performed.[93] The sole remedy of either party in case of non-performance is by action for breach of the new agreement.[94] The

92. *Alabama.*— Smith *v.* Elrod, (Ala. 1898) 24 So. 994.

Arkansas.— Pope *v.* Tunstall, 2 Ark. 209.

California.— Treadwell *v.* Himmelmann, 50 Cal. 9.

Colorado.— Whitsett *v.* Clayton, 5 Colo. 476.

Connecticut.— Goodrich *v.* Stanley, 24 Conn. 613.

Georgia.— Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84.

Illinois.— Simmons *v.* Clark, 56 Ill. 96.

Iowa.— Merry *v.* Allen, 39 Iowa 235; Hall *v.* Smith, 15 Iowa 584; Hall *v.* Smith, 10 Iowa 45.

Kentucky.— Bullen *v.* McGillicuddy, 2 Dana (Ky.) 90; Tomlin *v.* McChord, 6 J. J. Marsh. (Ky.) 1.

Maine.— White *v.* Gray, 68 Me. 579; Doyle *v.* Donnelly, 56 Me. 26.

Massachusetts.— Field *v.* Aldrich, 162 Mass. 587, 39 N. E. 288; Stults *v.* Newhall, 118 Mass. 98; Apthorp *v.* Shepard, Quincy (Mass.) 298, 1 Am. Dec. 6.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271; Whitney *v.* Cook, 53 Miss. 551.

Missouri.— Curtis *v.* Browne, 63 Mo. App. 431.

New Hampshire.— Woodward *v.* Miles, 24 N. H. 289; Ranlett *v.* Moore, 21 N. H. 336.

New York.— Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606; Morehouse *v.* Oswego Second Nat. Bank, 98 N. Y. 503; Kromer *v.* Heim, 75 N. Y. 574, 31 Am. Rep. 491; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Bicknell *v.* Speir, 7 Misc. (N. Y.) 108, 27 N. Y. Suppl. 386; Kellogg *v.* Richards, 15 Wend. (N. Y.) 116.

Pennsylvania.— Hart *v.* Boller, 15 Serg. & R. (Pa.) 162, 16 Am. Dec. 536; Christie *v.* Craige, 20 Pa. St. 430.

Rhode Island.— Bennett *v.* Hill, 14 R. I. 322.

South Carolina.— Kinsler *v.* Pope, 5 Strobh. (S. C.) 126.

Tennessee.— Foster *v.* Collins, 6 Heisk. (Tenn.) 1.

Texas.— Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556; Bradshaw *v.* Davis, 12 Tex. 336; Jennings *v.* Ft. Worth, 7 Tex. Civ. App. 329, 26 S. W. 927. See also Fort *v.* Barnett, 23 Tex. 460.

Utah.— Whitney *v.* Richards, 17 Utah 226, 53 Pac. 1122.

Vermont.— Draper *v.* Hitt, 43 Vt. 439, 5 Am. Rep. 292; Buchanan *v.* Paddleford, 43 Vt. 64; Babcock *v.* Hawkins, 23 Vt. 561; Bryant *v.* Gale, 5 Vt. 416.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91.

England.— Taylor *v.* Hilary, 1 C. M. & R. 741; Evans *v.* Powis, 1 Exch. 601; Case *v.* Barber, T. Raym. 450; Good *v.* Cheesman, 2 B. & Ad. 328; Crowther *v.* Farrer, 15 Q. B. 677; Cartwright *v.* Cooke, 3 B. & Ad. 701; Page *v.* Meek, 3 B. & S. 259, 113 E. C. L. 259.

Canada.— Clark *v.* Ring, 13 U. C. Q. B. 185; McHugh *v.* Grear, 18 U. C. C. P. 488; Thomas *v.* Mallory, 6 U. C. Q. B. 521.

Thus an agreement by which A promises to deliver to B certain property mentioned therein at a specified time and place, and B agrees to accept the property at the time and place specified and to deliver a certain promissory note of A to him, is valid, the mutual stipulations constituting a sufficient consideration. And if A tenders performance on his part on the day and at the place, and B fails to accept or perform on his part, a cause of action arises in favor of A for such damages as are caused by the breach of the agreement. Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546.

What is not an agreement to accept promise illustrated.— A judgment creditor and his debtor entered into a written agreement by which the latter was to pay the former $500 in six months, and give his note for $3,500 payable in two years, and the note was given accordingly. The contract provided that when the debtor should have paid the said sums of money with interest, the same were to be paid in full settlement of the judgment, which was for $8,000; and the creditor further agreed and bound himself to release said judgment upon payment of the sum mentioned in said promissory note by the maker thereof. It was held that the payment of $4,000 was to operate as a satisfaction of the judgment, and not that the mere promise of payment was to have that effect. Simmons *v.* Clark, 56 Ill. 96.

93. *Alabama.*— Smith *v.* Elrod, (Ala. 1898) 24 So. 994.

Connecticut.— Goodrich *v.* Stanley, 24 Conn. 613.

Mississippi.— Whitney *v.* Cook, 53 Miss. 551.

New Hampshire.— Woodward *v.* Miles, 24 N. H. 289; Ranlett *v.* Moore, 21 N. H. 336.

New York.— Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606.

Ohio.— *Contra,* Frost *v.* Johnson, 8 Ohio 393.

Texas.— Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556; Bradshaw *v.* Davis, 12 Tex. 336.

Wisconsin.— Palmer *v.* Yager, 20 Wis. 91.

England.— Cartwright *v.* Cooke, 3 B. & Ad. 701.

94. *Iowa.*— Merry *v.* Allen, 39 Iowa 235.

Maine.— White *v.* Gray, 68 Me. 579.

New York.— Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546.

Texas.— Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556.

Vermont.— Babcock *v.* Hawkins, 23 Vt. 561.

promise or agreement will not operate as a satisfaction of the debt or demand unless the claimant intended to accept it as such,[95] and such intention must be clearly shown.[96] In some decisions it has been said that an express agreement that the promise shall operate as satisfaction is necessary.[97] In others it has been said that it will be sufficient if the intention of the creditor to accept the promise in satisfaction appears either expressly or by implication, and this is probably a more correct statement of the rule.[98] Whether the promise has been accepted in satisfaction must be determined from the circumstances of each case.[99]

E. Release of Mutual Claims. A release of mutual claims or discontinuance of mutual actions constitutes a mutual accord and satisfaction and bars any further recourse to such claims or the further prosecution of such actions.[1] It has been said, though, that in order to make this transaction effectual as to mutual actions the release must be under seal;[2] but of course this cannot be the law in those states where seals have been dispensed with by statute.

VI. Rescission by Mutual Consent.

Parties to an accord and satisfaction may by a subsequent agreement rescind the same and restore the debt to its original status.[3]

VII. Impeaching and Setting Aside.

A. Grounds — 1. In General. Where persons have voluntarily settled their existing differences by accord and satisfaction the courts will not reopen the controversy without a sufficient showing to invalidate the accord.[4]

2. Fraud. If, however, the accord and satisfaction is procured by fraud on the debtor's part,— as, for instance, by false representations or by the suppression of material facts,— it is not binding, since fraud vitiates all contracts; and hence, in an action on the original obligation, the effect of the accord and satisfaction may be avoided by showing these facts,[5] or a suit may be brought in equity

95. *Connecticut.*— Goodrich *v.* Stanley, 24 Conn. 613.

Georgia.— Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; Molyneaux *v.* Collier, 13 Ga. 406.

Illinois.— Simmons *v.* Clark, 56 Ill. 96.

Kansas.— St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

Maine.— White *v.* Gray, 68 Me. 579.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271; Whitney *v.* Cook, 53 Miss. 551.

Missouri.— Briscoe *v.* Callahan, 77 Mo. 134; Curtis *v.* Browne, 63 Mo. App. 431.

New Mexico.— Frick *v.* Joseph, 2 N. Mex. 138.

Pennsylvania.— Hart *v.* Boller, 15 Serg. & R. (Pa.) 162, 16 Am. Dec. 536.

Texas.— Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695; Overton *v.* Conner, 50 Tex. 113.

Wisconsin.— Eastman *v.* Porter, 14 Wis. 39.

96. Curtis *v.* Browne, 63 Mo. App. 431; Gulf, etc., R. Co. *v.* Gordon, 70 Tex. 80, 7 S. W. 695; Overton *v.* Conner, 50 Tex. 113.

97. Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; Eastman *v.* Porter, 14 Wis. 39.

98. Morehouse *v.* Oswego Second Nat. Bank, 98 N. Y. 503; Hall *v.* Smith, 15 Iowa 584, 589, in which it was said: "We suppose that ordinarily no rule is violated in holding that it is sufficient if this intention or purpose is evidenced by any unequivocal act or in any clear manner."

99. Hall *v.* Smith, 15 Iowa 584.

1. Vedder *v.* Vedder, 1 Den. (N. Y.) 257; Foster *v.* Trull, 12 Johns. (N. Y.) 456. See also, as sustaining this doctrine, Williams *v.* London Commercial Exch. Co., 10 Exch. 569. But *compare* Dighton *v.* Whiting, 1 Lutw. 51, and Davis *v.* Ockham, Style 245, which are apparently in direct conflict therewith.

2. 2 Parsons Contr. (8th ed.) 685, 686.

3. Heavenrich *v.* Steele, 57 Minn. 221, 58 N. W. 982.

4. Rawlins *v.* Rawlins, 102 Mo. 563, 15 S. W. 78.

5. *California.*— Dobinson *v.* McDonald, 92 Cal. 33, 27 Pac. 1098.

Illinois.— National Syrup Co. *v.* Carlson, 47 Ill. App. 178.

Kentucky.— Stratton *v.* McMakin, 8 Ky. L. Rep. 766.

Massachusetts.— Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747.

Missouri.— Helling *v.* United Order of Honor, 29 Mo. App. 309.

New Hampshire.— Wright *v.* First Crockery Ware Co., 1 N. H. 281.

New York.— Stafford *v.* Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366; Pierce *v.* Drake, 15 Johns. (N. Y.) 475; Willson *v.* Foree, 6 Johns. (N. Y.) 110; Dolsen *v.* Arnold, 10 How. Pr.

to rescind the agreement.[6] It has been held that where the claimant executes a release under seal his only remedy is to go into equity to obtain the rescission of it; that he cannot attack it for fraud in an action at law on the original agreement.[7]

3. MISTAKE OR DURESS. An accord and satisfaction entered into and executed through mutual mistake of fact is not binding and may be rescinded,[8] and the same is the case where an accord and satisfaction has been procured through duress.[9]

But where a creditor, without force or intimidation, and with a full knowledge of all the facts, accepts in satisfaction of his claim, which is unliquidated, a less sum than he claims is due, he cannot rescind the agreement on the ground that this constitutes duress.[10]

B. Placing Party In Statu Quo. As a general rule, one who seeks to avoid the effect of an accord and satisfaction on the ground of fraud,[11] mis-

(N. Y.) 528; Oliwill *v.* Verdenhalven, 15 N. Y. Suppl. 94.

Pennsylvania.— Staub *v.* Wolfe, 4 Pennyp. (Pa.) 280.

Tennessee.— Fisk *v.* Spain, 1 Overt. (Tenn.) 391.

Vermont.— Reynolds *v.* French, 8 Vt. 85, 30 Am. Dec. 456.

Wisconsin.— Ball *v.* McGeoch, 81 Wis. 160, 47 N. W. 610; Leslie *v.* Keepers, 68 Wis. 123, 31 N. W. 486.

Applications of rule, generally.— If a debtor, by false and fraudulent representations as to his condition, induces his creditor to deliver to him promissory notes upon payment of part only of what is due, the creditor may, upon proof of the fraud, recover the balance of what is due in an action on the note. Reynolds *v.* French, 8 Vt. 85, 30 Am. Dec. 456. So if a debtor, through wilful misrepresentations or suppression of material facts in respect to the state of his affairs, induces his creditor to accept a note from a third person for part of the demand, in full payment and discharge of the whole, the accord and satisfaction is void. Stafford *v.* Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366.

Fraudulent representations as to matters within claimant's knowledge.— Where a person has released a claim for personal injuries he cannot avoid the effect of the release by showing that he was induced to execute it through the fraudulent act of its superintendent and physician in causing him to believe that his injury would not be permanent; no artifice or trick having been used to prevent him from ascertaining the true nature of the injuries and their probable duration, and these matters lying as much within his knowledge or means of knowledge as within the knowledge of defendant, its officers or agents. Hayes *v.* East Tennessee, etc., R. Co., 89 Ga. 264, 15 S. E. 361. See also King *v.* Williams, 71 Iowa 74, 32 N. W. 178.

6. Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

7. Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

8. Stengel *v.* Preston, 89 Ky. 616, 13 S. W. 839; Wiswall *v.* Harriman, 62 N. H. 671; Belt *v.* American Cent. Ins. Co., 148 N. Y. 624, 43 N. E. 64; Bensen *v.* Perry, 17 Hun (N. Y.) 16; Calkins *v.* Griswold, 11 Hun (N. Y.) 208; Galoupeau *v.* Ketchum, 3 E. D. Smith (N. Y.) 175. See also McKay *v.* Myers, 168 Mass. 312, 47 N. E. 98.

Thus, where a creditor has received in payment several notes held by his debtor against third persons, and one of them, though worthless, was represented by the debtor and believed by both parties to be secured by mortgage, the creditor may rescind his acceptance on the ground of mistake. Wiswall *v.* Harriman, 62 N. H. 671.

9. Green *v.* Frank, 63 Ga. 78; Rogers *v.* Ball, 54 Ga. 15; Grayson *v.* Lilly, 7 T. B. Mon. (Ky.) 6; Conway *v.* Barber, 6 Misc. (N. Y.) 627, 27 N. Y. Suppl. 136; Jacobs *v.* Day, 5 Misc. (N. Y.) 410, 25 N. Y. Suppl. 763; Thomas *v.* McDaniel, 14 Johns. (N. Y.) 185.

Thus, where some of a quantity of goods purchased by sample did not correspond with the sample, and the seller refuses the buyer's offer to return them, and the buyer accepts the return of a part of the purchase money, this does not constitute an accord and satisfaction, as the buyer had no alternative but to keep the goods. Jacobs *v.* Day, 5 Misc. (N. Y.) 410, 25 N. Y. Suppl. 763.

Usury.— So the mere deduction by a creditor, at the time a debt is settled, of a part of the usury included in the debt, does not amount to an accord and satisfaction, though it be agreed by the parties that the deduction is in satisfaction of the borrower's rights founded on the usury. The borrower is still, in the eye of the law, in duress when such agreement is made. Rogers *v.* Ball, 54 Ga. 15. In order for a settlement of admitted usury to be conclusive by way of accord and satisfaction it must leave the debtor in duress to the creditor. Green *v.* Frank, 63 Ga. 78.

10. U. S. *v.* Child, 12 Wall. (U. S.) 232, 20 L. ed. 360.

11. *California.*— Dobinson *v.* McDonald, 92 Cal. 33, 27 Pac. 1098.

Georgia.— Strodder *v.* Southern Granite Co., 99 Ga. 595, 27 S. E. 174, 94 Ga. 626, 19 S. E. 1022; East Tennessee, etc., R. Co. *v.* Hayes, 83 Ga. 558, 10 S. E. 350.

Maine.— Potter *v.* Monmouth Mut. F. Ins. Co., 63 Me. 440; Bisbee *v.* Ham, 47 Me. 543.

Michigan.— Pangborn *v.* Continental Ins. Co., 67 Mich. 683, 35 N. W. 814.

Missouri.— Alexander *v.* Grand Ave. R. Co., 54 Mo. App. 66; Jarrett *v.* Morton, 44 Mo. 275.

New York.— Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75.

take[12] or for any other reason (it is apprehended) must restore or offer to restore to the other party whatever he has received by virtue of the transaction.

The rule, however, is subject to some limitations and exceptions. It does not apply where the agreement is absolutely void,[13] or where the other party has failed to comply with other material obligations which were of the essence of the agreement,[14] or where defendant admits that what was paid was justly due under the contract sued on.[15] So, where the claimant executes a release for two distinct claims, on the understanding (superinduced by the other party's fraud) that it applies only to one of them, he need not tender back the consideration received before suing on the other.[16] It has also been urged that another exception should be made in case of the party's mental incapacity or financial inability to meet this requirement; but it was held that, even if the rule admitted of any such exception, the exception cannot obtain unless the fraud remained undiscovered or the mental incapacity continued until after the consideration for the agreement had been expended or otherwise put beyond plaintiff's control.[17]

VIII. PLEADING.

A. Nature and Effect of Plea. Pleas of accord and satisfaction are pleas in confession and avoidance, and belong to that division of the last-named plea known as pleas in discharge. The effect of a plea of accord and satisfaction is to show that although the plaintiff once had a cause of action it has been discharged by some subsequent act or matter.[18] Herein it differs from the other branch of pleas in confes-

United States.— Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

Reason for rule.— The reason is that to attack the contract on the ground of fraud involves an admission that such a contract was made and also the intent to rescind it; and the rule of rescission is that the opposite party must be placed *in statu quo.* Butler *v.* Richmond, etc., R. Co., 88 Ga. 594, 15 S. E. 668.

12. Bensen *v.* Perry, 17 Hun (N. Y.) 16.

13. Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37. See also Alexander *v.* Grand Ave. R. Co., 54 Mo. App. 66.

14. Long *v.* Scanlan, 105 Ga. 424, 31 S. E. 436.

15. Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597; Leslie *v.* Keepers, 68 Wis. 123, 31 N. W. 486. To the same effect see Butler *v.* Richmond, etc., R. Co., 88 Ga. 594, 15 S. E. 668, in which it was held that a return or offer to return the consideration is unnecessary where the claimant has received nothing which he ought not to have had independently of any agreement, fraudulent or otherwise, in regard to the claim in suit.

16. Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

17. Strodder *v.* Southern Granite Co., 99 Ga. 595, 27 S. E. 174, 94 Ga. 626, 19 S. E. 1022.

18. Martin Civ. Proc. § 292.

For form of a plea of accord and satisfaction with one of several plaintiffs see Wallace *v.* Kelsall, 7 M. & W. 264.

Forms of this plea in particular actions may be found in the following cases:

Account stated. Lifth *v.* Ault, 11 Eng. L. & Eq. 580.

Assumpsit for goods sold. Boyd *v.* Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247.

Breach of covenant. 2 Chit. Pl. (3d Am. ed. from 2d Lond. ed.) *545.

Libel. Boosey *v.* Wood, 3 H. & C. 484.

Trespass. Bainbridge *v.* Lax, 9 Q. B. 819; Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65.

Forms of this plea in which particular kinds of satisfaction were pleaded may be found in the following cases:

Satisfaction by acceptance of a less sum than claimed where the claim is unliquidated. Page *v.* Meek, 3 B. & S. 259.

Satisfaction by acceptance of judgment in satisfaction of bond. Seaman *v.* Haskins, 2 Johns. Cas. (N. Y.) 195.

Satisfaction by agreement to abide by an award to be made on a submission to arbitration of the matters in dispute. Williams *v.* London Commercial Exch. Co., 29 Eng. L. & Eq. 430.

Satisfaction by delivery of chattels. 2 Chit. Pl. (16th Am. ed.) 289, 290.

Satisfaction by delivery of deed of land. Pontious *v.* Durflinger, 59 Ind. 27; Baldwin *v.* Massilon Bank, 1 Ohio St. 141; Deut *v.* Coleman, 10 Sm. & M. (Miss.) 83.

Satisfaction by giving, and acceptance in satisfaction, of note of third person. Booth *v.* Smith, 3 Wend. (N. Y.) 66.

Satisfaction by giving and acceptance of services. 2 Chit. Pl. (16th Am. ed.) 290.

Satisfaction by giving bill of exchange accepted by third person. Curlewis *v.* Clark, 3 Exch. 375; 2 Chit. Pl. (16th Am. ed.) 293.

Satisfaction by giving guaranty of third person. Pope *v.* Andrews, 9 C. & P. 564; 2 Chit. Pl. (16th Am. ed.) 291.

Satisfaction by giving note indorsed by third person. Boyd *v.* Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247.

sion and avoidance, that is, pleas in justification or excuse, for this latter plea sets up new matter showing that by reason thereof plaintiff never had a cause of action.[19]

B. Necessity of Pleading Specially— 1. ADMISSIBILITY UNDER GENERAL ISSUE. At common law, in actions of assumpsit,[20] case,[21] and debt on simple contract,[22] accord and satisfaction may be shown under the general issue. In actions of debt on specialties,[23] judgments or recognizances,[24] and in actions of covenant,[25] and trespass *vi et armis*,[26] it must be specially pleaded. So a consideration of the general nature of pleas in actions of account render, detinue, and replevin, will, it is conceived, demonstrate clearly the necessity of pleading accord and satisfaction specially in these classes of actions.[27] It has been said that accord and satisfaction must be pleaded in all cases when made after suit brought,[28] and this, it is apprehended, is, as a general rule, correct.[29] In those states which have adopted the code system of pleading, accord and satisfaction must in all cases be pleaded specially;[30] but notwithstanding this requirement the weight of authority is that

Satisfaction by payment of smaller sum and abandonment of defense. Cooper *v.* Parker, 15 C. B. 822.

Satisfaction by payment of smaller sum by third person. 2 Chit. Pl. (16th Am. ed.) 293.

Admissions by plea illustrated.— In an action on bonds alleged to have been executed to plaintiff, defendant admits that the bonds were so executed by a plea of accord and satisfaction, and cannot be permitted to show that they were executed to plaintiff and another person. Dickinson *v.* Burr, 7 Ark. 34.

Pleading with general issue.— A plea of accord and satisfaction is not an admission of the cause of action when the general issue is also pleaded. Prince *v.* Puckett, 12 Ala. 832.

19. Martin Civ. Proc. § 293.

20. *Indiana.*— Burge *v.* Dishman, 5 Blackf. (Ind.) 272.

Massachusetts.— Baylies *v.* Fettyplace, 7 Mass. 325.

New Hampshire.— Curtis *v.* Egan, 53 N. H. 511.

New York.— Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

Ohio.— Chappell *v.* Phillips, Wright (Ohio) 372; Stewart *v.* Saybrook Tp., Wright (Ohio) 374.

West Virginia.— Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

England.— Paramour *v.* Johnson, 12 Mod. 376; Bird *v.* Randall, 3 Burr. 1345; Kearslake *v.* Morgan, 5 T. R. 513.

21. Lane *v.* Applegate, 1 Stark. 78; Martin *v.* Thornton, 4 Esp. 180; Bird *v.* Randall, 3 Burr. 1345. *Contra*, Gilman *v.* Noyes, 57 N. H. 627.

Trover is a species of action on the case, and accord and satisfaction would be admissible under the general issue in that form of action. See Martin Civ. Proc. § 266.

22. Page *v.* Prentice, 7 Blackf. (Ind.) 322. *Dictum* in Bailey *v.* Cowles, 86 Ill. 333.

23. Martin Civ. Proc. § 260; Saunders Pl. & Ev. 23; Bailey *v.* Cowles, 86 Ill. 333.

24. Martin Civ. Proc. § 260.

25. Martin Civ. Proc. § 261; Saunders Pl. & Ev. 23.

26. *Alabama.*— Phillips *v.* Kelly, 29 Ala. 628.

Illinois.— Kenyon *v.* Sutherland, 8 Ill. 99.

New Jersey.— Longstreet *v.* Ketcham, 1 N. J. L. 170.

England.— Doe *v.* Leo, 4 Taunt. 459; Bird *v.* Randall, 3 Burr. 1345.

27. See Martin Civ. Proc. §§ 263, 267, 268.

28. Saunders Pl. & Ev. 23.

29. See *infra*, VIII, F.

30. Sweet *v.* Burdett, 40 Cal. 97; Coles *v.* Soulsby, 21 Cal. 47 [*overruling* Gavin *v.* Annan, 2 Cal. 494]; Berdell *v.* Bissell, 6 Colo. 162; Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757; Combs *v.* Smith, 78 Mo. 32; Jacobs *v.* Day, 5 Misc. (N. Y.) 410, 25 N. Y. Suppl. 763.

See 1 Cent. Dig. tit. "Accord and Satisfaction," § 153.

"New matter" or "affirmative defense."— Accord and satisfaction is "new matter" (Coles *v.* Soulsby, 21 Cal. 47) or an "affirmative defense" (Jacobs *v.* Day, 5 Misc. (N. Y.) 410, 25 N. Y. Suppl. 763) within provisions requiring "new matter" or "affirmative defenses" to be pleaded.

Effect of the "Hilary rules."— Under the "Hilary rules" enacted in 1834 it became necessary to plead accord and satisfaction specially, no matter what the form of the action was. See Hil. T. 4 W. IV; Martin Civ. Proc. § 292; Alexander *v.* Strong, 9 M. & W. 733. [The form of action here was *assumpsit*.]

Effect of rules of court and statutes.— In Connecticut rules of court require accord and satisfaction to be specially pleaded. Atchison *v.* Atchison, 67 Conn. 35, 34 Atl. 761. In Vermont it is by statute made special matter of defense, not available unless specially pleaded, or unless, when pleading the general issue, defendant gives notice in writing that he will give it in evidence under the general issue and rely on it as a defense. Seaver *v.* Wilder, 68 Vt. 423, 35 Atl. 351. In Massachusetts, under Gen. Stat., c. 129, § 20, accord and satisfaction is not available, in an action on an account annexed, under an answer containing a general denial and alleging payment. Grinnell *v.* Spink, 128 Mass. 25. In Georgia, Code, § 5051, abolishes the general issue and requires that each paragraph of complaint be distinctly answered. Under this statute accord and satisfaction must be pleaded. Ingram *v.* Hilton, etc., Lumber Co., 108 Ga. 194, 33 S. E. 961.

any objection to the failure of defendant to plead it specially is waived by not objecting to evidence of it because of such failure,[31] and where the plaintiff, as a part of his own case, shows facts amounting to an accord and satisfaction, defendant may rely on these facts as constituting an accord and satisfaction, though he has not pleaded them as such.[32]

2. ADMISSIBILITY UNDER PLEA OF PAYMENT OR SET-OFF. While it has been held in one case that evidence of an accord and satisfaction is admissible under a plea of payment,[33] and *said* in another that evidence of this character would probably be admissible if a bill of particulars showing the character of the payment were filed with such a plea,[34] the weight of authority (and of reason, too, it is believed) is to the contrary,[35] nor is evidence of accord and satisfaction admissible under a plea of set-off.[36]

C. Admissibility under General Issue as Affecting Right to Plead Specially. Even in those classes of actions in which accord and satisfaction may be shown under the general issue it may nevertheless be pleaded specially.[37] Such a plea is not bad as amounting to the general issue, because it confesses the cause of action and avoids it by setting up new matter.[38]

D. Pleading in Connection with Other Pleas. So the plea may be pleaded with the general issue[39] or together with the pleas of payment and *nul tiel record*.[40] As the plea of accord and satisfaction and *nul tiel record* present entirely dissimilar issues, defendant, by going to trial on one, does not waive his objection to a ruling on demurrer to the other.[41]

E. Allegations and Requisites of Plea — 1. AS REGARDS FULLNESS. According to rules governing pleas in general, a plea of accord and satisfaction, which professes to be an answer to the whole declaration, but which in fact is an answer to a part only, is bad. The plea must be so framed as to afford a complete answer to the whole of the demand it professes to answer.[42]

2. THE NECESSARY ALLEGATIONS — a. The Agreement. According to the earlier

31. Berdell *v.* Bissell, 6 Colo. 162; Looby *v.* West Troy, 24 Hun (N. Y.) 78; Brett *v.* First Universalist Soc., 63 Barb. (N. Y.) 610. *Contra*, Smith *v.* Owens, 21 Cal. 11.

Offer of evidence not objected to.— Although accord and satisfaction is not pleaded, but an offer of evidence to show such defense is not objected to, and the court rules that the plea cannot be so amended as to set up this defense, it is error to reject such evidence. Donaldson *v.* Carmichael, 102 Ga. 40, 29 S. E. 135.

32. Looby *v.* West Troy, 24 Hun (N. Y.) 78.

33. Howe *v.* Mackay, 5 Pick. (Mass.) 44. See also Henderson *v.* Moore, 5 Cranch (U. S.) 11, 3 L. ed. 22.

34. Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

35. *Alabama.*— Smith *v.* Elrod, (Ala. 1898) 24 So. 994.

Arkansas.— Owens *v.* Chandler, 16 Ark. 651.

Colorado.— Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757.

Connecticut.— Kisham *v.* Nichols, 1 Root (Conn.) 75.

Kentucky.— Hamilton *v.* Coons, 5 Dana (Ky.) 317.

36. McCreary *v.* McCreary, 5 Gill & J. (Md.) 147.

37. *Alabama.*— Dunham *v.* Ridgel, 2 Stew. & P. (Ala.) 402.

Illinois.— Gillfillan *v.* Farrington, 12 Ill. App. 101.

New York.— Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

West Virginia.— Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

England.— Kearslake *v.* Morgan, 5 T. R. 513; Norman *v.* Thompson, 4 Exch. 755; Paramour *v.* Johnson, 12 Mod. 376; Hayselden *v.* Staff, 5 A. & E. 153.

38. Page *v.* Prentice, 7 Blackf. (Ind.) 322; Paramour *v.* Johnson, 12 Mod. 376.

Plea amounting to the general issue defined. —"A plea amounting to the general issue is a plea alleging matter which is in effect a denial of the whole or the principal part of the allegations in the declaration." Page *v.* Prentice, 7 Blackf. (Ind.) 322, 323.

39. Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Saunders Pl. & Ev. 23.

40. Kershaw *v.* Robinson, 1 Brev. (S. C.) 380, in which it was said, however, that defendant should perhaps be required to show by affidavit that the additional pleas were necessary to his defense.

Statutes authorizing several defenses.— Under a statute authorizing defendant to plead as many matters of fact in several pleas as he may deem necessary to his defense, he may file *nul tiel record* together with a plea of accord and satisfaction. Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233.

41. Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233.

42. Thomas *v.* Heathorn, 2 B. & C. 477; Hopkinson *v.* Tahourdin, 2 Chit. 303.

authorities the best way of pleading this defense is to omit a statement of the agreement or accord and plead it by way of satisfaction only;[43] for if it is pleaded by way of accord a precise execution thereof in every part must be pleaded, and if there be a failure in any part the plea will be insufficient; but if it is pleaded by way of satisfaction it will be sufficient to allege that defendant gave and plaintiff accepted a certain thing in satisfaction of the cause of action alleged.[44] While in the absence of statutes requiring a more specific form of pleading this may be true in regard to an accord and satisfaction by the delivery of chattels, and perhaps in a few other cases,[45] it is obvious that some kinds of accord and satisfaction cannot be pleaded without alleging the agreement and its terms,[46] and a number of the American decisions state without qualification that a clear agreement or accord must be alleged[47] and the material provisions thereof set out with precision.[48] An examination of the decisions in which this defense was made will show that in the majority of cases the agreement or accord was set forth, and, inasmuch as it is never erroneous to plead it, it seems that in order to be on the safe side it would be better to do so.

b. Consideration. The plea must show some consideration moving toward plaintiff,[49] or, in other words, that plaintiff obtained something of value by the new agreement.[50] A plea which on its face shows want of consideration is bad after verdict, and plaintiff is entitled to judgment *non obstante veredicto*.[51]

c. Performance, Acceptance in Satisfaction, and Execution. The plea must allege that what was done or given was in satisfaction of the cause of action,[52]

43. Daniels *v.* Hallenbeck, 19 Wend. (N. Y.) 408; Peytoe's Case, 9 Coke 77*b*; Bacon's Abr. tit. "Accord and Satisfaction, C;" Saunders Pl. & Ev. 24; Comyns's Digest, tit. "Accord and Satisfaction, C."

44. Peytoe's Case, 9 Coke, 77*b*; Bacon's Abr. tit. "Accord and Satisfaction, C."

45. It is to be noted that in several of the United States there are statutory forms of pleading an accord and satisfaction by the delivery and acceptance of chattels, by way of satisfaction, without pleading the accord.

46. Take, for instance, an accord and satisfaction arising out of a composition by creditors with an insolvent debtor, or satisfaction of a liquidated or certain demand by the giving of a less sum and some new consideration.

47. Smith *v.* Mechanics' Nat. Bank, 108 Ga. 211, 33 S. E. 857; Burnsides *v.* Smith, 5 T. B. Mon. (Ky.) 464; Young *v.* Jones, 64 Me. 563; Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472.

Under the code of Colorado the parties are bound to plead the facts by which the accord may be established. Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757, and this is probably true under all or most of the codes.

48. Burnsides *v.* Smith, 5 T. B. Mon. (Ky.) 464; Smith *v.* Mechanics' Nat. Bank, 108 Ga. 211, 33 S. E. 857. See also Simon *v.* Kendig, 4 Kulp (Pa.) 493, in which it was held that where an accord and satisfaction is evidenced by a written agreement in defendant's hands, the material provisions of the instrument, and not merely his construction of them, ought to be set forth.

49. Torrey *v.* U. S., 42 Fed. 207; Bayley *v.* Homan, 3 Bing. N. Cas. 915; Down *v.* Hatcher, 10 A. & E. 121. See also cases cited *infra*, in the following note:

Plea of payment of less sum in satisfaction of greater.— Probably one of the best illustrations of the rule stated in the text occurs where defendant pleads payment and acceptance of a smaller sum in satisfaction of a larger liquidated or undisputed sum. As this does not constitute an accord and satisfaction without some new consideration it is of course necessary to allege such consideration. Williams *v.* Langford, 15 B. Mon. (Ky.) 566; Akers *v.* Central Kentucky L. Asylum, 10 Ky. L. Rep. 817; Young *v.* Neal, 10 Ky. L. Rep. 404; Torrey *v.* U. S., 42 Fed. 207; Evans *v.* Powis, 1 Exch. 601; Thomas *v.* Heathorn, 2 B. & C. 477; Down *v.* Hatcher, 10 A. & E. 121.

Showing that satisfaction was of some value.— A plea of accord and satisfaction must show that what was received in satisfaction was of some value. Davis *v.* Noaks, 3 J. J. Marsh. (Ky.) 494; Commonwealth Bank *v.* Letcher, 3 J. J. Marsh. (Ky.) 195; Com. *v.* Miller, 5 T. B. Mon. (Ky.) 205.

50. Bayley *v.* Homan, 3 Bing. N. Cas. 915.

51. Down *v.* Hatcher, 10 A. & E. 121.

52. *California.*— Hogan *v.* Burns, (Cal. 1893) 33 Pac. 631.

Indiana.— Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; Sheets *v.* Russell, 12 Ind. App. 677, 40 N. E. 30; Sinard *v.* Patterson, 3 Blackf. (Ind.) 353; Dupay *v.* Robbins, 1 Blackf. (Ind.) 473.

Massachusetts.— Howe *v.* Mackay, 5 Pick. (Mass.) 44.

Ohio.— Detroit F. & M. Ins. Co. *v.* Commercial Ins. Co., 1 Clev. L. Rec. 81.

Rhode Island.— Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333.

England.— Paine *v.* Masters, 1 Str. 573; Pinnel's Case, 5 Coke 117*a*; Graham *v.* Gibson, 4 Exch. 768; Hawkshaw *v.* Rawlings, 1 Str. 23 [*cited* in Paine *v.* Masters, 1 Str. 573].

For form of plea sufficiently showing de-

and also that what was done or given was accepted in satisfaction.[53] So if the agreement itself, and not the performance, is relied on as satisfaction, the plea must allege that the agreement was accepted in satisfaction.[54] The plea must show that the accord or agreement has been fully executed.[55] Thus it will be insufficient to allege an agreement to accept in satisfaction without alleging

livery in satisfaction see Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

Allegation of acceptance in satisfaction by itself is insufficient. Pinnel's Case, 5 Coke 117*a*.

53. *California.*— Hogan *v.* Burns, (Cal. 1893) 33 Pac. 631.

Colorado.— Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757.

Illinois.— Allen *v.* Preusing, 32 Ill. 505.

Indiana.— Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514; Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; Louden *v.* Birt, 4 Ind. 566; Harbor *v.* Morgan, 4 Ind. 158; Sinard *v.* Patterson, 3 Blackf. (Ind.) 353; Dupay *v.* Robbins, 1 Blackf. (Ind.) 473; Sheets *v.* Russell, 12 Ind. App. 677, 40 N. E. 30.

Iowa.— Jones *v.* Fennimore, 1 Greene (Iowa) 134.

Kentucky.— Johnson *v.* Hunt, 81 Ky. 321; McDonald *v.* Patton, Ky. Dec. 295; Payne *v.* Barnet, 2 A. K. Marsh. (Ky.) 312; Haggin *v.* Williamson, 5 T. B. Mon. (Ky.) 8.

Maine.— Young *v.* Jones, 64 Me. 563.

Massachusetts.— Howe *v.* Mackay, 5 Pick. (Mass.) 44.

Mississippi.—Burrus *v.* Gordon, 57 Miss. 93.

Missouri.— Shaw *v.* Burton, 5 Mo. 478; Wilkerson *v.* Bruce, 37 Mo. App. 156; German Bank *v.* Mulhall, 8 Mo. App. 558.

Nebraska.— Van Housen *v.* Broehl, 58 Nebr. 348, 78 N. W. 624.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

North Carolina.— State Bank *v.* Littlejohn, 18 N. C. 563.

Ohio.— Detroit F. & M. Ins. Co. *v.* Commercial Ins. Co., 1 Clev. L. Rec. 81.

Pennsylvania.— Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Ellison *v.* Jones, 1 Kulp (Pa.) 273.

Rhode Island.— Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333.

West Virginia.— *Dictum* in Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Arkansas City First Nat. Bank *v.* Leech, 94 Fed. 310; Maze *v.* Miller, 1 Wash. (U. S.) 328, 16 Fed. Cas. No. 9,362.

England.— Graham *v.* Gibson, 4 Exch. 768; Paine *v.* Masters, 1 Str. 573; Drake *v.* Mitchell, 3 East 251; Hall *v.* Flockton, 20 L. J. Q. B. 208, 16 Q. B. 1039; Barclay *v.* New South Wales Bank, 5 App. Cas. 371.

Canada.— Brown *v.* Jones, 17 U. C. Q. B. 50; Macfarlane *v.* Ryan, 24 U. C. Q. B. 474; Fralick *v.* Lafferty, 3 U. C. Q. B. 159.

Contra, in McCullough *v.* Franklin Coal Co., 21 Md. 256, wherein it was held that a plea which alleges an agreement to compromise a pending suit for valuable consideration upon performance of certain conditions, and which avers the payment of the consideration and the performance of the conditions, is good; that the omission of the averment that the acts done were received and accepted in satisfaction is immaterial; and that this is necessarily implied in the other averments of the plea.

New York rule in case of unliquidated claim.— In New York it has been held that in an action on an unliquidated claim a plea alleging that defendant paid plaintiff a certain sum of money "as a full and final settlement" thereof, and that plaintiff accepted and retained it with knowledge that it was paid in full of the claim, is sufficient without alleging that he accepted it in satisfaction of the claim. The court said that the facts stated constitute all the elements necessary to the defense of accord and satisfaction as applied to an unliquidated claim, and that it was sufficient under Code Civ. Proc. § 519, providing that the allegations of a pleading must be liberally construed with a view to substantial justice between the parties. Lindsay *v.* Gager, 11 N. Y. App. Div. 93, 42 N. Y. Suppl. 851 [Bartlett, J., dissenting].

Waiving objection for failure to allege acceptance.— Where plaintiff does not demur for failure of defendant to allege acceptance in satisfaction, the objection is waived. Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145.

For form of plea sufficiently alleging acceptance in satisfaction see Hart *v.* Crawford, 41 Ind. 198; Troy Min. Co. *v.* White, 10 S. D. 475, 74 N. W. 236; Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

54. Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; Clough *v.* Murray, 3 Rob. (N. Y.) 7; Hall *v.* Flockton, 20 L. J. Q. B. 208, 16 Q. B. 1039.

55. *Arkansas.*— West *v.* Carolina L. Ins. Co., 31 Ark. 476.

California.— Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58; Simmons *v.* Oullahan, 75 Cal. 508, 17 Pac. 543.

Georgia.— Patterson *v.* Green, 81 Ga. 808, 10 S. E. 390.

Illinois.— Fitch *v.* Haight, 5 Ill. 51.

Indiana.— Eichholtz *v.* Taylor, 88 Ind. 38; Jackson *v.* Olmstead, 87 Ind. 92; Deweese *v.* Cheek, 35 Ind. 514; Coquillard *v.* French, 19 Ind. 274.

Kentucky.— Groshon *v.* Grant, Ky. Dec. 268; Hale *v.* Grogan, 99 Ky. 170, 35 S. W. 282; Payne *v.* Barnet, 2 A. K. Marsh. (Ky.) 312.

Maine.— Young *v.* Jones, 64 Me. 563.

Mississippi.—Guion *v.* Doherty, 43 Miss. 538.

Nebraska.— Goble *v.* American Nat. Bank, 46 Nebr. 891, 65 N. W. 1062.

New Mexico.—Armijo *v.* Abeytia, 5 N. Mex. 533, 25 Pac. 777.

North Carolina.— State Bank *v.* Littlejohn, 18 N. C. 563.

actual performance.[56] So a mere allegation of readiness to perform,[57] or tender of performance,[58] or part performance and tender of performance as to the rest, is insufficient;[59] and a plea which shows on its face that the accord has not been executed is fatally defective.[60]

d. Other Allegations Rendered Necessary by Character of Satisfaction. If the action is on an agreement under seal, a plea of accord and satisfaction must allege an acquittance under seal.[61] A plea of accord and satisfaction by a stranger need not allege that it was made by authority of the debtor or subsequently ratified by him. The mere fact of pleading it will of itself show sufficient ratification.[62] In an action by the indorsees against the acceptor of a bill, a plea stating that after the indorsement, and before suit brought, the plaintiffs accepted certain

Pennsylvania.— Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Philadelphia *v.* Devine, 1 Wkly. Notes Cas. (Pa.) 358.

Washington.— Rogers *v.* Spokane, 9 Wash. 168, 37 Pac. 300.

England.— Gabriel *v.* Dresser, 15 C. B. 622; Shephard *v.* Lewis, T. Jones 6; Allen *v.* Harris, 1 Ld. Raym. 122.

Delivery to third person for plaintiff.— If the plea alleges the delivery of a note of a third person for and on behalf of the plaintiff it should show that such person was plaintiff's agent. Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

Giving draft of third person.— A plea of accord and satisfaction alleging the giving and acceptance in satisfaction of a third person's draft is sufficient without alleging that such draft was negotiable, since the plea in the absence of such allegation is sufficient to admit proof of a negotiable instrument. Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667.

Quantity of articles delivered in satisfaction.— It was agreed between A and B that the former should furnish the latter with a specified quantity of various enumerated articles, and that the latter should pay the former $200 for them at a future day. A brought action for the money, alleging delivery of the kinds of articles agreed on to the value of $200 and their receipt by B in full satisfaction of the agreement. It was held that the plea was sufficient without stating the particular quantity furnished; that the uncertainty as to the quantity was rendered immaterial by the averment of their value. Richards *v.* Carl, 1 Blackf. (Ind.) 313.

Showing person to whom satisfaction made. — In an action by the indorsee of a note against the maker and a surety thereon, an answer by the surety merely alleging that the maker "had fully discharged and satisfied the same" is insufficient for failure to show to whom the payment or satisfaction was made; and if to the payee, the plea should have averred that the payment of satisfaction was made before notice of the indorsement of the note to the plaintiff. Nill *v.* Comparet, 15 Ind. 243.

Time of performance or execution.— The decisions are not harmonious as to the necessity for alleging time of performance, but it is apprehended that the question must depend to some extent at least on the particular facts and circumstances of the agreement or accord. In Strang *v.* Holmes, 7 Cow. (N. Y.) 224, it was held that time of accord and satisfaction is not material and may be departed from in evidence. In Pence *v.* Smock, 2 Blackf. (Ind.) 315, it is held that failure to allege time of performance renders the plea bad on special demurrer. In Evans *v.* Powis, 1 Exch. 601, it is held that if by the terms of a new agreement performance is to consist of payment in designated sums on designated days, the plea will be bad if it fails to allege that the payments were made at the precise days agreed on.

56. Johnson *v.* Hunt, 81 Ky. 321; Guion *v.* Doherty, 43 Miss. 538.

57. Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Carter *v.* Wormald, 1 Exch. 81; Allies *v.* Probyn, 2 C. M. & R. 408.

58. Gabriel *v.* Dresser, 15 C. B. 622, 80 E. C. L. 622; Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Stewart *v.* Hawson, 7 U. C. C. P. 168. See also *supra*, III, D, 2. *Contra*, Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65; Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233, which cases seem to hold that accord and tender of performance and refusal of acceptance is equivalent to satisfaction. And this being so, a plea alleging tender of performance would be sufficient. The great weight of authority, however, is to the effect that tender of performance, so far as accord and satisfaction is concerned, is not equivalent to performance; hence the rule stated in the text is the correct one.

For form of plea in which tender was held sufficient see Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65.

59. Shephard *v.* Lewis, T. Jones 6. See also Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472.

60. Fitch *v.* Haight, 5 Ill. 51; Rogers *v.* Spokane, 9 Wash. 168, 37 Pac. 300.

61. Ligon *v.* Dunn, 28 N. C. 133; Preston *v.* Christmas, 2 Wils. C. P. 86. See also Neal *v.* Sheaffield, Cro. Jac. 254. *Compare* Bailey *v.* Cowles, 86 Ill. 333, in which it was held that where a defendant pleads a release and quitclaim of his equity of redemption in real estate to the plaintiff, and the acceptance thereof by the plaintiff as an accord and satisfaction, it is not necessary that the plea should allege that such release and quitclaim were under seal. The court said that in pleading a release it is not necessary that it should be alleged to be under seal, because a release imports a seal.

62. Snyder *v.* Pharo, 25 Fed. 398.

goods from the drawer in full satisfaction of the bill and of all damages and causes of action in respect thereof, is bad; since satisfaction of a bill, as between a drawer and an indorser, does not necessarily enure as a satisfaction on behalf of the acceptor or operate to discharge him from liability to the indorsee.[63] A plea alleging satisfaction by the giving and acceptance of a bond must allege that the bond was assigned.[64]

3. EFFECT OF REPUGNANCY TO BILL OF PARTICULARS. Where a bill of particulars filed with and as a part of a plea is inconsistent with and repugnant to it the plea must fail.[65]

F. Pleas Puis Darrein Continuance — 1. MATTERS PLEADED. It is well settled that matters constituting an accord and satisfaction arising after the last continuance may be pleaded *puis darrein continuance*,[66] and, as a general rule, to render such matters available, they must be so pleaded.[67] A plea setting up matters of defense which arose before the last continuance before plea pleaded is objectionable as a plea *puis darrein continuance*.[68] If the accord and satisfaction takes place after suit brought, the plea must allege, and it must be proved, that it was a satisfaction of the costs and damages sustained by the breach of contract.[69]

2. WHEN PLEADED. This plea must be pleaded before the next continuance after the facts or events have occurred and become known to the party, and it is within the discretion of the court to allow or refuse such plea if not pleaded at such time.[70]

3. AMENDMENT OF PLEA. These pleas are amendable at any time before trial, and the amended plea may be entitled as of the term when the original plea was filed.[71]

4. EFFECT OF PLEA. The effect of these pleas is to waive all previous defenses.[72]

63. Jones *v.* Broadhurst, 9 C. B. 173, 67 E. C. L. 173.

64. Hence a plea alleging that defendant gave to plaintiff bonds which were received by plaintiff in satisfaction of a debt is insufficient for failing to allege that the bonds were assigned. The reason of this is that if they were not the plaintiff could not maintain an action in his own name. Nave *v.* Fletcher, 4 Litt. (Ky.) 242.

65. Snyder *v.* Pharo, 25 Fed. 398.

66. Taylor *v.* Frink, 2 Iowa 84; Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65; Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386.

For forms of pleas puis darrein continuance see Webster *v.* Wyser, 1 Stew. (Ala.) 184; Evans *v.* Collier, 79 Ga. 319, 4 S. E. 266; Heirn *v.* Carron, 11 Sm. & M. (Miss.) 361, 49 Am. Dec. 65.

67. Evans *v.* Cincinnati, etc., R. Co., 78 Ala. 341; Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653; Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Good *v.* Davis, Hempst. (U. S.) 16, 10 Fed. Cas. No. 5,530*a*.

Exceptions to rule.— Actions on the case, it has been held, constitute an exception to the rule stated in the text. In such actions it has been held that the defendant is permitted under the general issue to give in evidence satisfaction or any other matter *ex post facto* which shows that the cause of action has been discharged. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271. So it has been held that another exception arises where the parties seek not only to adjust the amount of the claim but also to have judgment entered for such amount. In this case it was said that on motion of defendants based on the agreement the court could properly inquire whether the agreement had been executed; and if it was claimed that the agreement was obtained by fraud it was the duty of the court to determine that question, and if the court should find that the agreement had been properly executed it should enter judgment according to its terms. Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653.

68. Kenyon *v.* Sutherland, 8 Ill. 99.

69. Francis *v.* Crywell, 5 B. & Ald. 886, 1 D. & R. 546; Goodwin *v.* Cremer, 18 Q. B. 757; Ash *v.* Pouppeville, L. R. 3 Q. B. 86.

70. Tilton *v.* Morgaridge, 12 Ohio St. 98. *Compare* Robinson *v.* Burkell, 3 Ill. 278, in which it was held that a plea of matters happening since the last continuance may be filed at any time before trial.

Pleas filed after judgment in justice's court. — While the proceeding by appeal from a justice's court is in the nature of a new trial to which defendant may plead matter arising since the last continuance, yet where, after a judgment in the justice's court and previous to an appeal, the suit between the parties is settled, and defendant, notwithstanding, prosecutes an appeal, plaintiff cannot allege the accord and satisfaction by way of plea *puis darrein continuance*. His proper course is to apply by motion to dismiss the appeal. On a new trial plaintiff is not entitled to interpose a plea in bar of the defense. Schenck *v.* Lincoln, 17 Wend. (N. Y.) 506.

71. Webster *v.* Wyser, 1 Stew. (Ala.) 184.

72. Taylor *v.* Hogan, Hempst. (U. S.) 16, 23 Fed. Cas. No. 13,794*a*.

G. Sham Pleas. The court will not permit a plea of accord and satisfaction to be pleaded as a sham plea for the purpose of delay.[73]

H. Demurrer to Plea. Defects of form in a plea of accord and satisfaction must be taken advantage of by special demurrer,[74] and if such demurrer is not filed within the time required by law it may properly be overruled, notwithstanding it is based on good grounds.[75]

I. Replications — 1. Traversing Plea. In accordance with the well-settled rules of pleading all traversable matters of the plea not traversed by the replication are admitted.[76] The replication may deny the delivery or performance in satisfaction,[77] or it may deny acceptance,[78] or it may deny both the delivery or performance and the acceptance in satisfaction.[79] Although, by virtue of statute, the plaintiff may show under a general denial that there was no acceptance in satisfaction, this does not prevent him from pleading such fact specially.[80] If the replication denies that the plaintiff received in satisfaction it must conclude to the country.[81] Where the plea states the agreement or accord instead of pleading it by way of satisfaction, it will be sufficient to traverse the agreement without noticing the allegations of performance or acceptance in satisfaction.[82]

2. By Way of Confession and Avoidance. The replication may also allege new matter in confession and avoidance. Thus it is a sufficient answer to the plea that the thing given and accepted in satisfaction (a deed) was rendered worthless by defendant's own act,[83] or that the acceptance was procured by fraud on the defendant's part.[84] Such fraud, however, must be pleaded, to be available,[85]

73. Richley *v.* Proone, 1 B. & C. 286.

74. Woods *v.* Harris, 5 Blackf. (Ind.) 585.

75. Brantley Co. *v.* Lee, 106 Ga. 313, 32 S. E. 101.

Ambiguous plea.— Where the plea is ambiguous, but is capable of being so construed as to make it a good answer, it will be held good if plaintiff pleads over instead of demurring. Stead *v.* Poyer, 1 C. B. 782, 50 E. C. L. 782.

76. Capital City Mut. F. Ins. Co. *v.* Detwiler, 23 Ill. App. 656; Reichel *v.* Jeffrey, 9 Wash. 250; 37 Pac. 296.

For form of replication to plea setting up an accord and satisfaction by deed see Turner *v.* Browne, 3 C. B. 157.

77. State Bank *v.* Littlejohn, 18 N. C. 563; 1 Chit. Pl. (16th Am. ed.) 608; Saunders Pl. & Ev. 24; Young *v.* Rudd, 5 Mod. 86.

78. Berdell *v.* Bissell, 6 Colo. 162; State Bank *v.* Littlejohn, 18 N. C. 563; O'Riley *v.* Wilson, 4 Oreg. 96; Cruikshank *v.* McAvity, 20 N. Brunsw. 352; 1 Chit. Pl. (16th Am. ed.) 608; Saunders Pl. & Ev. 214; Young *v.* Rudd, 5 Mod. 86. *Compare* Hawkshaw *v.* Rawlings, 1 Str. 23, in which it was held that, where defendant pleads payment and acceptance in satisfaction, a replication that plaintiff did not accept such payment in satisfaction, though an argumentative denial of payment, is good after verdict.

For form of plea denying acceptance see Saund. Pl. & Ev. 26.

Traversing immaterial allegations.— A replication which traverses immaterial allegations and leaves unanswered the acceptance in satisfaction is bad. Jones *v.* Sawkins, 5 C. B. 142, 57 E. C. L. 142.

79. Deut *v.* Coleman, 10 Sm. & M. (Miss.) 83 [this case contains a form of the replication mentioned in the text]; Baldwin *v.* Massilon Bank, 1 Ohio St. 141; Webb *v.* Weatherby, 1 Bing. N. Cas. 502; 1 Chit. Pl. (16th Am. ed.) 608.

Replication not bad for duplicity.— A plea which denies both the giving and acceptance in satisfaction is neither double nor uncertain. Deut *v.* Coleman, 10 Sm. & M. (Miss.) 83.

80. Pottlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030; and see also Burns' Annot. Rev. Stat. (1894), § 380.

81. Hayman *v.* Gerrard, 1 Saund. 102.

82. Bainbridge *v.* Lax, 9 Q. B. 819, 58 E. C. L. 819 [this case contains a form of a replication traversing the agreement].

Reason for rule.— Where the satisfaction is pleaded as made in pursuance of an agreement, the agreement is material and traversable. Bainbridge *v.* Lax, 9 Q. B. 819, 58 E. C. L. 819.

Plea setting up account stated.—Where the plea sets up an account stated between plaintiff and defendant, and an acceptance by plaintiff of defendant's agreement to pay the sum found due, plaintiff may traverse both the accounting and the acceptance. Light *v.* Woodstock, etc., R., etc., Co., 13 U. C. Q. B. 201.

Denying existence of subject-matter of agreement.— A denial of the existence of the subject-matter of the agreement set forth in the plea is a sufficient denial of the agreement, since no agreement could be made with respect to something that did not exist. Learmonth *v.* Grandine, 4 M. & W. 658.

83. Turner *v.* Browne, 3 C. B. 157, 54 E. C. L. 157 [this case contains a form of replication setting up new matter].

84. Stears *v.* South Essex Gas-Light, etc., Co., 9 C. B. N. S. 180, 99 E. C. L. 180.

85. Capital City Mut. F. Ins. Co. *v.* Detwiler, 23 Ill. App. 656; Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758; Currey *v.* Lawler, 29 W. Va. 111, 11 S. E. 897.

and the facts relied on as constituting fraud set out.[86] The replication should also allege the return or tender back of the consideration;[87] but it has been held that tender is waived by joining issue, and that even in case of a formal objection for want of tender the replication may be amended so as to make a formal tender.[88]

3. SETTING UP ACCORD AND SATISFACTION. If an accord and satisfaction is set up by the replication it must, like a plea setting up this defense, allege a giving and acceptance in satisfaction.[89]

IX. EVIDENCE.

A. Burden of Proof. Where an accord and satisfaction is relied on as a defense, the burden of proving it is on the defendant;[90] but where plaintiff, in making out his own case, is compelled to establish an accord, he must produce at least *prima facie* evidence that there has been no satisfaction.[91] So, if the plaintiff wishes to avoid the effects of an accord and satisfaction on the ground of fraud, the burden is on him to show fraud.[92]

B. Admissibility — 1. IN GENERAL. Where the terms of a written agreement leave it in doubt whether the claim assigned was intended to operate as full satisfaction or only on account of the claim in suit, parol evidence is admissible to remove this doubt.[93] Although an accord and satisfaction is pleaded, an order given by defendant to plaintiff is not admissible in evidence unless other evidence is offered to show that it was intended and accepted as satisfaction of the claim, or that it had been paid.[94] Where the amount of a claim is disputed, evidence of the retention by plaintiff of a check expressed to be in full of the claim is admissible to show an accord and satisfaction although indorsed by plaintiff as received on account.[95]

2. VARIANCE. The allegations and proof must correspond.[96] Hence evidence to establish an accord and satisfaction of a different character from that pleaded is inadmissible,[97] and so is evidence of an accord with a person other than the one mentioned in the plea.[98] Where a plea of accord and satisfaction is sufficient, the exclusion of evidence which would tend to support it is reversible error.[99]

C. Sufficiency — 1. DEGREE OF PROOF. To establish a plea of accord and sat-

86. Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758.

87. Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758; Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348.

88. Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348.

89. Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333.

90. *Alabama.*— Johnson *v.* Collins, 20 Ala. 435.

Arkansas.— Dickinson *v.* Burr, 7 Ark. 34.

California.— Simmons *v.* Oullahan, 75 Cal. 508, 17 Pac. 543.

Illinois.— McDavitt *v.* McNay, 78 Ill. App. 396; American *v.* Rimpert, 75 Ill. 228.

Michigan.— Browning *v.* Crouse, 43 Mich. 489, 5 N. W. 664.

Missouri.— Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145.

New York.— Noe *v.* Christie, 51 N. Y. 270; Rosenfeld *v.* New, 10 N. Y. Suppl. 232; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528.

91. Browning *v.* Crouse, 43 Mich. 489, 5 N. W. 664.

92. Helling *v.* United Order of Honor, 29 Mo. App. 309; Currey *v.* Lawler, 29 W. Va. 111, 11 S. E. 897; Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500.

93. Selser's Assigned Estate, 7 Pa. Co. Ct. 417.

94. Hogan *v.* Burns, (Cal. 1893) 33 Pac. 631.

95. King *v.* Dorman, 26 Misc. (N. Y.) 133, 55 N. Y. Suppl. 876.

96. Smith *v.* Elrod, (Ala. 1898) 24 So. 994; Walker *v.* Reese, (Ga. 1900) 35 S. E. 771.

What is not a variance illustrated:—Where, upon the indorsement of a note, it was agreed by parol between the indorser and indorsee that, if the former would execute to the latter a deed for a tract of land, the latter would strike out the indorsement and release the indorser from liability thereon, and the indorser had afterward executed a deed for the land which was accepted by the indorsee, it was held that proof of these facts was not evidence tending to show a contract variant from that contained in the written indorsement and was competent to show an accord and satisfaction. Smitherman *v.* Smith, 20 N. C. 89.

97. Walker *v.* Reese, (Ga. 1900) 35 S. E. 771.

98. Chappell *v.* Phillips, Wright (Ohio) 372.

99. McNamara *v.* Babcock, 3 N. Y. Suppl. 700.

isfaction no clearer or stronger degree of proof than in ordinary civil cases is necessary. A mere preponderance of evidence will be sufficient.[100]

2. Documents and Record Entries. A receipt expressed to be in satisfaction of all claims and demands is evidence of an accord and satisfaction.[101] So discontinuance of a suit and an agreement not again to assert the claim in consideration of defendant's paying costs sufficiently shows an accord and satisfaction.[102] On the other hand an entry of payment of costs by defendant on dismissal of a suit is not *prima facie* evidence of an accord and satisfaction;[103] neither is an entry that costs are to be paid by the defendant.[104] So, where defendant pleaded that plaintiff has agreed to accept and did accept the covenant of a third party in full satisfaction of the note in suit, and the only evidence to support the plea was an indorsement signed by the third party in these words, "I am to pay the within note May 13th, 1822," and a credit on the same date still legible, though lines had been drawn through it, for a sum paid by the third party,—it was held that this was no evidence of an accord and satisfaction of the note.[105]

3. Lapse of Time. Lapse of time after the breach of the contract may tend to support a plea of accord and satisfaction to an action for damages sustained by reason of such breach.[106]

D. Questions of Law and Fact. Where the facts in respect to an accord and satisfaction have been ascertained, their effect is purely a question of law and is not to be submitted to the jury.[107] But if the evidence is conflicting as to whether there has been an acceptance in satisfaction, the question is to be determined by the jury,[108] and it is error to instruct the jury that there was an acceptance.[109] So, where the evidence is conflicting as to whether an account sued on was included in the award out of which the accord and satisfaction grew, the question is properly left to the jury.[110]

ACCORDANT. Agreeing; concurring. The word is abbreviated "Acc." and "Accord."[1]

ACCOUCHEMENT. Delivery in childbed; parturition.[2]

ACCOUNT. See Accounts and Accounting.

ACCOUNTABLE. Subject to pay; responsible; liable for.[3]

100. Cheeves *v.* Danielly, 74 Ga. 712.

101. Grumley *v.* Webb, 48 Mo. 562.

102. Dana *v.* Taylor, 150 Mass. 25, 22 N. E. 65.

103. Carter *v.* Wilson, 19 N. C. 276.

104. Bond *v.* McNider, 25 N. C. 440.

105. Bruce *v.* Bruce, 4 Dana (Ky.) 530.

106. Thus, in Jenkins *v.* Hopkins, 9 Pick. (Mass.) 543, it was held that the lapse of twenty years after damages sustained by breach of a covenant against encumbrances on land is *prima facie* sufficient to support a plea of accord and satisfaction to an action on the covenant, but the lapse of eleven years after breach of contract without calling for payment is not sufficient evidence of accord and satisfaction. Austin *v.* Moore, 7 Metc. (Mass.) 116. See also Siboni *v.* Kirkman, 1 M. & W. 418, in which it was held that the lapse of twenty years from the time of making a contract to be performed in the future is not of itself evidence of a new contract alleged to have been performed and pleaded as an accord and satisfaction of the original contract; that such new contract must be proved specifically.

107. *Colorado.*— Gibbs *v.* Wall, 10 Colo. 153, 14 Pac. 216.

Florida.— Sanford *v.* Abrams, 24 Fla. 181.

Minnesota.— Washburn *v.* Winslow, 16 Minn. 33.

Missouri.— Helling *v.* United Order of Honor, 29 Mo. App. 309.

New York.— Logan *v.* Davidson, 18 N. Y. App. Div. 353, 45 N. Y. Suppl. 961.

108. Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145; Stone *v.* Miller, 16 Pa. St. 450. See also Shewell *v.* Meredith, 3 Penr. & W. (Pa.) 13; Greenwood *v.* Foley, 22 U. C. C. P. 352.

109. Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145.

110. Madden *v.* Blain, 66 Ga. 49.

1. Burrill L. Dict.

Frequently used in the reports to denote the accordance or agreement between one adjudged case and another in establishing or confirming the same doctrine. Burrill L. Dict. And sometimes the accordance of opinion of judges in the same case, as in the expressions "Holt, C. J., *accordant*," "Powys, J., *accord*." Clerk *v.* Withers, 6 Mod. 290, 298.

2. Century Dict.

3. Furber *v.* Caverly, 42 N. H. 74, 76; Breton *v.* Mockett, 9 Ch. D. 95.

ACCOUNTABLE RECEIPT. A written acknowledgment of the receipt, by the maker thereof, of money or other personal property, coupled with a promise or obligation to account for or pay to some person the whole or some part thereof.[4] (Accountable Receipt, Forgery of, see FORGERY.)

ACCOUNTANT. One whose vocation or function it is to keep or adjust accounts;[5] also a person who renders an account in a particular case.[6]

ACCOUNTANT-GENERAL. An officer in the court of chancery, appointed by act of parliament[7] to receive all money lodged in court, and to place the same in the Bank of England and withdraw it by order.[8]

ACCOUNT-BOOK. A book kept by a merchant, trader, mechanic, or other person, in which from time to time are entered the transactions of his trade or business.[9]

ACCOUNTING. See ACCOUNTS AND ACCOUNTING.

ACCOUNTING OFFICER. An officer who may lawfully pass upon and allow a claim against a municipal corporation, upon the authority of which allowance the comptroller may issue his warrant upon the treasurer.[10]

ACCOUNT RENDER. See ACCOUNTS AND ACCOUNTING.

4. State *v.* Riebe, 27 Minn. 315, 7 N. W. 262; Clark *v.* Newsam, 1 Exch. 131, 138. See also Com. *v.* Lawless, 101 Mass. 32, where the instrument which defendant was charged with forging was not an accountable receipt, since it did not acknowledge that anything had been received which was to be accounted for.

Such receipt may be in legal effect, though not in form, a promissory note. State *v.* Riebe, 27 Minn. 315, 317, 7 N. W. 262.

5. Abbott L. Dict.

6. Burrill L. Dict.

7. 12 Geo. I, c. 32.

8. Jacob L. Dict.

This officer has been superseded, under 35 & 36 Vict. c. 44, by an officer called the paymaster-general of England. Brown L. Dict.

9. Bouvier L. Dict.

10. Hauck *v.* State, 45 Ohio St. 439, 443, construing Ohio Rev. Stat. § 7075.

ACCOUNTS AND ACCOUNTING

By John Lehman

CROSS-REFERENCES

For Abatement of Actions for Accounting, see ABATEMENT AND REVIVAL.
Accounting between:
Joint Tenants, see JOINT TENANCY.
Landlord and Tenant, see LANDLORD AND TENANT.
Master and Servant, see MASTER AND SERVANT.
Partners, see PARTNERSHIP.
Persons Engaged in Joint Adventures, see JOINT ADVENTURES.
Tenants in Common, see TENANCY IN COMMON.
Accounting by:
Agents, see ATTORNEY AND CLIENT; CORPORATIONS; FACTORS AND BROKERS; PRINCIPAL AND AGENT.
Assignees, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY.
Auctioneers, see AUCTIONS AND AUCTIONEERS.
Corporations, see BUILDING AND LOAN SOCIETIES; CORPORATIONS and the particular corporation titles.
Guardians, see INFANTS; INSANE PERSONS.
Mortgages, see CHATTEL MORTGAGES; MORTGAGES.
Officers, see CORPORATIONS; OFFICERS.
Personal Representatives, see EXECUTORS AND ADMINISTRATORS.
Pledgees, see PLEDGES.
Receivers, see RECEIVERS.
Trustees, see TRUSTS.

For Accounting for Profits and Royalties, see COPYRIGHT; PATENTS; TRADE-MARKS AND TRADE-NAMES.
Accounting upon Redemption, see EXECUTIONS; MORTGAGES.
Accounts as Evidence, see EVIDENCE.
Alteration of Accounts, see ALTERATIONS OF INSTRUMENTS.
Annexation of Accounts to Pleadings, see PLEADING.
Assignment of Accounts, see ASSIGNMENTS.
Bills of Particulars in Actions Involving Accounts, see PLEADING.
Inspection of Accounts, see DISCOVERY.
Interest on Accounts, see INTEREST.
Payment or Part Payment of Accounts, see PAYMENT.
Reference of Proceedings Involving Accounts, see REFERENCES.
See also ACCORD AND SATISFACTION; COMPOSITIONS WITH CREDITORS; COMPROMISE AND SETTLEMENT; RELEASE.

I. TERMINOLOGY.

A. Account. An account is, strictly, no more than a list or catalogue of items, whether of debits or credits;[1] an exhibit of charges and credits growing out of mutual dealings, in such form as to facilitate the determination of the balance due by simple calculation, though also used to indicate the demand or right of action for the balance which appears to be due upon the statement of the items.[2] While it is said that the term has no very clearly defined legal meaning,[3] the primary idea of account, *computatio*, is some matter of debt and credit, and it implies that one is responsible to another on the score either of contract or of some fiduciary relation of a public or private nature, created by law or otherwise.[4] It is not necessarily restricted, however, to several distinct items,[5] nor is it the less an account that all the items of charge are by one person against another,

1. Rensselaer Glass Factory Co. *v.* Reid, 5 Cow. (N. Y.) 587.

A detailed statement of items of debt and credit arising out of contract. Furgeon *v.* Cote, 88 Me. 108, 33 Atl. 787.

Entry of debits and credits in a book or upon paper, of things bought and sold or services performed, with date and prices or value. Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313.

2. Abbott L. Dict.

"Balance" distinguished.—A balance is but the conclusion or result of the debit and credit sides of the account. McWilliams *v.* Allan, 45 Mo. 573.

"Bank account" applies to the statement of amounts deposited in and drawn out of a bank, which is kept in duplicate, one in the depositor's bank-book and the other in the books of the bank. Bouvier L. Dict.

3. Watson *v.* Penn, 108 Ind. 21, 8 N. E. 636.

4. *Indiana.*— Watson *v.* Penn, 108 Ind. 21, 8 N. E. 636, holding that rents accruing from and issuing out of real estate are in the nature of real chattels and cannot be assimilated to or accurately described as accounts until they have accrued or become due; Nelson *v.* Posey County, 105 Ind. 287, 4 N. E. 703.

Massachusetts.— Whitwell *v.* Willard, 1 Metc. (Mass.) 216.

Missouri.— McWilliams *v.* Allan, 45 Mo. 573.

New Hampshire.— Gale *v.* Drake, 51 N. H. 78, 84, holding that a bequest of "all my accounts" does not include a savings-bank account.

New York.— People *v.* Peck, 57 How. Pr. (N. Y.) 315, wherein it is held that goods sold and delivered and work and labor performed are matters of account, whether their value is fixed by an agreement, written or oral, or is to be ascertained by proof.

Wisconsin.— Stringham *v.* Winnebago County, 24 Wis. 594, holding that the term "account" cannot include a claim to have taxes on land refunded on the ground that they were excessive through the wrongful and illegal conduct of the assessor.

"Concerns" and "accounts" — Mercantile import.— Where a party agreed in writing "to account with the said B., and to pay to him or order any balance which may eventually be due on settling my concerns and accounts," etc., it was held that the words "concerns" and "accounts" were mercantile terms and had an appropriate technical import; that, the subject-matter in this case in reference to which they were used being merchandise on consignment, they meant in this instance nothing more or less than the ordinary incident of the sale of the consigned goods, and could not be perverted so as to include any other right, interest, or duty. Bruce *v.* Burdet, 1 J. J. Marsh. (Ky.) 80, 81.

5. Cave *v.* Burns, 6 Ala. 780; Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313; Hunter *v.* Anderson, 1 Heisk. (Tenn.) 1.

instead of being a statement of mutual demands of debit and credit, provided the charges arise out of contract, express or implied, or from some duty imposed by law.[6]

B. Mutual Accounts. Mutual accounts are such as consist of a reciprocity of dealing between the parties and do not embrace those having items on one side only, though made up of debits and credits.[7] But the account may be kept by one person against himself, and at the same time against another, and be a mutual account in the sense of the legal expression.[8]

C. Merchants' Accounts. This term means accounts between merchant and merchant concerning the trade of merchants or items of merchandise.[9]

D. Open Account. An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions;[10] also one in which some item in the contract is left open and undetermined by the parties,[11] in which sense it may exist whether there be but one item or many;[12] but if a single claim or contract is certain and fixed in all its terms it cannot be said to be an open account.[13]

E. Account Current. An account current is an open or running account between two or more parties,[14] or an account which contains items between the parties from which the balance due to one of them is or can be ascertained,[15] from which it follows that such an account comes under the terms of an open account in so far as it is running, unsettled, or unclosed.[16]

F. Account Rendered. An account rendered is one which is drawn up in form and delivered by the creditor to the debtor as an exhibition of the former's demand.[17]

6. Nelson *v.* Posey County, 105 Ind. 287, 4 N. E. 703.

7. *Alabama.*— Wilson *v.* Calvert, 18 Ala. 274; Todd *v.* Todd, 15 Ala. 743.

Arkansas.— McNeil *v.* Garland, 27 Ark. 343.

California.— Adams *v.* Patterson, 35 Cal. 122; Fraylor *v.* Sonora Min. Co., 17 Cal. 594; Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344.

Indiana.— Prenatt *v.* Runyon, 12 Ind. 174.

Maine.— Dyer *v.* Walker, 51 Me. 104; Theobald *v.* Stinson, 38 Me. 149.

Massachusetts.— Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

Michigan.—Nash *v.* Burchard, 87 Mich. 85, 49 N. W. 492.

New York.— Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496; Peck *v.* New York, etc., U. S. Mail Steamship Co., 5 Bosw. (N. Y.) 226.

Pennsylvania.—Lowber *v.* Smith, 7 Pa. St. 381; Ingram *v.* Sherard, 17 Serg. & R. (Pa.) 347.

South Carolina.— Turnbull *v.* Strohecker, 4 McCord (S. C.) 210.

England.— Phillips *v.* Phillips, 9 Hare, 471; Cotes *v.* Harris, Buller N. P. 149; Catling *v.* Skoulding, 6 T. R. 189; Cottam *v.* Partridge, 4 M. & G. 271.

The balance only is the debt due in the case of mutual accounts. Dee *v.* Morgan, 10 Hawaii 651; Kingsley *v.* Delano, 169 Mass. 285, 47 N. E. 1013; Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496.

8. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352. 880.

9. Fox *v.* Fisk, 6 How. (Miss.) 328. This is in connection with provisions in statutes of limitations excepting such accounts. See LIMITATIONS OF ACTIONS; also *supra*, I, B.

10. Tucker *v.* Quimby, 37 Iowa 17.

Form not conclusive.— Whether an account as a whole is one and the same transaction will depend upon the facts rather than the form. If it is all one transaction in fact, it should be so regarded, although for convenience or taste it is stated with one or more balances. Lamb *v.* Hanneman, 40 Iowa 41.

11. Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672; Gayle *v.* Johnston, 72 Ala. 254, 47 Am. Rep. 405; Battle *v.* Reid, 68 Ala. 149; Mims *v.* Sturtevant, 18 Ala. 359; Sheppard *v.* Wilkins, 1 Ala. 62.

12. See cases cited *supra*, note 11.

13. Bradford *v.* Barclay, 39 Ala. 33; Carville *v.* Reynolds, 9 Ala. 969; Caruthers *v.* Mardis, 3 Ala. 599; Maury *v.* Mason, 8 Port. (Ala.) 211.

14. Edwards *v.* Hoeffinghoff, 38 Fed. 635; Bouvier L. Dict.

15. Wilson *v.* Calvert, 18 Ala. 274.

16. Not open account current when items have been drawn up and paid. Lancey *v.* Maine Cent. R. Co., 72 Me. 34.

When an account is stated it ceases to be an account current. Fox *v.* Fisk, 6 How. (Miss.) 328; Davis *v.* Tiernan, 2 How. (Miss.) 786. And an account is no longer open when a definite amount is admitted. Drinkwater *v.* Holliday, 11 Ala. 134; Webber *v.* Tivill, 2 Saund. 124. As to the effect of adjusting balances and continuing the accounts with new items see LIMITATIONS OF ACTIONS; and as to extinguishment by execution of note see NOVATION; PAYMENT.

17. Abbott L. Dict.

G. Account Stated. An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions.[18]

H. Settled Account. A settled account is one the balance of which, having been stated, is paid;[19] though it has been said that the terms "stated" and "settled" accounts are equivalent expressions.[20]

I. First, Partial, and Final Account. A "partial,"[21] "first," or "final" account refers to the number or completeness of accounts presented to a court for confirmation.[22]

J. Accounting. Accounting is the rendering or delivering a formal statement of one's dealings.[23]

K. Book-Debt or Book-Account. A statutory remedy provided in some states for the collection of a balance due upon an account.[24]

II. ACCOUNTING.

A. Manner of Accounting. At common law there were two ways by which one might be called on to render an account. One was to bring him to account before the party himself who was entitled to the accounting, or before auditors assigned by himself; the other was by the original writ of account summoning him into court to make his account there.[25] To these may be added now a suit in equity for an account, in a proper case.[26]

B. Account Stated — 1. NATURE AND ELEMENTS — a. In General. In general terms, where an account is rendered by one person to another, showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the person against whom the balance appears, or where parties having previous transactions agree upon a definite balance as due from one to the other, this will constitute an account stated.[27]

18. Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435; Hendrix *v.* Kirkpatrick, 48 Nebr. 670, 67 N. W. 759; McKinster *v.* Hitchcock, 19 Nebr. 100, 26 N. W. 705; Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411; Lockwood *v.* Thorne, 18 N. Y. 285. See *infra*, II, B, 1.

19. Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173.

20. Liscomb *v.* Agate, 67 Hun (N. Y.) 388, 22 N. Y. Suppl. 126; Gibson *v.* Sumner, 6 Vt. 163.

The word "settled" has been held to have an established legal meaning, implying the mutual adjustment of accounts between different parties, and an agreement upon the balance. Kronenberger *v.* Binz, 56 Mo. 121; Baxter *v.* State, 9 Wis. 38; Murray *v.* Moffat, 19 N. Brunsw. 481.

21. Leslie's Appeal, 63 Pa. St. 355, holding that a partial account implies *ipso facto* that nothing is settled by it but those matters constituting the items in question in the statement itself. See also EXECUTORS AND ADMINISTRATORS.

22. Anderson L. Dict.

23. Abbott L. Dict. See also *infra*, II, A.

24. Abbott L. Dict. See also *infra*, III, I.

Referring to manner of proof.— The term "book-debt" also refers to the particular matters which are the subject of book-account, the evidence of which on the part of plaintiff consists of entries in the original book. Hamill *v.* O'Donnell, 2 Miles (Pa.) 101.

25. If a person himself took the account of his receiver or bailiff, who was found in arrears, he had no further remedy but an action of debt for these arrears; if the account was passed before auditors assigned, he might have his action of debt under the Statute of Westminster II, c. 11; and the accountant, if falsely charged, might have his writ of ex parti talis to re-examine the account in the exchequer as directed by that act. 3 Reeves' Hist. Eng. L. 276.

26. See *infra*, II, E.

27. *Alabama.*— Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93; Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Burns *v.* Campbell, 71 Ala. 271; Ware *v.* Dudley, 16 Ala. 742; Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

Arkansas.— Thurmond *v.* Sanders, 21 Ark. 255.

California.— Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Connecticut.— Zacarino *v.* Pallotti, 49 Conn. 36.

Maine.— McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

Mississippi.— Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432; Stebbins *v.* Niles, 25 Miss. 267; Fox *v.* Fisk, 6 How. (Miss.) 328; Davis *v.* Tiernan, 2 How. (Miss.) 786.

b. Nature of Account Subject to Doctrine. The doctrine of account stated is said to have been founded originally on the practice of merchants,[28] and not to have applied to a single sum under an express contract, but only to cases where an account had been stated with reference to former transactions.[29] And while the rule is retained that, in order to constitute an account stated, there must have been some anterior transaction,[30] the scope of the doctrine has been extended in other respects so as to embrace an account with items on one side only, or consisting of but a single item and where there are no mutual dealings,[31] and when the transaction has no relation to trade.[32]

c. Relation of Debtor and Creditor. To make a stated account there must be two parties, a debtor and a creditor.[33]

d. Subsisting Debt — (1) *In General.* In order to make a stated account, the admission of indebtedness must refer to a past transaction or subsisting debt.[34] It does not arise by reason of the original transaction alone, which itself creates the debt,[35] notwithstanding the proposition, as often laid down, that an admission

Nebraska.— Jorgenson *v.* Kingsley, (Nebr. 1900) 82 N. W. 104.

New York.— Volkening *v.* De Graaf, 81 N. Y. 268; Beach *v.* Kidder, 8 N. Y. Suppl. 587; Vernon *v.* Simmons, 15 Daly (N. Y.) 399, 7 N. Y. Suppl. 649; Lawson *v.* Douglass, 17 N. Y. Suppl. 4, 43 N. Y. St. 356; Lockwood *v.* Thorne, 12 Barb. (N. Y.) 487; Pierce *v.* Delamater, 3 How. Pr. (N. Y.) 162.

Oregon.— Holmes *v.* Page, 19 Oreg. 232, 23 Pac. 961; Truman *v.* Owens, 17 Oreg. 523, 21 Pac. 665.

Tennessee.— Bussey *v.* Gant, 10 Humphr. (Tenn.) 238.

Texas.— Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666.

United States.—Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093.

England.— Lane *v.* Hill, 18 Q. B. 252; Knowles *v.* Michel, 13 East 249; Porter *v.* Cooper, 1 C. M. & R. 387.

Canada.— Hea *v.* Jones, 7 N. Brunsw. 646.

Accord and satisfaction distinguished.— In Stevens *v.* Barss, 74 Hun (N. Y.) 388, 26 N. Y. Suppl. 461, two parties had an accounting upon which there appeared to be due from one to the other $1,125, and the latter agreed to take $1,000, for which notes were executed and afterward paid. It was held that while, upon the accounting, one of the parties said something which might have indicated a claim for interest by him, yet, as there was no real dispute or controversy, the transaction was not an accord and satisfaction, but a stated account.

28. Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780.

29. Wharton *v.* Cain, 50 Ala. 408.

30. See *infra*, II, B, 1, d.

31. *Alabama.*— Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Wharton *v.* Cain, 50 Ala. 408.

Missouri.— Rutledge *v.* Moore, 9 Mo. 537.

New Jersey.—Weigel *v.* Hartman Steel Co., 51 N. J. L. 446, 20 Atl. 67.

New York.— Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Kock *v.* Bonitz, 4 Daly (N. Y.) 117.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

Wisconsin.— Cobb *v.* Arundell, 26 Wis. 553.

United States.— Martin *v.* Acker, Blatchf. & H. Adm. 279, 16 Fed. Cas. No. 9,155.

England.—Knowles *v.* Michel, 13 East 249; Highmore *v.* Primrose, 5 M. & S. 65; Porter *v.* Cooper, 4 Tyrw. 456, 1 C. M. & R. 387; Styart *v.* Rowland, 1 Show. 215.

Same rule in other terms.— In other words, the rule is that if a fixed and certain sum is admitted to be due for which an action would lie this would be evidence to support a count upon an account stated. Porter *v.* Cooper, 4 Tyrw. 456, and see cases cited *supra*, this note.

32. Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

33. Stenton *v.* Jerome, 54 N. Y. 480; Austin *v.* Wilson, 11 N. Y. Suppl. 565; Vanbebber *v.* Plunkett, 26 Oreg. 562, 38 Pac. 707, 27 L. R. A. 811; Truman *v.* Owens, 17 Oreg. 523, 21 Pac. 665.

34. *Connecticut.*— Zacarino *v.* Pallotti, 49 Conn. 36.

Nebraska.— Jorgensen *v.* Kingsley, (Nebr. 1900) 82 N. W. 104.

New York.— Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Austin *v.* Wilson, 11 N. Y. Suppl. 565.

Oregon.— Vanbebber *v.* Plunkett, 26 Oreg. 562, 38 Pac. 707, 27 L. R. A. 811; Truman *v.* Owens, 17 Oreg. 523, 21 Pac. 665.

Pennsylvania.— Mellon *v.* Campbell, 11 Pa. St. 415.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

Washington.— Davis *v.* Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526.

England.— Hopkins *v.* Logan, 5 M. & W. 241; Clarke *v.* Webb, 2 Dowl. 671; Allen *v.* Cook, 2 Dowl. 546; Whitehead *v.* Howard, 5 Moore K. B. 105, 2 Ball & B. 372; Lemaire *v.* Elliott, 7 Jur. N. S. 1206; Lubbock *v.* Tribe, 3 M. & W. 607; Petch *v.* Lyon, 9 Q. B. 147; Wayman *v.* Hilliard, 7 Bing. 101; Baker *v.* Heard, 5 Exch. 959; Tucker *v.* Barrow, 7 B. & C. 623; French *v.* French, 2 M. & G. 644.

Canada.— Toms *v.* Sills, 29 U. C. Q. B. 497; Grant *v.* Young, 23 U. C. Q. B. 387; Kennedy *v.* Adams, 15 N. Brunsw. 162.

35. Zacarino *v.* Pallotti, 49 Conn. 36, wherein it is said that if one person agrees

of a certain sum being due in respect of a demand for which an action would lie is evidence sufficient to support an account on an account stated,[36] and a promise by an executor, made upon the supposition of a debt which in fact was not due, is not sufficient.[37] But on the other hand it is held that where there are mutual accounts and a balance is struck by the parties it is not necessary that all the debts should be *in præsenti*, or that they should be legal debts.[38]

(II) *Unliquidated Damages.* It is held that an unliquidated claim for damages cannot form the basis of an account stated.[39]

(III) *As between Original Parties.* The mere promise to pay the debt of another will not make an account stated as between the promisor and the creditor,[40] nor will the acknowledgment of a debtor, upon an order of his creditor, of the correctness of the debt, create an account stated as between the debtor and the holder of the order.[41]

e. Illegal Transactions. An illegal transaction is not sufficient to support an account stated.[42]

f. Finality of Accounting. An account may be the foundation of an account stated though it does not cover all the dealings between the parties.[43] But the rule that an account may become a stated account without including all the dealings between the parties is confined to an account on one side, and while a stated account in such a case would be evidence of the correctness of the demand on the one side, it would not be conclusive against a demand on the other side,[44] for to support a plea of a stated account so as to conclude the parties in relation to all the dealings between them, the accounting must be shown to have been

to pay another a certain amount for a chattel, this cannot be called an account stated; Truman *v.* Owens, 17 Oreg. 523, 21 Pac. 665.

36. This means "that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to a jury that plaintiff claims that sum to be due and that there are matters of account between the parties; it does not go further than that; and it is only when you come to look at the facts on which the promise was made that you are enabled to see whether it is an account stated or not." Lubbock *v.* Tribe, 3 M. & W. 607, 613.

37. Gough *v.* Findon, 7 Exch. 48.

38. Laycock *v.* Pickles, 4 B. & S. 497. See also Jugla *v.* Trouttet, 120 N. Y. 21, 23 N. E. 1066.

39. Vanbebber *v.* Plunkett, 26 Oreg. 562, 38 Pac. 707, 27 L. R. A. 811, upon the principle that to make an account stated there must be a subsisting debt.

Adjustment and part payment.— Plaintiff placed a quantity of cigars in defendant's hands, to be sold at a certain price, and not to be delivered until they had been paid for. In violation of instructions defendant sold the cigars on credit and delivered them without receiving payment. The agent afterward brought a suit in his own name against the purchaser for fraud in obtaining the goods, obtained a judgment, and settled judgment by taking the purchaser's note payable to the agent's order. After the commencement of the suit against the purchaser, and before judgment, the agent promised his principal to pay for the cigars, and afterward paid him a certain amount on account, and it was held that the nature of the claim was such that an action on account would have been plaintiff's appropriate remedy, and that when the parties met and defendant made the promise to pay, and had, in fact, paid plaintiff, the account might be regarded as adjusted; that that which before the agreement was indefinite and unsettled became settled and liquidated, and that there was sufficient to support an action upon an account stated. Mitchell *v.* Allen, 38 Conn. 188.

40. French *v.* French, 2 M. & G. 644. See *infra*, II, B, 1, h; II, B, 2, l, (II), (J).

Debt included in contract.— But where the purchaser of timber agreed, as a part of the consideration, to pay the debt of another to the vendor, and paid one half and promised to pay the other half on the following day, it was held that this would support an account stated for the half remaining unpaid. Ferguson *v.* Kerr, 5 U. C. Q. B. 261.

41. Kennedy *v.* Adams, 15 N. Brunsw. 162, where B drew upon A a written order requesting him to pay K "the amount of my account furnished," upon which, on presentment, A wrote "Correct for say $75," and it was held that there was no consideration to support an account stated.

42. See II, G, 4, f, (III), (E).

43. Graham *v.* Chubb, 39 Mich. 417; Filer *v.* Peebles, 8 N. H. 226; Pierce *v.* Delamater, 3 How. Pr. (N. Y.) 162. See *infra*, II, G, 4, b.

44. Graham *v.* Chubb, 39 Mich. 417; Pierce *v.* Delamater, 3 How. Pr. (N. Y.) 162, holding that where an account showing a balance due is rendered to the debtor, who admits the correctness of the balance, but claims to have a set-off, this is sufficient to entitle plaintiff to recover such balance in the absence of proof making out a set-off in favor of defendant.

final.[45] Hence the binding force of an account stated will not be given to the mere furnishing of an account or other transaction which was not with a view to asserting a claim, establishing a balance due, or finally adjusting the matters of account between the parties.[46]

g. Form — (I) *No Particular Form Necessary.* It is not necessary that an account should be in the form of an account current, or in any particular form, in order that it may become an account stated,[47] nor need there be any precise form of words in order to constitute the acknowledgment of debt or liability,[48] but if the account purports to be in the form of a regular account in the ordinary acceptance of the term it should be something more than a mere memorandum and should indicate that a final settlement is intended.[49]

(II) *Statement of Balance Unaccompanied by Items.* The bare statement of a balance due, if accepted, may constitute a stated account, even though the demand is not accompanied by an account of the items,[50] under the rule that if a fixed and certain sum is admitted to be due for which an action would lie, that will be evidence to support a count on an account stated.[51]

(III) *Account Including Former Balance.* Where an account rendered contains, as an item thereof, a balance of an account previously rendered, the

45. Hughes *v.* Smither, 23 N. Y. App. Div. 590, 49 N. Y. Suppl. 115; Rehill *v.* McTague, 114 Pa. St. 82, 7 Atl. 224, 60 Am. Rep. 341; Schmidt *v.* Lebby, 11 Rich. Eq. (S. C.) 329; Bussey *v.* Gant, 10 Humphr. (Tenn.) 238. See also *infra*, II, B, 2, b.

Mere furnishing of an account, therefore, will not be sufficient where the relation of the parties is such that this cannot be taken to be an accounting in itself, as between partners. Prentice *v.* Elliott, 72 Ga. 154; Burden *v.* McElmoyle, Bailey Eq. (S. C.) 375, which was a rough statement of the estimate of the condition of a copartnership prepared by one partner. See also *infra*, II, B, 3, h.

Statement by surviving partners to the administrator of a deceased partner will not constitute an account stated so as to prevent an accounting. McCarthy *v.* Wood, (Ky. 1890) 13 S. W. 792. But see Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

Periodical settlements shown by books.— Where partnership books exhibit statements of accounts and entries of periodical settlement and partial divisions of assets, but there has been no final accounting, this will not constitute a settlement or account stated so as to preclude a revision of the accounts. Rhyne *v.* Love, 98 N. C. 486, 4 S. E. 536.

46. *Arkansas.*— Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379, mere rendition of an account.

California.— Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504, mere rendition of an account.

Illinois.— Peterson *v.* Wachowski, 86 Ill. App. 661, where the amount of profits in which the party was entitled to share could not be known at the time of the rendition of the account.

Michigan.— Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170.

Minnesota.— Scase *v.* Gillette-Herzog Mfg. Co., 55 Minn. 349, 57 N. W. 58, the acceptance of a part of profits under a contract of employment.

New York.— Harvey *v.* West-Side El. R. Co., 13 Hun (N. Y.) 392 (where the account was furnished upon request, not for the purpose of asserting a claim); Vetter *v.* Kane, 15 N. Y. St. 666; Pickard *v.* Simpson, 6 N. Y. Suppl. 93 (where only one side of an account was gone over).

Rhode Island.— Allen *v.* Woonsocket Co., 11 R. I. 288.

47. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311; Bevan *v.* Cullen, 7 Pa. St. 281.

Account without vouchers.— If a party accepts an account without vouchers and does not call for a more detailed statement this will not prevent its operation as a stated account. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

48. Tyke *v.* Cosford, 14 U. C. C. P. 64.

49. Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504; Thomlinson *v.* Earnshaw, 14 Ill. App. 593; Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093.

Prices omitted.— Where daily bills are rendered under an executory contract for the delivery of lumber without designating the prices, the retention of such bills will not be regarded as giving them the effect of accounts stated. Robson *v.* Bohn, 22 Minn. 410.

50. May *v.* Kloss, 44 Mo. 300; Hatch *v.* Von Taube, 31 Misc. (N. Y.) 468, 64 N. Y. Suppl. 393; Robbins *v.* Downey, 18 N. Y. Suppl. 100, 45 N. Y. St. 279.

Omission of items of account — Waiver.— Although an account rendered is wanting in many particulars, as in the statement of weights, quantities, and prices, important in determining the accuracy of the account presented, the party to whom it is presented may waive these particulars, and if he asks for no information upon these matters in which the papers are not on their face defective it will not change the character of the stated account. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

51. Robbins *v.* Downey, 18 N. Y. Suppl. 100, 45 N. Y. St. 279.

former may become an account stated without giving the items from which such balance arose.[52]

(IV) *Writing.* It is not necessary that the transaction shown in support of an account stated should be in writing,[53] and it is no objection that a part thereof is in writing and a part oral.[54] Nor is it necessary, in order to make an account stated, that the assent or an admission of the party should be in writing or signed.[55]

h. Promise within Statute of Frauds. On the other hand, when the promise or admission is one which under the statute of frauds must be in writing, the statute operates notwithstanding the admission or promise is set up as a stated account.[56] But it has been held that though the original transaction is void under the statute of frauds, if the whole consideration is executed, a subsequent admission of indebtedness will make an account stated.[57]

i. Recovery of Purchase-Money against Recital in Deed. Where the receipt of purchase-money is admitted in a deed under seal, such purchase-money cannot be proved in an action therefor by an admission inconsistent therewith as an account stated.[58]

j. Balance Struck on Specialty— (I) *In General.* When a debt is secured by deed and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the balance and promises to pay it, it is held on the one hand that an action will not lie on an *insimul computassent*, but must be brought upon the security.[59] But on the other hand it is held that if subsequently to and independently of the deed there is an admission of indebtedness the amount may be recovered upon an account stated,[60] and where the

52. Dows *v.* Durfee, 10 Barb. (N. Y.) 213; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

53. Macfarlane *v.* Sumner, 1 Hawaii 364; Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300; Gross *v.* Bricker, 18 U. C. Q. B. 410; Pinchon *v.* Chilcot, 3 C. & P. 236; Knowles *v.* Michel, 13 East 249. *Contra,* Wood *v.* Gault, 2 Md. Ch. 433; Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333, holding that a replication intending to set up an account stated to a plea of set-off is bad if it does not allege that the account was in writing; Burk *v.* Brown, 2 Atk. 397. This, however, is not necessarily inconsistent with the rule stated in the text, but is a rule applied in equity where the accounting is resisted upon the ground that the party who was under legal obligation to render an account had before accounted. In such a case, oral statements not amounting to such a final accounting as the plaintiff was entitled to, the rule is applied that to amount to a stated account the account rendered should be in writing. Buel *v.* Selz, 5 Ill. App. 116.

54. Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300.

55. *Connecticut.*— Mitchell *v.* Allen, 38 Conn. 188.

Louisiana.— Darby *v.* Lastrapes, 28 La. Ann. 605; James *v.* Fellowes, 20 La. Ann. 116; Freeman *v.* Howell, 4 La. Ann. 196, 50 Am. Dec. 561.

Maryland.— Wood *v.* Gault, 2 Md. Ch. 433.

Minnesota.— Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397.

New Jersey.— Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York.— Lockwood *v.* Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Heartt *v.* Corning, 3 Paige (N. Y.) 566.

United States.— York *v.* Wistar, 16 Haz. Reg. (Pa.) 153, 30 Fed. Cas. No. 18,141.

England.— Willis *v.* Jernegan, 2 Atk. 251.

See also *infra,* II, B, 2, c.

56. Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791 (as to the admission of liability for the debt of a third person); Falmouth *v.* Thomas, 1 C. & M. 89, 3 Tyrw. 26 (holding that in an action on a stated account, under a plea that before the taking of an account there was a verbal agreement for the sale of certain crops growing on plaintiff's land, etc., that the money so to be paid for the crops, etc., was that concerning which the account was stated, and that there was no agreement in writing, the plaintiff could not recover because the contract came within the statute of frauds).

57. Cocking *v.* Ward, 1 C. B. 858, wherein there was a contract for the transfer of a leasehold interest in land by parol, void by the statute of frauds, but defendant was placed in possession and given full enjoyment of that for which he had bargained, and thereafter admitted that he owed the consideration-money to plaintiff and promised to pay. To the same effect, Knowles *v.* Michel, 13 East 249.

58. Sparling *v.* Savage, 25 U. C. Q. B. 259.

59. Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Gilson *v.* Stewart, 7 Watts (Pa.) 100; Middleditch *v.* Ellis, 2 Exch. 623.

60. Gross *v.* Bricker, 18 U. C. Q. B. 410.

In Foster *v.* Allanson, 2 T. R. 479, articles of partnership under seal were entered into between the parties, containing a covenant to account annually and make a final settlement at the end of the partnership, and upon a

account consists of items, part of which are recoverable in covenant and the residue are not recoverable in such action, and a general balance is struck, assumpsit on an account stated may be brought for the recovery of the whole balance.[61] Where the instrument under seal is not a contract to pay money, but is merely a release of mutual demands except such as are enumerated in the instrument, a final balance struck between the parties will support an account on an *insimul computassent*.[62]

(II) *Independent Indebtedness.* Where one induces another to enter into a lease by promise to contribute a certain amount of money for repairs, and afterward refuses to carry out such agreement, he may be liable on an account stated upon admissions made by him that he owed the amount, upon the ground that the matter of such admissions is distinct from the lease.[63]

2. Striking Balance and Admission of Correctness — a. In General. To constitute an account stated, the correctness of the balance must receive the assent of both parties. A certain fixed sum must be admitted by the one party to be due to the other, and where there are mutual or cross demands there must be an adjustment, a balance struck, and an assent to the correctness of the balance.[64] A

dissolution the parties accounted and struck a balance which was in favor of plaintiff and included items not connected with the partnership, which defendant promised to pay. It was held by the court that assumpsit lay on such promise. Mr. Justice Buller gave it as his opinion that the action might have been maintained though the account had included no other items than those of the partnership; but in Gibson *v.* Stewart, 7 Watts (Pa.) 100, this was said to carry the principle beyond any judicial determination in which the question was raised. In another case, however (Moravia *v.* Lery, 2 T. R. 483, note *a*) the same learned judge (Buller) distinctly held that upon the balance struck under such articles of partnership the express promise to pay the balance was sufficient ground for the action. In New York (Cartledge *v.* West, 5 Hill (N. Y.) 488) it was held that a landlord could recover under a count upon an *insimul computassent*, though the accounting concerned rents secured by deed; but the opinion in this case was based upon the statement of Mr. Justice Buller first above referred to. In Danforth, etc., Township Road Co., 12 Johns. (N. Y.) 227, *assumpsit* on an implied promise to pay a balance due under a covenant to pay money, a part of which had been paid, was sustained, but apparently upon the ground that no objection was made on the argument to the form of the action, in which case the court considered that the covenant was set out only as inducement, and relied upon Moravia *v.* Lery, 2 T. R. 483, note *a*.

61. State *v.* Jennings, 10 Ark. 428; Spangler *v.* Springer, 22 Pa. St. 454; Gilson *v.* Stewart, 7 Watts (Pa.) 100; Foster *v.* Allanson, 2 T. R. 479.

62. Hoyt *v.* Wilkinson, 10 Pick. (Mass.) 31, wherein the parties drew up an account and executed an instrument under seal, in which they agreed that the paper contained every claim that either had against the other, and that when the account should be balanced all other securities against each other should be canceled.

63. Seagoe *v.* Dean, 3 C. & P. 170.

64. *Alabama.*— Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Ryan *v.* Gross, 48 Ala. 370; Watson *v.* Byers, 6 Ala. 393.

Arkansas.— Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379.

Delaware.— Shea *v.* Kerr, 1 Pennew. (Del.) 198, 40 Atl. 241.

Georgia.— Prentice *v.* Elliott, 72 Ga. 154.

Hawaii.— Macfarlane *v.* Sumner, 1 Hawaii 364.

Illinois.— Peterson *v.* Wachowski, 86 Ill. App. 661.

Kansas.— Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; Treadway *v.* Ryan, 3 Kan. 437.

Louisiana.— Blanc *v.* Forgay, 5 La. Ann. 695.

Michigan.— McColl *v.* Jackson Iron Co., 98 Mich. 482, 57 N. W. 578; Tioga Mfg. Co. *v.* Stimson, 48 Mich. 213, 12 N. W. 173; Stevens *v.* Tuller, 4 Mich. 387.

Mississippi.— Reinhardt *v.* Hines, 51 Miss. 344; Miller *v.* Northern Bank, 28 Miss. 81; Stebbins *v.* Niles, 25 Miss. 267.

Missouri.— Cape Girardeau, etc., R. Co. *v.* Kimmel, 58 Mo. 83.

New Jersey.— Weigel *v.* Hartman Steel Co., 51 N. J. L. 446, 20 Atl. 67.

New York.— Eames Vacuum Brake Co. *v.* Prosser, 157 N. Y. 289, 51 N. E. 986; Stenton *v.* Jerome, 54 N. Y. 480; Lockwood *v.* Thorne, 18 N. Y. 285; Tinney *v.* Pierrepont, 18 N. Y. App. Div. 627, 45 N. Y. Suppl. 977; Stephens *v.* Ayers, 57 Hun (N. Y.) 51, 10 N. Y. Suppl. 502; Murphy *v.* Ross, 26 N. Y. Wkly. Dig. 124; Smith *v.* Harris, 26 N. Y. Wkly. Dig. 323; Pickard *v.* Simpson, 6 N. Y. Suppl. 93.

Rhode Island.— Allen *v.* Woonsocket Co., 11 R. I. 288.

Tennessee.— Bussey *v.* Gant, 10 Humphr. (Tenn.) 238.

Virginia.— Robertson *v.* Wright, 17 Gratt. (Va.) 534.

England.— Hughes *v.* Thorpe, 5 M. & W. 656; Teall *v.* Auty, 4 Moore K. B. 542; Bernasconi *v.* Anderson, M. & M. 183; Lane *v.*

mere admission of something indefinite due has been held to be insufficient even for nominal damages.[65] The exact amount need not necessarily be mentioned, however,[66] and when there is an admission of the items composing the mutual demands it is not necessary that one side of the account should be actually subtracted from the other. It is sufficient if the balance becomes a mere matter of subtraction.[67] But a mere request that a correct account be rendered is not an admission that the account will, when rendered, be correct,[68] and the admission of the correctness of one side only of the account does not make a stated account.[69]

b. Rendition of Account — (I) *In General.* The rendering of an account is not of itself sufficient to make an account stated; after such rendition it may be impeached or corrected within a reasonable time;[70] but under the rule requiring an examination of the account, and ascertainment of the balance and an admission of its correctness, some statement of the account must be rendered,[71] and an account-book,[72] or the mere balancing of an account in a book of accounts, will not of itself constitute an account stated,[73] though it is otherwise where the parties go over the account and assent to its correctness.[74] An account which fails to contain debits and credits and a balance, sent with a letter which indicates an unsettled controversy between the parties, cannot be construed into an account stated.[75]

(II) *Effect upon Party Rendering* — (A) *In General.* While the rule that silence without objection within a reasonable time after the rendition of an account may supply the *prima facie* evidence of assent necessary to bind one as upon an account stated is usually laid down in comprehensive terms which would

Hill, 18 Q. B. 252; Kirton *v.* Wood, 1 Mood. & R. 253.

Canada.— Harley *v.* Goodfellow, 12 N. Brunsw. 335.

Memorandum not affecting admission.— Where there is an unqualified acknowledgment of indebtedness to plaintiff's assignor, an added memorandum that the account is subject to an attachment in the suit of a third person does not affect the acknowledgment when the attachment had been discharged at the time the plaintiff's suit was brought. Halliburton *v.* Clapp, 1 N. Y. App. Div. 71, 36 N. Y. Suppl. 1041.

65. Kirton *v.* Wood, 1 Mood. & R. 253. To the same effect is Lane *v.* Hill, 18 Q. B. 252.

66. Exact amount need not be mentioned in admission.— The actual amount assented to need not be expressly stated. A promise to pay "the bill," "that bill," "the balance," and the like, each party knowing exactly what is referred to, implies the sum as certainly as if spoken. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217. See also *infra*, II, B, 7, b, (III), (A).

Certain amount less deductions.— An instrument reciting a settlement and an agreement that plaintiff is to receive a specified amount after certain deductions is sufficient to support an action on an account stated. Millikin *v.* Ferguson, 56 Mich. 189, 22 N. W. 278.

67. Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Treadway *v.* Ryan, 3 Kan. 437; Jaques *v.* Hulit, 16 N. J. L. 38.

68. Shannon *v.* Starkey, 5 Phila. (Pa.) 153, 20 Leg. Int. (Pa.) 141.

69. Harley *v.* Goodfellow, 12 N. Brunsw. 335.

70. Rowland *v.* Donovan, 16 Mo. App. 554; Guernsey *v.* Rexford, 63 N. Y. 631; Champion *v.* Joslyn, 44 N. Y. 653; Rehill *v.* McTague, 114 Pa. St. 82, 7 Atl. 224, 60 Am. Rep. 341; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Charlotte Oil, etc., Co. *v.* Hartog, 85 Fed. 150, 42 U. S. App. 716, 29 C. C. A. 56.

71. Where an account is closed by reason of the cessation of dealings between parties, it is not thereby made a stated account. Bevan *v.* Cullen, 7 Pa. St. 281; Mandeville *v.* Wilson, 5 Cranch (U. S.) 15, 3 L. ed. 23.

Death of a party to an account will not create an account stated. Bass *v.* Bass, 8 Pick. (Mass.) 187.

72. Bee *v.* Tierney, 58 Ill. App. 552; Spellman *v.* Muehlfeld, 48 N. Y. App. Div. 265, 62 N. Y. Suppl. 746.

73. Nostrand *v.* Ditmis, 127 N. Y. 355, 28 N. E. 27; Spellman *v.* Muehlfeld, 48 N. Y. App. Div. 265, 62 N. Y. Suppl. 746; Loeb *v.* Keyes, 86 Hun (N. Y.) 353, 33 N. Y. Suppl. 491; Rhyne *v.* Love, 98 N. C. 486, 4 S. E. 536; Gibson *v.* Sumner, 6 Vt. 163.

Transfer of account in book.— Where the balance of an account against a firm was transferred in a ledger to the private account of one of the members of the firm, without knowledge on the part of any of the members of the firm, it was held that such balance could be recharged to the firm, as there was no accounting such as would support a new promise, which is the foundation of liability on an account stated. Barker *v.* Blake, 11 Mass. 16.

74. Tennessee Brewing Co. *v.* Hendricks, 77 Miss. 491, 27 So. 526; Gibson *v.* Sumner, 6 Vt. 163.

75. Missouri Pac. R. Co. *v.* B. F. Coombs, etc., Commission Co., 71 Mo. App. 299. See II, B, 1, f.

seem to include both parties,[76] it has been held that it does not apply to the party who furnishes the account; that as to him the account is open to explanation for any omission or mistake,[77] though it is regarded as *prima facie* correct, casting upon him the burden of showing it to be otherwise;[78] and where there was no express agreement to treat an account rendered as a final settlement of the transactions between the parties, and on the trial the party who received it did not treat it as conclusive upon himself, it was held that he could not thereafter insist that his failure to object to it made it an account stated where the person who rendered it made no such claim.[79] For some purposes, however, and to a certain extent, it is held that the rendition of an account may conclude the parties rendering it whether an account stated results from such rendition or not, as in the case of consolidating different items of debt and applying credits in part extinguishment of the account, in which case the party is precluded from separating the items.[80]

(B) *Unascertained Value of Services.* The rendition of a bill for services, the value of which has not been ascertained by the agreement of the parties, cannot be converted into an account stated by such rendition so as to preclude plaintiff in an action for such services from recovering a greater sum than that fixed in the bill rendered as the value thereof,[81] and this notwithstanding the bill is retained

76. See *infra*, II, B, 2, l, (II).

Assent implied from other circumstances.— In Spellman *v.* Muehlfeld, 166 N. Y. 245, 59 N. E. 817, it was held that the fact that the book-keeper of a corporation made entries on the corporation ledger in the account of the president of the corporation, some of the entries having been made by the direction of the president and others always being open to his inspection, and the further fact that the president of the corporation subsequently made a written statement in proceedings for the dissolution of the corporation that a sum corresponding with the balance struck on the ledger account was due from him to the corporation, is sufficient evidence from which the jury may find a stated account and that the court could not decide as a matter of law that such circumstances are not sufficient for that purpose. This was upon the principle that an express assent is not necessary to make a stated account.

77. Schettler *v.* Smith, 34 N. Y. Super. Ct. 17.

78. Wilson *v.* Dowse, 140 Ill. 18, 29 N. E. 726; Rayburn *v.* Mason Lumber Co., 57 Mich. 273, 23 N. W. 811, wherein advances had been made according to rates of charges contained in a statement rendered; Smith *v.* Tucker, 2 E. D. Smith (N. Y.) 193; Fox *v.* Sturm, 21 Tex. 406.

Where plaintiff sent gold and drafts to defendant to be sold for currency, and defendant sold them and rendered an account showing that a certain sum was due plaintiff in currency, this is *prima facie* evidence that such sum was due plaintiff in current funds, and to excuse defendant from liability he must show that he paid the same or offered to do so, and an offer to pay in depreciated currency on demand would not excuse defendant from liability. Webster *v.* Pierce, 35 Ill. 158.

Estoppel.— In Cannon *v.* Sanford, 20 Mo. App. 590, it was held that in an action for a balance due upon a final account and settlement according to the account rendered by an attorney to his client, defendant could not set up, as an equitable defense, mistakes made by him in favor of his client where he had failed for several years after the rendition of the account to pay the balance. By his laches and negligence it was held that he was estopped.

79. Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379.

80. Marks *v.* Ballance, 113 N. C. 28, 18 S. E. 75; Hawkins *v.* Long, 74 N. C. 781; Kehl *v.* Smith, 87 Wis. 212, 58 N. W. 244. See also Dubose *v.* O'Bryan, 11 Rob. (La.) 514. But in Morris *v.* Hurst, 1 Wash. (U. S.) 433, 17 Fed. Cas. No. 9,832, plaintiff in an action in assumpsit had delivered to defendant, before bringing the action, an account wherein many years' transactions between the parties were included. Plaintiff proved only one item, to the amount of £230, and defendant attempted to meet this demand by selecting out of an account a credit to a larger amount, but without attempting to prove it, relying on the account as an admission by plaintiff. It was held that defendant could not rely on the items on the credit side without also admitting the debit side as proved by the account.

As to applications of payments generally see PAYMENT.

Note as item.— Where a note was given as a part payment of an account, and was credited on the account at less than its face, it was held that the payee was not precluded from bringing an action on the note separately from the other items of the account because he had stated the note as an item in his account. Robson *v.* McKoin, 18 La. Ann. 544.

81. Romeyn *v.* Campau, 17 Mich. 327; Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291; Allis *v.* Day, 14 Minn. 516; Stryker *v.* Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Williams *v.* Glenny, 16 N. Y. 389; Burlingame *v.* Shelmire, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 655; Harrison *v.* Ayers, 18 Hun (N. Y.) 336; Bradt *v.* Scott, 18 N. Y. Suppl. 507; Brauns *v.* Green Bay, 78 Wis. 81,

for a sufficient length of time to permit the principle of an account stated to be applied in other cases in which the nature of the claim would justify its application.[82] Even the stating of an account will not make it necessary to declare upon the account stated, but plaintiff may still recover upon the original account.[83] On the other hand it is held that the rendition of an account in such a case furnishes so strong a presumption of the real value of the services that it will absolutely conclude the party rendering it unless he shows the services to be of greater value[84] or that the first account was made in error.[85]

c. Actual Striking or Admission of Balance. Where the parties meet and go over their accounts, and strike a balance in favor of one of them, to which the other assents as correct, this is sufficient to show an account stated,[86] and the same result is brought about where the person to whom an account is rendered subsequently acknowledges the receipt of it and promises to pay it.[87] An account may become stated where the statement of dealings between two persons is made out by one of them and submitted to the other, who acquiesces in its correctness;[88] and if the acknowledgment in writing is not in fact stronger evidence of a statement of the account,[89] it is at any rate sufficient to make the account a stated one, where the other elements concur.[90]

46 N. W. 889; Nauman *v.* Zoerhlaut, 21 Wis. 466.

Settlement and part payment of liquidated claim.— Where one having a claim for work, amount of which was unliquidated and in dispute, came to an agreement with the debtor, by way of settlement, under which a certain amount was fixed as due, and a part thereof was paid, whereupon the creditor gave the debtor a receipt on account of the agreement and "for all special work done" and "as in full of all claims to date, save only fifty dollars," it was held that this constituted an account stated notwithstanding there was only a partial payment of the amount agreed upon as due. Hanley *v.* Noyes, 35 Minn. 174, 175, 28 N. W. 189.

82. Burlingame *v.* Shelmire, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 655; Harrison *v.* Ayers, 18 Hun (N. Y.) 336.

83. Cross *v.* Moore, 23 Vt. 482. But there is an intimation in Nauman *v.* Zoerhlaut, 21 Wis. 466, that one rendering an account for professional services would be bound if there is proof of acquiescence.

84. Daniels *v.* Wilber, 60 Ill. 526; Walsh *v.* Hettinger, 58 Ill. App. 619.

85. Flower's Succession, 3 La. Ann. 292, which was a claim for professional services by an attorney.

Itemized bill for work.— Where one rendered a bill for work which had been completed and afterward itemized the bill and increased it in amount without any explanation of why the bill was made larger, and without testimony on his part showing a mistake in rendering the original bill, it was held that plaintiff would be confined in his recovery to the amount of the original bill. Ayland *v.* Rice, 23 La. Ann. 75; Nicholson *v.* Pelanne, 14 La. Ann. 508; Spinrad *v.* Finelite, 6 Misc. (N. Y.) 259, 26 N. Y. Suppl. 761.

86. *Alabama.*— Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

District of Columbia.— Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382.

Michigan.— Albrecht *v.* Gies, 33 Mich. 389.

Minnesota.— Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397, holding that the fact that parties who had gone over their accounts and written out a final settlement did not make entries in their books showing the settlement or pass receipts is unimportant.

Missouri.— Silver *v.* St. Louis, etc., R. Co., 5 Mo. App. 381.

Pennsylvania.— Anderson *v.* Best, 176 Pa. St. 498, 35 Atl. 194; Darlington *v.* Taylor, 3 Grant (Pa.) 195.

Vermont.— Gibson *v.* Sumner, 6 Vt. 163.

87. Mackay *v.* Kahn, 17 N. Y. Suppl. 503, 44 N. Y. St. 286; Vernon *v.* Simmons, 15 Daly (N. Y.) 399, 7 N. Y. Suppl. 649.

88. Concord Apartment House Co. *v.* Alaska Refrigerator Co., 78 Ill. App. 682; Fitch *v.* Leitch, 11 Leigh (Va.) 471.

89. See *supra*, II, B, 1, g.

90. Acknowledgment on foot of account.— The subscription by a debtor, on the foot of an open account, of an acknowledgment of its correctness, changes the open account to an account stated. Tennessee Brewing Co. *v.* Hendricks, 77 Miss. 491, 27 So. 526.

Admission by letter.— Aylsworth *v.* Gallagher, 52 Hun (N. Y.) 610, 4 N. Y. Suppl. 853; Beach *v.* Kidder, 8 N. Y. Suppl. 587; Powell *v.* Noye, 23 Barb. (N. Y.) 184.

Audited account.— Where the section foreman of a railroad company is authorized to give laborers under his control a statement of the amount which has been ascertained to be due for services rendered, in accordance with the printed form furnished him by the company for that purpose, which statement is intended to be presented to the roadmaster, who has authority to finally audit the accounts and put them in shape for payment by the company's paymaster, the auditing of the account by the roadmaster and the acceptance of the statement by the laborer make an account stated. St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704.

d. Admission of Smaller Balance Than Claimed. Where defendant admits a debt to a smaller amount than that claimed, the admission is evidence of an account stated, even though the suit be for the larger amount.[91]

e. Admission of Garnishee. The answer of a garnishee is competent as an admission to constitute a stated account.[92]

f. Admission of Receipt of Money on Account of Bankrupt. But as there must be an admission of a subsisting debt,[93] an admission of one examined before commissioners of bankruptcy that he had received money on account of the bankrupt does not make an account stated with the assignee.[94]

g. Award — Balance Struck by Third Person by Consent. Where, for the purpose of ascertaining the correct balance of accounts between parties, they refer their accounts to a third person to strike a balance, and the balance so struck is acquiesced in by them, this will constitute a stated account,[95] and an award under a parol submission is held sufficient to support a stated account.[96] But there must be an agreement that the result is to be used as a final settlement,[97] and a mere submission to third persons to make a statement of accounts will not conclude the parties.[98]

h. Note, Due-Bill, or Acceptance — (I) *In General.* A note, due-bill, or acceptance may sufficiently show the admission of a balance to constitute an account stated.[99]

(II) *Offer to Settle by Note.* An offer to settle an account presented by executing a note for the balance due is equivalent to an admission that the account as presented is correct.[1]

i. Report on Claim. A claim against the government cannot be converted into an account stated by the report of an officer made in pursuance of directions to examine the facts and report on the claim.[2]

j. Duress — Threat to Sue. An agreement to pay induced by threatening to sue for the debt is not induced by duress.[3]

91. Chisman *v.* Count, 2 M. & G. 307. The fact that a suit brought for the larger amount was stayed, and plaintiff thereupon brought a second action for the sum admitted, is no reason, under the objection that by the first action plaintiff showed that he did not accept the admission, why the admission is not sufficient for a recovery on the account stated. Grundy *v.* Townsend, 36 Wkly. Rep. 531.

92. American Brewing Co. *v.* Berner-Mayer Co., 83 Ill. App. 446.

Answer of garnishee admitted in agreed case.— On a rule to quash an attachment, a case was stated agreeing to the admission of the garnishee of funds in his hands, and it was held that this amounted to a stated account. McDowell *v.* Smith, 21 Wkly. Notes Cas. (Pa.) 558.

93. See II, B, 1, d.

94. Tucker *v.* Barrow, 7 B. & C. 623.

95. Tompkins *v.* Gerry, 52 Ill. App. 592; Stevens *v.* Barss, 74 Hun (N. Y.) 388, 26 N. Y. Suppl. 461.

96. Buschman *v.* Morling, 30 Md. 384; Bates *v.* Curtis, 21 Pick. (Mass.) 247; Gooding *v.* Hingston, 20 Mich. 439; Henniken *v.* Brown, 4 Baxt. (Tenn.) 397.

Account stated is distinguished from arbitration and award in this, that in the case of a balance struck in the manner above stated there must be an acquiescence in the result. Stage *v.* Gorich, 107 Ill. 361; Tompkins *v.* Gerry, 52 Ill. App. 592; Bates *v.* Townley, 2 Exch. 152, 12 Jur. 606; Keen *v.* Batshore, 1 Esp. 195.

97. Holmes *v.* Morse, 50 Me. 102.

After expiration of time for making award. — After the time for making an award has expired, arbitrators cannot make a binding award without the concurrence of both parties, and such an award is not evidence under a count on an account stated, because the arbitrators cannot be said to be proceeding with defendant's assent or to be stating an account as his agent after the expiration of such authority. Ruthven *v.* Ruthven, 8 U. C. Q. B. 12.

98. Whitehead *v.* Darling, (Ky. 1887) 5 S. W. 356.

99. See *infra*, II, B, 7, b, (VII), (B).

1. I. L. Elwood Mfg. Co. *v.* Betcher, 72 Minn. 103, 75 N. W. 113.

2. Nutt *v.* U. S., 23 Ct. Cl. 68.

Claim against state.— Where, in pursuance of an order of the governor, the solicitor-general made a statement of the amount of a claim against the commonwealth without claimant's consent, it was held that this would not bind claimant even though payments have been made to him. Com. *v.* Beaumarchais, 3 Call (Va.) 122. So the decision of the secretary of state upon a claim against the state is held not to constitute an account stated. State *v.* Brown, 10 Oreg. 215.

3. Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76.

k. By and between Original or Third Parties — (I) *Admission to Third Persons in General.* An admission of the correctness of a balance or an account should be made to the opposite party or his authorized agent, and a casual admission to a third person, who is not plaintiff's agent, is not sufficient to bind the party making it as upon an account stated.[4] But on the other hand it has been held that such admission is admissible to prove an accounting, especially where there is evidence of the performance of the services by plaintiff,[5] like other evidence of admissions to go to the jury upon the question of the accounting, though not itself constituting an account stated.[6]

(II) *Acts of Authorized Persons for Original Parties* — (A) *In General.* There is no rule which forbids the statement of an account except between the original parties,[7] and the transactions which result in the statement of an account need not be between the debtor and creditor in person.[8]

(B) *Necessity of Competent Authority or Ratification.* But the person whose acts are thus sought to be made binding upon one as principal must have

4. *Arkansas.*— Thurmond *v.* Sanders, 21 Ark. 255.

Illinois.— Bee *v.* Tierney, 58 Ill. App. 552.

Maryland.— Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628.

England.— Breckon *v.* Smith, 1 A. & E. 488; Bates *v.* Townley, 2 Exch. 152.

Canada.— Curtis *v.* Flindall, 3 U. C. Q. B. 323; Green *v.* Burtch, 1 U. C. C. P. 313.

5. Wharton *v.* Cain, 50 Ala. 408 (wherein the court refers to Breckon *v.* Smith, 1 A. & E. 488, as the case upon which the authorities for the rule first stated in the text are founded, and indicates that it does not support the broad proposition. The case referred to, however, fully supports the proposition laid down in the text, and further is distinguishable from Wharton *v.* Cain, 50 Ala. 408, by the facts of that case. Those facts show that defendant had in his possession a promissory note a three-quarter interest in which belonged to parties who were debtors to plaintiff, and that defendant, at the request of such persons, promised to pay plaintiff the amount due to them out of the proceeds of such note when collected,— a promise altogether different from the loose admission made to strangers as contemplated by the rule first stated in the text); Cunningham *v.* Subletts, 4 Mo. 224 (which seems to be contrary to the rule in the last preceding text).

6. Bloomley *v.* Grinton, 1 U. C. C. P. 309.

7. **Assignee.**— An account is properly rendered to an assignee, who alone has authority to reject or confirm it. Thompson *v.* Fisher, 13 Pa. St. 310.

8. Thus, if either party is represented by an agent authorized to act in his behalf, the elements of assent or agreement may appear sufficiently to show an account stated.

Alabama.— Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

Arkansas.— Southwestern Tel., etc., Co. *v.* Benson, 63 Ark. 283, 38 S. W. 341.

Illinois.— Bee *v.* Tierney, 58 Ill. App. 552.

New York.— Field *v.* Knapp, 108 N. Y. 87, 14 N. E. 829; Martine *v.* Huyler, 55 Hun (N. Y.) 611, 8 N. Y. Suppl. 734; Wiley *v.* Brigham, 16 Hun (N. Y.) 106.

Pennsylvania.— Thompson *v.* Fisher, 13 Pa. St. 310.

England.— Grundy *v.* Townsend, 36 Wkly. Rep. 531.

Canada.—Rhodes *v.* Crawford, 1 U. C. Q. B. 257 (note given to agent).

Clerk of firm acting for one partner.— Where, after the dissolution of a partnership, one of the clerks of the firm, acting for one of the partners, went over the accounts with another of the partners, and the latter made no objection to particular charges, it sufficiently appeared that there was a stated account. Lloyd *v.* Carrier, 2 Lans. (N. Y.) 364.

Note signed by husband for wife.— McCormick *v.* Altneave, 73 Miss. 86, 19 So. 198. Where a wife is not liable except for items shown to have enured to the benefit of her separate estate, she cannot be held liable, as on an account stated, upon an account rendered to her husband, in whose name it was kept, though she made no objection to the account when rendered. Powell *v.* Hopson, 13 La. Ann. 626.

Knowledge on part of debtor.—A statement of an account sent to the agent of a debtor will not bind the debtor unless he had knowledge of the rendition of the account. Knapp *v.* Smith, 97 Wis. 111, 72 N. W. 349.

Implied admission to auditors appointed to examine account.— In St. John *v.* Lockhart, 23 N. Brunsw. 430, defendant was chairman of water commissioners of the city of St. John, and as such kept the cash-book showing his receipts and disbursements. When the balance between his receipts and outlays was ascertained by auditors appointed by the corporation, defendant was informed of such balance, the correctness of which he did not dispute. On being asked if he could explain the balance against him, he said he could not and being then told that it would have to be reported to the corporation he replied, "Well, you will just have to report it." It was held that this was sufficient evidence to enable plaintiffs to recover the balance on an account stated.

competent authority to act in the matter,[9] or there must be a ratification of his acts by the principal.[10]

1. **Implied Promise and Assent** — (I) *Promise Inferred from Adjustment of Accounts.* It is not necessary that there should be an express promise to pay a balance due in order to convert an account into an account stated. Such promise may be implied by law from an adjustment of an account by the parties and the ascertainment or admission of a balance due from one of them.[11] But where an account is stated and as a part of the transaction there is an express promise to pay upon a condition different from that which otherwise the law would imply from the mere adjustment of the account, such implied promise is excluded.[12]

(II) *Assent Inferred from Silence after Rendition* — (A) *General Rule.* Evidence of assent to the correctness of an account may be found in circumstances from which such assent may be inferred, as where one party presents an account to another, which the latter retains without making objection within a reasonable time.[13]

9. Mink *v.* Morrison, 42 Mich. 567, 4 N. W. 302; Harvey *v.* West-Side El. R. Co., 13 Hun (N. Y.) 392; Verrier *v.* Guillou, 97 Pa. St. 63.

Express and special authority.— In Louisiana it was held, where a merchant's bookkeeper rendered an account showing a balance due from his employer, that this would not be binding upon the employer without evidence of an express and special authority in the bookkeeper. Spears *v.* Turpin, 9 Rob. (La.) 293.

Authorized representative of lunatic.— Where A kept cash with B, a banker, and the balance to his credit was stated from time to time in a pass-book, and A became a lunatic, and the account continued to be kept with his family in the pass-book, the entries of which were written by B, it was held that this was not evidence to support an account stated with A in an action brought by his representatives against B. Tarbuck *v.* Bispham, 2 M. & W. 2.

10. Mink *v.* Morrison, 42 Mich. 567, 4 N. W. 302.

11. *Indiana.*— Bouslog *v.* Garrett, 39 Ind. 338.

Michigan.— Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300.

Missouri.— Koegel *v.* Givens, 79 Mo. 77; Burger *v.* Burger, 34 Mo. App. 153.

Nebraska.— Hendrix *v.* Kirkpatrick, 48 Nebr. 670, 67 N. W. 759; Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411.

New Hampshire.— Cochrane *v.* Allen, 58 N. H. 250.

New Jersey.— Weigel *v.* Hartman Steel Co., 51 N. J. L. 446, 20 Atl. 67; Jaques *v.* Hulit, 16 N. J. L. 38.

New York.—Kock *v.* Bonitz, 4 Daly (N. Y.) 117.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65.

United States.— York *v.* Wistar, 16 Haz. Reg. (Pa.) 153, 30 Fed. Cas. No. 18,141.

England.— Rackstraw *v.* Imber, 1 Holt N. P. 368.

Canada.— Hea *v.* Jones, 7 N. Brunsw. 646.

Therefore it is held that an instruction which purports to give the elements of an account stated is not erroneous because it omits the element of a promise to pay. Burger *v.* Burger, 34 Mo. App. 153.

12. Work *v.* Beach, 53 Hun (N. Y.) 7, 6 N. Y. Suppl. 27. See also *infra*, II, B, 7, b, (VIII).

13. *Alabama.*— Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

California.— Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95.

Louisiana.—Brodnax *v.* Steinhardt, 48 La. Ann. 682, 19 So. 572; Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177, holding that such conduct dispenses with the necessity of afterward itemizing the account.

Michigan.—Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393; Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. 872.

Minnesota.— I. L. Elwood Mfg. Co. *v.* Betcher, 72 Minn. 103, 75 N. W. 113.

Mississippi.—McCall *v.* Nave, 52 Miss. 494.

New Hampshire.— Austin *v.* Ricker, 61 N. H. 97; Rich *v.* Eldredge, 42 N. H. 153.

New York.— Spellman *v.* Muehlfeld, 166 N. Y. 245, 59 N. E. 817; Lockwood *v.* Thorne, 18 N. Y. 285; Dows *v.* Durfee, 10 Barb. (N. Y.) 213.

Tennessee.— Johnson *v.* McCampbell, 11 Heisk. (Tenn.) 27.

Washington.— Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13.

United States.— Wittkowski *v.* Harris, 64 Fed. 712; Eichel *v.* Sawyer, 44 Fed. 845; Bradley *v.* Richardson, 2 Blatchf. (U. S.) 343, 3 Fed. Cas. No. 1,786.

Offering excuse for delay.— Where one party renders his account to another, admits credits, and offers to settle any other credits than those given if claimed and indicated, to which account and offer there is no answer except one in which the debtor excuses himself from present payment on account of his pecuniary inability at the time, it is held that this is decisive of liability. Lawrence *v.* Ellsworth, 41 Ark. 502.

Bank — Effect of suspension of business.— The fact that a bank receiving an account has suspended business will not operate against the presumption of acquiescence in

(B) *Extent of Rule — Differences in Application.* The rule as to assent implied by silence is not always applied to the same extent; that is, while the effect of such acquiescence as *prima facie* evidence seems to be undoubted, greater strength is accorded to it in some cases than in others. It may be premised that the *prima facie* force of such proof shifts the burden from the party whose interest it is to establish the account,[14] though it does not necessarily constitute a new and independent agreement.[15] In many cases, however, this implied assent is sufficient to supply, *prima facie*, the ingredient of assent which is necessary to constitute an account stated.[16] On the other hand a mere silence after the

the correctness of the account from failure to object, where the bank was engaged in settling up its business. Union Bank *v.* Planters' Bank, 9 Gill & J. (Md.) 439, 31 Am. Dec. 113.

14. Goldsmith *v.* Latz, 96 Va. 680, 32 S. E. 483; Baxter *v.* Waite, 2 Wash. Terr. 228, 6 Pac. 429; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884.

15. Buxton *v.* Edwards, 134 Mass. 567.

16. *Alabama.*— Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454; Joseph *v.* Southwark Foundry, etc., Co., 99 Ala. 47, 10 So. 327; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Sloan *v.* Guice, 77 Ala. 394; Burns *v.* Campbell, 71 Ala. 271; Hirschfelder *v.* Levy, 69 Ala. 351; Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

Arkansas.—Lawrence *v.* Ellsworth, 41 Ark. 502.

California.— Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95; Hendy *v.* March, 75 Cal. 566, 17 Pac. 702; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Terry *v.* Sickles, 13 Cal. 427.

Florida.— Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

Hawaii.— Dudoit *v.* Spencer, 1 Hawaii 493.

Illinois.— King *v.* Rhoads, etc., Co., 68 Ill. App. 441; House *v.* Beak, 43 Ill. App. 615; Mackin *v.* O'Brien, 33 Ill. App. 474.

Louisiana.— Brodnax *v.* Steinhardt, 48 La. Ann. 682, 19 So. 572; Darby *v.* Lastrapes, 28 La. Ann. 605; Blanc *v.* Scruggs, 26 La. Ann. 208; Mansell *v.* Payne, 18 La. Ann. 124; Freeman *v.* Howell, 4 La. Ann. 196, 50 Am. Dec. 561.

Mississippi.—Coopwood *v.* Bolton, 26 Miss. 212; Stebbins *v.* Niles, 25 Miss. 267.

Missouri.— Brown *v.* Kimmel, 67 Mo. 430; Powell *v.* Pacific R. Co., 65 Mo. 658; McKeen *v.* Boatmen's Bank, 74 Mo. App. 281; Missouri Pac. R. Co. *v.* B. F. Coombs, etc., Commission Co., 71 Mo. App. 299.

New Hampshire.— Austin *v.* Ricker, 61 N. H. 97; Rich *v.* Eldredge, 42 N. H. 153.

New York.— Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Knickerbocker *v.* Gould, 115 N. Y. 533, 22 N. E. 573; Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. 861; Samson *v.* Freedman, 102 N. Y. 699, 7 N. E. 419; Lockwood *v.* Thorne, 18 N. Y. 285; Lockwood *v.* Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Donald *v.* Gardner, 44 N. Y. App. Div. 235, 60 N. Y. Suppl. 668; Hutchinson *v.* Market Bank, 48 Barb. (N. Y.) 302; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Carpenter *v.* Nickerson, 7 Daly (N. Y.) 424; Case *v.* Hotchkiss, 37 How. Pr. (N. Y.) 283; Murray *v.* Toland, 3 Johns. Ch. (N. Y.) 569; Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

North Carolina.— Marks *v.* Ballance, 113 N. C. 28, 18 S. E. 75; Gooch *v.* Vaughan, 92 N. C. 610; Webb *v.* Chambers, 25 N. C. 374.

Ohio.— Dyer *v.* Isham, 4 Ohio Cir. Ct. 429.

Oregon.—Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086; Holmes *v.* Page, 19 Oreg. 232, 23 Pac. 961. In a case in which plaintiff was not suing upon a stated account, evidence of the sending of a letter by him to defendant, inclosing an account, was admitted over the objection that an account stated had not been pleaded, upon the ground that the evidence was at most admissible to show an admission or acknowledgment. Foster *v.* Standard L., etc., Ins. Co., 34 Oreg. 125, 54 Pac. 811.

Pennsylvania.— Bevan *v.* Cullen, 7 Pa. St. 281; Hall *v.* Sloan, 9 Phila. (Pa.) 138, 30 Leg. Int. (Pa.) 232; Colket *v.* Ellis, 1 Wkly. Notes Cas. (Pa.) 246, 32 Leg. Int. (Pa.) 82.

Tennessee.— Johnson *v.* McCampbell, 11 Heisk. (Tenn.) 27.

Utah.— Benites *v.* Hampton, 3 Utah 369, 3 Pac. 206.

Vermont.— Tharp *v.* Tharp, 15 Vt. 105.

Washington.—Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13.

United States.— Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884; Allen-West Commission Co. *v.* Patillo, 90 Fed. 628, 61 U. S. App. 94, 33 C. C. A. 194; Porter *v.* Price, 80 Fed. 655, 49 U. S. App. 295, 26 C. C. A. 70; Talcott *v.* Chew, 27 Fed. 273; Baker *v.* Biddle, Baldw. (U. S.) 394, 2 Fed. Cas. No. 764; Bainbridge *v.* Wilcocks, Baldw. (U. S.) 536, 2 Fed. Cas. No. 755; Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697; Richmond Mfg. Co. *v.* Starks, 4 Mason (U. S.) 296, 20 Fed. Cas. No. 11,802.

England.— Willis *v.* Jernegan, 2 Atk. 251; Holstcomb *v.* Rivers, 1 Ch. Cas. 127.

Goods delivered before abandonment of contract.— Where an executory contract for the delivery of lumber was abandoned by the parties before the completion thereof, daily bills stating the quantities delivered, but not the prices, were held not to be evidence of an account stated as to the prices, though they might be so regarded as to the quantities, because the prices were not stated in the bills and the original contract had been abandoned. Robson *v.* Bohn, 22 Minn. 410.

receipt of an account is held to be admissible as tending to show acquiescence, but the determination whether the silence amounts to an admission is left for the jury in the particular case,[17] and in this aspect such circumstances seem to be regarded, not as creating an account stated, but as furnishing evidence merely of the correctness of the account, the weight and sufficiency of which is to be determined by the jury.[18] In some of these cases, however, the character of the parties as merchants or otherwise would seem to control,[19] though others are not always clear and sometimes seem not altogether consistent.[20]

(c) *As between Merchants or Others.* The rule that the retention of an

17. Bertrand *v.* Taylor, 32 Ark. 470; Bailey *v.* Bensley, 87 Ill. 556; Miller *v.* Bruns, 41 Ill. 293; Peoria Grape Sugar Co. *v.* Turney, 58 Ill. App. 563; Moran *v.* Gordon, 33 Ill. App. 46; McCord *v.* Manson, 17 Ill. App. 118.

In Pennsylvania it was held that the rendition of an account and its retention without objection was only slight evidence of its correctness. Killam *v.* Preston, 4 Watts & S. (Pa.) 14; Spangler *v.* Springer, 22 Pa. St. 454. But these cases should perhaps be confined to the particular circumstances, for both before and since it has been there held that such conduct furnishes *prima facie* evidence of the correctness of the account. Verrier *v.* Guillou, 97 Pa. St. 63; Sergeant *v.* Ewing, 30 Pa. St. 75; Phillips *v.* Tapper, 2 Pa. St. 323.

18. Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435; Hendrix *v.* Kirkpatrick, 48 Nebr. 670, 67 N. W. 759; Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113; Robertson *v.* Wright, 17 Gratt. (Va.) 534.

19. See *infra*, II, B, 2, l, (II), (C).

20. A review of several of the cases will illustrate this. In Hendrix *v.* Kirkpatrick, 48 Nebr. 670, 67 N. W. 759, it was said that while many cases went to the extent of holding that by a mere failure to object to an account rendered it became a liquidated unimpeachable demand, the sound rule is believed to be that such fact is admissible as evidence of an acknowledgment of the correctness of the demand, the weight and sufficiency of such proof being a question of fact for the jury. The court cited Chisman *v.* Count, 2 M. & G. 307; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Guernsey *v.* Rexford, 63 N. Y. 631, and Sharkey *v.* Mansfield, 90 N. Y. 227, in all of which, however, the general rule is recognized that retention of an account for an unreasonable time without objection will furnish the ingredient of assent necessary to make an account stated. In addition to this, an account stated is not in the nature of an estoppel. See *infra*, II, G.

In Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884, it was held that where an account was admitted in evidence by reason of the fact that it was retained without objection, the burden was on the party disputing it to show fraud, omission, or mistake, and that in these respects the party was in no wise concluded by the admission. In stating the rule that such acquiescence is merely *prima facie* evidence of assent the court cited Lockwood *v.* Thorne, 18 N. Y. 285, which supports that proposition in this sense, that the inference of assent may be repelled by showing facts inconsistent with it, as that the party was absent from home, etc., but still recognizes that in the absence of such evidence to repel the inference of assent, the element of assent necessary to make an account stated is sufficiently shown. This is different from the effect accorded to such silence in those cases which hold that by *prima facie* evidence of an admission is meant that the facts may go to the jury with the other evidence in the action which they may weigh as evidence of an admission.

Again, in Talcott *v.* Chew, 27 Fed. 273, it was held that silence for an unreasonable time would make an account rendered a stated account, but that the stated account would not be conclusive, but would merely throw the burden of proving its incorrectness upon the other party, and the court relied upon Wiggins *v.* Burkham, 10 Wall. (U. S.) 132, 19 L. ed. 884, and Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463.

So the cases above cited from Pennsylvania might be taken to refer to the effect of an account stated as *prima facie* evidence because it has been expressly held in that state that the statement of an account need not be by a meeting between the parties, but may equally grow out of a statement placed in the hands of one by the other, and acquiesced in and acted upon, as where statements in a pass-book are ratified by carrying the balance struck in such pass-book to others during a series of years, in which case such circumstances are held to be conclusive except for fraud or mistake. Ruch *v.* Fricke, 28 Pa. St. 241, in which case the character of defendant as a merchant was not considered, and in fact he was not a merchant but a coach-manufacturer. He was, however, a business man in such sense as to justify the presumption spoken of in other cases. See *infra*, II, B, l, (II), (C).

In Illinois, while it has been held that such silence is admissible in evidence to go to the jury, as above indicated, a stated account may arise from such conduct as between merchants, but even in this case the presumption is deemed to be conclusive, only until some fraud, omission, or inaccuracy is shown. B. S. Green Co. *v.* Smith, 52 Ill. App. 158.

account rendered without raising any objections thereto within a reasonable time will raise a presumption of assent arose out of the custom of merchants and was first applied to them.[21] It will therefore be found in some of the cases that the effect given to such acquiescence as an account stated is often applied especially to merchants, or great strength is accorded to such evidence in the case of merchants,[22] and in some the rule of presumption of assent from silence, in so far as assent may be supplied as an element of a stated account, is expressly confined to merchants, though evidence of such retention as between other parties than merchants may be given to show an implied admission of an acquiescence in its correctness, the weight of such testimony being for the consideration of the jury under all the circumstances of the case.[23] But with the enlarged needs of modern business the rule has been extended to others,[24] so that it may be properly applied to all classes of business men,[25] though especially applicable to accounts rendered between merchant and merchant,[26] and some presumption of assent to the correctness of an account rendered from the silence of the party arises with more or less force in the case of all persons who can be regarded as men of business.[27]

(D) *Objection to or Admission of Particular Items.* Where an account is rendered and only one item thereof is objected to at the time, this is an admission of the correctness of the other items to which no objections are made.[28] The same inference arises where there is an express admission as to a part of the

21. Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086; Sherman *v.* Sherman, 2 Vern. 276; Willis *v.* Jernegan, 2 Atk. 251.

22. Freas *v.* Truitt, 2 Colo. 489; Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Allen *v.* Stevens, 1 N. Y. Leg. Obs. 359; Willis *v.* Jernegan, 2 Atk. 251.

23. Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435; Rich *v.* Eldredge, 42 N. H. 153.

In Townes *v.* Birchet, 12 Leigh (Va.) 173, the rule seems to have been applied upon the assumption that the parties were merchants. One of the judges dissented upon the ground that the parties were not merchants, and this view was followed in Robertson *v.* Wright, 17 Gratt. (Va.) 534. These cases are relied on in Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435, but in Goldsmith *v.* Latz, 96 Va. 680, 32 S. E. 483, wherein the parties seem not to have been merchants, it was held that the acquiescence raises a strong presumption of correctness which requires rebuttal, thus going much further than Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435, *supra.*

24. Burns *v.* Campbell, 71 Ala. 271; Lawrence *v.* Ellsworth, 41 Ark. 502 (which was an account between physicians); Shepard *v.* State Bank, 15 Mo. 143; McKeen *v.* Boatmen's Bank, 74 Mo. App. 281.

So in Pennsylvania it has been said that nothing short of an estoppel, or that which rises no higher than mere evidence, should have more weight in mercantile transactions than accounts which are rendered to one man by another followed by acquiescence, and, above all, by subsequent dealings of the same nature. Payne *v.* Nicholas, 2 Phila. (Pa.) 220, 14 Leg. Int. (Pa.) 36. *Compare* with cases cited above in II, B, 2, l, (II), (B).

25. Joseph *v.* Southwark Foundry, etc., Co., 99 Ala. 47, 10 So. 327; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086; Porter *v.* Price, 80 Fed. 655, 49 U. S. App. 295, 26 C. C. A. 70.

26. Porter *v.* Price, 80 Fed. 655, 49 U. S. App. 295, 26 C. C. A. 70.

27. Rich *v.* Eldredge, 42 N. H. 153, wherein it is said that such presumption arises with more or less force considering the nature of the business and education of the parties, their local situation, and other circumstances, and that such presumption applies with more force in cities and is slightly regarded in the country; Bradley *v.* Richardson, 2 Blatchf. (U. S.) 343; 3 Fed. Cas. No. 1,786.

28. Joseph *v.* Southwark Foundry, etc., Co., 99 Ala. 47, 10 So. 327; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Sloan *v.* Guice, 77 Ala. 394; Burns *v.* Campbell, 71 Ala. 271.

Illinois.— Neagle *v.* Herbert, 73 Ill. App. 17.

Missouri.— Mulford *v.* Cæsar, 53 Mo. App. 263.

New Jersey.— But see, *contra,* Weigel *v.* Hartman Steel Co., 51 N. J. L. 446, 20 Atl. 67.

New York.— Power *v.* Root, 3 E. D. Smith (N. Y.) 70.

Ohio.—Dudley *v.* Geauga Iron Co., 13 Ohio St. 168, holding that where one item of an account was objected to, but the balance was carried through subsequent accounts and no further objection made, and the last account was settled with an agreement that the disputed items should remain open, such items should not be considered as a stated account.

United States.— Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884.

England.— Chisman *v.* Count, 2 M. & G. 307.

claim[29] or where the objection is as to the price but not as to the quantity.[30] But such an admission must be certain, and where, upon the presentation of an account, defendant admits that the account is correct in part, this cannot avail the plaintiff, because of its uncertainty; under such circumstances defendant's silence cannot raise a presumption as to the correctness of the entire account in an action on the account.[31] The recovery in such cases should be confined to the items admitted to be due.[32]

(E) *Receipt of Account and Acquiescence.* In order that acquiescence in the correctness of an account may be presumed from silence, it must appear that the account has been received[33] and acquiesced in, and if the conduct of the party excludes the idea of acquiescence it cannot be converted into an account stated.[34]

(F) *Effect of Silence upon Statute of Limitations.* The doctrine that a new promise may take a claim out of the operation of the statute of limitations cannot be applied to an account made up by one man and sent to another, and retained

29. Tuggle *v.* Minor, 76 Cal. 96, 18 Pac. 131; Bee *v.* Tierney, 58 Ill. App. 552.

30. Dakin *v.* Walton, 85 Hun (N. Y.) 561, 33 N. Y. Suppl. 203.

31. Watson *v.* Byers, 6 Ala. 393.

Claim for larger credit.— Where defendant said nothing but to claim a greater credit, this was held not to be parallel with the case of the admission of an item. Ford *v.* Reid, 23 N. Brunsw. 589.

32. Tuggle *v.* Minor, 76 Cal. 96, 18 Pac. 131.

Admission of counterclaim.— Where defendant, in an action on an account, set up an account as a counterclaim, and plaintiff admitted the correctness of defendant's account, but at the same time set up a demand for further credits, it was held that plaintiff's admission would not preclude him from claiming the further credits so demanded. B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

33. Hall *v.* Morrison, 3 Bosw. (N. Y.) 520.

Custom of rendering.— The mere fact that it was the custom to render weekly bills is not sufficient unless the bills were actually received and acquiesced in. Davis *v.* Fromme, 23 N. Y. App. Div. 498, 48 N. Y. Suppl. 474.

Account exhibited but not left with party. — Where a claim is sued on as a stated account, and the statute of limitations is pleaded to a part of the claim, the fact that the account was exhibited to defendant is not sufficient where defendant remained quiet and the account was retained by plaintiff and not left with defendant. Payne *v.* Walker, 26 Mich. 60; White *v.* Campbell, 25 Mich. 463.

34. Lockwood *v.* Thorne, 18 N. Y. 285; Champion *v.* Recknagel, 6 N. Y. App. Div. 151, 39 N. Y. Suppl. 814; Hall *v.* Morrison, 3 Bosw. (N. Y.) 520; Carpenter *v.* Nickerson, 7 Daly (N. Y.) 424; Tully *v.* Felton, 177 Pa. St. 344, 36 Atl. 285; Valley Lumber Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216; McKenzie *v.* Poorman Silver Mines, 88 Fed. 111, 60 U. S. App. 1, 31 C. C. A. 409; Charlotte Oil, etc., Co. *v.* Hartog, 85 Fed. 150, 42 U. S. App. 716, 29 C. C. A. 56.

Ignorance of delivery of goods not ordered. — So where goods were sent to a person without his authority, and thereafter several bills were sent to him, to which he paid no attention, not having ordered the goods and having no knowledge of their delivery, it was held that, having returned the goods as soon as he discovered that they had been placed on his premises, the failure to notice the bills which had been sent to him could not bind him, as there was no debt for which a bill could be rendered. Austin *v.* Wilson, 11 N. Y. Suppl. 565.

Mere silence after rendition of bill for goods not accepted.— Where goods are sent to a person without his authority, and his conduct is not such as to show that he accepted them, mere silence upon the subsequent rendition of a bill for the goods will not bind him as upon an account stated. Cobb *v.* Arundell, 26 Wis. 553, in which case the party refused to receive the goods as his own, but consented to store them temporarily at the request of the person delivering them, and it was held that he was not under necessity of objecting to the bill subsequently sent to him or otherwise expressing his non-acceptance of the goods.

Retaining after objection at instance of creditor.— Where there is no evidence of acquiescence, but, on the contrary, the party to whom a bill is rendered, though retaining it six months, in the meantime objects, and at the instance of the creditor retains the bill after the objection until the return of a clerk who had knowledge of the disputed item, is not estopped to question the account. Porter *v.* Lobach, 2 Bosw. (N. Y.) 188.

Retention after disagreement of parties.— The rule that acquiescence may constitute an account stated does not apply if, when the account is sent, the parties had already come to a disagreement, as in such a case the assent from silence cannot be reasonably inferred. Engfer *v.* Roemer, 71 Wis. 11, 36 N. W. 618; Edwards *v.* Hoeffinghoff, 38 Fed. 635.

Seeking information after receipt of account.— The presumption of assent is not warranted where, twenty days after the receipt by a client of a bill from an attorney, the client wrote to the attorney asking for

by the latter without objection,[35] and retaining an account without objection will not preclude the debtor from pleading the statute.[36]

(G) *Silence in Proceedings on Trials of Controversies.* The doctrine of acquiescence does not apply to the proceedings on the trials of controversies.[37]

(H) *Claim Subject to Special Contract.* The rule that assent to the correctness of an account will be implied from the retention of the account without objection does not apply when the claim is subject to special contract.[38]

(I) *Claim for Damages.* The rule that a merchant's account which has been retained without objection may be treated as an account stated does not apply to a distinct and independent claim for damages.[39]

(J) *Where There Is No Direct Obligation.* Where there is no direct obligation to pay an account, the rendering to one who keeps it without objection does not make it an account stated,[40] and where one is sought to be charged as by an implied admission such an admission will not be available to charge him with the debt of another.[41]

m. Usage. An account may become stated by transactions which are according to long usage,[42] or at least such usage may be sufficient to justify the inference by the jury of acquiescence in the correctness of the account.[43]

n. Payment and Receiving Payment — (I) *In General.* Receiving pay-

information to enable him to determine the justness of the account, and the attorney failed to give the information. Failure to deny the correctness of the bill would not show acquiescence in its correctness under these circumstances. Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13, wherein it was also held that where, upon receipt of an account, the debtor writes for information to which he receives no reply, the fact that he afterward retains the account is not sufficient to show assent, and the presumption that a letter furnishing the information mailed to him was received by him will have but little weight against his positive testimony that the information was never received.

35. Bryan *v.* Ware, 20 Ala. 687. See also LIMITATIONS OF ACTIONS.

As against executor.— Where a claim on its face, and in connection with other facts averred in the complaint, shows that a part of the claim was barred by the statute of limitations at the death of a testator, the presumption of acquiescence from retaining the claim without objection, if applicable at all to the case of an executor, is rebutted. Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780.

36. Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443; Verrier *v.* Guillou, 97 Pa. St. 63.

37. The reason for this rule is said to be because it is no right or duty of a party to interrupt the order of proceedings in such cases by denials or contradictions, and therefore his silence under such circumstances cannot be deemed an admission. Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64, relating to the statements of a witness during the trial of a cause.

38. Kusterer Brewing Co. *v.* Triar, 99 Mich. 190, 58 N. W. 52; Valley Lumber Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216; Gallinger *v.* Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790. See also Donald *v.* Gardner, 44 N. Y. App. Div. 235, 6 N. Y. Suppl. 668.

39. Fraley *v.* Bispham, 10 Pa. St. 320, 51 Am. Dec. 486; Charnley *v.* Sibley, 73 Fed. 980, 34 U. S. App. 705, 20 C. C. A. 157.

40. Davis *v.* Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526, holding that an account stated only determines the amount of a debt where liability exists, and does not create the liability. See also *supra*, II, B, 1, d. But in Avery *v.* Leach, 9 Hun (N. Y.) 106, it was held that after a long acquiescence in an account rendered the party will not be permitted to set up that the goods were furnished to another,— in this case, his son.

41. Spangler *v.* Springer, 22 Pa. St. 454.

42. King *v.* Rhoads, etc., Co., 68 Ill. App. 441. Thus, where an employer gives to his workman orders on a merchant for goods, and the latter receives his pay by presenting such orders to the employer, the amount being fixed by the orders and deducted from the workman's wages, the arrangement is evidence of an account stated. Bull *v.* Brockway, 48 Mich. 523, 12 N. W. 685.

43. Union Bank *v.* Planters' Bank, 9 Gill & J. (Md.) 439, 31 Am. Dec. 113, holding that where it was according to a proved usage between two banks that they rendered accounts to each other, and that the objecting bank gave notice to the other of any objections to an account rendered, from absence of such objection the jury might infer acquiescence by the bank receiving the account.

The usage of trade which may control the stating of accounts between the parties must have been continued for such a time as to have become generally known to those engaged in the particular trade, and to have become the settled rule of commercial intercourse in the absence of a special policy or special course of dealing between the parties. York *v.* Wistar, 16 Haz. Reg. (Pa.) 153, 30 Fed. Cas. No. 18,141.

ment and executing a receipt in full is not necessarily an account stated,[44] but where a balance is ascertained or where a statement of an account is rendered and retained without objection, acceptance of payment by the party in whose favor the balance appears, or payment of the balance by the other party, furnishes sufficient evidence of a stated account.[45] So where one acquiesces in and draws for the balance of an account rendered, this is strong evidence of an account stated.[46] Payment of part of an amount shown to be due, or receiving payment in part, together with other acts by the parties which tend to show assent to the correctness of the balance, may be sufficient to make an account stated,[47] as by payment of a part and a promise to pay the balance.[48]

(II) *Must Be in Final Settlement.* Where, however, the payment is not accepted[49] or made as a final settlement it will not operate as an account stated so as to conclude the parties,[50] and to charge one as on an account stated by reason of his acceptance and payment on a bill rendered, the bill must be unambiguous to show the nature and extent of the demand.[51]

(III) *Payment under Duress.* Where a balance is paid for the sole purpose of procuring, from one claiming such balance, property which the latter refuses to give up except upon such payment, this is not such acquiescence as will constitute an account stated.[52]

o. Conditional or Qualified Assent or Promise. It has been held that in order to constitute an account stated the promise to pay must be absolute and unqualified.[53] This rule is one of pleading and proof relating to the necessity in general of declaring specially on a conditional promise,[54] or else refers to a qualified admission of liability rather than to a condition which merely postpones the time of payment or provides for payment out of a particular fund. The mere

44. Ingraham *v.* Lukens, 30 S. C. 616, 9 S. E. 348. See *infra*, II, G, 5, b.

45. Pynchon *v.* Day, 118 Ill. 9, 7 N. E. 65; McClain *v.* Schofield, 74 Hun (N. Y.) 437, 26 N. Y. Suppl. 700; Schuyler *v.* Ross, 13 N. Y. Suppl. 944; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

Balance of preceding statement included.— Where several monthly statements are rendered, each succeeding statement including as an item the balance of the last preceding one, acquiescence in the last balance and accepting payment thereof will make the account a stated account at that date and supersede those rendered before, notwithstanding an objection might have been made to a balance shown by one of the prior statements. McClain *v.* Schofield, 74 Hun (N. Y.) 437, 26 N. Y. Suppl. 700.

46. Lockwood *v.* Thorne, 18 N. Y. 285; Woodward *v.* Suydam, 11 Ohio 360; Hall *v.* Sloan, 9 Phila. (Pa.) 138, 30 Leg. Int. (Pa.) 232; Charlotte Oil, etc., Co. *v.* Hartog, 85 Fed. 150, 42 U. S. App. 716, 29 C. C. A. 56; Richmond Mfg. Co. *v.* Starks, 4 Mason (U. S.) 296, 20 Fed. Cas. No. 11,802.

47. Samson *v.* Freedman, 102 N. Y. 699, 7 N. E. 419.

Where the debtor retains an account rendered to him, and, after some time has elapsed without objection, writes on the back of the account "balance," and pays a portion thereof, it is held that this will constitute an account stated. Holler *v.* Apa, 17 N. Y. Suppl. 504.

48. Hendrix *v.* Kirkpatrick, 48 Nebr. 670, 67 N. W. 759; Hatch *v.* Von Taube, 31 Misc. (N. Y.) 468, 64 N. Y. Suppl. 393. See also Mulford *v.* Cæsar, 53 Mo. App. 263.

49. Scase *v.* Gillette-Herzog Mfg. Co., 55 Minn. 349, 57 N. W. 58; Elliott *v.* Walker, 1 Rawle (Pa.) 126.

Receipt "on account."— Where the party receiving payment receipts "on account," this shows that he did not consider the payment as one made in final settlement. Fickett *v.* Cohu, 14 Daly (N. Y.) 550, 1 N. Y. Suppl. 436.

Receiving under protest part payment of an amount claimed to be due will not constitute the receipt an account stated. Smith *v.* Drew, 10 Ben. (U. S.) 614, 22 Fed. Cas. No. 13,038.

50. Where a tenant in common received all the rents and profits of the estate and accounted to his cotenant, and on one occasion paid to the latter a larger amount than he was entitled to, such account and payment, being voluntary and without mistake of fact, was held not to operate as an account stated. Schettler *v.* Smith, 34 N. Y. Super. Ct. 17.

51. Manion Blacksmith, etc., Co. *v.* Carreras, 26 Mo. App. 229.

52. Stenton *v.* Jerome, 54 N. Y. 480.

53. Rutledge *v.* Moore, 9 Mo. 537; Evans *v.* Verity, R. & M. 239, wherein it appeared that plaintiff, in conversation with defendant, said, "Pay me the ten pounds you owe me," and defendant said he would, provided plaintiff had moved the grates, which he considered as fixtures; plaintiff in reply denied that they were fixtures. It was held that this qualified acknowledgment of a sum due would not support a count on an account stated.

54. See Assumpsit; also *infra*, II, B, 6, a, (VI), (B); and II, B, 7, b, (VIII).

fact that a debtor reserves the right to pay an admitted debt at a future day,[55] or promises to pay if he is able to do so, after an admission of indebtedness,[56] or promises to pay when he procures the money from a particular source, will not render it the less a stated account.[57] And when the promise to pay is accompanied with a designation of a particular fund out of which the payment is to be made, it is held that resort must be had to that fund in the first instance, and that if there is no such fund or it is insufficient the promise will support an *insimul computassent*.[58] But in any event it is error to instruct that one of the elements of an account stated is an unconditional promise to pay when such a promise is not in issue, for the reason that the law implies a promise from the adjustment of an account, and no express promise is necessary in such a case.[59]

p. Errors Excepted. In the settlement of an account the mere insertion of the expression that errors are excepted will render the settlement none the less a stated account subject to all rules applicable to such accounts.[60]

q. Knowledge of Facts. An account stated must be made with knowledge or with opportunity of knowledge on the part of the debtor of all the circumstances,[61]

55. Baird *v.* Crank, 98 Cal. 293, 33 Pac. 63, in which case it is further held that if the deferred time is to be ascertained by the happening of a contingency, and the action is brought before the contingency arises, the only defense which could be interposed on this ground is that the action was prematurely brought; Coughlin *v.* Gutta Percha, etc., Mfg. Co., 33 Ill. App. 71; McQueen *v.* McQueen, 9 U. C. Q. B. 536.

In Rutledge *v.* Moore, 9 Mo. 537, it was held that where a wood-boat had been sunk by the mismanagement of a steamboat captain, who promised to replace the wood-boat with another, or, failing to do so, to pay a certain sum as its value, this would not sustain a count upon an account stated. In holding that the evidence of the promise was properly excluded the court added that there was no evidence in the case that defendant had not complied with his agreement to replace the boat.

Promise to pay in instalments as convenient.— In Bottum *v.* Moore, 13 Daly (N. Y.) 464, an agreement to pay in instalments as defendant found it convenient was held to be a promise to pay within a reasonable time.

56. McCormack *v.* Sawyer, 104 Mo. 36, 15 S. W. 998; Powell *v.* Noye, 23 Barb. (N. Y.) 184.

57. Robbins *v.* Downey, 18 N. Y. Suppl. 100, 45 N. Y. St. 279.

58. Montgomerie *v.* Ivers, 17 Johns. (N. Y.) 38, holding that a clause added to a promise to pay, to the effect that the sum was to be paid out of the parties' interest in certain proceeds, was a qualified assignment of those proceeds.

Out of funds as assignee.— The promise to pay as soon as defendant should have the funds as assignee will not support an action in the absence of proof that such funds have been received. Cartledge *v.* West, 2 Den. (N. Y.) 377.

59. Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411.

60. *Alabama.*— Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

Arkansas.— Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

California.— Branger *v.* Chevalier, 9 Cal. 353.

Missouri.— Marmon *v.* Waller, 53 Mo. App. 610; Kent *v.* Highleyman, 28 Mo. App. 614.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

Oregon.— Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

Texas.— McKay *v.* Overton, 65 Tex. 82.

England.— Johnson *v.* Curtis, 3 Bro. Ch. 266.

The reason for this rule is that there is an implication in every stated account that the settlement is subject to such correction (Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99), and such reservation at most can make the settlement subject to the right to correct (Hale *v.* Church, 11 N. Y. St. 864).

Duty to examine and correct.— Where a statement of an account is presented to one who approves it subject to future examination and correction, it becomes the duty of the latter to examine the statement and give notice of errors within a reasonable time, and a failure to do so will be deemed a ratification of the prior approval, and the account stated cannot be impeached except for fraud or mistake. Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

61. *Illinois.*— Follansbee *v.* Parker, 70 Ill. 11.

Louisiana.— Where one who could not read permitted his employer to invest his wages for him, it was held that accounts rendered by the employer, the contents of which the employee could not know, would not bind the latter as an account stated. Guenivet *v.* Perret, 18 La. Ann. 356.

Ohio.— Under an ordinance that a street railway shall pay into the city treasury annually, on the first day of January, in advance, for and upon each car run by said railway, a certain sum per lineal foot of every such car, etc., statements rendered and payments made are to be considered as payments on account, because it cannot be determined in advance what amounts will be due the city

and the rule that retaining an account without objection makes an account stated cannot be applied to cases in which the party to whom the account is rendered has no knowledge of his own interests in the matters contained in the account.[62] So, where a party renders an account under a mistake of facts, it is held that the rule that acquiescence in an account rendered will make it an account stated does not apply.[63]

r. **Objection or Acquiescence** — (I) *In General.* It is not necessary that the objection should be made at the time of striking the balance or receiving the account. The rule simply requires an objection within a reasonable time.[64] Less indulgence is permitted, however, where the parties meet and scrutinize their accounts.[65]

(II) *Prompt Objection.* Where a balance is promptly, or within a reasonable time, objected to, it cannot be considered an account stated.[66]

(III) *Refusal to Pay.* A refusal to pay or to settle an account is a sufficiently certain manner of objecting thereto,[67] as well as by meeting the account with an express denial and pronouncing it false in every particular.[68]

(IV) *Denial of Liability.* If one to whom an account is presented disclaims all liability therefor, the account cannot be said to be stated by reason of his failure to examine the items thereof,[69] nor is it sufficient that the correctness of the items is admitted at the same time there is a refusal to admit liability therefor.[70] And even a naked promise to pay, after a denial of liability on the account, upon the ground that another is responsible therefor, may not be sufficient to conclude the promisor as upon an account stated.[71]

for the succeeding year. The city had a right at the end of each year to demand payment for the actual number of cars run, and to constitute an account settled the parties must settle the accounts upon a full view of all the transactions. Cincinnati *v.* Cincinnati St. R. Co., 6 Ohio N. P. 140.

Oregon.— Kinney *v.* Heatley, 13 Oreg. 35, 7 Pac. 359.

Pennsylvania.— Tully *v.* Felton, 177 Pa. St. 344, 36 Atl. 285.

62. Thus where one conveys his property to a trustee in trust for certain purposes designated, and thereafter to convey the legal title to the property to the children of the grantor, the rule stated in the text will not apply where the trustee renders an account to the grantor, who is an illiterate man, where the account casually falls into the hands of the grantor's son, who examines it solely with a view of informing his father of its contents and without being aware at the time that his own interests were involved in their accuracy. Andrew *v.* Hobson, 23 Ala. 219.

63. Polhemus *v.* Heiman, 50 Cal. 438.

Perhaps a better statement is that it is not necessary that the consent or agreement to the correctness of the account be given with knowledge of the items comprising the account, but that a want of knowledge might be the groundwork of such mistake as to justify the impeachment of the stated account. Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

64. Lockwood *v.* Thorne, 18 N. Y. 285; Darlington *v.* Taylor, 3 Grant (Pa.) 195; Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692.

65. Darlington *v.* Taylor, 3 Grant (Pa.) 195, holding that the rule that objection may be made within a reasonable time after an account is presented is not applied where two persons who have accounts between them meet on a set purpose to scrutinize and adjust them, for the reason that it is presumed that a man who undertakes to settle his own business knows what he is about, and that he will call for an explanation of every item which he does not understand or remember, and is ready to detect and dispose of every material error or attempt at imposition.

66. *Illinois.*— Peoria Grape Sugar Co. *v.* Turney, 58 Ill. App. 563.

Michigan.— McColl *v.* Jackson Iron Co., 98 Mich. 482, 57 N. W. 578.

Mississippi.— Reinhardt *v.* Hines, 51 Miss. 344, holding that where a party insisted that upon a fair settlement there would be nothing due from him, whereupon both parties agreed that the balance might be ascertained by referees, but the matter was permitted to remain unadjusted up to the time of the bringing of the action, there was no account stated.

New York.— Eames Vacuum Brake Co. *v.* Prosser, 157 N. Y. 289, 51 N. E. 986; Fickett *v.* Cohu, 14 Daly (N. Y.) 550, 1 N. Y. Suppl. 436; Schneider *v.* Irving Bank, 1 Daly (N. Y.) 500; Hall *v.* Morrison, 3 Bosw. (N. Y.) 520.

West Virginia.— Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692.

67. Peoria Grape Sugar Co. *v.* Turney, 58 Ill. App. 563.

68. Shannon *v.* Starkey, 5 Phila. (Pa.) 153, 20 Leg. Int. (Pa.) 141.

69. Ryan *v.* Gross, 48 Ala. 370; Quincey *v.* White, 63 N. Y. 370.

70. Harris *v.* Woodard, 40 Mich. 408.

71. Stephens *v.* Ayers, 57 Hun (N. Y.) 51, 10 N. Y. Suppl. 502, holding that in an action against an administrator the evidence falls short of establishing such an account be-

(v) *Control of Particular Facts in Each Case*—(a) *In General.* Whether the operation by which an account is converted into an account stated has been performed or not in any instance must depend upon the particular facts.[72]

(b) *Sufficiency of Acquiescence Depending upon Circumstances.* So what will amount to a sufficient acquiescence to make an account an account stated depends upon the facts and circumstances of each particular case, the relation of the parties, and the particular course of dealing between them.[73] The more numerous the bills sent the stronger the inference of assent.[74] Various periods of silence under different circumstances have been held sufficient to show implied assent.[75]

(c) *Giving Credit for Particular Items.* Other acts besides retention without objection may strengthen the inference arising from such retention, as where the party retains the bill for some days and then renders a bill upon which he credits the account so rendered to him,[76] or where the party to whom a bill is rendered gives credit for the amount thereof on an account in his favor against the party so rendering it, and the latter proceeds to liquidate the balance shown by the delivery of articles in the course of his business.[77] Such conduct as just

tween plaintiff and deceased which shows that the witness who attempted to prove the account stated presented the claim to deceased, who first expressed surprise at the amount of the bill, next declared that another person ought to have paid it, then suggested a possible defense or counterclaim, and ended by a naked promise to pay to avoid trouble.

72. Hawkins *v.* Long, 74 N. C. 781.

73. *Alabama.*— Hirschfelder *v.* Levy, 69 Ala. 351.

Florida.— Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

Iowa.—Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306; White *v.* Hampton, 10 Iowa 238.

Louisiana.— Darby *v.* Lastrapes, 28 La. Ann. 605; Freeman *v.* Howell, 4 La. Ann. 196, 50 Am. Dec. 561.

Mississippi.— Miller *v.* Northern Bank, 28 Miss. 81.

New York.— Spellman *v.* Muehlfeld, 166 N. Y. 245, 59 N. E. 817; Lockwood *v.* Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

Pennsylvania.— Darlington *v.* Taylor, 3 Grant (Pa.) 195.

Utah.— Benites *v.* Hampton, 3 Utah 369, 3 Pac. 206.

Washington.— Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13.

74. Austin *v.* Wilson, 11 N. Y. Suppl. 565.

Between merchants living in different countries it is said that a longer time is given, but at best objection should be made within several opportunities of writing, else the silence will be considered an acquiescence.

Colorado.— Freas *v.* Truitt, 2 Colo. 489.

Mississippi.— Stebbins *v.* Niles, 25 Miss. 267.

New Jersey.— Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York.— Lockwood *v.* Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

England.— Willis *v.* Jernegan, 2 Atk. 251.

75. Two years.— Freeland *v.* Heron, 7 Cranch (U. S.) 147, 3 L. ed. 297; Allen-West Commission Co. *v.* Patillo, 90 Fed. 628, 61 U. S. App. 94, 33 C. C. A. 194. So in Murray *v.* Toland, 3 Johns. Ch. (N. Y.) 569, 575, Chancellor Kent mentioned the rule: "It has been often held that if a party receives a stated account from abroad and keeps it by him for any length of time (one case says two years) without objection, he shall be bound by it" [*citing* Willis *v.* Jernegan, 2 Atk. 251, *supra*, and Tickel *v.* Short, 2 Ves. 239, in which last case Lord Hardwicke said that if one merchant sends an account current to another in a different country, on which a balance is made due to himself, and the other keeps it by him two years without objection, it is to be considered a stated account].

Several months.— In Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319, it was held that the court properly instructed the jury, as a question of law, that an account retained without objection from September, 1875, to January, 1876, became converted into a stated account which could not be impeached except for fraud or mistake. So where one receives a statement of an indebtedness and retains it without objection for nearly a year and until suit is brought he will be deemed to have acquiesced in its correctness. I. L. Elwood Mfg. Co. *v.* Betcher, 72 Minn. 103, 75 N. W. 113.

Date of service of summons.— Where the summons in action was dated as of the day after plaintiff sent and defendant received a statement of an account, but was not served until a month and a half thereafter, and defendant retained the account during this time without objection, this may make an account stated. Donald *v.* Gardner, 44 N. Y. App. Div. 235, 60 N. Y. Suppl. 668.

76. Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881, holding that such a credit is binding on the party making it, as an admission of the correctness of the other's bill.

77. Beals *v.* Wagener, 47 Minn. 489, 50 N. W. 535.

instanced, however, must be taken altogether, and cannot be made to operate as an admission against the party without giving effect to the accompanying claim in his favor.[78]

(D) *Inference of Acquiescence Subject to Rebuttal.* There is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or consent to the correctness of the bill. It is merely competent evidence subject to be rebutted by circumstances from which counter-inferences may be drawn,[79] and for this purpose the original transactions may be inquired into notwithstanding the general rule of conclusiveness of a stated account in the absence of fraud or mistake.[80]

3. Particular Parties and Accounts — a. Consignor and Consignee. The consignor of goods, being the legal owner thereof, is the proper party to whom the consignee should render his account of sales, and although another person may have an interest in the goods the rendition of an account of sales to the consignor will constitute an account stated.[81]

b. Corporation. A debt may be converted into a stated account though one of the parties to the transaction is a corporation,[82] as where a claim is allowed by the board of directors of a corporation,[83] or a certificate of wages earned by an employee is issued to him by competent authority and is audited and allowed by the proper officer of the corporation.[84] And there is no reason why the rule that assent may be inferred from silence after the rendition of an account should not be applied as against a private corporation.[85]

78. Hughes *v.* Smither, 23 N. Y. App. Div. 590, 49 N. Y. Suppl. 115, holding that where one to whom an account is rendered himself renders an account to the other party, upon which he gives credit for the amount of the balance of the account so rendered to him, which still leaves a balance in his favor, it will not be construed to make the account rendered to him an account stated, but that the whole transaction must be taken together. So in Spurr *v.* Allison, 8 N. Brunsw. 454, it was held that where, upon the rendition of an account, the party to whom it is rendered writes upon it a sum of money as a deduction from the balance claimed, there is no admission of the balance of the account without the deduction. But see Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881, cited *supra,* note 76.

79. Guernsey *v.* Rexford, 63 N. Y. 631; Lockwood *v.* Thorne, 18 N. Y. 285; Carpenter *v.* Nickerson, 7 Daly (N. Y.) 424; Engfer *v.* Roemer, 71 Wis. 11, 36 N. W. 618; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884.

Applications of rule.— In Lockwood *v.* Thorne, 18 N. Y. 285, it is pointed out that the inference arising from the retention of an account without objection may be rebutted by such evidence as that the party to whom the account was rendered was absent from home and could not make objection, or by other statements which might satisfactorily account for the omission to object in a given time, as that the party lived at a great distance and was expecting to see the person rendering the account in a few days, or that the expected meeting between the parties was prevented or delayed by some unforeseen casualty, or by proof of the course of dealings between the parties or of some understanding between them that no technical defaults should be insisted on.

In an action to recover for legal services plaintiff testified that, upon presenting his bill, defendant asked whether she should draw a check at once or whether plaintiff would call at a later day; and defendant testified that she was surprised at the amount of the bill rendered and told plaintiff that he should call at another time, when she would see him about it, and that her question whether she should draw a check, as testified to by plaintiff, was merely ironical. It was held that the proof failed to show an account stated. Tinney *v.* Pierrepont, 18 N. Y. App. Div. 627, 45 N. Y. Suppl. 977.

80. See *infra,* II, B, 7, b, (IX).

81. Bevan *v.* Cullen, 7 Pa. St. 281.

82. Bradley *v.* Richardson, 2 Blatchf. (U. S.) 343, 3 Fed. Cas. No. 1,786.

Agent of corporation.— An account rendered to a corporation must be delivered to an authorized agent in order to bind it as an account stated. Missouri Pac. R. Co. *v.* B. F. Coombs, etc., Commission Co., 71 Mo. App. 299.

Municipal corporation.—Public officers may bind a municipal corporation by way of an account stated. Cincinnati *v.* Cincinnati St. R. Co., 6 Ohio N. P. 140. See also St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202.

83. Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724; St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 576.

84. St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704.

85. Bradley *v.* Richardson, 2 Blatchf. (U. S.) 343, 3 Fed. Cas. No. 1,786.

c. Executor or Administrator. An administrator or executor may state an account of dealings of the testator or intestate, and an action on an *insimul computassent* may be maintained by or against him,[86] unless such a course is precluded by the statutory method prescribed for the allowance of claims,[87] though it has been held that mere silence on the part of an executor when a claim against the estate is presented to him may not be regarded as an admission of the claim against the estate.[88]

d. Female. The mere fact that one to whom an account is rendered is a female is not a reason for keeping it open and subjecting the parties who might have had dealings with the female's testator or intestate to the necessity of affirmatively establishing the correctness of the account after the lapse of many years.[89]

e. Husband and Wife. The rule of account stated does not apply in favor of a husband against his wife.[90]

f. Infants. An infant cannot state an account, and consequently assumpsit on an account stated cannot be maintained against an infant, although the particulars of the account were for necessaries, because the only consideration for the promise is the stating of the account.[91] But an account stated by an infant may be ratified by him after coming of age.[92]

g. Joint Covenantees. Where one is bound under seal to pay, not to plaintiff alone, but to him jointly with another, the legal interest of the other party under the deed cannot be extinguished by an account stated with one of the two covenantees.[93]

h. Partners — (I) *Between Themselves.* The doctrine as to debtor and creditor on an implied promise resulting from presenting an account by one party, and the retention of it by the other in silence, cannot be reasonably applied to a partnership account,[94] though it may be when the account is rendered as a final adjustment of the whole of the partnership affairs.[95] And where there is a mutual statement and settlement of accounts upon the dissolution of a partnership the law will imply a promise to pay the balance found due.[96]

(II) *With Others.* One partner may bind the firm upon an account stated, and the admission of one partner is sufficient as an admission of the firm,[97] though

86. Chambers *v.* Fennemore, 4 Harr. (Del.) 368; McCormick *v.* Interstate Consol. Rapid-Transit R. Co., 154 Mo. 191, 55 S. W. 252; Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Campbell *v.* Campbell, 16 N. Y. Suppl. 165; Wright *v.* Beirne, 2 Dem. Surr. (N. Y.) 539; Secar *v.* Atkinson, 1 H. Bl. 102; Powell *v.* Graham, 7 Taunt. 581; Ashby *v.* Ashby, 7 B. & C. 444; Smith *v.* Forty, 4 C. & P. 126.

87. Fish *v.* Morse, 8 Mich. 34. See also EXECUTORS AND ADMINISTRATORS.

88. Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780.

As to the necessity for an express promise to pay in order to stop the statute of limitations from running against executors and administrators see EXECUTORS AND ADMINISTRATORS.

89. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

90. **Account rendered not prima facie evidence.**— An account rendered by a husband to his wife, and received and kept by the latter for some time without objection, was held to be not even *prima facie* evidence of the correctness of the account against the wife in a suit by her against her husband to recover her money. Southwick *v.* Southwick, 1 Sweeny (N. Y.) 47.

91. Trueman *v.* Hurst, 1 T. R. 40; Bartlett *v.* Emery, 1 T. R. 42, note *a*.

92. Williams *v.* Moor, 11 M. & W. 256.

93. Zimmerman *v.* Woodruff, 17 U. C. Q. B. 584.

94. Hughes *v.* Smither, 23 N. Y. App. Div. 590, 49 N. Y. Suppl. 115; Rehill *v.* McTague, 114 Pa. St. 82, 7 Atl. 224, 60 Am. Rep. 341; Killam *v.* Preston, 4 Watts & S. (Pa.) 14; Schmidt *v.* Lebby, 11 Rich. Eq. (S. C.) 329.

95. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311; Atwater *v.* Fowler, 1 Edw. (N. Y.) 417.

96. Rackstraw *v.* Imber, 1 Holt N. P. 368.

97. Cady *v.* Kyle, 47 Mo. 346; Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666.

Partner not a party.— The admission of one partner has been held sufficient though the action is dismissed as to such partner because he has not been served with process. Cady *v.* Kyle, 47 Mo. 346. But mere retention by one without objection is not conclusive of partnership relations. Kemp *v.* Peck, 59 Hun (N. Y.) 118, 13 N. Y. Suppl. 112.

Account addressed to other members of firm.— In Benites *v.* Hampton, 3 Utah 369, 3 Pac. 206, it was held that an account made out in the name of two members of a firm, and sent to them by mail, would not bind a third member as an account stated, without an express admission on his part, where it is

such an agreement will not operate to release the joint liability of the firm.[98] But where the original transaction is one in which one partner cannot bind others, a subsequent admission of a debt based thereon cannot bind the partners who did not join in the admission.[99]

i. Physicians and Attorneys. The rules as to accounts stated have been applied as between attorney and client[1] and physician and patient,[2] where there is proof of employment.[3]

j. Between Broker, Factor, or Commission-Merchant, and Principal or Customer. An account or account of sales rendered by a broker, factor, or commission-merchant to his principal or customer may become binding upon the parties as an account stated.[4]

k. Pass-Book — (I) *In General.* A pass-book being the book of the buyer or the debtor party, in which he allows the other party to enter their mutual transactions, the entries become in a great degree the written admission of both parties, and whatever is entered therein, being with the other's consent, becomes a stated account in the absence of fraud or mistake,[5] and a balance struck in a broker's pass-book may be an account stated.[6]

(II) *Bank Pass-Book.* The relation of a bank and its depositor is that of debtor and creditor so as to make a bank pass-book balance the subject of the rules applicable to stated account.[7]

not shown that he knew of the account. This was upon the theory that when an account is sent by mail the party to be charged must be a party to the account, or it must be clearly made known to him and payment thereof demanded.

98. Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

After dissolution of partnership.— So it has been held that one partner has authority, after the dissolution of his firm, to adjust and state a claim against the firm, and that such statement is sufficient to support an action on a stated account. Buxton *v.* Edwards, 134 Mass. 567. *Contra,* Walker *v.* Duberry, 1 A. K. Marsh. (Ky.) 189. See also generally PARTNERSHIP.

99. Brettel *v.* Williams, 4 Exch. 623.

1. Pulliam *v.* Booth, 21 Ark. 420; King *v.* Rhoads, etc., Co., 68 Ill. App. 441; Case *v.* Hotchkiss, 37 How. Pr. (N. Y.) 283.

2. Lallande *v.* Brown, 121 Ala. 513, 25 So. 997.

3. Wharton *v.* Cain, 50 Ala. 408.

But the mere fact of a rendition of such an account will not create a cause of action. There must have been an actual employment to render the services mentioned in the account. Kellogg *v.* Rowland, 40 N. Y. App. Div. 416, 57 N. Y. Suppl. 1046.

Services rendered another.— Where a physician presented his bill to a woman for services rendered to her deceased husband, and she paid a part of it and offered to make further payments in settlement thereof, telling him that he had better accept such part than nothing, it was held that the evidence did not show a stated account, there being nothing in the evidence to prove that the services were rendered at the request of the woman, or that she had ever had any dealings with the physician before her husband's death. Callahan *v.* O'Rourke, 17 N. Y. App. Div. 277, 45 N. Y. Suppl. 764.

4. Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95; Woodward *v.* Suydam, 11 Ohio 360; Bevan *v.* Cullen, 7 Pa. St. 281; Hall *v.* Sloan, 9 Phila. (Pa.) 138, 30 Leg. Int. (Pa.) 232.

Rule that the necessary assent may be inferred from the retention of an account rendered without objection is applied as between these parties:

Alabama.—Burns *v.* Campbell, 71 Ala. 271; Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

Iowa.— Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220.

Kentucky.— Phelps *v.* Plum, (Ky. 1895) 32 S. W. 753.

Louisiana.— Flower *v.* O'Bannon, 43 La. Ann. 1042, 10 So. 376; Allen *v.* Nettles, 39 La. Ann. 788, 2 So. 602.

New Hampshire.— Austin *v.* Ricker, 61 N. H. 97.

New York.— Knickerbocker *v.* Gould, 115 N. Y. 533, 22 N. E. 573; Quincey *v.* White, 63 N. Y. 370; Dows *v.* Durfee, 10 Barb. (N. Y.) 213.

Pennsylvania.— Smedley *v.* Williams, 1 Pars. Eq. Cas. (Pa.) 359.

United States.— Allen-West Commission Co. *v.* Patillo, 90 Fed. 628, 61 U. S. App. 94, 33 C. C. A. 194; Eichel *v.* Sawyer, 44 Fed. 845.

Or, as held in other cases, such silence is *prima facie* evidence of the correctness of the account. McCord *v.* Manson, 17 Ill. App. 118; Wittkowski *v.* Harris, 64 Fed. 712.

Two sales of same goods.— Where a principal has received an account of sales and has approved and recognized it, it is held that he is not bound to object to a second account of sales covering the same goods or run the risk of its being taken as a stated account. Cartwright *v.* Greene, 47 Barb. (N. Y.) 9.

5. Ruch *v.* Fricke, 28 Pa. St. 241.

6. Marye *v.* Strouse, 5 Fed. 483.

7. *Iowa.*— Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263; Benton County Bank *v.* Walker, 85 Iowa 728, 51 N. W. 241.

4. Effect of Subsequent Acts — a. Indulgence by Creditor. After an account has been stated the creditor may extend indulgence to the debtor by postponing the time of payment, without waiving the benefit of the prior settlement of the account.[8]

b. Ex Post Facto Promise. Where an account is stated the law implies a promise by the debtor to pay on request, and any *ex post facto* promise by him, differing in its nature from the promise implied by law, to pay on a particular day, will be *nudum pactum* unless made upon a new consideration.[9]

c. Sale of Securities. After the settlement of an account by an admission of the balance shown thereon and a promise to pay, plaintiff does not waive the stated account by selling collaterals in his hands, but the account remains stated and settled subject to credit for any amount realized from the sale of securities.[10]

5. Parties. Persons jointly liable on an account stated may be joined.[11] And where an account is stated by the survivor of joint creditors, action may be maintained by him, upon the theory that the statement of the account is in the nature of a new promise.[12] If it appears that the plaintiff in an action on a stated account had, before the action, made an assignment for the benefit of his creditors, the record may be amended by adding the name of the assignee as party plaintiff.[13]

6. Pleading — a. Declaration or Complaint — (1) *Necessity to Declare on Account Stated.* To recover on an account stated plaintiff must declare upon an account stated, and if he proceeds upon the original cause of action the rules of evidence governing an action on an account stated will not apply.[14] But

Maryland.— Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Missouri.— McKeen *v.* Boatmen's Bank, 74 Mo. App. 281.

New York.— Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Harley *v.* Eleventh Ward Bank, 76 N. Y. 618; August *v.* New York Fourth Nat. Bank, 1 N. Y. Suppl. 139; Clark *v.* Mechanics' Nat. Bank, 11 Daly (N. Y.) 239; Hutchinson *v.* Market Bank, 48 Barb. (N. Y.) 302; Welsh *v.* German-American Bank, 42 N. Y. Super. Ct. 462.

United States.— Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811.

The rule that assent to the correctness of a balance may be inferred from retaining an account rendered without objection within a reasonable time, so as to cast the burden of impeaching the correctness of the account, for fraud or mistake, upon the party complaining of the balance, applies to such cases. See last preceding note. Where a depositor's bank-book showed a balance due him, less certain checks for drafts which had been protested because of the failure of the bank, the fact that the depositor waited some time before objecting to the deduction in his account does not make the book an account stated, where it was afterward credited with unpaid drafts and his claim certified by the bank to be the original deposit. Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. 790.

8. Lawson *v.* Douglass, 17 N. Y. Suppl. 4, 43 N. Y. St. 356.

9. Robbins *v.* Downey, 18 N. Y. Suppl. 100, 45 N. Y. St. 279; Hopkins *v.* Logan, 5 M. & W. 241.

10. Lawson *v.* Douglass, 17 N. Y. Suppl. 4, 43 N. Y. St. 356.

11. Throop *v.* Sherwood, 9 Ill. 92.

12. Holmes *v.* D'Camp, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

13. Felty *v.* Deaven, 166 Pa. St. 640, 31 Atl. 333.

14. Thompson *v.* Thompson, 2 Harr. (Del.) 202; Bump *v.* Cooper, 20 Oreg. 527, 26 Pac. 848.

Inquiry into original debt.— If plaintiff declares upon an original debt without an amendment he cannot exclude evidence of a defense pertaining to such cause of action. Wilson *v.* Waldron, 12 Wash. 149, 40 Pac. 740, holding that where plaintiff merely declares on an indebtedness on an account for merchandise sold and delivered, evidence was admissible to disprove the sale and delivery. McCormick Harvesting-Mach. Co. *v.* Wilson, 39 Minn. 467, 40 N. W. 571; Northern Line Packet Co. *v.* Platt, 22 Minn. 413.

Accounting as one item of indebtedness.— Where a complaint alleged that under a contract plaintiffs cut and hauled a certain quantity of logs for defendant during one season, and that at the end of the season the parties had an accounting under which a certain amount was found due to plaintiffs, which defendants promised to pay, and that in the following season plaintiffs cut and hauled another quantity of logs under the settled contract upon which a balance was due, it was held that the allegations of the first accounting merely amounted to an admission of payment except as to such amount, and did not convert the pleading into an action on an account stated so as to make it necessary for plaintiffs to prove such accounting. Blewett *v.* Gaynor, 77 Wis. 378, 46 N. W. 547. To the same effect is Sichel *v.* Davies, 15 N. Y. St. 317.

Proceeding to trial without regard to form of pleading.— In New York, where the com-

it has been held under the code that a judgment may be rendered on an account stated notwithstanding there was no allegation of an account stated in the complaint.[15]

(II) *Form of Declaration in General.* Where parties have stated an account between them assumpsit is the proper form in which to declare.[16] The emphatic words of a technical count upon an account stated were *insimul computassent*, that they, plaintiff and defendant, accounted together.[17]

(III) *Sufficiency in General.* The essential elements of an account stated must be alleged, else the pleading will be fatally defective.[18] The essential requirement is that the declaration shall show that the account received the assent of both parties, and if this is shown it will not be demurrable on account of its generality;[19] and a complaint which alleges an accounting and the ascertainment of a balance due to plaintiff in a certain sum, and an agreement or promise to pay it, sufficiently states a cause of action.[20] But where, after the ascertainment of a balance due, such balance is reduced by payments, in an action to recover on the settlement the amount may be laid as that which finally remains due after crediting

plaint alleged an indebtedness upon an account of services rendered and for moneys paid out at defendant's request, this was held not to mean necessarily an indebtedness upon an account stated; and where the trial proceeded without much regard for pleading, and plaintiff elected to proceed upon an account stated, and the court at the close of the evidence allowed an amendment of the answer and the complaint so as to make it conform to the facts proved without making the record formally show what the amendment was and without exception on the part of defendant, there was no error. Dickerson *v.* Scheuer, 1 N. Y. Suppl. 419.

15. Sloan *v.* Westfield, 17 S. C. 589.

16. James *v.* Fellowes, 20 La. Ann. 116.

Forms of complaints, declarations, etc., in actions on accounts stated may be found set out in whole, in part, or in substance in the following cases:

Alabama.— Eslava *v.* Ames Plow Co., 47 Ala. 384; Chapman *v.* Lee, 47 Ala. 143.

California.— Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95; De Witt *v.* Porter, 13 Cal. 171.

Georgia.— Ward *v.* Stewart, 103 Ga. 260, 29 S. E. 872.

Indiana.— Bouslog *v.* Garrett, 39 Ind. 338; McDowell *v.* North, 24 Ind. App. 435, 55 N. E. 789.

Massachusetts.— Buxton *v.* Edwards, 134 Mass. 567.

Missouri.— McCormack *v.* Sawyer, 104 Mo. 36, 15 S. W. 998; Cape Girardeau, etc., R. Co. *v.* Kimmel, 58 Mo. 83.

Montana.— Voight *v.* Brooks, 19 Mont. 374, 48 Pac. 549; McFarland *v.* Cutter, 1 Mont. 383.

New York.— Volkening *v.* De Graaf, 81 N. Y. 268; Moss *v.* Lindblom, 39 N. Y. App. Div. 586, 57 N. Y. Suppl. 703; Hathaway *v.* Russell, 46 N. Y. Super. Ct. 103; Graham *v.* Camman, 13 How. Pr. (N. Y.) 360.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

Texas.— Neyland *v.* Neyland, 19 Tex. 423.

England.— Webber *v.* Tivill, 2 Saund. 124; Styart *v.* Rowland, 1 Show. 215.

Canada.— Tyke *v.* Cosford, 14 U. C. C. P. 64, being a special count.

17. Volkening *v.* De Graaf, 81 N. Y. 268.

18. Davis *v.* Boswell, 77 Mo. App. 294.

19. Carlisle *v.* Davis, 9 Ala. 858.

Accounting "between."— An allegation that the parties accounted "between" them was held to be sufficient over an objection that it should have been alleged that the account was stated "by and between" them. Debenhan *v.* Chambers, 3 M. & W. 128, 129, in which it was said that the ruling in Hooper *v.* Vestris, 5 Dowl. 710, that an affidavit of debt stating defendant to be indebted to deponent "as an account stated between them" was insufficient, seemed to overlook the word "indebted." Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666; Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

Complaint loosely drawn.— A complaint on an account stated is sufficient, though loosely drawn, to withstand a general demurrer. Graham *v.* Camman, 13 How. Pr. (N. Y.) 360.

20. Carlisle *v.* Davis, 9 Ala. 858; De Witt *v.* Porter, 13 Cal. 171, in which case a complaint which set up that defendant was justly indebted to plaintiff in the sum of, etc., for money laid out at his special instance, to wit, etc., on, etc., and in the sum of, etc., for money found to be due between, etc., on an account then stated between them, together with an allegation of an undertaking on the part of defendant to pay the sum ascertained to be due, was held to be sufficient, as upon an account stated, over the objection that it contained two causes of action, neither of which was complete in itself, and that one could not be looked to in aid of the other; McDowell *v.* North, 24 Ind. App. 435, 55 N. E. 789; McFarland *v.* Cutter, 1 Mont. 383.

Allegation of accounting not bad as a conclusion.— Where it is alleged that an account was stated between the parties, upon which a balance was found to be due, this is sufficient though it states a conclusion. Hatch *v.* Von Taube, 31 Misc. (N. Y.) 30, 62 N. Y. Suppl. 1031.

the payments, and such allegation will be sustained by proof of the larger amount ascertained on the settlement and of the subsequent payments by which it was reduced.[21] The mere statement of a conclusion, however, that accounts have been stated, without other allegations, as that the parties have actually accounted and that a balance was ascertained, is not sufficient.[22]

(IV) *ALLEGATION AS TO TIME OF ACCOUNTING.* The time when the account was stated must be alleged.[23]

(V) *ALLEGATION OF ASSENT* — (A) *The Rule.* An averment that plaintiff assented to the balance ascertained is essential.[24]

(B) *Retention of Account.* The mere allegation of retention of an account rendered without objection is an allegation of evidence which may or not lead to the conclusion that the parties agreed to the balance, and is not sufficient as an allegation of an account stated.[25]

(VI) *ALLEGATION OF PROMISE* — (A) *In General.* While an allegation of an express promise to pay may be proper, and a pleading containing it with other allegations of the essential elements of an account stated in general terms will be sufficient,[26] the better rule seems to be that it is sufficient to allege the accounting and the ascertainment of a balance due from one party to the other without alleging an express promise to pay such balance, because the law implies the promise from the accounting, and legal conclusions need not be alleged,[27] though there are cases which hold otherwise, notwithstanding it is recognized that proof of an express promise under such allegation is not necessary.[28] An additional allegation that for the balance due upon the account stated defendant executed a promissory note does not make the pleading state more than a single cause of action.[29]

(B) *Express Promise Different from That Implied by Law.* If the transaction consists of an adjustment of an account and a promise to liquidate the balance otherwise than by the payment of money,— that is, if there is an express promise other than the law implies from the mere adjustment of the account,— the declaration should count specially.[30]

21. Thompson *v.* Smith, 82 Iowa 598, 48 N. W. 988.

22. Ward *v.* Farrelly, 9 Mo. App. 370; Nicoll *v.* Haas, 5 N. Y. App. Div. 206, 39 N. Y. Suppl. 205.

23. Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672, holding that a complaint without this averment would be as defective as a complaint upon a promissory note which failed to aver when the note was made.

Such time need not be proved strictly as laid, it not being of the essence of the promise. Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672.

Time laid after commencement of suit.— Where the time was laid as after the commencement of a suit it was held not to render the declaration demurrable, as in such a case plaintiff would be confined in his proof to a time before the commencement of the action. Carlisle *v.* Davis, 9 Ala. 858.

24. Van Blarcom *v.* Donovan, 16 Mo. App. 535.

25. St. Louis Lager Beer Bottling Co. *v.* State Nat. Bank, 8 Colo. 70, 5 Pac. 800; Brown *v.* Kimmel, 67 Mo. 430; Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780.

26. Approved form.— It seems that the technical count on an *insimul computassent* went on to say that on such accounting defendant was found in arrears and indebted to plaintiff in the sum named, and, being so in arrears, he undertook and promised to pay the same to plaintiff. Volkening *v.* De Graaf, 81 N. Y. 268 [*citing* 2 Chitty Pl. 90, 1 Chitty Pl. 358].

27. *Georgia.*— Ward *v.* Stewart, 103 Ga. 260, 29 S. E. 872.

Indiana.— Bouslog *v.* Garrett, 39 Ind. 338.

Minnesota.— Heinrich *v.* Englund, 34 Minn. 395, 26 N. W. 122.

Montana.— Voigt *v.* Brooks, 19 Mont. 374, 48 Pac. 549.

New York.— Moss *v.* Lindblom, 39 N. Y. App. Div. 586, 57 N. Y. Suppl. 703.

Ohio.— Dyer *v.* Isham, 4 Ohio Cir. Ct. 429.

Interest — Under statute.— In Matlock *v.* Purefoy, 18 Ark. 492, it was held, under the statute in that state, that a count upon a stated account which alleged a promise to pay the amount with ten per cent. interest, without alleging a promise to pay the interest to be in writing, was fatally defective, but that the defect could be considered as amended under the statute by striking out the words referring to the interest unless the objection was specifically pointed out as a cause of demurrer.

28. Kent *v.* Highleyman, 17 Mo. App. 9; Cape Girardeau, etc., R. Co. *v.* Kimmel, 58 Mo. 83, holding, however, that the omission is cured by verdict.

29. Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411.

30. Tyke *v.* Cosford, 14 U. C. C. P. 64; Hopkins *v.* Logan, 5 M. & W. 241. See *infra*, II, B, 7, b, (VIII).

(VII) *ALLEGATION OF BREACH.* An allegation, after setting out an accounting between the parties, that defendant had not paid any part of the balance found due, is a sufficient allegation of the breach.[31] So an allegation that upon the statement of an account a balance was found to be due sufficiently shows that there was a breach of contract.[32]

(VIII) *ALLEGATION AS TO ORIGINAL DEBT.* Upon the principle that the implied promise resulting from the accounting is the gist of the cause of action upon a stated account, the subject-matter of the original debt need not be set forth,[33] and therefore a bill of particulars need not be filed with the pleading,[34] and it need not allege that an indebtedness actually existed between the parties.[35] But where the parties are such that their right to sue and liability to be sued is restricted, it should be averred that the account was stated of certain moneys due by defendant to plaintiff for and by reason of some matter which can by law create a debt from the one to the other.[36] Even under an apparently stricter rule which requires some statement of the original items, a pleading which alleges the nature of the original indebtedness and a subsequent accounting is sufficient.[37]

(IX) *ALLEGATION AS TO PARTIES.* While an account need not be stated between the original parties,[38] yet where the account filed with the complaint purports to be an account between defendant and a person other than plaintiff, and there is nothing in the complaint to show that plaintiff has acquired the ownership, a judgment by default under a service by publication cannot be supported.[39]

(X) *INTEREST OF WIFE JOINED WITH HUSBAND.* A declaration by husband and wife on an account stated must show that the accounting was concerning matters in which the wife had an interest.[40]

(XI) *ASSIGNEE CONFINED TO THEORY OF CASE.* If the assignee of a claim sues upon it as upon an account stated, upon the theory that the relation of the original parties was that of principal and agent, he cannot recover if the relation was that of persons engaged in a joint adventure.[41]

(XII) *JOINDER OF COUNTS*—(A) *In General.* It is said to be advisable to insert a count on an account stated in all declarations in assumpsit for a recovery of a money demand,[42] and sometimes it is necessary, as in actions by or against

31. Debenhan *v.* Chambers, 3 M. & W. 128.

32. Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666.

33. McCall *v.* Nave, 52 Miss. 494; Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Moss *v.* Lindblom, 39 N. Y. App. Div. 586, 57 N. Y. Suppl. 703; Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331. See also *infra*, II, G, 3.

But it has been held that where one counts on a parol statement of accounts he must set out the original accounts settled, by exhibits or otherwise, so that the opposite party may have notice of the matters alleged to have been adjusted. Neyland *v.* Neyland, 19 Tex. 423; Hill *v.* Newlee, 3 Tex. App. Civ. Cas. § 217.

34. See *infra*, II, G, 3, b.

35. Bouslog *v.* Garrett, 39 Ind. 338; McDowell *v.* North, 24 Ind. App. 435, 55 N. E. 789.

36. Huron Dist. Council *v.* London Dist. Council, 4 U. C. Q. B. 302, which was a case involving certain districts as parties.

37. Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666.

38. See *supra*, II, B, 2, k, (II).

39. Thompson *v.* Stetson, 15 Nebr. 112, 17 N. W. 368.

Demurrer admits accounting by defendant. — An objection to a complaint on the ground that it appears from an account attached to it that the statement of the account was not made between plaintiff and defendant, but that another than defendant appears to have signed it, cannot be raised on a general demurrer to the complaint, because such a demurrer admits the allegation of the complaint that the account was stated between the parties, and whether the person who signed the statement was authorized to do so is a mere matter of proof to be considered on the trial. Moss *v.* Lindblom, 39 N. Y. App. Div. 586, 57 N. Y. Suppl. 703.

40. Johnson *v.* Lucas, 1 E. & B. 659.

41. Hughes *v.* Smither, 23 N. Y. App. Div. 590, 49 N. Y. Suppl. 115, wherein it was said that had the suit been by the assignor, and the proof had deviated from the allegations so as to show an account stated of a joint adventure, an amendment could not have prejudiced defendant because he could have shown errors sufficient to warrant the opening of the account; but that as plaintiff was only an assignee of the claim set forth in the complaint, and the allegation was that the account was stated between principal and agent, and of an assignment of that claim, he must recover strictly upon the issues thus tendered.

42. 1 Chitty Pl. (16th Am. ed.) 371. See ASSUMPSIT, ACTION OF.

executors and administrators when it becomes material for plaintiff to rely upon a promise or acknowledgment since the death of the testator or intestate.[43]

(B) *Joinder of Counts on Original Debt.* A party may join a count for the original debt with a count upon an account stated, and, in such condition of the pleadings, should he fail upon the account stated, he may recover upon the original debt.[44] But if the pleadings are framed so that the party relies solely upon the account stated he cannot fall back upon the original account.[45]

(XIII) *AMENDMENT.* In an action on an account stated an amendment may be allowed adding a separate cause of action on a note included in the account.[46]

b. Plea or Answer[47]— (I) *GENERAL ISSUE.* In an action on an account stated the plea of the general issue puts the burden upon plaintiff to establish that there is a stated account,[48] and under the general issue[49] or general denial any evidence is admissible which shows that no account was stated, that being the thing upon which the recovery depends.[50]

(II) *DENIAL OF ASSENT.* Where defendant acknowledges the receipt of an account rendered, but denies the allegation that he assented to its correctness, this is sufficient to raise the issue as to the stating of an account.[51]

(III) *DENIAL OF SIGNATURE.* Where the name of a person is subscribed to an account without an acknowledgment of its correctness except such as may be inferred from the signature, he may show that the signature is not genuine without pleading *non est factum* under oath.[52]

43. 1 Saunders Pl. (2d Am. ed.) 30. See EXECUTORS AND ADMINISTRATORS.

44. Johnson *v.* Tyng, 1 N. Y. App. Div. 610, 37 N. Y. Suppl. 516; Goings *v.* Patten, 17 Abb. Pr. (N. Y.) 339.

In framing the pleading rules of Hil. T., 4 Wm. IV, it was considered that in assumpsit and debt on simple contract plaintiff should be at liberty to proceed as well for the original debt as upon any admission that the debt was due, and therefore the rule provided that a count for money due on the account stated might be joined with any other count for a money demand, though it may not be to establish a distinct subject-matter of complaint in respect of each of such counts. 1 Chitty Pl. (16th Am. ed.) 473.

45. See *infra*, II, B, 7, b, (II).

46. Oden *v.* Bonner, 93 Ala. 393, 9 So. 409, holding that in an action on a stated account against two persons as late copartners, it appearing that another firm consisting of one of the late copartners and another had succeeded the first firm without assuming its liabilities, the court properly permitted plaintiff to amend by dismissing as to the member of the first partnership who was not a member of the succeeding partnership, and adding, as a separate cause of action against the member of the succeeding firm who was a member of the old firm, notes of the new firm which were items of the original account, because a new cause of action was not thereby set up.

Amendment on appeal.— As plaintiff suing upon an account stated must recover thereon, if there is a failure of proof on account of which the complaint is dismissed, and no amendment is asked, an amendment will not be allowed on appeal for the purpose of reversing the judgment of dismissal, although it appears that something was due which would have justified an amendment in the court below. Volkening *v.* De Graaf, 81 N. Y. 268.

47. Forms of pleas in actions on stated accounts may be found set out in whole, in part, or in substance in Kennedy *v.* Broun, 13 C. B. N. S. 677; Webber *v.* Tivill, 2 Saund. 124.

Plea of illegal items in action on stated account is set out in Kennedy *v.* Broun, 13 C. B. N. S. 677.

48. Lallande *v.* Brown, 121 Ala. 513, 25 So. 997.

49. Plea bad as amounting to general issue. Under the general issue it may be shown that the accounts are not settled or adjusted, or that no balance was struck between plaintiff and defendant, and if defendant sets up facts which show this the plea will be bad as amounting to the general issue. Worrall *v.* Grayson, 1 M. & W. 166.

Failure of consideration.— Under the general issue "never indebted," defendant denies that he is indebted to plaintiff on an account stated, and if he pleads the facts, as a failure of consideration, which show that he is not indebted, the plea will be bad as amounting to the general issue. Jacobs *v.* Fisher, 1 C. B. 178.

50. Field *v.* Knapp, 108 N. Y. 87, 14 N. E. 829; Ensign *v.* Hooker, 6 N. Y. App. Div. 425, 39 N. Y. Suppl. 543.

Note not matured.— Where the evidence of an account stated is a note which had not matured when the action was brought, this may be shown under the general issue. Hill *v.* Lott, 13 U. C. Q. B. 465.

51. McKenzie *v.* Poorman Silver Mines, 88 Fed. 111, 60 U. S. App. 1, 31 C. C. A. 409, assigning as a reason for this that the mere rendition of an account is not of itself enough to make an account stated.

52. Ross *v.* Yeatman, 2 Swan (Tenn.) 144.

(IV) *PLEA OF ACCOUNT STATED*[53] — (A) *In General.* There is some confusion in the earlier cases upon the right to plead an accounting in an action on the original debt. At first it was held that a mutual accounting operated as a set-off and payment of the cross-demands, and the plea was allowed.[54] Afterward such a plea was held bad upon the ground that a simple-contract debt could not be discharged by an accounting.[55] These cases cannot be sustained upon the theory upon which they are decided, for it seems to be established that an accounting of mutual and cross-demands operates as a settlement and payment,[56] for it was determined even at this date that if cross-demands were set off against each other in the accounting it might be set up as a defense,— not by pleading the accounting as such, but by pleading it according to its legal operation, as payment.[57] Other cases, however, established the rule to be that in the case of an accounting involving cross-demands defendant could plead the accounting, setting up the cross-items as a set-off and alleging payment.[58] Under the statutory practice per-

53. Plea of account stated may be found set out in Callander *v.* Howard, 10 C. B. 290; Learmonth *v.* Grandine, 4 M. & W. 658; Beattie *v.* Hatch, 12 U. C. Q. B. 195; Melville *v.* Carpenter, 11 U. C. Q. B. 132.

54. Milward *v.* Ingram, 2 Mod. 43, wherein North, C. J., said that after such an account as that stated in the plea the plaintiff could never have recourse to the first contract. In this case there was no payment alleged, but merely that the defendant promised to pay the plaintiff the balance and that the plaintiff promised to release him.

54. Rolls *v.* Barnes, W. Bl. 65; Atherley *v.* Evans, Say. 269; Scarborough *v.* Butler, 3 Lev. 237. See also ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT; RELEASE.

56. Callander *v.* Howard, 10 C. B. 290. The same view was taken in Ashby *v.* James, 11 M. & W. 542; Clark *v.* Alexander, 8 Scott N. R. 147; Pott *v.* Clegg, 16 M. & W. 321; Scholey *v.* Walton, 12 M. & W. 510; Hayford *v.* Andrews, Cro. Eliz. 697.

57. May *v.* King, 12 Mod. 537, 1 Ld. Raym. 680. In New York the same ruling was adhered to. Bump *v.* Phœnix, 6 Hill (N. Y.) 308.

Atherley *v.* Evans, Say. 269, in which it is held that a plea of an account stated is bad upon the ground that an accounting will not discharge a simple-contract debt, refers to May *v.* King, 12 Mod. 537, as a case wherein the authority of Milward *v.* Ingram, 2 Mod. 43, was denied, but if the authority of this last case was denied in May *v.* King, 12 Mod. 537, it was not upon the ground upon which the ruling seems to be based in Atherley *v.* Evans, Say. 269, but rather upon the ground that the defense should have been pleaded according to its legal operation and not as an account stated. And indeed in this last case the defendant not only pleaded the accounting but further pleaded that he had paid the balance found to be due.

58. Beattie *v.* Hatch, 12 U. C. Q. B. 195; Melville *v.* Carpenter, 11 U. C. Q. B. 132; Callander *v.* Howard, 10 C. B. 290 (which was assumpsit on three bills of exchange with a count for goods sold and delivered, money paid, and a count upon an account stated, and the defendant pleaded that after the accruing of the causes of action and before the commencement of the suit he and the plaintiff accounted together of and concerning said causes of action and of and concerning certain other claims and demands of the plaintiff against the defendant and certain other claims and demands of the defendant against the plaintiff, and that on this accounting a certain amount was found to be due to the plaintiff which the defendant promised to pay in consideration of the premises and which he afterward paid, and it was held that the plea amounted to an allegation of the allowance of the cross-demands upon an account stated, and payment of the balance, and that it was unexceptionable in form); Learmonth *v.* Grandine, 4 M. & W. 658 (wherein the same character of plea was pleaded, but the cross-items were pleaded in terms as a set-off); Smith *v.* Page, 15 M. & W. 683 (holding that a plea in an action of *indebitatus assumpsit*, that after the accruing of the causes of action in the declaration mentioned and before the commencement of the suit, defendant and plaintiff accounted together of and concerning said causes of action and all other claims and demands then being between plaintiff and defendant, and that on such accounting a certain sum was found to be due, which the defendant promised to pay and which before the commencement of the suit he did pay, was bad because it did not show that at the time of the second accounting any cross-demand existed in favor of the defendant against the plaintiff, etc.); Sutton *v.* Page, 3 C. B. 204 (wherein Tindal, C. J., said that the plea in that case alleged both an accounting and payment of a sum found due, but that if it had not alleged both, it would not have been good). But in two of the cases hereinbefore cited which hold that a plea of an account stated is bad (Rolls *v.* Barnes, W. Bl. 65, and Bump *v.* Phœnix, 6 Hill (N. Y.) 308), it was alleged in the pleas that the balance found due on the accounting was in favor of the defendant.

General issue.— Where, upon an account stated, a balance was found in favor of the plaintiff upon which assumpsit was brought, if the defendant wished to plead a second accounting between himself and the plaintiff upon which a balance was found due the de-

mitting the pleading of the material facts necessary to constitute a cause of action or defense without averring their legal effect, as well as upon the theory that the promise to pay an amount found to be due on an accounting is a discharge of the items on each side, a plea setting up an accounting between the parties and a balance found due to plaintiff in full settlement to a date specified is good.[59]

(B) *General Issue with Notice.* In assumpsit on common counts other than *insimul computassent* defendant may, under the general issue and notice of a set-off, show a balance due to him on an account stated of more than sufficient to extinguish plaintiff's claim.[60]

(C) *Affirmative Defense under Code.* It has been held under the code, however, that an account stated is an affirmative defense, and as such must be affirmatively pleaded in the answer.[61]

(V) *Duplicity.* Where other common counts are joined with a count for the same amount on an account stated, plaintiff claims two sums, and the account stated must be understood to have been stated of sums other than that separately demanded in the other counts, whether it be so expressed in the counts or not, and the plea must go to separate claims of distinct amounts.[62]

c. Replication or Reply[63]—(I) *Of Stated Account.* In a suit for the recovery of the balance of an account, to a counterclaim setting up a verified account plaintiff may file a verified reply of an account stated, which is a sufficient denial of the verified account.[64]

(II) *New Promise.* Although plaintiff need not allege an express promise in order to recover on an account stated, yet when he declares upon the implied promise, but relies upon a new promise to take the original debt out of the operation of the statute, which is pleaded, he must set up the express promise by way of reply.[65]

(III) *Never Indebted.* Where a defendant in an action of assumpsit pleads an accounting and set-off of cross-demands resulting in a full discharge and satisfaction of the promises declared on, plaintiff may reply "never indebted" in the manner and form, etc., and it is not necessary to traverse the accounting.[66]

(IV) *Denial of Accounting.* And where a plea alleges an accounting covering the causes of action in the declaration mentioned and all other claims and demands then being between plaintiff and defendant, and payment of the balance found due, a replication denying the accounting as broadly as it is laid in the plea is good.[67]

fendant, it was held that under the rules of Hil. T., 4 Wm. IV, such second account must be taken to be either a payment or a set-off, and in neither case could the defendant avail himself of these defenses under the general issue. Fidgett *v.* Penny, 1 C. M. & R. 108. See also Evans *v.* Downes, 2 Jur. 1066.

59. Rand *v.* Wright, 129 Mass. 50.

60. Nichols *v.* Alsop, 6 Conn. 477.

61. Rishel *v.* Weil, 31 Misc. (N. Y.) 70, 63 N. Y. Suppl. 178.

Immaterial variance, under N. Y. Code Civ. Proc. § 2943, where defendant in an action to recover a balance on an account proved a stated account and payment of the balance ascertained, though his answer did not technically set up an account stated. Schuyler *v.* Ross, 13 N. Y. Suppl. 944.

62. Foot *v.* Baker, 5 M. & G. 335; Rawlinson *v.* Shand, 5 M. & W. 468; Mee *v.* Tomlinson, 4 A. & E. 262.

But where the bill of particulars does not indicate to which count it applies, and the *ad damnum* is too small to cover both counts if intended for different demands, it is held that an answer which covers the whole of plaintiff's case is good. Rundlett *v.* Weeber, 3 Gray (Mass.) 263.

63. Replication in action on account stated may be found set out in Webber *v.* Tivill, 2 Saund. 124.

64. Complaint and reply construed together. — Molino *v.* Blake, (Ariz. 1898) 52 Pac. 366, holding that the complaint and reply in such a case, not being repugnant, should be construed together, and that where defendant chooses to go to trial on the pleadings as they thus stand, the only issue is the fact whether or not there had been an adjustment and settlement of the accounts of the parties.

65. Dyer *v.* Isham, 4 Ohio Cir. Ct. 429, holding further that where the parties go to trial without objecting on these points, and the case is tried as if the issue were properly made by the pleadings, it will be too late to object thereafter.

66. Learmonth *v.* Grandine, 4 M. & W. 658.

67. Sutton *v.* Page, 3 C. B. 204.

7. EVIDENCE — a. Burden of Proof. In an action upon a stated account the burden is upon plaintiff to prove an account stated in accordance with the principles already laid down, and nothing less will support his allegations.[68] In like manner, where defendant relies upon a stated account, the burden is on him to prove the fact.[69]

b. Admissibility and Sufficiency — (I) *In General.* An account stated being a confession that there is a fixed and definite sum due from one person to another at the date of the alleged accounting, any facts which show that this is a necessary result of the transactions involved are competent on the trial of such an issue,[70] as that the parties made and agreed upon the balance.[71] Inferences against items as proper charges may be overcome by the presumption of assent arising from the rendition of an account, its examination, correctness in certain particulars, and return.[72] But the action on a stated account is not extended to the case of such compulsory adjustments of demands as the law may make against the will of the party.[73]

(II) *ORIGINAL INDEBTEDNESS* — (A) *In General.* Mere proof of indebtedness is not sufficient to authorize a recovery on or to sustain an account stated,[74] nor can the party fall back upon the original account[75] unless the pleadings are so framed as to show that he does not rely solely upon a stated account.[76] And even if a count for the original debt is joined, but the issue at the trial is confined to the account stated, judgment cannot be rendered for an item of the account upon failure to prove the stated account.[77] Where the transactions upon the result of which the balance is sought to be recovered are not pleaded as an account stated, it is permissible for either party to show the nature of such transactions.[78]

(B) *Proof without Regard to Original Items.* An action on an account stated being upon the new promise, and not upon the original debt or items of account,

68. *Alabama.*— Christian *v.* Hill, 122 Ala. 490, 26 So. 149; Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93; Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672.

Arkansas.— Thurmond *v.* Sanders, 21 Ark. 255.

Illinois.— Pick *v.* Slimmer, 70 Ill. App. 358.

Michigan.— Stevens *v.* Tuller, 4 Mich. 387.

Missouri.— Koegel *v.* Givens, 79 Mo. 77; Davis *v.* Boswell, 77 Mo. App. 294.

New York.— Volkening *v.* De Graaf, 81 N. Y. 268.

Oregon.— Truman *v.* Owens, 17 Oreg. 523, 21 Pac. 665.

69. White *v.* Campbell, 25 Mich. 463, holding that where the statute of limitations is relied upon by defendant, upon the ground that a claim has been converted into a stated account by his assent, such assent must be proved.

70. Chapman *v.* Lee, 47 Ala. 143; Gooding *v.* Hingston, 20 Mich. 439; Montgomerie *v.* Ivers, 17 Johns. (N. Y.) 38; Fitch *v.* Leitch, 11 Leigh (Va.) 471.

In an action on a stated account evidence of an admission by defendants that they were doing business as partners, though not confined to the exact time within which the account accrued, is admissible. Sager *v.* Tupper, 38 Mich. 258.

71. Albrecht *v.* Gies, 33 Mich. 389.

72. Sergeant *v.* Ewing, 36 Pa. St. 156.

73. Cooley, J., in Gooding *v.* Hingston, 20 Mich. 439, in which case it was held that a foreign judgment is not admissible in support of the common counts of assumpsit, including the count on an account stated.

74. Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672; Koegel *v.* Givens, 79 Mo. 77.

Account inadmissible.— In an action upon the promise to pay the balance struck on an account rendered, the account itself is not competent evidence, and therefore it is error to permit the jury, over the objection of defendant, to take it out with them. Watson *v.* Davis, 52 N. C. 178. It is held that the admission of an account between parties tending to show dealings between them in an action on a stated account is erroneous where other evidence shows that a balance was agreed upon, upon an examination of such dealings. Albrecht *v.* Gies, 33 Mich. 389.

Harmless error.— The admission of an open account is not prejudicial, even if erroneous, where the cause was submitted to the jury on the issue whether there was an account stated, and the recovery was based upon the ground that there was such an account. Warder, etc., Co. *v.* Angell, 99 Wis. 298, 74 N. W. 789.

75. Koegel *v.* Givens, 79 Mo. 77.

76. Goings *v.* Patten, 1 Daly (N. Y.) 168, holding that defendant may fall back upon the accounts and prove a balance due to him, though he relies upon a stated account, unless his pleadings show a sole reliance upon the stated account.

77. Johnson *v.* Tyng, 1 N. Y. App. Div. 610, 37 N. Y. Suppl. 516.

78. Northern Line Packet Co. *v.* Platt, 22 Minn. 413. See also II, B, 6, a, (XII), (B).

such action is sufficiently supported by showing an account stated in accordance with the principles already enunciated, and it is not necessary to give evidence of the original character of the debt or of the several items constituting the account.[79] And where an account is rendered and retained without objection, the implied acquiescence from such silence is *prima facie* sufficient evidence of the debt shown by the account.[80]

(III) *Admission*— (A) *Of Amount.* The mere admission of indebtedness without reference to any specific amount will not support a count on an account stated,[81] yet, as it is only necessary that the parties should agree upon a certain amount, evidence that they agreed to the amount without naming it, but alluding to it as "the bill," is sufficient.[82]

(B) *Answer of Garnishee.* An answer of a garnishee in prior garnishee proceedings is competent evidence to prove the admission of a debt under a count on an account stated.[83]

(C) *Admission of Corporation.* The admission of a corporation may be shown by the approval of its authorized officers without reference to minute or record entries of such action.[84]

(D) *Books of Account as Admission.* Where the person to whom an account is rendered examined the book from which it was taken, and made no objection to its correctness, the book was held to be admissible as in the nature of an admission.[85]

(E) *Pass-Book in Defendant's Possession.* In an action on an account stated plaintiff may prove the statement of the account by a pass-book in the possession of defendant.[86]

(F) *Conversation with Third Person.* While the admission of one who is not defendant's agent, out of defendant's presence, will not bind him, a conversation

79. *Alabama.*— Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Ware *v.* Dudley, 16 Ala. 742; Johnson *v.* Kelly, 2 Stew. (Ala.) 490.

Arkansas.— State *v.* Jennings, 10 Ark. 428.

California.— Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Delaware.— Gregory *v.* Bailey, 4 Harr. (Del.) 256; Parkin *v.* Bennington, 1 Harr. (Del.) 209.

Florida.— Jacksonville, etc., R., etc., Co. *v.* Warriner, 35 Fla. 197, 16 So. 898.

Illinois.— Throop *v.* Sherwood, 9 Ill. 92; American Brewing Co. *v.* Berner-Mayer Co., 83 Ill. App. 446.

Louisiana.— Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177; Oakey *v.* Weil, 7 La. Ann. 169.

Maryland.— Clemens *v.* Baltimore, 16 Md. 208.

Massachusetts.— Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep. 171; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

Mississippi.— Reinhardt *v.* Hines, 51 Miss. 344.

New York.— Field *v.* Knapp, 108 N. Y. 87, 14 N. E. 829; Wiley *v.* Brigham, 16 Hun (N. Y.) 106.

Utah.— Benites *v.* Hampton, 3 Utah 369, 3 Pac. 206.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

United States.— Marye *v.* Strouse, 5 Fed. 483.

England.— Bartlett *v.* Emery, 1 T. R. 42, note *a*.

Books of original entry.— The gist of an action on a stated account being the agreement to or acquiescence in the correctness of the account, it is not necessary, in proving the cause of action, first to show the books of original entry from which the account was made up. Jacksonville, etc., R., etc., Co. *v.* Warriner, 35 Fla. 197, 16 So. 898.

80. As to implied assent see *supra*, II, B, 2, l, (II).

81. Bernasconi *v.* Anderson, M. & M. 183; Kirton *v.* Wood, 1 Mood. & R. 253. In Lane *v.* Hill, 18 Q. B. 252, it was held that plaintiff could not recover on an account stated upon evidence of a letter in which defendant wrote to plaintiff, "Oblige [me] by holding my check till Monday, and in the interim [I] will send you the amount in cash," — the check being post-dated and not admissible in evidence, and there being no further evidence of the amount admitted to be due.

82. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

83. See *supra*, II, B, 2, e.

84. Jacksonville, etc., R., etc., Co. *v.* Warriner, 35 Fla. 197, 16 So. 898.

Unrecorded approval.— In an action on a stated account against a corporation the cause may be supported by a resolution of the board of trustees notwithstanding the board omitted to record its vote upon the resolution. St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 576.

85. Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393.

86. Ruch *v.* Fricke, 28 Pa. St. 241.

between the creditor and such other person in the presence of the debtor is admissible as tending to prove an account stated.[87]

(IV) *Competency of Third Person.* A party relying on a stated account may show by the person who stated the account that it was made upon items admitted by the parties,[88] or by plaintiff's attorney who presented the account and to whom the admission of its correctness and the promise to pay were made.[89]

(V) *Written Acknowledgment.* A written acknowledgment, whether it be construed to be a promissory note or otherwise, is good evidence in support of a count on an account stated.[90]

(VI) *Written Settlement.* And where the settlement of the account is reduced to writing, the written instrument is the best evidence of the fact.[91]

(VII) *Instruments Importing Past Consideration and Privity*— (A) *In General.* Where an instrument sufficiently raises the inference of an executed consideration passed and received, a recovery may be had thereon under a count on an account stated.[92]

(B) *Note, Due-Bill, or Acceptance*— (1) In General. The execution of a note or due-bill is such evidence of a settlement as to raise the *prima facie* presumption of a final settlement of all matters of debit and credit between the parties, and is sufficient to support an action on an account stated.[93] In like man-

87. Lallande *v.* Brown, 121 Ala. 513, 25 So. 997, holding that the admission of evidence of a conversation between plaintiff and defendant's brother in the presence of defendant was proper, though defendant was very ill at the time; and that an objection on account of the illness of defendant, and the probability of his not having heard the conversation, went to the weight rather than to the admissibility of the testimony.

Admissions by attorney in presence of principal.— Where an attorney becomes a mere agent of the party employing him for the purpose of adjusting the account, and as such agent makes statements in the presence of the principal as to the condition of the account, such statements are admissible as tending to support defendant's plea of an account stated in an action brought by the principal. Burraston *v.* Nephi First Nat. Bank, (Utah 1900) 62 Pac. 425.

88. Walker *v.* Driver, 7 Ala. 679.

89. Lawson *v.* Douglass, 17 N. Y. Suppl. 4, 43 N. Y. St. 356, wherein it is said, however, that such testimony is subject to some criticism.

90. Montgomerie *v.* Ivers, 17 Johns. (N. Y.) 38.

91. Walker *v.* Driver, 7 Ala. 679.

Oral promise to pay money due under written instrument.—In an action for use and occupation and on an account stated, evidence that upon application to defendant for payment of the rent he said he would pay it in a week, was held to be admissible as proof of an account stated, although it appeared on cross-examination that the premises were occupied under a written instrument which was not produced, as the case was upon the oral promise to pay, no matter from what cause arising. Arthur *v.* Dartch, 9 Jur. 118.

92. Barry *v.* White, 59 Pa. St. 172, holding that a writing certifying that the party signing it would pay a certain amount for a town lot on or before a certain date, and that if he should sell said lot before that time for more than a designated amount the payee should have the benefit of the excess, was sufficient evidence of an account stated, as embracing an executed consideration passed and received.

93. *Alabama.*— Mills *v.* Geron, 22 Ala. 669.

District of Columbia.— Marmion *v.* McClellan, 11 App. Cas. (D. C.) 467.

Iowa.— Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220; Frost *v.* Clark, 82 Iowa 298, 48 N. W. 82; Remsey *v.* Duke, Morr. (Iowa) 385.

Massachusetts.— Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

Michigan.— Maybury *v.* Berkery, 102 Mich. 126, 60 N. W. 699.

Mississippi.— McCormick *v.* Altneam, 73 Miss. 86, 19 So. 198.

Missouri.—McCormick *v.* Interstate Consol. Rapid Transit R. Co., 154 Mo. 191, 55 S. W. 252.

New Mexico.— Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181.

New York.— Wright *v.* Wright, 74 Hun (N. Y.) 138, 26 N. Y. Suppl. 238; Lake *v.* Tysen, 6 N. Y. Suppl. 461; Davis *v.* Gallagher, 55 Hun (N. Y.) 593, 9 N. Y. Suppl. 11; Treadwell *v.* Abrams, 15 How. Pr. (N. Y.) 219; De Freest *v.* Bloomingdale, 5 Den. (N. Y.) 304.

Pennsylvania.— Fairchild *v.* Dennison, 4 Watts (Pa.) 258.

Canada.— Palmer *v.* McLennan, 22 U. C. C. P. 258, 565; Ritchie *v.* Prout, 16 U. C. C. P. 426.

Proof of execution.— In Matlock *v.* Purefoy, 18 Ark. 492, it was held that a count upon a stated account not alleged to have been signed by defendant is not founded upon an instrument in writing charged to have been executed by the other party, and that a promissory note is not admissible in evidence until its execution is proved.

After alteration.—Where a promissory note was delivered up to one of the makers upon the death of a co-maker, for the purpose of

ner an acceptance is admissible in support of an account stated between the drawer and acceptor,[94] but not between an indorsee and acceptor, because the acceptance does not import a prior debt as between these parties.[95] And where evidence of the settlement is conflicting, the fact that defendant executed the due bill for the balance may be sufficient to establish the settlement of the account.[96]

(2) INSTRUMENT NOT ADMISSIBLE UNDER SPECIAL COUNT. Though a writing is not technically a promissory note, or for other reasons may not be admissible under a special count, it may nevertheless be evidence of a stated account if it sufficiently admits a prior indebtedness,[97] and where there is a variance between the note declared on in a special count and that introduced, this will not affect its admissibility in support of a count on an account stated.[98]

(c) *Instrument Not Payable to Plaintiff in Terms* — (1) IN GENERAL. The instrument need not be payable in terms to plaintiff, if it is such an instrument as may import an admission of indebtedness to him from the maker.[99]

(2) I O U. An I O U is sufficient evidence that the account was stated with plaintiff.[1]

(VIII) *PROMISE OTHER THAN IMPLIED BY LAW.* If the promise upon the adjustment of an account is different from that which the law implies from the bare statement of an account, such promise will not be sufficient to support a general count on an account stated,[2] but it will be sufficient to support a special count, and the promise to pay will import a consideration.[3]

having the former procure the signature of an additional party, and at the time of such delivery two of the makers signed an I O U for the amount of the note, it was held that whether or not the addition of another name to the note was such a material alteration as to avoid it, as the note was free from objection at the time the I O U was executed, it was admissible in evidence in support of a count on an account stated by the I O U. Gould *v.* Coombs, 1 C. B. 543.

Joint payees.— Where a note is executed to two persons for the price of land it is immaterial whether the land was owned by one of the payees alone, or by both. The note is *prima facie* evidence of a debt between the parties. McQueen *v.* McQueen, 10 U. C. Q. B. 359.

94. Anthony *v.* Savage, 3 Utah 277, 3 Pac. 546, holding that, under an allegation that defendant admitted in writing and promised to pay, evidence of bills of exchange drawn by plaintiffs and accepted by defendant is admissible together with proof showing that the indebtedness represented by the bills of exchange was the same which defendant promised to pay, as tending to show an indebtedness as the consideration of the new promise. Stewart *v.* Kirk, 10 N. Brunsw. 131.

95. Stephens *v.* Berry, 15 U. C. C. P. 548; Calvert *v.* Baker, 4 M. & W. 417.

96. Frost *v.* Clark, 82 Iowa 298, 48 N. W. 82.

97. Grant *v.* Young, 23 U. C. Q. B. 387; Reed *v.* Reed, 11 U. C. Q. B. 26; Hogan *v.* McSherry, 6 U. C. Q. B. O. S. 633; Crooks *v.* Law, 5 U. C. Q. B. O. S. 306; Russell *v.* Wells, 5 U. C. Q. B. O. S. 725; Palmer *v.* McLennan, 22 U. C. C. P. 258, 565; Young *v.* Fluke, 15 U. C. C. P. 360; Casey *v.* Hanington, 19 N. Brunsw. 282; Emerson *v.* Gardiner, 6 N. Brunsw. 451.

Illustration.— "Good to Mr. Palmer for $850 on demand," though not a promissory note, was *prima facie* evidence of an account stated. Palmer *v.* McLennan, 22 U. C. C. P. 258, 565, 566.

Valid note replaced by void note.— Where a note is given up and replaced by another, and the latter is void because not stamped, so that a recovery could not be had on it, the note for which it was given in renewal may be introduced to prove an account stated. Ritchie *v.* Prout, 16 U. C. C. P. 426.

98. Oden *v.* Bonner, 93 Ala. 393, 9 So. 409; Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181; Merritt *v.* Woods, 2 N. Brunsw. 409.

As to bills of particulars, generally, see PLEADING.

99. Payable to maker and indorsed.— The production of an instrument which was a promise to pay a certain sum of money to the order of the maker, signed and indorsed by the maker, is *prima facie* evidence of an account stated between the maker and the party who sues on an account stated. Wood *v.* Young, 14 U. C. C. P. 250.

1. Curtis *v.* Rickards, 1 M. & G. 46; Fesenmayer *v.* Adcock, 16 M. & W. 449; Buck *v.* Hurst, L. R. 1 C. P. 297,— holding that if defendant wishes to rebut the presumption arising from the production of an I O U he should show that it had been in the hands of some other party.

2. Tyke *v.* Cosford, 14 U. C. C. P. 64; Hopkins *v.* Logan, 5 M. & W. 241.

3. Davies *v.* Wilkinson, 10 A. & E. 98.

"$300 — Good to T. T. to the amount of $300, to be paid to him, or his order, at E. C.'s mill . . . in lumber at cash price," is a sufficient acknowledgment and promise to pay, and imports a consideration sufficient to sustain a special count on an account stated. Tyke *v.* Cosford, 14 U. C. C. P. 64, 65.

(IX) *Where Existence of Account Stated Is in Issue.* In an action on a stated account defendant may introduce evidence which tends to show that there is no account stated, or plaintiff may prove earlier transactions as a foundation for the settlement, notwithstanding for other purposes the court will not inquire into the character of the original items in the absence of fraud or mistake,[4] and in an action on a stated account for goods sold, evidence of a third person to whom they had been formerly offered is admissible for the purpose of identifying the goods.[5]

(X) *Proof of Receipt of Account Sent.* Where accounts are sent by the regular vehicles of communication they will be presumed to have been received, in the absence of evidence rebutting such presumption.[6]

(XI) *Account Stated after Action Brought.* As a plaintiff is not confined, in the introduction of an account stated, to the count on an account stated, but may introduce it under any of the common counts in assumpsit, if the parties take and state an account after the action is brought it may be given in evidence on the trial.[7] But there must be a debt subsisting at the time the action is brought.[8]

c. Evidence Opposed to Stated Account. As any evidence is admissible which tends to prove statement of an account in accordance with the requirements as to the elements of such an account, so any evidence which would tend to defeat liability on a stated account in accordance with the rules which permit the impeachment thereof is admissible for this purpose.[9] The evidence of a stated account which may be afforded by a note may be overcome by evidence of the usage and dealings of the parties of such character as to show that the note does not repre-

4. *Illinois.*— Pick *v.* Slimmer, 70 Ill. App. 358.

Indiana.— Binford *v.* Miner, 101 Ind. 147.

Missouri.— Koegel *v.* Givens, 79 Mo. 77.

New York.— Field *v.* Knapp, 108 N. Y. 87, 14 N. E. 829, in which case it was held that defendant might show that while there was an account on his books in plaintiff's name it was not plaintiff's account, but the account of another represented by such name, and that all the dealings were with such other person. Kaminsky *v.* Mendelson, 25 Misc. (N. Y.) 500, 54 N. Y. Suppl. 1010.

Pennsylvania.— Mead *v.* White, (Pa. 1887) 8 Atl. 913.

To the same effect is Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504.

5. Sager *v.* Tupper, 38 Mich. 258.

6. Darby *v.* Lastrapes, 28 La. Ann. 605; New York Cab Co. *v.* Crow, 23 Misc. (N. Y.) 340, 51 N. Y. Suppl. 252. *Contra,* Rowland *v.* Donovan, 16 Mo. App. 554, holding, upon the principle that an account must be received and acquiesced in, in order to make it a stated account, that proof of the mailing of an account by a creditor to a debtor does not of itself show an account stated.

7. Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67.

8. Allen *v.* Cook, 2 Dowl. 546. And a note not due at the commencement of the action has been held to be inadmissible to prove an account stated. Hill *v.* Lott, 13 U. C. Q. B. 465. See also *supra,* II, B, 1, d.

9. McCall *v.* Nave, 52 Miss. 494.

Against admission by corporation.— Where the statement of the account is proved by minute entries of corporate directors, other minute entries made by the directors on the same day, in which the vote approving the account in question does not appear, are admissible. Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591.

Denial of authority by corporate officer.— The denial, by the officer of the corporation, of his authority to acknowledge the correctness of the debt, may be admissible, but it is not conclusive where there is other evidence upon the subject. Concord Apartment House Co. *v.* Alaska Refrigerator Co., 78 Ill. App. 682.

Judgment as credit.— A judgment in another action by plaintiff against defendant is not admissible to show a credit under an allegation of payment as a defense on an action on an account stated, unless it is shown that the judgment was recovered on some of the items in the account. Traitel *v.* Dwyer, 61 N. Y. Suppl. 1100.

Contradiction by former testimony of plaintiff.— Where one party sets up fraud or misrepresentation as the inducement to the stated account, he may show evidence given by the other on examination before trial which contradicted the account stated where the latter was subpœnaed to produce the books containing the account and failed to do so. Upton *v.* Bedlow, 4 Daly (N. Y.) 216.

Instrument referred to in written settlement.— When the settlement of an account is written on the back of an instrument to which the settlement referred, the party against whom the settlement is read may introduce the instrument in order to explain the settlement without proving the execution of the instrument. Walker *v.* Driver, 7 Ala. 679.

sent an ascertained balance.[10] So there is no rule of law which requires any particular method of proving a mistake of fact upon which an account stated is based. Whatever naturally and legitimately tends to establish the fact is competent evidence.[11]

8. Province of Court and Jury — a. In General. How far the decision as to the existence or non-existence of an account stated from particular facts rests with the court or jury, the authorities are not in harmony. In some cases it is held that the question is one of fact for the determination of the jury,[12] though of these some recognize the propriety of the court's instructing the jury upon the hypotheses presented by the evidence of the facts.[13] In others, while the question is considered one for the jury in any event where the evidence is contradictory,[14] where the evidence is clear and undisputed it is reserved to the court to say, as a matter of law, whether there is a stated account.[15] Where there is sufficient evidence to form a legitimate basis for a finding by the jury of the existence of a stated account the verdict will not be disturbed.[16]

b. Assent Implied from Silence. It has been held that whether or not timely objection has been made to an account rendered is a question for the jury,[17] and where the mere retention of an account without objection furnishes evidence admissible as tending to show acquiescence in the correctness of the account, whether silence under the particular circumstances amounts to an admission of correctness, and whether the delay was unreasonable, are held to be questions of fact for the jury.[18] But in other cases, where assent from silence is implied so as to furnish the necessary element to bind the parties as upon an account stated, the question what is a reasonable time within which an account will be presumed to become stated is a question of law when the facts are agreed upon;[19] though,

10. Hill *v.* Durand, 58 Wis. 160, 15 N. W. 390, holding that where one was in the habit of giving notes which did not represent an actual debt, but was intended to stand as security, the execution of a note at a particular time is not *prima facie* evidence that the amount thereof represented a balance due upon a stated account.

11. Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319.

Admission by plaintiff after assignment of claim.— But evidence relative to admissions tending to prove a mistake in the settlement, made by plaintiff after he had transferred his interests in an account to the person for whose use the suit is brought, was held inadmissible as against the beneficial party when made after the transfer. State *v.* Jennings, 10 Ark. 428.

12. McLellan *v.* Crofton, 6 Me. 307; Rosenfield *v.* Fortier, 94 Mich. 29, 53 N. W. 930; Burritt *v.* Villenuve, 92 Mich. 282, 52 N. W. 614; Davis *v.* Tiernan, 2 How. (Miss.) 786; Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65.

Where an objection to an account was made either on the day after its rendition or not for three years thereafter or within the lifetime of the other party, it was held that an instruction that a failure to make objection to the account within thirty days was an admission of its correctness as a matter of law was harmless if inaccurate, no error in the account having been shown. Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393.

Trial without jury.— Where the trial is by the court, the question is to be decided by the court as a question of fact. Pick *v.* Slimmer, 70 Ill. App. 358.

13. Davis *v.* Tiernan, 2 How. (Miss.) 786; Sergeant *v.* Ewing, 36 Pa. St. 156.

14. Kronenberger *v.* Binz, 56 Mo. 121; Meyer *v.* Marshall, 34 W. Va. 42, 11 S. E. 730.

Denial of facts by defendant.— Where the evidence tending to show an account stated is denied by defendant, the question is one of fact for the jury. Spellman *v.* Muehlfeld, 166 N. Y. 245, 59 N. E. 817; Robbins *v.* Downey, 16 N. Y. Suppl. 205, 41 N. Y. St. 95; Vernon *v.* Simmons, 15 Daly (N. Y.) 399, 7 N. Y. Suppl. 649; Watson *v.* Davis, 52 N. C. 178.

15. Lockwood *v.* Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

16. Warder, etc., Co. *v.* Angell, 99 Wis. 298, 74 N. W. 789.

17. Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68; Druse *v.* Wheeler, 26 Mich. 189; Porter *v.* Patterson, 15 Pa. St. 229; Bevan *v.* Cullen, 7 Pa. St. 281.

18. Miller *v.* Bruns, 41 Ill. 293; Moran *v.* Gordon, 33 Ill. App. 46; Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306.

Trial without jury.— Where the court takes the place of the jury its finding upon these questions has the same effect as the finding of the jury. Moran *v.* Gordon, 33 Ill. App. 46.

19. McKeen *v.* Boatmen's Bank, 74 Mo. App. 281; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086; Ault *v.* Interstate Savings, etc., Assoc., 15 Wash. 627, 47 Pac. 13; Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct.

where the evidence is conflicting, whether there was any assent,[20] or the reasonableness of time within which objection is made, becomes a question of fact for the jury,[21] as where the presumption of correctness arising from the retention of a bill without objection is met by proof of mistake undiscovered while the account was so retained,[22] or where the time at which the account was rendered or when objections were made is in controversy.[23] These questions, however, are to be determined under proper instructions from the court, in which aspect it is perhaps more accurately stated that when the facts are disputed or the evidence is not clear the question is a mixed one of law and fact.[24]

c. Construction of Account. An account stated which is unambiguous in its terms is to be construed by the court.[25] Where a settlement consists of names and figures which are not self-explanatory, and do not show the transactions covered, it is for the jury to determine whether the settlement covered the debt in suit.[26]

9. Directing Verdict. Where defendant does not deny the accuracy of the account or that it was rendered, there is nothing to submit to the jury and the court is justified in directing a verdict for plaintiff.[27]

C. Action of Account — 1. The Remedy and Its Application — a. General Nature at Common Law. Account is an ancient common-law action by means of which certain persons who were under a legal duty to account for property or money of another were compelled to render such account, the common way of charging defendant being either as bailiff or receiver.[28] It was the proper remedy where plaintiff wanted an account and could not give evidence of his right without it.[29] It is generally said to have extended to bailiffs, receivers, guardians in socage, and to merchants in favor of trade, being confined strictly to these,[30] though in its earliest use it seems to have been more circumscribed.[31]

178, 27 L. ed. 319; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 57 U. S. App. 546, 30 C. C. A. 260; Talcott *v.* Chew, 27 Fed. 273.

20. Lockwood *v.* Thorne, 18 N. Y. 285; Dickerson *v.* Scheuer, 1 N. Y. Suppl. 419.

21. Hutchinson *v.* Market Bank, 48 Barb. (N. Y.) 302; Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

22. Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161.

23. Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086.

24. Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791; Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. 13; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884, wherein it is said that when the proofs are conflicting the court should instruct the jury as to the law on the several hypotheses of fact insisted upon by the parties.

25. Gem Chemical Co. *v.* Youngblood, (S. C. 1900), 36 S. E. 437.

26. Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859.

27. Knickerbocker *v.* Gould, 115 N. Y. 533, 22 N. E. 573.

28. 3 Reeves Hist. Eng. L. 277.

"Bill for account" and "account render" were formerly employed in common-law practice to denote the procedure by which an account was secured. Field *v.* Brown, 146 Ind. 293, 45 N. E. 464.

The earliest known instance of this action dates from 1232. It was a new action as late as 1259. Most of its efficiency in later times was due to the statutes of 1267 and 1285 (Stat. Marlb. c. 23; Stat. West. II, c. 11). 2 Pollock & M. Hist. Eng. L. 219, 1 Pollock & M. Hist. Eng. L. 303 note.

29. Tomkins *v.* Willshear, 5 Taunt. 431.

30. Appleby *v.* Brown, 24 N. Y. 143; Thouron *v.* Paul, 6 Whart. (Pa.) 615 [*citing* 1 Bacon Abr. tit. Accompt, (A.) 32; Coke Litt. 172*a*; 2 Inst. 379; 1 Rolle Abr. 117, l. 43; 1 Comyns' Dig. tit. Accompt (A.) 1; Buller N. P. 127]; 3 Reeves Hist. Eng. L. 55.

31. Guardian in socage.— "In Bracton's day no distinction in this respect seems drawn between the guardian in chivalry and the guardian in socage. Neither one nor the other need account to the heir for the profits of the land; the one, like the other, can sell the ward's marriage. This was so until the eve of the Barons' War, when one of the Provisions of Westminster, afterward confirmed by the Statute of Marlborough, laid down the rule that the guardian in socage must, when the heir has attained majority, account to him or her for the profits of the land, and is not to give or sell the ward in marriage save to the profit of the ward." 1 Pollock & M. Hist. Eng. L. 303, wherein the authors say that Coke, 2 Inst. 135, regards the chapter of the Statute of Marlborough about guardianship in socage as a "declaration of the common law," but that he did not know the Provisions of Westminster and had no warrant for his doctrine.

Partners.— "It was denied in the Year-Book (11 Hen. IV. fol. 79) that where two merchants have goods in common the one can

b. Later Use and Abandonment. In several of the states the action of account has been a recognized remedy and applied under similar circumstances as the action at common law as aided by the several English and American statutes.[32] But the action began to be abandoned at an early day in cases where assumpsit could be brought, so as to preclude defendant of his wager of law,[33] and though it was still used where wager of law was not allowed, yet it fell by degrees into what eventually amounted to almost total disuse, on account of its dilatory and expensive nature,[34] and became supplanted by other remedies, as by assumpsit where the circumstances admitted of such remedy, or by the broader remedy afforded by a bill in a court of equity, which court began at an early day to assume jurisdiction in matters of account.[35] The question whether or not assumpsit will lie has been raised not only with reference to the propriety of that

bring account against the other; and Rolle adopts the remark as law (1 Rolle Abr. 118, Account E). He was probably right as to the strict common-law rule; for it will be seen both by Coke Litt. 172*a* and Fitzherbert Nat. Brev. 267 D., that the action is expressly referred, both in principle and the form of the writ, to the law merchant. This is indeed a part of the common law, and it may in that sense be said that account lies between partners at the common law." Cowen, J., in McMurray *v.* Rawson, 3 Hill (N. Y.) 59, 63.

32. *Connecticut.*— Griggs *v.* Dodge, 2 Day (Conn.) 28, 2 Am. Dec. 82; Beach *v.* Hotchkiss, 2 Conn. 425.

Illinois.— Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11; Lee *v.* Abrams, 12 Ill. 111; Hawley *v.* Burd, 6 Ill. App. 454.

Maine.— Black *v.* Nichols, 68 Me. 227; Closson *v.* Means, 40 Me. 337.

Maryland.— Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724.

New York.— Kelly *v.* Kelly, 3 Barb. (N. Y.) 419; Jacobs *v.* Fountain, 19 Wend. (N. Y.) 121.

Pennsylvania.— Bitterling *v.* Deshler, 160 Pa. St. 1, 28 Atl. 445; Reeside *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503; Long *v.* Fitzimmons, 1 Watts & S. (Pa.) 530; Thouron *v.* Paul, 6 Whart. (Pa.) 615; Bredin *v.* Dwen, 2 Watts (Pa.) 95.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Woodward *v.* Harlow, 28 Vt. 338; Tobias *v.* McGregor, 19 Vt. 113; Mattocks *v.* Lyman, 16 Vt. 113.

Equitable relief where no court of chancery. In Pennsylvania it was held that in general the action of account render lies whenever one man has received moneys as the agent of another, and although an attorney intrusted to collect money for his client may not be included in the strict words of the definition of a bailiff, yet by an equitable construction, there being no court of chancery in that state, it may be enlarged to embrace such a case, and as relief could have been had in chancery it will be granted in this action. Bredin *v.* Kingland, 4 Watts (Pa.) 420. By the same equitable construction the action was extended to joint partners. James *v.* Browne, 1 Dall. (Pa.) 339.

Trial adapted to particular circumstances. — In Illinois a statute relating to an action of account permits the court to adapt the trial to the particular circumstances if it shall appear that an action of account is proper, and it may change the form of action to an action of account. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11. But an amendment of the form of action from assumpsit to account render will not be allowed when the motion is not made until six months after the judgment of nonsuit and until after the statute of limitations has barred the action. Bitterling *v.* Deshler, 160 Pa. St. 1, 28 Atl. 445.

33. Reeves says that debt and accompt lost ground in proportion as assumpsit grew more into fashion; that the principal inducement to recur to assumpsit instead of these writs was to preclude defendant from his wager of law; that when, therefore, a transaction was so circumstanced that the law would not allow this privilege there was no reason for going out of the ancient track, and if the case was such as to be within the compass of these remedies it was still usual to bring debt and accompt. 3 Reeves Hist. Eng. L. 534.

34. McMurray *v.* Rawson, 3 Hill (N. Y.) 59; Carlisle *v.* Wilson, 13 Ves. Jr. 276.

35. *Iowa.*— Stuart *v.* Kerr, Morr. (Iowa) 240, wherein it appears that all the old forms were abolished by statute, and it was held that account could not be brought.

Kentucky.— Neal *v.* Keel, 4 T. B. Mon. (Ky.) 162.

Massachusetts.— Robinson *v.* Robinson, 173 Mass. 233; Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233 (holding that justice could be determined in a form more simple and less expensive by an action of assumpsit, especially since the court was authorized to appoint auditors); Sargent *v.* Parsons, 12 Mass. 149 (wherein it appears from the reporter's note that account was abolished by statute in that state, though in other cases it appears that, irrespective of statute, assumpsit was considered an appropriate remedy where account might have been brought at common law). See Badger *v.* Holmes, 6 Gray (Mass.) 118; Shepard *v.* Richards, 2 Gray (Mass.) 424; Jones *v.* Harraden, 9 Mass. 540 note; Brigham *v.* Eveleth, 9 Mass. 538.

Tennessee.— Blanton *v.* Vanzant, 2 Swan (Tenn.) 276.

Vermont.— Hall *v.* Peck, 10 Vt. 474, 477.

England.— Carlisle *v.* Wilson, 13 Ves. Jr. 276; *Ex p.* Bax, 2 Ves. 388.

remedy as compared with the action of account, but also as compared with the remedy by bill in equity in the cases of particular relations, as where the parties were tenants in common or partners,[36] and while assumpsit has been held to have superseded the remedy by account in general terms, though applying the rule to the relation of tenants in common,[37] when the former is resorted to by tenants in common it is restricted to cases where the action of account would lie, that is, as to the liability by and between such parties;[38] and this is true where the action between such parties is not technically in form assumpsit, but is an action under the statutory system of practice.[39] On the other hand it is held that assumpsit is not a proper remedy between such parties in the absence of an express promise to pay a balance, the remedy being, from the nature of the relation of the parties, by action of account or bill in equity,[40] and in some of the earlier cases the reason usually assigned for resorting either to assumpsit or a bill in equity — namely, the expensive and dilatory character of the common-law action — has been vigorously disputed.[41] The fact remains, however, that notwithstanding the remedy has been used, it may be gathered, not only from cases in which the general statement is made, but from those in which equitable jurisdiction has been assumed, that the remedy by an action of account has in practice fallen into comparative disuse.[42]

c. Necessity of Privity. To maintain an action of account there must be either a privity in deed by consent of the party,— for against a disseizor or

36. See TENANCY IN COMMON; PARTNERSHIP.

37. *Maine.*— Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Cutler *v.* Currier, 54 Me. 81.

Massachusetts.— Badger *v.* Holmes, 6 Gray (Mass.) 118; Shepard *v.* Richards, 2 Gray (Mass.) 424; Munroe *v.* Luke, 1 Metc. (Mass.) 459; Miller *v.* Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264, 9 Pick. (Mass.) 34; Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Jones *v.* Harraden, 9 Mass. 540 note; Brigham *v.* Eveleth, 9 Mass. 538.

New York.— Cochran *v.* Carrington, 25 Wend. (N. Y.) 409.

Pennsylvania.— Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; Borrell *v.* Borrell, 33 Pa. St. 492; Gillis *v.* McKinney, 6 Watts & S. (Pa.) 78, in which case, however, there was an express promise on the part of the tenant receiving the rents to pay the other tenant his share.

Tennessee.— Blanton *v.* Vanzant, 2 Swan (Tenn.) 276.

38. Hudson *v.* Coe, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; Richardson *v.* Richardson, 72 Me. 403; Cutler *v.* Currier, 54 Me. 81; Gowen *v.* Shaw, 40 Me. 56; Peck *v.* Carpenter, 7 Gray (Mass.) 283, 66 Am. Dec. 477; Sargent *v.* Parsons, 12 Mass. 149; Blanton *v.* Vanzant, 2 Swan (Tenn.) 276.

39. Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550; Ragan *v.* McCoy, 29 Mo. 356; Woolever *v.* Knapp, 18 Barb. (N. Y.) 265. See TENANCY IN COMMON.

40. *Illinois.*— Crow *v.* Mark, 52 Ill. 332.

Maine.— Maguire *v.* Pingree, 30 Me. 508.

Maryland.— Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724; Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681.

New York.— Sherman *v.* Ballou, 8 Cow. (N. Y.) 304.

Pennsylvania.— Ozeas *v.* Johnson, 1 Binn. (Pa.) 191.

Tennessee.— Terrell *v.* Murray, 2 Yerg. (Tenn.) 384.

England.— Thomas *v.* Thomas, 5 Exch. 28.

41. Beach *v.* Hotchkiss, 2 Conn. 425, in which case Hosmer, J., said that the difficulty attending the action was not intrinsic, but adventitious, resulting from the old mode of practice, and that under the more simple practice prevailing in that state the action was not more objectionable on the ground of expense or protracted litigation than any other action. In McMurray *v.* Rawson, 3 Hill (N. Y.) 59, it was said that there had been only one case of account in that state before that time, and that the present experiment would probably be the last, and the court instanced Godfrey *v.* Saunders, 3 Wils. C. P. 73, as a case showing the dilatoriness of this remedy. But in a later case in New York (Kelly *v.* Kelly, 3 Barb. (N. Y.) 419, 423) it was held, as in Beach *v.* Hotchkiss, 2 Conn. 425, *supra*, that under the practice as established by the revised statutes in New York at that time there was "no more difficulty in prosecuting an action of account after a judgment *quod computet* than in prosecuting an action of assumpsit involving the examination of a long account." A case earlier than either of these in this state recognized the propriety of an action and failed to notice the objection made in the first case mentioned. See Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513. So in Hamilton *v.* Conine, 28 Md. 635, 92 Am. Dec. 724, the court relied upon Godfrey *v.* Saunders, 3 Wils. C. P. 73, as illustrating the advantages of the action of account over a bill in equity, pointing out that the matter involved therein was examined before auditors and determined in the course of two years, though they had previously been pending in chancery upward of twelve years.

42. See *infra*, II, E, 1.

wrongdoer no account will lie,— or a privity in law, *ex provisione legis*, made by the law as against a guardian, etc.[43] As an exception to this rule an infant tenant in socage may maintain an action of account render against a stranger who enters into his land and receives the profits thereof.[44]

d. Against Bailiff or Receiver — (I) *Character of Bailiff or Receiver.* A bailiff is one who has charge of lands, goods, and chattels of another to make the best profit for the owner;[45] a receiver, one who has received money or property of another for which he ought to account.[46] In the latter case the party should be charged as receiver and not as bailiff,[47] for a bailiff is accountable for the profits he may reasonably have made, and is entitled to his reasonable charges and expenses, and in this he is distinguishable from a receiver.[48] Therefore a guardian should be charged as bailiff and not as receiver, otherwise he would lose his costs and expenses.[49]

(II) *Appointment.* A bailiff can only be one who is appointed such or who is made such by law; but the latter instance applies only to a guardian who is bailiff of his ward.[50] But there is no necessity that there should have been any special appointment in order to charge one as receiver.[51]

e. By Cotenants — (I) *Necessity of Appointment of Bailiff.* — (A) *At Common Law.* As a bailiff at common law could only be such by appointment, one tenant in common or joint tenant could not have an action of account against his cotenant unless the latter had been appointed bailiff of the former.[52]

(B) *Under Statute.* This defect of the common law was remedied by the statute of 4 Anne whereby one joint tenant or tenant in common may have an account against his cotenant as bailiff for receiving more than his share of profit, though there be no appointment of the latter as receiver,[53] and in the United States similar statutes have been adopted. Under these statutes, however, while the tenant is made liable as bailiff for receiving, etc., without the appointment, the liability

43. Anonymous, 2 N. C. 259; Portsmouth *v.* Donaldson, 32 Pa. St. 202, 72 Am. Dec. 782; Conklin *v.* Bush, 8 Pa. St. 514; Thouron *v.* Paul, 6 Whart. (Pa.) 615; Whelen *v.* Watmough, 15 Serg. & R. (Pa.) 153; Kelley *v.* Kelley, 13 Phila. (Pa.) 179, 36 Leg. Int. (Pa.) 284; Brinsmaid *v.* Mayo, 9 Vt. 31; Coke Litt. 172*a*.

44. Thouron *v.* Paul, 6 Whart. (Pa.) 615 [*citing* Fitzherbert Nat. Brev. 117, note *a*; Coke Litt. 89*b*; Hughs *v.* Harrys, Cro. Car. 229].

45. Bredin *v.* Kingland, 4 Watts (Pa.) 420, Coke Litt. 172*a*.

46. Wood *v.* Merrow, 25 Vt. 340; Coke Litt. 172*a*.

47. Wood *v.* Merrow, 25 Vt. 340.

48. Bredin *v.* Kingland, 4 Watts (Pa.) 420; Gibbs *v.* Sleeper, 45 Vt. 409; Cilley *v.* Tenny, 31 Vt. 401; Swift *v.* Raymond, 11 Vt. 317; Sturton *v.* Richardson, 13 M. & W. 17, Coke Litt. 172*a*.

The distinction, however, has been held not to be universally applicable. In Pennsylvania it was held that an attorney who had received money for his client would be compelled to account as bailiff, though an attorney might not come within the strict definition of bailiff; that the relief was such as a court of chancery would have afforded at common law in England and in this country in order to accomplish justice; that the distinction between a bailiff and receiver is that the former is entitled to reasonable expenses, while the latter is not, but that the distinction is not universally true, as it does not apply to partners. Bredin *v.* Kingland, 4 Watts (Pa.) 420.

49. Coke Litt. 89*a*, 172*a*.

50. Sargent *v.* Parsons, 12 Mass. 149.

51. Kelly *v.* Kelly, 3 Barb. (N. Y.) 419 [*citing* Anonymous, 12 Mod. 509].

52. Lacon *v.* Davenport, 16 Conn. 331; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Brinsmaid *v.* Mayo, 9 Vt. 31; Coke Litt. 200*b*.

53. 4 Anne, c. 16, § 27, provides that "actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant and tenant in common, his executors and administrators, against the other as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common; and the auditors appointed by the court where such action shall be depending shall be and are hereby empowered to administer an oath and examine the parties touching the matter in question, and for their pains and trouble in auditing and taking such account have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be." Hayden *v.* Merrill, 44 Vt. 336, 340, 8 Am. Rep. 372; Coke Litt. 172*a*.

is not that of a common-law bailiff, but one for the actual receipt of more than his just share.[54] Under express statutory provisions the liability has been sometimes extended further than this.[55]

(II) *Purchaser of Interest of Cotenant.* Where one cotenant sells his interest, the purchaser thereof becomes a tenant in common with the other owner, and in such a case there exists that privity which is said to be essential to sustain an action of account.[56]

f. Under Lease to Farm upon Shares. Under a farm lease whereby the produce of the farm is to be divided in specific proportions between the lessor and the lessee, account is the proper remedy against the lessee after demand and refusal to account.[57] But an accounting against one as bailiff and receiver under such a contract will not be compelled until the expiration of the time specified therein.[58]

g. By Partners. Where parties sustain to each other the relation of partners, account is an available remedy, where the remedy exists, to compel an accounting,[59] and where, by statute, an action may be brought against a partner, it is held that the remedy is not confined to mercantile partners.[60]

h. Remedy Restricted to Two Partners or Tenants. The action was restricted to cases where there were only two partners or tenants in common, the remedy in others being by bill in equity, because of the inability of a court of law to render distinct and several judgments in one action,[61] unless it may be done by statute,[62] or the action is extended because of the absence of a court of chancery to grant appropriate relief in such cases.[63] But it has been held that where several parties

54. Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219; Kelley *v.* Kelley, 13 Phila. (Pa.) 179, 36 Leg. Int. (Pa.) 284; Henderson *v.* Eason, 17 Q. B. 701; Wheeler *v.* Horne, Willes 208. See *infra*, II, C, 6, a, (III), (B).

Action upon the statute.— It is said that an action by a tenant in common under the statute of Anne is not an action of account, but is an action upon the statute or upon the particular circumstances which give the action. Sargent *v.* Parsons, 12 Mass. 149 [*citing* Wheeler *v.* Horne, Willes 208].

Question for jury.— Where the character of a tenant in common as bailiff is established, and there is evidence that defendant had received more than his just share, it is proper to leave it to the jury to say whether or not defendant had received more than his just share. Beer *v.* Beer, 12 C. B. 60.

55. Knowles *v.* Harris, 5 R. I. 402, 73 Am. Dec. 77; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372.

56. Oviatt *v.* Sage, 7 Conn. 95, holding, upon the principle stated, that testimony of the assent of the vendor's cotenant to the sale, and of the agreement of the purchaser to consider such cotenant as a tenant in common with him, is admissible, and its exclusion erroneous; Aiken *v.* Smith, 21 Vt. 172.

57. La Point *v.* Scott, 36 Vt. 603; Cilley *v.* Tenny, 31 Vt. 401; Aiken *v.* Smith, 21 Vt. 172; Stedman *v.* Gassett, 18 Vt. 346; Ganaway *v.* Miller, 15 Vt. 152; Albee *v.* Fairbanks, 10 Vt. 314.

Reason for rule.— This does not depend upon the language of the statute alone, permitting the action by one tenant in common against another, but also rests upon the doctrine of the common law that by such contract defendant is bailiff of the landlord. Cilley *v.* Tenny, 31 Vt. 401; Stedman *v.* Gassett, 18 Vt. 346; Albee *v.* Fairbanks, 10 Vt. 314.

58. Ganaway *v.* Miller, 15 Vt. 152.

59. Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; Thouron *v.* Paul, 6 Whart. (Pa.) 615; Griffith *v.* Willing, 3 Binn. (Pa.) 317; James *v.* Browne, 1 Dall. (Pa.) 339; Newell *v.* Humphrey, 37 Vt. 265; Wood *v.* Merrow, 25 Vt. 340. See, generally, PARTNERSHIP.

60. Kelly *v.* Kelly, 3 Barb. (N. Y.) 419, holding that there is no reason for driving partners in any other business than mercantile into a court of chancery.

61. Beach *v.* Hotchkiss, 2 Conn. 425; McMurray *v.* Rawson, 3 Hill (N. Y.) 59; Stevens *v.* Coburn, 71 Vt. 261, 44 Atl. 354; Newell *v.* Humphrey, 37 Vt. 265; Wood *v.* Merrow, 25 Vt. 340; Brinsmaid *v.* Mayo, 9 Vt. 31.

A writ of account render will not be quashed on motion upon the ground that defendant was summoned to answer to individuals who have no community of interest. Clarke *v.* Ballou, 12 Pa. Co. Ct. 369.

62. In Vermont, by statute, the action of account was extended to cases where more than two parties had separate and distinct interests. Newell *v.* Humphrey, 37 Vt. 265. But as before the statute the remedy in such a case was in equity, and the statute conferred equitable powers upon a particular court to meet the exigency, jurisdiction was confined to this court. Stevens *v.* Coburn, 71 Vt. 261, 44 Atl. 354; La Point *v.* Scott, 36 Vt. 633.

63. James *v.* Browne, 1 Dall. (Pa.) 339.

Necessity of joint liability.— An action of account render can be maintained only where there is a contract express or implied; and

have one joint interest as against another it is the same as if there were only two parties and the action will lie.[64]

i. Husband and Wife — (I) *By Both for Account of Wife's Property.* Husband and wife may join in an action of account for rents and profits of the wife's land arising during coverture.[65]

(II) *By Wife after Coverture.* And after coverture a woman may affirm her former proceedings and continue one her bailiff whom she had appointed during coverture, so as to make him accountable to her as bailiff after coverture.[66]

j. Remainder Interest in Personalty. Where personal property is limited over by way of remainder, account will lie to recover the property upon the termination of the particular estate as against the holder of the intermediate estate.[67]

k. Against Trustee in Will. Where a trustee named in a will has been the receiver of the effects charged in the declaration, account render is the proper remedy to compel him to account for his receipts and expenses.[68]

l. Account for Notes. Where notes are put into the hands of a bailiff or receiver under a contract, he may be called upon to account in a common-law action of account,[69] even under such circumstances that a suit on the note itself could not be maintained in the name of the plaintiff.[70]

2. Propriety as Compared with Other Remedies in Particular Cases — a. In General. Where evidence can be given of the receipt of money, assumpsit or debt is substituted for the action of account,[71] and in cases where assumpsit or

as each partner of the firm contracts with the other for himself alone, one partner cannot maintain an action of account against two others without showing a joint liability to account to him. Portsmouth *v.* Donaldson, 32 Pa. St. 202, 72 Am. Dec. 782; Whelen *v.* Watmough, 15 Serg. & R. (Pa.) 153.

64. Stevens *v.* Coburn, 71 Vt. 261, 44 Atl. 354; Wiswell *v.* Wilkins, 4 Vt. 137.

In Connecticut it was held that a statute providing that a suit against two or more defendants to compel them to render an account should be brought by bill in equity had reference to cases where the defendants were sued severally and not as joint bailiffs or partners. Barnum *v.* Landon, 25 Conn. 137.

65. Lewis *v.* Martin, 1 Day (Conn.) 263.

66. Smith *v.* Woods, 3 Vt. 485, in which case notes were executed by a husband to a third person for the benefit of his wife, and placed in escrow not to be binding upon the maker until after a divorce obtained by the wife against the husband. In an action of account against the nominal payee of the notes it was objected that the plaintiff, being a *feme covert,* was destitute of the power to constitute defendant her bailiff at the time the notes were executed; but it was held that as the divorce was obtained and the woman then affirmed her former proceedings it was immaterial that she was a *feme covert* when the notes were signed, as that difficulty was over before they had any binding force upon the signers.

67. Griggs *v.* Dodge, 2 Day (Conn.) 28, 2 Am. Dec. 82.

68. Bredin *v.* Dwen, 2 Watts (Pa.) 95, under a statute giving assumpsit, debt, detinue, or account render, as the case may require, for any legacy or bequest of money, goods, or chattels.

69. Woodward *v.* Harlow, 28 Vt. 338. See also Spalding *v.* Dunlap, 1 Root (Conn.) 319.

70. **Rule as in trover.**— Where a note is payable to defendant, but was executed for the sole benefit of plaintiff, account may be maintained by plaintiff against defendant as bailiff, and parol evidence may be admitted to show that defendant received it as bailiff, upon the same principle that permits a person having such beneficial interest in a note of this kind to bring trover for its conversion. Smith *v.* Woods, 3 Vt. 485.

71. Linton *v.* Walker, 8 Fla. 144 [*citing* 1 Archbold N. P. 197]; Thompson *v.* Babcock, Brayt. (Vt.) 24.

Receipt of money presumed.— It is not necessary to prove the actual receipt of money in order to justify recovery in an action for money had and received to plaintiff's use, and if, after a reasonable time has elapsed, defendant does not account, it may be presumed that he has received money for the goods of plaintiff, or plaintiff may proceed against him for an accounting. Hunter *v.* Welsh, 1 Stark. 178. This may not be true, however, if defendant tied himself down to proof of a sale, by a positive averment of that fact. Elbourn *v.* Upjohn, 1 C. & P. 572.

Election.— Action of account at common law is concurrent in many cases with assumpsit. Hall *v.* Peck, 10 Vt. 474. It lies in every case where a person has received money to the use of another, but plaintiff may waive this remedy and bring assumpsit on the promise. Mumford *v.* Avery, Kirby (Conn.) 163; Wetmore *v.* Woodbridge, Kirby (Conn.) 164. But he cannot do so to the prejudice of defendant. Tousey *v.* Preston, 1 Conn. 175. And he cannot convert the latter action into account and have auditors after the issue is found against him on the promise. Wetmore *v.* Woodbridge, Kirby (Conn.) 164.

debt will not lie it is usually necessary to bring an action of account or file a bill in equity.[72]

b. Simple Relation of Debtor and Creditor. Where the relation of the parties is simply that of debtor and creditor, and the amount of the debt is certain or ascertainable by simple calculation, account is not the proper remedy, but the claim should be enforced in the ordinary forms of action according to the nature of the demand, as where assumpsit[73] or covenant is the proper remedy.[74] And the mere fact that there are several items on both sides of an account, when by subtracting one side from the other a balance is easily ascertainable, will not drive plaintiff from assumpsit to account.[75]

c. Rents Reserved Unascertained. It is a general rule that account will not lie for rent reserved on a lease, but this must be understood of a certain rent, and not where the amount is uncertain and an account on oath may be necessary to ascertain the amount received.[76]

d. Interest in Profits. Under a contract whereby a person is to have a share in the profits of a transaction, whether his remedy may be assumpsit or must be account depends upon whether he had any property in the chattels, and so in the specific money for which they are sold, or whether the form of contract is only a mode of determining compensation for labor. In the latter case the remedy is by an action of assumpsit; in the former, account would be proper.[77]

e. Nature of Agent's Duty. The nature of the duty to be performed by an agent determines the form of action in which he is to be sued. If the trust is to pay to the principal directly, assumpsit is proper; but if it is only one of outlay requiring an exhibit of sums expended, assumpsit is not proper until it is ascertained by an action of account that a balance is due.[78]

f. Equitable Title. The action of account will not lie upon mere equitable title to recover rents and profits, and the rule is applied where it is sought to recover for the avails of lands sold.[79]

72. Linton *v.* Walker, 8 Fla. 144 [*citing* 1 Archbold N. P. 197].

73. Richey *v.* Hathaway, 149 Pa. St. 207, 24 Atl. 191.

No discovery necessary.— Thouron *v.* Paul, 6 Whart. (Pa.) 615, in which case, as there was no court of chancery to resort to, the doctrine applied in a court of chancery that equitable jurisdiction will not be entertained where the accounts are all on one side and no discovery is needed was applied to an action of account render.

Items of book account.— In an action of account, items of book account are properly excluded, and the statute which allows items of account to be adjusted in book account does not operate *vice versa* to allow the adjustment of items of book account in account. Cilley *v.* Tenny, 31 Vt. 401; Tobias *v.* McGregor, 19 Vt. 113; Swift *v.* Raymond, 11 Vt. 317.

In Illinois the action was enlarged by statute so that it could be brought on book account. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11.

74. Addams *v.* Tutton, 39 Pa. St. 447, wherein it is said that notwithstanding action of account render and the action of covenant for breach of a partnership contract may practically overreach each other at some points, they have theoretically different provinces; that for a breach of contract of partnership in wrongfully dissolving the partnership, and for wrongful acts which embarrass its operations, covenant is the proper remedy.

75. Tomkins *v.* Willshear, 5 Taunt. 431, wherein it was said that Scott *v.* McIntosh, 2 Campb. 238, decided at *nisi prius*, could not be used as an authority to the contrary, as that case involved so great a number of items between merchants as that it would have been impossible to have tried it before a jury, and it was therefore necessary to take an account.

76. Long *v.* Fitzimmons, 1 Watts & S. (Pa.) 530, where defendants agreed to account for a certain proportion of tolls and profits which they should receive from a grist-mill demised, which they had refused to do.

77. Mattocks *v.* Lyman, 16 Vt. 113. But as to the right of persons claiming an interest in profits see PARTNERS.

78. Richey *v.* Hathaway, 149 Pa. St. 207, 24 Atl. 191; Reeside *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503; Hartup *v.* Wardlove, 2 Show. 301.

79. Cearnes *v.* Irving, 31 Vt. 604.

Assignment for use of assignee.— Where plaintiff made an assignment of a policy of insurance and a bill of lading in consideration of an indebtedness to the assignee and to secure the latter for services in a particular business, and constituted the assignee his attorney to collect claims thereunder for the use of the assignee, he cannot bring an action of account against the assignee as bailiff, because by the assignment he parted with all his legal interest. Dexter *v.* Hitchcock, 10 Conn. 209.

Bailiff by appointment.— But in Connecti-

3. Demand. Before bringing an action of account against one to account as bailiff and receiver there should be a demand of defendant to render an account.[80]

4. Damages. In an action of account plaintiff may recover damages as laid in his declaration, or the amount of value as found by auditors, and also costs under the name of damages.[81] And plaintiff's claim for damages arising out of a breach of a lease to cultivate land and for the division of the avails of the products, which damages affect the proper settlement, may be brought into the accounting.[82] But a breach of contract whereby the making of profits has been prevented need not necessarily be brought into an account, but may be sued independently.[83] In the case of the letting of a farm upon shares there should be an express contract shown in order to create an independent cause of action for articles received by the landlord.[84]

5. Jurisdiction of Justice of Peace. It has been held that a justice of the peace has no jurisdiction of an action of account,[85] though in other jurisdictions the contrary rule has prevailed.[86]

6. Pleading — a. Declaration[87] — (1) *In General.* A declaration in an action of account should set forth enough to show that plaintiff is entitled to both the judgments which are incident to such an action: namely, judgment that defendant do account; and judgment, after the account, for the balance found due;[88]

cut it was held that where the tenant was bailiff by appointment as at common law, and by agreement was to account to plaintiff during a particular time, it was immaterial in whom the legal title to the property rested. Lacon *v.* Davenport, 16 Conn. 331.

80. Barnum *v.* Landon, 25 Conn. 137; Chadwick *v.* Divol, 12 Vt. 499; Topham *v.* Braddick, 1 Taunt. 572. But see Sturges *v.* Bush, 5 Day (Conn.) 452.

Demand of return and denial of right.— Where a tenant in common with defendant of property of which defendant had obtained possession demanded the return of the property or payment for it, and defendant denied that the plaintiff had any right to the property, it was held that this was sufficient to sustain the issue on the part of plaintiff upon a plea that there was no special demand upon defendant to render his account. Aiken *v.* Smith, 21 Vt. 172.

Demand before expiration of lease.— The demand upon a lessee for a division of crops, made after the crops had been stored and before the expiration of the time limited for the continuance of the lease, is sufficient in case the lessee fails to account after the expiration of such time, and the lessor may maintain an action of account without waiting until the crops are consumed or disposed of by the lessee, and then demanding an account. Stedman *v.* Gassett, 18 Vt. 346.

81. Gratz *v.* Phillips, 5 Binn. (Pa.) 564, 568 [*quoting* from Bacon Abr. that "if the defendant resists the plaintiff's claim by pleading, or where an increase is received by the receiver *ad merchandizandum*, there shall be judgment for damages"]; Collet *v.* Robston, 2 Leon. 118.

82. La Point *v.* Scott, 36 Vt. 603; Cilley *v.* Tenny, 31 Vt. 401, holding that under such a contract the recovery by defendant for plaintiff's neglect to keep up fences, etc., as provided by the contract, are no less the proper subjects of an accounting because they are called damages.

83. La Point *v.* Scott, 36 Vt. 603.

84. La Point *v.* Scott, 36 Vt. 603.

85. Crow *v.* Mark, 52 Ill. 332.

86. Bulkly *v.* Lewis, 1 Root (Conn.) 217; Chadwick *v.* Divol, 12 Vt. 499, 502, holding that under the statute relating to the action of account the course of proceeding mentioned in the act was by no means adapted to a justice's court, but that by the terms of the act the course prescribed was clearly made applicable to "any action of account pending in any court in this state," and that therefore the action of account might be brought before a justice of the peace where the question of jurisdiction did not arise in reference to the amount in controversy.

Equity powers conferred upon particular court.— But in Vermont, under a statute conferring equitable jurisdiction upon a particular court in cases involving an accounting between more than two persons having distinct interests, it was held that this jurisdiction could not be extended to a justice of the peace. La Point *v.* Scott, 36 Vt. 633.

87. Forms of declarations in actions of account may be found set out in whole, in part, or in substance in the following cases:

Connecticut.— Sturges *v.* Bush, 5 Day (Conn.) 452; Griggs *v.* Dodge, 2 Day (Conn.) 28, 2 Am. Dec. 82; Lewis *v.* Martin, 1 Day (Conn.) 263.

Missouri.— Hughes *v.* Woosley, 15 Mo. 492.

Pennsylvania.— McLean *v.* Wade, 53 Pa. St. 146; Bredin *v.* Dwen, 2 Watts (Pa.) 95; Long *v.* Fitzimmons, 1 Watts & S. (Pa.) 530; Gratz *v.* Phillips, 5 Binn. (Pa.) 564.

Vermont.— Joy *v.* Walker, 29 Vt. 257; Field *v.* Torrey, 7 Vt. 372.

England.— Henderson *v.* Eason, 17 Q. B. 701; Baxter *v.* Hozier, 5 Bing. N. Cas. 288; Beer *v.* Beer, 12 C. B. 60; Gorely *v.* Gorely, 1 H. & N. 144; Topham *v.* Braddick, 1 Taunt. 572; Godfrey *v.* Saunders, 3 Wils. C. P. 73.

88. Travers *v.* Dyer, 16 Blatchf. (U. S.) 178, 24 Fed. Cas. No. 14,150, holding that on general demurrer the only question is whether

and defendant should be charged in the particular character in which he is liable.[89]

(II) *Allegation as to Privity.* The declaration must show the existence of that privity upon which the right to an account depends.[90]

(III) *Against Cotenant*—(A) *As Bailiff at Common Law.* Where a cotenant is charged as bailiff at common law it is not necessary to allege that he received more than his share of the rents and profits.[91]

(B) *Under Statute*—(1) Receipt of Rents, etc. Under the statutes heretofore mentioned, giving the action of account to cotenants, a declaration must allege the relation of the parties as cotenants and that defendant had received more than his share of the rents and profits.[92] In the absence of an allegation of such relation of the parties it will be intended that defendant was bailiff by appointment, in which event the appointment must be proved, and recovery cannot be had under the statute,[93] and any allegation of the receipt of rents and profits by defendant not inconsistent with his having received more than his just share is not sufficient.[94]

(2) Interests of Tenants. The declaration should not only allege the tenancy in common or joint tenancy of plaintiff and defendant, but should set out the proportions in which they severally hold, so that the particular relation of the parties in regard to their respective interests may be seen by the court.[95]

(IV) *Receipt of Money.* In account against a receiver the declaration should show from whom the money was received,[96] where the privity between the parties does not arise from such a relation that money may be presumed to

the count is sufficient in substance without regard to form, though enough must be stated in some form to constitute a cause of action according to the principle stated in the text.

Demand before justice of the peace.— Where the action could be brought before a justice of the peace it was held that plaintiff should demand in his writ the defendant's reasonable account as well as his damages. Bulkly *v.* Lewis, 1 Root (Conn.) 217.

89. Wood *v.* Merrow, 25 Vt. 340; Bishop *v.* Eagle, 11 Mod. 186.

90. Wood *v.* Merrow, 25 Vt. 340; Travers *v.* Dyer, 16 Blatchf. (U. S.) 178, 24 Fed. Cas. No. 14,150.

91. Barnum *v.* Landon, 25 Conn. 137.

92. **The reason for this is** that if not thus brought within the terms of the statute it cannot be shown upon what rule of liability defendant is to account. Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Cearnes *v.* Irving, 31 Vt. 604; Brinsmaid *v.* Mayo, 9 Vt. 31; Wheeler *v.* Horne, Willes 208; Sturton *v.* Richardson, 13 M. & W. 17.

93. Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219; Wheeler *v.* Horne, Willes 208.

Charge as bailiff and cotenant.— Where the declaration charged defendant as bailiff, and it was further to be gathered from the declaration that the parties were tenants in common, evidence tending to show that they were co-owners and that defendant had received more than his share of the proceeds of the property will sustain the declaration. Onion *v.* Fullerton, 17 Vt. 359.

94. Strong *v.* Richardson, 19 Vt. 194; Brinsmaid *v.* Mayo, 9 Vt. 31.

Waiver of objection.— The objection for a defect in this respect must be taken by demurrer, and if defendant pleads in bar and the issue is tried the objection will be waived. Strong *v.* Richardson, 19 Vt. 194.

95. Cearnes *v.* Irving, 31 Vt. 604; Strong *v.* Richardson, 19 Vt. 194; Brinsmaid *v.* Mayo, 9 Vt. 31, holding that where the declaration alleged that defendant was seized of one moiety as tenant in common with plaintiff, but did not allege that plaintiff was seized of the other moiety, it was bad because for aught that appeared there may have been numerous owners of the other moiety, in which event account would not lie, but the remedy was in chancery.

Waiver of objection by pleading in bar instead of demurring, see Strong *v.* Richardson, 19 Vt. 194.

96. *New York.*— McMurray *v.* Rawson, 3 Hill (N. Y.) 59.

Pennsylvania.— Demmy *v.* Dougherty, 1 Pearson (Pa.) 236.

Vermont.— May *v.* Williams, 3 Vt. 239.

United States.—Jordan *v.* Wilkins, 2 Wash. (U. S.) 482, 13 Fed. Cas. No. 7,526.

England.— Bishop *v.* Eagle, 11 Mod. 186; Coke Litt. 172*a*; 3 Reeves Hist. Eng. L. 279.

The reason given for the rule is that if it were by the hands of plaintiff, defendant might wage his law. Buller N. P. 127 [*cited* in McMurray *v.* Rawson, 3 Hill (N. Y.) 59]. See also Bishop *v.* Eagle, 11 Mod. 186. But it was held not to dispense with the rule though wage of law is abolished. McMurray *v.* Rawson, 3 Hill (N. Y.) 59. And so the reason seems also to rest upon the ground of general uncertainty. See Moore *v.* Wilson, 2 D. Chipm. (Vt.) 91, cited *infra*, note 97; Jordan *v.* Wilkins, 2 Wash. (U. S.) 482, 13 Fed. Cas. No. 7,526; Bishop *v.* Eagle, 11 Mod. 186.

have been received by the one for which he is accountable to the other;[97] or, in the case of goods belonging to partners, that there was a receipt for the joint benefit of the partners.[98] A count against one as receiver should allege what moneys were received,[99] but in the case of a bailiff it is not necessary to charge by whose hands money was received.[1]

(v) *Property of Which Defendant Is Bailiff.* In an action of account against one as bailiff a declaration should state the goods. An omission in this respect is at least a defect of form which is reached by a special demurrer,[2] and a variance to the extent of showing a different liability from that charged will be fatal.[3] But it is no objection that one is called upon as bailiff to account for a part only of the property in his hands.[4]

(vi) *Specification of Items.* In an action of account against defendant as plaintiff's bailiff it is not necessary that all the items for which defendant is accountable under the contract should be specified in the declaration.[5]

(vii) *Time.* It appears that to charge one as bailiff in proper form the time during which he acted as bailiff should be set up,[6] but where the time is left in blank the defect will be cured by verdict.[7] If defendant was bailiff of plaintiff for any time during the period laid in the declaration it is held that plaintiff may recover,[8] but evidence cannot be given of the receipt of moneys before the time laid in the declaration.[9]

97. The distinction is made as between parties occupying such relation as is stated in the text, as partners, and such as between whom the privity depends upon or is created by the receipt of money. Moore *v.* Wilson, 2 D. Chipm. (Vt.) 91. But see McMurray *v.* Rawson, 3 Hill (N. Y.) 59.

98. McFadden *v.* Sallada, 6 Pa. St. 283; Thouron *v.* Paul, 6 Whart. (Pa.) 615; James *v.* Browne, 1 Dall. (Pa.) 339; Demmy *v.* Dougherty, 1 Pearson (Pa.) 236.

Variance.— Where the declaration charged defendant as bailiff of certain goods belonging to plaintiff to make a profit for plaintiff and as receiver of certain sums by the hands of certain persons, being the money of plaintiff, and the evidence was of money received from a person not named and on the partnership account of plaintiff and defendant, it was held that the variance was fatal; that the declaration stated a cause of action at common law and the case proved was that of one tenant in common suing another; that if plaintiff meant to proceed upon the statute he should have stated his case truly and that the money was received on joint account by the hands of the person who really received it. Jordan *v.* Wilkins, 2 Wash. (U. S.) 482, 13 Fed. Cas. No. 7,526.

99. May *v.* Williams, 3 Vt. 239.

1. Hughes *v.* Woosley, 15 Mo. 492; Robinson *v.* Wright, Brayt. (Vt.) 22; Coke Litt. 172*a*; 3 Reeves Hist. Eng. L. 279.

2. McMurray *v.* Rawson, 3 Hill (N. Y.) 59.

But in Bishop *v.* Eagle, 11 Mod. 186, it was said that particulars need not be set up in account between merchants. And in Robinson *v.* Wright, Brayt. (Vt.) 22, it was held, in an action by an administrator against a surviving partner as bailiff and receiver, that the declaration need not aver of what defendant was bailiff.

Description of note.— In account against one as bailiff and receiver of a note described as in the name and in favor of plaintiff, a note executed to selectmen for the use and benefit of plaintiff was held to support the issue under the plea of "never bailiff." Spalding *v.* Dunlap, 1 Root (Conn.) 319.

3. Under a declaration charging defendant as bailiff of certain enumerated articles as the proper goods of plaintiff, evidence in the shape of a writing to plaintiff by defendant which shows the receipt by defendant of the whole cargo of which the parties were joint owners, and of the whole of which plaintiff was entitled to one sixth of the avails, is not admissible because the liability and the property as shown by such evidence are different from those alleged in the declaration. Hughes *v.* Barney, 2 Conn. 704.

4. Lacon *v.* Davenport, 16 Conn. 331; Sturges *v.* Bush, 5 Day (Conn.) 452.

5. The reason is that defendant has no occasion to know the items of the account in order to enable him to make his defense, for it is not the separate items or the separate release of items to which defendant can plead in bar, but it is to the contract or relation out of which the account is claimed that such a plea must apply. The items are to be met and answered before the auditor. Joy *v.* Walker, 29 Vt. 257 [*overruling* in effect Ganaway *v.* Miller, 15 Vt. 152].

6. See Lacon *v.* Davenport, 16 Conn. 331; Stedman *v.* Gassett, 18 Vt. 346; Ganaway *v.* Miller, 15 Vt. 152; Godfrey *v.* Saunders, 3 Wils. C. P. 73. But see Hughes *v.* Woosley, 15 Mo. 492, in which case the form approved as one in accord with the precedents contained blanks for the time during which defendant was alleged to have acted as bailiff.

7. Wright *v.* Guy, 10 Serg. & R. (Pa.) 227.

8. Lacon *v.* Davenport, 16 Conn. 331.

9. Sweigart *v.* Lowmarter, 14 Serg. & R. (Pa.) 200.

(VIII) *DEMAND.* A general averment that, though requested, defendant had not rendered his reasonable account, is a sufficient allegation of demand,[10] and while an action of account by one cotenant against another is proper only after demand and at reasonable periods,[11] an averment that a reasonable time had elapsed after defendant had been required to account and before the commencement of the action is not necessary.[12]

(IX) *DUPLICITY.* A declaration containing matters of account is not double because it sets up an express contract showing how the money should have been applied.[13]

(X) *JOINDER* — (A) *In General.* Two claims which are entirely dissimilar in their nature cannot be joined. This was applied to the subject-matter of account as bailiff and receiver and items of book account.[14] But it is no ground for defeating an action of account that defendant is called upon in several counts to account for several distinct trusts when there is in fact but one trust,[15] and a count charging defendant as bailiff may be joined with one charging him as tenant in common.[16]

(B) *Adding Count by Amendment.* A declaration charging defendant as bailiff may be amended by adding a count charging him as tenant in common.[17]

b. Plea[18] — (I) *IN GENERAL.* The only plea in bar to an action of account is one which shows that defendant is not liable to account,[19] and it is not the separate items of account or the release of separate items to which defendant can plead.[20]

(II) *GENERAL ISSUE.* While it has been said that there is no general issue in such an action, but that defendant must plead specifically to the cardinal points upon which the account is claimed,[21] "never bailiff or receiver," in an action charging defendant as bailiff or receiver, has been considered to be a general-issue plea because it goes to the root of the action.[22]

(III) *FACTS SHOWING NO LIABILITY TO ACCOUNT* — (A) *In General.* The preliminary judgment in an action of account can be barred only by proof of a former accounting or by a denial of the existence of such relation between the parties as entitles the plaintiff to such relief.[23] It is therefore proper to plead to such action any facts which show that defendant is not in law accountable,[24] though it is said he cannot pay money into court.[25]

10. Hughes *v.* Woosley, 15 Mo. 492.

11. Barnum *v.* Landon, 25 Conn. 137.

12. Beer *v.* Beer, 12 C. B. 60, where it is said that Eason *v.* Henderson, 12 Q. B. 986, is the only modern case in which such averment can be found.

13. Smith *v.* Smith, 2 Root (Conn.) 42.

14. May *v.* Williams, 3 Vt. 239.

15. Lacon *v.* Davenport, 16 Conn. 331.

16. McAdam *v.* Orr, 4 Watts & S. (Pa.) 550.

17. McAdam *v.* Orr, 4 Watts & S. (Pa.) 550.

After the report of auditors, however, the declaration cannot be amended so as to introduce a new claim without first setting aside the report, in which case defendant should be allowed to plead *de novo.* Joy *v.* Walker, 28 Vt. 442.

18. Forms of pleas in actions of account may be found set out in whole, in part, or in substance in the following cases: Field *v.* Torrey, 7 Vt. 372; Ricketts *v.* Loftus, 14 Q. B. 482; Beer *v.* Beer, 12 C. B. 60; Gorely *v.* Gorely, 1 H. & M. 144; Godfrey *v.* Saunders, 3 Wils. C. P. 73.

Form of plea and new assignment in action of account is set out in McDowall *v.* Boyd, 17 L. J. Q. B. 295.

Forms of replications in actions of account may be found set out in Field *v.* Torrey, 7 Vt. 372; Godfrey *v.* Saunders, 3 Wils. C. P. 73.

Form of rejoinder in action of account is set out in Godfrey *v.* Saunders, 3 Wils. C. P. 73.

Form of surrejoinder in action of account is set out in Godfrey *v.* Saunders, 3 Wils. C. P. 73.

19. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11.

20. Mott *v.* Downer, 1 Root (Conn.) 425; Joy *v.* Walker, 29 Vt. 257.

21. Cearnes *v.* Irving, 31 Vt. 604; Bishop *v.* Baldwin, 14 Vt. 145.

22. Whelen *v.* Watmough, 15 Serg. & R. (Pa.) 153; Godfrey *v.* Saunders, 3 Wils. C. P. 94.

23. McPherson *v.* McPherson, 33 N. C. 391, 53 Am. Dec. 416.

24. Ricketts *v.* Loftus, 14 Q. B. 482, 2 Chitty Pl. (16th Am. ed.) 294; 3 Reeves Hist. Eng. L. 279.

25. 2 Chitty Pl. (16th Am. ed.) 294 [*citing* Buller N. P. 128].

(B) *Denial of Relation as Tenant.* Thus defendant may plead that he was not tenant in common with plaintiff.[26]

(C) "*Never Bailiff or Receiver.*" Where defendant is charged as bailiff or receiver the existence of this relation is the gist of the cause of action, and defendant may plead "never bailiff" or "never receiver" in bar of the account.[27] But the issue raised by this plea will be confined to the existence of the relation, and plaintiff will not be required to show other matters not bearing upon this point,[28] and, if defendant received any of the property mentioned in the declaration, the jury will be warranted in finding a general verdict that defendant was bailiff and receiver.[29]

(D) *Plene Computavit* — (1) IN GENERAL. As the action is grounded upon the refusal of defendant to account, that defendant has fully accounted is a good plea in bar of the action.[30]

(2) SUFFICIENCY OF ACCOUNTING TO SUPPORT. The accounting may be with plaintiff himself or before auditors assigned by plaintiff, and the reason is that after such an accounting plaintiff's remedy is by an action of debt for the arrears or balance, and the action of account is gone,[31] but it must be the rendering of an account to the satisfaction of plaintiff, or an account which shows an agreed balance between the parties, as nothing short of this will alter the nature of the demand and give plaintiff an action of debt for the balance.[32]

(E) *Release.* The defendant in an action of account may plead a release of all receipts.[33]

(F) *Infancy.* A defendant in an action of account may plead infancy.[34]

(IV) *JOINDER OF PLEAS.* If defendant is charged as receiver and also with goods bailed to him, he may plead to the first *non receptor* and to the second that

26. Bishop *v.* Baldwin, 14 Vt. 145.

Hence it is proper to plead any facts which show that he and plaintiff did not sustain this relation to each other. Brinsmaid *v.* Mayo, 9 Vt. 31; Ricketts *v.* Loftus, 14 Q. B. 482, in which case the declaration stated that by deed land had been settled to such uses as the grantor should appoint, and, in default of appointment, to certain specified uses in the declaration; that the grantor died without appointing, whereby the limitations in default of appointment took effect under which plaintiff and defendant became tenants in common. Defendant, for plea, set out the deed and alleged that the grantor did appoint, and set out the appointment, which showed that plaintiff and defendant were not tenants in common, concluding with the verification. It was held that the plea was good, for that the fact of this appointment ought not to have been pleaded as a traverse of the allegation of non-appointment, such allegation in the count being unnecessary.

27. McMurray *v.* Rawson, 3 Hill (N. Y.) 59; Whelen *v.* Watmough, 15 Serg. & R. (Pa.) 153; 3 Reeves Hist. Eng. L. 56. See also Lacon *v.* Davenport, 16 Conn. 331; Bishop *v.* Baldwin, 14 Vt. 145; Wiswell *v.* Wilkins, 4 Vt. 137.

28. Chadwick *v.* Divol, 12 Vt. 499, holding that a plea of "never bailiff" does not involve the question of demand, and under the issue thereby raised plaintiff need not prove such demand.

29. Sturges *v.* Bush, 5 Day (Conn.) 452.

30. Godfrey *v.* Saunders, 3 Wils. C. P. 94; 3 Reeves Hist. Eng. L. 279.

Payment — Question for jury.— Where defendant pleads payment to an action under the code for an account and settlement, and introduces evidence in support of the defense, the jury's attention should be called thereto. Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782.

31. Baxter *v.* Hozier, 5 Bing. N. Cas. 288; Godfrey *v.* Saunders, 3 Wils. C. P. 94.

Settlement set aside.— But where a settlement between partners has been set aside in a legal proceeding, the parties are restored to their original position, and an action of account will lie. Leonard *v.* Leonard, 1 Watts & S. (Pa.) 342.

32. Lee *v.* Abrams, 12 Ill. 111; Woodward *v.* Francis, 19 Vt. 434; Read *v.* Bertrand, 4 Wash. (U. S.) 556, 20 Fed. Cas. No. 11,602; Baxter *v.* Hozier, 5 Bing. N. Cas. 288.

33. Godfrey *v.* Saunders, 3 Wils. C. P. 94; 3 Reeves Hist. Eng. L. 279.

Averment of performance of conditions.— A deed of assignment for the benefit of creditors contained a provision that it should be void unless all the creditors agreed to receive their proportion of the proceeds of the property in discharge of their demands. A release executed by one of the creditors contained a proviso that it should be void if any of the other creditors should fail to comply with the provision of the deed above mentioned. It was held that a plea setting up the assignment and release was bad unless it averred the assent of the creditors according to the provision in the deed. Bakewell *v.* Dalton, 5 Day (Conn.) 489.

34. Bishop *v.* Baldwin, 14 Vt. 145; Coke Litt. 172*a*; 3 Reeves Hist. Eng. L. 279. See also INFANTS.

he had accounted,[35] and the plea of "fully accounted" may be added to that of "never bailiff;" the former will not operate to admit liability so as to make the latter inconsistent.[36]

(v) *Pleading in Bar before Judgment to Account.* As the only plea in bar in an action of account is one which goes to the liability of defendant to account, and the judgment to account is conclusive as to the mere liability to account, matter proper in such a plea should be pleaded before the interlocutory judgment to account.[37]

7. Judgment — a. In General — The Two Judgments. In an action of account there are two judgments: first, upon the preliminary trial of the right to the accounting, that the defendant do account; and second, final judgment upon the report of the auditors for the balance found due.[38] And where the action may be referred to arbitrators it is held that they should make an award *quod computet* before awarding a certain sum against defendant.[39]

b. Nature and Effect of Quod Computet[40] — (i) *Interlocutory.* The judgment *quod computet* is interlocutory.[41]

(ii) *Determination of Liability to Account.* The interlocutory judgment to account determines nothing beyond the liability of defendant to account,[42] even if defendant makes default;[43] but it does determine that defendant is liable to account, leaving such matters as are proper for consideration upon the taking of the account to the auditors before whom the parties are sent.[44] The adjudi-

35. 3 Reeves Hist. Eng. L. 56.

36. Whelen *v.* Watmough, 15 Serg. & R. (Pa.) 153, wherein it was held that "fully accounted," in such a case, was like plea of payment added to the general issue *non est factum* or *non assumpsit*. If defendant has paid over as trustee, and has thus executed his trust, this is in bar of an action and he was never accountable; but it could not be given in evidence on the general issue of *ne unques bailiff*, because it would contradict that issue. Godfrey *v.* Saunders, 3 Wils. C. P. 94.

37. The rule was that except in case of a release or *plene computavit*, if the party was once chargeable and accountable he could not plead in bar, but must plead before auditors, and these exceptions were because a release and full accounting were in total extinguishment of the right of action. Godfrey *v.* Saunders, 3 Wils. C. P. 94. See *infra*, II, C, 7, b.

38. *Illinois.*— Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11; Pardridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627; Lee *v.* Abrams, 12 Ill. 111; Lee *v.* Yanaway, 52 Ill. App. 23.

Kentucky.— Neal *v.* Keel, 4 T. B. Mon. (Ky.) 162.

Maine.— Closson *v.* Means, 40 Me. 337.

North Carolina.— McPherson *v.* McPherson, 33 N. C. 391, 53 Am. Dec. 416.

United States.— Travers *v.* Dyer, 16 Blatchf. (U. S.) 178, 24 Fed. Cas. No. 14,150.

England.— Godfrey *v.* Saunders, 3 Wils. C. P. 73.

See also 3 Reeves Hist. Eng. L. 279.

Issue presented by pleadings.— In Connecticut no preliminary judgment was required unless the pleadings presented some issue proper to be determined by the court in the first instance. Spalding *v.* Day, 37 Conn. 427.

Change of form of action.— In Illinois it was provided by statute that the court might change the form of action from assumpsit to account. Under this statute an amendment allowed, changing the form of action to account and ordering an account to be taken, was virtually a judgment *quod computet*. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11.

Before justice of the peace.— In an action before a justice of the peace the justice must first render a judgment against defendant that he account, and then, as he is not empowered to appoint auditors, he must adjust the account as auditors would do, and give final judgment for the balance. Bulkly *v.* Lewis, 1 Root (Conn.) 217.

39. Deal *v.* Deal, 7 Serg. & R. (Pa.) 201.

40. **Form of judgment** *quod computet* in action of account is set out in Lee *v.* Yanaway, 52 Ill. App. 23; Hathaway *v.* Russell, 46 N. Y. Super. Ct. 103; Godfrey *v.* Saunders, 3 Wils. C. P. 73.

41. Lee *v.* Abrams, 12 Ill. 111; Lee *v.* Yanaway, 52 Ill. App. 23, holding that the judgment is not such as will support an appeal as from a final judgment; Beitler *v.* Zeigler, 1 Penr. & W. (Pa.) 135, holding that a writ of error does not lie.

42. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11; Pardridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627; Lee *v.* Abrams, 12 Ill. 111; Lee *v.* Yanaway, 52 Ill. App. 23.

Damages.— The judgment *quod computet* includes no damages, and if, upon the issue "never bailiff" or "receiver," the jury assess damages, no judgment can be given for them. Gratz *v.* Phillips, 5 Binn. (Pa.) 564. See also Lee *v.* Abrams, 12 Ill. 111.

43. Lee *v.* Abrams, 12 Ill. 111; Bishop *v.* Baldwin, 14 Vt. 145.

44. Mott *v.* Downer, 1 Root (Conn.) 425; Hawley *v.* Burd, 6 Ill. App. 454; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Read *v.* Bertrand, 4 Wash. (U. S.) 556, 20 Fed. Cas. No. 11,602.

cation of this liability is conclusive upon the parties in the further progress of the cause,[45] and therefore, unless otherwise provided by statute,[46] all questions upon which the liability to account might have been contested must have been raised before the account was sent to the auditors, and nothing can be pleaded before the auditors which might have been pleaded in bar of the action.[47] Thus that defendant had fully accounted is a plea in bar and cannot be interposed before the auditors, though defendant may prove payment on the account, when the matter is before the auditors, without pleading it in bar.[48]

c. Appointment of Auditors by Consent. Auditors may be appointed by consent of the parties without a judgment to account, and this will operate as an admission that there are no matters in dispute except the statement of an account.[49]

45. Plaintiff's disability.— After judgment to account it is too late to object to the disability of the plaintiff. Bredin *v.* Dwen, 2 Watts (Pa.) 95.

46. Sturgis *v.* Hull, 48 Vt. 302, wherein it appeared that by statute in that state a judgment to account did not preclude defendant from making any defense before the auditor; but it was held that where the judgment to account was rendered and the auditor was appointed before the passage of the statute it was not operative in that case.

47. *Connecticut.*— Day *v.* Lockwood, 24 Conn. 185.

Illinois.— Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11; Lee *v.* Abrams, 12 Ill. 111.

Maine.— Black *v.* Nichols, 68 Me. 227; Closson *v.* Means, 40 Me. 337.

North Carolina.— McPherson *v.* McPherson, 33 N. C. 391, 53 Am. Dec. 416.

Vermont.— Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Porter *v.* Wheeler, 37 Vt. 281; Morgan *v.* Adams, 37 Vt. 233; Baxter *v.* Thompson, 26 Vt. 559; Pickett *v.* Pearsons, 17 Vt. 470; Bishop *v.* Baldwin, 14 Vt. 145.

United States.— Spear *v.* Newell, 2 Paine (U. S.) 267, 22 Fed. Cas. No. 13,224.

England.— Godfrey *v.* Saunders, 3 Wils. C. P. 94.

No pleading before referee, see Kelly *v.* Kelly, 3 Barb. (N. Y.) 419; REFERENCES.

Issue tried by jury.— Under the statute providing that the issue denying the right of the plaintiff to an accounting is to be tried by a jury, the issue is not whether, upon the final settlement, the account is balanced, but whether there should be an account made. Pardridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627; Hawley *v.* Burd, 6 Ill. App. 454.

48. Lee *v.* Abrams, 12 Ill. 111; Godfrey *v.* Saunders, 3 Wils. C. P. 94; 3 Reeves Hist. Eng. L. 279.

Distinction between "plene computavit" and "nothing in arrear."— In Pickett *v.* Pearsons, 17 Vt. 470, it was said that whether defendant is in arrear at the time of the accounting before the auditor is almost precisely the same inquiry which might have been raised before a court and jury upon the plea of *plene computavit*, though perhaps not precisely the same; that a defense of *plene computavit* seemed to rest upon the ground of an express settlement, while that of "never in arrear" goes upon the ground that there is nothing now in the defendant's hands which he is liable to account for, and that the latter may be shown in various ways, as that it has been handed over to plaintiff, destroyed, or has perished without defendant's fault.

Account partly adjusted.— Where a portion of an account had been adjusted by partners before suit, defendant in an action of account need not plead such adjustment, and defendant may have the benefit thereof before the auditor, because, if he had pleaded *plene computavit*, the evidence of the partial settlement would not have supported the plea, and on the other hand a mere partial settlement would not go in bar of an action, but merely to the amount in arrear, and need not be specially pleaded. Morgan *v.* Adams, 37 Vt. 233.

Issues certified to court.— In Pennsylvania, in account render, the course was to take issue before the auditors upon all matters in discharge of the account which the auditors certified to the court and which were tried by the court or jury according as they were issues of law or fact. The account was regulated by the auditors according to the result of such trial. Little *v.* Stanton, 32 Pa. St. 299; Crousillat *v.* McCall, 5 Binn. (Pa.) 433.

49. Spalding *v.* Day, 37 Conn. 427.

General reference.— A general reference in an action of account may be entered by the consent of the parties instead of an appointment of auditors at common law. Barde *v.* Wilson, 3 Yeates (Pa.) 149. In Baxter *v.* Hozier, 5 Bing. N. Cas. 288, a verdict was entered for plaintiff and all the issues submitted to the award of the barrister who was, by the order of reference by consent of the parties, empowered to direct that the verdict should be entered for plaintiff or defendant and such judgment thereon for either of the parties as he should think proper. It was held that by such order of reference and consent of the parties it was intended that the arbitrator, after deciding that defendant should account, should take the account between the parties; that he should sit as an arbitrator to whom all matters in difference were referred, and not simply as an auditor assigned under the common-law judgment *quod computet*, notwithstanding judgment was ultimately to be entered in the action. See REFERENCES.

d. Damages. In an action of account it is held that defendant may have judgment for arrears to a greater amount than the damages laid in the declaration.[50]

D. Action under Reformed Procedure. The action to account may be said to have fallen into disuse also by reason of the adoption of reformed systems of procedure, exactly as under such systems other forms of action have lost their identity as distinctive forms. The rights of the parties are not altered by such change, however,[51] but the relief is administered under pleadings presenting facts to show a proper case therefor,[52] and the suit will not be dismissed because allegations appropriate to a legal cause of action are contained in the complaint.[53] When admittedly for an accounting, the action is essentially an equitable action,[54] though whether it is legal or equitable is often governed by the same considerations which control where law and equity are separately administered,[55] especially

Change of form of action.— Under statute in Illinois permitting the court to change the form of action from assumpsit to account, an order permitting the amendment without objection is conclusive as to the liability to account. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11. And while it is irregular and arbitrary to change the form of an action to account over the plaintiff's objection after a second trial of the case had proceeded as far as the opening arguments of counsel, defendant, who did not complain of such action, cannot afterward complain, for he is bound as by consent to a judgment *quod computet*. Pardridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627.

50. Lee *v.* Abrams, 12 Ill. 111; Gratz *v.* Phillips, 5 Binn. (Pa.) 564.

51. Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550 (in which case the complaint attempted to set up a cause of action by one tenant in common against another for a share of rents and profits, but as neither the statute of Anne nor any similar statute was in force in that state it was held that the action was a common-law action of account, and that the complaint was fatally defective in not averring that defendant occupied the premises as plaintiff's bailiff under appointment); Ragan *v.* McCoy, 29 Mo. 356; Woolever *v.* Knapp, 18 Barb. (N. Y.) 265; Wright *v.* Wright, 59 How. Pr. (N. Y.) 176 (which was called an action of account or for money had and received, being against a cotenant for receiving more than his just proportion).

52. *Colorado.*—Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803.

Georgia.— Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782; Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608.

Nebraska.— Daugherty *v.* Gouff, 23 Nebr. 105, 36 N. W. 351.

New York.— Johnson *v.* Golder, 132 N. Y. 116, 30 N. E. 376; Williams *v.* Slote, 70 N. Y. 601; Darling *v.* Brewster, 55 N. Y. 667; Emery *v.* Pease, 20 N. Y. 62; Parker *v.* Pullman, 36 N. Y. App. Div. 208, 56 N. Y. Suppl. 734; Schuetz *v.* German-American Real Estate Co., 21 N. Y. App. Div. 163, 47 N. Y. Suppl. 500; Myers *v.* Bolton, 89 Hun (N. Y.) 342, 35 N. Y. Suppl. 577; Pickard *v.* Simpson, 6 N. Y. Suppl. 93; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Redfield *v.* Middleton, 1 Abb. Pr. N. S. (N. Y.) 15.

North Carolina.— Dunn *v.* Johnson, 115 N. C. 249, 20 S. E. 390; Martin *v.* Wilbourne, 66 N. C. 321.

South Carolina.— Buist *v.* Melchers, 44 S. C. 46, 21 S. E. 449; National Bank *v.* Jennings, 38 S. C. 372, 17 S. E. 16.

Texas.—Santleben *v.* Froboese, 17 Tex. Civ. App. 626, 43 S. W. 571; Pfeiffer *v.* Maltby, 38 Tex. 523.

Washington.— Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317.

Wisconsin.— Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645; Schwickerath *v.* Lohen, 48 Wis. 599, 4 N. W. 805.

Complaint not for money judgment.— In West *v.* Brewster, 1 Duer (N. Y.) 647, 55 N. Y. 667, the complaint against an attorney alleged that he had collected divers sums of money for plaintiff amounting to a certain sum specified, and had neglected and refused to pay it over, and prayed for an accounting and a judgment for the amount found to be due. It was held that from the particular relation of the parties the contract which that relation implied was not for the payment of money only, and that the notice in the summons that if defendant failed to answer plaintiff would apply to the court for the relief demanded was properly adapted to the relief demanded.

Action for accounting and on account stated.— In California, under a complaint seeking to recover against a partner on an account stated, and also an accounting of other partnership transactions, it was held that if the court should be of opinion that there was no account stated it should order an account to be taken *de novo* of all the partnership dealings. Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504.

53. Myers *v.* Bolton, 89 Hun (N. Y.) 342, 35 N. Y. Suppl. 577. See *infra*, II, E, 9, a, (x).

54. Smith *v.* Smith, 88 Cal. 572, 26 Pac. 356; Garner *v.* Reis, 25 Minn. 475.

Action ex contractu, see Chapman *v.* Charleston, 28 S. C. 373, 6 S. E. 158, 13 Am. St. Rep. 681.

55. Illustration.— Where an action was brought for an accounting by a pledgor against one to whom the pledgee had assigned the securities without making the pledgee a party, it was held that the action could not be maintained as an equitable action for an ac-

where the subject-matter comes under well-recognized heads of chancery jurisdiction, as fraud,[56] trusts or other fiduciary relations,[57] partnership,[58] or the adjustment of rights and interests of part owners.[59] In some cases, however, the adequacy of the legal remedy under the code is made to exclude a resort to the method of trial incident to equitable actions, as a trial by the court without a jury, in cases which would be proper for equitable jurisdiction in a court of chancery. Thus the complicated character of the accounts and the need of discovery have been said to furnish but slight if any reason for a resort to equity under such code provisions as allow a reference of complicated accounts or an examination of adverse parties before trial,[60] though the jurisdiction over trusts and other fiduciary relations remains.[61] A mere asking for an accounting will not have the effect of changing the form of action so as to require a trial by the court exclusively, or by a referee in a case for the recovery of money had and received or on an account stated.[62]

E. Accounting in Equity — 1. Jurisdiction — a. In General. Originally, matters of account proper for an action of account were cognizable exclusively at law,[63] but, the ancient common-law action of account being considered imperfect in its processes and inadequate in its remedies, jurisdiction in such matters was assumed by courts of equity because the common-law courts could not afford any remedy or because the remedy was not as complete as that furnished by the court

counting in the absence of such a party, and that the court could not convert it into an action at law and give judgment as in an action for a tort, because this involved a different mode of trial and took away from defendant the right of trial by jury which was secured to him by the constitution, and if the parties had not waived that mode of trial the action as one for the recovery of damages could be tried in no other way. Lewis *v.* Varnum, 12 Abb. Pr. (N. Y.) 305.

Code cases are included in the citation of cases in support of the various principles of equitable jurisdiction. See *infra*, II, E, 1.

56. Johnson *v.* Golder, 132 N. Y. 116, 30 N. E. 376; Bird *v.* Lanphear, 11 N. Y. App. Div. 613, 42 N. Y. Suppl. 623.

57. Getty *v.* Devlin, 70 N. Y. 504; West *v.* Brewster, 1 Duer (N. Y.) 647; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Dunn *v.* Johnson, 115 N. C. 249, 20 S. E. 390; Martin *v.* Wilbourne, 66 N. C. 321; Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645. See also National Bank *v.* Jennings, 38 S. C. 372, 17 S. E. 16.

58. Daugherty *v.* Gouff, 23 Nebr. 105, 36 N. W. 351; King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332; Williams *v.* Slote, 70 N. Y. 601.

59. Whiton *v.* Spring, 74 N. Y. 169; Dyckman *v.* Valiente, 42 N. Y. 549.

60. Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066; Lamaster *v.* Scofield, 5 Nebr. 148; Uhlman *v.* New York L. Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; Marvin *v.* Brooks, 94 N. Y. 71; Smith *v.* Bodine, 74 N. Y. 30; Williams *v.* Slote, 70 N. Y. 601; Hackett *v.* Equitable L. Assur. Soc., 30 Misc. (N. Y.) 523, 63 N. Y. Suppl. 847; Howell *v.* Crosby, 89 Hun (N. Y.) 355, 35 N. Y. Suppl. 328. To the same effect, Oglesby *v.* State, 73 Tex. 658, 11 S. W. 873. But in Wisconsin, under a complaint alleging that plaintiff was not in possession of any books, papers, or memoranda by which the amount of the moneys to be accounted for could be ascertained, it was held that, notwithstanding a statute which superseded the proceeding by a bill in equity for discovery in aid of another action, the complaint stated a cause of action in equity, as such statute did not affect the jurisdiction of equity in matters of accounting. Schwickerath *v.* Lohen, 48 Wis. 599, 4 N. W. 805.

Duty to account imposed by law.—But notwithstanding the cases above cited from New York, it is held there that where a corporation is under an obligation imposed by law to pay a percentage of its earnings to the city an equitable action for an accounting may be maintained against the corporation. New York *v.* Manhattan R. Co., 25 N. Y. Suppl. 860, which was put upon the ground that where an accounting is necessary to determine the amount due to the city of the city's money in possession of defendant such a remedy is proper, upon the authority of New York *v.* Twenty-third St. R. Co., 113 N. Y. 311, 21 N. E. 60, where the action was of this character and an interlocutory judgment for an accounting was affirmed without discussing the question of the remedy.

61. Marvin *v.* Brooks, 94 N. Y. 71. See Schantz *v.* Oakman, 163 N. Y. 148, 57 N. E. 288, where the facts were held not to show confidential relations.

62. Silver *v.* St. Louis, etc., R. Co., 5 Mo. App. 381. See *infra*, II, E, 9, a, (x).

Accounting or on account stated.— So in New York it seems the court may determine from the complaint whether the action is for an accounting or is an action for a stated account. Pickard *v.* Simpson, 6 N. Y. Suppl. 93.

63. Church *v.* Anti-Kalsomine Co., 118 Mich. 219, 76 N. W. 383.

of chancery.[64] This jurisdiction is generally based upon the grounds of the complicated character of the accounts, the need of discovery, and the existence of a trust or fiduciary relation.[65] It has been extended to cases in which the remedy at law was never applied,[66] and is said to be among the most comprehensive of those which equity has assumed.[67]

b. Ordinary Heads of Equity Jurisdiction—(1) *In General.* In many cases it appears that the equitable jurisdiction over matters of account is exercised not primarily upon the ground of account alone, but because there is involved some recognized head of equitable jurisdiction, as in the instance of the jurisdiction which such courts possess and exercise over express, implied, and constructive trusts,[68] frauds,[69] the rescission of contracts,[70] the enforcement of rights under the doctrine of subrogation,[71] over partnerships and accounting between partners,[72] tenants in common, part owners of vessels, and the like, and where a party is interested with others so that he would be in the position of both plaintiff and defendant in an action at law,[73] for the enforcement of a purely equitable title or demand[74] as incidental to a bill to stay waste[75] or the enforcement of a lien for which an action at law affords no adequate remedy.[76] So cases arise where the

64. *Alabama.*— Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94.

Florida.— Broome *v.* Alston, 8 Fla. 307.

Indiana.— Field *v.* Brown, 146 Ind. 293, 45 N. E. 464.

Kentucky.—Bruce *v.* Burdet, 1 J. J. Marsh. (Ky.) 80.

Tennessee.—Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

England.— Carlisle *v.* Wilson, 13 Ves. Jr. 276.

65. Bellingham *v.* Palmer, 54 N. J. Eq. 136, 33 Atl. 199; Marvin *v.* Brooks, 94 N. Y. 71; Story Eq. Jur. § 459.

66. Church *v.* Anti-Kalsomine Co., 118 Mich. 219, 76 N. W. 383.

67. Tillar *v.* Cook, 77 Va. 477.

68. See *infra*, II, E, 1, i.

As to compensation and damages see EQUITY.

69. *Georgia.*— Wood *v.* Tompkins, 28 Ga. 159, holding that equity will entertain jurisdiction of a bill by the surety of a defendant in an action of trover, who had paid the judgment, to have an account from persons to whom the property was delivered, during the pendency of the action, under a collusive agreement to defraud the surety.

Hawaii.— Chave *v.* Dowsett, 6 Hawaii 221.

Illinois.— Higgs *v.* French, 16 Ill. 343; Bunn *v.* Schnellbacher, 59 Ill. App. 222.

Massachusetts.— Dole *v.* Wooldredge, 135 Mass. 140.

Michigan.—Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651.

New Jersey.— Scudder *v.* Stout, 10 N. J. Eq. 377.

Pennsylvania.—Bierbower's Appeal, 107 Pa. St. 14; Hubert Oil Co. *v.* Riddle, 6 Phila. (Pa.) 495, 25 Leg. Int. (Pa.) 12.

70. Fulton *v.* Woodman, 40 Miss. 593. See also CONTRACTS.

71. Wood *v.* Tompkins, 28 Ga. 159. See also SUBROGATION.

72. Tillar *v.* Cook, 77 Va. 477, holding that where partnership is involved, outside of the jurisdiction which equity generally assumes in matters of accounting, the partnership relation of the parties is plainly a ground of equity jurisdiction, and that if a dissolution as well as the account be sought, common-law jurisdiction is altogether excluded. So in Gillett *v.* Hall, 13 Conn. 426, it was said that while the rule at law was that an action for a settlement of a copartnership account would not lie where the number of copartners exceeded two, it does not follow and is not the law that the remedy is exclusively at law where there are only two partners, though jurisdiction was sustained upon a different ground, to wit, the necessity for the exercise of extraordinary powers of the court of chancery under allegations that some of the defendants had by force and fraud seized upon notes and accounts, etc., belonging to the copartnership, in addition to which the bill had called for the production of these papers and prayed for injunction. See also PARTNERSHIP.

73. Kirkman *v.* Vanlier, 7 Ala. 217; Mustard *v.* Robinson, 52 Me. 54; Maguire *v.* Pingree, 30 Me. 508; Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; Penniman *v.* Jones, 58 N. H. 447. See also TENANCY IN COMMON.

Obligor of bond interested in debts collected.— If the obligor of a bond conditioned upon his accounting for moneys to be collected is personally interested in the collections, suit on the bond for an accounting against the obligor is properly brought in equity. Rush *v.* Rush, 53 Ill. App. 454.

74. Trammell *v.* Craddock, 100 Ala. 266, 13 So. 911; Plumkett *v.* Carew, 1 Hill Eq. (S. C.) 169; Miller *v.* Trevilian, 2 Rob. (Va.) 1; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975.

75. Jenks *v.* Langdon, 21 Ohio St. 362. See also WASTE.

76. Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176; Brower *v.* Brower, 29 Fed. 485. See also LIENS.

right to an accounting is considered in connection with one or more of these independent grounds of jurisdiction and the remedy of course sustained.[77]

(II) *Retaining Cause for Complete Relief.* Another general principle, to be hereafter more particularly applied,[78] closely connected with the last preceding section, may be here stated, namely, when a court of equity once acquires jurisdiction upon equitable grounds it will proceed to do complete justice and administer full relief. To this end it will order an accounting,[79] and will settle the whole controversy even to the extent of adjudicating matters of purely legal cognizance.[80] And on the other hand, where defendant is called on to account in a proper case, the court, having obtained jurisdiction for this purpose, will take cognizance of the whole matter involved,[81] and necessary incidental relief will be granted.[82] If, however, the allegations of the bill creating equitable cognizance are not sustained, the jurisdiction will fall, and a mere demand for an account, in the absence of other or equitable circumstances, will not be enough to require the retention of the cause.[83]

(III) *To Prevent Multiplicity of Suits.* Equity assumes jurisdiction in matters of account to prevent a multiplicity of suits,[84] which principle extends into the other subdivisions of this title.

c. Concurrent Jurisdiction — (I) *The General Rule.* So uniformly have courts of equity assumed jurisdiction of matters of account, that the rule in general terms is now established that they have concurrent jurisdiction with courts of law in all matters of account,[85] especially in cases where, in addition to the ordinary jurisdiction which equity assumes over accounts, property involved in the suit is encumbered by mortgages.[86] On the other hand a court of law is not necessarily ousted of its jurisdiction simply because an account is involved,[87] and the court which first acquires jurisdiction will retain it to the exclusion of the other,[88] though a court of equity may enjoin an action at law, on account of the complicated character of the accounts, if complete justice cannot be done in the lawsuit,

77. Kirkman *v.* Vanlier, 7 Ala. 217; Shaw *v.* Chase, 77 Mich. 436, 43 N. W. 883.

78. See *infra,* II, E, 1, e.

79. Trammell *v.* Craddock, 100 Ala. 266, 13 So. 911; Lott *v.* Mobile County, 79 Ala. 69; Patterson *v.* Glassmire, 166 Pa. St. 230, 31 Atl. 40. See also EQUITY.

80. Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542, 9 So. 256; Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176; Patterson *v.* Glassmire, 166 Pa. St. 230, 31 Atl. 40.

81. Rathbone *v.* Warren, 10 Johns. (N. Y.) 587.

82. Laeber *v.* Langhor, 45 Md. 477; Davis *v.* Grove, 2 Rob. (N. Y.) 134.

83. Tecumseh Iron Co. *v.* Camp, 93 Ala. 572, 9 So. 343; Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176; Hodges *v.* Pingree, 10 Gray (Mass.) 14; Randolph *v.* Kinney, 3 Rand. (Va.) 394.

84. McLaren *v.* Steapp, 1 Ga. 376; White *v.* Hampton, 10 Iowa 238; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Tyler *v.* Nelson, 14 Gratt. (Va.) 214.

85. *Alabama.*— Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; Bradford *v.* Spyker, 32 Ala. 134.

Delaware.— Davis *v.* Davis, 1 Del. Ch. 256.

Kentucky.—Bruce *v.* Burdet, 1 J. J. Marsh. (Ky.) 80; Breckenridge *v.* Brooks, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401.

Maine.— McKim *v.* Odom, 12 Me. 94.

New Jersey.— Jewett *v.* Bowman, 29 N. J. Eq. 174; Seymour *v.* Long Dock Co., 20 N. J. Eq. 396.

New York.— Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Post *v.* Kimberly, 9 Johns. (N. Y.) 470; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291.

North Carolina.— Jones *v.* Bullock, 17 N. C. 368.

Pennsylvania.— Adams's Appeal, 113 Pa. St. 449, 6 Atl. 100; Baugher *v.* Conn, 1 Pa. Co. Ct. 184.

Tennessee.—Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

United States.— Mitchell *v.* Great Works Milling, etc., Co., 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662.

England.—North-Eastern R. Co. *v.* Martin, Phil. 758; Carlisle *v.* Wilson, 13 Ves. Jr. 276; Lewes *v.* Sutton, 5 Ves. Jr. 683; Shepard *v.* Brown, 4 Giff. 208.

86. Broome *v.* Alston, 8 Fla. 307; Cullen *v.* Queensberry, 1 Bro. Ch. 101.

87. Church *v.* Anti-Kalsomine Co., 118 Mich. 219, 76 N. W. 383.

In Jaques *v.* Hulit, 16 N. J. L. 38, it was held that a covenant to divide the proceeds of certain property when sold terminated as soon as the property was sold, and that an action would lie for the recovery of a balance due from one of the parties to the other, without resorting to an action of account render.

88. Meyer *v.* Saul, 82 Md. 459, 33 Atl. 539; Scott *v.* Liverpool, 5 Jur. N. S. 105.

but not otherwise.[89] But if plaintiff elects to proceed at law and fails to establish his claim in that court, he cannot ordinarily then turn to a court of equity to have the same accounts reëxamined.[90]

(II) *Under Contract.* In cases arising *ex contractu* or *quasi ex contractu*, but involving accounts, courts of equity have exercised a general jurisdiction; among which, arising from the cognizance of this court, are agencies, claims against attorneys, consignees, receivers, and stewards.[91] Where the contract fixes no time for its termination it will be construed as requiring an accounting at reasonable periods, and the reasonableness of such periods will be determined by the previous acts of the parties.[92] If the contract is one which is not enforceable under the statute of frauds, equity will not decree an accounting under it.[93] Nor can an accounting be decreed under a contract unless the party seeking it comes strictly within the terms of the contract under which he might be entitled to an accounting.[94] The contract must be so certain that it is capable of enforcement, as the court will not attempt to interject by construction that upon which the minds of the parties had not met.[95]

(III) *In Cases Proper for Action of Account.* In all cases in which an action of account would have been a proper remedy at law the jurisdiction of a court of equity over the matters involved seems to be undoubted.[96]

(IV) *Remedy Confined.* Other cases would seem to confine the jurisdiction, holding in general terms that a bill for an accounting will not lie except when an action of account at common law would be proper, or when the case comes under some appropriate head of equity jurisdiction.[97] And so, while a court of chancery is said to have jurisdiction in matters of account, it is not every account

89. Ely *v.* Crane, 37 N. J. Eq. 157, holding that on a motion to dissolve an injunction in such a case the bill and answer will be taken together, and therefore on such a motion the court may act notwithstanding the bill alone does not show the necessity therefor.

90. Southgate *v.* Montgomery, 1 Paige (N. Y.) 41.

As to equitable relief against judgments see JUDGMENTS.

91. U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Dabbs *v.* Nugent, 11 Jur. N. S. 943; Shepard *v.* Brown, 4 Giff. 208. A suit for an accounting is not barred by a prior recovery in an action at law of an amount then due under the contract. Montrose *v.* Wanamaker, 11 N. Y. Suppl. 106.

92. Luce *v.* Hartshorn, 56 N. Y. 621.

93. Black *v.* Black, 15 Ga. 445.

94. Tartar *v.* Finch, 9 Cal. 276, in which case plaintiff, who kept a ferry under a license which had expired, lost his boat, and thereupon agreed with defendant that the latter should furnish and run a boat under complainant's license, which complainant was to renew, until defendant should be repaid his advances. Plaintiff neglected to renew his license, and after several months defendant obtained a license for himself, and it was held that complainant, in a suit for an account and return of the ferry, could not recover.

Election pending contract.— Under an agreement between plaintiff and defendant, the latter was to pay plaintiff a stipulated weekly sum for his services in a particular business until the business had paid for itself, after which plaintiff might have an election to take one half of the profits in lieu of such weekly payments, and it was held that if plaintiff did not make his election before quitting the employment he could not maintain a suit for an accounting. Hart *v.* Wilder, 3 N. Y. App. Div. 356, 38 N. Y. Suppl. 288.

95. Young *v.* Farwell, 146 Ill. 466, 34 N. E. 373.

96. *Arkansas.*— Trapnall *v.* Hill, 31 Ark. 345.

Indiana.— Field *v.* Brown, 146 Ind. 293, 45 N. E. 464.

Pennsylvania.— Adams's Appeal, 113 Pa. St. 449, 6 Atl. 100; Persch *v.* Quiggle, 57 Pa. St. 247; Shriver *v.* Nimick, 41 Pa. St. 80; Baugher *v.* Conn, 1 Pa. Co. Ct. 184. In this state, in an action of account render begun by foreign attachment, upon a rule to show cause why plaintiff should not have leave to file a bill in equity with the same effect as if the proceeding had been begun ordinarily by bill in equity, the rule was made absolute. Crowe *v.* Davis, 33 Wkly. Notes Cas. (Pa.) 552.

Vermont.— Sanborn *v.* Braley, 47 Vt. 170.

Virginia.— Hunter *v.* Spotswood, 1 Wash. (Va.) 145.

United States.— Fowle *v.* Lawrason, 5 Pet. (U. S.) 495, 8 L. ed. 204.

England.— Leake *v.* Cordeaux, 4 Wkly. Rep. 806.

Contra, Stannard *v.* Whittlesey, 9 Conn. 556; Staniford *v.* Dewit, 1 Root (Conn.) 317.

97. Fowle *v.* Lawrason, 5 Pet. (U. S.) 495, 8 L. ed. 204; Hunton *v.* Equitable L. Assur. Soc., 45 Fed. 661; Baker *v.* Biddle, Baldw. (U. S.) 394, 2 Fed. Cas. No. 764.

which will entitle it to interfere, but it must be such as cannot be justly and fairly taken in a court of law.[98]

d. Adequacy of Legal Remedy — (I) *In General.* It has been said that matters of account are *per se* within the scope of equitable jurisdiction.[99] This broad statement, however, must be taken to rest within certain general prescribed limits, and confined to cases which do not fall without the pale of equity jurisdiction, for in the latter event the mere existence of an account would not confer jurisdiction.[1] No precise rule can be laid down as to when the concurrent jurisdiction of equity will be exercised, as the court of equity seems to reserve to itself a large discretion upon the bare question of the adequacy of the legal remedy.[2] A decision as to the proper tribunal must be governed by considerations of evidence and adequacy, to be determined by the facts of each particular case and the relief sought.[3]

(II) *Where Legal Remedy Embarrassed — Discovery.* Consistently with what has been said, as well as with general principles upon which courts of equity assume jurisdiction, where the party has no legal remedy or where the remedy at law is inadequate or embarrassed, either from a defect of proof or through some impediment, a court of equity has jurisdiction of matters of account.[4] And such equities may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the party from resorting to his legal remedy, or which render such remedy difficult, inadequate, and incomplete.[5]

(III) *On Ground of Greater Convenience of Equity.* The mere fact of the existence of a legal remedy which may be made available is not a sufficient

98. Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Bowen *v.* Johnson, 12 Ga. 9; Powers *v.* Cray, 7 Ga. 206; Craig *v.* McKinney, 72 Ill. 305; Darthez *v.* Clemens, 6 Beav. 165.

99. Tillar *v.* Cook, 77 Va. 477. In Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169, it was held that though plaintiff might sue at law for the balance of an account and hold the party to bail, yet, as chancery holds a concurrent jurisdiction upon the head of account, plaintiff might have a writ of ne exeat on the positive affidavit of a threat, etc. In this case the demand was clearly a single item or transaction on one side, and while the chancellor doubted that the bill was such as to justify equitable jurisdiction, he placed his interference on the necessity of the case, as it appeared from the facts charged that the remedy in the pending suit at law would be absolutely defeated without equitable interposition.

1. This will appear from what has been said as well as from the succeeding paragraphs of this section.

2. Devereux *v.* McCrady, 46 S. C. 133, 24 S. E. 77; Petty *v.* Fogle, 16 W. Va. 497; North-eastern R. Co. *v.* Martin, 2 Phil. 758, wherein it is said that the infinitely varied transactions of mankind would be found continually to baffle such rules and to escape from any definitions which might be laid down.

Exercise of discretion.— Where the court cannot do complete justice between the parties because it cannot enforce the agreement in all its parts, the discretion will be exercised against the taking of the account in equity. Kernot *v.* Potter, 3 De G. F. & J. 447.

3. Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94.

4. *Alabama.*— Jackson *v.* King, 82 Ala. 432, 3 So. 232.

Arkansas.— Witter *v.* Arnett, 8 Ark. 57.

District of Columbia.— Reynolds *v.* Smith, 6 Mackey (D. C.) 497.

Georgia.— Printup *v.* Fort, 40 Ga. 276; McLaren *v.* Steapp, 1 Ga. 376.

Kentucky.— Dunwidie *v.* Kerley, 6 J. J. Marsh. (Ky.) 501.

Massachusetts.— Dole *v.* Wooldredge, 135 Mass. 140.

New Jersey.— North Plainfield Tp. *v.* Colthar, 41 N. J. Eq. 348, 7 Atl. 641.

Tennessee.— Pearl *v.* Nashville, 10 Yerg. (Tenn.) 179.

Vermont.— Holt *v.* Daniels, 61 Vt. 89, 17 Atl. 786.

Virginia.—Johnson *v.* Roanoke Land, etc., Co., 82 Va. 284; Townes *v.* Birchett, 12 Leigh (Va.) 173.

United States.— Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Ames Iron Works *v.* West, 24 Fed. 313.

Obstruction of legal remedy by party.— Where defendant had obstructed plaintiff's legal remedy by withholding from him a copy of a contract, so that he was not able to frame his declaration, it was held that plaintiff might dismiss his action and bring a bill in equity for an accounting. Sturtevant *v.* Goode, 5 Leigh (Va.) 83, 27 Am. Dec. 586.

5. Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219.

objection to the more convenient remedy in equity, and in many cases the latter court assumes jurisdiction on the ground of the greater convenience and adaptability of its peculiar machinery.[6] Upon this ground jurisdiction has been exercised notwithstanding a cumulative statutory remedy,[7] or that courts of law had adopted equitable principles,[8] and upon the ground of convenience this jurisdiction has been upheld, even admitting the remedy at law to be perfect and complete.[9]

e. Discovery — (1) *In General.* Though discovery is not the sole ground of equity jurisdiction in matters of account,[10] it was one of the sources thereof where there was a want of power to draw out the proofs from the consciences of the parties.[11] And where plaintiff is entitled to a discovery, a bill for an account is proper, and relief will be granted if the case is one for which the discovery is necessary, notwithstanding the account is on one side or the matters involved are purely legal. The court, having acquired jurisdiction, will retain it for complete relief and to prevent a multiplicity of suits.[12] The right to discovery carries with

6. *Alabama.*— Dallas County *v.* Timberlake, 54 Ala. 403.

Arkansas.— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Delaware.— Davis *v.* Davis, 1 Del. Ch. 256.

Illinois.— Crown Coal, etc., Co. *v.* Thomas, 73 Ill. App. 679, holding that in a case of complicated accounts involving the rights of third parties equity jurisdiction did not depend upon an entire absence of a legal remedy, but rather upon its adequacy and practicability.

Iowa.— White *v.* Hampton, 10 Iowa 238.

Massachusetts.— Hallett *v.* Cumston, 110 Mass. 32; Massachusetts General Hospital *v.* State Mut. L. Assur. Co., 4 Gray (Mass.) 227; Bartlett *v.* Parks, 1 Cush. (Mass.) 82. Under the statute in this state it was provided that equity should have jurisdiction where the account could be more conveniently taken than at law, and in the last case above cited it was said that while an auditor and reference allowed in assumpsit might have relieved some of the difficulties, it did not supersede the equity jurisdiction, as accounts generally can be more conveniently taken in chancery, and in this case plaintiff was entitled to discovery and production of books and papers.

Mississippi.— Watt *v.* Conger, 13 Sm. & M. (Miss.) 412.

New York.— Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Post *v.* Kimberly, 9 Johns. (N. Y.) 470; Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513.

Pennsylvania.— Bierbower's Appeal, 107 Pa. St. 14; Long *v.* Cochran, 9 Phila. (Pa.) 267, 30 Leg. Int. (Pa.) 37.

Tennessee.—Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

Virginia.—Tyler *v.* Nelson, 14 Gratt. (Va.) 214; Hickman *v.* Stout, 2 Leigh (Va.) 6.

England.— Plunkett *v.* Dublin, 1 Bligh N. S. 312; Carlisle *v.* Wilson, 13 Ves. Jr. 276; Mackenzie *v.* Johnston, 4 Madd. 373; Barker *v.* Dacie, 6 Ves. Jr. 681.

7. Dallas County *v.* Timberlake, 54 Ala. 403; State *v.* Wilmington Bridge Co., 2 Del. Ch. 58.

8. Berry *v.* Whidden, 62 N. H. 473.

9. Post *v.* Kimberly, 9 Johns. (N. Y.) 470; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717.

10. Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291.

11. Plunkett *v.* Dublin, 1 Bligh N. S. 312.

12. *Alabama.*— Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542, 9 So. 256; Bullock *v.* Governor, 2 Port. (Ala.) 484.

Arkansas.— Witter *v.* Arnett, 8 Ark. 57.

Florida.— Gordon *v.* Clarke, 10 Fla. 179.

Georgia.— McLaren *v.* Steapp, 1 Ga. 376.

Illinois.— Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176.

Kentucky.— Handley *v.* Fitzhugh, 1 A. K. Marsh. (Ky.) 24.

New Hampshire.— Brooks *v.* Goodwin, (N. H. 1900) 47 Atl. 255; Berry *v.* Whidden, 62 N. H. 473.

New Jersey.— Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676.

New York.— King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717.

Pennsylvania.— Gloninger *v.* Hazard, 42 Pa. St. 389; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Oil Co. *v.* Adams, 6 Phila. (Pa.) 182, 23 Leg. Int. (Pa.) 349, 113 Pa. St. 449, 6 Atl. 100.

Tennessee.— Taylor *v.* Tompkins, 2 Heisk. (Tenn.) 89; Pearl *v.* Nashville, 10 Yerg. (Tenn.) 179.

Vermont.— Lynde *v.* Wright, 1 Aik. (Vt.) 383.

Virginia.— Sturtevant *v.* Goode, 5 Leigh (Va.) 83, 27 Am. Dec. 586.

West Virginia.— Petty *v.* Fogle, 16 W. Va. 497; Lafever *v.* Billmyer, 5 W. Va. 33.

Wisconsin.— Meyer *v.* Garthwaite, 92 Wis. 571, 66 N. W. 704.

United States.— Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961. But in Babbott *v.* Tewksbury, 46 Fed. 86, it was held that the necessity for a discovery was not sufficient to make a suit in equity proper for the enforcement of the contract to pay commissions on sales, because defendant might be subpœnaed *duces tecum* if within a hundred

it the right to relief, because, when the relief is sought in the shape of an account, courts of law and equity have concurrent jurisdiction.[13] The fact that the acts complained of in a bill impute to defendant the commission of a crime, and that, if compelled to render an account, evidence might be adduced which might form the basis of a criminal accusation, will not defeat the jurisdiction of the court.[14]

(II) *When Not Sufficient Ground.* Jurisdiction on the ground of discovery, however, cannot be invoked where the discovery is a mere pretext for resorting to equity.[15] Upon the principle that discovery is merely incidental to some other main relief, and that the right to the latter must appear in order to support the former, discovery and account, as incidental to other main relief, cannot be granted when the right to such main relief is not established,[16] and this principle has been applied when the accounting is the main relief sought and the case is one in which there is no right to an accounting in equity.[17]

f. Mutual and Complicated Accounts—(I) *General Rule.* Courts of equity have for a long time exercised a general jurisdiction in cases of mutual account founded in privity, upon the ground of the inadequacy of the remedy afforded by the common law, and this may be said to be the established rule,[18]

miles, or his testimony might be taken if he lived beyond that distance.

England.—Adley *v.* Whitstable Co., 17 Ves. Jr. 315; Barker *v.* Dacie, 6 Ves. Jr. 681; Weymouth *v.* Boyer, 1 Ves. Jr. 416; Lee *v.* Alston, 1 Bro. Ch. 194; Ryle *v.* Haggie, 1 Jac. & W. 234; Shepard *v.* Brown, 4 Giff. 208.

As to discovery under reformed procedure see *supra*, II, D.

13. Shepard *v.* Brown, 4 Giff. 208; Adley *v.* Whitstable Co., 17 Ves. Jr. 315; Ryle *v.* Haggie, 1 Jac. & W. 234.

14. Warren *v.* Holbrook, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554, holding that while defendant could not, of course, be compelled to discover any facts tending to incriminate him, this did not prevent the trial of the issues made by the pleadings under the rules of evidence in civil actions.

15. Wilson *v.* Mallett, 4 Sandf. (N. Y.) 112 (holding that an assignee stands in the shoes of the assignor, and that if the latter could not maintain a bill because all of the particulars of the account between him and defendant were within his knowledge, the assignee would be chargeable with the same knowledge); Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76 (where a contractor under a written contract did work and provided materials and had been partially paid, but did not know the amount of the payments, and this was held not sufficient ground for equitable jurisdiction, for the reason that there was nothing intricate in the accounts and the case was not one in which complainant was entitled to or needed a discovery, as, if the payments could not be proved by defendant in an action at law by complainant for the whole amount, the loss would fall on defendant); Dinwiddie *v.* Bailey, 6 Ves. Jr. 136; King *v.* Rossett, 2 Y. & J. 33.

Where, in the progress of a cause, it appears by plaintiff's own showing that he could have proved his account by witnesses, the jurisdiction will not be sustained simply because he came into equity on the ground that he could not prove the items of his account without the aid of an answer. Meze *v.* Mayse, 6 Rand. (Va.) 658.

16. Jewett *v.* Bowman, 29 N. J. Eq. 174.

17. *Connecticut.*— Norwich, etc., R. Co. *v.* Storey, 17 Conn. 364.

New Jersey.— Bellingham *v.* Palmer, 54 N. J. Eq. 136, 33 Atl. 199.

New York.— Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342.

United States.— Everson *v.* Equitable L. Assur. Soc., 71 Fed. 570, 39 U. S. App. 34, 18 C. C. A. 251.

England.— Smith *v.* Leveaux, 2 De G. J. & S. 1; King *v.* Rossett, 2 Y. & J. 33; Dinwiddie *v.* Bailey, 6 Ves. Jr. 136. And it has been held that if plaintiff is entitled to discovery he should frame his bill for discovery alone and not for discovery and relief. Phillips *v.* Phillips, 9 Hare 471; Padwick *v.* Stanley, 9 Hare 627. This would seem to be a stricter rule than is recognized in the cases cited above. See *supra*, II, E, 1, d, (III), and II, E, 1, e, (I). And see also PRINCIPAL AND AGENT.

But it has been held, even while recognizing the propriety of the rule stated in the text, that where a bill is brought for a discovery in a case which is not the proper subject of an accounting, but the relief ultimately to be rendered is the payment of damages, and a discovery is needed, and the ascertainment of damages is intricate, and an action at law is not adequate, equity will assume jurisdiction of the whole cause and proceed to a final decree on the merits. Magic Ruffle Co. *v.* Elm City Co., 14 Blatchf. (U. S.) 109, 16 Fed. Cas. No. 8,950. See, generally, upon the question when equity will retain a cause for complete relief, EQUITY.

18. *Alabama.*— Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94.

Arkansas.— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

Illinois.— Bracken *v.* Kennedy, 4 Ill. 558.

Indiana.— Cummins *v.* White, 4 Blackf. (Ind.) 356.

even where the accounts consist of items of a purely legal character.[19] *A fortiori*, though the accounts may not be strictly mutual,[20] where they have become so complicated as to embarrass the remedy at law, equity has jurisdiction.[21] This rule is applied where the account is made up of many items for and against each party,[22] or the items are numerous and extend over a long period of time.[23]

(II) *EXTENT* — (A) *In General.* Beyond certain limits the cases furnish but an uncertain guide for the application of any rule to particular circumstances. Each case seems to stand upon its own facts.[24] The jurisdiction in the case of complicated accounts is based upon the inadequacy of the legal remedy, as where there is an embarrassment in making proof, the necessity for a discovery or the

Iowa.— White *v.* Hampton, 10 Iowa 238.
Kentucky.— Power *v.* Reeder, 9 Dana (Ky.) 6.
New Jersey.— Woolley *v.* Osborne, 39 N. J. Eq. 54.
New York.— Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Post *v.* Kimberly, 9 Johns. (N. Y.) 470; Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169; Wilson *v.* Mallett, 4 Sandf. (N. Y.) 112.
Pennsylvania.— Gloninger *v.* Hazard, 42 Pa. St. 389.
Virginia.— Hickman *v.* Stout, 2 Leigh (Va.) 6.
West Virginia.— Petty *v.* Fogle, 16 W. Va. 497; Lafever *v.* Billmyer, 5 W. Va. 33.
England.— Courteney *v.* Godschall, 9 Ves. Jr. 473; Dinwiddie *v.* Bailey, 6 Ves. Jr. 136.
Transfer of action.— In Arkansas, upon the motion of defendant, an action to recover a disputed balance on a complicated mutual account extending through a long period was held to be properly transferred to equity. Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622. See also Sturm *v.* Boker, 150 U. S. 312.

19. Cummins *v.* White, 4 Blackf. (Ind.) 356.

20. Blodgett *v.* Foster, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504; Taff Vale R. Co. *v.* Nixon, 1 H. L. Cas. 110. But where the account is on one side only, a strong case must be shown before the court will exercise its jurisdiction. Fowle *v.* Lawrason, 5 Pet. (U. S.) 495, 8 L. ed. 204; Phillips *v.* Phillips, 9 Hare 471.

21. *Alabama.*— Kirkman *v.* Vanlier, 7 Ala. 217.
Arkansas.— Lawrence *v.* Ellsworth, 41 Ark. 502.
Delaware.— Farmers, etc., Bank *v.* Polk, 1 Del. Ch. 167.
Illinois.— Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143; Crown Coal, etc., Co. *v.* Thomas, 73 Ill. App. 679.
Indiana.— Cummins *v.* White, 4 Blackf. (Ind.) 356.
Iowa.— Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910; Blair Town Lot, etc., Co. *v.* Walker, 50 Iowa 376.
Massachusetts.— Badger *v.* McNamara, 123 Mass. 117.
Michigan.— Blodgett *v.* Foster, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504.
Mississippi.— Watt *v.* Conger, 13 Sm. & M. (Miss.) 412.
North Carolina.—Jones *v.* Bullock, 17 N. C. 368.
Pennsylvania.— Christy's Appeal, 92 Pa. St. 157; Baugher *v.* Conn, 1 Pa. Co. Ct. 184.
South Carolina.— Devereux *v.* McCrady, 46 S. C. 133, 24 S. E. 77; Taylor *v.* Smith, 1 Brev. (S. C.) 230.
Tennessee.— Taylor *v.* Tompkins, 2 Heisk. (Tenn.) 89; Hay *v.* Marshall, 3 Humphr. (Tenn.) 623; Stothart *v.* Burnet, Cooke (Tenn.) 417.
Virginia.— Hickman *v.* Stout, 2 Leigh (Va.) 6.
West Virginia.— Lafever *v.* Billmyer, 5 W. Va. 33.
United States.— Gunn *v.* Brinkley Car Works, etc., Co., 66 Fed. 382, 27 U. S. App. 779, 13 C. C. A. 529; Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277; Crossley *v.* New Orleans, 20 Fed. 352; Gaines *v.* New Orleans, 17 Fed. 16; Mitchell *v.* Great Works Milling, etc., Co., 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662.
England.— Kimberley *v.* Dick, L. R. 13 Eq. 1; Watford, etc., R. Co. *v.* London, etc., R. Co., L. R. 8 Eq. 231; O'Connor *v.* Spaight, 1 Sch. & Lef. 305; Kennington *v.* Houghton, 2 Y. & C. Ch. 620; Dabbs *v.* Nugent, 11 Jur. N. S. 943. But under a statute the effect of which is that full force must be given by a court of equity to any agreement for arbitration, etc., it was held that complication of accounts would not confer jurisdiction where there was such an agreement. Watford, etc., R. Co. *v.* London, etc., R. Co., L. R. 8 Eq. 231.

22. *Alabama.*— Kirkman *v.* Vanlier, 7 Ala. 217.
North Carolina.— McLin *v.* McNamara, 22 N. C. 82.
South Carolina.— Devereux *v.* McCrady, 46 S. C. 133, 24 S. E. 77.
Virginia.— Hickman *v.* Stout, 2 Leigh (Va.) 6.
United States.— Gaines *v.* New Orleans, 17 Fed. 16.

23. Watt *v.* Conger, 13 Sm. & M. (Miss.) 412; Woolley *v.* Osborne, 39 N. J. Eq. 54; Taylor *v.* Smith, 1 Brev. (S. C.) 230; Hay *v.* Marshall, 3 Humphr. (Tenn.) 623.

24. North-Eastern R. Co. *v.* Martin, 2 Phil. 758.

production of books and papers,[25] or where it would be difficult, if not impossible, for a jury to unravel the numerous transactions involved, and justice could not be done except by employing the methods of investigation peculiar to courts of equity.[26] This would seem to be the true foundation and spirit of the rule, for while the cases lay it down in general terms that mere complication of accounts confers jurisdiction,[27] and there need be no necessity for a discovery,[28] or an entire absence of legal remedy,[29] the complexity, if the accounts are not mutual, or if the case does not come within a peculiar class over which the court has undoubted jurisdiction, must be substantial and material.[30] Where these conditions exist, however, no other equitable element need be involved, the jurisdiction being founded upon the very necessity of the case.[31]

(B) *Mere Matter of Payment or Set-Off.* No such complication of accounts is shown as to justify equitable interference where the account consists merely of matters of charge on the one side and payments or set-off on the other,[32] where no discovery is necessary or proper.[33] This is upon the principle that such

25. Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608; McLaren *v.* Steapp, 1 Ga. 376; Handley *v.* Fitzhugh, 1 A. K. Marsh. (Ky.) 24; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Taylor *v.* Tompkins, 2 Heisk. (Tenn.) 89.

26. Channon *v.* Stewart, 103 Ill. 541; Buel *v.* Selz, 5 Ill. App. 116; Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569; Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219; Harrington *v.* Churchward, 6 Jur. N. S. 576.

27. See *supra*, II, E, 1, f, (I).

In Uhlman *v.* New York L. Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482, it was said that while there were many cases in which the statement had been made as indicated in the text, in most of them it would seem that there were added other grounds which made it proper for equity to assume jurisdiction.

28. Devereux *v.* McCrady, 46 S. C. 133, 24 S. E. 77; Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. C.) 189.

29. Crown Coal, etc., Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042; Post *v.* Kimberly, 9 Johns. (N. Y.) 470.

30. *Alabama.*—Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128; Attalla Min., etc., Co. *v.* Winchester, 102 Ala. 184, 14 So. 565; Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94.

Connecticut.— Norwich, etc., R. Co. *v.* Storey, 17 Conn. 364.

Hawaii.— Hawaiian Government *v.* Brown, 6 Hawaii, 750.

Iowa.— Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67.

Kentucky.— Blight *v.* Alexander, 4 J. J. Marsh. (Ky.) 96, holding that the fact that accounts are very complicated is not sufficient where the remedy at law is ample.

New Jersey.— Crane *v.* Ely, 37 N. J. Eq. 564, 157. In this state it was held that in determining whether courts of law could adequately deal with an account, the present and not the past method of legal procedure should be regarded, and therefore, under the proceedings which could have been had at law, it was held that discovery was not sufficient ground for retaining a suit for an account which was complicated. Bellingham *v.* Palmer, 54 N. J. Eq. 136, 33 Atl. 199. But a strong case against this theory is Shepard *v.* Brown, 4 Giff. 208, and the rule applied seems stricter than that which recognizes a broad equitable jurisdiction in matters of account.

England.— The jurisdiction has been denied in a suit to investigate an ordinary builder's account against which fraud could not be established, unless no relief could be obtained at law. Flockton *v.* Peake, 12 Wkly. Rep. 464.

31. Ely *v.* Crane, 37 N. J. Eq. 157; Seymour *v.* Long Dock Co., 20 N. J. Eq. 396.

32. *Alabama.*— State *v.* Bradshaw, 60 Ala. 239; Dallas County *v.* Timberlake, 54 Ala. 403; Dickinson *v.* Lewis, 34 Ala. 638; Crothers *v.* Lee, 29 Ala. 337.

Arkansas.— Trapnall *v.* Hill, 31 Ark. 345.

Maryland.— Oliver *v.* Palmer, 11 Gill & J. (Md.) 426.

Massachusetts.— Frue *v.* Loring, 120 Mass. 507.

Mississippi.— Kelly *v.* Weaver, 37 Miss. 631.

New Jersey.— Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76.

New York.— Durant *v.* Einstein, 5 Rob. (N. Y.) 423; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169.

North Carolina.— Haywood *v.* Hutchins, 65 N. C. 574; McLin *v.* McNamara, 22 N. C. 82.

Pennsylvania.— Passyunk Bldg. Assoc.'s Appeal, 83 Pa. St. 441; Gloninger *v.* Hazard, 42 Pa. St. 389; Ingram *v.* Sherard, 17 Serg. & R. (Pa.) 347.

Rhode Island.— McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11.

Tennessee.— Smith *v.* Bell, Mart. & Y. (Tenn.) 101.

Virginia.— Richmond First Presb. Church *v.* Manson, 4 Rand. (Va.) 197; Poage *v.* Willson, 2 Leigh (Va.) 490; Smith *v.* Marks, 2 Rand. (Va.) 449.

West Virginia.— Petty *v.* Fogle, 16 W. Va. 497; Lafever *v.* Billmyer, 5 W. Va. 33.

United States.—Blakeley *v.* Biscoe, Hempst. (U. S.) 114, 30 Fed. Cas. No. 18,239.

England.— Moses *v.* Lewis, 12 Price 502; King *v.* Rossett, 2 Y. & J. 33; Smith *v.* Leveaux, 2 De G. J. & S. 1.

33. See *infra*, II, E, 1, f, (II), (C).

accounts are not mutual within the meaning of the term when applied to the independent jurisdiction of a court of equity over mutual accounts.[34] But it must be taken with some qualification, as the question resolves itself, under the strictest construction, into a determination whether there is an adequate remedy at law;[35] in other words, though the accounts are not technically mutual if the complication is such as to distinguish the transactions from a debt on the one side and a set-off on the other, equity may have jurisdiction.[36]

(c) *Accounts on One Side or Simple Legal Demand.* Where the accounts are on one side only, or the claim is a simple legal demand, conditions must exist which show the necessity for the exercise of equitable jurisdiction. There must either be shown such complication in the matters that a common-law court is unable to ferret them out, or other equitable grounds must exist, as fiduciary relations or the necessity for a discovery.[37] Such jurisdiction will not be assumed

34. Nash *v.* Burchard, 87 Mich. 85, 49 N. W. 492; Fowle *v.* Lawrason, 5 Pet. (U. S.) 495, 8 L. ed. 204; Phillips *v.* Phillips, 9 Hare 471.

35. Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. C.) 189; Phillips *v.* Phillips, 9 Hare 471, wherein it is said that a case of mere receipts and payments may become so complicated, as indicated in Taff Vale R. Co. *v.* Nixon, 1 H. L. Cas. 110, that the account cannot be taken at law and may become properly the subject of equity jurisdiction, but that a strong case must be shown before such jurisdiction will be exercised. To the same point are State *v.* Bradshaw, 60 Ala. 239; Fowle *v.* Lawrason, 5 Pet. (U. S.) 495, 18 L. ed. 204.

36. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880, wherein it is stated that it is safe to say that in all cases where mutuality of accounts is claimed to be the basis of equitable jurisdiction, mutuality is only an essential element in this, that it indicates intricacy and complication; Trapnall *v.* Hill, 31 Ark. 345; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169; Blakeley *v.* Biscoe, Hempst. (U. S.) 114, 30 Fed. Cas. No. 18,239.

A series of consignments on the one side and payments on the other is held to constitute such an account as may be settled in equity. McLin *v.* McNamara, 22 N. C. 82.

37. *Alabama.*— Johnson *v.* National Bldg., etc., Assoc., (Ala. 1900) 28 So. 2; Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; Tecumseh Iron Co. *v.* Camp, 93 Ala. 572, 9 So. 343; Avery *v.* Ware, 58 Ala. 475; Dallas County *v.* Timberlake, 54 Ala. 403; Crothers *v.* Lee, 29 Ala. 337; May *v.* Lewis, 22 Ala. 646; Cullum *v.* Bloodgood, 15 Ala. 34; Knotts *v.* Tarver, 8 Ala. 743.

Connecticut.— Berlin *v.* New-Britain, 9 Conn. 175.

Illinois.— Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 56 N. E. 791; Clinton County *v.* Schuster, 82 Ill. 137; Logan *v.* Lucas, 59 Ill. 237.

Indiana.— Cummins *v.* White, 4 Blackf. (Ind.) 356.

Iowa.— Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67; Galliers *v.* Peppers, 76 Iowa 521, 41 N. W. 205; Upton *v.* Paxton, 72 Iowa 295, 33 N. W. 773.

Maine.— Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

Massachusetts.— Walker *v.* Brooks, 125 Mass. 241; Badger *v.* McNamara, 123 Mass. 117; Frue *v.* Loring, 120 Mass. 507.

Mississippi.— Fulton *v.* Woodman, 40 Miss. 593.

New Hampshire.— Walker *v.* Cheever, 35 N. H. 339.

New Jersey.— Rutherford *v.* Alyea, 54 N. J. Eq. 411, 34 Atl. 1078; Olds *v.* Regan, (N. J. 1895) 32 Atl. 827; Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76.

New Mexico.— Lewis *v.* Baca, 5 N. M. 289, 21 Pac. 343.

New York.— Dyckman *v.* Valiente, 42 N. Y. 549; Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342; Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169.

Oregon.— Duclos *v.* Walton, 21 Oreg. 323, 28 Pac. 1.

Pennsylvania.— Winton Coal Co. *v.* Pancoast Coal Co., 170 Pa. St. 437, 33 Atl. 110; Paton *v.* Clark, 156 Pa. St. 49, 27 Atl. 116; Pittsburgh, etc., R. Co.'s Appeal, 99 Pa. St. 177; Grubb's Appeal, 90 Pa. St. 228; Passyunk Bldg. Assoc.'s Appeal, 83 Pa. St. 441; Gloninger *v.* Hazard, 42 Pa. St. 389; Shollenberger's Appeal, 21 Pa. St. 337; Long *v.* Cochran, 9 Phila. (Pa.) 267, 30 Leg. Int. (Pa.) 37; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Mather's Appeal, (Pa. 1885) 1 Atl. 531; McGowin *v.* Remington, 12 Pa. St. 56, 51 Am. Dec. 584.

South Carolina.— Latham *v.* Harby, 50 S. C. 428, 27 S. E. 862; Nix *v.* Harley, 3 Rich. Eq. (S. C.) 379.

Tennessee.— Pearl *v.* Nashville, 10 Yerg. (Tenn.) 179.

Virginia.— Goddin *v.* Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678; Poage *v.* Willson, 2 Leigh (Va.) 490.

Washington.— Seattle Nat. Bank *v.* School District No. 40, 20 Wash. 368, 55 Pac. 317.

West Virginia.—Van Dorn *v.* Lewis County Ct., 38 W. Va. 267, 18 S. E. 579; Hoke *v.* Davis, 33 W. Va. 485, 10 S. E. 820; Lafever *v.* Billmyer, 5 W. Va. 33.

Wisconsin.— Ellis *v.* Southwestern Land Co., 102 Wis. 409, 78 N. W. 583; Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173.

United States.— French *v.* Hay, 22 Wall. (U. S.) 231, 22 L. ed. 799.

where the amount of recovery to which the party is entitled is ascertained and admitted by both parties,[38] or where an exact sum is claimed and defendant admits it less certain unliquidated damages.[39] And equity will not assume jurisdiction upon the ground of account where the case presents merely a legal claim for damages[40] unless other and equitable relief is necessary, as an injunction,[41] or plaintiff is for other reasons entitled to equitable interference, though an action might also lie.[42] But where the relation of the parties is of a nature to invoke equitable jurisdiction, the fact that defendant admits liability in his answer to the amount of the items constituting the account as set forth by plaintiff will not defeat the jurisdiction.[43]

g. Complication Involving Different Parties. Where different persons are involved in the accounting so that the remedy at law would not be adequate by a separate action on behalf of each of such persons,[44] or the settlement involves a complicated account between different persons whose interests are so interwoven that complete justice cannot be done without having all of them before the court,[45] or where proportionate liability of different parties is sought to be enforced, which can be determined only by an accounting, a suit in equity is proper.[46]

h. Action on Bond — Different Sets of Sureties. Where the default of a principal has not been established, a bill for an accounting against a surety is not proper.[47] Equitable jurisdiction cannot be substituted for a mere action on a bond.[48] It has been held, however, that in a proper case for an accounting against the principal on a bond, or his representatives, the sureties may be joined, upon the ground that a decree against the principal would bind the surety as to the

England.— Hoare *v.* Contencin, 1 Bro. Ch. 27; Navulshaw *v.* Brownrigg, 2 De G. M. & G. 441; King *v.* Rossett, 2 Y. & J. 33; Smith *v.* Leveaux, 2 De G. J. & S. 1.

38. McArthur *v.* McArthur, (N. J. 1890) 19 Atl. 1094.

39. Hagenbeck *v.* Hagenbeck Zoological Arena Co., 59 Fed. 14.

40. *Michigan.*— Linn *v.* Gunn, 56 Mich. 447, 23 N. W. 84.

Mississippi.— Planters' Compress Assoc. *v.* Hanes, 52 Miss. 469.

New York.— McLellan *v.* Goodwin, 43 N. Y. App. Div. 148, 59 N. Y. Suppl. 290; Lafond *v.* Lassere, 26 Misc. (N. Y.) 77, 56 N. Y. Suppl. 459; Durant *v.* Einstein, 5 Rob. (N. Y.) 423; Monk *v.* Harper, 3 Edw. (N. Y.) 109.

North Carolina.— Buncombe Turnpike Co. *v.* Allen, 22 N. C. 115.

Pennsylvania.— Paton *v.* Clark, 156 Pa. St. 49, 27 Atl. 116; Pittsburgh, etc., R. Co.'s Appeal, 99 Pa. St. 177; Koch's Appeal, 9 Wkly. Notes Cas. (Pa.) 343.

United States.— Willson *v.* Winchester, etc., R. Co., 99 Fed. 642, 41 C. C. A. 215; Washburn, etc., Mfg. Co. *v.* Freeman Wire Co., 41 Fed. 410; Baker *v.* Biddle, Baldw. (U. S.) 394, 2 Fed. Cas. No. 764.

Specific performance.— Where an obligation is not the subject of a decree for specific performance the suit will not be retained in the absence of other grounds on the score of account where the remedy is at law for damages. Bradford, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116; Tonawanda Valley, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 641, 25 N. E. 503; Campbell *v.* Rust, 85 Va. 653, 8 S. E. 664.

41. See, for example, Patterson *v.* Glassmire, 166 Pa. St. 230, 31 Atl. 40; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975.

42. Ramsay *v.* Sims, 12 Rich. Eq. (S. C.) 430, holding that where a debtor's property is, by consent, sold at private sale by the oldest judgment creditor, and he receives the money and warrants the title to the purchaser, and the property is afterward sold at sheriff's sale, and the warrantor receives the proceeds, a bill in equity lies by the purchaser at the private sale, against the warrantor, to compel him to account for the proceeds of the sheriff's sale.

43. Ross *v.* Willett, 76 Hun (N. Y.) 211, 27 N. Y. Suppl. 785.

44. Norton *v.* Ladd, 22 Conn. 203.

45. Hunter *v.* Spotswood, 1 Wash. (Va.) 145.

46. Buist *v.* Melchers, 44 S. C. 46, 21 S. E. 449. To the same point see Brinckerhoff *v.* Bostwick, 105 N. Y. 567, 12 N. E. 58; Stone *v.* Chisolm, 113 U. S. 302, 5 S. Ct. 497, 28 L. ed. 991; Hornor *v.* Henning, 93 U. S. 228, 23 L. ed. 879. See, further, CORPORATIONS.

47. Bissell *v.* Ames, 17 Conn. 121; Grady *v.* Hughes, 80 Mich. 184, 44 N. W. 1050.

48. State *v.* Bradshaw, 60 Ala. 239 [*disapproving* Norton *v.* Hixon, 25 Ill. 439, 79 Am. Dec. 338, which was a proceeding against a sheriff to make him account for moneys which had come to him by virtue of his office, in that it rested in a false analogy to cases of executors and administrators; the vice of this position being that while a sheriff is a public officer executors and the like are merely invested with a trust over which chancery has always maintained jurisdiction]; Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176.

amount due on the bond, but that no decree for payment could be made against the surety in that suit.[49] So cases involving the liability of several sets of sureties have been held to present no ground for equitable jurisdiction,[50] even where the officer has failed to keep his accounts so that it can be ascertained under which of the bonds the defalcation occurred,[51] though it has also been held otherwise.[52]

i. **Trusts and Fiduciary Relations.** Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty arising out of such relation rests upon one of the parties to render an account to the other.[53] This embraces not only the supervisory power of such courts over

49. Rutherford *v.* Alyea, 53 N. J. Eq. 580, 32 Atl. 70; Dorsheimer *v.* Rorback, 23 N. J. Eq. 46, 25 N. J. Eq. 516.

50. Rutherford *v.* Alyea, 53 N. J. Eq. 580, 32 Atl. 70; Oglesby *v.* State, 73 Tex. 658, 11 S. W. 873; Grafton *v.* Reed, 26 W. Va. 437.

51. Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066, in which case it appears, however, that discovery was not a ground for equitable jurisdiction, and that such jurisdiction was confined to cases having their origin in confidential or trust relations.

52. Dallas County *v.* Timberlake, 54 Ala. 403; State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880; Governor *v.* McEwen, 5 Humphr. (Tenn.) 241; Tyler *v.* Nelson, 14 Gratt. (Va.) 214.

53. *Alabama.*— Donovan *v.* Haynie, 67 Ala. 51; Dallas County *v.* Timberlake, 54 Ala. 403; Halsted *v.* Rabb, 8 Port. (Ala.) 63; Bullock *v.* Governor, 2 Port. (Ala.) 484.

California.— San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309; Green *v.* Brooks, 81 Cal. 328, 22 Pac. 849; Wooster *v.* Nevills, 73 Cal. 58, 14 Pac. 390; Sanderson *v.* McIntosh, 65 Cal. 36, 2 Pac. 728, holding that equity had jurisdiction to compel an assignee in insolvency to execute his trust and to account, the remedy afforded creditors under the insolvency laws not being exclusive.

Illinois.— Clapp *v.* Emery, 98 Ill. 523; Smith *v.* Sackett, 15 Ill. 528; Gillett *v.* Hickling, 16 Ill. App. 392, holding that where a mortgagee sold mortgaged premises by an agreement with the mortgagor, and took promissory notes in payment of the purchase-money, and refused to collect the last of said notes, which represented a surplus due the mortgagor, equity would interfere in the latter's favor notwithstanding he might have a remedy at law.

Indiana.— Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24.

Maine.— Doyle *v.* Whalen, 87 Me. 414, 32 Atl. 1022, 31 L. R. A. 118; Webb *v.* Fuller, 77 Me. 568, 1 Atl. 737.

Maryland.— Laeber *v.* Langhor, 45 Md. 477; Dillon *v.* Connecticut Mut. L. Ins. Co., 44 Md. 386; Williams *v.* West, 2 Md. 174.

Massachusetts.— Pratt *v.* Tuttle, 136 Mass. 233; Dole *v.* Wooldredge, 135 Mass. 140; Badger *v.* McNamara, 123 Mass. 117; Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

Michigan.— Warren *v.* Holbrook, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554; Holmes *v.* Malcolm McDonald Lumber Co., 95 Mich. 606, 55 N. W. 450; Petrie *v.* Torrent, 88 Mich. 43, 49 N. W. 1076; Shaw *v.* Chase, 77 Mich. 436, 43 N. W. 883; Darrah *v.* Boyce, 62 Mich. 480, 29 N. W. 102; Clarke *v.* Pierce, 52 Mich. 157, 17 N. W. 780; Cochrane *v.* Adams, 50 Mich. 16, 14 N. W. 681.

Minnesota.— Smith *v.* Glover, 44 Minn. 260, 46 N. W. 406.

Mississippi.— Philips *v.* Hines, 33 Miss. 163.

Missouri.— Berlien *v.* Bieler, 96 Mo. 491, 9 S. W. 916; Hubbard *v.* Lucas, 71 Mo. 505; Jones *v.* Real Estate Sav. Inst., 67 Mo. 109.

New Hampshire.— Brooks *v.* Goodwin, (N. H. 1900) 47 Atl. 255.

New Jersey.— Fay *v.* Fay, (N. J. 1894) 29 Atl. 356.

New York.— Brinckerhoff *v.* Bostwick, 105 N. Y. 567, 12 N. E. 58; Marvin *v.* Brooks, 94 N. Y. 71; Getty *v.* Devlin, 70 N. Y. 504; Frethey *v.* Durrant, 24 N. Y. App. Div. 58, 48 N. Y. Suppl. 839, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15; Gould *v.* Seney, 5 N. Y. Suppl. 928, 9 N. Y. Suppl. 818; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Long *v.* Majestre, 1 Johns. Ch. (N. Y.) 305; Ellas *v.* Lockwood, Clarke (N. Y.) 311.

North Carolina.— Dunn *v.* Johnson, 115 N. C. 249, 20 S. E. 390; Martin *v.* Wilbourne, 66 N. C. 321.

Pennsylvania.— Yeaney *v.* Keck, 183 Pa. St. 532, 38 Atl. 1041; Reeder *v.* Trullinger, 151 Pa. St. 287, 24 Atl. 1104; Bierbower's Appeal, 107 Pa. St. 14; Steinruck's Appeal, 70 Pa. St. 289; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

Tennessee.— Mann *v.* Bamberger, 4 Heisk. (Tenn.) 486; Dillard *v.* Harris, 2 Tenn. Ch. 196; Hale *v.* Hale, 4 Humphr. (Tenn.) 183.

Virginia.— Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449; Simmons *v.* Simmons, 33 Gratt. (Va.) 451; Thornton *v.* Thornton, 31 Gratt. (Va.) 212; Coffman *v.* Sangston, 21 Gratt. (Va.) 263; Berkshire *v.* Evans, 4 Leigh (Va.) 223.

Wisconsin.— Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645.

United States.— Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Seymour *v.* Freer, 8 Wall. (U. S.) 202, 19 L. ed. 306; Fowle *v.* Lawrason, 5 Pet. (U. S.) 495, 8 L. ed. 204; U. S. *v.* National Bank, 73 Fed. 379; Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219; Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277; Bischoffsheim *v.* Baltzer, 20 Fed. 890.

England.— Mackenzie *v.* Johnston, 4 Madd. 373; Moxon *v.* Bright, L. R. 4 Ch. 292; Power

trust estates generally, but over acts amounting to a breach of trust and fraudulent conduct on the part of persons occupying relations of confidence.[54] In such cases it is not necessary that the accounts should be mutual,[55] or that the bill should be framed for discovery.[56] And it is no objection that an action at law sounding in damages may be brought for the breach; the legal and equitable remedies are concurrent, and complainant has his election.[57]

j. Determination of Legal Title. Account by itself is not sufficient to confer jurisdiction where plaintiff must first establish his legal title, as in the case of a suit to try the title to land and for an account of rents and profits.[58]

k. Objections to Jurisdiction. Matters of account are so far within the pale of equity jurisdiction as to draw to them the application of the general rule that where the subject-matter is not altogether foreign to the court a plea to the jurisdiction ought to be interposed at the very earliest opportunity, and the parties should not be suffered to wade through a tedious and expensive litigation and then make objection that the remedy is at law.[59]

v. Power, 13 L. R. Ir. 281; Makepeace *v.* Rogers, 13 Wkly. Rep. 450.

Upon application of trustee.— There is no good reason why a trustee who desires to have his account settled should not be at liberty to call the *cestui que trust* into a court of equity for that purpose. Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291. And it has been held that an agent intrusted with funds of his principal may come into equity to render his account, and have it allowed, and have himself discharged, though he is not without a remedy at law. Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. C.) 189.

54. *Michigan.*— Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651.

New York.— Jones *v.* Butler, 20 How. Pr. (N. Y.) 189.

Pennsylvania.— Steinruck's Appeal, 70 Pa. St. 289.

Wisconsin.— Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645.

United States.— Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219.

55. Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645.

56. Cochrane *v.* Adams, 50 Mich. 16, 14 N. W. 681.

Production of books.— In such a case, although complainant may be unwilling to take defendant's answer under oath, yet the jurisdiction may rest upon other grounds,— the production of the books in the possession of defendant, by which alone may be elucidated the subject in controversy and the alleged frauds exposed. Dallas County *v.* Timberlake, 54 Ala. 403.

Against corporate officer after expiration of term.— In Bay City Bridge Co. *v.* Van Etten, 36 Mich. 210, it was held that the reasons for seeking the aid of equity which commonly exist in cases of breach of trust are wholly wanting in a suit by a corporation to call to account, as trustees, persons who had ceased to be officers of the corporation, for an appropriation of the corporate funds, where no discovery is sought.

57. Dillon *v.* Connecticut Mut. L. Ins. Co., 44 Md. 386; Petrie *v.* Torrent, 88 Mich. 43, 49 N. W. 1076; Warren *v.* Holbrook, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554; Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651; Seymour *v.* Freer, 8 Wall. (U. S.) 202, 19 L. ed. 306.

58. Tecumseh Iron Co. *v.* Camp, 93 Ala. 572, 9 So. 343; Ashley *v.* Little Rock, 56 Ark. 391, 19 S. W. 1058; Barry *v.* Shelby, 4 Hayw. (Tenn.) 228. See also EJECTMENT.

In 1 Fonblanque Eq. b. 1, ch. 3, § 3, note (*k*) it is said that courts of equity, when resorted to for the purpose of an account of mesne profits, will in many cases consult the principle of convenience and sometimes decree it where the party has not already established his right at law. But Mr. Justice Story says that while this is to some extent borne out by authority, as in the case of shareholders in real property of a peculiar nature (such as shareholders in the New River Water Works in England) there is great reason to question whether the doctrine is generally admissible as a rule in equity resulting from mere convenience, but that it seems rather to result from the peculiar character of the property where there are many proprietors in the nature of partners having a common title to the profits, and therefore the whole becomes appropriately a matter of account. Story Eq. Jur. § 509 [*citing* Townsend *v.* Ash, 3 Atk. 336; Adley *v.* Whitstable Co., 17 Ves. Jr. 315; Lorimer *v.* Lorimer, 5 Madd. 363].

59. *Connecticut.*— Smith *v.* Lawrence, 26 Conn. 468.

Illinois.— Crawford *v.* Schmitz, 139 Ill. 564, 29 N. E. 40.

New Jersey.— Seymour *v.* Long Dock Co., 20 N. J. Eq. 396.

New York.— Schuetz *v.* German-American Real Estate Co., 21 N. Y. App. Div. 163, 47 N. Y. Suppl. 500; Post *v.* Kimberly, 9 Johns. (N. Y.) 470; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291.

North Carolina.— Dickens *v.* Ashe, 3 N. C. 381 note.

Ohio.— Nicholson *v.* Pim, 5 Ohio St. 25.

Pennsylvania.— Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538; Evans *v.* Goodwin, 132 Pa. St. 136, 19 Atl. 49.

Virginia.— Hickman *v.* Stout, 2 Leigh (Va.) 6.

After evidence before master.— And where

2. Demand. Where an accounting party is not necessarily in default simply by reason of his ultimate liability to account, a demand should be made before bringing a suit in equity for an accounting.[60]

3. Necessity for or Present Liability to Account — a. In General. Generally, when one party calls upon another for an accounting, it must be made to appear that the accounting will be available to complainant, as that there is something in the hands of defendant due to complainant.[61] On the other hand an accounting may be proper notwithstanding the fact that the balance which might be found due upon such accounting should not be turned over to complainant, the right to call for the accounting depending upon the peculiar relation of the parties and the particular circumstances of the transaction,[62] or at least, if defendant has made the suit necessary, the complaint need not be dismissed because nothing is shown to be due.[63] In the same way an accounting may be sought against a trustee, and it is not necessary, to entitle complainant to relief, that there should be something due if he is entitled to know in such a proceeding whether anything is due,[64] unless the answer, in response to the bill, shows an accounting to be unnecessary.[65]

b. Confined to Particular Interest. A reversioner who has no interest in the income of the property, but only in the *corpus* of the estate, is concerned only in

the bill shows that an accounting is proper because the accounts are complicated, running through many years, the bill will not be dismissed after evidence before the master discloses that no such accounting was in fact necessary, and that a remedy at law was adequate. Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538. But where the master and the court find against plaintiff upon the matters which are the basis of the jurisdiction on the ground of account, the appeal will be dismissed. Ahl's Appeal, 129 Pa. St. 49, 18 Atl. 475, 477; Passyunk Bldg. Assoc.'s Appeal, 83 Pa. St. 441; Silvis *v.* Clous, 1 Pa. Super. Ct. 41; 37 Wkly. Notes Cas. (Pa.) 346.

A decree by consent ordering an account is a waiver of objection to the jurisdiction of the court to order an account. Dillard *v.* Harris, 2 Tenn. Ch. 196.

60. Smith *v.* Lawrence, 26 Conn. 468. See also II, E, 9, a, (v).

61. In other words there must be something to be accounted for before a reference will be ordered. Graham Paper Co. *v.* Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632; Hunt *v.* Gorden, 52 Miss. 144; Stamps *v.* Bracy, 1 How. (Miss.) 312; Hargrave *v.* Conroy, 19 N. J. Eq. 281; Metz *v.* Farnham, 8 Phila. (Pa.) 267.

Complaint by accounting party.— Where the accounting party under a contract shows in his complaint that there is nothing to account for, but proceeds to seek to have the account stated for the purpose of preventing defendant from declaring a forfeiture of the contract, and asks for time to pay whatever may be found due defendant, there is no case for an accounting. Safety Electric Constr. Co. *v.* Creamer, 84 Hun (N. Y.) 570, 33 N. Y. Suppl. 411.

Receipt of proceeds of notes not matured. — Where one is entitled to an accounting from another for a share of proceeds of notes, it is immaterial that some of the notes have not matured when defendant has in fact received the proceeds thereof. Purslow *v.* Jackson, 93 Iowa 694, 62 N. W. 12.

62. Thomas *v.* Hartshorne, 45 N. J. Eq. 215, 16 Atl. 916, 3 L. R. A. 381, wherein money was advanced to a person for the purpose of being used in raising a sunken vessel containing treasure, upon his promise to return a large sum if the venture was successful. He undertook the work, and prosecuted it for some time, during which additional advances were made. It was held that while parties who made the advances might not, under the contract, be entitled to a repayment of the money advanced, yet they were entitled to know how the money was being disposed of, though where the further prosecution of the work had become impossible on account of the government rescinding its permission to defendant to pursue it, the parties who had advanced the money were entitled to an accounting for the purpose of recovering back what was left unexpended in the work.

63. Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

64. Green *v.* Brooks, 81 Cal. 328, 22 Pac. 849; Frethey *v.* Durant, 24 N. Y. App. Div. 58, 48 N. Y. Suppl. 839, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15; Long *v.* Perdue, 83 Pa. St. 214.

Sale by trustee on a credit.— But where land is conveyed merely as security, and defendant makes a sale thereof upon credit and without authority, the trustee becomes immediately accountable to the *cestui que trust* for the proceeds or its value, ascertained by the note of the purchaser and the mortgage executed to secure the same. Burlingame *v.* Hobbs, 12 Gray (Mass.) 367. See, further, Trusts.

65. Stamps *v.* Bracy, 1 How. (Miss.) 312, wherein the answer, directly responsive to the discovery sought, showed that defendant had disposed of the property, as far as it went, in discharging the debts which he undertook to discharge under the obligation under which the bill sought to charge him.

the allowance of the indebtedness of the property, therefore he will not be entitled to an account further than this.[66]

4. Lapse of Time — Laches. The lapse of a long time (twenty years) balances the account of all antecedent transactions, in the absence of disability or some act or admission of liability to account,[67] and an accounting will not be decreed after a great lapse of time, especially after the party has by his conduct acquiesced in the construction of his rights which, if correct, would make an account unnecessary,[68] or when, on account of complainant's delay, the transactions have become so obscured by the lapse of time, death of parties and witnesses, and loss of papers and evidence, that a just and accurate account cannot be stated.[69] But there is no certain and definite rule on this subject. Each case must depend upon the exercise of a sound discretion arising out of the particular facts.[70] Fortuitous circumstances will not stand in the way of an accounting, even though the statement of the account may be attended with great embarrassment.[71] On the other hand, mere staleness of demand is not an available objection where periods of limitation are prescribed for both legal and equitable actions.[72]

5. Rents and Profits — Period of Accounting Restricted by Acquiescence. Where one receives income or revenue without knowledge of any accountability to another therefor, and with full knowledge on the part of the latter, but tacitly by his consent or acquiescence, there can be no accounting beyond the filing of

66. Patterson *v.* Johnson, 113 Ill. 559.

67. Weatherford *v.* Tate, 2 Strobh. Eq. (S. C.) 27.

68. Bell *v.* Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; Bolling *v.* Bolling, 5 Munf. (Va.) 334.

69. *Delaware.*— Hall *v.* Walker, 1 Del. Ch. 241.

Michigan.— German American Seminary *v.* Kiefer, 43 Mich. 105, 4 N. W. 636.

Mississippi.— Clayton *v.* Boyce, 62 Miss. 390.

New Jersey.— Osborne *v.* O'Reilly, 43 N. J. Eq. 647, 12 Atl. 377.

New York.— Rayner *v.* Pearsall, 3 Johns. Ch. (N. Y.) 578; Ellison *v.* Moffatt, 1 Johns. Ch. (N. Y.) 46; Ray *v.* Bogart, 2 Johns. Cas. (N. Y.) 432.

Virginia.— Harrison *v.* Gibson, 23 Gratt. (Va.) 212; Caruthers *v.* Lexington, 12 Leigh (Va.) 610; Carr *v.* Chapman, 5 Leigh (Va.) 164.

Statute governing legal action.— In matters over which courts of chancery have concurrent jurisdiction with courts of law (as, for example, partnership account), the statute of limitations governing the legal action is applied. Bradford *v.* Spyker, 32 Ala. 134; Atwater *v.* Fowler, 1 Edw. (N. Y.) 417. See Limitations of Actions.

In analogy to limitation at law.— Where suit on a mere constructive trust has been delayed until many of the persons concerned in the transaction are dead, and the recollection of others is such that the court must be in doubt whether the case established by the evidence is not partial and misleading, equity will not interfere. In such a case an equitable action of assumpsit will be outlawed by the same lapse of time as bars an action at law. In this case it was held that the suit was merely a suit in equity to recover a sum of money had and received to complainant's use, the jurisdiction being based upon a constructive trust. German American Seminary *v.* Kiefer, 43 Mich. 105, 4 N. W. 636. See Equity.

70. Rayner *v.* Pearsall, 3 Johns. Ch. (N. Y.) 578. Where defendant admits, under oath, property in his hands at a time before the filing of the bill which will not show a sufficient period to have elapsed to invoke the rule as to stale demands, he cannot escape liability. Kerr *v.* Webb, 9 Rich. Eq. (S. C.) 369.

71. Johnson *v.* Diversey, 82 Ill. 446, in which case the administratrix of a deceased partner filed a bill against the surviving partner for an account of the partnership, and shortly afterward, on account of the breaking out of the civil war, complainant, being a resident of one of the Confederate states, was unable to communicate with her counsel. Defendant, who resided in the county where the suit was pending, did nothing to bring the cause to a hearing, and no steps were taken therein for seven years, when defendant died and complainant revived the suit. From that time the suit was actively prosecuted until the record had become voluminous and was destroyed by the Chicago fire. It being impracticable to supply the lost record, the suit was dismissed, and another instituted, being in reality a revival of the original suit. It was held that complications and difficulties arising out of war and the destruction of records being the chief causes of delay, such delay could not be imputed to complainant as laches; that the difficulties in the way of taking accurate accounts in consequence of the default of the parties and witnesses may be embarrassing to both parties, but constitute no insuperable objection to adjusting accounts of trust funds which should have been adjusted sooner, and that the cause should be heard on the merits.

72. Derby *v.* Yale, 13 Hun (N. Y.) 273.

the bill,[73] as in the case of mere adverse possession. Where such circumstances do not exist, however, complainant is entitled to an account from the time of the accrual of his title, as if complainant was delayed by the fraud of the other party, or if the party in possession is a trustee or bailiff.[74]

6. Parties Left In Statu Quo. Where an account is impossible of statement because of an absence of evidence upon which any result can be based, the court will leave the parties as they are found,[75] and where complainant was so at fault in the course of the transactions involved as to render an accurate statement of the accounts impossible, a court of equity will not interfere.[76]

7. Parties to Suit[77] — a. In General. One seeking an account must have such an interest in the fund of which the accounting is sought as will justify him in demanding such relief.[78]

b. All Parties Interested — (i) *General Rule.* In a suit for an accounting the general equity rule in regard to parties applies, namely, that all persons interested in the subject-matter — that is, in the accounting — should be before the court, to the end that complete justice may be administered,[79] notwithstanding they are not

73. Roosevelt *v.* Post, 1 Edw. (N. Y.) 579; Pettiward *v.* Prescott, 7 Ves. Jr. 541; Pulteney *v.* Warren, 6 Ves. Jr. 72; Edwards *v.* Morgan, 13 Price 782; Bowes *v.* East London Water-works, 3 Madd. 375; Dormer *v.* Fortescue, 3 Atk. 124. In Rowland *v.* Best, 2 McCord Eq. (S. C.) 317, the account was restricted to four years before the filing of the bill. In Hercy *v.* Ballard, 4 Bro. Ch. 468, the account was restricted to six years in consideration of the application of the statute of limitations, and in Reade *v.* Reade, 5 Ves. Jr. 744, it was confined to six years by analogy to an action for mesne profits.

74. Roosevelt *v.* Post, 1 Edw. (N. Y.) 579 [*citing* Pearce *v.* Newlyn, 3 Madd. 186; Atty.-Gen. *v.* Stafford, 1 Russ. 547]; Hicks *v.* Sallitt, 3 De G. M. & G. 782; Bolton *v.* Deane, Prec. Ch. 516. Where there is a trust, and complainant brings his bill upon a mere equitable title, he shall recover the estate, and the court will give him an account of the rents and profits from the time the title accrued, in the absence of special circumstances requiring it to restrain the accounting to the time of bringing the bill. Dormer *v.* Fortescue, 3 Atk. 124; Dean *v.* Wade, 1 Ch. Rep. 48.

By infant. — In the case of a bill brought by an infant for the possession of an estate and an account of rents and profits, the court will decree an account from the time the infant's title accrued, because every person who enters on the estate of an infant does so as guardian or bailiff for the infant. Dormer *v.* Fortescue, 3 Atk. 124.

75. Slater *v.* Arnett, 81 Va. 432.

76. Macauley *v.* Elrod, (Ky. 1894) 28 S. W. 782; Nightingale *v.* Milwaukee Furniture Co., 71 Fed. 234.

77. As to the necessity of making sureties parties in cases of collateral liability see *supra*, II, E, 1, h.

78. Nicholas *v.* Anderson, 8 Wheat. (U. S.) 365, 5 L. ed. 637, holding that the state could not call on a surveyor to account for fees received on delivering warrants toward raising a fund for paying contingent expenses, under an act for the locating of lands given to Revolutionary soldiers, because it was not shown that there were no private parties *in esse* entitled to claim the fund.

A reversioner cannot file a bill for an accounting beyond the allowance of indebtednesses affecting the *corpus* of the estate, because he has no present interest in the subject-matter. Patterson *v.* Johnson, 113 Ill. 559.

79. *California.*— Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534; Young *v.* Hoglan, 52 Cal. 466; McPherson *v.* Parker, 30 Cal. 455, 89 Am. Dec. 129; Wilson *v.* Lassen, 5 Cal. 114.

Connecticut.— Bissell *v.* Ames, 17 Conn. 121.

Georgia.— Pearce *v.* Bruce, 38 Ga. 444; Wells *v.* Strange, 5 Ga. 22.

Hawaii.— Waterhouse *v.* Hitchcock, 6 Hawaii 131.

Kentucky.— Dozier *v.* Edwards, 3 Litt. (Ky.) 67.

Maine.— Beal *v.* Bass, 86 Me. 325, 29 Atl. 1088; Mudgett *v.* Gager, 52 Me. 541; Fuller *v.* Benjamin, 23 Me. 255.

Maryland.— Kunkel *v.* Markell, 26 Md. 390.

Massachusetts.— McCabe *v.* Bellows, 1 Allen (Mass.) 269; Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

Minnesota.— Fish *v.* Berkey, 10 Minn. 199.

New Jersey.— Speakman *v.* Tatem, 45 N. J. Eq. 388, 17 Atl. 818; Keeler *v.* Keeler, 11 N. J. Eq. 458.

New York.—Petrie *v.* Petrie, 7 Lans. (N. Y.) 90; Warth *v.* Radde, 18 Abb. Pr. (N. Y.) 396; Lewis *v.* Varnum, 12 Abb. Pr. (N. Y.) 305.

Pennsylvania.— Petitt *v.* Baird, 10 Phila. (Pa.) 57, 30 Leg. Int. (Pa.) 208; Potter *v.* Hoppin, 10 Phila. (Pa.) 396, 32 Leg. Int. (Pa.) 66; Hughes *v.* McMurray, 6 Phila. (Pa.) 200, 24 Leg. Int. (Pa.) 44.

Rhode Island.— New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 73 Am. Dec. 688; D'Wolf *v.* D'Wolf, 4 R. I. 450.

South Carolina.—Jewell *v.* Jewell, 11 Rich. Eq. (S. C.) 296.

Virginia.— Sheppard *v.* Stark, 3 Munf. (Va.) 29.

joined in the same right,[80] and if, after an interlocutory order to account against two, one of them dies, the action survives, and the executor and representatives of the deceased party should be brought in.[81]

(II) *Application of Rule.* The application of the rule requiring the presence of all parties interested usually arises upon a suit for a general accounting, where the shares of some in a fund cannot be determined until the ascertainment of the rights of all parties interested,[82] or where a party may become liable upon some contingency.[83] And where defendant in such a bill may have an interest in requiring an omitted party or his legal representative to be brought before the court, because of the latter's ultimate liability to defendant,[84] or for the purpose of discharging defendant from further liability to the omitted party in matters involved, an objection to the further progress of the cause in the absence of the omitted party will be sustained.[85]

United States.— Bell *v.* Donohoe, 8 Sawy. (U. S.) 435, 17 Fed. 710; Vose *v.* Philbrook, 3 Story (U. S.) 335, 28 Fed. Cas. No. 17,010; Parsons *v.* Howard, 2 Woods (U. S.) 1, 18 Fed. Cas. No. 10,777.

England.— Evans *v.* Stokes, 1 Keen 24; Ireton *v.* Lewes, Finch 96; Richardson *v.* Hastings, 7 Beav. 301; Hills *v.* Nash, 1 Phil. 594; Palk *v.* Clinton, 12 Ves. Jr. 48; Sherrit *v.* Birch, 3 Bro. Ch. 229.

The reason of the rule is that otherwise the accounting party may be harassed with successive suits for the same purpose by each party. D'Wolf *v.* D'Wolf, 4 R. I. 450.

Exceptions.— As to exceptions to the general rule when the parties are numerous or some are out of the jurisdiction see EQUITY.

Under the code providing that an objection for want of parties shall be taken by demurrer if the defect appears upon the face of the complaint, or by answer if the defect does not so appear, it is held that in a suit for an accounting by a trustee the objection cannot be made for the first time after the order to account, and that if other persons interested are omitted the referee can make provision in his report for their protection. Rose *v.* Durant, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15.

80. Skidmore *v.* Collier, 8 Hun (N. Y.) 50; Smith *v.* Sheppar, 3 N. C. 349; Hindmarsh *v.* Southgate, 3 Russ. 324; Holland *v.* Prior, 1 Myl. & K. 237; Palk *v.* Clinton, 12 Ves. Jr. 48; Hobart *v.* Abbott, 2 P. Wms. 643. See EXECUTORS AND ADMINISTRATORS; MORTGAGES.

81. See ABATEMENT AND REVIVAL.

82. McPherson *v.* Parker, 30 Cal. 455, 89 Am. Dec. 129; Speakman *v.* Tatem, 45 N. J. Eq. 388, 17 Atl. 818; Hallett *v.* Hallett, 2 Paige (N. Y.) 15; Eldredge *v.* Putnam, 46 Wis. 205, 50 N. W. 595.

Assignee and creditors.— A creditor secured by a trust deed cannot maintain a bill for an account of the trust fund without making all creditors who are preferred and in the same class with him parties either as plaintiffs or defendants. Murphy *v.* Jackson, 58 N. C. 11; Fisher *v.* Worth, 45 N. C. 63; Waterhouse *v.* Hitchcock, 6 Hawaii 131. So the assignor is a proper if not a necessary party. Noyes *v.* Wernberg, 15 N. Y. Wkly. Dig. 72.

Several trustees.— Where a bill is brought for an accounting and settlement of a trust, all the trustees must be made parties. Petrie *v.* Petrie, 7 Lans. (N. Y.) 90; Conolly *v.* Wells, 33 Fed. 205; Howth *v.* Owens, 29 Fed. 722; Scurry *v.* Morse, 9 Mod. 89. And if one of them, who was an actual trustee, previously dies, his representative must be made a party. Howth *v.* Owens, 29 Fed. 722. But the representative of a deceased co-trustee is not a necessary party where the trustee represented in the suit had the exclusive possession and control of the trust property. Fleming *v.* Gilmer, 35 Ala. 62.

As to breach of trust see TRUSTS.

83. Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

84. Bailey *v.* Inglee, 2 Paige (N. Y.) 278, holding that where the bill seeks to enjoin an action already begun at law by defendants against complainants and others, defendants in the bill have a right to insist that one of the defendants in the action at law, who was sued as jointly liable with complainant in the bill, should be made a party to the bill, and that defendants in the bill have such an interest in having such person before the court as entitles them to make objection if he is not a party; Petitt *v.* Baird, 10 Phila. (Pa.) 57, 30 Leg. Int. (Pa.) 208; Hills *v.* Nash, 1 Phil. 594; Devaynes *v.* Robinson, 24 Beav. 86.

85. Keeler *v.* Keeler, 11 N. J. Eq. 458.

Secured creditors.— Where property is conveyed in trust for the purpose of applying the proceeds thereof to the payment of certain claims, and it does not appear that such claims have been satisfied, in a suit for an accounting against the trustee by the debtor the secured creditors are necessary parties. Fish *v.* Berkey, 10 Minn. 199. So in Berlien *v.* Bieler, 96 Mo. 491, 9 S. W. 916, wherein a creditor of one occupying land under a contract of purchase purchased it at a tax-sale under an agreement to convey it to the debtor upon the payment by the latter of the debt, but instead conveyed it to a third person who had notice of the agreement, it was held that upon offering to perform his part of the agreement the debtor might sue for an accounting, but that the creditor should be made a party defendant in order to a complete and final adjudication

c. Suit Not for General Accounting and Distribution. Where the account sought is not a general one for the distribution of the fund, but only for the protection of a contingent liability, and the rights of defendants before the court cannot be prejudiced by the omission of another party, though the latter might be a proper party he is not a necessary one;[86] and the same is true where the suit is for the purpose of enforcing a preferred claim against a fund in the hands of one representing all parties interested therein,[87] as well as in other cases in which the parties in interest are legally represented by persons acting for them as a class and where distribution of the fund is not an object of the suit.[88]

d. Persons without Interest — (I) *In General.* Whatever may be the relation between the complainant seeking an accounting and a third person as between themselves, the latter is not a necessary party if he has no interest in the result, and defendant's liability is in no wise affected by his absence.[89] The same is true where the interest of one of the parties has ceased or he has been accounted with and satisfied; he is not a necessary party[90] unless the defendant before the court, for the purpose of having his own rights finally settled, is still interested in having the omitted party before the court, and the settlement with such party is not conclusive upon defendant before the court.[91]

(II) *Agent of Accounting Party.* A mere agent of one who is under liability to account is not, it seems, a proper party to a bill for an accounting against the principal,[92] though the character of the agency and the transactions may be

of the whole matter. The decree for an account was made upon condition that such creditor be made a party.

86. Stringfield *v.* Graff, 22 Iowa 438, which was a suit by a surety, without joining the principal, against an attorney who had received notes in satisfaction of a judgment against complainant and his principal, for an accounting and cancellation of the judgment.

87. Pritchard *v.* Hicks, 1 Paige (N. Y.) 270; Patton *v.* Bencini, 41 N. C. 204.

Suits for distribution.— See generally, as to the recovery of an aliquot part of an estate for the enforcement of claims having priority, EXECUTORS AND ADMINISTRATORS; TRUSTS.

88. Richardson *v.* Hastings, 7 Beav. 301. As where the suit is brought by one in his representative character to recover funds belonging to the estate. Sturgeon *v.* Burrall, 1 Ill. App. 537. See also, generally, EQUITY; EXECUTORS AND ADMINISTRATORS; TRUSTS.

Corporation and stockholders.— Under a lease, by one railroad corporation, of its railroad and equipment to another railroad corporation, one of the provisions of which was that dividends should be paid to the stockholders of the lessor corporation, said stockholders are not necessary parties to a bill for an accounting by the lessor against the lessee. The corporation is composed of the stockholders and fully represents their interest. Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277. See also CORPORATIONS.

89. Burlingame *v.* Hobbs, 12 Gray (Mass.) 367 (which was a bill for an accounting as to advances made by defendant to a third person for which plaintiff had given security and which had been disposed of unauthorizedly); Palmer *v.* Stevens, 100 Mass. 461 (holding that where the liability of defendant to account is based upon his fraudulent conduct, no other person who was not privy to the fraud, though he may have derived some ultimate advantage from it,— in this case the omitted parties became the purchasers of the plaintiff's interest in a partnership through the fraudulent conduct of the defendant,— is a necessary party); Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477. On a bill by an administrator against a defendant who had purchased claims allowed against the estate with money of the estate advanced by the administrator, a third person who was interested, as surety, together with defendant, on some of the notes so purchased, is not a necessary party, the agreement being with defendant himself that he should account for the money advanced. McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837.

90. Hobart *v.* Andrews, 21 Pick. (Mass.) 526; Smith *v.* Glover, 44 Minn. 260, 46 N. W. 406; D'Wolf *v.* D'Wolf, 4 R. I. 450; Carpenter *v.* Robinson, Holmes (U. S.) 67, 5 Fed. Cas. No. 2,431.

91. Hills *v.* Nash, 1 Phil. 594.

A bill is not defective for want of parties when the only defect is one such as that if plaintiff cannot establish his case by proof as to particular items, because they are chargeable against another with whom plaintiff and defendant have had mutual dealings, the suit must fail. Darthez *v.* Clemens, 6 Beav. 165.

92. Lockwood *v.* Abdy, 14 Sim. 437, holding that it is not proper to join in a bill against a trustee one who has received some of the trust property merely as the agent of the trustee.

Agent dealt with as principal.— Where plaintiff had mistakenly dealt with one as principal in several matters, and had made payments to him and his agent, and it turned out that in some of the matters the supposed principal was in fact but agent himself of another, without authority to employ a sub-

such as to create sufficient privity to make the agent a proper accounting party.[93]

(III) *JOINDER OF PERSONS WITHOUT INTEREST IN ACCOUNT.* The mere fact that one who has no interest in the accounting is joined as a party defendant will not necessarily subject a complaint to an objection for misjoinder of parties,[94] and where an injunction is sought against a threatened sale, the prospective purchaser may be made a party in order to make effectual the other relief sought.[95]

e. Assignment of Part of Joint Interest. Where the relation of two parties under a contract is such as to entitle the one to call for an account from the other of the dealings thereunder, and the former assigns a part of his interest in the contract to a stranger, such assignment will not deprive the assignor of his right to call for an accounting and settlement of the transactions, and the assignee is a proper if not a necessary party to such a proceeding.[96]

f. Joinder of One of Two Accounting Parties as Defendant with Stranger. Where the suit is properly one for equitable cognizance on account of the relation and rights of the parties, a third person who was party to the particular transaction complained of, or who is charged with fraud therein, may be joined.[97]

8. ATTITUDE OF PARTIES AS ACTORS — a. General Rule. In matters of account both parties are actors.[98] Hence, after a decree to account, a defendant may revive the suit.[99] But where the suit is brought for the purpose of recovering a specific sum of money, it is held that a mere reference to state an account is not a decree to account so as to make both parties actors.[1]

agent, it was held that a bill for an account of funds misappropriated by the subagent should be brought against the supposed principal, and not against the real principal whom the subagent had no authority to represent. Reynolds *v.* Smith, 6 Mackey (D. C.) 497.

93. Agent acting for trustee by authorized appointment.— Where trustees were authorized to appoint agents, and one was appointed and managed the trust for some time, and after his death another was appointed, there is sufficient privity to sustain a bill by the administrators of the first agent against the second agent for an account of moneys which had been advanced by the first agent and confirmed to him by the trustees, and of a further sum which had been awarded to his estate for his services. Williams *v.* West, 2 Md. 174.

94. Buie *v.* Mechanics' Bldg., etc., Assoc., 74 N. C. 117.

95. Mills *v.* Hurd, 32 Fed. 127.

96. Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091. See also PARTNERSHIP.

97. Hoyt *v.* Smith, 27 Conn. 63, 468; Penniman *v.* Jones, 58 N. H. 447. In Bartlett *v.* Parks, 1 Cush. (Mass.) 82, one of two partners, after the dissolution of the partnership, assigned partnership property to an agent for sale and to apply the proceeds to a partnership debt, and it was held that the other partner could sue for an accounting without joining his copartner, who had become insolvent, as plaintiff, but might join him as a defendant, as the interests of defendants and complainant were opposed, as well as because of the general rule which permits such joinder where one person cannot compel another to join with him as plaintiff. And so in Jewett *v.* Cunard, 3 Woodb. & M. (U. S.) 277, 13 Fed. Cas. No. 7,310, it was held that where a part owner of property which had been conveyed to a third person to secure debts of the co-owners, and of one of the co-owners alone, charged misconduct in the management of the property on the part of the creditor as well as on the part of his co-owner, the latter is properly made a co-defendant in a bill for an accounting, though plaintiff can recover only the proportion which his interest bears to the whole property, and the co-owner who is made a defendant may by proper plea against the other respondent obtain his proportionate share.

Effect of amendment of bill.— Where a bill is held to be fatally defective for the purpose of requiring an accounting of particular matters, a defendant who has been joined upon the ground of his having fraudulently received some of the funds which plaintiff is claiming from a co-defendant cannot relieve himself by paying over such funds to his co-defendant before the allowance of an amendment of the bill. If the bill is amended, the party who was joined on the ground of conspiracy and fraud will be held responsible for the moneys in his hands, as of the time of the commencement of the suit. Hoyt *v.* Smith, 27 Conn. 63, 468.

98. Glenn *v.* Smith, 17 Md. 260, wherein it was held that after a decree to account both parties are called upon to be active; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; Cozzens *v.* Sisson, 5 R. I. 489; Done's Case, 1 P. Wms. 263.

Where both parties seek an account both have a right to an accounting. Fairchild *v.* Valentine, 7 Rob. (N. Y.) 564.

99. See *ante*, ABATEMENT AND REVIVAL, III, B, 7, a, (III), (B), (2).

1. Frieze *v.* Glenn, 2 Md. Ch. 361. To the same effect Pullman Palace Car Co. *v.* Central Transp. Co., 34 Fed. 357.

b. Application of Rule — (I) *Dismissal of Bill by Complainant.* Likewise, after a decree to account, complainant cannot dismiss his bill to defendant's prejudice and without his consent.[2]

On the other hand, if an accounting and other relief is sought, and defendant has not become an actor by cross-bill, the accounting may be abandoned by plaintiff, and defendant cannot require a reference.[3]

(II) *Defendant's Claim Not Independent.* Defendant's claim is not an independent one, but is admitted and asserted by plaintiff so far as defendant can prove his items, and provided they exceed those on plaintiff's side, because the court, having acquired jurisdiction of the cause, will dispose of the entire matter and decree for one or other of the parties as the account may stand.[4]

(III) *Both Parties Required to Account.* And where an account is sought by one party, both may be required to account when justice requires it in order to a true statement of the accounts.[5]

(IV) *As between Defendants.* An order that defendants should account among themselves is unusual and ought not to be made except when it becomes necessary to a final settlement, and where at least one of the parties interested requests it;[6] but to the rule that a decree shall not be entered in favor of one defendant against co-defendants, except upon a cross-bill,[7] the case of a suit for general distribution of a fund is an exception.[8]

9. Pleading — a. The Bill — (I) *In General.* As in other cases, the rule of certainty applies to a bill for an accounting, requiring it to show upon its face that complainant is entitled to the relief demanded, that he is the proper party and invested with the right to maintain the suit.[9]

2. Wyatt *v.* Sweet, 48 Mich. 539, 13 N. W. 525, 12 N. W. 692; Cozzens *v.* Sisson, 5 R. I. 489; Hutchinson *v.* Paige, 67 Wis. 206, 29 N. W. 908.

3. Schulz *v.* Schulz, 138 Ill. 665, 28 N. E. 808.

4. *Arkansas.*— Saunders *v.* Wood, 15 Ark. 24.

Iowa.— McGregor *v.* McGregor, 21 Iowa 441.

Massachusetts.— Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359.

New Hampshire.— Raymond *v.* Caine, 45 N. H. 201.

New York.— Scott *v.* Pinkerton, 3 Edw. (N. Y.) 70.

Rhode Island.— Cozzens *v.* Sisson, 5 R. I. 489.

South Carolina.— Page *v.* Street, Speers Eq. (S. C.) 159.

Tennessee.— Allen *v.* Allen, 11 Heisk. (Tenn.) 387.

Virginia.— Payne *v.* Graves, 5 Leigh (Va.) 561; Fitzgerald *v.* Jones, 1 Munf. (Va.) 150; Hill *v.* Southerland, 1 Wash. (Va.) 128.

England.— Bodkin *v.* Clancy, 1 Ball & B. 216. In Hollis *v.* Bulpett, 13 Wkly. Rep. 492, it was held that where a mortgagor obtained a decree for an account, but neither the bill nor the decree contained the usual offer by plaintiff to pay any balance found due to defendant if the balance is found due, the court cannot order the payment.

See also *infra*, II, E, 9, b, (II). As to the extent of accounting as including all matters down to the time of stating the account see References.

5. Both parties required to account.— Where two stockholders of a company, with others, had called another stockholder, as general agent of the company, to account, and it appeared that the two complainant stockholders had managed extensive transactions for the company an account of which defendant was entitled to in order that he might render an account of his general agency, it was held that defendant was entitled to an order that such parties should account for those transactions. Williams *v.* Gregg, 2 Strobh. Eq. (S. C.) 297. Where a defendant prays in his answer for an account from plaintiff it is held that the former is bound to render an account to the latter, though the bill does not pray for an account. Terry *v.* Hopkins, 1 Hill Eq. (S. C.) 1.

6. Craig *v.* Craig, Bailey Eq. (S. C.) 102.

7. See Equity.

8. As where the suit is by one distributee against an administrator and co-distributees, or by a legatee against an executor and co-legatees, in which case the administrator or executor may have a decree settling and distributing the entire fund. Caldwell *v.* Kinkead, 1 B. Mon. (Ky.) 228.

9. Nicholas *v.* Anderson, 8 Wheat. (U. S.) 365, 5 L. ed. 637; Hubbard *v.* Urton, 67 Fed. 419.

Forms of bills, complaints, or petitions for account may be found set out in the following cases:

Arkansas.—State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

California.—San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309; More *v.* Calkins, 85 Cal. 177, 24 Pac. 729; Millard *v.* Hathaway, 27 Cal. 119.

Colorado.— Lawrence *v.* Robinson, 4 Colo. 567.

Connecticut.— Hoyt *v.* Smith, 27 Conn. 468.

(II) *Showing Proper Case for Equity Jurisdiction*—(A) *Mutual or Complicated Accounts.* The bill should show a proper case for equitable interference, as that the accounts are mutual or complicated,[10] and in order to maintain a suit in equity on the ground that the account is so complicated that it cannot be conveniently taken in an action at law, facts which show the existence of this ground should be alleged, and the general allegation that the account is of such a character is not sufficient.[11]

(B) *Necessity for Discovery.* Where the jurisdiction is invoked upon the ground of the necessity of a discovery, the bill must be so framed as to disclose that necessity, and a discovery must be prayed for,[12] and the oath to the answer should not be waived.[13] Where, however, the right to an account does not depend upon discovery, but upon independent matter of equitable jurisdiction, the answer under oath may be waived.[14]

(III) *Facts for Relief*—(A) *In General.* The bill must state the facts upon which complainant is entitled to call upon defendants to render an account, and which make defendants liable to do so.[15] But it is sufficient to show the relation of the parties which entitles complainant to the relief, and the general statement of the matters pertaining to which the account is sought will be sufficient.[16] The items of the account need not be stated,[17] and where the issues neces-

Georgia.— Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782.

Illinois.— Craig *v.* McKinney, 72 Ill. 305.

Nebraska.— Daugherty *v.* Gouff, 23 Nebr. 105, 36 N. W. 351.

New Jersey.— Pace *v.* Bartles, 45 N. J. Eq. 371, 17 Atl. 636.

New York.—Gillespie *v.* Davidge Fertilizer Co., 20 N. Y. Suppl. 833.

North Carolina.—Buie *v.* Mechanics' Bldg., etc., Assoc., 74 N. C. 117.

Pennsylvania.—Brotherton *v.* Reynolds, 164 Pa. St. 134, 30 Atl. 234.

South Carolina.— Chapman *v.* Charleston, 28 S. C. 373, 6 S. E. 158, 13 Am. St. Rep. 681.

Tennessee.— Henderson *v.* Mathews, 1 Lea (Tenn.) 34.

Virginia.— Miller *v.* Trevilian, 2 Rob. (Va.) 1.

United States.— McGahan *v.* Rondout Nat. Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403; Conery *v.* Sweeney, 81 Fed. 14, 41 U. S. App. 691, 26 C. C. A. 309; Mills *v.* Hurd, 32 Fed. 127; Pacific R. Co. *v.* Atlantic, etc., R. Co., 20 Fed. 277.

England.— Taff Vale R. Co. *v.* Nixon, 1 H. L. Cas. 110.

10. Trapnall *v.* Hill, 31 Ark. 345; Van Dorn *v.* Lewis County Ct., 38 W. Va. 267, 18 S. E. 579.

11. *Alabama.*— Attalla Min., etc., Co. *v.* Winchester, 102 Ala. 184, 14 So. 565.

Arkansas.— Trapnall *v.* Hill, 31 Ark. 345.

Massachusetts.—Badger *v.* McNamara, 123 Mass. 117.

New Jersey.— Olds *v.* Regan, (N. J. 1895) 32 Atl. 827.

Rhode Island.— McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11.

West Virginia.— Lafever *v.* Billmyer, 5 W. Va. 33.

England.— Where plaintiff took upon himself to state what was the result of the accounting, and thus apparently removed all difficulty in the way of a legal remedy, it was said that it was as bold an experiment as he could have made, but upon the real nature of the case the court held that it was only intended to state that there was an account and that plaintiff had collected the result of it at this sum, and that this manner of stating it was to take it out of the statute of limitations. Barker *v.* Dacie, 6 Ves. Jr. 681.

12. Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; Crothers *v.* Lee, 29 Ala. 337; Cook County *v.* Davis, 143 Ill. 151, 32 N. E. 176; Van Dorn *v.* Lewis County Ct., 38 W. Va. 267, 18 S. E. 579; Frietas *v.* Dos Santos, 1 Y. & J. 574.

13. Ward *v.* Peck, 114 Mass. 121.

14. Cochrane *v.* Adams, 50 Mich. 16, 14 N. W. 681.

Partial discovery.— If plaintiff calls upon defendant to state on oath an account of money collected by him for plaintiff, and waives the oath as to all other matters, the objection cannot be raised by a motion to dismiss the bill for want of equity where the bill shows complainant to be entitled to an accounting. Henderson *v.* Mathews, 1 Lea (Tenn.) 34.

15. Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Gutsch Brewing Co. *v.* Fischbeck, 41 Ill. App. 400; Kennicott *v.* Leavitt, 37 Ill. App. 435; Berry *v.* Pierson, 1 Gill (Md.) 234; Smith *v.* Gill, 52 Miss. 607.

16. McRaven *v.* Dameron, 82 Cal. 57, 23 Pac. 33; North Plainfield Tp. *v.* Colthar, 41 N. J. Eq. 348, 7 Atl. 641; Ludington *v.* Taft, 10 Barb. (N. Y.) 447.

Omission of date of agency.—And if the bill shows a liability to account on the ground of agency or mutual accounts, a mere omission to state the date of the creation of the agency, though it may be a defect, will not justify the dismissal of the bill on motion. Henderson *v.* Mathews, 1 Lea (Tenn.) 34.

17. San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309; West *v.* Brewster, 1 Duer (N. Y.) 647.

sarily involve a general accounting the evidence need not be confined to the claims set up by either party.[18] But where complainant was under the duty, as trustee or under contract, to keep and render accounts, and files a bill seeking an account, he should present his account with his bill.[19]

(B) *Under Contract.* And where the right to an accounting depends upon a contract between the parties, the bill must show such a state of facts as will bring the case within its provisions, so as to entitle plaintiff to an account and make defendant liable to render it.[20] A bill seeking an accounting under a contract may allege the contract according to its legal effect.[21]

(IV) *Theory of Case.* The complainant must recover upon the theory of his bill,[22] and cannot have an accounting of matters not embraced in the transactions set up as the basis of the bill.[23] Where an accounting is sought on the ground of partnership, and the proof fails to show such relation, it has been held that the variance is fatal.[24] On the other hand it seems to be the better rule that though the exact relation of the parties may be improperly characterized, an accounting will be proper if they sustain such relation to each other as that equity may assume jurisdiction,[25] or if there are other equitable grounds than

18. Northern Grain Co. *v.* Pierce, 13 S. D. 265, 83 N. W. 256.

Account brought forward in answer.— An account which is brought forward in the answer increases the demand of plaintiff, which, though not mentioned in the bill, may be allowed under the general demand for a just account. Dozier *v.* Edwards, 3 Litt. (Ky.) 67.

19. Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545, holding that if complainant in such a case fails to present his account, the court will suspend the hearing, after the taking of testimony and upon an application for a reference, until he makes his account, because in such a case it would be unjust to impose the labor upon the court or the master; Wood *v.* Boney, (N. J. 1891) 21 Atl. 574.

20. Galliers *v.* Peppers, 76 Iowa 521, 41 N. W. 205; Meyer *v.* Saul, 82 Md. 459, 33 Atl. 539; Kunkel *v.* Markell, 26 Md. 390.

Applications of rule.— In an action for an accounting it appeared that plaintiff entered into a contract with one of the defendants to sell and deliver to him logs which defendant agreed to saw and sell, and out of the proceeds pay certain expenses and a mortgage on the logs held by a co-defendant. The contract was not set up, nor was there any allegation showing a delivery of logs by plaintiff or that he had in any manner complied with his contract, nor was it alleged that any logs had been sawed or any money realized from the sale of lumber, or that the mortgagee had any of plaintiff's property in his possession, and it was held that the complaint did not state a cause of action. Runyan *v.* Russell, 3 Wash. 665, 29 Pac. 348. Where a controversy over the infringement of a patent was settled under an agreement that defendant and those to whom he had sold the patented machinery should be released from liability, that defendant might sell the machinery in the United States for the remaining time of the patent, collecting a license-fee therefor from the parties to whom the machinery should be sold, and that the license-fee should be collected by defendant, who should retain one half thereof and render a quarterly account to plaintiff, a complaint seeking an account failed to aver that defendant ever collected any license-fee or that he owed plaintiff for anything, but stated on information and belief that defendant had furnished persons with the patented machinery, it was held that there was no foundation shown for an accounting in equity. Richards *v.* Allis, 82 Wis. 509, 52 N. W. 593.

21. Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128.

22. *Alabama.*— Crothers *v.* Lee, 29 Ala. 337, holding that where a bill charged that complainant's debtor placed claims in the hands of defendant as trustee for the benefit of complainant, and the proof showed that complainant received the claim as payment *pro tanto* of his debt and placed it in the hands of defendant as an attorney, the variance is fatal.

Illinois.— Craig *v.* McKinney, 72 Ill. 305.

Missouri.— Matthews *v.* Wilson, 27 Mo. 155.

New Jersey.— McAndrew *v.* Walsh, 31 N. J. Eq. 331.

New York.— Manning *v.* Manning, 89 Hun (N. Y.) 471, 35 N. Y. Suppl. 333.

23. Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454; Arnett *v.* Welch, 46 N. J. Eq. 543, 20 Atl. 48; Ormsby *v.* Low, 24 Vt. 436.

Matters properly included by waiver of objection.— But where, in a suit for an accounting under a contract, the decree included an account which had accrued before the contract was made and in pursuance of the same kind of business, and which had been carried forward in the statement made to defendants, to which they never objected, it was held that no error could be predicated of this action. Moore *v.* Swanton Tanning Co., 60 Vt. 459, 15 Atl. 114.

24. Arnold *v.* Angell, 62 N. Y. 508; Salter *v.* Ham, 31 N. Y. 321.

25. *California.*— Coward *v.* Clanton, 122 Cal. 451, 55 Pac. 147.

Nevada.— Mitchell *v.* O'Neale, 4 Nev. 504.

those which come strictly under the allegations and theory of the bill and upon which relief can be granted.[26]

(v) *Demand.* A bill or complaint for an accounting should show a demand and refusal to account.[27]

(vi) *Allegation of Balance Due.* As ordinarily a court of equity will not decree an accounting if it is apparent that nothing can be found to be due upon the accounting,[28] the bill should allege that there is an indebtedness due from defendant to plaintiff.[29] But as the right of the beneficiary of a trust to enforce an account does not depend upon the fact that any amount has been realized by the trustee, the allegation is not necessary in such a case.[30]

(vii) *Offer to Do Equity.* A bill for an accounting of mutual accounts implies that there are items on both sides and that the balance is unascertained until it is ascertained by the aid of the court, and imports an offer on the part of plaintiff, which was formerly required to be expressed, to pay the balance if it should turn out against him, and no such offer to do equity is necessary.[31] When the accounting is incidental to the main relief, and a tender or offer in the bill is prerequisite to obtaining such relief, the bill will not be sustained on the ground of an account alone and in the absence of such tender or offer.[32]

(viii) *Surplusage.* Mere surplusage will not invalidate a bill for an accounting.[33]

(ix) *Multifariousness and Misjoinder.* A bill having the single object of an accounting will not be rendered multifarious because it embraces various matters or parties which all tend to, and are involved in, the one end sought.[34] And a

Oregon.— Shirley *v.* Goodnough, 15 Oreg. 642, 16 Pac. 871.

Wisconsin.— Driggs *v.* Morely, 2 Pinn. (Wis.) 403.

United States.— Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266.

26. Brower *v.* Brower, 29 Fed. 485. Where the bill proceeds upon the theory that there was a trust fund held by defendant for the benefit of plaintiff which entitles him to an accounting, if no objection is taken to the form of the bill the court will proceed to consider whether upon any other grounds than that strictly of trust the bill can be maintained for an account. Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433.

27. Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Kennicott *v.* Leavitt, 37 Ill. App. 435; Magauran *v.* Tiffany, 62 How. Pr. (N. Y.) 251.

28. See *supra*, II, E, 3.

29. Gutsch Brewing Co. *v.* Fischbeck, 41 Ill. App. 400; Metz *v.* Farnham, 8 Phila. (Pa.) 267; Volmer *v.* McCauley, 7 Phila. (Pa.) 382.

30. Green *v.* Brooks, 81 Cal. 328, 22 Pac. 849; Reading *v.* Haggin, 58 Hun (N. Y.) 450, 12 N. Y. Suppl. 368.

31. *Alabama.*— Nelson *v.* Dunn, 15 Ala. 501.

Colorado.— Craig *v.* Chandler, 6 Colo. 543.

Georgia.— Wells *v.* Strange, 5 Ga. 22.

Massachusetts.— Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359.

England.— Colombian Government *v.* Rothschild, 1 Sim. 94; Clarke *v.* Tipping, 4 Beav. 588.

Applied to a cross-bill, the court, in Nelson *v.* Dunn, 15 Ala. 501, laid down the rule as stated in the text and further held that if an offer to pay what may be found due is necessary an allegation that cross-complainant is ready and willing to pay such sum is in substantial compliance with the requirements, because action on the part of the court is necessary in order to ascertain the sum which was due.

32. American Freehold Land, etc., Co. *v.* Jefferson, 69 Miss. 770, 12 So. 464. See Usury.

33. Sturgeon *v.* Burrall, 1 Ill. App. 537; Silver King Min. Co. *v.* Knowlton, 26 N. Y. Wkly. Dig. 241.

34. *Alabama.*— Fleming *v.* Gilmer, 35 Ala. 62.

California.— Garr *v.* Pedman, 6 Cal. 574.

Georgia.— Burchard *v.* Boyce, 21 Ga. 6, which was the investigation of the accounts of two firms; Wells *v.* Strange, 5 Ga. 22.

Minnesota.— Fish *v.* Berkey, 10 Minn. 199.

New Jersey.— Olds *v.* Regan, (N. J. 1895) 32 Atl. 827.

New York.— Logan *v.* Moore, 27 N. Y. Civ. Proc. 241, 54 N. Y. Suppl. 462; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Day *v.* Stone, 15 Abb. Pr. N. S. (N. Y.) 137.

Pennsylvania.— Persch *v.* Quiggle, 57 Pa. St. 247.

Wisconsin.—McLachlan *v.* Staples, 13 Wis. 448.

Application of general rule.— In bills for accounting the general rule is applied that the bill is multifarious only when it contains distinct and separate claims by one plaintiff against the same defendant, or by the same plaintiff against several defendants requiring distinct relief, or by several plaintiffs against one defendant requiring separate relief against him. Wells *v.* Strange, 5 Ga. 22. See also, generally, Equity.

bill is not multifarious for containing distinct matters of account between the same parties, all of which matters are due in the same right,[35] as where an accounting is sought of the acts of one person covering the administration of the same estate during successive periods but in different capacities.[36] So an averment made to show complainant's title will not render the bill multifarious,[37] nor will this result follow if one of the grounds for relief is not sustainable.[38] Several parties interested in a trust fund may join in a bill to compel an accounting on the part of the trustee, though their complaints are not strictly joint, where the trustee will not be embarrassed and a multiplicity of suits will be thereby avoided.[39] But it is held that when two plaintiffs are jointly concerned in one of the charges of the bill, and one of the plaintiffs is solely interested in the other charges, they cannot join in one bill for such causes of action.[40] The gist of the suit is a failure to account, and an additional allegation that defendant converted the money to his own use will not change the nature of the suit.[41] On the other hand it is held that the blending of legal and equitable jurisdictions has not worked such a confusion of remedies as to permit a complaint to set up a cause of action for an accounting between the parties, joining therewith another cause for the conversion and wrongful detention of the property.[42]

(x) *Prayer.* A general prayer for an accounting is sufficient to call defendant to account in the character in which he is charged and for the matters embraced within the relief made proper by the allegations of the bill.[43] And so, if a proper case is presented for an accounting of particular matters, the account may be taken under a general prayer for relief.[44] But the prayer for an accounting cannot authorize an accounting of other matters than such as come within the frame of

35. Graves *v.* Hull, 27 Miss. 419. Under contracts with different municipalities the contractor employed one party under an agreement providing that the employee should receive a per cent. of the profits of the undertaking. The employee brought a bill for an accounting and it was held that while the objection of multifariousness might be raised by one of the municipalities because of the joinder of these different contracts the contractor could raise no such objection. Olds *v.* Regan, (N. J. 1895) 32 Atl. 827.

36. Williams *v.* West, 2 Md. 174, wherein the bill sought an accounting of defendant as trustee under an appointment as the successor of the original trustee, who had died, as well for his acts in this capacity as for his acts as agent of the first trustee whom he had succeeded. In North Carolina it was held that where several accounts against one as executor, guardian and trustee were so united that they could not be conveniently separated they might be embraced in the same complaint. Oliver *v.* Wiley, 75 N. C. 320. See also McLachlan *v.* Staples, 13 Wis. 448.

37. Phillips *v.* Allen, 5 Allen (Mass.) 85, which was an averment, in a bill by the administrator of a *cestui que trust* for an account and payment of moneys received by a trustee, that complainant is also the sole owner of the land involved.

38. Pleasants *v.* Glasscock, Sm. & M. Ch. (Miss.) 17.

39. Morris *v.* Hassler, 22 Fed. 401.

A leading case on this subject is Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139, which was a bill by several judgment creditors claiming by distinct judgments for a discovery and account, the aid sought being based upon alleged fraudulent acts of a judgment debtor equally affecting all of them, and it was held that the bill was not multifarious. See Creditors' Suits; Fraudulent Conveyances.

40. Harrison *v.* Hogg, 2 Ves. Jr. 323.

Where parties become part owners at different times, a bill by one against the others for that period during which all were owners is properly brought; otherwise it would be multifarious. McLellan *v.* Osborne, 51 Me. 118.

41. Silver King Min. Co. *v.* Knowlton, 26 N. Y. Wkly. Dig. 241; State *v.* Chadwick, 10 Oreg. 423, holding that such an allegation unsupported by proof will not prevent a recovery for an amount shown to have been received and not accounted for.

42. Thompson *v.* St. Nicholas Nat. Bank, 61 How. Pr. (N. Y.) 163; McDonald *v.* Kountze, 58 How. Pr. (N. Y.) 152.

Joinder in separate paragraphs — Separate trials.— In Indiana a legal cause of action for the recovery of money in one paragraph of a complaint may be joined with an equitable cause in another paragraph, and such causes may be severed and that of the legal character may be tried by jury. Field *v.* Brown, 146 Ind. 293, 45 N. E. 464.

43. Buffalow *v.* Buffalow, 37 N. C. 113; Humphrey *v.* Foster, 13 Gratt. (Va.) 653. See also Equity.

44. Haworth *v.* Taylor, 108 Ill. 275.

Proper case made.— A general prayer will only sustain such a decree as the facts alleged justify. Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 56 N. E. 791. See also Dominguez *v.* Dominguez, 7 Cal. 424.

the bill.[45] Nor can the decree rest entirely upon the prayer.[46] On the other hand a prayer for special relief is not conclusive if the cause for relief in equity is made out by the bill or pleading under the code, whether the mistake be in asking for an accounting when the bill or complaint justifies other relief only,[47] or in demanding legal relief under the code when the complaint shows plaintiff to be entitled to equitable relief.[48]

(xi) *Amendment.* The bill may be amended when it appears that complainant is entitled to a more extensive accounting than the facts originally alleged will justify.[49] And where the parties have had joint transactions which are unsettled, so that either might ask for an accounting, an amendment of the pleadings may be allowed when such amendment will not substantially change the claim.[50] Where plaintiff seeks an accounting in his own right, but it appears that he is entitled in right of a representative of an estate, and the judgment directs payment to plaintiff in that capacity, the complaint may be considered as amended to conform with the proof on the trial.[51]

(xii) *Supplemental Bill.* Where the account is sought upon obligations set forth in the bill, and the answer denies these and sets up and admits other obligations, in order to have an accounting upon the obligations set up in the answer complainant should file a supplemental bill alleging them in the alternative.[52]

b. Plea or Answer — (i) *Responsiveness of Answer* — (a) *In General.* To so much of a bill as is necessary for defendant to answer he must answer directly, pursuant to the general rule of equity pleading.[53] If not sufficiently responsive it will not justify the dismissal of the bill, but an account will be ordered.[54] On a general bill for account, an answer setting up disbursements is not evidence,

45. Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454; Craig *v.* McKinney, 72 Ill. 305; Scott *v.* Gamble, 9 N. J. Eq. 218.

Failure to prove grounds for particular accounting sought.—In a suit against an agent, not seeking a general account, but for a recovery of several specified sums of money which are alleged to have been received and misapplied by the agent, it was held that, the allegation of misapplication of the funds having been found in defendant's favor, there was no case for an accounting. Matthews *v.* Wilson, 27 Mo. 155.

46. Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 56 N. E. 791.

47. May *v.* Lewis, 22 Ala. 646, holding that where, notwithstanding a special prayer for an account, it appeared that complainant's remedy was complete at law in respect to the matters of which an accounting was prayed, the bill presented necessary facts to authorize the court to enforce a vendor's lien and should therefore be retained for the appropriate relief warranted under the general prayer of the bill.

Under the code a prayer for relief is not conclusive, nor will it render the complaint demurrable. Kayser *v.* Maugham, 8 Colo. 232, 6 Pac. 803; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782; Williams *v.* Slote, 70 N. Y. 601; Middleton *v.* Ames, 37 N. Y. App. Div. 510, 57 N. Y. Suppl. 443; Parker *v.* Pullman, 36 N. Y. App. Div. 208, 56 N. Y. Suppl. 734; Walker *v.* Spencer, 45 N. Y. Super. Ct. 71; Magauran *v.* Tiffany, 62 How. Pr. (N. Y.) 251. See also Pleading.

Prayer for different and inconsistent kinds of relief.— A prayer for different and inconsistent kinds of relief will not make the complaint demurrable. Logan *v.* Moore, 27 N. Y. Civ. Proc. 241, 54 N. Y. Suppl. 462.

Legal action notwithstanding prayer for account.— Short *v.* Barry, 3 Lans. (N. Y.) 143. So in Missouri it was held that a demand which might be prosecuted in an action for money had and received and on the account stated is not modified by a prayer in the petition for an accounting so as to require a trial by the court exclusively or by a referee. Silver *v.* St. Louis, etc., R. Co., 5 Mo. App. 381 [*affirmed* in 72 Mo. 194].

48. Emery *v.* Pease, 20 N. Y. 62.

49. Hoyt *v.* Smith, 27 Conn. 63, 468.

50. Crosby *v.* Watts, 41 N. Y. Super. Ct. 208.

Effect of amendment.— Where plaintiff demanded an account and a judgment for an amount to which he might be entitled it was held that an order allowing the pleading to be amended so as to authorize a partnership accounting was not conclusive as to the character of the action, but that the nature of the action would be determined by the pleading. White *v.* Rodemann, 44 N. Y. App. Div. 503, 60 N. Y. Suppl. 971.

51. Haddow *v.* Haddow, 3 Thomps. & C. (N. Y.) 777.

52. Ormsby *v.* Low, 24 Vt. 436, holding that if complainant should traverse the matter set up in the answer he would then be confined to an accounting of the matters set up in his bill, and upon a failure of proof as to them could not go back on the obligations admitted in the answer.

53. Leycraft *v.* Dempsey, 15 Wend. (N. Y.) 83.

54. Porter *v.* Young, 85 Va. 49, 6 S. E. 803.

because such disbursements are not responsive,[55] and on a bill requiring a general accounting and calling for an answer as to whether defendant had received particular sums, defendant is bound to answer specifically to each charge.[56] But where a particular designated asset is made an issue by the bill, an answer showing that the particular item was not in fact an asset is responsive.[57] When a trustee submits his readiness to account he should file his account with his answer.[58] It is not sufficient to refer to books in which accounts are entered, instead of setting them out by schedule,[59] though he is bound to set them forth only as well as he is able,[60] and where the documents are numerous it is not necessary to specify each of them, but they may be described so as to enable plaintiff to move for them.[61]

(B) *Matter in Avoidance.* Where the answer admits the *prima facie* case made by the bill, but sets up matter in avoidance, the latter is not responsive[62] and will not prevent a decree for an accounting.[63]

(C) *Answer as Evidence.* Where the bill calls for discovery as to the state of accounts between the parties, a responsive answer is *prima facie* evidence of the matters therein contained,[64] against as well as for the defendant.[65] But where the answer sets up matter not responsive to the bill, as matter in avoidance, the burden of proving such matter rests upon him, and the answer is not evidence thereof,[66] though it may still be evidence of matters contained therein which are responsive to the bill.[67]

(II) *Items in Defendant's Favor* — (A) *In General.* Under a bill for an accounting involving mutual accounts defendant has nothing to plead in order to get the advantage of it.[68]

(B) *Cross-Bill and Counterclaim* — (1) In General. As germane to the last proposition, under a bill for an accounting according to the terms of the

55. McNeal *v.* Glenn, 4 Md. 87; Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250.

56. Leycraft *v.* Dempsey, 15 Wend. (N. Y.) 83.

Amount received.—An answer alleging that defendant had paid over the sum received for interest, and concerning which he was interrogated, is sufficient without stating the amount. New York M. E. Church *v.* Jaques, Hopk. (N. Y.) 453.

57. Davis *v.* Crockett, 88 Md. 249, 41 Atl. 66.

58. Booth *v.* Sineath, 2 Strobh. Eq. (S. C.) 31.

59. Telford *v.* Ruskin, 8 Wkly. Rep. 575.

60. He is not bound to refer to books for the purpose of making out the accounts, though he must allow plaintiffs to inspect them, especially where defendant is not a party to the transactions, but only the representative of a party. Christian *v.* Taylor, 11 Sim. 401.

Showing where materials may be found.—Where the answer shows where the materials may be found for obtaining the information sought, namely, in the books and papers mentioned in the schedule to the answer, and to which plaintiffs have always had access, and it is not alleged by plaintiffs that anything has been fraudulently or erroneously inserted or omitted, it is held that though the answer may be technically insufficient and does not answer in detail the interrogatories of complainant, if the court can see that no object can be gained by compelling a more detailed account in the manner asked for by the bill, an exception to the answer will be overruled. White *v.* Barker, 5 De G. & Sm. 746.

61. Christian *v.* Taylor, 11 Sim. 401.

62. Donovan *v.* Haynie, 67 Ala. 51; May *v.* Barnard, 20 Ala. 200; Bradshaw *v.* Clark, 31 N. J. Eq. 39; Gibbes *v.* Guignard, 1 S. C. 359; Barksdale *v.* Hall, 13 Rich. Eq. (S. C.) 180.

63. Bradshaw *v.* Clark, 31 N. J. Eq. 39.

64. *Alabama.*— May *v.* Barnard, 20 Ala. 200, holding that in the absence of opposing proof complainant is entitled to no decree on that part of the bill covered by the answer.

Arkansas.— Roberts *v.* Totten, 13 Ark. 609.

Georgia.— Dillard *v.* Ellington, 57 Ga. 567.

Pennsylvania.— Bailie *v.* Bailie, 166 Pa. St. 472, 31 Atl. 246; Fidelity Title, etc., Co. *v.* Weitzel, 152 Pa. St. 498, 25 Atl. 569.

United States.— Peeler *v.* Lathrop, 48 Fed. 780, 2 U. S. App. 40, 1 C. C. A. 93.

A vague and general answer as to certain items will not be sufficient to discharge defendant where the receipt of the money appears by other testimony. New York M. E. Church *v.* Jaques, Hopk. (N. Y.) 453.

65. Williamson *v.* Downs, 34 Miss. 402.

66. Donovan *v.* Haynie, 67 Ala. 51; Barksdale *v.* Hall, 13 Rich. Eq. (S. C.) 180.

67. Fidelity Title, etc., Co. *v.* Weitzel, 152 Pa. St. 498, 25 Atl. 569.

68. Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359; Wyatt *v.* Sweet, 48 Mich. 539, 13 N. W. 525, 12 N. W. 692; Armstrong *v.* Chemical Nat. Bank, 37 Fed. 466. To the same effect, Hearn *v.* Laird, 103 Ga. 271, 29 S. E. 973. See also *supra*, II, E, 8.

contract, defendant may have the account of receipts by complainant without filing the cross-bill.[69]

(2) Improper Counterclaim. A defendant cannot aver a counterclaim not connected with the transactions upon which the accounting is sought,[70] nor can he set up a claim for unliquidated damages,[71] though in the latter case the decree should be suspended until defendant has had an opportunity to establish his claim at law.[72]

(c) *Items for Consideration on Reference.* The particulars of an account which are the proper matters for consideration on the reference should not be set up in the answer[73] and will not be considered on the hearing as to the mere right to an account.[74] But it has been held that where the bill acknowledges certain credits due to defendant, and the latter, in his answer, avers no other credits due to him than those so admitted, he can avail himself of no others.[75]

(III) *Failure to Answer.* In a suit for an accounting no decree can be entered upon defendant's default other than for an accounting, and a judgment for a specific sum is not proper.[76]

(IV) *Expression of Willingness to Account — Effect upon Limitation.* Where the statute of limitations has run against a suit for an accounting in chancery, a mere expression, in the answer, of defendant's readiness and willingness to account, especially when accompanied by the assertion that the balance upon the accounting would be in defendant's favor, will not operate to remove the bar.[77]

(V) *Necessity for Discovery When Defendant Answers.* Whether a defendant to a bill for an accounting who by his answer denies complainant's right to an accounting is nevertheless required to give the account called for, the decisions are conflicting. On the one hand it has been considered that defendant may refuse to give an account in such case,[78] while, on the other, the rule is applied that where defendant can protect himself from giving account by plea or demurrer, but submits to answer, he must answer fully.[79] The result of the authorities would

69. Wyatt *v.* Sweet, 48 Mich. 539, 13 N. W. 525, 12 N. W. 692; Scott *v.* Lalor, 18 N. J. Eq. 301; Allen *v.* Allen, 11 Heisk. (Tenn.) 387; Hutchinson *v.* Paige, 67 Wis. 206, 29 N. W. 908.

70. Spaulding *v.* Farwell, 62 Me. 319; Parker *v.* Turner, 8 N. Y. St. 500, holding that where the complaint sets up a contract between defendant and complainant alone, defendant cannot allege that there was no such contract as declared and then counterclaim another contract between complainant, defendant, and another party; that if the only contract is the one which defendant sets up then plaintiff will fail in his proof; Carey *v.* Williams, 1 Lea (Tenn.) 51.

71. McCracken *v.* Harned, (N. J. 1899) 44 Atl. 959; Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Rawson *v.* Samuel, Cr. & Ph. 161.

72. McCracken *v.* Harned, (N. J. 1899) 44 Atl. 959; Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676.

73. Porter *v.* English, 1 Phila. (Pa.) 85, 7 Leg. Int. (Pa.) 150.

74. See *infra*, II, E, 10, a, (III).

75. Purdy *v.* Rutter, 3 W. Va. 262.

76. See *infra*, II, E, 10, b, (VIII).

77. Bradford *v.* Spyker, 32 Ala. 134, holding that such an expression in an answer can have no greater effect than if made before the commencement of the suit as a waiver of the plea of the statute of limitations, and that such an expression would not revive a cause of action barred by the statute, because it is necessary that there should be an express or implied promise to pay.

78. Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173; Porter *v.* English, 1 Phila. (Pa.) 85, 7 Leg. Int. (Pa.) 150; French *v.* Rainey, 2 Tenn. Ch. 640, under a statutory provision allowing matter proper for plea or demurrer to be taken advantage of by answer as well as from the result of the decisions on the subject independently of said provision; Gethin *v.* Gale [*cited* in Sweet *v.* Young, Ambl. 353]; Donegal *v.* Stewart, 3 Ves. Jr. 446; Great Western Colliery Co. *v.* Tucker, L. R. 9 Ch. 376; Phelips *v.* Caney, 4 Ves. Jr. 107; Randal *v.* Head, Hardres 188; Sweet *v.* Young, Ambl. 353; Jacobs *v.* Goodman, 2 Cox Ch. 282; John *v.* Dacie, 13 Price 632; Capon *v.* Miles, 13 Price 767; Adams *v.* Fisher, 3 Myl. & C. 526.

79. Saull *v.* Browne, L. R. 9 Ch. 364; Elmer *v.* Creasy, L. R. 9 Ch. 69; Rowe *v.* Teed, 15 Ves. Jr. 372; Howe *v.* McKernan, 30 Beav. 547; Reade *v.* Woodrooffe, 24 Beav. 421; Great Luxembourg R. Co. *v.* Magnay, 23 Beav. 646; Clegg *v.* Edmonson, 22 Beav. 125; Swinborne *v.* Nelson, 16 Beav. 416; Mazarredo *v.* Maitland, 3 Madd. 66; Lancaster *v.* Evors, 1 Phil. 349; Stephens *v.* Stephens [*cited* in Richardson *v.* Mitchell, Cas. t. King 51].

seem to indicate that, while the matter is one of judicial discretion,[80] the real distinction between the discovery which complainant is entitled to demand where his title to relief is denied, and the discovery which he is not entitled to in such a case, may be gathered from the rule that the right to discovery is confined to the question to come on for trial.[81] Where defendant in his answer asserts that there are no such accounts as those mentioned in the bill and that none can be given, no case is presented for the application of the rule that if a defendant assumes to answer he must answer fully.[82]

(VI) *Answer under Code.* An answer under the code denying the receipt of money as alleged in the complaint raises a distinct issue as to plaintiff's right to demand an accounting.[83] But under an answer admitting the agreement upon which plaintiff seeks an accounting he is entitled to a bill of particulars.[84]

(VII) *Stated or Settled Account*[85] — (A) *In General.* A stated or settled account is a good bar to a suit for an accounting, except so far as it is impeached for fraud or mistake,[86] and, being matter in avoidance, must be

80. French *v.* Rainey, 2 Tenn. Ch. 640. In Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205, the chancellor's view was that it must depend upon the reason and convenience of the case whether the general rule will be enforced that when defendant submits to answer he must answer fully, and was of opinion that exception to the rule was where defendant objected to the discovery because plaintiff had no title. In Great Western Colliery Co. *v.* Tucker, L. R. 9 Ch. 376, the court refused to require defendant to give a discovery of account called for by the bill, saying that the circumstances were just such as those referred to in Elmer *v.* Creasy, L. R. 9 Ch. 69, *supra*, note 79, under which the court may be trusted to exercise the proper control over any attempt on plaintiff's part to press for discovery which would be unreasonable or vexatious.

81. French *v.* Rainey, 2 Tenn. Ch. 640 [*citing* Wigram Disc. §§ 91, 244]; Hall *v.* Noyes, 3 Bro. Ch. 483; Great Western Colliery Co. *v.* Tucker, L. R. 9 Ch. 376.

In Pace *v.* Bartles, 45 N. J. Eq. 371, 17 Atl. 636, it was held that where the bill is filed for an account and the account does not appear by the allegations and charges of the bill to be useful in establishing complainant's right to it, but appears merely as that which must ultimately be rendered in fulfillment of the obligation an enforcement of which is sought, defendant need not set out the account in his answer in case it is necessary to resort to the answer rather than to plead or demur in resisting complainant's right. But if the right to relief may be resisted by plea or demurrer, and defendant nevertheless submits to answer, he must answer fully.

82. Armstrong *v.* Crocker, 10 Gray (Mass.) 269.

83. Perry *v.* Foster, 62 How. Pr. (N. Y.) 228.

Answer not frivolous.—In an action against a corporation alleging that plaintiffs delivered goods to defendant under an agreement whereby defendant was to hold them as trustee, with power to sell, and to deliver the proceeds to plaintiffs, an answer denying the allegations of the complaint, but admitting the receipt of certain goods similar to those mentioned in the complaint, and admitting that it had sold a part and received the proceeds of a part of such goods, but not admitting the agreement set up in the complaint nor the receipt of the goods specified in the complaint, is not frivolous. The denials were held not to be affected by these admissions, and the denial of the receipt of the goods specified in the complaint still stood, as there was no admission, direct or indirect, of the agreement referred to, nor of the receipt of the goods specified. Gillespie *v.* Davidge Fertilizer Co., 20 N. Y. Suppl. 833.

84. Miller *v.* Kent, 60 How. Pr. (N. Y.) 388, which was a suit against a commission-broker to compel an account of purchases and sales under an agreement for a division of profits.

85. **Form of plea of stated account** to bill for accounting. Allen *v.* Woonsocket Co., 11 R. I. 288.

86. *Illinois.*— Craig *v.* McKinney, 72 Ill. 305.

Iowa.— Weiland *v.* Ehlers, 107 Iowa 186, 77 N. W. 858.

New Jersey.— Harrison *v.* Farrington, 40 N. J. Eq. 353, 3 Atl. 80; Driggs *v.* Garretson, 25 N. J. Eq. 178; Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York.— Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; Weeks *v.* Hoyt, 5 Hun (N. Y.) 347; Sherburne *v.* Taft, 20 N. Y. Suppl. 757; Weed *v.* Smull, 7 Paige (N. Y.) 573; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293.

North Carolina.— Gray *v.* Lewis, 94 N. C. 392; Grant *v.* Bell, 87 N. C. 34; Suttle *v.* Doggett, 87 N. C. 203; Costin *v.* Baxter, 41 N. C. 197; Harrison *v.* Bradley, 40 N. C. 136.

Pennsylvania.—Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173; Cruise *v.* Walker, 6 Phila. (Pa.) 294, 24 Leg. Int. (Pa.) 141.

South Carolina.— Britton *v.* Lewis, 8 Rich. Eq. (S. C.) 271; Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156.

United States.— Chappedelaine *v.* Dechenaux, 4 Cranch (U. S.) 306, 2 L. ed. 629; Baker *v.* Biddle, Baldw. (U. S.) 394, 2 Fed. Cas. No. 764.

proved by the party pleading it.[87] In order to be made available it should be pleaded.[88]

(B) *In Bar of Relief and Discovery.* A stated account may be pleaded in bar to discovery and relief,[89] or may be set up by answer,[90] and this will bar further accounting unless upon a bill charging error or fraud,[91] though an answer in support of the plea may be necessary.[92]

(C) *Sufficiency of Plea.* Though, as hereinbefore shown, assent to the correctness of a balance may be presumed from long acquiescence,[93] and in the absence of fraud or mistake the account which thus acquires the character of a stated account will not be opened on an accounting,[94] it is held that a plea of stated account should allege that complainants and defendant made up, stated, and settled the account in writing after an examination and approval of the account,[95] showing the balance due and that it was fair and just.[96] But on the other hand it is held that a plea is not necessarily incomplete because such examination and approval are not alleged.[97] Where the account stated is pleaded it is not necessary to set out the account when the bill does not impeach it.[98]

c. Disclaimer. A party cannot disclaim all interest in the account and thus avoid the necessity of accounting.[99]

10. Hearing and Decree — a. Prior Determination of Liability to Account — (I) *General Rule.* Defendant's liability to account is a preliminary question in a suit for an accounting which should be determined before the reference, upon

Particular capacity.— Where a bill seeks an account of defendant's doings as attorney in fact of complainant, and no mention is made of any other power or authority given to defendant, though the prayer seeks discovery as to what was done by virtue of the power of attorney or under and by virtue of any other power or authority, a plea of a settled account in respect to the transactions of defendant as an attorney under such power of attorney is good. Craig *v.* McKinney, 72 Ill. 305.

87. Allen *v.* Woonsocket Co., 11 R. I. 288.

88. Derby *v.* Yale, 13 Hun (N. Y.) 273.

89. Weed *v.* Smull, 7 Paige (N. Y.) 573; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173; Cruise *v.* Walker, 6 Phila. (Pa.) 294, 24 Leg. Int. (Pa.) 141; Sumner *v.* Thorpe, 2 Atk. 1.

90. Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173; Cruise *v.* Walker, 6 Phila. (Pa.) 294, 24 Leg. Int. (Pa.) 141; Capon *v.* Miles, 13 Price 767; Endo *v.* Caleham, Younge 306.

91. Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Sumner *v.* Thorpe, 2 Atk. 1.

92. Thus in Danels *v.* Taggart, 1 Gill & J. (Md.) 311, an answer was deemed to be necessary in support of the plea for the purpose of denying the receipt of money after the time when the account was stated and adjusted, and for which the bill called for an account.

93. See *supra*, II, B, 2, 1.

94. *New Jersey.*— Harrison *v.* Farrington, 40 N. J. Eq. 353, 3 Atl. 80.

New York.— Murray *v.* Toland, 3 Johns. Ch. (N. Y.) 569.

South Carolina.— Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156.

Vermont.— Tharp *v.* Tharp, 15 Vt. 105.

United States.— Dexter *v.* Arnold, 2 Sumn. (U. S.) 108, 7 Fed. Cas. No. 3,858.

England.— Holstcomb *v.* Rivers, 1 Ch. Cas. 127.

95. Wood *v.* Gault, 2 Md. Ch. 433; Meeker *v.* Marsh, 1 N. J. Eq. 198; Bussey *v.* Gant, 10 Humphr. (Tenn.) 238; Burk *v.* Brown, 2 Atk. 397.

96. Breckenridge *v.* Brooks, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; Schwarz *v.* Wendell, Harr. (Mich.) 395; Harrison *v.* Farrington, 38 N. J. Eq. 358; Driggs *v.* Garretson, 25 N. J. Eq. 178.

Fully accounted is not a good plea in equity. Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173; Morton *v.* Lea, 73 N. C. 21, holding that to plead that defendant has already accounted he should allege the manner of the former account so as to show that the account has been settled and that it was just and true.

Dividend not sufficient.— To a bill for a general account it is not sufficient, for the purpose of setting up a stated account, to show that there has been a dividend, which implies an account stated, for a dividend may be made upon the supposition that the estate will amount to so much, but still subject to an account which may be afterward taken. Dawson *v.* Dawson, 1 Atk. 1.

97. Greene *v.* Harris, 11 R. I. 5, this being consistent with the rule that to make an account stated it is not essential that there should be an actual examination or express approval.

98. Meeker *v.* Marsh, 1 N. J. Eq. 198; Weed *v.* Smull, 7 Paige (N. Y.) 573; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293.

99. Glassington *v.* Thwaites, 2 Russ. 458. See Equity.

which follows the order or decree leading to the accounting,[1] unless it appears more expeditious to order the accounting in the first instance.[2]

(II) *Disposition of Issues.* Where there are issues of fact raised by the pleadings they should be tried before ordering an account,[3] and if a plea in bar is interposed it must be disposed of before the accounting or decree,[4] although defendant admits the necessity of an account of transactions subsequent to a settlement pleaded.[5] But where the right to an account is admitted in terms or in effect the court may order it at once without waiting to try the issues of fact raised by the pleadings.[6]

(III) *Hearing Confined to Liability to Account.* Upon an application for an account the only question to be considered is whether the account shall be taken,— plaintiff's right to the accounting and defendant's liability to render the account,— and therefore the only evidence necessary upon the hearing at this stage is that which shows the particular right and liability.[7] Therefore matters which are properly for consideration as to the state of the accounts will not be inquired into.[8] On the other hand the right to an accounting and the liability to account should be contested at a primary stage of the cause when the application for an accounting is made, as a decree to account will generally conclude such questions.[9]

1. *Maryland.*—Neale *v.* Hagthrop, 3 Bland (Md.) 551.

New York.— Rose *v.* Durant, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15.

North Carolina.— Dozier *v.* Sprouse, 54 N. C. 152; McCaskill *v.* McBryde, 37 N. C. 52; McLin *v.* McNamara, 21 N. C. 407.

Pennsylvania.— Collyer *v.* Collyer, 38 Pa. St. 257.

Tennessee.— Cobb *v.* Jameson, 1 Tenn. Ch. 604.

Special reference.— This may be done by a special reference. Christy's Appeals, 92 Pa. St. 157, in which case it was held that the proper practice would have been to have made a special reference to the master to report upon the preliminary question of defendant's liability as a partner, but that as the master had done what he ought to have done under a proper reference the order of reference made in the cause might be regarded as amended; Dampf's Appeal, 106 Pa. St. 72.

Where the cause is referred to referee the right to an account may be found first and then an account ordered to be taken. Hathaway *v.* Russell, 46 N. Y. Super. Ct. 103. See also REFERENCES.

2. See Carter *v.* Alston, 3 N. C. 421.

3. Cleary *v.* Coor, 2 N. C. 225. See also, for settling principles in order of reference, REFERENCES.

4. Royster *v.* Wright, 118 N. C. 152, 24 S. E. 746; Bridgers *v.* Bridgers, 101 N. C. 71, 7 S. E. 586; Quarles *v.* Jenkins, 98 N. C. 258, 3 S. E. 395; Clements *v.* Rogers, 95 N. C. 248; Atlantic, etc., R. Co. *v.* Morrison, 82 N. C. 141; Price *v.* Eccles, 73 N. C. 162; Eaton *v.* Eaton, 43 N. C. 102; Collyer *v.* Collyer, 38 Pa. St. 257; Dunsford *v.* Brown, 19 S. C. 560. If the bill is dismissed and the record shows an indiscriminate mixture of allegations and evidence on the main and preliminary questions in the cause, and there is nothing to indicate which of the questions were decided against complainant, the decree will be reversed and the cause remitted for the regular course of proceeding as above indicated. Collyer *v.* Collyer, 38 Pa. St. 257.

Exception.— Where the paper set up by the plea is vague and uncertain it has been held that the rule stated in the text does not apply. Smith *v.* Barringer, 74 N. C. 665, referring to a plea of release on a former accounting, in a suit for a partnership accounting.

5. Clements *v.* Rogers, 95 N. C. 248.

6. Albright *v.* Albright, 91 N. C. 220; Atlantic, etc., R. Co. *v.* Morrison, 82 N. C. 141.

7. Ligare *v.* Peacock, 109 Ill. 94; Conlin *v.* Carter, 93 Ill. 536; Standish *v.* Babcock, 48 N. J. Eq. 386, 22 Atl. 734; Hudson *v.* Trenton Locomotive, etc., Mfg. Co., 16 N. J. Eq. 475; Chalk *v.* Trader's Nat. Bank, 87 N. C. 200; Barrett *v.* Henry, 85 N. C. 321; Atlantic, etc., R. Co. *v.* Morrison, 82 N. C. 141; Hairston *v.* Hairston, 55 N. C. 123; Dozier *v.* Sprouse, 54 N. C. 152; Leake *v.* Cordeaux, 4 Wkly. Rep. 806.

8. Ligare *v.* Peacock, 109 Ill. 94; Bradshaw *v.* Clark, 31 N. J. Eq. 39; Campbell *v.* Zabriskie, 8 N. J. Eq. 738; Hudson *v.* Trenton Locomotive, etc., Mfg. Co., 1 N. J. Eq. 475; Porter *v.* English, 1 Phila. (Pa.) 85, 7 Leg. Int. (Pa.) 150; Law *v.* Hunter, 1 Russ. 100; Walker *v.* Woodward, 1 Russ. 107.

9. Barrett *v.* Henry, 85 N. C. 321; Bailey *v.* Wilson, 21 N. C. 182; Everhart's Appeal, 106 Pa. St. 349; McRae *v.* David, 7 Rich. Eq. (S. C.) 375. See also Auld *v.* Butcher, 2 Kan. 135. As to mere objection to remedy in equity see *supra*, II, E, 1, k.

In Smith *v.* Mallett, 3 N. C. 381, under the peculiar circumstances of the case it was held that the reference to take the account did not preclude the parties from denying their liability to account.

After the account is taken it is too late to raise such objection. Lattimore *v.* Dixon, 65 N. C. 664; Protchett *v.* Schaefer, 11 Phila. (Pa.) 166, 33 Leg. Int. (Pa.) 12.

b. Decree to Account[10]— (i) *In General.* The decree to account is not of course, and unless by consent,[11] or on admission of the allegations of the bill which show a right to the accounting,[12] should not be directed except upon a hearing. The facts should not only be put in issue, but there should be evidence to show the probability of the facts and the equity proper.[13] And if the answer called for is given,[14] or the right to the accounting is not admitted or is put in issue, and is not proven, the bill will be dismissed.[15] Where the defense is anticipated, but defendant nevertheless pleads it and avoids the fraud charged, this does not shift the burden of proof from plaintiff.[16] But if defendant sets up matter subsequent to the contract under which the account is sought, in avoidance of liability to account, the burden is on him to prove such matter.[17]

(ii) *Right to Part of Relief Sought.* If complainant is entitled to the relief sought only to a partial extent, the bill will not be dismissed though he may not be entitled to all he claims.[18]

(iii) *Matters Subsequent to Bill.* A bill against a trustee praying an account may be retained in order to effect an accounting between the parties, including matters subsequent to the filing of the bill, notwithstanding plaintiff failed to establish the allegations of his bill.[19]

(iv) *Consistency with Pleadings.* The decree to account cannot require an accounting of a different character from that sought by the bill,[20] and where one is a party, not as an accountant, but only for the purpose of participating in the distribution, the decree should not order him to account.[21]

(v) *Contingent Liability.* Where a contingent liability has been decreed against a party he may be compelled to account with a view to such liability upon the happening of the contingency.[22]

Settlement may be shown. Pratt *v.* Grimes, 48 Ill. 376. Akin to this in action of account see *supra*, II, C, 7, b.

10. Form of decree to account is set out in Hindmarsh *v.* Southgate, 3 Russ. 324.

As to the settlement of the principles on which the referee or other officer to whom the proceeding is referred must state the account see REFERENCES.

11. Cutting *v.* Carter, 4 Hen. & M. (Va.) 478.

Motion for account.— A motion for an account is irregular; it should be for a decree; and if the court cannot enter a decree without an account it will then order the account. Hampton *v.* Pollard, 4 Hen. & M. (Va.) 451.

Where defendant submits to a decree to account, proof in reference to matters of the account is not necessary in the first instance. Dozier *v.* Sprouse, 54 N. C. 152.

12. Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676.

13. McLoskey *v.* Gordon, 26 Miss. 260; Planters' Bank *v.* Stockman, Freem. (Miss.) 502.

14. Runyan *v.* Russell, 3 Wash. 665, 29 Pac. 348; Peeler *v.* Lathrop, 48 Fed. 780, 2 U. S. App. 40, 1 C. C. A. 93.

15. *Illinois.*— Adams *v.* Gaubert, 69 Ill. 585.

Maryland.— Neale *v.* Hagthrop, 3 Bland (Md.) 551.

Mississippi.—Hunt *v.* Gorden, 52 Miss. 194.

New Jersey.— Adams *v.* Mahnken, 40 N. J. Eq. 373, 3 Atl. 520; Gardner *v.* Raisbeck, 31 N. J. Eq. 23.

New York.— Slee *v.* Bloom, 20 Johns. (N. Y.) 669.

Virginia.— Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182.

England.— Bliss *v.* Smith, 34 Beav. 508.

No reference to establish bill.— An account will not be decreed merely to establish by evidence the allegations of the bill. Beale *v.* Hall, 97 Va. 383, 34 S. E. 53; Baltimore Steam Packet Co. *v.* Williams, 94 Va. 422, 26 S. E. 841; Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451.

16. Farrington *v.* Harrison, 44 N. J. Eq. 232, 15 Atl. 8, 10 Atl. 105.

17. Abandonment of interest in venture.— Ross *v.* Stevens, 45 N. J. Eq. 231, 13 Atl. 225, 11 Atl. 114.

18. Driggs *v.* Morely, 2 Pinn. (Wis.) 403. But in Adams *v.* Gaubert, 69 Ill. 585, it was held that on a bill to have a certain purchase declared a joint one, and for a share of the profits realized by defendant, the bill showing some other partnership dealings, it was not error to dismiss the bill on finding the question of the purchase for joint benefit against complainant, instead of retaining it for an account, where the proofs taken failed to show anything due complainant.

19. Hagar *v.* Whitmore, 82 Me. 248, 19 Atl. 444.

20. Felder *v.* Wall, 26 Miss. 595, holding that on a bill against a representative of a decedent to have an accounting of a copartnership between complainant and decedent the decree should order an account between the partners in the firm business, and not of the amount due plaintiff.

21. Tucker *v.* Cocke, 32 Miss. 184.

22. State Bank *v.* Rose, 2 Strobh. Eq. (S. C.) 90.

(VI) *NATURE OF DECREE TO ACCOUNT.* The decree to account on a bill seeking to bring to an accounting one upon whom that duty rests is interlocutory.[23] But where the decree to account is incidental to a final decree granting other and main relief (as upon a decree to stay waste under a bill for that purpose), defendant may appeal from the whole decree;[24] and where a motion to amend such a decree made at a former term is denied, the decree will have the force of a final decree at the final hearing.[25] On the other hand it is held that when defendant pleads in bar to a suit for an accounting, and the issue is found against him, the order is appealable.[26] Where the accounts are settled by the court, if plaintiff does not appeal from a decree holding him liable for a certain share of the expense of keeping partnership property, such decree will be the basis for the accounting on appeal by defendant.[27]

(VII) *DECREE TO ACCOUNT BEFORE FINAL DECREE.* Until it is determined that defendant should account, the cause is not ripe for a final decree.[28] And even when defendant fails to answer, the proper course would seem to require a reference to state the account on the decree *pro confesso*, and a final decree on the hearing of the decree *pro confesso* on the proofs and report, and a decree on the merits in the first instance, would not be regular.[29] But a final decree may be entered under some circumstances without stating the account, upon determining the right and the amount appearing,[30] and where there is a direct admission in the answer of a specific sum due to plaintiff, and the pleadings do not admit of further contest as to other matters, a judgment for the amount admitted is proper.[31] So, in a case admitting of such a course, the court may order the rendition of an account when a reference may be saved thereby.[32]

23. *Alabama.*— Richardson *v.* Peagler, 111 Ala. 478, 20 So. 434.

California.— Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570; Hinds *v.* Gage, 56 Cal. 486.

Mississippi.— Prewett *v.* Crump, 23 Miss. 574.

New York.— Walker *v.* Spencer, 86 N. Y. 162.

Pennsylvania.— Keller *v.* Swartz, 137 Pa. St. 65, 20 Atl. 627.

United States.— Spalding *v.* Mason, 161 U. S. 375, 16 S. Ct. 592, 40 L. ed. 738.

24. Jenks *v.* Langdon, 21 Ohio St. 362.

As to details of accounting.— Where an accounting is ordered as incidental to the main decree entered, that part which deals with the details of the account is interlocutory in its nature and an appeal cannot be taken merely to correct errors in such matters. Humphrey *v.* Foster, 13 Gratt. (Va.) 653.

Effect of appeal as stay.— See APPEAL AND ERROR.

25. Payson *v.* Ross, 77 Ill. App. 635.

26. Clements *v.* Rogers, 95 N. C. 248, on the ground that if the plea of discharge or release is sustained the action will be at an end, and to compel a party to account under such circumstances would be vexatious.

27. Welden *v.* Conley, (Iowa 1898) 76 N. W. 725.

28. Reeder *v.* Trullinger, 151 Pa. St. 287, 24 Atl. 1104; Peeler *v.* Lathrop, 48 Fed. 780, 2 U. S. App. 40, 1 C. C. A. 93.

29. Chapman *v.* Evans, 44 Miss. 113; Porter *v.* Lent, 4 Duer (N. Y.) 671, in which case the summons was for the relief demanded in the complaint, under the code, and it was held it would not warrant a judgment for a specific sum of money; Findlay *v.* Sheffey, 1 Rand. (Va.) 73; Pendleton *v.* Evans, 4 Wash. (U. S.) 391, 19 Fed. Cas. No. 10,921. To the same effect are Craig *v.* McKinney, 72 Ill. 305, and Ross *v.* Noble, 6 Kan. App. 361, 51 Pac. 792.

Account stated by the court.— But as to the power of the court to take and state an account instead of sending it to the master see REFERENCES.

30. Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676, holding that where the evidence is fully gone into before final decree in a suit for an accounting under a contract by which plaintiffs were entitled, in addition to a stated annual sum, to a percentage of the net profits of the business, the latter being guaranteed to a certain amount, from which evidence it appeared that the net profits were not large enough to give complainants any interest beyond the sum guaranteed, the court will decree a payment to complainants of the sum so guaranteed. And in Calvit *v.* Markham, 3 How. (Miss.) 343, where an agent was appointed to settle accounts and the settlement was sufficient to establish complainant's right to sue for the sum named, it was held that a final decree could be entered without taking an account under an interlocutory order. See also Neal *v.* Keel, 4 T. B. Mon. (Ky.) 162.

31. See McConnell *v.* Lincoln First Nat. Bank, 38 Nebr. 252, 56 N. W. 1013.

32. Ross *v.* Stevens, 45 N. J. Eq. 231, 13 Atl. 225, 11 Atl. 114, wherein, upon determining that complainant was entitled to one half of the profit made by defendant on a particular transaction, the court deferred the order of reference, but directed in the decree that defendant should deliver to complainant's solicitor within a fixed time an itemized

c. Findings by Court. Under the practice requiring the issues to be found by the court and the findings announced and filed before entry of judgment, the findings upon which the right to an account is denied must be something more than a mere legal inference.[33]

d. Evidence. A decree in a suit for an accounting cannot be made in the absence of any evidence showing something due.[34] Where defendant is an accounting party, as one occupying a fiduciary relation, the burden is on him to show the performance of his trust,[35] and one who is liable to render an account has the burden of proving allowances or credits which he may claim.[36] But in other cases, as where there is no relation which imposes upon defendant the duty to keep and render accounts, the burden of accounting is not exclusively on defendant.[37]

e. Final Decree — (1) *In General.* In a suit for an accounting the decree must be consistent with the relief sought by the pleadings,[38] as well as with the case made, and if defendant is liable upon a contingency only, or complainant is entitled to have his interest declared, an unqualified judgment for a specific sum of money is improper.[39] The accounting should be considered as furnishing the proper foundation for the decree.[40] But where, after a decree for an account and that defendant pay the amount found due, an order for an execution is entered upon the report of the accounting, the decree and order will be taken together as

account showing the gross profits realized and also the deductions which defendant might claim should be made in order to show the net profit, and that complainant should within a fixed time notify defendant's solicitor whether he was satisfied with the account, and, if not, to state the particulars of his objections, and that thereupon either party might within a fixed time apply to the court for direction as to how the objections to the account should be tried and determined.

Filing account.— In Louisiana, in a suit to compel defendant to render an account, defendant may file his account at any time before judgment by default is made final. Ledoux *v.* Murray, 14 La. Ann. 613.

33. Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266, holding that a finding by the court that there was no such cotenancy between the parties in the mine in controversy as to entitle plaintiff to an accounting is a mere legal inference, and not a sufficient finding of fact upon which to base a decree.

34. Slater *v.* Arnett, 81 Va. 432; Peeler *v.* Lathrop, 48 Fed. 780, 2 U. S. App. 40, 1 C. C. A. 93.

For proceeding, evidence, etc., in general on the reference see REFERENCES, and for sufficiency of evidence in particular cases see specific titles, as JOINT ADVENTURES; PARTNERSHIP; EXECUTORS AND ADMINISTRATORS.

35. Marvin *v.* Brooks, 94 N. Y. 71.

36. Thatcher *v.* Hayes, 54 Mich. 184, 19 N. W. 946.

Settlement must be established as defense. Pratt *v.* Grimes, 48 Ill. 376.

37. Davenport *v.* Schutt, 46 Iowa 510; Pullman Palace Car Co. *v.* Central Transp. Co., 34 Fed. 357.

38. Black *v.* Merrill, 65 Cal. 90, 3 Pac. 113; Passyunk Bldg. Assoc.'s Appeal, 83 Pa. St. 441, holding that on a bill by a stockholder against a building association and its president, who was alleged to have in his hands funds of the association, a prayer for an accounting between the president and the association and between the association and plaintiff, and that the amount due complainant as a withdrawing stockholder be decreed to him, would not support a decree against the president for a certain sum of money. But on the other hand it is held that where a complainant has properly brought an action in equity for an accounting in regard to partnership property, and on such accounting it appears that there is no property to which he has a claim, but that he is entitled to a personal judgment against defendants as partners, he may be given such judgment by the chancery court. McLean *v.* McLean, 109 Mich. 258, 67 N. W. 118.

39. Stark *v.* Pierce City Real Estate Co., 97 Mo. 449, 10 S. W. 877, which was a suit for an accounting of profits of land in which plaintiff owned an undivided interest. It was held that plaintiff was not entitled to a judgment for money to the amount of his interest where the purchase-money was represented by notes taken in good faith and complainant claimed the benefit of the sale, but that the judgment should determine his interest in the notes and direct its payment when collected.

Provision for future share.— Where the share of a widow in funds arising from the rental of a mine under a lease made by the guardian of her children is declared, the decree may provide for the product mined during the continuance of the lease. Neel's Appeal, 3 Pennyp. (Pa.) 66.

40. Bullock *v.* Governor, 2 Port. (Ala.) 484; Farley *v.* Ward, 1 Tex. 646.

Where property is found, undisposed of, in the hands of defendant, on a partnership accounting, it is error to render judgment for money only before a complete settlement of the account and distribution. McGillvray *v.* Moser, 43 Kan. 219, 23 Pac. 96.

a sufficient adjudication that the amount reported is due complainant.[41] Where the real parties entitled to the fund to be accounted for are joined as defendants with the accounting party, the court may direct the cause to proceed for their benefit and make a final decree in their favor for the fund.[42]

(II) *Settlement of Accounts between All Parties.* Where the bill is for an accounting and settlement of accounts between all parties interested, as in the case of part owners[43] or partners, the decree should settle the rights of all.[44] But where the bill is filed by one of several persons interested in certain profits, and the several defendants unite in resisting complainant's claim without professing any inability to settle among themselves, the decree need not declare the share of each of the defendants in the fund involved.[45]

f. Review. A decree will not be reversed for an improper charge contained therein if it appears that the amount found against appellant would be increased upon a proper settlement,[46] but if correct except for items certain and ascertainable it will be affirmed with modification as to such particular items.[47] If a charge complained of is stricken out, credits so connected with the charge as to require adjustment with it must likewise be considered and rejected.[48]

g. Costs. As in other cases in equity, costs are largely discretionary with the court.[49] In the absence of circumstances which should impose the burden on a particular party the court may make an equitable disposition of them, between the parties or out of the fund.[50] But where complainant is entitled to a decree to account over defendant's refusal, or the conduct of the latter has made the suit necessary, the former will be entitled to costs.[51] Conversely, where complainant fails to establish his right to an account, the bill will be dismissed with costs.[52] But where the demand to account was too broad the partial relief to which plaintiff may be entitled will not subject defendant to costs.[53]

F. Venue — Location of Property. Location of the land or property an accounting of the profits or avails of which is sought, though such property is beyond the territorial jurisdiction of the court, will not affect the question of jurisdiction when the parties are subject to the process of the court.[54] On the

41. Ruckman *v.* Decker, 28 N. J. Eq. 5.

42. Trapnall *v.* Byrd, 22 Ark. 10, which was a suit by a debtor against an attorney for an account of collections made upon several claims which the debtor had placed in the attorney's hands to be appropriated to judgments in favor of several judgment creditors, the latter being made defendants.

43. Little *v.* Merrill, 62 Me. 328.

44. Grove *v.* Fresh, 9 Gill & J. (Md.) 280. See *supra*, II, E, 8.

45. Patterson *v.* Ware, 10 Ala. 444.

46. Caldwell *v.* Kinkead, 1 B. Mon. (Ky.) 228; Handly *v.* Snodgrass, 9 Leigh (Va.) 484.

47. Spalding *v.* Mason, 161 U. S. 375, 16 S. Ct. 592, 40 L. ed. 738.

Objections to report, time and manner of making, etc., see REFERENCES.

48. Laurel Springs Land Co. *v.* Fougeray, 57 N. J. Eq. 318, 41 Atl. 694.

49. Armstrong *v.* McAlpin, 18 Ohio St. 184; Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382.

50. Armstrong *v.* McAlpin, 18 Ohio St. 184 (holding that where the fund is sufficient to pay only prior liens and a part of the costs, the party against whom the issues upon which the costs arose were decided may be taxed); Shirley *v.* Goodnough, 15 Oreg. 642, 16 Pac. 871 (holding that where it appears that all the parties acted in good faith and the suit involves a settlement of accounts and a disposition of property in which all the parties are interested, the costs will be ordered to be paid out of the fund in court before distribution); Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382; Neel's Appeal, 3 Pennyp. (Pa.) 66.

51. Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676; Shearman *v.* Morrison, 149 Pa. St. 386, 24 Atl. 313; Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140. Where plaintiff seeks to have opened and readjusted partnership accounts, and an accounting as to all business transactions from the commencement of the partnership to its close, and fails to have the account opened, but is entitled to an accounting from the date of the account stated, he is entitled to costs. Rutty *v.* Person, 52 N. Y. Super. Ct. 329.

52. See Bliss *v.* Smith, 34 Beav. 508.

53. Chew *v.* Corkery, (N. J. 1887) 10 Atl. 437, in which case a creditor refused to surrender two bonds held by him on demand of the debtor, and upon an accounting it was found that the debtor was entitled to the surrender of only one of the bonds.

54. Lewis *v.* Martin, 1 Day (Conn.) 263 (which involved rents and profits of lands lying in another county); Wood *v.* Warner, 15 N. J. Eq. 81; Reading *v.* Haggin, 58 Hun (N. Y.) 450, 12 N. Y. Suppl. 368 (recognizing the application of the rule that equity

other hand it is held that an equitable action under the code is essentially a personal action, and defendant has a right to trial in the county of his residence unless the subject-matter is exclusively land.[55]

G. Effect and Impeachment of Stated or Settled Account — 1. EFFECT OF STATED ACCOUNT IN GENERAL. An account stated operates as a confession that there is a fixed and definite sum due from one person to another at the date of the accounting.[56] All intricacies of the account, or doubt as to which side the balance may fall, are thereby disposed of,[57] and the acquiescence and promise to pay sufficiently admit the performance of conditions which would be in the nature of jurisdictional requirements for the enforcement of the original liability.[58]

2. STATED ACCOUNT TO BE TAKEN AS ENTIRETY. Where an account is stated and a balance is struck it should be taken as an entirety; the debits are not admissible without the credits,[59] and judgment should not be given for a larger amount than the balance, or for the charges without the credits.[60]

3. CHANGE OF CAUSE OF ACTION BY STATEMENT OF ACCOUNT — a. Effect in General. In one sense, relating to the necessity to look to the original items, an account stated alters the character of the original indebtedness and is itself in the nature of a new promise or undertaking.[61] It is not, however, strictly speaking, the creation of a new debt, but merely a statement and acknowledgment of an old debt, from which the law implies a sufficient promise to support an action;[62] it merely reduces a preëxisting liability to a certainty.[63] Therefore an action upon an account stated is not founded upon the original items or debt, but upon the balance ascertained and fixed by the mutual consent of the parties, without regard to the original debt or items.[64] The action may be maintained on

has jurisdiction notwithstanding the lands lie in another state, where the parties are before the court); Whitmore *v.* Orcutt, Brayt. (Vt.) 22 (which was an action of account between parties both of whom resided in another state, and the locks and canals of which the account was claimed were situated in the state of the parties' residence). See also COURTS; VENUE.

55. Smith *v.* Smith, 88 Cal. 572, 26 Pac. 356; Le Breton *v.* Superior Ct., 66 Cal. 27, 4 Pac. 777.

56. Chapman *v.* Lee, 47 Ala. 143; Quincey *v.* White, 63 N. Y. 370; Hawkins *v.* Long, 74 N. C. 781; Darlington *v.* Taylor, 3 Grant (Pa.) 195.

Waiver of laches.— Where the drawee of a bill of exchange had refused payment, and thereafter the amount was admitted to be due and the drawee promised to pay it, it was held that a recovery could be had under a count on an account stated, and that any laches with regard to the bill was waived. Smith *v.* Curlee, 59 Ill. 221.

57. Watson *v.* Lyle, 4 Leigh (Va.) 236.

58. Clemens *v.* Baltimore, 16 Md. 208, in which case acquiescence in the correctness of a bill presented by a suit for paving taxes, and a promise to pay the same, were held to be an admission that the city had taken the necessary preliminary steps and had done the paving, and was sufficient to authorize a verdict for plaintiff.

59. Dougherty *v.* Knowlton, 19 Ill. App. 283; Green *v.* Glasscock, 9 Rob. (La.) 119; Freeland *v.* Cocke, 3 Munf. (Va.) 352. See also *infra*, III, D.

60. McCarthy *v.* Mt. Tecarte Land, etc., Co., 111 Cal. 328, 43 Pac. 956.

61. *California.*— McCarthy *v.* Mt. Tecarte Land, etc., Co., 111 Cal. 328, 43 Pac. 956; Hendy *v.* March, 75 Cal. 566, 17 Pac. 702; Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694.

District of Columbia.— Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382.

Illinois.— Throop *v.* Sherwood, 9 Ill. 92.

Minnesota.— Christofferson *v.* Howe, 57 Minn. 67, 58 N. W. 830.

New York.— Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Smith *v.* Glens Falls Ins. Co., 66 Barb. (N. Y.) 556; Holmes *v.* D'Camp, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

England.— Foster *v.* Allanson, 2 T. R. 479.

62. Laycock *v.* Pickles, 4 B. & S. 497.

No demand is necessary before bringing the action. Robinson *v.* Williams, 49 Mass. 454; Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

63. Goings *v.* Patten, 11 Abb. Pr. (N. Y.) 339, 340 [*citing* Drue *v.* Thorne, Alleyn]. See also *supra*, II, B, 1, d.

64. *Alabama.*— Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672.

Arkansas.— St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704.

California.— Hendy *v.* March, 75 Cal. 566, 17 Pac. 702.

Illinois.— Throop *v.* Sherwood, 9 Ill. 92; American Brewing Co. *v.* Berner-Mayer Co., 83 Ill. App. 446.

Michigan.— Albrecht *v.* Gies, 33 Mich. 389.

Minnesota.— Christofferson *v.* Howe, 57 Minn. 67, 58 N. W. 830.

Oregon.—Fleischner *v.* Kubli, 20 Oreg. 328, 25 Pac. 1086; Holmes *v.* Page, 19 Oreg. 232, 23 Pac. 961.

Virginia.— Watson *v.* Lyle, 4 Leigh (Va.) 236.

the stated account notwithstanding the acknowledgment of indebtedness is in writing.[65]

b. Effect with Respect to Bill of Particulars. As the statement of an account is in the nature of a new promise, in an action upon an account stated a bill of particulars of the items of the original debt need not be furnished and cannot be required.[66] But it is held that defendant may be entitled to a copy of the stated account, although the original items of the open account upon which the account was stated need not be furnished.[67] If, however, plaintiff furnishes a more detailed statement than is necessary, there can be no objection on this ground.[68]

c. Effect with Respect to Statute of Limitations. Where an account is stated and a balance struck by the parties, the balance becomes the new principal, and the admission of a precise debt is sufficient to defeat a plea of the statute of limitations.[69] And on the other hand, when an account has become stated the creditor cannot change the character thereof to an open account and maintain a suit upon the original items for the purpose of evading the statute of limitations.[70]

d. Effect upon Fiduciary Character. Where a debt is created in a fiduciary capacity, and such debts are excepted by the insolvent law from the operation of a discharge in insolvency, the fact that the account is stated will not change the fiduciary capacity of defendant so that the debt may be barred by his discharge in insolvency.[71]

4. Conclusive and Prima Facie Effect — a. In General. Formerly the stating of an account was considered so deliberate an act as to preclude an examination into the items,[72] but since an early day greater latitude has prevailed, and it may

United States.— Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Marye *v.* Strouse, 5 Fed. 483.

England.— Arthur *v.* Dartch, 9 Jur. 118.

Assimilated to promissory note.— The demand is essentially the same as if a promissory note has been given for the balance. Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93; Volkening *v.* De Graaf, 81 N. Y. 268.

Balance brought into new account.— A balance found due upon a settlement may be charged as a balance in a new account and allowed in a subsequent action of account between the parties. Kidder *v.* Rixford, 16 Vt. 169, 42 Am. Dec. 504.

65. Mackay *v.* Kahn, 17 N. Y. Suppl. 503, wherein it is held that where the amount of a debt is ascertained and admitted, and there is no dispute as to the amount of plaintiff's claim, the paper executed as an acknowledgment of the debt cannot be said to be the result of a compromise and does not become a substitute for plaintiff's original cause of action so as to preclude an action on an account stated.

66. *California.*— Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Indiana.— Salem Gravel Road Co. *v.* Pennington, 62 Ind. 175.

Iowa.— Buehler *v.* Reed, 11 Iowa 182.

Mississippi.— Pipes *v.* Norton, 47 Miss. 61.

New York.— Hoff *v.* Pentz, 1 Abb. N. Cas. (N. Y.) 288; Kingsley *v.* Jones, 1 N. Y. L. Rec. 215.

Virginia.— Fitch *v.* Leitch, 11 Leigh (Va.) 471.

67. Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504. See also Cunard *v.* Francklyn, 49 Hun (N. Y.) 233, 1 N. Y. Suppl. 877, holding that the statute in New York requiring copies of accounts would include an account stated which contains items, but that in the case in hand the account involved was not such an account, but consisted in data or evidence upon which the parties reached their agreement. But in Sanchez *v.* Dickinson, 19 N. Y. Suppl. 733, 47 N. Y. St. 203, defendant in an action to recover a balance pleaded an account stated, and upon a demand for copies of the accounts and a refusal to furnish them he was precluded from giving evidence of any such accounts or the items thereof, upon the ground that it was as necessary for plaintiff to know what the account contained, where it is claimed that the account is a stated account, as in the case of an account upon which a balance is claimed.

68. In Massachusetts the statute required a bill of particulars to be filed under all the common counts, including the *insimul computassent*, and it was held that while it might be true that the bill of particulars under that count would not necessarily give the items of indebtedness, and that such items need not be shown in proof on the trial, there could be no objection to a bill of particulars stating all the items of the indebtedness, and showing the basis of the alleged indebtedness on the *insimul computassent*, if plaintiff should elect to file such a bill. Rundlett *v.* Weeber, 3 Gray (Mass.) 263.

69. McClelland *v.* West, 70 Pa. St. 183. See Limitations of Actions.

70. Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724.

71. Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95.

72. Holmes *v.* D'Camp, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293 [*citing* Trueman *v.* Hurst, 1 T. R. 40]. See also Cogswell *v.* Whittlesey, 1 Root (Conn.) 384.

now be said to be the rule that an account stated does not create an estoppel,[73] and that neither a stated nor a settled account is conclusive, but simply affords strong presumptive evidence which may be rebutted by showing fraud or mistake.[74] And while the practice of opening accounts which the parties have themselves adjusted is considered dangerous, yet a settlement must be so far considered as made upon absolute mistake or imposition, if palpable errors are shown, as not to be obligatory upon the injured party.[75] The presumption is one relating to the evidence.[76]

73. Higham *v.* Harris, 108 Ind. 246, 8 N. E. 255; Lockwood *v.* Thorne, 18 N. Y. 285; Barker *v.* Hoff, 52 How. Pr. (N. Y.) 382.

74. *Alabama.*— Rice *v.* Schloss, 90 Ala. 416, 7 So. 802; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Walker *v.* Driver, 7 Ala. 679.

Arkansas.— State *v.* Jennings, 10 Ark. 428.

Colorado.— St. Louis Lager Beer Bottling Co. *v.* Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 800.

Connecticut.— Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591; Nichols *v.* Alsop, 6 Conn. 477.

Illinois.— Stage *v.* Gorich, 107 Ill. 361; Eddie *v.* Eddie, 61 Ill. 134; Town *v.* Wood, 37 Ill. 512.

Kansas.— Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

Louisiana.— Oglesby *v.* Renwick, 26 La. Ann. 668; Taylor *v.* Simon, 14 La. Ann. 351; Green *v.* Glasscock, 9 Rob. (La.) 119; Flower *v.* Millaudon, 19 La. 195; Zacharie *v.* Blandin, 6 La. 193; Pavie *v.* Noyrel, 5 Mart. N. S. (La.) 92.

Maryland.— Barger *v.* Collins, 7 Harr. & J. (Md.) 213.

Michigan.— Stevens *v.* Saginaw County, 62 Mich. 579, 29 N. W. 492; White *v.* Campbell, 25 Mich. 463.

Minnesota.— Wharton *v.* Anderson, 28 Minn. 301, 9 N. W. 860; Mower County *v.* Smith, 22 Minn. 97.

Missouri.— Brown *v.* Kimmel, 67 Mo. 430; Kent *v.* Highleyman, 17 Mo. App. 9.

Nebraska.— McKinster *v.* Hitchcock, 19 Nebr. 100, 26 N. W. 705; Kennedy *v.* Goodman, 14 Nebr. 585, 16 N. W. 834.

New Jersey.— Vanderveer *v.* Statesir, 39 N. J. L. 593.

New York.— Conville *v.* Shook, 144 N. Y. 686, 39 N. E. 405; Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Samson *v.* Freedman, 102 N. Y. 699, 7 N. E. 419; Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161; Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Donald *v.* Gardner, 44 N. Y. App. Div. 235, 60 N. Y. Suppl. 668; Langer *v.* Berger, 38 N. Y. App. Div. 619, 56 N. Y. Suppl. 168; Bergen *v.* Hitchings, 22 N. Y. App. Div. 395, 48 N. Y. Suppl. 96; Frankel *v.* Wathen, 58 Hun (N. Y.) 543, 12 N. Y. Suppl. 591; Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 161; Anthony *v.* Day, 52 How. Pr. (N. Y.) 35; Holmes *v.* D'Camp, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293; Wilde *v.* Jenkins, 4 Paige (N. Y.) 481.

Pennsylvania.— Kirkpatrick *v.* Turnbull, Add. (Pa.) 259. If defendant has been overcharged and is a person who could not read English, it is proper to leave it to the jury to say whether fraud had been practised on him, and to permit him to correct the account if fraud had been practised. Ruch *v.* Fricke, 28 Pa. St. 241.

South Carolina.— Carrere *v.* Whaley, 17 S. C. 595.

Texas.— Houston, etc., R. Co. *v.* Snelling, 59 Tex. 116.

Utah.— Lawler *v.* Jennings, 18 Utah 35, 55 Pac. 60.

Washington.— Baxter *v.* Waite, 2 Wash. Terr. 228, 6 Pac. 429.

Wisconsin.— Marsh *v.* Case, 30 Wis. 531.

United States.— Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884; Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463; Charlotte Oil, etc., Co. *v.* Hartog, 85 Fed. 150, 42 U. S. App. 716, 29 C. C. A. 56; Baxter *v.* Card, 59 Fed. 165; Thompson *v.* Faussat, Pet. C. C. (U. S.) 182, 23 Fed. Cas. No. 13,954.

England.— Thomas *v.* Hawkes, 8 M. & W. 140; Rose *v.* Savory, 2 Scott 199.

Instruction not harmless.— Where the court charged the jury that a stated account would raise a conclusive presumption of law that the account is correct, and there is no evidence upon which the jury might base an impeachment or falsification in whole or in part of the account, plaintiff cannot invoke the doctrine of error without injury. Rice *v.* Schloss, 90 Ala. 416, 7 So. 802. See also Kent *v.* Highleyman, 17 Mo. App. 9.

Existence of judgment.— Where a party to a settlement of an account admits that a judgment obtained against a third person was properly included in the account as a debit, the person against whom the judgment purported to have been rendered may be introduced to prove that the judgment did not exist, but not to impeach any matter which is concluded by the judgment if it exists, as that he did not owe the money upon which the judgment was founded. Walker *v.* Driver, 7 Ala. 679.

Action by an attorney against client.— In an action for a recovery for professional services by an attorney, the client may have the fairness of the charges investigated, and an instruction upon the conclusive effect of a stated account which ignores the relation of attorney and client is erroneous. Hopkinson *v.* Jones, 28 Ill. App. 409; Gruby *v.* Smith, 13 Ill. App. 43.

75. Kennedy *v.* Goodman, 14 Nebr. 585, 16 N. W. 834; Lawler *v.* Jennings, 18 Utah 35, 55 Pac. 60; Chappedelaine *v.* Dechenaux, 4 Cranch (U. S.) 306, 2 L. ed. 629.

76. Burlingame *v.* Shelmire, 12 N. Y. Suppl. 655.

b. As to Finality and Completeness — (I) *In General.* An account stated or settled is *prima facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of its statement.[77] But this presumption does not extend to a cause of action which had not accrued at the time of the statement of the account.[78] Nor will the parties be concluded by such presumption as to matters which were not contemplated by them or which were not in fact included in the statement or settlement, though they existed at the time, but the presumption will be destroyed when the details of the settlement show that the matter in controversy was not included.[79] Either party may show that the balance found was struck upon a partial, and not a general accounting, and either party may thereafter avail himself of a matter outside of the settlement by showing that it was not included therein.[80]

(II) *Party Rendering Account.* While, as has been shown, a mere rendition of an account, though not necessarily resulting in an account stated, may be pertinent evidence of an admission on the part of the person rendering it,[81] such conduct is capable of explanation, and if any accidental omission or mistake has been made the items so omitted may be proved or the mistake corrected.[82]

77. *Alabama.*— Dowling *v.* Blackman, 70 Ala. 303.

Illinois.— Straubher *v.* Mohler, 80 Ill. 21; Bull *v.* Harris, 31 Ill. 487.

Indiana.— Linville *v.* State, 130 Ind. 210, 29 N. E. 1129.

Louisiana.— Stewart *v.* McCalop, 10 La. Ann. 332.

Michigan.— Bourke *v.* James, 4 Mich. 336.

Missouri.— Pickel *v.* St. Louis Chamber of Commerce Assoc., 10 Mo. App. 191.

Nebraska.— Keller *v.* Keller, 18 Nebr. 366, 25 N. W. 364.

New Hampshire.— Ryan *v.* Rand, 26 N. H. 12.

New York.— Mount *v.* Ellingwood, 2 Thomps. & C. (N. Y.) 527.

North Carolina.— Kennedy *v.* Williamson, 50 N. C. 284.

Oregon.— Normandin *v.* Gratton, 12 Oreg. 505, 8 Pac. 653.

Tennessee.— Shuman *v.* Clater, 3 Head (Tenn.) 445.

Texas.— Barkley *v.* Tarrant County, 53 Tex. 251; Saunders *v.* Brock, 30 Tex. 421; Rowe *v.* Collier, 25 Tex. Suppl. 252; Blackman *v.* Green, 17 Tex. 322; Ables *v.* Austin, 10 Tex. 218.

Virginia.— Johnson *v.* Johnson, 4 Call (Va.) 38.

Wisconsin.— Freeman *v.* Bolzell, 63 Wis. 378, 23 N. W. 708.

Note *prima facie* evidence of settlement of all existing items. Rosencrantz *v.* Mason, 85 Ill. 262; Maybury *v.* Berkery, 102 Mich. 126, 60 N. W. 699; Sherman *v.* McIntyre, 7 Hun (N. Y.) 592; Dutcher *v.* Porter, 63 Barb. (N. Y.) 15; Smith *v.* Holland, 61 Barb. (N. Y.) 333; Proctor *v.* Thompson, 13 Abb. N. Cas. (N. Y.) 340; Robertson *v.* Branch, 3 Sneed (Tenn.) 506.

Mortgage *prima facie* evidence of settlement of existing items. Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358.

78. Dowling *v.* Blackman, 70 Ala. 303.

Evidence of claim subsequent to settlement.— Evidence of claims which do not enter into an account, and which arose subsequently to the statement of it, was held to be inadmissible on an action on an account stated. Hillebrands *v.* Nibbelink, 40 Mich. 646.

79. *Alabama.*— Wharton *v.* Cain, 50 Ala. 408; Mills *v.* Geron, 22 Ala. 669; Drinkwater *v.* Holliday, 11 Ala. 134.

Dakota.— Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607.

Illinois.— Straubher *v.* Mohler, 80 Ill. 21; McDavid *v.* Ellis, 78 Ill. App. 381.

Nebraska.—Clarke *v.* Kelsey, 41 Nebr. 766, 60 N. W. 138.

New Hampshire.— Ryan *v.* Rand, 26 N. H. 12.

New York.— Taylor *v.* Thwing, 21 Misc. (N. Y.) 76, 46 N. Y. Suppl. 892; Davis *v.* Gallagher, 55 Hun (N. Y.) 593, 9 N. Y. Suppl. 11; Smith *v.* Holland, 61 Barb. (N. Y.) 333.

Oregon.— Normandin *v.* Gratton, 12 Oreg. 505, 8 Pac. 653.

Vermont.— Nichols *v.* Scott, 12 Vt. 47.

United States.—Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463; Burrill *v.* Crossman, 91 Fed. 543, 62 U. S. App. 368, 33 C. C. A. 663.

80. *Alabama.*—Mills *v.* Geron, 22 Ala. 669.

Dakota.— Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607.

Massachusetts.— Boston, etc., R. Corp. *v.* Nashua, etc., R. Corp., 157 Mass. 258, 31 N. E. 1067.

Nebraska.— Clarke *v.* Kelsey, 41 Nebr. 766, 60 N. W. 138.

New Hampshire.— Ryan *v.* Rand, 26 N. H. 12.

New York.— Champion *v.* Joslyn, 44 N. Y. 653.

Vermont.— Nichols *v.* Scott, 12 Vt. 47.

81. See *supra*, II, B, 2, (II).

82. Pavie *v.* Noyrel, 5 Mart. N. S. (La.) 92; Fox *v.* Sturm, 21 Tex. 406.

Breach of warranty.— Where one renders an account under a mistake of facts, it is held that the account will not bind him as an account stated, and when sued for the balance thereby shown he may set up a mistake which consists in ignorance on his part of the bad order of the goods delivered, which was a breach of warranty under the contract

c. Qualification of Rule. Rather as a qualifying clause of the rule itself than as an exception thereto, it should be added that the right to correct an account notwithstanding it has become an account stated is confined to cases in which no element of estoppel has intervened,[83] or where there is an obligatory agreement between the parties, as upon a settlement and mutual compromises.[84]

d. Time for Objection Limited by Agreement. If, on the settlement of accounts, the parties agree to limit the time within which the correction of mistakes or omissions shall be made, evidence of such mistakes may be excluded unless it is shown that the claim for its allowance was made within the time agreed upon by the parties.[85]

e. Assignee. Where an account has been settled between the parties, the right to impeach it for a mistake therein, after acquiescence by the original parties, cannot be assigned.[86] On the other hand it is held that where a claim is not stale or based upon an account stated the assignee may impeach it for a mutual mistake.[87]

f. Conclusiveness Except for Fraud or Mistake — (1) *In General.* But while an account stated or settlement does not operate as an estoppel, it is nevertheless the rule that a settled or stated account is conclusive in the absence of fraud, mistake, or error, and the burden to impeach it by clear and convincing testimony rests upon him who on such grounds would escape its binding force.[88]

under which the goods were to be delivered. Polhemus *v.* Heiman, 50 Cal. 438.

83. *Alabama.*— Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

Indiana.— Higham *v.* Harris, 108 Ind. 246, 8 N. E. 255.

Kentucky.— Phelps *v.* Plum, (Ky. 1895) 32 S. W. 753.

Minnesota.— Wharton *v.* Anderson, 28 Minn. 301, 9 N. W. 860.

New York.— Comer *v.* Mackey, 73 Hun (N. Y.) 236, 25 N. Y. Suppl. 1023.

Application of estoppel.— Where several employees of the same employer, engaged for the purpose of soliciting shipments, were to settle among themselves what shipments each was to be credited with, and an account showing the amount due to one of them for commissions was delivered to him, and he accepted and retained it for five years without objection, it was held that such acquiescence should be considered as conclusive evidence of the correctness of the account when any other effect given to it would be to the prejudice of the employer, who might have settled upon a proper basis with the other agents if timely objection to the account had been made. Phelps *v.* Plum, (Ky. 1895) 32 S. W. 753. So where an agent attempted to use his position to extort money from his principal, it was held that he could not complain of a recovery against him of the amount shown to be due the principal by an account rendered by the agent, notwithstanding a portion of the money shown by the account rendered to have come into the agent's hands for the principal had not in fact been received by the agent. Johnston *v.* Thumm, (Pa. 1887) 7 Atl. 739.

Balance struck pending hearing before referee.— Where a balance was struck by the parties after the hearing before the referee had begun, and was reported to the referee and entered on the minutes, it was held that the settlement could not be opened, but concluded the parties as an admission in the course of a cause for the purpose of dispensing with further proof. Clark *v.* Fairchild, 22 Wend. (N. Y.) 576.

84. Wharton *v.* Anderson, 28 Minn. 301, 9 N. W. 860; Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Lockwood *v.* Thorne, 18 N. Y. 285; Austin *v.* Wilson, 11 N. Y. Suppl. 565; Aylsworth *v.* Gallagher, 4 N. Y. Suppl. 853; Kock *v.* Bonitz, 4 Daly (N. Y.) 117; Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 35 C. C. A. 120.

See Accord and Satisfaction; Compromise and Settlement.

85. Vanderveer *v.* Statesir, 39 N. J. L. 593.

86. Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

87. Lawler *v.* Jennings, 18 Utah 35, 55 Pac. 60.

88. *Alabama.*— Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Sloan *v.* Guice, 77 Ala. 394; Walker *v.* Driver, 7 Ala. 679; Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60; Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454.

Arkansas.— Lanier *v.* Union Mortg., etc., Co., 64 Ark. 39, 40 S. W. 466; Moscowitz *v.* Lemp, (Ark. 1890) 12 S. W. 781; Lawrence *v.* Ellsworth, 41 Ark. 502.

California.— Hendy *v.* March, 75 Cal. 566, 17 Pac. 702; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

District of Columbia.— Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382.

Georgia.— Turner *v.* Pearson, 93 Ga. 515, 21 S. E. 104.

Illinois.— Sutphen *v.* Cushman, 35 Ill. 186; Gottfried Brewing Co. *v.* Szarkowski, 79 Ill. App. 583; McDavid *v.* Ellis, 78 Ill. App. 381; Concord Apartment House Co. *v.* Alaska Refrigerator Co., 78 Ill. App. 682; Pick *v.* Slimmer, 70 Ill. App. 358; Hodge *v.* Boynton, 16 Ill. App. 524.

Where a settlement of accounts is deliberately made with no intention to defraud the creditor, such creditor will not be in a position to have the settlement set aside, except upon the clearest proof of fraud between the parties thereto.[89]

(II) *Assimilated to Right of Recovery Back.* In determining whether an account stated can be impeached, the case is put upon the same footing as if the money had been paid. Such payment would be conclusive subject to the right to recover it back on a failure of consideration, and so, on the statement of an account, if the case is one in which a payment, if made, could have been recovered back, the facts which show the failure of consideration may be proved.[90]

Indiana.— Linville *v.* State, 130 Ind. 210, 29 N. E. 1129; Bouslog *v.* Garrett, 39 Ind. 338.

Iowa.— Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220; Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

Louisiana.— Stewart *v.* McCalop, 10 La. Ann. 332.

Maine.— Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

Maryland.— Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Williams *v.* Savage Mfg. Co., 1 Md. Ch. 306; Gover *v.* Hall, 3 Harr. & J. (Md.) 43; Stiles *v.* Brown, 1 Gill (Md.) 350.

Massachusetts.— Boston, etc., R. Corp. *v.* Nashua, etc., R. Corp., 157 Mass. 258, 31 N. E. 1067.

Michigan.— Eccard *v.* Brush, 48 Mich. 3, 11 N. W. 756.

Minnesota.— Christofferson *v.* Howe, 57 Minn. 67, 58 N. W. 830.

Mississippi.— Dickerson *v.* Thomas, 67 Miss. 777, 7 So. 503.

Missouri.— St. Louis Gas Light Co. *v.* St. Louis, 84 Mo. 202; Kronenberger *v.* Binz, 56 Mo. 121; Carroll *v.* Paul, 16 Mo. 226; Gibson *v.* Smith, 77 Mo. App. 233; Marmon *v.* Waller, 53 Mo. App. 610; Pickel *v.* St. Louis Chamber of Commerce Assoc., 10 Mo. App. 191.

Nebraska.— McKinster *v.* Hitchcock, 19 Nebr. 100, 26 N. W. 705; Keller *v.* Keller, 18 Nebr. 366, 25 N. W. 364; Kennedy *v.* Goodman, 14 Nebr. 585, 16 N. W. 834.

New Jersey.— Brands *v.* Depue, (N. J. 1890) 20 Atl. 206; Somers *v.* Cresse, (N. J. 1888) 13 Atl. 23.

New York.— Jugla *v.* Trouttet, 120 N. Y. 21, 23 N. E. 1066; Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. 861; Harley *v.* Eleventh Ward Bank, 76 N. Y. 618; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Chubbuck *v.* Vernam, 42 N. Y. 432; Lockwood *v.* Thorne, 18 N. Y. 285; Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Suppl. 154; Campbell *v.* Campbell, 16 N. Y. Suppl. 165; Kingsley *v.* Melcher, 56 Hun (N. Y.) 547, 10 N. Y. Suppl. 63; Beach *v.* Kidder, 8 N. Y. Suppl. 587; Martine *v.* Huyler, 8 N. Y. Suppl. 734; Weber *v.* Bridgeman, 12 N. Y. St. 622; Gilchrist *v.* Brooklyn Grocers' Mfg. Assoc., 66 Barb. (N. Y.) 390; McIntyre *v.* Warren, 3 Abb. Dec. (N. Y.) 99; Herrick *v.* Ames, 1 Keyes (N. Y.) 190; Philips *v.* Belden, 2 Edw. (N. Y.) 1; White *v.* Whiting, 8 Daly (N. Y.) 23; Burke *v.* Isham, (N. Y. 1871) 3 Alb. L. J. 209.

North Carolina.— Gray *v.* Lewis, 94 N. C. 392; Gooch *v.* Vaughan, 92 N. C. 610; Hawkins *v.* Long, 74 N. C. 781; Costin *v.* Baxter, 41 N. C. 197.

North Dakota.— Montgomery *v.* Fritz, 7 N. D. 348, 75 N. W. 266.

Ohio.— Dewey *v.* Sloan, 11 Cinc. L. Bul. 102, 9 Ohio Dec. (Reprint) 151.

Oregon.— Fisk *v.* Basche, 31 Oreg. 178, 49 Pac. 981; Hoyt *v.* Clarkson, 23 Oreg. 51, 31 Pac. 198.

Pennsylvania.—Varner's Appeal, (Pa. 1888) 16 Atl. 98; Shillingford *v.* Good, 95 Pa. St. 25; Ruch *v.* Fricke, 28 Pa. St. 241; Emmons *v.* Stahlnecker, 11 Pa. St. 366; Tennent *v.* Dewees, 7 Pa. St. 305; Shirk's Appeal, 3 Brewst. (Pa.) 119.

Rhode Island.— Seamans *v.* Burt, 11 R. I. 320.

Texas.— McKay *v.* Overton, 65 Tex. 82.

Vermont.— Hodges *v.* Hosford, 17 Vt. 615.

Virginia.— Neff *v.* Wooding, 83 Va. 432, 2 S. E. 731.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

Wisconsin.— Hawley *v.* Harran, 79 Wis. 379, 48 N. W. 676; Orr *v.* Le Clair, 55 Wis. 93, 12 N. W. 356; Hoyt *v.* McLaughlin, 52 Wis. 280, 8 N. W. 889; Martin *v.* Beckwith, 4 Wis. 219.

United States.— Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319; Hager *v.* Thomson, 1 Black (U. S.) 80, 17 L. ed. 41; Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463; Freeland *v.* Heron, 7 Cranch (U. S.) 147, 3 L. ed. 297; Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 57 U. S. App. 546, 30 C. C. A. 260; Porter *v.* Price, 80 Fed. 655, 49 U. S. App. 295, 26 C. C. A. 70; Marye *v.* Strouse, 5 Fed. 483; Brydie *v.* Miller, 1 Brock. (U. S.) 147, 4 Fed. Cas. No. 2,071; Harden *v.* Gordon, 2 Mason (U. S.) 541, 11 Fed. Cas. No. 6,047.

England.— Arthur *v.* Dartch, 9 Jur. 118; Pit *v.* Cholmondeley, 2 Ves. 565; Townsend *v.* Trench, 2 Molloy 242.

See also *infra*, II, G, 5, c, (II).

89. Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893.

90. *Alabama.*— Christian *v.* Niagara F. Ins. Co., 101 Ala. 634, 14 So. 374.

Iowa.— Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

New York.— Conville *v.* Shook, 144 N. Y. 686, 39 N. E. 405.

Pennsylvania.— Miller *v.* Probst, Add. (Pa.) 344.

England.— Wilson *v.* Wilson, 14 C. B. 616; Laycock *v.* Pickles, 4 B. & S. 497.

(III) *Application and Extent of Rule*—(A) *In General.* The presumption of conclusiveness which attaches to an account stated is one of evidence, and the extent of the application of the foregoing principles cannot be resolved into the statement of an unalterable rule which will cover all cases. Thus mere acquiescence after the rendition of an account may be sufficient to bind one as upon an account stated,[91] and while this species of proof is said to be far from conclusive, though sufficient in the absence of contradictory evidence,[92] yet the question is one merely of evidence, and at most an express admission is but stronger proof of correctness requiring stronger proof of mistake,[93] and payment of the balance ascertained is but stronger proof than these requiring perhaps still stronger proof in rebuttal.[94] In neither case, however, would the parties be precluded from giving evidence to impeach the account in the absence of an intervening estoppel or obligatory agreement, the force of the admission and the strength of the evidence necessary to overcome it always depending upon the circumstances of each case.[95]

(B) *Character of Mistake or Error*—(1) In General. In many of the cases the general rule as to the effect of an account stated seems to be applied merely to the extent of dispensing with other proof of the correctness of the items of the account, shifting the burden upon the other party if he wishes to show that it is incorrect,[96] though by the mere statement of the rule thus broadly it is not always intended that it should have such unqualified effect.[97] This seems to be the spirit of the rule, however, where the assent is to be implied from silence after the rendition of an account,[98] though it has been intimated that the rule is to be applied alike, whether the admission is express or implied.[99] On the other hand it is held that the defense in an action on a stated account must relate to the account stated, and not to matters of anterior liability, except in so far as such matters may be the foundation for the substantial defense impeaching the settlement for fraud or mistake.[1] Instances of the application of this rule are given in the notes, attention being called, however, to the statement hereinbefore made, that so far as the strength of the particular evidence is concerned each case must depend upon its own circumstances.[2]

91. See *supra*, II, B, 2, l, (II).

92. Quincey *v.* White, 63 N. Y. 370.

93. Quincey *v.* White, 63 N. Y. 370.

94. Sloan *v.* Guice, 77 Ala. 394; Nolte *v.* Leary, 14 Mo. App. 598; Lockwood *v.* Thorne, 18 N. Y. 285.

95. Lockwood *v.* Thorne, 18 N. Y. 285; Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 35 C. C. A. 120; Charlotte Oil, etc., Co. *v.* Hartog, 85 Fed. 150, 42 U. S. App. 716, 29 C. C. A. 56.

96. Sloan *v.* Guice, 77 Ala. 394; Walker *v.* Steel, 9 Colo. 388, 12 Pac. 423; St. Louis Lager Beer Bottling Co. *v.* Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 800; Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791; McKinster *v.* Hitchcock, 19 Nebr. 100, 26 N. W. 705.

97. Higham *v.* Harris, 108 Ind. 246, 8 N. E. 255.

98. Massachusetts Mut. L. Ins. Co. *v.* Carpenter, 49 N. Y. 668; Freeland *v.* Heron, 7 Cranch (U. S.) 147, 3 L. ed. 297, and see *supra*, II, B, 2, l, (II).

99. Sloan *v.* Guice, 77 Ala. 394.

1. *California.*— Coffee *v.* Williams, 103 Cal. 550, 37 Pac. 504.

District of Columbia.— Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382.

Illinois.— Gottfried Brewing Co. *v.* Szarkowski, 79 Ill. App. 583.

Iowa.— Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

Missouri.— Koegel *v.* Givens, 79 Mo. 77.

Pennsylvania.— McClelland *v.* West, 70 Pa. St. 183.

Wisconsin.— Hawley *v.* Harran, 79 Wis. 379, 48 N. W. 676.

Character of mistake illustrated.— Under a contract to furnish a specified number of barrel-headings, to be counted by a man to be furnished by one of the parties as they were piled on his land from time to time, in order to obtain an approximate estimate of the quantity piled and the amount of advances to the other party under the contract, an inspection and final count to be made by another person at another place to which the headings were to be shipped, and the property in the headings to pass under the first delivery on the party's land, in an action to recover a balance alleged to be due on account of the price of these headings, the count of the inspector is subject to impeachment for fraud or mistake, the mistake being not a mere alleged error of judgment, but one of fact which prevented the proper exercise of his judgment. Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319.

2. Failure of consideration by breach of warranty.— Matters of contract growing out of a sale are merged in a stated account, and where deceit is not shown the question of failure of consideration by reason of a breach

(2) Error by Accident or Design. It does not matter whether the error in the accounting occurred by accident or design in order that it may be available as against the conclusiveness of the account stated.[3]

(3) Mistake Mutual or on One Side. In order to impeach an account stated for errors or mistake, it is not necessary that they should be mutual.[4]

(4) Error Not Affecting Result. A stated account or settlement will not be opened for an error which does not affect the result.[5]

(c) *Ratification of Acts of Agent.* As between principal and agent, as where accounts of sales are rendered by a commission-merchant to his principal, acquiescence in the rendition of accounts may amount to a ratification of acts

of implied warranty cannot be considered in an action on a stated account. Gem Chemical Co. *v.* Youngblood, (S. C. 1900) 36 S. E. 437.

Assent with full knowledge of facts.— Where a statement of sales is sent by a factor to his principal, in which the gross price received on sales is not set out, but only the net price after deducting charges of cartage, demurrage, and commissions, and the principal accepted such statement with knowledge of the manner in which it was made, he is bound thereby and cannot afterward claim anything because of the form in which the account was made out. Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220. Where a bank-book is balanced several times after an objectionable item appeared in a former balance, and the bank has full knowledge of the facts when such subsequent balances are made, it will be bound. Harley *v.* Eleventh Ward Bank, 76 N. Y. 618. Where a customer of a bank receives his pass-book with full knowledge that charges for interest are made therein, and no objection is raised to such charges, they cannot be impeached any more than if they had been paid and an action had been brought to recover them. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263. Where full opportunity is given to a party to satisfy himself as to the correctness of an account, and he has full knowledge of any objectionable features therein, he will not afterward be heard to impeach the account for those objections which were so known to him. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Flower *v.* O'Bannon, 43 La. Ann. 1042, 10 So. 376; Allen-West Commission Co. *v.* Patillo, 90 Fed. 628, 61 U. S. App. 94, 33 C. C. A. 194. Where there is a settlement for work done in full knowledge of all the facts, it is binding except for fraud or mistake. Linville *v.* State, 130 Ind. 210, 29 N. E. 1129. Where defendant had contracted to purchase hides from plaintiff, to pay him the highest market price therefor and to give him an extra price for hides prepared in a certain way, both parties being possessed of the same knowledge and the same means of informing themselves of the prices, which defendant, by his statements, asserted to be the highest market prices, plaintiff could not rely on the assumption that defendant was paying him the highest market price without examining his weekly statement, and afterward, on the ground of mutual mistake, claim that the statements were incorrect. Stern *v.* Ladew, 47 N. Y. App. Div. 331, 62 N. Y. Suppl. 267. And so, where the balance is paid under the circumstances last mentioned, defendant cannot afterward claim any allowance on the ground that the quantity of produce furnished to him was less than that charged in the account. Lanier *v.* Union Mortg., etc., Co., 64 Ark. 39, 40 S. W. 466; Gilchrist *v.* Brooklyn Grocers' Mfg. Assoc., 66 Barb. (N. Y.) 390.

Execution of note with full knowledge.— Where a debtor executes a note for the balance ascertained to be due, having full knowledge of all the facts, he will be concluded as to the propriety of the original items. Turner *v.* Pearson, 93 Ga. 515, 21 S. E. 104; Audleur *v.* Kuffel, 71 Ind. 543; Davis *v.* Fowler, 20 N. Y. App. Div. 633, 47 N. Y. Suppl. 221. Where, after the completion of a building, the owner, upon an accounting, executed his note for the balance shown to be due without claiming damages for delay, he cannot afterward set up damages resulting from delay. Pickel *v.* St. Louis Chamber of Commerce Assoc., 80 Mo. 65. Where an employer gave to an employee credit for his salary during his illness, and upon a subsequent settlement executed a note for a part of the balance shown by the employer's account to be due, including credits for the salary during the sickness of the employee, which note was subsequently paid, and some time thereafter the employee was discharged, in an action thereafter on a promissory note executed by the employer, brought by one claiming through the employee, who was the payee in the note, the maker of the note cannot claim a set-off for the time of the employee's illness included in the settlement. Prussing Vinegar Co. *v.* Meyer, 26 Ill. App. 564.

3. Eddie *v.* Eddie, 61 Ill. 134.

4. Eddie *v.* Eddie, 61 Ill. 134; Conville *v.* Shook, 144 N. Y. 686, 39 N. E. 405; Sedgwick *v.* Macy, 21 N. Y. App. Div. 1, 49 N. Y. Suppl. 154.

Accord and satisfaction distinguished.—See Stevens *v.* Barss, 74 Hun (N. Y.) 388, 26 N. Y. Suppl. 461.

5. Wilson *v.* Frisbie, 57 Ga. 269; Linville *v.* State, 130 Ind. 210, 29 N. E. 1129.

Clerical error.— Jaques *v.* Hulit, 16 N. J. L. 38, holding that a clerical error in footing up an account or striking a balance does not change its legal effect as an account stated, but the real balance is ascertainable by a correct addition and subtraction.

done in violation of instructions, under which circumstances the principal will be precluded from recovery for any alleged violations of instructions in transactions covered by such accounts of sales.[6]

(D) *Forged Checks in Bank-Book Balance.* The writing up of a bank pass-book with a return of vouchers or a statement of account is not conclusive upon the parties so as to preclude an ascertainment of the true state of the account in a case where checks are included in the balance which are subsequently discovered to have been forged.[7] But where the depositor is under a duty, from the usages of business or otherwise, to examine the account within a reasonable time and to give timely notice of any objections he may have, an omission to perform this duty and leaving the bank to rely upon the presumption that the account is acquiesced in, whereby it is misled to its prejudice, will operate to make the account conclusive.[8]

(E) *Illegality.* Where an account stated is based on illegal transactions it may be impeached by showing such illegality,[9] and a debtor is not estopped from showing illegality in particular items of an account stated or by reason of his having retained the account rendered without objection.[10] Therefore it is held that an action upon a stated account will fall if one of several claims of indefinite amount included in it must be omitted for illegality.[11] The burden of proof is upon the party alleging such illegality.[12]

(F) *Where Existence of Account Stated Is in Issue.* Facts may be shown which tend to prove the non-existence of a stated account.[13]

(G) *Settlement and Payment.* It has been held that where, upon the statement of an account, there is an actual settlement or payment of the balance shown, it cannot be avoided for mistakes in the items of the account.[14] Many of the cases, however, which support the rule permitting the impeachment of a stated account for fraud or mistake do not recognize this unqualified restriction,[15] in

6. Woodward *v.* Suydam, 11 Ohio 360. See PRINCIPAL AND AGENT.

7. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Shipman *v.* State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; August *v.* New York Fourth Nat. Bank, 1 N. Y. Suppl. 139; Welsh *v.* German American Bank, 42 N. Y. Super. Ct. 462; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229.

Burden of showing forgery.— In an action against a bank to recover an alleged balance the burden of showing that checks included in making up the balance in the bank-book were forgeries is on plaintiff. August *v.* New York Fourth Nat. Bank, 1 N. Y. Suppl. 139. The presumption that the account as balanced is correct may be rebutted by showing error or fraud which was not discoverable by the exercise of reasonable care, or that the circumstances were not such as to excite suspicion. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

8. Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. ed. 811. To the same point, Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335; Weinstein *v.* National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Effect of negligence.— Further, for the effect of negligence in examining such accounts in connection with the question whether or not there was actual injury, see BANKS AND BANKING.

Question for jury.— In an action by depositor against a bank, the question of ratification of account rendered by the bank in a pass-book and vouchers returned is for the jury. Dana *v.* National Bank, 132 Mass. 156.

9. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217; Wakefield *v.* Farnum, 170 Mass. 422, 49 N. E. 640; Dunbar *v.* Johnson, 108 Mass. 519; State *v.* Hoeflinger, 31 Wis. 257; Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605; Kennedy *v.* Broun, 13 C. B. N. S. 677.

10. Keane *v.* Branden, 12 La. Ann. 20; Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217; Jorgensen *v.* Kingsley, (Nebr. 1900) 82 N. W. 104.

11. Kennedy *v.* Broun, 13 C. B. N. S. 677.

12. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

13. See *supra*, II, B, 7, b, (IX).

14. Hawley *v.* Harran, 79 Wis. 379, 48 N. W. 676, wherein the plaintiff, in order to recover a balance of an account which defendant had promised to pay, offered proof only of the presentation of the account and payment of a part and a promise to pay the balance, and it was said that this was more than a mere stated account and could be defeated only by proof that the promise was induced by fraud. Knox *v.* Whalley, 1 Esp. 159.

15. Sloan *v.* Guice, 77 Ala. 394; Cunningham *v.* Sublette, 4 Mo. 224; Conville *v.* Shook, 144 N. Y. 686, 39 N. E. 405; Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161; Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319; Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 35 C. C. A. 120; Thompson *v.* Faussat, Pet. C. C. (U. S.) 182, 23 Fed. Cas. No. 13,954.

addition to which it is not consonant with the principle upon which money may be recovered back upon facts showing a failure of consideration,[16] and should perhaps be referred to and controlled by other principles, such as those which govern in the case of an accord and satisfaction or a compromise and settlement.[17] But on the other hand, where parties, instead of predicating their settlement upon a direct examination and an exact statement of all the items between them, intend rather to adopt a basis which they believe will be just and right, and to waive and release all errors, a settlement fairly and deliberately made will be held binding upon the parties and all others fully advised of the facts, and will be upheld notwithstanding immaterial error.[18]

5. Opening, Surcharging, and Falsifying — a. Terms Distinguished. To surcharge means to show the omission for which credit ought to be given, and to falsify means to show the insertion of a wrong charge. This is the distinction between surcharging and falsifying,[19] and these are both distinguished from the opening of an account or a general accounting in that upon a general accounting the whole of the account may be unraveled, while upon permission to surcharge or falsify the account stands as *prima facie* correct, and the party alleging mistakes must prove them.[20]

b. At Law or Collateral Impeachment — (I) *In General.* While a suit to open, surcharge, or falsify an account is one proper for equitable jurisdiction,[21] defendant can reduce the amount of a stated account showing that plaintiff was then indebted to him upon a subsisting account which, though due, was not liquidated at the time,[22] and the rule seems to be established that a stated account need not necessarily be impeached by a direct suit brought for that purpose. It may be impeached either at law or in equity whenever it is brought forward as a defense or cause of action, for fraud or mistake,[23] unless upon an accounting an

16. See *infra*, II, G, 4, f, (II).

17. The following cases will illustrate the application of the stricter rule of conclusiveness where there has been a dispute, or doubt as to the rights of the parties, or when elements of an accord and satisfaction intervene.

Arkansas.— Southwestern Tel., etc., Co. *v.* Benson, 63 Ark. 283, 38 S. W. 341.

Georgia.— Hamilton *v.* Stewart, 108 Ga. 472, 34 S. E. 123.

New York.— Davenport *v.* Wheeler, 7 Cow. (N. Y.) 231; Schuyler *v.* Ross, 13 N. Y. Suppl. 944.

Utah.— Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

United States.—Lawrence *v.* Schuylkill Nav. Co., 4 Wash. (U. S.) 562, 15 Fed. Cas. No. 8,143; Harden *v.* Gordon, 2 Mason (U. S.) 541, 11 Fed. Cas. No. 6,047; Thompson *v.* Faussat, Pet. C. C. (U. S.) 182, 23 Fed. Cas. No. 13,954. See Accord and Satisfaction; Compromise and Settlement.

18. Hamilton Woollen Co. *v.* Goodrich, 6 Allen (Mass.) 191.

Restatement by parties.— When parties have once stated an account they may, by mutual consent, reopen and restate the account. Horn *v.* St. Paul, etc., R. Co., 37 Minn. 375, 34 N. W. 593, in which case it was held that the payment of the balance on the second statement of an account would constitute a full settlement, although the amount was less than that fixed in the first statement. See Accord and Satisfaction; Compromise and Settlement.

19. Liscomb *v.* Agate, 67 Hun (N. Y.) 388, 22 N. Y. Suppl. 126; Philips *v.* Belden, 2 Edw. (N. Y.) 1; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Bailey *v.* Westcott, 6 Phila. (Pa.) 525, 25 Leg. Int. (Pa.) 173; Rehill *v.* McTague, 114 Pa. St. 82, 7 Atl. 224, 60 Am. Rep. 341; Pit *v.* Cholmondeley, 2 Ves. 565.

20. Cowan *v.* Jones, 27 Ala. 317, under the code; Philips *v.* Belden, 2 Edw. (N. Y.) 1.

21. Houston *v.* Dalton, 70 N. C. 662; Murphy *v.* Harrison, 65 N. C. 246. In Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181, a stated account was held to be conclusive until leave is given to surcharge, falsify, or open it, which is obtained by a bill in chancery for that purpose.

Equitable counterclaim.— In a suit on a note given in settlement of a balance found due upon an accounting, a mistake may be shown by way of counterclaim, under the court's equitable jurisdiction. Garrett *v.* Love, 89 N. C. 205.

22. See *infra*, II, G, 4, b.

23. *Alabama.*— Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335.

Colorado.— Colorado Fuel, etc., Co. *v.* Chappell, 12 Colo. App. 385, 55 Pac. 606.

Connecticut.— Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591.

Illinois.— Peddicord *v.* Connard, 85 Ill. 102; Hopkinson *v.* Jones, 28 Ill. App. 409; Gruby *v.* Smith, 13 Ill. App. 43; Thompson *v.* Fullinwider, 5 Ill. App. 551.

Kansas.— Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

instrument is executed which at law conclusively imports a sufficient consideration.[24] But it has been held that an action to recover damages alleged to have resulted from the misconduct of an accounting party presents no issue under which the presumption of the accuracy of a stated account can be destroyed.[25]

(II) *Settlement.* Even where a promissory note is given for an ascertained balance, the account may be impeached in an action by and between the original parties.[26] So, when items are omitted, the stated or settled account may be impeached by plaintiff suing for the correct balance,[27] and where the balance of a stated account is settled or paid, or where, upon accounting between parties, an item is omitted by mistake, the account may be impeached in a suit to recover the omitted item[28]

Louisiana.— Flower *v.* Millaudon, 19 La. 195.

Missouri.— Carroll *v.* Paul, 16 Mo. 226.

Nebraska.— Kennedy *v.* Goodman, 14 Nebr. 585, 16 N. W. 834.

New York.— Conville *v.* Shook, 144 N. Y. 686, 39 N. E. 405; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Frankel *v.* Wathen, 58 Hun (N. Y.) 543, 12 N. Y. Suppl. 591; Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289.

Ohio.— Dewey *v.* Sloan, 11 Cinc. L. Bul. 102, 9 Ohio Dec. (Reprint) 151.

Wisconsin.— Marsh *v.* Case, 30 Wis. 531.

United States.— Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463.

England.— Daniell *v.* Sinclair, 6 App. Cas. 181; Rose *v.* Savory, 2 Scott 199; Thomas *v.* Hawkes, 8 M. & W. 140; Wilson *v.* Wilson, 14 C. B. 616.

Accounts between bank and depositor.— Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335; Dana *v.* National Bank, 132 Mass. 156; McKeen *v.* Boatmen's Bank, 74 Mo. App. 281; Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Welsh *v.* German American Bank, 42 N. Y. Super. Ct. 462.

Illegal transactions.— Accounts stated on illegal transactions attacked by plea in an action on stated account. Kennedy *v.* Broun, 13 C. B. N. S. 677.

On mandamus.— Upon an application for a mandamus on behalf of the state to compel the proper officers of the county to apportion, collect, and pay over to the state a certain sum of money, statements rendered annually by the proper officer of the state to the proper officer of the county, and retained by the latter without objection, and showing the amount due to the state, may be impeached for fraud or mistake. Stevens *v.* Saginaw County, 62 Mich. 579, 29 N. W. 492.

24. Gray *v.* Washington, Cooke (Tenn.) 320, holding that where there is a settlement and bond executed, a suit in equity is proper because a defense at law would not be available. But where both law and equity are administered in the same civil action, mistake or fraud in the consideration of such instruments may be set up when they are sued on. Hall *v.* Guilford County, 74 N. C. 130. And so in California it was held, under the practice then prevailing, that in an action to recover under a sealed deed of settlement defendant may impeach the settlement for fraud in its procurement. Hopkins *v.* Beard, 6 Cal. 664. See generally, for effect of seal, SEALS. And see also, for effect of bonds and releases, BONDS; RELEASES.

25. Beach *v.* Kidder, 8 N. Y. Suppl. 587, which was an action against stockbrokers for damages alleged to have resulted from defendants' misconduct in buying and selling stock and for money belonging to plaintiff in defendants' hands.

26. *Kansas.*— Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

Louisiana.— Oglesby *v.* Renwick, 26 La. Ann. 668; Waters *v.* Briscoe, 11 La. Ann. 639; Green *v.* Glasscock, 9 Rob. (La.) 119; Flower *v.* Millaudon, 19 La. 195.

Minnesota.— Wharton *v.* Anderson, 28 Minn. 301, 9 N. W. 860.

Nebraska.— Keller *v.* Keller, 18 Nebr. 366, 25 N. W. 364; Kennedy *v.* Goodman, 14 Nebr. 585, 16 N. W. 834.

New York.— Bergen *v.* Hitchings, 22 N. Y. App. Div. 395, 48 N. Y. Suppl. 96.

See BILLS AND NOTES.

Equitable defense.— The doctrine that the execution of a promissory note for a balance would stop all subsequent inquiry into the correctness of the account would have the effect to abolish all equitable defenses upon notes or accounts stated. Waters *v.* Briscoe, 11 La. Ann. 639.

27. *Alabama.*— Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335.

Kansas.— Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

Louisiana.— Pavie *v.* Noyrel, 5 Mart. N. S. (La.) 92.

Maine.— Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

New York.— Ract *v.* Duviard-Dime, 51 Hun (N. Y.) 639, 4 N. Y. Suppl. 156.

United States.— Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319.

28. *Indiana.*— Armstrong Furniture Co. *v.* Kosure, 66 Ind. 545.

Massachusetts.— Boston, etc., R. Corp. *v.* Nashua, etc., R. Corp., 157 Mass. 258, 31 N. E. 1067.

Minnesota.— Madigan *v.* De Graff, 17 Minn. 52.

New York.— Stevens *v.* Barss, 74 Hun (N. Y.) 388, 26 N. Y. Suppl. 461.

Pennsylvania.— Emmons *v.* Stahlnecker, 11 Pa. St. 366.

In Connecticut it was held that where an article was omitted by mistake in a settle-

or items paid by mistake or fraud.[29] But accounts will not be opened in an action to recover back, in the absence of clear and convincing evidence of mistake and after so long a lapse of time that acquiescence will be presumed.[30]

(III) *Voluntary Payment.* Where charges are made and voluntarily paid in a statement and settlement of an account with knowledge of the facts, they cannot be recovered back.[31]

(IV) *Direct Impeachment by Complaint.* The impeachment of an account stated is sometimes sought by an action directly to impeach and set it aside and for a recovery of the proper balance or items omitted,[32] partaking of the nature of a bill in equity to open, surcharge, and falsify an account or settlement.[33]

(V) *Pleading*—(A) *In General.* Where a plaintiff in an action involving an account does not allege a settlement, but denies that there was a settlement as alleged by defendant, the only issue is whether there was a final settlement, and specific frauds, errors, etc., need not be alleged.[34] And so, where a creditor by mistake accepts a note in settlement for a smaller balance than is actually due, it is held that he may sue on the original account, and may show, under a general

ment of accounts it could not be subsequently recovered in an action of book-debt. Punderson *v.* Shaw, Kirby (Conn.) 150; Remington *v.* Noble, 19 Conn. 383. But in Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128, it was held that an action of general *indebitatus assumpsit* would be sustained to recover for an item omitted by mistake in such a settlement, and that the declaration need not specifically point out such mistake. In Remington *v.* Noble, 19 Conn. 383, it was held that it was not the intention of the court in Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128, *supra*, to supersede in such cases the action of assumpsit, but only to render the pleadings in assumpsit simple and concise.

Receipt.— A receipt does not necessarily preclude parol testimony that a greater sum was due, which remains unpaid. The general rule is that where a court of equity would set aside the contract as for fraud or mistake, such matter may be shown to destroy the effect of the receipt. Fuller *v.* Crittenden, 9 Conn. 401, 23 Am. Dec. 364; Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; Gibson *v.* Hanna, 12 Mo. 162; Harden *v.* Gordon, 2 Mason 541, 11 Fed. Cas. No. 6,047. See, generally, EVIDENCE.

Items barred.— But where the mutual accounts are itemized and a balance is struck and paid, the items can no longer be regarded as unsettled within the meaning of the statute of limitations, although one item was omitted by mistake; and if after the statute of limitations has barred such item, and, upon discovering the omission, action is brought on the entire account to recover the real balance, the recovery will be barred. Lancey *v.* Maine Cent. R. Co., 72 Me. 34.

29. Hanson *v.* Jones, 20 Mo. App. 595. Where, in an action by an employee to recover money which plaintiffs claimed they overpaid him in refunding his traveling expenses upon reports presented by him, which plaintiffs alleged to have been false, the admission by defendant of items of debit in a bill of particulars filed by plaintiff, which admission is that such items had gone into an account stated, is not sufficient to justify a recovery by plaintiff where there was no legal evidence of fraud. Linn *v.* Gilman, 46 Mich. 628, 10 N. W. 46.

Memoranda used on settlement.— In an action to recover an amount on account of a mistake in the accounting and settlement between the parties, the accounts or memorandums thereof used by the parties as a basis for a settlement are admissible as a part of the *res gestæ*. Madigan *v.* De Graff, 17 Minn. 52.

A mistake of law cannot be thus complained of. Scioto *v.* Gherky, Wright (Ohio) 493.

30. Peddicord *v.* Connard, 85 Ill. 102; Shillingford *v.* Good, 95 Pa. St. 25; Emmons *v.* Stahlnecker, 11 Pa. St. 366.

31. A receipt executed with full knowledge of all the facts and circumstances is conclusive. Fuller *v.* Crittenden, 9 Conn. 401, 23 Am. Dec. 364.

32. Madigan *v.* De Graff, 17 Minn. 52; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; McDougall *v.* Cooper, 31 N. Y. 498; Stevens *v.* Barss, 74 Hun 388, 26 N. Y. Suppl. 461, 27 N. Y. Suppl. 1116; Smith *v.* Ogilvie, 5 N. Y. Suppl. 382.

33. Thus in New York it was held that an action upon an account stated, wherein the complaint alleged various errors and omissions and asked for a correction thereof, was properly adapted in form to correct the account in the respects of which specific objections were taken. Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

Summons for specific sum.—In an equitable action to open a settled account and to correct the same, and for a recovery of an omitted item, the judgment should not be reversed because the summons was for a specific sum instead of for relief, for where defendant answers a complaint under such circumstances the court can grant only the relief which is consistent with the case made. McDougall *v.* Cooper, 31 N. Y. 498.

34. Quarles *v.* Jenkins, 98 N. C. 258, 3 S. E. 395. To the same effect, Hutchinson *v.* Market Bank, 48 Barb. (N. Y.) 302.

denial to the defense of the account stated, that there has been no settlement of the items of account between him and the debtor.[35] On the other hand, where there has been an account actually stated, objections thereto should be pointed out either by the complaint or in a reply when the account stated is set up as a defense.[36]

(B) *Where Issue Is an Estoppel.* Where the issue raised by the pleadings is whether an estoppel is created by reason of defendant's failure to act with promptness, as in the examination of a balance in a bank-book containing as items alleged forgeries, it seems that the determination of this issue does not involve a settlement in the sense that the balance cannot be impeached without express allegations in the pleading.[37]

(C) *Under General Issue or General Denial.* The authorities are divided upon the question whether, in an action on an account stated, defendant may impeach it under the general issue or general denial. On the one hand it is held that, the allegation in the declaration being that defendant was indebted, he could not admit the indebtedness and at the same time avoid it,[38] and that any errors may therefore be shown under the general issue,[39] and fraud or mistake may be shown under a general denial.[40] On the other hand it is held that under the general issue defendant cannot enter into a reëxamination of accounts which have been settled,[41] and that fraud, mistake, or misrepresentation[42] cannot be shown under a mere general denial, or under the general issue without notice of

35. Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; Mower County *v.* Smith, 22 Minn. 97.

36. Colorado Fuel, etc., Co. *v.* Chappel, 12 Colo. App. 385, 55 Pac. 606 (holding that such a replication is not an attempted statement of a cause of action for opening an account settled and the taking of a new account, because a stated account is only *prima facie* evidence of its correctness, and it may be impeached, whenever brought forward as a cause of action or defense, without first bringing an original suit for that purpose); Hutchinson *v.* Market Bank, 48 Barb. (N. Y.) 302 (wherein it is said the matter should be set up in the complaint or by permission in a reply).

Confined to grounds pleaded.— When the replication attacks an account stated pleaded in an answer only upon particular grounds, the account stated cannot be impeached upon other grounds where there is a failure upon the ground alleged. Barker *v.* Hoff, 52 How. Pr. (N. Y.) 382.

Waiver of objection.— In an action for wages and for money expended, defendant answered setting up a counterclaim, to which plaintiff replied a general denial. Under this state of the pleadings, where no objection is made at the trial to evidence surcharging and falsifying items of what was claimed to be a stated account, no objection could be raised for the first time on appeal. Liscomb *v.* Agate, 67 Hun (N. Y.) 388, 22 N. Y. Suppl. 126.

37. McKeen *v.* Boatmen's Bank, 74 Mo. App. 281. See also Dana *v.* National Bank, 132 Mass. 156; Welsh *v.* German American Bank, 42 N. Y. Super. Ct. 462, 73 N. Y. 424; Weinstein *v.* National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

38. Thomas *v.* Hawkes, 8 M. & W. 140.

39. Bouslog *v.* Garrett, 39 Ind. 338; Vanderveer *v.* Statesir, 39 N. J. L. 593; Wittich *v.* Allison, 56 Fed. 796, 13 U. S. App. 389, 6 C. C. A. 135; Thomas *v.* Hawkes, 8 M. & W. 140.

Failure of consideration.— Upon a sale of a leasehold the purchaser agreed to pay a certain amount in cash and the residue on completion, but instead of actually making the cash payment he paid only a part thereof and gave an I O U for the balance, and it was held that upon the failure of the vendor to make a good title he was not entitled to recover such balance upon an account stated, and that the defense was admissible under "never indebted." Wilson *v.* Wilson, 14 C. B. 616.

40. Jorgensen *v.* Kingsley, (Nebr. 1900) 82 N. W. 104, holding that usury is available as a defense without alleging that the balance claimed to be due was agreed to in consequence of fraud or mistake; McKinster *v.* Hitchcock, 19 Nebr. 100, 26 N. W. 705.

41. Lyne *v.* Gilliat, 3 Call (Va.) 5.

42. *California.*— Hendy *v.* March, 75 Cal. 566, 17 Pac. 702; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Clarkson *v.* Hoyt, (Cal. 1894) 36 Pac. 382.

Georgia.— Threlkeld *v.* Dobbins, 45 Ga. 144.

Kansas.— Fuller *v.* Jackson County, 2 Kan. 445.

Minnesota.— Moody *v.* Thwing, 46 Minn. 511, 49 N. W. 229; Warner *v.* Myrick, 16 Minn. 91.

Missouri.— Kronenberger *v.* Binz, 56 Mo. 121; Marmon *v.* Waller, 53 Mo. App. 610.

New York.— Field *v.* Knapp, 108 N. Y. 87, 14 N. E. 829; Robbins *v.* Downey, 18 N. Y. Suppl. 100, 45 N. Y. St. 279.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

special matter,[43] and that such errors should be specifically pointed out.[44] But when errors are once shown, others may be shown though the latter are not specifically pleaded.[45]

c. In Equity — (I) *Jurisdiction in General.* While an account stated or settled will bar discovery and relief if the balance ascertained is not correct or the settlement is infected with mistake or fraud or brought about by undue advantage, equity will entertain jurisdiction for the purpose of opening it either for restatement or for correction in part.[46] The accounts which, when stated, the court will open, must be such as fall within the jurisdiction of the chancery court. The court will not have jurisdiction to open and examine a stated account when the account, before it was stated, did not pertain to the jurisdiction of that tribunal.[47]

(II) *Power Exercised with Caution* — (A) *Rule Stated.* The power to open accounts which have been settled, especially to the extent of requiring a general accounting, is exercised with much caution and with due regard to the security of business transactions between the parties *sui juris* when no confidential relations exist.[48] It will be done only upon clear and convincing proof of the

43. Dunlap *v.* Miles, 4 Yeates (Pa.) 366, holding that under a plea of *non assumpsit* without notice of special matter defendant could not show that he entered into an agreement with a third person, trusting to the accuracy of the books kept by plaintiff, without giving notice of the special matters under the practice allowing a defendant to bring forward all his equities under such a method of pleading.

44. Threlkeld *v.* Dobbins, 45 Ga. 144.

Facts showing mistake.— To a count upon a stated account a plea is good which shows that if any promise to pay was made it was made upon a mistake of law and fact, followed by a statement of facts which, if true, brings the defense within the principle that a promise to pay a claim which is without merit and not based upon colorable right, and where the promisee surrenders nothing and is not injured, cannot support an action at law or in equity, though if the plea had stopped short of this statement of facts it would have been subject to criticism. Christian *v.* Niagara F. Ins. Co., 101 Ala. 634, 14 So. 374.

Affidavit of defense.— An affidavit of defense which itemizes the amounts alleged to have been erroneously charged and credited, whereby a wrong balance was ascertained, is sufficient. Teller *v.* Sommer, 132 Pa. St. 33, 18 Atl. 1071.

45. Bergen *v.* Hitchings, 22 N. Y. App. Div. 395, 48 N. Y. Suppl. 96.

46. *Alabama.*— Kilpatrick *v.* Henson, 81 Ala. 464, 1 So. 188; Paulling *v.* Creagh, 54 Ala. 646; Dickinson *v.* Lewis, 34 Ala. 638; Cowan *v.* Jones, 27 Ala. 317; Rembert *v.* Brown, 17 Ala. 667.

California.— Branger *v.* Chevalier, 9 Cal. 353.

Florida.— La Trobe *v.* Hayward, 13 Fla. 190.

Illinois.— Stage *v.* Gorich, 107 Ill. 361.

Kentucky.— Waggoner *v.* Minter, 7 J. J. Marsh. (Ky.) 173; Barnett *v.* Barnett, 6 J. J. Marsh. (Ky.) 499; Wickliffe *v.* Mosely, 4 J. J. Marsh. (Ky.) 172; Lee *v.* Reed, 4 Dana (Ky.) 109.

Missouri.— Kraushaar *v.* Brant, 22 Mo. App. 162.

Ohio.— Fowler *v.* Piatt, Wright (Ohio) 206.

South Carolina.— McCrae *v.* Hollis, 4 Desauss. (S. C.) 122.

Tennessee.—Bankhead *v.* Alloway, 6 Coldw. (Tenn.) 56; Love *v.* White, 4 Hayw. (Tenn.) 210; Gray *v.* Washington, Cooke (Tenn.) 320.

United States.— Chappedelaine *v.* Dechenaux, 4 Cranch (U. S.) 306, 2 L. ed. 629; Dunbar *v.* Miller, 1 Brock. (U. S.) 85, 7 Fed. Cas. No. 4,130.

England.— Mac Kellar *v.* Wallace, 26 Eng. L. & Eq. 62; Wharton *v.* May, 5 Ves. Jr. 27.

Particular court — Equitable action.—A suit to open, surcharge, and falsify an account is only for equitable jurisdiction, and where a particular court has jurisdiction of a complaint presenting a case for equitable jurisdiction, it is proper to bring an action to surcharge and falsify an account in that court. Houston *v.* Dalton, 70 N. C. 662.

47. Dickinson *v.* Lewis, 34 Ala. 638, which was an account for clothes furnished to complainant by defendant, there being no mutuality of accounts and nothing on complainant's side except a claim of credits for payments, and it was held that the court was without jurisdiction to open the account after it had been stated by the parties, as it would have been without jurisdiction to have stated the account in the first instance upon the application of either party. See *supra*, II. E, 1, f, (II), (B).

Fraud and complicated accounts.— Where the accounts between the parties are complicated, this of itself is reason for going into equity; and when to this is added the charge of fraud in settlement between the parties, the jurisdiction is undoubted. Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569.

Where accounts are to be stated it seems equity is the proper remedy. Robinson *v.* Dawson, 2 Wkly. Notes Cas. (Pa.) 185.

48. Kilpatrick *v.* Henson, 81 Ala. 464, 1 So. 188; Kingsley *v.* Melcher, 56 Hun (N. Y.) 547, 10 N. Y. Suppl. 63; Bullock *v.* Boyd, Hoffm. (N. Y.) 294; Raht *v.* Union Consol. Min. Co., 5 Lea (Tenn.) 1; Ruffner *v.* Hewitt, 7 W. Va. 585.

grounds justifying it,[49] especially in the absence of fraud and where the ground of relief is mistake,[50] and after the lapse of time,[51] or after renewals of notes and securities.[52] The general rule as to the burden of proof upon the impeachment of a stated or settled account has already been stated.[53] The cases there cited are applicable here. The party impeaching must start with the burden of the presumption that the accounts are correct.[54] And where defendant denies the errors complained of, and the stated account was for a long time in the possession of plaintiff, the latter must produce the account or prove its loss, its contents, and the errors complained of.[55] And, as on a bill for an accounting the right to an account is to be determined before an account is ordered,[56] where a bill is filed to set aside a previous accounting, it is proper to dismiss it without a reference when it appears that complainant is not entitled to open the account.[57]

(B) *Where Parties Had Knowledge or Means of Knowledge.* Equity will not open accounts where the parties acted with full knowledge or with ample means of knowing all the facts, in the absence of fraud or imposition,[58] and it has

49. *Arkansas.*— Moscowitz *v.* Lemp, (Ark. 1890) 12 S. W. 781.

Illinois.— Conlin *v.* Carter, 93 Ill. 536.

Mississippi.— Taylor *v.* Blackman, (Miss. 1893) 12 So. 458.

New Jersey.— Somers *v.* Cresse, (N. J. 1888) 13 Atl. 23.

New York.— Murphy *v.* Ross, 7 N. Y. St. 182; Wilde *v.* Jenkins, 4 Paige (N. Y.) 481; McIntyre *v.* Warren, 3 Abb. Dec. (N. Y.) 99.

Ohio.— Fowler *v.* Piatt, Wright (Ohio) 206.

South Carolina.— McCrae *v.* Hollis, 4 Desauss. (S. C.) 122.

Wisconsin.— Case *v.* Fish, 58 Wis. 56, 15 N. W. 808; Hoyt *v.* McLaughlin, 52 Wis. 280, 8 N. W. 889.

United States.— Chappedelaine *v.* Dechenaux, 4 Cranch (U. S.) 306, 309, 2 L. ed. 629, wherein Marshall, C. J., said that "no practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony;" Edler *v.* Clark, 51 Fed. 117; Brydie *v.* Miller, 1 Brock. (U. S.) 147, 4 Fed. Cas. No. 2,071.

50. Moscowitz *v.* Lemp. (Ark. 1890) 12 S. W. 781; Wilde *v.* Jenkins, 4 Paige (N. Y.) 481; Emmons *v.* Stahlnecker, 11 Pa. St. 366.

51. See *infra*, II, G, 5, c, (IV).

52. Conlin *v.* Carter, 93 Ill. 536.

53. See *infra*, II, G, 4, f, (I).

54. Townsend *v.* French, 2 Molloy 242.

Difficulty does not dispense with proof.— Where a bill seeks to open a settlement for alleged fraud and mistake, though the evidence shows that the settlement was of the whole items in a lump, it is said that, notwithstanding in such a settlement it is difficult to show a mistake, difficulty does not dispense with all proof. Fowler *v.* Piatt, Wright (Ohio) 206.

55. Redman *v.* Green, 38 N. C. 54.

Not enough to raise a mere suspicion.— It is not sufficient for plaintiff to raise a suspicion that indefinite credits at uncertain times have been omitted. Evidence to sustain credit for a large amount of cotton, in the form of estimates of witnesses as to the yield of the plantation for each year involved, based upon the acreage and general character of the crops as good, fair, or bad, is too indefinite to falsify balances as shown by a merchant's books. Dickerson *v.* Thomas, 67 Miss. 777, 7 So. 503.

Books, vouchers, etc., of accounting party. — Where errors are to be corrected in the stating of an account which would not have been sufficient, standing alone, to justify the opening of the account, the books, papers, and vouchers in possession of the accounting party should be taken as *prima facie* correct without further proof than his oath or that of his agent or clerk. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

56. See *supra*, II, E, 10.

57. Conlin *v.* Carter, 93 Ill. 536.

58. *Illinois.*— Gage *v.* Parmelee, 87 Ill. 329.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

Missouri.— Quinlan *v.* Keiser, 66 Mo. 603.

New Jersey.— Swayze *v.* Swayze, 37 N. J. Eq. 180.

New York.— Rutty *v.* Person, 52 N. Y. Super. Ct. 329.

North Carolina.— Compton *v.* Culberson, 17 N. C. 93.

South Carolina.— McDow *v.* Brown, 2 S. C. 95.

United States.— Merrill *v.* Marker, 47 Fed. 138.

Application of rule.— In settling an account between an agent and the representatives of his deceased principal, certain items which at the time were of little or no value were omitted, but with full means of knowledge as to the facts on the part of both parties, and it was held that no fraud was shown by such facts. Farnam *v.* Brooks, 9 Pick. (Mass.) 212. Proof which at most excites only slight suspicion that defendant did not disclose to complainant at the settlement expectations which he, defendant, had of obtaining from the state an extra allowance on a contract involved in the settlement, the facts upon which such expectations rested being known to both parties, is not sufficient. Fowler *v.* Piatt, Wright (Ohio) 206.

been held that an account will not be opened for frauds alleged, which, however, appeared upon the face of the account or which could have been detected by slight examination.[59] But where the party complaining was so situated at the time of the settlement as not to have had a fair opportunity of fully scrutinizing the account which was prepared and extended by the other party, slighter evidence may be sufficient to impeach any particular item of the account than if the settlement had been made with full knowledge of the facts.[60]

(c) *Where Parties Stand in Confidential Relations or on Unequal Terms.* Where the parties stand in confidential relations or on unequal terms, equity will much more freely interpose than where such conditions do not exist, and will open accounts upon much slighter grounds.[61] But on the other hand it is held that there is no reason why accounts which have been settled in a case of stewardship or agency should be opened merely because at the time of the settlement the agent possessed the confidence of his principal,[62] and where parties deal with each other at arms' length a court of equity will not interfere on the ground of impaired health and depressed spirits on the part of one of them, in the absence of proof of mental unsoundness.[63]

(d) *Where Vouchers Are Surrendered.* The reason for the strictness of the rule requiring allegation and proof of the matters relied upon to impeach a settlement is stronger when the vouchers used in the settlement are given up to the complaining party.[64]

(e) *Where Security Taken upon Settlement.* The rule that deliberate settlements will be opened with great caution is particularly applicable where an account has been signed and security taken on the foot of it.[65] But where

59. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

60. Lee *v.* Reed, 4 Dana (Ky.) 109.

Family settlement.— Although courts of equity uphold family settlements with a strong hand, where complainant was incapable of examining accounts upon which a settlement was based, examination of which was necessary to their full understanding, the court will permit him to surcharge and falsify to the extent of the errors pointed out in his bill, notwithstanding the settlement may be regarded as a family settlement. Williams *v.* Savage Mfg. Co., 1 Md. Ch. 306.

61. Moses *v.* Noble, 86 Ala. 407, 5 So. 181; Paulling *v.* Creagh, 54 Ala. 646; Rembert *v.* Brown, 17 Ala. 667; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Williamson *v.* Barbour, 9 Ch. D. 529; Pit *v.* Cholmondeley, 2 Ves. 565; Newman *v.* Payne, 2 Ves. Jr. 199.

Application of rule.— In the case of guardian and ward, trustee and *cestui que trust*, attorney and client, etc., the law presumes, from the relation of the parties, that their situation is unequal, and throws the burden upon the one having the advantageous position of showing the fairness of his dealings. This doctrine may be extended to many other relations of trust, confidence, or inequality, but in any case the question whether the parties are so situated is one of fact depending upon the circumstances. Smith *v.* Ogilvie, 5 N. Y. Suppl. 382. To the same effect, Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Piddock *v.* Brown, 3 P. Wms. 289.

Attorney and client — General allegation of error admitted.— A settled account between an attorney and his client will be opened upon general allegations of error admitted, though no specific errors are pointed out. Matthews *v.* Wallwyn, 4 Ves. Jr. 118.

Difference between surcharging and falsifying.— Where an executor was also the guardian of a minor, his settlements in the probate office will not be regarded as accounts stated, and upon a bill to open his settlement the onus will be upon him to sustain the items thereof which are falsified by the bill, but as to the items of surcharge it was held that the complainant must assume the burden of proof. Moore *v.* Felkel, 7 Fla. 44.

62. Philips *v.* Belden, 2 Edw. (N. Y.) 1; Rixey *v.* Moorehead, 79 Va. 575.

In case of attorney and client there has generally existed some special circumstances which show fraud and imposition practised upon the client, or an undue use made of the power and influence which the relation of attorney and client had given the former over the latter, and of which he had taken unconscientious advantage. Philips *v.* Belden, 2 Edw. (N. Y.) 1 [*citing* Wharton *v.* May, 5 Ves. Jr. 27; Lewes *v.* Morgan, 5 Price 42; Jenkins *v.* Gould, 3 Russ. 385].

63. Billingslea *v.* Ware, 32 Ala. 415.

64. Lee *v.* Reed, 4 Dana (Ky.) 109.

Books of defendant destroyed.— Where, since the rendering of his account, defendant's books have been destroyed by fire, and plaintiff does not produce his own books or vouchers on the account rendered by defendant, the court will not open the account. Bruen *v.* Hone, 2 Barb. (N. Y.) 586.

65. Kilpatrick *v.* Henson, 81 Ala. 464, 1 So. 188; Redman *v.* Green, 38 N. C. 54; Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156; Drew *v.* Power, 1 Sch. & Lef. 182.

The security becomes prima facie a debt according to its terms, and it cannot be overturned on doubtful or probable testimony

bonds or other securities are given for a balance found due on a settlement, and it is found that such settlement was infected with mistake, oppression, and unfair advantage, the securities will be set aside and the whole account reopened.[66]

(F) *Where Release Executed.* If an account is impeached, a release the only consideration for which is a settlement will not prevent the court from looking into the account. The release is entitled to no greater force in a court of equity than the settlement of the account upon which it was given.[67] On the other hand the evidence must be clear and convincing to justify the reversal of a finding against the claim of fraud or mistake on the bill to open the settlement,[68] and where an accounting party makes a settlement whereby the rights of third parties are acknowledged, and upon the faith of the settlement moneys are paid to such third persons, the settlement will not be overturned without the fullest proof of ignorance of fact, fraud, or imposition, and a release may operate as an estoppel *in pais*.[69] So, in order to justify relief against a covenant to pay a sum certain under a settlement and mutual releases, there must be fraud or palpable and gross mistake,[70] though where a settlement is not a compromise or speculation it is held that a clear mistake is sufficient ground for opening mutual releases, even if the mistake is one of law.[71]

(III) *To What Extent Opened* — (A) *Where Opened Entirely* — (1) In General. In the absence of allegation and proof of fraud or undue advantage which taints the entire account, the court will not open and unravel it as if no accounting had been made.[72]

(2) Fraud or Mistake Tainting Whole Account. Where accounts are opened as fraudulent, the relief will not be limited to the right to surcharge and falsify,[73] and where accounts which are impeached as erroneous are shown to con-

that error intervened in the accounts which were settled, without imparting to all business transactions insecurity and uncertainty. Kilpatrick *v.* Henson, 81 Ala. 464, 1 So. 188.

66. Barrow *v.* Rhinelander, 1 Johns. Ch. (N. Y.) 550; Sands *v.* Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305.

Security to stand for true balance.— In Wharton *v.* May, 5 Ves. Jr. 27, it was held that where a general account is decreed on the ground of fraud the security will be ordered to stand for the real balance.

Deed constructively fraudulent.— For the principle that a deed constructively fraudulent will be ordered to stand as a credit for the sum really due see Boyd *v.* Dunlap, 1 Johns. Ch. (N. Y.) 478; Bernal *v.* Donegal, 1 Bligh N. S. 594; Gwynne *v.* Heaton, 1 Bro. Ch. 1. See also Fraudulent Conveyances.

67. Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961; James *v.* Atlantic Delaine Co., 3 Cliff. (U. S.) 614, 13 Fed. Cas. No. 7,177; Roche *v.* Morgell, 2 Sch. & Lef. 721.

68. Augsbury *v.* Flower, 68 N. Y. 619.

Fraud or surprise.— Where accounts are settled a release executed is conclusive unless plaintiff establishes either fraud or surprise. Davies *v.* Spurling, Tam. Ch. 199.

Release under seal — Mutual mistake.— After a written settlement of account under seal and a contract founded thereon, one party cannot be relieved in the absence of fraud or mutual mistake. Horan *v.* Long, 11 Tex. 230.

69. Brown *v.* Rowles, 21 Md. 11. See Executors and Administrators.

70. Wood *v.* Young, 5 Wend. (N. Y.) 620.

71. Gist *v.* Cattell, Bailey Eq. (S. C.) 343. See, further, Compromise and Settlement.

72. *Alabama.*— Moses *v.* Noble, 86 Ala. 407, 5 So. 181.

Florida.— White *v.* Walker, 5 Fla. 478.

Maryland.— Gover *v.* Hall, 3 Harr. & J. (Md.) 43.

New York.—Bruen *v.* Hone, 2 Barb. (N. Y.) 586.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

73. *Alabama.*— Paulling *v.* Creagh, 54 Ala. 646.

Arkansas.— Roberts *v.* Totten, 13 Ark. 609.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

New York.— Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Barrow *v.* Rhinelander, 1 Johns. Ch. (N. Y.) 550.

South Carolina.— Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156.

England.— Wharton *v.* May, 5 Ves. Jr. 27; Vernon *v.* Vawdry, 2 Atk. 119; Clarke *v.* Tipping, 9 Beav. 284.

Collusion or circumstances showing injustice.— A settlement is good for nothing if, either from the collusion of the parties or from the circumstances under which it takes place, it is apparent to a court of equity that the transaction was not so fully and fairly understood between the parties as it ought to have been, and that injustice has been done on either side. Peteet *v.* Crawford, 51 Miss. 43.

tain errors of considerable extent in number and amount, or which extend over a long period of years, the accounts will be opened whether the errors were caused by mistake or by fraud, and the parties will not merely be confined to surcharge and falsify.[74] But the errors must be shown to be so numerous that justice cannot be done without restating the account.[75]

(B) *Party Confined to Surcharging or Falsifying.* While it has been held that when an account has been surcharged or falsified in one particular the complainant may have liberty to surcharge or falsify it at large,[76] this rule has been confined to errors or mistakes which cast suspicion of nefariousness upon the whole account,[77] and it is generally held that when only errors and mistakes are alleged and proved in respect to particular items, or the fraud or imposition does not affect the whole settlement or account, the court will give the party complaining permission to surcharge and falsify the account, and will limit the authority to a correction of the errors or mistakes pointed out, leaving the balance of the account to stand unimpaired.[78] And if complainant seeks to open an account on the ground of undue influence, as well as for specific errors alleged in a former settlement, and the cause is referred by consent to take the accounts on the basis of the former accounts, with liberty to surcharge and falsify, he is held to waive the ground of undue influence.[79]

(C) *Under Agreement as to Correction.* Where written agreements upon a statement of accounts show how far such accounts should be binding and for what cause they may be varied, the accounts will be varied, in the absence of fraud or coercion, only so far as is consistent with the terms of the agreement.[80]

(D) *Correction on Both Sides.* Consistently with the maxim that he who asks equity must do equity, it is not improper, upon plaintiff's application to open a settlement for his benefit and for the purpose of correcting an error against him, to decree that the settlement should be opened upon condition that errors upon both sides shall be corrected.[81]

(IV) *LACHES*—(A) *General Rules.* After an account has been stated or set-

74. Branger *v.* Chevalier, 9 Cal. 353; La Trobe *v.* Hayward, 13 Fla. 190; Williamson *v.* Barbour, 9 Ch. D. 529.

75. Patton *v.* Cone, 1 Lea (Tenn.) 14.

76. Davies *v.* Spurling, Tam. Ch. 199.

77. Bullock *v.* Boyd, Hoffm. Ch. (N. Y.) 294; Bankhead *v.* Alloway, 6 Coldw. (Tenn.) 56.

Errors in law.— Where one is given liberty to surcharge and falsify under a decree directing the master to examine accounts, he is not confined merely to errors in fact, but may take advantage of errors in law. Roberts *v.* Kuffin, 2 Atk. 112.

78. *Alabama.*— Moses *v.* Noble, 86 Ala. 407, 5 So. 181; Cowan *v.* Jones, 27 Ala. 317; Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

Arkansas.— Roberts *v.* Totten, 13 Ark. 609.

California.— Branger *v.* Chevalier, 9 Cal. 353.

Illinois.— Stage *v.* Gorich, 107 Ill. 361.

Maryland.— Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

New York.— Carpenter *v.* Kent, 101 N. Y. 591, 5 N. E. 787; Bruen *v.* Hone, 2 Barb. (N. Y.) 586.

North Carolina.— Redman *v.* Green, 38 N. C. 54.

South Carolina.— Murrell *v.* Greenland, 1 Desauss. (S. C.) 332.

Tennessee.—Bankhead *v.* Alloway, 6 Coldw. (Tenn.) 56.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585; Windon *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

England.— Drew *v.* Power, 1 Sch. & Lef. 182.

Particular items left open.— The fact that particular items have been left open in the settlement will not affect the balance of the account. Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156.

Stated account set aside as to particular items.— An agreement that items in regard to which no false representations are alleged should be charged will sustain such items upon setting aside an account stated as to other items. Berdell *v.* Allen, 54 N. Y. Super. Ct. 38, 3 N. Y. St. 523.

79. Compton *v.* Culberson, 17 N. C. 93.

80. Troup *v.* Haight, 1 Hopk. (N. Y.) 239, holding that where the accounts are sent to the master for correction in certain particulars under circumstances stated in the text, neither party will be required to assume the burden of proof exclusively.

81. Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Floyd *v.* Priester, 8 Rich. Eq. (S. C.) 248, which involved an opening and correction of a guardian's settlement: McCrae *v.* Hollis, 4 Desauss. (S. C.) 122; Higginson *v.* Fabre, 3 Desauss. (S. C.) 89; Grace *v.* Newbre, 31 Wis. 19.

tled, one complaining thereof must not be guilty of laches in seeking relief, for the caution with which courts approach such applications is emphasized when they are made after a long lapse of time,[82] and it is said that equity will not correct mistakes in a settlement for the purpose of relieving the person whose mistake was the result of his own gross negligence.[83] On the one hand, from the lapse of time and a failure to object sooner, the party may be considered to have acquiesced in any errors or inaccuracies of which he may complain.[84] On the other hand, as lapse of time necessarily obstructs the truth and destroys the evidence of past transactions,[85] equity will not open accounts after the lapse of such a time as that the evidence and means of arriving at a just conclusion may be impaired, especially where the death of parties has intervened[86] and the matters were within the knowledge of both parties.[87] These are merely applications of the general rule that a court of equity will not entertain stale or antiquated demands which would encourage laches or negligence.[88]

(B) *Permission to Surcharge and Falsify.* But upon a bill impeaching accounts after the lapse of a number of years, the court may permit the party to surcharge and falsify, though it will refuse to open up the accounts generally.[89]

(C) *Whole Opened for Fraud.* On the other hand, where fraud is shown, it has been held that equity will open and examine the whole account after any length of time, and even after the death of the party against whom fraud is charged.[90]

(V) *THE BILL*[91] — (A) *Allegation of Error or Fraud.* Equity will not open

82. *Alabama.*— Paulling *v.* Creagh, 54 Ala. 646.

Illinois.— Conlin *v.* Carter, 93 Ill. 536.

Maryland.— Hutchins *v.* Hope, 7 Gill (Md.) 119; Gover *v.* Hall, 3 Harr. & J. (Md.) 43.

Mississippi.— Taylor *v.* Blackman, (Miss. 1893) 12 So. 458.

New York.— Augsbury *v.* Flower, 68 N. Y. 619; Kingsley *v.* Melcher, 56 Hun (N. Y.) 547, 10 N. Y. Suppl. 63; Philips *v.* Belden, 2 Edw. (N. Y.) 1.

Pennsylvania.—Emmons *v.* Stahlnecker, 11 Pa. St. 366.

United States.— Badger *v.* Badger, 2 Cliff. (U. S.) 137, 2 Fed. Cas. No. 718.

Formal exception.— The court will not suffer an account of twenty years' standing to be unraveled merely for the purpose of giving the party the benefit of the formal exception. Gregory *v.* Forrester, 1 McCord Eq. (S. C.) 318.

83. Thompson, J., in Cannon *v.* Sanford, 20 Mo. App. 590.

84. Gover *v.* Hall, 3 Harr. & J. (Md.) 43; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Wilde *v.* Jenkins, 4 Paige (N. Y.) 481; Irvine *v.* Robertson, 3 Rand. (Va.) 549. See also Conery *v.* Sweeney, 81 Fed. 14, 41 U. S. App. 691, 26 C. C. A. 309, where a delay of three years after an alleged settlement was not considered laches under the particular circumstances. Where defendant sought to impeach a settled account, and the attorney before whom the settlement was made testified to its correctness, and it appeared that defendant had had a statement of the account in his possession for more than a year without objecting to it, his testimony is not sufficient to overcome the correctness of the settlement. Brands *v.* Depue, (N. Y. 1890) 20 Atl. 206.

85. Stearns *v.* Page, 7 How. (U. S.) 819, 12 L. ed. 928.

86. *Maryland.*— Hutchins *v.* Hope, 7 Gill (Md.) 119; Gover *v.* Hall, 3 Harr. & J. (Md.) 43.

North Carolina.— Bruce *v.* Child, 11 N. C. 372.

South Carolina.—Geddes *v.* Hutchinson, 40 S. C. 402, 19 S. E. 9.

Tennessee.— Love *v.* White, 4 Hayw. (Tenn.) 210.

United States.— Hemmick *v.* Standard Oil Co., 91 Fed. 332, 63 U. S. App. 273, 33 C. C. A. 547.

England.— Bright *v.* Legerton, 6 Jur. N. S. 1179.

87. Swayze *v.* Swayze, 37 N. J. Eq. 180. See *infra*, II, G, 5, c, (II), (B).

88. Bruen *v.* Hone, 2 Barb. (N. Y.) 586. See EQUITY.

89. Gover *v.* Hall, 3 Harr. & J. (Md.) 43; Ogden *v.* Astor, 4 Sandf. (N. Y.) 311; Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289; Love *v.* White, 4 Hayw. (Tenn.) 210; Brownell *v.* Brownell, 2 Bro. Ch. 62.

Discretion of court after account opened.— While it would not be proper, after a great lapse of time, to open an account generally, the court may permit it to be opened for particular fraud or mistake distinctly charged in the bill and on account of which the court may be satisfied that corrections should be made. In such a case the inquiry need not be confined to such frauds or mistakes as would have been necessary to justify the opening of the account in the first instance, and when once opened the extent to which particular items or charges may be impeached are matters within the court's discretion. Ogden *v.* Astor, 4 Sandf. (N. Y.) 311.

90. Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156; Vernon *v.* Vawdry, 2 Atk. 119.

91. Form of bill to impeach accounts may be found set out in substance in Peteet *v.*

accounts upon a mere asking. The error or fraud relied upon must be particularly pointed out in the pleading,[92] especially where the mere suggestion in the bill is denied in the answer.[93]

(B) *Facts Showing Fraud.* If a bill alleges sufficient facts to show actual or constructive fraud, the fact that there is no direct averment of fraud will not preclude complainant from obtaining relief.[94]

(C) *Grounds of Surcharge or Falsification.* The particular grounds upon which it is sought to surcharge or falsify an account should be specifically stated,[95] and while a defendant in a suit for relief based upon a stated account or settlement may impeach the account, he must surcharge or falsify and directly allege the errors relied on.[96] And where accounts were rendered by defendant and set-

Crawford, 51 Miss. 43; Gray *v.* Washington, Cooke (Tenn.) 320; Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076.

Form of decree to account under bill to impeach accounts may be found in Mayo *v.* Bosson, 6 Ohio 525, refusing to readjust in part, and permitting correction in particular items; Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076.

92. *Alabama.*— Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

Arkansas.— State *v.* Turner, 49 Ark. 311, 5 S. W. 302.

California.— Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

Kentucky.— Lee *v.* Reed, 4 Dana (Ky.) 109.

Massachusetts.— Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

Mississippi.— Miller *v.* Womack, Freem. (Miss.) 486.

Missouri.—Wetmore *v.* Crouch, 55 Mo. App. 441.

New Jersey.— Brown *v.* Welsh, 27 N. J. Eq. 429.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 209; Leycraft *v.* Dempsey, 15 Wend. (N. Y.) 83.

North Carolina.— Gooch *v.* Vaughan, 92 N. C. 610; Costin *v.* Baxter, 41 N. C. 197; Mebane *v.* Mebane, 36 N. C. 403.

Oregon.— Fisk *v.* Basche, 31 Oreg. 178, 49 Pac. 981; Hoyt *v.* Clarkson, 23 Oreg. 51, 31 Pac. 198.

South Carolina.— Porter *v.* Cain, McMull. Eq. (S. C.) 81; Murrel *v.* Murrel, 2 Strobh. Eq. (S. C.) 148, 49 Am. Dec. 664; Fraser *v.* Hext, 2 Strobh. Eq. (S. C.) 250.

Tennessee.— Raht *v.* Union Consol. Min. Co., 5 Lea (Tenn.) 1.

England.— Drew *v.* Power, 1 Sch. & Lef. 182; Taylor *v.* Haylin, 2 Bro. Ch. 310.

As affecting answer.— A general charge of concealment of accounts and fraudulent charges in an account which has been settled is not a sufficient averment to require an inquiry into the details, and the bill is no better which makes only general charges of fraud as to particular branches of an account. French *v.* Rainey, 2 Tenn. Ch. 640.

Bill held to be for accounting only.—Where a bill seeking an account alleged that complainant was induced by defendant's fraudulent representations to accept a smaller sum than was due, and that the statement rendered by defendant to plaintiff was not correct in other respects, it was held to be merely a bill for an accounting, and the particulars mentioned are merely a reason why complainant should have an account. Harrison *v.* Farrington, 36 N. J. Eq. 107, holding that the bill was not demurrable as setting up an account stated, since it did not in fact set up an account stated, nor because it sought an account and to surcharge an account as to the same matters.

93. Fraser *v.* Hext, 2 Strobh. Eq. (S. C.) 250.

General charge of fraud held sufficient in a case not susceptible of more specific charge. McLachlan *v.* Staples, 13 Wis. 448.

94. Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Peteet *v.* Crawford, 51 Miss. 43.

95. *Mississippi.*— Abraham *v.* McCurdy, (Miss. 1894) 15 So. 137.

New York.—Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Liscomb *v.* Agate, 67 Hun (N. Y.) 388, 22 N. Y. Suppl. 126; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Philips *v.* Belden, 2 Edw. (N. Y.) 1; Nourse *v.* Prime, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403.

Tennessee.— Gray *v.* Washington, Cooke (Tenn.) 320.

United States.— Badger *v.* Badger, 2 Cliff. (U. S.) 137, 2 Fed. Cas. No. 718.

England.— Johnson *v.* Curtis, 3 Bro. Ch. 266.

General charge of error in books.— Where a note given for balancing an account corresponds in amount with the account on the books of the payee at the date of the note, it will not do to point generally to the books and say that there was error in them, but the specific errors must be pointed out. Abraham *v.* McCurdy, (Miss. 1894) 15 So. 137.

96. Roberts *v.* Totten, 13 Ark. 609; Brodrib *v.* Brodrib, 56 Cal. 563, cross-complaint; Moore *v.* McCullough, 8 Mo. 401; De Mott *v.* Benson, 4 Edw. (N. Y.) 297; Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366, 20 Johns. (N. Y.) 669.

Settlement not admitted.— Where the answer does not admit the settlement, evidence of errors is inadmissible. Moore *v.* McCullough, 8 Mo. 401.

Answer as evidence.— Where complainant relies on a settlement of certain matters embraced therein, an answer relating to such matters will not be evidence for defendant under the rule that until the settlement is impeached and set aside it is conclusive on the parties. Roberts *v.* Totten, 13 Ark. 609.

tled, it is held that the bill for an accounting, in order that it may be sufficient for the correction of such accounts, should not only specify the errors to be corrected, but should aver a balance due to plaintiff.[97] But it has been held that where the grounds alleged in the bill are not sustained by the proof and are denied in the answer, the bill may be amended so as to allege the matter shown by the evidence, or the court may dispense with the formal amendment.[98]

(D) *After Great Lapse of Time — Excuse for Delay.* Where a complainant seeks to open accounts after a great lapse of time, he must distinctly state in his bill the particular act of fraud, misrepresentation, or concealment, and if a mistake is alleged it must be stated with precision.[99] And especially should there be distinct averments as to the time when the fraud or mistake was discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been made before.[1]

(E) *Offer to Do Equity.* It has been held that where complainant is unable to restore the benefit he has received, the maxim that he who seeks equity must do equity will be applied upon his application to open accounts. The bill in such a case should offer to do equity.[2]

(F) *Other Relief Than Opening Settlement.* Where a bill seeks to open a settlement, other relief, as the reformation of a deed, etc., will not be granted unless the bill is appropriately framed for the purpose.[3]

(G) *Waiver of Statute of Frauds.* In an action to impeach an account upon grounds which necessarily admit the existence of a formal contract, plaintiff cannot invoke the statute of frauds against the validity of the contract.[4]

(H) *When Account Only Is Sought — Amendment or Reply.* Under the rule that a bill or complaint seeking to impeach a settled account must specifically charge the fraud or error relied on, an account cannot be opened, surcharged, or falsified when set up as a defense to a bill or complaint which merely seeks an accounting.[5] In such a case plaintiff must amend his bill because the defense is *prima facie* a bar until the account or settlement is impeached, or particular errors are assigned,[6] unless he may reply such matter.[7] Such an amendment is proper and will be allowed[8] unless the right to impeach the account has been

97. Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

98. Shugart *v.* Thompson, 10 Leigh (Va.) 434.

99. Stearns *v.* Page, 7 How. (U. S.) 819, 12 L. ed. 928.

1. Bruce *v.* Child, 11 N. C. 372; Horan *v.* Long, 11 Tex. 230; Stearns *v.* Page, 7 How. (U. S.) 819, 12 L. ed. 928. See also EQUITY; LIMITATIONS OF ACTIONS.

General averment of ignorance insufficient. — A general allegation of ignorance of the mistake and a failure to discover it sooner will not relieve the party from the imputation of laches where nothing is shown from which ignorance or failure to discover the error sooner could be reasonably inferred. Paulling *v.* Creagh, 54 Ala. 646.

2. Bruen *v.* Hone, 2 Barb. (N. Y.) 586.

3. Billingslea *v.* Ware, 32 Ala. 415.

4. Porter *v.* Wormser, 94 N. Y. 431, discussing the availability of the statute of frauds as a defense, for which see, further, FRAUDS, STATUTE OF.

5. Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94; Costin *v.* Baxter, 41 N. C. 197; Lamb *v.* Trogden, 22 N. C. 190.

6. *Missouri.*— McMahill *v.* Jenkins, 69 Mo. App. 279.

New Jersey.— McClane *v.* Shepherd, 21 N. J. Eq. 76.

New York.—Weed *v.* Smull, 7 Paige (N. Y.) 573.

Oregon.— Hoyt *v.* Clarkson, 23 Oreg. 51, 31 Pac. 198.

Pennsylvania.— Cruise *v.* Walker, 6 Phila. (Pa.) 294, 24 Leg. Int. (Pa.) 141.

England.— Dawson *v.* Dawson, 1 Atk. 1.

Rule applied to complaint ignoring stated account.— Barker *v.* Hoff, 52 How. Pr. (N. Y.) 382; Hutchinson *v.* Market Bank, 48 Barb. (N. Y.) 302.

7. In Iowa, under the code provision making a variance between pleading and proof immaterial unless the opposite party is misled to his prejudice, and permitting the court to direct the facts to be found according to the evidence and to order an amendment where the variance is immaterial, it is held that in an action for an accounting, after the plea of full settlement and evidence tending to show mistake or fraud warranting a finding that there had been no settlement, the court may permit plaintiff, after a verdict, to file an amended reply setting up such fraud. Weiland *v.* Ehlers, 107 Iowa 186, 77 N. W. 855.

Special replication abolished.—See EQUITY.

8. **After issue on account stated found against plaintiff.**— When issue is joined upon an answer setting up a stated account on a bill for an accounting, and the issue is found

waived by the original party, in which case his assignee will not be allowed to set up such matter by amendment.[9]

(I) *General Prayer.* On a bill for an account of fraudulent dealings, a prayer for general relief is sufficient, and it is not necessary to pray specifically that every instrument taken by defendant without consideration should be set aside.[10]

(VI) *Plea or Answer.* As hereinbefore stated, a plea of an account stated is good in bar of relief and discovery to a bill for an accounting.[11] This has been confined, however, to cases where the bill does not directly impeach the accounts,[12] and where such a defense is set up in the answer as a bar to relief and discovery, under the latter circumstances, complainant cannot by an amendment compel a discovery after the plea has been ordered to stand for answer.[13] But even where a former settlement is attacked directly by the bill, defendant may still plead a stated account, with proper averments denying the fraud.[14] The plea of "stated account" should set out the account in such a case[15] unless the bill waives an answer under oath,[16] and must be supported by an answer,[17] and both the plea and the answer must traverse the matters alleged in impeachment.[18]

III. ACTION ON ACCOUNT.

A. Proper Matters of Account — 1. In Ordinary Language. In ordinary language the word "account" is applied to almost every kind of contract which consists of several items.[19]

in favor of defendant, the court may permit the bill to be amended so as to surcharge and falsify the account. McNeel *v.* Baker, 6 W. Va. 153.

9. Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94, wherein the right on the part of the assignee to make such an amendment was denied because by acquiescence for a number of years the original party had lost his right to impeach the account.

10. Newman *v.* Payne, 2 Ves. Jr. 199; Roche *v.* Morgell, 2 Sch. & Lef. 721.

11. See *supra*, II, E, 9, b, (VII).

12. Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Sumner *v.* Thorpe, 2 Atk. 1; Roche *v.* Morgell, 2 Sch. & Lef. 721.

Where charge in bill insufficient.— Where a bill contains only a general charge of concealment and fraud in the settlement of an account, it will not be a sufficient averment to require inquiry into details. This was on consideration of the sufficiency of the answer, and it was held that if plaintiff should show himself entitled to a discovery on the hearing he would then be in the position of a complainant to whose bill a false plea had been put in; that is, he could have an order to examine defendant on interrogatories. French *v.* Rainey, 2 Tenn. Ch. 640. See also Discovery; Equity.

13. Plea ordered to stand for answer.— Where a plea is ordered to stand for an answer without leave given to accept, this, in effect, adjudges the plea to be sufficient as an answer as to so much of the bill as it covers, and protects the defendant from further discovery. Leycraft *v.* Dempsey, 15 Wend. (N. Y.) 83. See Discovery; Equity.

14. Greene *v.* Harris, 11 R. I. 5; Knight *v.* Bampfield, 1 Vern. 179; Willis *v.* Jernegan, 2 Atk. 251.

15. Meeker *v.* Marsh, 1 N. J. Eq. 198.

Charge that plaintiff has no counterpart.— Where a bill seeks to impeach a stated and settled account and charges that complainant has no counterpart of the account, and prays that the same may be set forth, defendant must set out or annex the account by way of schedule to his answer or plea, although he pleads or sets up as a defense the stated account. The reason of this is that without a discovery of the account itself complainant cannot point out the errors upon the face of it, provided any exist. Weed *v.* Smull, 7 Paige (N. Y.) 573; Bullock *v.* Boyd, 2 Edw. (N. Y.) 293; Hankey *v.* Simpson, 3 Atk. 303.

16. Weed *v.* Smull, 7 Paige (N. Y.) 573.

17. McClane *v.* Shepherd, 21 N. J. Eq. 76; Blackledge *v.* Simpson, 2 N. C. 259.

Answer in support of plea.— See Equity.

Effect of rule.— If defendant properly pleads a stated account, the settlement cannot be opened except plaintiff prove the allegations of his bill; otherwise, however, if defendant does not thus plead his defense. Blackledge *v.* Simpson, 2 N. C. 259.

18. Harrison *v.* Farrington, 38 N. J. Eq. 1; McClane *v.* Shepherd, 21 N. J. Eq. 76; Blackledge *v.* Simpson, 2 N. C. 259; Phelps *v.* Sproule, 1 Myl. & K. 231; Parker *v.* Alcock, 1 Y. & J. 432. To the same effect, where the plea or answer was amended, Meeker *v.* Marsh, 1 N. J. Eq. 198; Allen *v.* Randolph, 4 Johns. Ch. (N. Y.) 693; Bayley *v.* Adams, 6 Ves. Jr. 586; Davies *v.* Davies, 2 Keen 534. See, generally, Equity.

Denial of facts constituting fraud.— Where facts constituting the fraud upon which a former accounting is attacked are denied by the plea setting up stated accounts, the plea is sufficient. Greene *v.* Harris, 11 R. I. 5.

19. Barkley *v.* Rensselaer, etc., R. Co., 27 Hun (N. Y.) 515. See also *supra*, I.

2. In Connection with Particular Purposes — a. In General. But this is an inartificial view, and what are or are not proper subjects of account must be determined with a due regard to the particular connection in which the question arises. In general terms the matter is presented in two aspects: (1) upon the admissibility of particular evidence, as book-entries, to prove matters ordinarily the subject of such entries; and (2) upon the remedy, as well as upon the manner of establishing a cause of action in a suit on an account.[20]

b. As to Evidence. As just stated, the first aspect refers to the admissibility of, and manner of proving, books of entry,[21] and under it the account contemplated is such an one as is kept in the ordinary course of business, where the goods are sold and delivered,— a registry of sale and delivery actually made of the things therein contained at the time of their being so entered,[22] — as under an affidavit-of-defense law requiring an affidavit of defense to prevent a judgment upon an account without further proof than the book-entries or copy,[23] or a statute under which such account may be proved by the plaintiff's own oath.[24]

c. As to Remedy. Matters of account usually include personal property sold and delivered, services performed, materials found and provided, and the use of such property hired and returned,[25] or those matters which are usually the subject of a count in *indebitatus assumpsit*.[26] And this head (the second aspect

20. To illustrate, while matters may not be the proper subject of book-account so that they may be proved by book-entries, they may be the subject of an action on an account under provisions regulating the manner of pleading. Thus, while a charge for rent cannot be supported by the books and oath of the party, as charges in an account annexed generally may be, because abundant other testimony of use and occupation must exist, it does not follow that the charge is improper in an account annexed, but the subject-matter, though not technically the subject of book-account, may be included in an account annexed, and the declaration may be as good as if the matter were set out therein. Hilton *v.* Burley, 2 N. H. 193.

21. See Evidence.

22. *Delaware.*— Ward *v.* Powell, 3 Harr. (Del.) 379; Rowland *v.* Burton, 2 Harr. (Del.) 288.

Iowa.— Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673.

Massachusetts.— Prince *v.* Smith, 4 Mass. 455.

New Jersey.— Danser *v.* Boyle, 16 N. J. L. 395; Swing *v.* Sparks, 7 N. J. L. 71; Wilson *v.* Wilson, 6 N. J. L. 114.

New York.— Merrill *v.* Ithaca, etc., R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130.

Pennsylvania.— Shoemaker *v.* Kellog, 11 Pa. St. 310.

23. McLaughlin *v.* Weer, 1 Marv. (Del.) 267, 40 Atl. 1122; Sloan *v.* Grimshaw, 4 Houst. (Del.) 326; Fenn *v.* Early, 113 Pa. St. 264, 6 Atl. 58; Wall *v.* Dovey, 60 Pa. St. 212; Kunzig *v.* Haedrick, 2 Wkly. Notes Cas. (Pa.) 228; Ridgway *v.* Bell, 1 Phila. (Pa.) 117, 7 Leg. Int. (Pa.) 195.

24. French *v.* Brandon, 1 Head (Tenn.) 47.

25. 1 Wait Act. & Def. 189.

26. See, generally, Curran *v.* Curran, 40 Ind. 473; Elm City Club *v.* Howes, 92 Me. 211, 42 Atl. 392 (holding that in practice the account annexed is a substitute for the common money counts); Cape Elizabeth *v.* Lombard, 70 Me. 396; Chapman *v.* Rich, 63 Me. 588 (which was assumpsit on an account annexed for board of defendant's minor child, wherein it appeared that defendant's daughter, a minor, went to live with plaintiff, under a verbal agreement to remain until of age, for her board, clothing, and schooling, but left before the expiration of that time, and it was held that as defendant had broken the contract she could not keep the consideration which had been received under it, and that plaintiff could treat the contract as a nullity and recover the value of what had been expended in pursuance of it); Quin *v.* Bay State Distilling Co., 171 Mass. 283, 50 N. E. 637; Lovell *v.* Earle, 127 Mass. 546; Lowe *v.* Pimental, 115 Mass. 44; Raymond *v.* Eldridge, 111 Mass. 390 (holding defendant liable, in an action on an account annexed, for the board of his testator's children in the lifetime of the testator, where the children had been expelled from his home under circumstances such as to render him liable for board furnished to them by plaintiff); Morse *v.* Sherman, 106 Mass. 430; Richardson *v.* Crooker, 7 Gray (Mass.) 190 (holding that the price of wood standing on land could not be recovered under a count on an account annexed, as this was not the subject of the common counts in assumpsit); Stearns *v.* Washburn, 7 Gray (Mass.) 187 (controlled by the last case, holding that the price of grass growing on land is not the subject of an action on an account annexed); Lovejoy *v.* Wilson, 1 Cranch C. C. (U. S.) 102, 15 Fed. Cas. No. 8,551.

Money had and received distinguished.— Gray *v.* Farmer, 55 Me. 487, holding that where the evidence does not show any sale by plaintiff to defendant, nor any fact from which the law will raise an implied promise on the part of defendant to pay for the property in question, there is nothing on which a count in *indebitatus assumpsit* on an account annexed can stand; distinguishing this ac-

above referred to) has reference to the various statutory provisions for the recovery on accounts, regulating the manner of pleading and making the accounts or copies of items of the plaintiff's demand *prima facie* evidence of the cause of action when not denied under oath.[27]

3. By Agreement. Whether a particular item is recoverable in an action upon an account should not be determined upon a motion in arrest, but is to be settled by the evidence, and, if by agreement the items have become the subject-matter of an account between the parties in their mutual dealings, it is proper matter of book-charge.[28]

4. Necessity for Actual Entry of Items on Account. It has been held that the rule relating to book-entries as evidence contemplates the actual making of the entries at the time of the transaction.[29] Conversely, it does not matter that items are actually entered in a book if they are not the proper subjects of book-account.[30] On the other hand the practice prescribed for a convenient method of declaring on such a claim is held not to require the items to have been actually entered in an account,[31] even when the items must be the subject-matter of book-entry,[32] if in such case the matters are in fact proper items of a book-account.[33]

5. Action In Tort or Ex Contractu. It is not every claim which plaintiff may sue upon as an account. It must be founded in contract, and one cannot, by merely tabulating his claim, convert an action in tort into an action on an account.[34]

tion from a count for money had and received, because the latter may be sustained without an express promise and even against defendant's denial of liability, whenever it appears that he has received money which in equity belongs to plaintiff. So in Georgia it is held that an action on an open account is not proper to recover for money had and received, the court saying that it is by no means an easy matter to define in precise and accurate terms what constitutes an action upon "open account." Thornton *v.* Abbott, 97 Ga. 546, 25 S. E. 338.

27. Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151; Thornton *v.* Abbott, 97 Ga. 546, 25 S. E. 338; Eaton *v.* Peavy, 75 Iowa 740, 38 N. W. 423; Bowen *v.* South Bldg., 137 Mass. 274; Hilton *v.* Burley, 2 N. H. 193.

A claim for attorney's fees and disbursements made in payment of witnesses and the like is as much an action on an account as an action by a merchant for goods sold and delivered. Eaton *v.* Peavy, 75 Iowa 740, 38 N. W. 423.

Matters of book-entry.—The statutory provision controls, however, and sometimes it refers to the remedy in connection only with matters which are technically the subject of book-entry, in the sense of making such book-entries evidence. This, for example, was the construction of the provision in Ohio for declaring in short form on book-accounts. Horning *v.* Poyer, 18 Ohio Cir. Ct. 732; McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23. Work and labor is such an item, and, if items which are the proper subject of the book-account, and other items, as cash, not ordinarily subjects of such an account, are mingled, this will not defeat the action. McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23.

28. Nedvidek *v.* Meyer, 46 Mo. 600, rent; Horning *v.* Poyer, 18 Ohio Cir. Ct. 732; Mc- 732.

29. Stoops *v.* Post, 15 Wkly. Notes Cas. (Pa.) 176, wherein it seems to be held that lost book-accounts are not within the meaning of an act relating to the *prima facie* evidence of book-entries, and that when the book cannot be produced the kind of evidence required by the statute to establish a *prima facie* case is wanting, and plaintiff is put to other proof. See also Evidence.

30. Fenn *v.* Early, 113 Pa. St. 264, 6 Atl. 58; Harbison *v.* Hawkins, 81* Pa. St. 142.

31. Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151, holding that there is no reason why an officer of a corporation whose yearly compensation is fixed by the board of directors may not make out his claim against the corporation in the form of an account and sue upon it as such. So, under a statute precluding plaintiff from proving his account if he fails to deliver a copy thereof, etc., it is said to be of no concern to the other party that plaintiff kept the items of his account in a book or in his head. Lonsdale *v.* Oltman, 50 Minn. 52, 52 N. W. 131.

32. Clark *v.* Clark, 46 Conn. 586; Horning *v.* Poyer, 18 Ohio Cir. Ct. 732.

33. Black *v.* Chesser, 12 Ohio St. 621.

34. Albertson *v.* Grier, 4 Houst. (Del.) 541; Spencer *v.* Hewett, 20 Ga. 426 (holding that plaintiff could not resort to the form of an action on an account authorized by the statute which was intended to simplify and curtail pleadings at law, where his cause of action was in trover, and that the fact that the statute provided a form in trover for cases appropriate to that kind of action showed that the legislature intended that some regard should be paid to form); Atchison, etc., R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043 (holding that one may waive a tort and sue on an account for the value of articles taken, or which in some way have been a benefit to defendant, but that where

6. Special Contract. Upon the question of evidence, special contracts are not the subject-matter of book-accounts and cannot be proved thereby.[35] As a rule relating to the remedy where the demand is based solely upon a breach of contract, the remedy should be confined to that,[36] but, following the rule applying to the action of assumpsit generally,— that upon the full performance of a special contract, so that the obligation to pay money is all that remains, a declaration on the common counts is sufficient,[37]— an action upon an account (or an open account) may be maintained if plaintiff has fully performed his part of the contract and nothing remains to be done but the payment of money.[38] Plaintiff is restricted to the special contract and cannot recover on a general count only when the contract is open and in full force.[39] In one state, however, it has been held that under the statutory provision making a verified open account sufficient *prima facie* evidence of plaintiff's claim, the term "account" applies only to transactions in which by sale and purchase the title to personal property is passed, and the relation of debtor and creditor created, and not to isolated transactions founded upon special contract.[40]

goods have been damaged and retained by the owner he must bring his action for the tort or wrong); Sandeen *v.* Kansas City, etc., R. Co., 79 Mo. 278 (which was an action before a justice of the peace by filing an account, wherein it was held that where property was taken without the consent of the owner and converted to defendant's use, plaintiff must sue in tort and cannot bring an action on an account; that the extension of the doctrine permitting a waiver of the tort to all cases in which the wrongdoer had acquired a benefit by his wrong is not in accord with the spirit and logic of the practice act, which requires the pleader to set out the actual facts constituting his cause of action or defense); Henry Pank, etc., Mfg. Co. *v.* American Car Co., 72 Mo. App. 344; Western, etc., R. Co. *v.* Mead, 4 Sneed (Tenn.) 107; Galveston, etc., R. Co. *v.* Gildea, 2 Tex. App. Civ. Cas. § 271 (holding that a suit for damages for delay in shipment and delivery by defendant was not an open account within the statute making such accounts evidence when supported by the affidavit of the party); Houston, etc., R. Co. *v.* Hays, 1 Tex. App. Civ. Cas. § 759; Galveston, etc., R. Co. *v.* Morris, 1 Tex. App. Civ. Cas. § 777.

Waiver of tort.— In Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536, it was held that the owner of goods in possession of another party, who without legal excuse refuses to deliver them to the owner on demand, may sue in tort for the conversion, or he may waive the tort and treat the wrongdoer as a purchaser and sue and recover upon account for their value. But see Sandeen *v.* Kansas City, etc., R. Co., 79 Mo. 278, cited *supra;* and, generally, Election of Remedies.

35. Ward *v.* Powell, 3 Harr. (Del.) 379; Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673 [*citing* Pritchard *v.* McOwen, 1 Nott & M. (S. C.) 131, note *a*; Nickle *v.* Baldwin, 4 Watts & S. (Pa.) 290]; Wilson *v.* Wilson, 6 N. J. L. 114. See also Evidence.

36. Action on account annexed is not a proper remedy for a breach of contract. Bowen *v.* South Bldg., 137 Mass. 274.

37. See Hancock *v.* Ross, 18 Ga. 364; Felton *v.* Dickinson, 10 Mass. 287; Dermott *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351; and Assumpsit.

38. Roberts *v.* Leak, 108 Ga. 806, 33 S. E. 995; Tumlin *v.* Bass Furnace Co., 93 Ga. 594, 20 S. E. 44; Burch *v.* Harrell, 93 Ga. 719, 20 S. E. 212; Schmidt *v.* Wambacker, 62 Ga. 321; Johnson *v.* Quin, 52 Ga. 485; Elm City Club *v.* Howes, 92 Me. 211, 42 Atl. 392, holding that assumpsit on an account annexed may be brought to recover dues owing to an association in accordance with its by-laws, over the objection that the suit should be upon the defendant's written contract to pay the dues; Bowen *v.* South Bldg., 137 Mass. 274; Lovell *v.* Earle, 127 Mass. 546; Lowe *v.* Pimental, 115 Mass. 44; Morse *v.* Sherman, 106 Mass. 430; Cincinnati *v.* Cameron, 33 Ohio St. 336. But see Parnell *v.* Wilson, Dudley (S. C.) 371.

In harmony with code pleading.— When it is considered that this principle of pleading is recognized as a common-law principle, according to the cases above cited (note 37), the propriety of authorizing a recovery on a petition under the code, founded upon an account in harmony with the special contract, cannot be questioned. Buford *v.* Funk, 4 Greene (Iowa) 493; Emslie *v.* Leavenworth, 20 Kan. 562.

Under contract terminable at will.— Where a contract to furnish labor and materials, etc., is terminable by either of the parties at his pleasure, plaintiff may maintain an action on an account annexed for what is due him immediately upon terminating the contract. Quin *v.* Bay State Distilling Co., 171 Mass. 283, 50 N. E. 637.

Rent under parol demise.— Bowen *v.* South Bldg., 137 Mass. 274, as to action on an account annexed.

39. Buford *v.* Funk, 4 Greene (Iowa) 493.

40. Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70; Ballew *v.* Casey, 60 Tex. 573; McCamant *v.* Batsell, 59 Tex. 363; Garwood *v.* Schlichenmaier, (Tex. Civ. App. 1901) 60 S. W. 573; Schutze *v.* Von Boeckmann, 22 Tex. Civ.

B. Illegal Items. If some of the items of an account are illegal, plaintiff may strike them out and recover for the others which are legal.[41]

C. When Due — Demand. An account which neither party considers due immediately is due on demand, or on the expiration of a reasonable time, or at the time the creditor understood it to be due.[42] No demand is necessary, however, before bringing an action for the recovery of the price of articles sold and delivered, where the contract itself does not impose that condition. Such a debt is due when the transaction is complete.[43]

D. Account as an Entirety. Where any item of an account delivered by one party to another is sought to be made available against the former, the account must be taken as an entirety. A party cannot claim the benefit of credits without also submitting to the debits shown by the account.[44] But it is held that this principle does not apply when the persons furnishing the accounts are bound by law to furnish them, as agents, etc.[45]

App. 112, 53 S. W. 836; Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Coleman *v.* Anheuser-Busch Brewing Assoc., (Tex. Civ. App. 1897) 39 S. W. 1088; De Long *v.* Miller (Tex. Civ. App. 1896), 37 S. W. 191; Galveston, etc., R. Co. *v.* Schwartz, 2 Tex. App. Civ. Cas. § 758; Murray *v.* McCarty, 2 Tex. App. Civ. Cas. § 107; Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 104; Texas, etc., R. Co. *v.* Smith, 2 Tex. App. Civ. Cas. § 51; Gulick *v.* Fortson, 1 Tex. App. Civ. Cas. § 425; Texas, etc., R. Co. *v.* Looby, 1 Tex. App. Civ. Cas. § 577; Houston, etc., R. Co. *v.* Hays, 1 Tex. App. Civ. Cas. § 759.

An action for work and labor is not on an open account. Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70; Texas, etc., R. Co. *v.* Smith, 2 Tex. App. Civ. Cas. § 51; Murray *v.* McCarty, 2 Tex. App. Civ. Cas. § 107. So a claim for board of laborers and for services rendered by plaintiff as a section foreman were held not to come within the meaning of the statute. Galveston, etc., R. Co. *v.* Schwartz, 2 Tex. App. Civ. Cas. § 758.

A claim for professional services is an isolated transaction based upon special contract, and does not come within the meaning of the statute. Garwood *v.* Schlichenmaier, (Tex. Civ. App. 1901) 60 S. W. 573; De Long *v.* Miller, (Tex. Civ. App. 1896) 37 S. W. 191. But see Gulick *v.* Fortson, 1 Tex. App. Civ. Cas. § 425, and Schutze *v.* Von Boeckmann, 22 Tex. Civ. App. 112, 53 S. W. 836. In the last case, in a suit before a justice of the peace, the citation described the demand as an action of debt for professional services of an attorney; and in arriving at the conclusion that a sworn plea was not necessary in attacking the consideration, as in a suit on a written instrument, the court decided that the action was not on the contract under which the services were rendered.

An account for goods delivered to an agent to be sold by him and accounted for is held not to be such an open account. Coleman *v.* Anheuser-Busch Brewing Assoc., (Tex. Civ. App. 1897) 39 S. W. 1088. But an account for goods sold and delivered in accordance with the terms of a special contract between the buyer and seller is an open account under the statute. Ballew *v.* Casey, 60 Tex. 573; Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707.

Money items intermingled in an account with items of merchandise will not destroy its character as an account under this statute. Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 104.

41. Philips *v.* Moses, 65 Me. 70; Monroe *v.* Thomas, 61 Me. 581; Plummer *v.* Erskine, 58 Me. 59 [*citing* Towle *v.* Blake, 38 Me. 528; Boyd *v.* Eaton, 44 Me. 51, 69 Am. Dec. 83]; Hilton *v.* Burley, 2 N. H. 193.

42. Chandler *v.* Chandler, 62 Ga. 612. See also, generally, ACTIONS.

43. Ryors *v.* Prior, 31 Mo. App. 555; Ballew *v.* Casey, 60 Tex. 573; Low *v.* Griffin, (Tex. Civ. App. 1897) 41 S. W. 73.

Furnishing account before suit brought.— A creditor is under no obligation to furnish a statement of the items of his account before bringing suit for the amount due. Foster *v.* Newbrough, 66 Barb. (N. Y.) 645.

44. *Alabama.*— Fitzpatrick *v.* Harris, 8 Ala. 32.

Illinois.— Dougherty *v.* Knowlton, 19 Ill. App. 283.

Louisiana.— Green *v.* Glasscock, 9 Rob. (La.) 119.

Virginia.— Freeland *v.* Cocke, 3 Munf. (Va.) 352.

United States.— Bell *v.* Davidson, 3 Wash. (U. S.) 328, 3 Fed. Cas. No. 1,248; Morris *v.* Hurst, 1 Wash. (U. S.) 433, 17 Fed. Cas. No. 9,832.

Calling for account to disprove it.— Where defendant alleges that plaintiff's account, which from ignorance or mistake he did not object to originally, is erroneous, and calls for it expressly to disprove some of the items and gives evidence to this effect, the fact of his calling for the account is not evidence of its correctness. Gracy *v.* Bailee, 16 Serg. & R. (Pa.) 126.

Suit upon two separate accounts.— Where plaintiff sues upon two accounts exhibited, but no evidence is offered upon one, and all the evidence introduced applies solely to the other, the admission of payments or the credits upon the account upon which no evidence is introduced cannot be held to apply to that upon which plaintiff relies. Saltmarsh *v.* Vandeveer, 16 Tex. 5.

45. Marr *v.* Hyde, 8 Rob. (La.) 13; Moorhead *v.* Thompson, 1 La. 281; Smith *v.* Harrathy, 5 Mart. N. S. (La.) 319.

E. Pleading — 1. Declaration or Complaint — a. In General. A claim founded upon an account is the subject of an action of assumpsit under the common counts.[46]

b. Sufficiency — (I) *In General.* In an action on an account the material facts upon which the liability of defendant depends should be distinctly alleged.[47] Under the statutory practice requiring the complaint to state facts which constitute the cause of action, but which permits a more general method of pleading when the account is incorporated in or attached to the complaint, a complaint is bad which fails to give the items of the account or the nature of the demand.[48] In other words, where the complaint itself attempts to set up the cause of action, it must state the subject-matter or consideration of the account.[49]

(II) *Demand.* In an action on an account an allegation that defendant had refused to pay for the services rendered sufficiently shows that demand was made, if such demand is necessary.[50]

(III) *Recovery Confined to Matters Pleaded.* A recovery cannot be had for a different cause of action than that pleaded.[51]

(IV) *Balance of Account.* Sometimes it is material that a proper distinction be made between declaring on an account generally and declaring for the balance.[52] Where plaintiff attempts to recover a general balance of account and alleges a payment on the account generally and the balance remaining due, such payment cannot be applied to any particular item of the account.[53]

46. Bliss Code Pl. § 298.

Form of declaration or complaint, in full, in part, or in substance, under the subdivisions of this section, may be found in the following cases:

Alabama.— Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239, complaint on verified account with averment of verification instead of indorsement thereof; Eslava *v.* Ames Plow Co., 47 Ala. 384.

Arizona.— Wagener *v.* Boyce, (Ariz. 1898) 52 Pac. 1122, complaint on open account making a verified itemized statement a part thereof as an exhibit; Molino *v.* Blake, (Ariz. 1898) 52 Pac. 366.

California.— Magee *v.* Kast, 49 Cal. 141, complaint in ordinary form of count in *indebitatus assumpsit.*

Georgia.— Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151, petition on an account annexed.

Indiana.— Mayes *v.* Goldsmith, 58 Ind. 94 (complaint before justice of the peace, annexing bill of particulars as exhibit); Sherrod *v.* Shirley, 57 Ind. 13 (complaint before justice of the peace); Johnson *v.* Kilgore, 39 Ind. 147 (complaint in form of general count upon account annexed).

Maine.— Cape Elizabeth *v.* Lombard, 70 Me. 396, count in assumpsit upon an account annexed under statute.

Massachusetts.— Stearns *v.* Washburn, 7 Gray (Mass.) 187, statutory form of count on account annexed.

Missouri.— Robinson *v.* Hope Bldg., etc., Co., 72 Mo. App. 522, before justice of the peace by filing itemized account for work and labor, materials furnished, etc.

Ohio.— Ralston *v.* Kohl, 30 Ohio St. 92 (petition for balance of account, annexing copy); Horning *v.* Poyer, 18 Ohio Cir. Ct. 732 (petition in short form on account annexed).

Rhode Island.— Hawkins *v.* McNeal, 16 R. I. 386, 17 Atl. 172, special count on annexed account under statute.

South Carolina.— General Electric Co. *v.* Blacksburg Land, etc., Co., 46 S. C. 75, 24 S. E. 43, complaint annexing copy as part thereof.

47. Sale and delivery are the material facts in an action on an account for goods and wares sold and delivered, but the legal inference or conclusion of defendant's liability and promise to pay, arising from these facts, need not be alleged, and, if alleged, may be regarded as surplusage. Love *v.* Doak, 5 Tex. 343.

48. Gise *v.* Cook, 152 Ind. 75, 52 N. E. 454; Bay *v.* Saulspaugh, 74 Ind. 397.

49. Bradfield *v.* Patterson, 106 Ala. 397, 398, 17 So. 536, holding, however, that a complaint which seeks to recover a particular amount due from defendant "by account on, to-wit, April 11, 1890, with interest from that date," is too uncertain, but, in the absence of objection, is sufficient to support a judgment after verdict.

50. Ryors *v.* Prior, 31 Mo. App. 555.

51. See *infra,* III, F, 2, c; III, H, 2.

52. Burford *v.* Earl, (Ark. 1900) 60 S. W. 234, wherein the trial court refused to declare the law to be that plaintiff could not recover on the account for the year sued for if it had been paid, but declared that the suit was for a general balance of account and not for any particular year; but this was held to be erroneous because the pleading showed that the action was brought for an account for goods sold in one year, and in such a case a payment of that account was a complete bar, and a recovery could not be had on an account for goods sold in a prior year.

53. Huffstater *v.* Hayes, 64 Barb. (N. Y.) 573.

(v) *Certainty as to Nature of Claim* — (a) *Furnishing Items* — (1) In General. The common counts in assumpsit gave scant notice of the exact nature of the demand, but this uncertainty has been remedied by various statutory provisions requiring the filing of a bill of particulars in all actions of assumpsit, or the setting out in or filing with the pleading a copy of the items of account sued on.[54] Under these provisions the items of the account need not be set forth in the complaint,[55] but defendant is entitled to notice of these matters, at least if he demands it, and under some statutes, if the pleading is so general as to give no notice of the items, he may demand to be served with a copy of the account sued on. Such statutes are to the effect that plaintiff need not plead the items, but must, upon demand, serve a copy thereof,[56] or certainty is attained by requiring a copy of the account sued on to be filed with or attached to the pleading,[57] or by requiring a copy of the account to be incorporated in the pleading, or, in the alternative, to be filed therewith.[58]

(2) Short Forms on Items Annexed. Under provisions of this character the pleading on behalf of plaintiff often assumes a very concise and inartificial form, the certainty necessary to apprise defendant of the cause of action being embraced in the particulars thus furnished, as that, in effect, plaintiff claims of defendant a certain amount due, as shown by the account annexed or set out.[59]

54. For the practice relating to bills of particulars and exhibits see Pleading.

The manifest object of such provisions is to simplify the form of pleading and yet to furnish the adversary with the particulars of the claim which he is called upon to meet. B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139; McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23. And at the same time it is to protect the defendant against a subsequent action for the same cause. Soria *v.* Planters' Bank, 3 How. (Miss.) 46.

55. *California.*— Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199.

Idaho.— Mills *v.* Glennon, 2 Ida. 95, 6 Pac. 116.

Minnesota.— Tuttle *v.* Wilson, 42 Minn. 233, 44 N. W. 10.

Missouri.— B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

New York.— Beekman *v.* Platner, 15 Barb. (N. Y.) 550.

United States.— Albion Phosphate Min. Co. *v.* Wyllie, 77 Fed. 541, 42 U. S. App. 214, 23 C. C. A. 276, under the code of South Carolina.

56. Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199; Tuttle *v.* Wilson, 42 Minn. 233, 44 N. W. 10; Gebhard *v.* Parker, 120 N. Y. 33, 23 N. E. 982; Barkley *v.* Rensselaer, etc., R. Co., 27 Hun (N. Y.) 515; Beekman *v.* Platner, 15 Barb. (N. Y.) 550; Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313; Gebhard *v.* Squier, 13 N. Y. Civ. Proc. 43; Schulhoff *v.* Co-operative Dress Assoc., 3 N. Y. Civ. Proc. 412; Goings *v.* Patten, 1 Daly (N. Y.) 168; Kellogg *v.* Paine, 8 How. Pr. (N. Y.) 329; Flanders *v.* Ish, 2 Oreg. 320, if the items are not set out in the pleading, or filed therewith.

57. *Florida.*— Belote *v.* O'Brien, 20 Fla. 126, bill of particulars.

Illinois.— McCarthey *v.* Mooney, 41 Ill. 300, bill of particulars.

Indiana.— Gise *v.* Cook, 152 Ind. 75, 52 N. E. 454 [*citing* Peden *v.* Mail, 118 Ind. 556, 20 N. E. 493; Lassiter *v.* Jackman, 88 Ind. 118; Connersville *v.* Connersville Hydraulic Co., 86 Ind. 235; Wolf *v.* Schofield, 38 Ind. 175]; Jennings County *v.* Verbarg, 63 Ind. 107; Mayes *v.* Goldsmith, 58 Ind. 94; Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707.

Iowa.— Eaton *v.* Peavy, 75 Iowa 740, 38 N. W. 423; Winters *v.* Page County, 70 Iowa 300, 30 N. W. 576; Rodefer *v.* Myers, 56 Iowa 227, 9 N. W. 186; Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673.

Mississippi.— Pipes *v.* Norton, 47 Miss. 61, under a statute requiring that a copy of an open account sued on shall be filed with the declaration in assumpsit.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Rhode Island.— Hawkins *v.* McNeal, 16 R. I. 386, 17 Atl. 172, under a statute requiring the filing of copy of an account in particular cases in assumpsit.

Virginia.— Wright *v.* Smith, 81 Va. 777; Minor *v.* Minor, 8 Gratt. (Va.) 1; Fitch *v.* Leitch, 11 Leigh (Va.) 471.

58. Jones *v.* Dronberger, 15 Ind. 443; Winters *v.* Page County, 70 Iowa 300, 30 N. W. 576; Meyer *v.* Chambers, 68 Mo. 626; Smith *v.* McGehee, 1 Tex. App. Civ. Cas. § 940.

Filing account in justice's court.— Wyandotte, etc., Gas Co. *v.* Schliefer, 22 Kan. 468.

59. *Georgia.*— Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151; McClendon *v.* Hernando Phosphate Co., 100 Ga. 219, 28 S. E. 152.

Maine.— Assumpsit on an account annexed, which is a substitute for the common money counts. Elm City Club *v.* Howes, 92 Me. 211, 42 Atl. 392; Dudley *v.* Poland Paper Co., 90 Me. 257, 38 Atl. 157. The account, when in the writ, is to be read as its words would naturally be interpreted when out of the writ. Therefore by usage it has always been understood and allowed that an item "for merchandise" shall mean "merchandise sold and delivered;" "for work and materials"

(3) Compliance with Statute — (a) Want of Compliance Not Jurisdictional. A failure to file or annex an account or bill of particulars does not go to the jurisdiction of the court.[60]

(b) Effect of Want of Compliance upon Pleading or as to Evidence. The effect of a failure to set out, attach, or serve a copy of the items of an account depends upon the character of the requirements in this regard. While such particulars are always considered as for the purpose of giving notice of the items, sometimes they are for this purpose exclusively and are not in any sense a part of the pleading,[61] and, while defendant may move for the particulars of the demand,[62] the effect of a failure to comply with the statute, whether in the first instance or only after demand, is to preclude proof of such items.[63] In some of these cases

shall mean "done and expended for defendant at the defendant's request;" "for cash" shall mean "money lent;" and "for money paid" shall mean "money paid at the special instance and request of the defendant." Cape Elizabeth *v.* Lombard, 70 Me. 396. But a charge "for rent" is too general; it should be stated "for use and occupation of messuage or tenement," as in a declaration. Plummer *v.* Bowie, 76 Me. 496. See also Hilton *v.* Burley, 2 N. H. 193. "For balance due" discloses no items as required by the statute. Turgeon *v.* Cote, 88 Me. 108, 33 Atl. 787.

Massachusetts.— Assumpsit on an account annexed as a substitute for the common counts. Stearns *v.* Washburn, 7 Gray (Mass.) 187.

Nebraska.— Fletcher *v.* Co-operative Pub. Co., 58 Nebr. 511, 78 N. W. 1070; McArthur *v.* H. T. Clarke Drug Co., 48 Nebr. 899, 67 N. W. 861; Collingwood *v.* Merchants Bank, 15 Nebr. 118, 17 N. W. 359.

New Hampshire.— Assumpsit on an account annexed. Hilton *v.* Burley, 2 N. H. 193.

Ohio.— Hazen *v.* O'Connor, 14 Ohio Cir. Ct. 529; McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23; Wheeler, etc., Mfg. Co. *v.* Haas, 6 Ohio N. P. 451. In this state the petition setting out a copy of the account, and stating that there is due to plaintiff on such account a specified sum, is called a "petition in short form."

Oregon.— Flanders *v.* Ish, 2 Oreg. 320.

Sworn copy attached as evidence.— But where a sworn account is attached to a petition only as a matter of evidence to relieve plaintiff of making other *prima facie* proof, it is held that this will not relieve the pleader from making all necessary allegations of delivery and price under the contract of which the exhibit might be the evidence. Hemming *v.* McRea, 1 Tex. App. Civ. Cas. § 752.

60. Harrington *v.* Tuttle, 64 Me. 474; Burgess *v.* Bugbee, 100 Mass. 152; Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

Suit in justice's court.— Where the statute provides that in a suit founded on an account a bill of items of such account shall be filed with the justice before any process shall be issued in the suit, it is held that, a justice's court being one of special limited jurisdiction, the proceedings therein must show such facts as constitute a case within its jurisdiction, and if the account which is the foundation of the action is not filed before the issuance of the writ, all proceedings thereafter are *coram non judice.* Pendleton *v.* Fowler, 6 Ark. 41.

61. Belote *v.* O'Brian, 20 Fla. 126.

62. For practice as to requiring particulars see Pleading.

63. *California.*— Hart *v.* Spect, 62 Cal. 187.

Florida.— Robinson *v.* Dibble, 17 Fla. 457.

Minnesota.— Where the items are not set out or furnished on demand. Lonsdale *v.* Oltman, 50 Minn. 52, 52 N. W. 131; Tuttle *v.* Wilson, 42 Minn. 233, 44 N. W. 10.

Mississippi.— In assumpsit on an account annexed, no evidence can be given of the items of an account, unless it is annexed or filed. Pipes *v.* Norton, 47 Miss. 61; Nevitt *v.* Rabe, 5 How. (Miss.) 653. See also Bloom *v.* McGrath, 53 Miss. 249.

Missouri.— Budde *v.* Allen, 21 Mo. 20.

New York.— Failure to furnish on demand. Gebhard *v.* Parker, 120 N. Y. 33, 23 N. E. 982; Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313; Kellogg *v.* Paine, 8 How. Pr. (N. Y.) 329; Gebhard *v.* Squier, 13 N. Y. Civ. Proc. 43; Schulhoff *v.* Co-operative Dress Assoc., 3 N. Y. Civ. Proc. 412. If one pleads an account stated, but his pleadings are not inconsistent with the theory that he relies also upon the original account, he must comply with the statute requiring a copy of the account to be furnished, or he will be deemed to have elected to rely upon the stated account alone and will be precluded from giving evidence of the original account upon the trial. Goings *v.* Patten, 1 Daly (N. Y.) 168.

Oregon.— Flanders *v.* Ish, 2 Oreg. 320, under a statute requiring plaintiff to set forth the items of the account or to file a copy thereof with his pleadings, verified by his own oath, or, upon failure to do either, to deliver such verified copy to the adverse party upon demand.

Virginia.— Upon failure to file the account sued on with the declaration in *indebitatus assumpsit.* Minor *v.* Minor, 8 Gratt. (Va.) 1; Fitch *v.* Leitch, 11 Leigh (Va.) 471.

United States.— Albion Phosphate Min. Co. *v.* Wyllie, 77 Fed. 541, 42 U. S. App. 214, 23 C. C. A. 276, under the South Carolina code, not evidence if the account is not set out in the pleading or furnished on demand.

the account filed is regarded as a part of the pleading,[64] as is also the construction under code provisions requiring a copy of the account to be set out or attached, thus dispensing with a more particular statement in the pleading itself,[65] as well as under a statute providing for a short form of pleading in assumpsit by annexing an account. In these instances a failure to comply with the statute may be taken advantage of by demurrer.[66] In such cases as the last, defendant may move for a bill of particulars if he chooses, but the privilege of doing so will not preclude him from demurring.[67]

(c) Pleading Dispensing with Copy. If the declaration is sufficiently plain and particular to give defendant notice of the account sued on, this is a sufficient compliance with the statute requiring a copy of the account to be filed with the declaration in assumpsit,[68] and the form of pleading prescribed by the code, whereby plaintiff may set out a copy of an account sued on and state that there is due him a certain sum thereon, has been held to be permissive merely and not to exclude a full statement of plaintiff's cause of action.[69] But a pleading which neither attaches the account as it purports to do, nor states the facts which show the nature of the indebtedness, is bad.[70]

(d) Short Form. When the statute permits a short method of pleading, as by alleging that the cause of action is based upon an account set out or annexed, the pleading must be in compliance with the statute.[71] But it is held that this

64. Minor *v.* Minor, 8 Gratt. (Va.) 1; Fitch *v.* Leitch, 11 Leigh (Va.) 471.

65. Gise *v.* Cook, 152 Ind. 75, 52 N. E. 454; Bay *v.* Saulspaugh, 74 Ind. 397; Jones *v.* Dronberger, 15 Ind. 443; Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707; Winters *v.* Page County, 70 Iowa 300, 30 N. W. 576; Boynton *v.* Chamberlain, 38 Tex. 604; Howell Cotton Co. *v.* Citizens' Nat. Bank, 81 Fed. 767, 52 U. S. App. 372, 26 C. C. A. 604. For exhibits see Pleading.

66. Turgeon *v.* Cote, 88 Me. 108, 33 Atl. 787.

67. Wolf *v.* Schofield, 38 Ind. 175.

Substantial compliance.— If the statute is substantially complied with it is sufficient, and if defendant desires greater certainty he should move to make the petition more definite and certain. Meyer *v.* Chambers, 68 Mo. 626. If one of the items is too general, and there are other specific items for which judgment may be rendered on an account annexed, the demurrer should be special, calling attention to the particular defect, and not general, drawing the whole declaration in question. Blanding *v.* Mansfield, 72 Me. 427.

68. Tierney *v.* Duffy, 59 Miss. 364; Nevitt *v.* Rabe, 5 How. (Miss.) 653; People *v.* Monroe C. P., 4 Wend. (N. Y.) 200. See, generally, Pleading.

69. Fletcher *v.* Co-operative Pub. Co., 58 Nebr. 511, 78 N. W. 1070; Home F. Ins. Co. *v.* Arthur, 48 Nebr. 461, 67 N. W. 440; Collingwood *v.* Merchants Bank, 15 Nebr. 118, 17 N. W. 359. In New York it was held that where the action was for money advanced, laid out, and expended for defendant's use, and the complaint specified the facts and circumstances under which and the manner in which it was done, the cause of action was based upon the original indebtedness, and not within the section of the code which precluded plaintiff from giving evidence of the account mentioned in the complaint, unless a copy thereof was furnished upon demand; that under this section it was only in cases in which the pleading was based upon the specific account that this rule applied. Moore *v.* Belloni, 42 N. Y. Super. Ct. 184. But in Barkley *v.* Rensselaer, etc., R. Co., 27 Hun (N. Y.) 515, it was held that there was no necessity for giving a limited construction to the word "account" as used in Code Civ. Proc. § 531. See also Derringer *v.* Pugh, 7 Ohio Cir. Ct. 158.

Contra.— Winters *v.* Page County, 70 Iowa 300, 30 N. W. 576, holding that under § 2648 of the code, providing that where an action is brought upon an open account, and no copy is incorporated into or attached to the petition, defendant may demur, the necessity for setting out a copy of the account sued on, where the claim is simply and fully stated, does not clearly appear, yet, as the statute requires it to be done, a strict compliance is necessary. But see O'Brien *v.* Chicago, etc., R. Co., 64 Iowa 411, 20 N. W. 738, wherein, on a petition for the recovery on an account for work and labor, it was held, upon a demurrer based upon the objection that the petition showed on its face that the cause of action was brought on an account, and the items thereof were not set forth in the petition or attached thereto, that the cause of action did not necessarily embrace separate items of account, and that under the petition it was competent for plaintiff to prove that he did the work for defendant at the latter's request; that he could establish the allegations of the petition without proof of separate items and by proving the value of the work as a whole.

70. See Home F. Ins. Co. *v.* Arthur, 48 Nebr. 461, 67 N. W. 440.

71. McClendon *v.* Hernando Phosphate Co., 100 Ga. 219, 28 S. E. 152 (holding that a declaration which alleges that defendant is indebted to plaintiff upon an account, without stating what plaintiff claims to be due

form is not exclusive, and that plaintiff may use the common count, which may be made more definite and certain by requiring him to furnish a bill of particulars.[72]

(B) *Use of General Counts under Code Practice.* The use of the general counts in assumpsit has been held to be wholly inconsistent with the theory of code pleading.[73] But where a bill of particulars is attached, as required by the statute, it is held that a complaint in the nature of a common count will be sufficient.[74] In some of the code states, however, it is held that the requirement that the complaint shall contain a plain and concise statement of the facts constituting the cause of action does not change the rule of pleading, but facts and not evidence of facts must be pleaded, and that a complaint containing the essential elements of a count in *indebitatus assumpsit* is sufficient, leaving the defendant to demand a bill of particulars or to move to make the pleading more definite and certain.[75]

(VI) *ALLEGATION AS TO ACCOUNT ANNEXED.* Under the statute relating to a copy of a book-account as evidence when sued upon as such, it is held that the copy must not only be a correct copy, but that this should be made to appear upon its face or by categorical averment.[76] So, under a statute relating to verified

upon the account, is not sufficient, notwithstanding it alleges that plaintiff sues for the amount which appears upon the face of a bill of particulars annexed); Beck *v.* Ball, 1 Clev. L. Rep. (Ohio) 147, 4 Ohio Dec. (Reprint) 233; Archer *v.* Moore Combination Desk Co., 11 Cinc. L. Bull. 224, 9 Ohio Dec. (Reprint) 225 (wherein it is held that a petition under such statute must allege that there "is due" on the account a certain amount, and that to say defendant is indebted is not sufficient).

Matters not proper for book-account.— So, if a petition in short form, provided for the recovery of matters properly chargeable in book-account, embraces items which are not properly so charged, defendant should demur to the particular items or move to strike them out, and if he proceeds to trial without objection he cannot move in arrest of judgment. Horning *v.* Poyer, 18 Ohio Cir. Ct. 732; McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23. In New Jersey it was held that where a part of plaintiff's demand was "due on contract on exchange of horses, as difference thirty dollars," that part of the demand should not be stated as a matter of book-account, as it was there, but should be specifically set forth; that the defect was not cured by its being mingled with an aggregate charge on the book-account. Danser *v.* Boyle, 16 N. J. L. 395.

72. Hazen *v.* O'Connor, 14 Ohio Cir. Ct. 529. See also McNutt *v.* Kaufman, 26 Ohio St. 127; Wheeler, etc., Mfg. Co. *v.* Haas, 6 Ohio N. P. 451.

Good as common count.— Where such petition was amended by alleging that defendant was indebted to plaintiff in a certain sum for money loaned and had and received, etc., "a statement of said claim is hereto attached, marked exhibit A," which statement is a substantial copy of that attached to the original petition, it was held that the amended petition was not intended as a petition in short form under the statute, but was in the nature of a claim for recovery on the common count with a bill of particulars. McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23, 27.

73. Buchanan *v.* Beck, 15 Oreg. 563, 16 Pac. 422; Bowen *v.* Emmerson, 3 Oreg. 452.

Sworn copy as evidence.— In Texas it has been held that a sworn copy of an account attached to a petition will not relieve the pleader of the necessity of making all necessary allegations of delivery and price under the contract of which the exhibit might be the evidence. Hemming *v.* McRea, 1 Tex. App. Civ. Cas. § 752.

74. Jennings County *v.* Verbarg, 63 Ind. 107; Johnson *v.* Kilgore, 39 Ind. 147.

Complaint before justice of the peace.— A complaint in an action on an account before a justice of the peace is good, with an averment that defendant is indebted in a certain sum, without alleging expressly that the amount is due and unpaid. Mayes *v.* Goldsmith, 58 Ind. 94.

75. The leading case on this subject is Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542, and the view there expressed has been adopted in the following cases:

California.— Magee *v.* Kast, 49 Cal. 141; Abadie *v.* Carrillo, 32 Cal. 172; Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64; Freeborn *v.* Glazer, 10 Cal. 337.

Minnesota.— Solomon *v.* Vinson, 31 Minn. 205, 17 N. W. 340.

New York.— Beekman *v.* Platner, 15 Barb. (N. Y.) 550; Kellogg *v.* Paine, 8 How. Pr. (N. Y.) 329; Cudlipp *v.* Whipple, 1 Abb. Pr. (N. Y.) 106; Adams *v.* Holley, 12 How. Pr. (N. Y.) 326.

Wisconsin.— Grannis *v.* Hooker, 29 Wis. 65.

United States.— Albion Phosphate Min. Co. *v.* Wyllie, 77 Fed. 541, 42 U. S. App. 214, 23 C. C. A. 276, under the South Carolina code.

Statutory foundation.—The particular statute said to be the only warrant for these decisions is that which provides that it shall not be necessary to set forth in the pleading the items of the account, but that the pleader shall deliver to the adverse party, within a certain time after demand, a copy of the account, etc. Bliss Code Pl. § 298, where it is also pointed out that in those states where this provision does not exist the rule would not apply.

76. Fritz *v.* Hathaway, 135 Pa. St. 274, 19 Atl. 1011; Freeman *v.* Refowich, 20 Pa.

accounts, it is held that the petition should contain an allegation of the correctness of the account,[77] and under a statute making a sworn account, when coming from another state or county, conclusive unless denied under oath, it is held that the action is upon the sworn account and the declaration should allege that the account is such as the statute provides for.[78]

(VII) *ASSIGNED ACCOUNT.* If the action is on an account of which plaintiff is the assignee, the assignment should be shown[79] and the claim identified.[80]

c. Joinder. Different items of an account may be joined in one paragraph or count as one cause of action,[81] and an action on a contract performed may be united with an action on an account, both items being included in one account.[82] The assignee of an account may bring an action thereon, and join therein a

Co. Ct. 17; Loeb *v.* Heere, 19 Pa. Co. Ct. 641; Camburn *v.* Cox, 12 Montg. Co. Rep. (Pa.) 30. See also Terriberry *v.* Broude, 173 Pa. St. 48, 37 Wkly. Notes Cas. (Pa.) 435, 33 Atl. 699, where the statement and copy help each other out by averment.

Sufficiency.— A copy of the book-entries, accompanied by the averment that they are taken from the books of original entry and constitute plaintiff's demand upon which suit is brought, is enough to put defendant to his affidavit of defense. Orth *v.* Saylor, 2 Wkly. Notes Cas. (Pa.) 349.

77. Dewey *v.* Burton, 4 Kan. App. 582, 46 Pac. 321; Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447.

78. Hunter *v.* Anderson, 1 Heisk. (Tenn.) 1. See *infra*, III, F, 4.

Before a justice of the peace the fact that the suit is based on an account coming from another state and sworn to should be stated in the warrant or otherwise made to appear. It is enough if the account is attached to the warrant. Wilkhorn *v.* Gillespie, 6 Heisk. (Tenn.) 329.

Waiver.— Where defendant fails to deny under oath an account from another state proven and authenticated as required by statute, and admitted in evidence under such proof and authentication, this is a waiver of a failure to make profert of the account in the declaration. App *v.* Tieman, 10 Heisk. (Tenn.) 44. If defendant had denied the justice of the account and had objected to its introduction in evidence, it would have been error to have permitted the account to go to the jury. In this the case is distinguished from Hunter *v.* Anderson, 1 Heisk. (Tenn.) 1.

Suit not on verified account.— In Alabama, under the statute making an itemized statement of a verified account competent evidence of the correctness of the account, if plaintiff, at the time of bringing suit, indorses on the summons and complaint or other original process the fact that the account is verified by affidavit, etc., it is held that it is not within the purview of the statute that the suit should be brought upon the verified account; that the suit is upon the account, which, when verified, is evidence, and that if the fact of verification is noted in the complaint instead of indorsing it thereon, such averment is not descriptive of the cause of action. Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239; Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249.

79. Jones *v.* Dronberger, 15 Ind. 443, holding that if the suit is by an assignee of an account the complaint should be accompanied by a copy of the assignment, or, if the assignment was by parol, should aver this fact. But in Union Bank *v.* Tillard, 26 Md. 446, assumpsit to recover the amount of an account brought by an assignee, it was held that while, according to the common-law rules of pleading, an omission to aver that the assignment was in writing would have been fatal on demurrer, the form provided by the code in such a case did not require such an averment, and therefore it was not necessary.

Against debtor and assignor as guarantor. — A petition by the assignee of an open account, alleging that the account had been assigned to plaintiff, that its payment had been guaranteed by the assignor, and that, though often demanded, the debt had not been paid by the debtors on the account or the assignment, is sufficient to fix liability on both parties. Cleveland *v.* Campbell, (Tex. Civ. App. 1896) 38 S. W. 219.

80. Bay *v.* Saulspaugh, 74 Ind. 397.

81. Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199; Mills *v.* Glennon, 2 Ida. 95, 6 Pac. 116; Gaff *v.* Hutchinson, 38 Ind. 341.

Short form — Account annexed.— See McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23, holding that the reason for the law which allows a short form of pleading on an account is that if each item of the debit side of a running account is to be made the subject of a separate cause of action it would be too expensive and burdensome to be borne. The statute therefore allows the account to be pleaded as if all the matters embraced in it were under a single arrangement. And see also Lovell *v.* Earle, 127 Mass. 546, holding that goods sold and work and labor done, either at their reasonable worth, or at a stipulated price, or under a special contract fully performed by plaintiff, may be sued for under the common counts, and therefore may be joined in a count on an account annexed.

82. Buford *v.* Funk, 4 Greene (Iowa) 493, under the code provision abolishing technical forms of action and pleading, and permitting the joinder of several causes where they affect all the parties thereto in the same capacities. See also *supra*, III, A, 6.

cause of action against the assignor on his guaranty of the payment of the account.[83]

d. Amendment. Failure to file or annex an account is an amendable defect.[84] So, also, a declaration or complaint may be amended by setting out additional items of account,[85] or by inserting words to identify the account sued on.[86] An amendment may be allowed by adding a count on a promissory note which has been pleaded in payment.[87]

2. Plea or Answer — a. Denial of Items. The denial of specific items of an account is proper matter to be pleaded in defense.[88]

b. Denial of Indebtedness — Nil Debet. A plea merely denying indebtedness to plaintiff, or which amounts to the general issue, *nil debet*, is not a sufficient denial of the averments plainly and distinctly made in the complaint, and raises no issue as to the correctness of the account sued on,[89] and in an action for goods sold and delivered an answer which does no more than deny all indebtedness and set up a counter-claim operates as an admission of plaintiff's claim as set forth in the complaint subject to defendant's counter-claim, and plaintiff must recover unless the counter-claim is established.[90]

83. Cleveland *v.* Campbell, (Tex. Civ. App. 1896) 38 S. W. 219.

84. Harrington *v.* Tuttle, 64 Me. 474 [*citing* Butler *v.* Millett, 47 Me. 492; Burgess *v.* Bugbee, 100 Mass. 152; Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345].

Enlargement of claim.— Plaintiff's claim cannot be enlarged by such an amendment. Butler *v.* Millett, 47 Me. 492.

85. Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310, holding that if the court orders that plaintiff have leave to amend on condition that a previous offer by defendant to allow judgment in a certain sum shall be deemed increased to correspond with the increased demand of plaintiff, and plaintiff does not act on this suggestion, he cannot complain of the denial of his application.

Transfer of items from another action.— But where two parties have commenced separate actions against the same defendant on accounts annexed to their writs, for different and distinct items, the court is not authorized to permit the items of the account embraced in one action to be transferred and added to the account in the other by way of amendment. This would not be an amendment to cure an imperfection or mistake in the manner of stating plaintiff's cause, but would be to substitute a different cause. Merrill *v.* Russell, 12 N. H. 74.

86. Hawkins *v.* McNeal, 16 R. I. 386, 17 Atl. 172, permitting an amendment by inserting the words "balance due" so as to make the action one for a balance due on a book-account.

Identification of account reduced by credits. — In a suit on an open account alleged to be due from defendant to plaintiff's assignor under an assignment for the benefit of creditors, the account appeared in the schedule of the various debts assigned, and the account attached to the petition was for a larger amount. Plaintiff alleged, in an amended petition, that the account had been reduced by credits to the amount stated in the assignment. Defendant objected that it was not stated in the assignment to be the balance of the account, but an open account, and therefore contended that the debt sued for was not the one assigned, but it was held that as the object of the assignment was to set over the amount due on an open account from the debtor for the benefit of the creditors, that object would be defeated by mere inadvertency in calling it the balance of an account, and that plaintiff could show that the amount sued for was the balance after credits claimed by defendant for the purpose of identifying the account sued on pursuant to the allegations in the amended petition. Burnham *v.* Chandler, 15 Tex. 441.

87. Fels *v.* Loeb, 3 Pa. Co. Ct. 136; Blum *v.* Mays, 1 Tex. App. Civ. Cas. § 475.

88. Rodefer *v.* Myers, 56 Iowa 227, 9 N. W. 186; Collins *v.* Fenley, (Ky. 1899) 53 S. W. 667, under the code requiring a specific denial of each allegation of the petition controverted by defendant, holding that the answer must be precise and certain as to the special items intended to be controverted; Cincinnati *v.* Cameron, 33 Ohio St. 336. But under a petition on an account in the short form permitted by the code in Ohio it was held that a defendant could answer by simply denying the amount due; that in such a case defendant does not deny any items of the account or admit them, but simply denies the amount due and avers specially that it is not as much as the plaintiff claims. Wheeler, etc., Mfg. Co. *v.* Haas, 6 Ohio N. P. 451.

Before a justice of the peace, under Tex. Rev. Stat. arts. 1603, 1604, it is not necessary for defendant in an action on an open account to plead in writing that the account is not due, as such defense may be made orally and under the general denial. But defendant should be confined to any plea he may make, either in writing or orally, and if he pleads that a certain number of items are incorrect he should not be allowed to dispute other items. Low *v.* Griffin, (Tex. Civ. App. 1897) 41 S. W. 73.

89. Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627; Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815, holding that such an answer is inappropriate and should be stricken out as frivolous.

90. Skinker *v.* Clute, 9 Nev. 342.

c. Admission by Failure to Deny. In an action on an account, a failure to answer and controvert the account operates as an admission of defendant's demand, and no other proof is necessary.[91]

d. Want of Information or Knowledge. As to the correctness of particular items an answer averring that defendant has no knowledge or information sufficient to form a belief, and therefore denying the same, is good under the code,[92] but if defendant desires to defend upon the ground that plaintiff had assigned his claim he must allege the fact.[93]

e. Payment. A plea of payment admits a sale and delivery of the items, and raises no issue as to whether the goods were wrongfully obtained.[94]

f. Several Defenses. Defendant may plead several defenses when the truth of one does not show the falsity of the other.[95]

g. Answer by Way of Set-Off or Counter-Claim. If an answer is based upon an account it should be filed with the pleading, as in the case of a complaint when this is necessary under the statute.[96]

3. Affidavit of Defense — Book-Debt. In several states statutory provisions have existed in substance requiring a defendant sued on a book-account to file an affidavit of defense, and, upon his failure to file a sufficient affidavit, permitting judgment to be entered on the account for the amount thereof.[97] Where the matter is not the proper subject of book-account so that it may be proved by the book, such affidavit is not required in order to prevent judgment,[98] and the account should show a *prima facie* case.[99] The affidavit of defense must be direct and

91. See *infra*, III, H, 5.

92. Morgan *v.* Roper, 119 N. C. 367, 25 S. E. 952.

93. Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

94. Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562. See also Gervin *v.* Beaird, 26 La. Ann. 630.

95. Grier Commission Co. *v.* Dockstader, 47 Mo. App. 42, holding that an affirmative defense that the balance sued for was the result of wagering contracts, and a further defense that plaintiff, as defendant's agent in these transactions, disobeyed the orders and directions of defendant, and thus caused loss to him, were not inconsistent, and that it was reversible error to compel defendant to elect upon which defense he would rely.

Payment and denial of value.— Collins *v.* Fenley, (Ky. 1899) 53 S. W. 667, wherein a denial of the value of the services sued for was held not to be inconsistent with the special plea of payment.

Payment and a denial of the account are inconsistent defenses. Gervin *v.* Beaird, 26 La. Ann. 630.

96. Biddle *v.* Reed, 33 Ind. 529 (answer based upon an account by way of set-off); Home F. Ins. Co. *v.* Arthur, 48 Nebr. 461, 67 N. W. 440 (holding that where a defendant sets up as a counter-claim a cause of action as for money due according to an exhibit attached, but no account or exhibit is attached to his pleading, and there are no allegations showing the nature of the indebtedness, a judgment for plaintiff cannot be disturbed because the court will be unable to say that evidence offered was responsive to any issue formed on the counter-claim).

Items are not necessary in other cases, and evidence to defeat any item of the account sued on, or to show that the amount is not correct, does not tend to show a set-off or counter-claim, and does not require a defendant to file an itemized pleading. Low *v.* Griffin, (Tex. Civ. App. 1897) 41 S. W. 73.

97. See Sloan *v.* Grimshaw, 4 Houst. (Del.) 326; Fenn *v.* Early, 113 Pa. St. 264, 6 Atl. 58; Wall *v.* Dovey, 60 Pa. St. 212; O'Connor *v.* American Iron Mountain Co., 56 Pa. St. 234; Newton *v.* Smith, 6 Wkly. Notes Cas. (Pa.) 56; Orth *v.* Saylor, 2 Wkly. Notes Cas. (Pa.) 349; Hart *v.* Kirk, 1 Wkly. Notes Cas. (Pa.) 84; Pawtucket Steam, etc., Pipe Co. *v.* Briggs, 21 R. I. 457, 44 Atl. 595. See also Pleading.

98. Sloan *v.* Grimshaw, 4 Houst. (Del.) 326; Fenn *v.* Early, 113 Pa. St. 264, 6 Atl. 58; Newton *v.* Smith, 6 Wkly. Notes Cas. (Pa.) 56.

99. Fritz *v.* Hathaway, 135 Pa. St. 274, 19 Atl. 1011; Hamill *v.* O'Donnell, 2 Miles (Pa.) 101; Kunzig *v.* Haedrick, 2 Wkly. Notes Cas. (Pa.) 228; Ridgway *v.* Bell, 1 Phila. (Pa.) 117, 7 Leg. Int. (Pa.) 195.

Must charge defendant.— The book entry must *prima facie* charge defendant. Farrell *v.* Baxter, 11 Wkly. Notes Cas. (Pa.) 400. Items which do not appear to be charged to anyone are not sufficient. Wall *v.* Dovey, 60 Pa. St. 212; Camburn *v.* Cox, 12 Montg. Co. Rep. (Pa.) 30. But where the demand is expressly founded upon a book-account for services rendered by plaintiff to defendant's wife as per copy set out, an objection that it did not appear that defendant had been debited in the account was held to be untenable. Tiedeman *v.* Lœwengrund, 2 Wkly. Notes Cas. (Pa.) 272. See also Baltimore *v.* Ideson, 47 Md. 542.

Name of creditor.— In assumpsit a copy of an account filed need not contain the name of the plaintiff from whom the goods were bought, in order to be such a copy that judg-

certain,[1] and if it is sufficient a rule for judgment will be discharged, and plaintiff will have the burden of establishing his account.[2]

F. Evidence — 1. Burden of Proof. In an action on an account, plaintiff's account is not in its nature self-proving. Until some testimony is produced tending to prove its correctness, plaintiff shows no right to a recovery, and it is not necessary for defendant to offer any evidence in defense.[3] So plaintiff must prove every other allegation in his pleading essential to his cause of action.[4]

2. Sufficiency — a. In General. Without entering into the question of the admissibility of plaintiff's books as evidence,[5] where this kind of evidence is not resorted to, plaintiff must prove his account by direct and positive testimony,[6] and, conceding the admissibility of such books, they constitute no higher evidence of sale and delivery than the positive testimony of witnesses who swear to the fact.[7]

ment can be entered upon it for want of affidavit of defense. Heft *v.* Basford, 3 Pa. Co. Ct. 319; Orth *v.* Saylor, 2 Wkly. Notes Cas. (Pa.) 349.

Lumped charges.— A book-account showing lumped charges is held to be insufficient in this connection. Loeb *v.* Heere, 19 Pa. Co. Ct. 641 [*citing* Appel *v.* Stein, 6 Wkly. Notes Cas. (Pa.) 451; Brown *v.* Dupuy, 4 Wkly. Notes Cas. (Pa.) 491; Coll *v.* Stelwagon, 20 Wkly. Notes Cas. (Pa.) 21]. See also McLaughlin *v.* Weer, 1 Marv. (Del.) 267, 40 Atl. 1122.

1. Coulston *v.* Bertolet, (Pa. 1888) 12 Atl. 255 (wherein the affidavit was such that no charge for perjury would lie upon it and contained no averment of how or when an alleged payment was made); Comly *v.* Simpson, 6 Pa. Super. Ct. 12 (wherein all the allegations might have been admitted, and yet defendant might have been properly credited on another account with what he alleged he had paid plaintiff).

Form of affidavit under such statute. Thorne *v.* Travellers Ins. Co., 80 Pa. St. 15; New England Steam Brick Co. *v.* Dube, 19 R. I. 397, 37 Atl. 14.

2. See Thorne *v.* Travellers Ins. Co., 80 Pa. St. 15; Newell *v.* Richardson, (Pa. 1887) 7 Atl. 764.

Sufficiency.— In the following cases the affidavit of defense has been held sufficient: Keough *v.* Leslie, 92 Pa. St. 424; Stoops *v.* Post, 15 Wkly. Notes Cas. (Pa.) 176; Gillingham *v.* Koppella, 13 Wkly. Notes Cas. (Pa.) 281; Newton *v.* Smith, 6 Wkly. Notes Cas. (Pa.) 56; Erlicher *v.* Lawson, 5 Wkly. Notes Cas. (Pa.) 473; Atha *v.* Barnett, 2 Wkly. Notes Cas. (Pa.) 478; Robson *v.* Davis, 2 Wkly. Notes Cas. (Pa.) 274; Myers *v.* Brice, 2 Wkly. Notes Cas. (Pa.) 262; Kunzig *v.* Haedrick, 2 Wkly. Notes Cas. (Pa.) 228; Crompton *v.* Restein, 2 Wkly. Notes Cas. (Pa.) 154; Jones *v.* Bely, 2 Wkly. Notes Cas. (Pa.) 139; Derr *v.* Coar, 1 Wkly. Notes Cas. (Pa.) 433; Smith *v.* Potter, 1 Wkly. Notes Cas. (Pa.) 51.

In the following cases the affidavits have been held insufficient: Atkinson *v.* Harper, 14 Wkly. Notes Cas. (Pa.) 359; Lantz *v.* Fowler, 14 Wkly. Notes Cas. (Pa.) 359; Tiedeman *v.* Lœwengrund, 2 Wkly. Notes Cas. (Pa.) 272; Badeau *v.* Auerbach, 2 Wkly. Notes Cas. (Pa.) 223; Hart *v.* Kirk, 1 Wkly. Notes Cas. (Pa.) 84; Gabell *v.* Thomas, 1 Wkly. Notes Cas. (Pa.) 51.

Waiver of objection.— If defendant makes no objection to an insufficient affidavit of defense until the trial of the action, he will be deemed to have waived his objection. Pawtucket Steam, etc., Pipe Co. *v.* Briggs, 21 R. I. 457, 44 Atl. 595.

3. Rice *v.* Schloss, 90 Ala. 416, 7 So. 802; Crawford *v.* McLeod, 64 Ala. 240; Carver *v.* Harris, 19 La. Ann. 121; Moore *v.* Joyce, 23 Miss. 584.

Note executed in part payment.— And where, under the pleadings, the burden is on plaintiff to prove the items of his account, notwithstanding a note has been executed in part payment of the balance, the burden is on him to show with reasonable certainty the existence and verity of his demand. Byrne *v.* Grayson, 15 La. Ann. 457.

Open and stated account distinguished.— In an action on an open account the burden of proof is on plaintiff to show the correctness of the account, and not on defendant to show mistakes or credits. In this the rule is different from that in an action on a stated account, in which case the onus is on defendant to impeach its correctness. An instruction which does not observe this distinction is erroneous. Rice *v.* Schloss, 90 Ala. 416, 7 So. 802.

4. Fluke *v.* Martin, 26 La. Ann. 279, holding that in an action for the balance of an account for supplies furnished to make a crop, an allegation that the supplies enured to defendant's benefit must be proved.

5. See Evidence.

6. Moore *v.* Joyce, 23 Miss. 584; Simmons *v.* Means, 8 Sm. & M. (Miss.) 397.

Secondary evidence — Waiver of objection. Where secondary evidence is introduced to prove an account, and no objection is made thereto, it is as good as if the account had been proved by the best evidence. Smith *v.* Mather, (Tex. Civ. App. 1899) 49 S. W. 257.

7. Godbold *v.* Blair, 27 Ala. 592. Where plaintiff introduces evidence from books of original entry for a part of the account, and substantiates the entire account by oral evidence and by the admissions of defendant, it is sufficient, and more cannot be required to establish the account. Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294.

The proof must go to the items[8] unless an implied or express assent to the correctness of the account can be shown.[9]

b. Proof of Items Dispensed with — (I) *In General.* But it is not necessary to prove the correctness of specific items of an account if the correctness of the account as a whole can be otherwise established.[10]

(II) *Admission — Stated Account.* An account may be supported without proof as to the particular items by proving that defendant had admitted the account to be correct.[11] In other words, evidence of a stated account is sufficient proof to support plaintiff's cause of action on an open account,[12] and therefore it may be supported by an implied as well as an express admission, as by the assent which is presumed from acquiescence in an account rendered.[13] But a mere admission of indebtedness without reference to the account in suit may not be sufficient, because the admission must be of such character as to bar a subsequent recovery of the items of the particular account.[14]

c. Recovery Confined to Amount Proved. The plaintiff cannot recover, as a

8. Coats *v.* Gregory, 10 Ind. 345.

9. See *infra*, III, F, 2, b, (II).

10. Pryor *v.* Johnson, 32 Ala. 27, in which case, in compliance with a written notice to furnish a bill of particulars, plaintiff produced an account containing lump sums for several months respectively, and proved that he kept no account of each item of his customers' accounts and that defendant was one of his regular customers and knew that plaintiff only entered on his books a monthly summary of each customer's account.

11. *Alabama.*— Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Rice *v.* Schloss, 90 Ala. 416, 7 So. 802; Hirschfelder *v.* Levy, 69 Ala. 351; Holmes *v.* Gayle, 1 Ala. 517; Johnson *v.* Kelly, 2 Stew. (Ala.) 490.

Colorado.— Ohio Creek Anthracite Coal Co. *v.* Hinds, 15 Colo. 173, 25 Pac. 502.

Florida.— Hurly *v.* Roche, 6 Fla. 746.

Iowa.— Mitchell *v.* Joyce, 69 Iowa 121, 28 N. W. 473.

Nebraska.— Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241.

New Hampshire.— Stetson *v.* Godfrey, 20 N. H. 227.

New Jersey.— Bonnell *v.* Mawha, 37 N. J. L. 198.

Tennessee.— Craighead *v.* State Bank, Meigs (Tenn.) 199.

Texas.— Chandler *v.* Meckling, 22 Tex. 36; Morrison *v.* Few, 3 Tex. App. Civ. Cas. § 384.

Wisconsin.— Duffy *v.* Hickey, 63 Wis. 312, 23 N. W. 707.

Entries as admissions against interest.— Entries in the ledger kept by defendant are admissible in behalf of plaintiff as admissions against interest. Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294. See also Evidence.

Execution of note.— In a suit by a merchant on an account current, the fact that plaintiff was defendant's factor and that the latter had executed his promissory note in part payment of the balance of the account, does not prove such balance where defendant's answer contains a general denial and a special averment that at the time he signed the note he had not examined the accounts, and such an answer imposes upon plaintiff the burden of proving the accounts under consideration. Byrne *v.* Grayson, 15 La. Ann. 457.

Receipt for part payment executed by plaintiff.— In a suit on an account for a balance brought against an administrator of the debtor, a receipt by plaintiff to the decedent for a payment on the account, reciting the balance due, which was found in a pocket-book belonging to decedent after his death, is not such evidence as will require a verdict for plaintiff for such balance. It is doubtful if such evidence alone would support a verdict, but where the verdict was found for defendant the evidence is certainly not such as will require a reversal. Chastain *v.* Worrill, 69 Ga. 288.

Admission of account in evidence.— After an account is proved to have been stated between the parties, it is admissible in evidence (Rice *v.* Schloss, 90 Ala. 416, 7 So. 802); and it is competent for a witness to identify a copy of a paper which he himself had made from a book of accounts, and to show what defendant said in relation to it (Hirschfelder *v.* Levy, 69 Ala. 351; Holmes *v.* Gayle, 1 Ala. 517).

12. Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67, holding that a stated account may be shown under any of the other counts in assumpsit to which it is applicable. Theus *v.* Jipson, 3 Tex. App. Civ. Cas. § 189. See also Schwaner *v.* Winn Boiler Compound Co., 19 Mo. App. 534.

13. Rice *v.* Schloss, 90 Ala. 416, 7 So. 802. See also Bonnell *v.* Mawha, 37 N. J. L. 198.

Effect of counter-affidavit.— While the proper verification of an account under the statute authorizes the admission of the account in evidence, unless met by a counter-affidavit denying the correctness of the account, such counter-affidavit destroys the admissibility of the account only by virtue of the provisions of the statute and has no influence to exclude the account which is shown to have been rendered to defendant and acquiesced in by him. Hirschfelder *v.* Levy, 69 Ala. 351.

14. Coats *v.* Gregory, 10 Ind. 345.

balance of an account, a larger amount than that proved.[15] But he is not bound to prove all he claims, and may recover for any sum within that claimed which is established by evidence.[16]

d. Balance. Plaintiff is only to show the correctness of the debits with the credits to which the account is entitled, and the difference will make the balance to be recovered unless the account is falsified by proof of other credits, etc.[17] But where the action is for the recovery of a general balance of an account upon which a payment is admitted, the full balance cannot be recovered without proof of all the items of debt, because there is no authority in such a case to apply the payments to any particular items of the account.[18]

e. Evidence Tending to Show Truth of Items. The truth of the items being the point in issue, any evidence which tends to show this is proper.[19]

f. Special Contract. As has been shown, an action on an account may be maintained notwithstanding the subject-matter relates to a special contract which has been fully performed,[20] from which it logically follows that plaintiff may prove his action as laid, though the writing itself would be admissible in evidence whether mentioned in the pleading or not.[21]

15. Jesse *v.* Davis, 34 Mo. App. 351; Chandler *v.* Meckling, 22 Tex. 36.

Erroneous instruction.— It is erroneous to instruct the jury that positive proof of the correctness of most of the items of the account is sufficient to justify them in presuming that all the items are correct. Moore *v.* Joyce, 23 Miss. 584.

16. Belcher *v.* Grey, 16 Ga. 208; Lovell *v.* Earle, 127 Mass. 546; Memphis Mach. Works *v.* Aberdeen, 77 Miss. 420, 27 So. 608.

Accounts carelessly kept.—Where plaintiff, whose duty it is to keep and render accounts, has copied his accounts and given receipts so carelessly as to render it impossible to ascertain with certainty the amount due him, in a suit instituted by him to recover the balance of the account a judgment giving him less than he claims will not be disturbed. It is his duty to keep his accounts in such manner as to furnish such evidence as will enable the court to fix with certainty the exact amount due to him. Moreau *v.* Blanchard, 6 La. Ann. 101.

Verdict for one item of running account.— Though an indebtedness may be the result of a running account, it is not necessary, in an action for money had and received, to produce the account to prove all the items thereof, but plaintiff may prove any isolated receipt of money and claim a verdict for the amount. Planters' Bank *v.* Farmers, etc., Bank, 8 Gill & J. (Md.) 449.

17. Hooper *v.* Hartwell, 12 Colo. App. 161, 54 Pac. 864. In Hunt *v.* Mewis, 17 Nebr. 422, 23 N. W. 10, defendant, in an action for the recovery of a balance due for goods sold and delivered, pleaded a set-off, and judgment was rendered in his favor. An itemized bill was attached to the deposition of one of the witnesses, and the fact of the purchase was not seriously questioned, but it was claimed that the goods were received at a particular store of the plaintiff. The action did not purport to be brought on an account with that store, but for a general balance, and, admissions being shown to have been made by defendant that he owed plaintiff a balance, it was held that the judgment for defendant could not be sustained.

18. Huffstater *v.* Hayes, 64 Barb. (N. Y.) 573; Allen *v.* Brown, 11 Tex. 520.

In an action on an open account and a note, less admitted credits, the burden is on plaintiff to establish that both are owing by defendant, and therefore defendant is entitled to an instruction to this effect. Laubheimer *v.* Naill, 88 Md. 174, 40 Atl. 888.

19. Graham *v.* Harmon, 84 Cal. 181, 23 Pac. 1097, wherein the account furnished contained charges and credits by mistake which offset each other and it was held that plaintiff might be allowed to explain such items and to show that they grew out of an attempt to blend the distinct accounts into one by mistake, such testimony tending to show the true state of the account.

20. See *supra*, III, A, 6.

21. Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151; Burch *v.* Harrell, 93 Ga. 719, 20 S. E. 212; Schmidt *v.* Wambacker, 62 Ga. 321; Elm City Club *v.* Howes, 92 Me. 211, 42 Atl. 392. The fact that the amount proved to be due was under a special contract and was less than the sum of the items included in plaintiff's account will not, as a matter of law, prevent the recovery of the amount actually due. Lovell *v.* Earle, 127 Mass. 546.

Assumpsit on account annexed.— But in assumpsit on an account annexed it is held that a sufficient declaration must contain all the allegations necessary to make out plaintiff's case without reference to a paper not attached; that an account annexed is a part of the declaration; and that as each item is or may be a separate contract in itself, no proof in regard to such contract is admissible if not relied upon in the declaration. This was in reference to an account annexed containing but one lumped item without notice of the several items of which it consisted. Bennett *v.* Davis, 62 Me. 544.

Amendment.— Plaintiff may amend his declaration, not for the purpose of counting upon the contract as a distinct cause of ac-

g. Evidence against Existence or Correctness of Claim. Any evidence which legitimately tends to combat the correctness[22] or existence of plaintiff's claim is admissible.[23] But testimony which cannot control the issues legally made is inadmissible,[24] and if such evidence is prejudicial its admission will be reversible error.[25]

3. Proof by Oath of Plaintiff. By statute in some states, especially at an early day, the oath of plaintiff has been made competent and sufficient evidence of an account,[26] referring to particular kinds of demands, as those which are properly chargeable on book, in connection with the introduction of such book in evidence,[27] or upon other conditions prescribed.[28] Where the admissibility of such proof is made to depend upon defendant's failure to controvert the truth of the facts sworn to by plaintiff, the latter's oath is deprived of all effect as testimony if it is met by defendant's oath as prescribed.[29]

tion, but to disclose the pertinent facts under which the sale and delivery were made. Tumlin *v.* Bass Furnace Co., 93 Ga. 594, 20 S. E. 44.

22. Glenn *v.* Salter, 50 Ga. 170, evidence of a credit to which defendant was entitled and which had not been discovered until testimony introduced on a former trial.

Evidence of former trial.— Where plaintiff brought two suits on an open account it was held proper to admit, on the trial of the second, evidence of payments which was introduced on the trial of the first, if the jury are cautioned that defendant cannot be allowed twice for the same payments, where, on account of the confused condition of the facts, it is apparent that complete justice cannot be done unless all the evidence on the first trial is admitted on the second, so that a true balance may be arrived at, and where no injury can result from such course. Hazard Powder Co. *v.* Viergutz, 6 Kan. 471.

23. **Previous assignment not including debt claimed.**— Evidence that plaintiff had previously made an assignment for the benefit of his creditors without including the account sued on in his list of assets is competent to show that such claim was not, at the time of the assignment, considered a legal one. Pawtucket Steam, etc., Pipe Co. *v.* Briggs, 21 R. I. 457, 44 Atl. 595.

Goods furnished to third persons.— Evidence that plaintiff agreed to take payment in goods to be furnished to third persons is admissible to defeat plaintiff's cause of action. Price *v.* Combs, 12 N. J. L. 216.

24. Low *v.* Griffin, (Tex. Civ. App. 1897) 41 S. W. 73, holding that, in an action on an open account for the price of lumber sold, evidence of a custom to allow builders a reasonable time to check bills is inadmissible, because, in the absence of an agreement, such items are due when the lumber is delivered.

25. Wolff *v.* Matthews, 39 Mo. App. 376, holding that as, in an action on an account brought by an assignee, an individual debt cannot be set off against a partnership debt, testimony by defendant that one of the members of the assignor firm was largely indebted to defendant at the time of the trial is irrelevant and prejudicial when introduced for the purpose of creating the inference that the assignment of the account had been made to defraud the creditors of the assignor.

26. McWilliams *v.* Cosby, 26 N. C. 110; Colbert *v.* Piercy, 25 N. C. 77; State *v.* Molier, 12 N. C. 263; Cram *v.* Spear, 8 Ohio 494; Irwin *v.* Jordan, 7 Humphr. (Tenn.) 167.

Deposition.— The deposition of plaintiff under such statute may be taken under circumstances which will authorize the taking of the deposition of any other witness. Moore *v.* Hatfield, 3 Ala. 442.

On appeal.— On appeal from a justice's court to the circuit court where the trial is *de novo*, plaintiff may prove his claim by his own oath where it is under the amount prescribed by the statute. Murfs *v.* Harding, 6 Port. (Ala.) 121.

27. Cram *v.* Spear, 8 Ohio 494; Irwin *v.* Jordan, 7 Humphr. (Tenn.) 167; French *v.* Brandon, 1 Head (Tenn.) 47. See Evidence.

28. **Time of standing of account.**— Alexander *v.* Smoot, 35 N. C. 461. An account originating several years before action, which contains a series of charges the last of which is within a year of the time of the commencement of the action, is an account within the statute providing that the court or justice may examine the parties under oath in actions on book-accounts of no more than eighteen months' standing. Marshall *v.* Bond, Tappan (Ohio) 99.

Restriction as to amount.—Jordan *v.* Owen, 27 Ala. 152. See Moore *v.* Hatfield, 3 Ala. 442; Murfs *v.* Harding, 6 Port. (Ala.) 121; McWilliams *v.* Cosby, 26 N. C. 110. The plaintiff may prove his account by his own oath when the balance is within the amount limited by statute, although the account produced appears to have been for more than that amount originally, but is reduced by credits to an amount within that prescribed by the statute. Grant *v.* Cole, 9 Ala. 366; McWilliams *v.* Cosby, 26 N. C. 110. And if an account carries interest on appeal from a justice's court, plaintiff may release the interest and thus bring his claim within the amount prescribed, so as to be entitled to prove it by his own oath. Murfs *v.* Harding, 6 Port. (Ala.) 121.

Strict construction.— The restriction upon the right to prove an account in reference to the articles sold and delivered cannot be made to confer any additional right by construction. Alexander *v.* Smoot, 35 N. C. 461.

29. Jordan *v.* Owen, 27 Ala. 152; Jones *v.* McLuskey, 10 Ala. 27; Hudgins *v.* Nix, 10 Ala. 575; Anderson *v.* Collins, 6 Ala. 783.

4. Verified Accounts — a. Nature and Effect — (1) *In General.* In many of the states, statutory provisions have been enacted which in effect make a verified account in an action on an account *prima facie* evidence of its correctness unless such affidavit is controverted or the correctness of the account is denied by defendant under oath.[30] Under these provisions, if the account is verified and

Plaintiff restricted.— Plaintiff cannot, under such a provision, shape the facts which he proposes to prove by his own oath so as to deprive defendant of the right to prove by his oath that the demand has been paid. Jordan *v.* Owen, 27 Ala. 152.

Defendant restricted.— Defendant is confined to a denial of the whole or a portion of plaintiff's statements (Yarborough *v.* Hood, 13 Ala. 176), and the statement of additional facts will not weaken the first denial (Jones *v.* McLuskey, 10 Ala. 27). Where plaintiff has proved the correctness of his account by his own oath, defendant cannot bring out new facts on cross-examination and then contradict them upon his own oath. West *v.* Brunn, 35 Ala. 263.

Defendant not a witness generally.—Under such a statute defendant is not made a competent witness to be sworn generally to give evidence to the jury, but his only privilege is to deny on oath the truth of plaintiff's testimony and thus exclude it from the jury. Hayden *v.* Boyd, 8 Ala. 323. The statute cannot be construed to permit a defendant to prove an offset arising out of an account, the privilege being accorded to plaintiff because he must necessarily give notice to defendant for what the latter is sued, and defendant will always be prepared to rebut oath with oath; but if the same privilege were extended to defendant the same conditions would not exist unless it be admitted that a plaintiff is bound to attend the progress of his suit in person. Bennett *v.* Armstead, 3 Ala. 507.

Positive oath.— Under the statute making plaintiff competent to establish the correctness of his demand by his own oath unless defendant in open court "denies upon oath the truth of the facts proposed to be sworn to by plaintiff," it is contemplated that the denial of defendant, as well as the statement of plaintiff, shall be positive, as of one who speaks from actual knowledge and not merely upon information and belief. This was held to be clearly indicated by the fact that by another section of the code the legislature enacted that the above provision should not apply in cases in which parties occupying fiduciary relations were defendants, since they are not personally cognizant of the facts. Fitzpatrick *v.* Hays, 36 Ala. 684, 686.

30. *Alabama.*— Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239; Gainer *v.* Pollock, 96 Ala. 554, 11 So. 539; Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249.

Arizona.— Molino *v.* Blake, (Ariz. 1898) 52 Pac. 366.

Arkansas.— Heer Dry Goods Co. *v.* Shaffer, 51 Ark. 368, 11 S. W. 517; Hershy *v.* MacGreevy, 46 Ark. 498.

Georgia.— Rockmore *v.* Cullen, 94 Ga. 648, 21 S. E. 845; Dowdle *v.* Stenson, Ga. Dec. pt. II, 150.

Kansas.— Johnston *v.* Johnson, 44 Kan. 666, 24 Pac. 1098; Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447.

Michigan.— Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235, under How. Stat. § 7525, which provided for the service of a declaration with the account and affidavit showing its correctness and making the account, when so served, *prima facie* evidence unless defendant filed with his plea an affidavit denying its correctness.

Mississippi.— Ware *v.* McQuillan, 54 Miss. 703; Reinhardt *v.* Carter, 49 Miss. 315.

Texas.— Olive *v.* Hester, 63 Tex. 190; Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Shuford *v.* Chinski, (Tex. Civ. App. 1894) 26 S. W. 141, holding that in an action on a verified account plaintiff must prove only such items as are not denied on oath; Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 104; Carder *v.* Wilder, 1 Tex. App. Civ. Cas. § 14.

Exception — Administrators.— Such account is not evidence against an administrator on an account against his intestate. Another article of the revised statute controls, which provides that in an action by or against an administrator neither party shall be allowed to testify against the other as to transactions with or statements by the intestate. Leverett *v.* Wherry, (Tex. App. 1890) 15 S. W. 121.

Account stated.— Where a complaint contains two counts, one declaring on an account stated and the other for goods, wares, and merchandise sold by plaintiff to defendant, and plaintiff, at the time of bringing suit, indorses on the summons and complaint the fact that the account sued on is verified by affidavit, both counts are held to be on an account within the statute, and there is no variance between the allegations and the proof made by the verified account. Clements *v.* Mayfield Woolen Mills, (Ala. 1900) 29 So. 10.

A set-off is in effect a cross-action, and an account constituting it may be proved under a statute of this character. Heer Dry Goods Co. *v.* Shaffer, 51 Ark. 368, 11 S. W. 517.

Supplying lost account.— A verified itemized account is merely an instrument of evidence, and, if lost or mislaid after the suit is begun and before trial, may be supplied by a new account. But in order to prove the contents of the verified account it must be shown that the account was verified by an officer authorized to take affidavits, as well as when the account accrued, when it became due, and what was the substance of the verification. Alexander *v.* Moore, 111 Ala. 410, 20 So. 339.

defendant fails to file a counter-affidavit as prescribed, the evidence furnished by the account and affidavit of plaintiff is sufficient to entitle him to a recovery, and defendant cannot dispute the correctness of the account. But if the account is denied under oath the *prima facie* effect of plaintiff's affidavit is utterly destroyed.[31] If, however, plaintiff does not verify his account, he must establish his cause as in other cases, and defendant will be at liberty to contest the correctness of the account without denying its correctness under oath.[32]

(II) *Issue Raised without Counter-Affidavit.* The statute prescribes a rule of evidence and not of pleading, and if an appropriate plea is filed it cannot be treated as a nullity, because the correctness of the account is not denied under oath, but the issue thus formed must be submitted to the jury.[33]

(III) *Evidence Confined to Correctness of Account* — (A) *In General.* An account verified in the mode prescribed will not establish more than that of which the statute makes it evidence,— that is to say, the existence and justness of the demand,— and it will not establish the character in which defendant is sued or other material allegations of the declaration.[34]

(B) *Defenses Available without Counter-Affidavit.* Consistently with the rule last stated, if the matter which defendant sets up is not an attack upon the account, he may show such matter in defense without a denial under oath of plaintiff's verified account. That the account is not due,[35] payment,[36] set-off or recoupment,[37] counter-claim,[38] and the statute of limitations, have been held to be of this character.[39]

(IV) *Effect of Introducing Other Evidence.* Where proof of the

Account from another state or county.— In Tennessee a statutory provision such as mentioned in the text is confined to accounts coming from another state or county. See Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 673; Hunter *v.* Anderson, 1 Heisk. (Tenn.) 1; Brien *v.* Peterman, 3 Head (Tenn.) 498. This statute is not to be construed *in pari materia* with another statute commonly called the book-debt law, and the proven account need not be limited to the sum which plaintiff may prove by virtue of the said book-debt law. Cave *v.* Baskett, 3 Humphr. (Tenn.) 340.

31. Except in Texas the text is fully supported by the cases last above cited. In this state, under the act of 1874, it was held that defendant was not precluded from rebutting the *prima facie* case made by plaintiff's affidavit without a counter-affidavit. English *v.* Miltenberger, 51 Tex. 296. But under Tex. Rev. Stat. art. 2266, it is held that a verified account cannot be denied except by regular denial under oath. Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 104; Rives *v.* Habermacher, 1 Tex. App. Civ. Cas. § 747.

Effect of supplemental pleading.— In a suit upon an open account verified by affidavit the denial of the correctness of the account under oath destroys the *prima facie* effect of plaintiff's affidavit. This result cannot be obviated by a supplemental petition under oath reiterating the original pleading as to the justice of the account. Olive *v.* Hester, 63 Tex. 190.

Introduction in evidence.— But it is held that, as a statute of this character merely makes the account *prima facie* evidence, like other evidence it must be introduced before defendant is called upon to make objections. Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485, holding that the mere filing of an account with a justice before trial is not a sufficient introduction, and that when a case is submitted under such circumstances without any other evidence, plaintiff cannot have a judgment.

32. Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447; Smith *v.* Mather, (Tex. Civ. App. 1899) 49 S. W. 257.

On appeal from justice's judgment.— The introduction of the affidavit in evidence to the jury on the trial of an appeal taken by defendant from a judgment of a justice of the peace is conclusive upon plaintiff's right to recover unless defendant has filed his written affidavit denying the justness of the whole or some part of the account. Rockmore *v.* Cullen, 94 Ga. 648, 21 S. E. 845.

33. Reinhardt *v.* Carter, 49 Miss. 315.

34. Trundle *v.* Edwards, 4 Sneed (Tenn.) 572. *Contra*, Carder *v.* Wilder, 1 Tex. App. Civ. Cas. § 14, holding that such affidavit, unless denied under oath, proved a partnership as well as other material facts necessary to make out a *prima facie* case.

35. Johnston *v.* Johnson, 44 Kan. 666, 24 Pac. 1098, without verified answer.

36. Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Galveston, etc., R. Co. *v.* McTiegue, 1 Tex. App. Civ. Cas. § 457. *Compare* Loeb *v.* Nunn, 4 Heisk. (Tenn.) 449.

37. Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 673.

38. Galveston, etc., R. Co. *v.* Schwartz, 2 Tex. App. Civ. Cas. § 758.

39. Wagener *v.* Boyce, (Ariz. 1898) 52 Pac. 1122.

account is made by other evidence, defendant is in no manner injured by the admission in evidence of a verified account under the statute.[40]

(v) *Examination of Parties as Witnesses.* But the statute does not contemplate that either party shall be examined on oath as a witness in the usual form, but intends that the affidavit required from one party shall be met by an affidavit from the other.[41] Nor does it apply where plaintiff appears in open court to prove his account.[42]

b. Compliance with Statute — (i) *In General.* It is only by force of the statute that an itemized statement of an account verified by affidavit is legal evidence. The account must be one which comes within the terms of the statute,[43] and such conditions as it prescribes must be complied with.[44] Where the statute requires a verified account to be served with the pleading it cannot be made *prima facie* evidence unless it is so served.[45]

(ii) *Sufficiency of Affidavit* — (a) *In General.* The affidavit to an account must comply with the statute, else the account should be excluded upon objection.[46] But if the affidavit contains all that the statute requires, stated in substantial compliance with the statute, it will be sufficient.[47]

(b) *Time of Making.* At what time the affidavit should be made in order to make the account *prima facie* evidence on the trial depends upon the statute. Thus, under the statutes already referred to, making it necessary for a plaintiff to furnish a statement of his items upon demand, or, upon failure to do so, excluding evidence thereof,[48] or requiring such items to be annexed to the pleading under

40. Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235.

41. Wilkhorn *v.* Gillespie, 6 Heisk. (Tenn.) 329.

42. Dowdle *v.* Stenson, Ga. Dec. pt. II, 150, holding that where plaintiff proves his account on the trial the affidavit of defendant is not admissible to rebut the original affidavit of plaintiff, as both affidavits are inadmissible in such a case.

43. **Items due.**— Where the statute required the affidavit to the account to state that the account was due, it was held that all the items of the account must have matured at the date of the affidavit in order to give it the effect intended. Shaunnessey *v.* Le Gierse, 1 Tex. App. Civ. Cas. § 379.

Other matters must be proved otherwise. Forsee *v.* Matlock, 7 Heisk. (Tenn.) 421.

44. **Indorsement of fact of verification.**— Where the statute prescribes, as a condition of the competency of such evidence, that plaintiff at the time of bringing his suit shall indorse on the summons and complaint or other original process the fact that the account is verified by affidavit, the account cannot be admitted in evidence by virtue of the statute unless the indorsement is made. Gainer *v.* Pollock, 96 Ala. 554, 11 So. 539. See *supra*, III, E, 1, b, (vi). One way of noting the fact of verification is to aver it in the complaint, and this is taken as a sufficient compliance with the statute. Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Alexander *v.* Moore, 111 Ala. 410, 20 So. 339; Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239; Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249.

45. McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881.

46. Walker *v.* Chambers, 5 Harr. (Del.) 311; Evans *v.* Bonner, 2 Harr. & M. (Md.) 377 (holding that where the probate annexed simply recites that the party made oath "according to law," the account is not legal evidence, and defendant will not be required to prove that the oath was not administered in the words of the act); Smoot *v.* Bunbury, 1 Harr. & J. (Md.) 136; Dyson *v.* West, 1 Harr. & J. (Md.) 567 (holding that an omission in one probate cannot be supplied by another); Brin *v.* Wachusetts Shirt Co., (Tex. Civ. App. 1897) 43 S. W. 295 (holding that an affidavit which fails to allege that the facts stated therein are "within the knowledge of affiant" and that "all just and legal offsets, credits and payments have been allowed," is defective and will not support a judgment by default); Shandy *v.* Conrales, 1 Tex. App. Civ. Cas. § 235; Duer *v.* Endres, 1 Tex. App. Civ. Cas. § 322. See also Shaunnessey *v.* Le Gierse, 1 Tex. App. Civ. Cas. § 379; Rogers *v.* Fenwick, 1 Cranch. C. C. (U. S.) 136, 20 Fed. Cas. No. 12,011.

Form of affidavit under such statutes. Ford *v.* Cornish, 2 MacArthur (D. C.) 57; Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235.

47. Hershy *v.* MacGreevy, 46 Ark. 498; McGowan *v.* Lamb, 66 Mich. 615, 618, 33 N. W. 881, holding that an affidavit that the "annexed account is just, due, and unpaid" is a substantial compliance with the requirement that the affidavit shall state the account to be "justly owing and due," as, to be just, due, and unpaid, the account must necessarily be justly owing and due.

Verified pleading.—It is not necessary that the affidavit should be attached to the account, but the spirit of the statute is complied with if the complaint to which the account is attached, and in which reference is made to it, is verified. Hershy *v.* MacGreevy, 46 Ark. 498.

48. Robbins *v.* Benson, 11 Oreg. 514, 6 Pac. 69; Flanders *v.* Ish, 2 Oreg. 320. See Pleading.

the same penalty, the account must be sworn to at the time it is so furnished or annexed.[49] The statute must be considered as intending that the oath shall be made at least substantially contemporaneous with the institution of the suit.[50]

(c) *By Whom Made.* The affidavit must be made by the person contemplated by the statute, as by one who is competent to testify to the facts, being the party himself or his qualified agent.[51] Where two defendants are jointly interested, the oath of one of them is sufficient if it goes to the justice of the entire account,[52] and if an affiant has sufficient interest at the time of making the affidavit it is immaterial that his interest was acquired after the transactions to which he swears.[53]

(d) *Before Whom Made.* The affidavit should be made before an officer having authority to administer the oath.[54]

(iii) *Sufficiency of Denial.* The sworn denial must be in compliance with the statute in order to deprive plaintiff's affidavit of its force as evidence.[55] A verified plea is held to be a sufficient verified denial,[56] but an unsworn plea will not suffice as a substitute for the affidavit required.[57] Where the statute does not require the affidavit to be filed with the pleading,[58] a denial at any time before trial has been held to be sufficient,[59] and the denial may be made for the first time on appeal from a judgment of a justice of the peace.[60]

(iv) *Objection — Waiver.* Objection to plaintiff's affidavit should be raised when the account is offered in evidence, as the defect goes to the evidence and not to the pleading and is not available on demurrer,[61] and if defendant appears and permits an account and affidavit to be introduced in evidence without objec-

49. Service of account and affidavit.— McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881.

Sworn petition — Amendment.— Where an account is annexed to a sworn petition, plaintiff may be permitted to amend by verifying the account. Budde *v.* Allen, 21 Mo. 20, wherein the court was of opinion that the account was a part of the sworn petition.

50. McHugh *v.* Butler, 39 Mich. 185, in which case the affidavit was made seven days before the suit was brought, and it was held that plaintiff could not insist, as a matter of right, on going back and making the proof necessary to substantiate his account after defendant had closed his case, though the court, in its discretion, may permit him to do so.

51. After assignment an affidavit by the assignor is not sufficient. Carpenter *v.* Historical Pub. Co., (Tex. Civ. App. 1894) 24 S. W. 685. See also Gregory *v.* Bailey, 4 Harr. (Del.) 256.

52. Brien *v.* Peterman, 3 Head (Tenn.) 498.

53. Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707, holding that the fact that affiant was not a member of plaintiff's firm at the time of the sale and shipment of the goods may be true, and yet he may have knowledge of the facts sworn to; and if, after acquiring such knowledge, he became a member of the firm, he had such an interest as permitted him to make the affidavit; that how he acquired the knowledge is not a pertinent inquiry.

54. Alexander *v.* Moore, 111 Ala. 410, 20 So. 339.

Statutes construed in pari materia.— A general statute authorizing certain officers outside of the state to administer oaths and affidavits to be used in the state will be construed *in pari materia* with a statute relating to affidavits to accounts to be used as *prima facie* evidence, so that an affidavit taken before such officer outside the state will be admissible. Reinhardt *v.* Carter, 49 Miss. 315.

55. Ford *v.* Cornish, 2 MacArthur (D. C.) 57 (holding that an affidavit merely to the truth of a plea which sets up a vague and general denial fails to show the particulars of the defense relied upon and is insufficient); Eberstadt *v.* Jones, 19 Tex. Civ. App. 480, 48 S. W. 558 (holding that an affidavit denying the correctness of an account except as to items mentioned in an exhibit attached is insufficient if the exhibit does not specify such items so that they may be identified).

56. Molino *v.* Blake, (Ariz. 1898) 52 Pac. 366.

57. Rockmore *v.* Cullen, 94 Ga. 648, 21 S. E. 845, holding further that a sworn plea will not be sufficient unless the oath thereto is in writing.

58. Affidavit filed with pleading.— Sometimes the statute provides that defendant shall file with his plea an affidavit denying the correctness of the account. Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235.

59. Brien *v.* Peterman, 3 Head (Tenn.) 498, holding that a denial on the day before the trial was sufficient.

60. Texas, etc., R. Co. *v.* Norton, 1 Tex. App. Civ. Cas. § 403.

In petition for certiorari.— A denial of the justice of an account, made in a petition for certiorari, is sufficient to require plaintiff to prove his account or to admit evidence to disprove it. Brown *v.* Stabler, 1 Heisk. (Tenn.) 444.

61. Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249.

tion he waives his right to object for the first time after the proof is closed.[62] In like manner, if a defendant pleads without making the required affidavit, and issue is joined and the parties go to trial without objection, plaintiff is held to waive the benefit of the statute.[63]

G. Instructions — 1. In General. The court may properly instruct as to the true rule for the deduction of credits in the adjustment of a balance,[64] but should not declare to the jury a mere presumption of fact.[65] And an instruction upon the burden of proof which fails to observe the proper distinction between actions upon open and stated accounts, in a case calling for such distinction, is erroneous.[66]

2. As to Items Which May Be Stricken Out. If any of the items of an account sued on are such as may be stricken out, they need not be actually expunged, but the jury may be directed to disregard them.[67]

H. Verdict and Judgment — 1. In General. Where an issue is made by the pleadings a judgment *nil dicit* cannot be entered.[68] The judgment should be based upon the verdict of the jury, and a general verdict without ascertaining the amount due will not support a judgment for the sum demanded.[69]

2. Confined to Items Pleaded. Plaintiff's recovery will be confined to the items which he has pleaded as his cause of action,[70] but he is entitled to a judgment for that part of his account which is shown to be due, though the evidence is uncertain as to the remainder.[71]

3. Balance of Account. In an action upon an open and mutual account current the balance of the account is the subject of the recovery, and a verdict for such balance should be returned, though defendant fails to plead a set-off.[72]

62. Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485; Locke *v.* Farley, 41 Mich. 405, 1 N. W. 955.

63. Bloom *v.* McGrath, 53 Miss. 249 (holding that in such a case plaintiff cannot invoke the benefit of the statute by an instruction to the jury that they should disregard defendant's notice denying the correctness of the account); Loeb *v.* Nunn, 4 Heisk. (Tenn.) 449.

64. Dixon *v.* Dixon, 12 N. Y. St. 505.

65. Wise *v.* Wakefield, 118 Cal. 107, 112, 50 Pac. 310, holding that where defendant claimed credit for goods furnished by him to sundry persons on the order of plaintiff's agent it was proper to refuse an instruction that if the jury found that defendant charged the goods in his books to the persons who received them, "the presumptions are that defendant furnished the same to said parties on their own account, and not to plaintiffs."

66. Rice *v.* Schloss, 90 Ala. 416, 7 So. 802.

67. Hoskins *v.* Wright, 1 Hen. & M. (Va.) 378.

Instruction covering general principles.— If any of the items of the account are not proved by competent testimony, defendant may move to have them excluded, or for an instruction that there is no evidence before the jury as to such items; but the court should not be asked to instruct that one clerk cannot testify as to entries made by another unless he knew them to be correct of his own knowledge, or to give an instruction covering general principles as to the admissibility of evidence. Ward *v.* Wheeler, 18 Tex. 249.

68. Clements *v.* Mayfield Woolen Mills, (Ala. 1900) 29 So. 10, wherein the evidence without conflict sustained plaintiff's cause of action on an account, and it was held error to enter judgment *nil dicit* with award of a writ of inquiry, as defendant had pleaded *non assumpsit* and was entitled to have the jury pass upon the credibility of the evidence.

69. Taylor *v.* Hathaway, 29 Ark. 597.

70. Johnson *v.* Kelly, 2 Stew. (Ala.) 490; Burford *v.* Earl, (Ark. 1900) 60 S. W. 234 (holding that where the pleadings show that the action was brought on an account for goods sold to defendant in one year, payment of that account is a complete bar, and a recovery cannot be had on an account for goods sold in another year prior to that sued for); Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310; Hopkins *v.* Orcutt, 51 Cal. 537 (holding that in an action to recover a balance due on an open account an item of a special contract which does not constitute an item in the open account, and is not so treated under the complaint as framed, cannot be recovered).

Judgment correct as to amount, but erroneous as to items.— If the judgment is erroneous as to particular items allowed or disallowed, but is correct as to the amount, the error is not prejudicial. Clark County *v.* Kerstan, 60 Ark. 508, 30 S. W. 1046.

Remitting excess.— In an action on an account annexed to the writ the verdict should not be for a larger amount than that claimed in the writ, but the plaintiff may remit the excess. Butler *v.* Millett, 47 Me. 492.

71. Belcher *v.* Grey, 16 Ga. 208.

72. Kingsley *v.* Delano, 169 Mass. 285, 47 N. E. 1013.

Larger balance than prayed.— In an action to recover a balance due, where defendant files an answer and contests plaintiff's right, it is held in Colorado that plaintiff may re-

4. Illegal Items. Where the verdict includes no part of an illegal item, but is based only on those items of the account which are legal, it is good.[73]

5. Default or Admission. For those items of an account which defendant admits to be due, plaintiff is entitled to a verdict and judgment in any event.[74] Such admission also refers to the failure of defendant to deny particular items, and to default judgments rendered upon pleadings conforming to the statutory provisions relating to the setting out or attachment of accounts sued on and the failure to deny verified accounts.[75]

I. Book-Account — 1. General Nature of Action. "Book-account," or "book-debt," as it is sometimes called, is a form of action resorted to in Connecticut and Vermont for the recovery of claims such as are usually evidenced by a book-account.[77]

cover a judgment for a larger amount than that prayed for, if the evidence justifies it. Ohio Creek Anthracite Coal Co. *v.* Hinds, 15 Colo. 173, 25 Pac. 502.

73. Brown *v.* Burns, 67 Me. 535. See *supra*, III, B.

74. Conrad *v.* Burbank, 24 La. Ann. 17, holding that such a judgment may be rendered on motion any time after suit, reserving the right to defendant to contest the items not admitted.

75. *Georgia.*— Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627.

Iowa.— Eaton *v.* Peavy, 75 Iowa 740, 38 N. W. 423.

Kentucky.— Harris *v.* Ray, 15 B. Mon. (Ky.) 628.

Maryland.— Baltimore *v.* Ideson, 47 Md. 542.

Mississippi.— Memphis Mach. Works *v.* Aberdeen, 77 Miss. 420, 27 So. 608.

Missouri.— Clark *v.* Evans, 64 Mo. 258, holding that under the statute requiring the service of a copy, nothing short of a delivery to all the defendants will authorize a judgment as by confession against one not so served. See also Mills *v.* Poindexter, 2 Code Rep. (N. Y.) 89.

Nevada.— Skinker *v.* Clute, 9 Nev. 342.

Ohio.— Dallas *v.* Ferneau, 25 Ohio St. 635.

South Carolina.— Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913, holding that under the code provisions authorizing a judgment without verdict when the itemized account is duly verified and served with the summons and complaint, where the account is not so verified a default judgment will be vacated on motion; and that where the record shows that the account was not so verified it is immaterial that there is found unexplained in the judgment-roll a separate and unattached paper purporting to be an itemized account. See also Locke *v.* Farley, 41 Mich. 405, 1 N. W. 955.

76. As to jurisdiction of county court in matters of book-account see Courts.

As to jurisdiction of justice of the peace in book-account see Justices of the Peace.

77. Bouvier L. Dict. See also *supra*, I, K; and *infra*, III, A, 2.

Book-account should not be extended beyond the necessity which gave birth to it. Terrill *v.* Beecher, 9 Conn. 344; Keeler *v.* Mathews, 17 Vt. 125; Hall *v.* Eaton, 12 Vt. 510; Case *v.* Berry, 3 Vt. 332. In Bradley *v.* Goodyear, 1 Day (Conn.) 104, 106, the court said: "The action of book-debt is peculiar to Connecticut. The allowing a party to support a claim by his own testimony is repugnant to general common-law principles, and though the action was originally dictated by a supposed necessity it ought not to be extended beyond the objects of its institution." In Wilkins *v.* Stevens, 8 Vt. 214, 217, Redfield, J., says: "Formerly great diversity of opinion among the profession, and not a little upon the bench, prevailed in relation to the policy of restricting or extending the boundaries of this action. And the mode of trial which obtains by statute in that action is so different from proceedings in trials at common law that there is very just grounds for such contrariety of opinion. Some, indeed, of eminent attainments in judicial science and learning, prefer extending the same mode of trial to all action; while others, of no less pretensions, would wish to abolish the action entirely."

Thus book-account will not lie to aid one in recovering money paid which in equity and good conscience the party ought not to recover in any other form of action, especially where, at the time of its payment and receipt, it was never expected to form a subject of a claim on book. Hall *v.* Eaton. 12 Vt. 510. So, where a party is engaged in an illicit transaction, the court will not sustain an action of book-account to aid him in such transaction. Lockwood *v.* Knap, 1 Root (Conn.) 153. Subscriptions for capital stock of a railroad company are not proper items of book-charge and should not be so charged in the absence of an agreement to that effect. Gleason *v.* Vermont Cent. R. Co., 25 Vt. 37.

Beyond its original limits the action has been extended so that it will lie now "where from the course of dealing between the parties it might be presumed to have been their intention that the subject should be so adjusted." Hall *v.* Eaton, 12 Vt. 510, 512 [*citing* Fassett *v.* Vincent, 8 Vt. 73; Farrand *v.* Gage, 3 Vt. 326; Case *v.* Berry, 3 Vt. 332]. Thus where plaintiff, a railroad corporation, agreed to pay a reasonable compensation for passing over defendant's land, and the auditor reported that it was the mutual expectation of the parties that these damages would be embraced in the adjustment of their book-accounts, it was held proper to include such an item. Chamberlain *v.* Farr, 23 Vt. 265.

2. When Action Lies — a. Rule Stated. Where the articles or services are such as are usually charged on book, and are themselves proper subjects of book-charge, the action of book-account, in jurisdictions where such action exists, may be maintained if at common law assumpsit will lie to recover the same claim.[78] It is well settled that book-account will not lie except where at common law assumpsit will lie;[79] but while book-account can only lie where at common law assumpsit will lie, it is nevertheless true that assumpsit may be maintained in many cases where book-account will not be allowed.[80] Like assumpsit, book-account requires a contract or promise, express or implied, to support it,[81] and in

It will also now lie "where plaintiff has been induced to accept that in payment which is no payment, and that by the misrepresentation of defendant." Hall *v.* Eaton, 12 Vt. 510, 512 [*citing* Gilman *v.* Peck, 11 Vt. 516, 34 Am. Dec. 702].

Distinguished from action of account.— Book-debt is distinguished from action of account at common law in Bowers *v.* Dunn, 2 Root (Conn.) 59; Woodward *v.* Harlow, 28 Vt. 338; Wetherell *v.* Evarts, 17 Vt. 219. See also *supra*, II. In Woodward *v.* Harlow, 28 Vt. 338, it is said that when notes go into the hands of a bailiff or receiver under a contract he may be called to an account in the common-law action of account, or under the Vermont statute he may be sued in book-account. But account on book and action of account at common law are not always concurrent remedies. Hall *v.* Peck, 10 Vt. 474, In Huxley *v.* Carman, 46 Vt. 462, it was said to be foreign to the letter and spirit of the Vermont statute to allow a party whose principal matter of controversy properly belongs to the action of account, but who has a few items of book-account disconnected with it, or incidentally connected with it, to bring in and adjust such matter in an action of book-account. "Little can be said in favor of the action of account over the action on book-account." Herrick *v.* Richardson, 17 Vt. 375, 379.

Distinguished from assumpsit.— See *infra*, III, A, 2, a.

Distinguished from covenant.—Where remedy by covenant upon a contract under seal may be maintained, it seems that plaintiff cannot waive the right to sue in covenant and sue in book-account or assumpsit. Myrick *v.* Slason, 19 Vt. 121. To the same effect see Proctor *v.* Wiley, 55 Vt. 344.

Its analogy to action of debt.— Book-account is more analogous to the action of debt on simple contract than to the action of account. Matthews *v.* Tower, 39 Vt. 433.

78. Humphrey *v.* Oviatt, 8 Conn. 413; Hodges *v.* Fox, 36 Vt. 74; Pangborn *v.* Saxton, 11 Vt. 79; Case *v.* Berry, 3 Vt. 332; Newton *v.* Higgins, 2 Vt. 366; Stevens *v.* Richards, 2 Aik. (Vt.) 81.

79. Kidder *v.* Sowles, 44 Vt. 303; Hodges *v.* Fox, 36 Vt. 74; Case *v.* Berry, 3 Vt. 332; Barlow *v.* Read, 1 Vt. 97; Read *v.* Barlow, 1 Aik. (Vt.) 145.

In Wilkins *v.* Stevens, 8 Vt. 214, 219, the court says: "In every case when, in the action on book, the parties claim to recover for goods sold and delivered, or labor, etc., if they are the ordinary subjects of book-charge and might have been recovered under the general *indebitatus* counts in assumpsit they will be permitted to recover. . . . But whenever the contract is so expressed that the party must go, not for a fixed price named in currency, not for the value of his alternative of the obligation, but for the value of defendant's promise, then neither this action nor general *indebitatus assumpsit* will lie."

Collateral liability.— Book-account cannot be sustained to enforce defendant's liability where the liability is only collateral to that of another person. Smith *v.* Hyde, 19 Vt. 54.

"So far as convenience is concerned, the book action is preferable to assumpsit, and the remedy is as ample." Herrick *v.* Richardson. 17 Vt. 375, 379.

80. Case *v.* Berry, 3 Vt. 332; Boardman *v.* Keeler, 2 Vt. 65, 66, wherein it is said: "There is frequently some difficulty in drawing the line where book-debt shall end and assumpsit commence."

By statute in Connecticut, however, it is said that book-debt has been made coextensive with general assumpsit. Lockwood *v.* Lockwood, 22 Conn. 425; Finch *v.* Finch, 22 Conn. 411. See also Wetherell *v.* Evarts, 17 Vt. 219, 222, wherein it is said that "book-account has to a great extent become a concurrent remedy with the action of assumpsit for the collection of debts."

81. Finch *v.* Finch, 22 Conn. 411; Lockwood *v.* Lockwood, 22 Conn. 425; Phenix *v.* Prindle, Kirby (Conn.) 207; Hodges *v.* Fox, 36 Vt. 74; Jones *v.* Wood, 30 Vt. 268; Gleason *v.* Briggs, 28 Vt. 135; Chase *v.* Spencer, 27 Vt. 412; Stearns *v.* Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Hassam *v.* Hassam, 22 Vt. 516; Eaton *v.* Whitcomb, 17 Vt. 641; Bailey *v.* Bailey, 16 Vt. 656; Peach *v.* Mills, 14 Vt. 371; Barlow *v.* Read, 1 Vt. 97; Read *v.* Barlow, 1 Aik. (Vt.) 145.

Authentication of contract.—"The question whether the party may bring this action depends upon other considerations than the mode of authenticating the contract." Wilkins *v.* Stevens, 8 Vt. 214, 218.

Implied promise.— In Wolcott *v.* Wolcott, 19 Vt. 37, plaintiff was allowed to recover in book-account against the town where it appeared that the overseers of the poor requested him to take care of a transient boarder in his house, there being an implied promise to reimburse him for his expenses.

Privity of contract is necessary to sustain the action, and the law may raise such a privity from the circumstances of the transaction. Waterman *v.* Stimpson, 24 Vt. 508.

the absence of such a promise the action of book-account can no more be maintained than can the action of assumpsit at common law.[82]

b. Charges on Book for Which Action Will Lie — (I) *Right to Charge* — (A) *Generally.* The right to make a charge on book must exist at the time of delivering the articles[83] or at the time of rendering the services;[84] and must arise in consequence of such delivery or rendition.[85]

(B) *Existence of Relation of Debtor and Creditor.* The right to make a charge on book may exist, although the party charged is not absolutely the debtor in relation to the subject.[86]

(C) *Special Agreements.* Special agreements as to the amount, or as to the time and manner of payment, it seems, will not defeat plaintiff's right to make a book-charge of items of a kind usually so charged.[87] On the other hand an

Subsequent promise.— Where one undertook to sell certain articles on commission and was unsuccessful, a subsequent promise to pay all expenses incurred for a relinquishment of his right constitutes such a promise to pay as will support an action of book-account. Perry *v.* Buckman, 33 Vt. 7.

82. Jones *v.* Moore, 50 Vt. 53, wherein it was held that the value of certain goods which had been attached by plaintiff and lost in the officer's hands after the attachment had been abandoned could not be recovered in book-account.

Repairs on borrowed property.— In Scott *v.* Brigham, 27 Vt. 561, the expenses of repairing a borrowed article which was broken while used by the borrower could not be recovered in book-account in the absence of a contract to that effect, express or implied, on the part of the borrower. But see *infra*, note 2, p. 499, as to repairs on hired property.

Torts.— Since the right of action must depend upon a promise, express or implied, book-account will not lie for a tort. Green *v.* Pratt, 11 Conn. 205; Stow *v.* Black, 37 Vt. 25; Drury *v.* Douglas, 35 Vt. 474; Winn *v.* Sprague, 35 Vt. 243; Jones *v.* Wood, 30 Vt. 268; Smalley *v.* Soragen, 30 Vt. 2; Soule *v.* Dougherty, 24 Vt. 92; Hassam *v.* Hassam, 22 Vt. 516; Scott *v.* Lance, 21 Vt. 507; McCrillis *v.* Banks, 19 Vt. 442; Peach *v.* Mills, 14 Vt. 371; Fry *v.* Slyfield, 3 Vt. 246; Miller *v.* French, 1 Aik. (Vt.) 99. Thus, neither money lost by the negligence of a servant (Chase *v.* Spencer, 27 Vt. 412), nor the value of goods which have been intermixed with those of defendant, are proper subjects of book-charge (Pratt *v.* Bryant, 20 Vt. 333); but by special agreement damages for a tort may, it seems, be made a proper subject of book-charge. Stow *v.* Black, 37 Vt. 25; Winn *v.* Sprague, 35 Vt. 243; Chamberlain *v.* Farr, 23 Vt. 265; Hassam *v.* Hassam, 22 Vt. 516.

Tort cannot be waived so as to recover for the claim in book-account. Drury *v.* Douglas, 35 Vt. 474; Stearns *v.* Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Hassam *v.* Hassam, 22 Vt. 516; Scott *v.* Lance, 21 Vt. 507; McCrillis *v.* Banks, 19 Vt. 442; Peach *v.* Mills, 14 Vt. 371.

83. Terrill *v.* Beecher, 9 Conn. 344 [*following* Bradley *v.* Goodyear, 1 Day (Conn.) 104]; Perry *v.* Buckman, 33 Vt. 7; Hall *v.* Peck, 10 Vt. 474 [*cited* in Kidder *v.* Sowles, 44 Vt. 303]; Nason *v.* Crocker, 11 Vt. 463. See also Waterman *v.* Stimpson, 24 Vt. 508.

Facts which occur subsequent to the delivery of the article will not, as a rule, confer the right to charge on book. Bradley *v.* Goodyear, 1 Day (Conn.) 104. The right to charge the items to defendant must arise at the time at which they were incurred, by the terms of a contract then existing, or the contract must contemplate the happening of an event that would confer the right. Perry *v.* Buckman, 33 Vt. 7.

Knowledge of right to charge is not necessary, provided the facts establishing the right exist. Loomis *v.* Wainwright, 21 Vt. 520.

Right under subsequent supervening contract.— Right to charge may not exist under the original contract, yet it may become perfected under a new contract supervening which changes the status of affairs. Perry *v.* Buckman, 33 Vt. 7; Starr *v.* Huntley, 12 Vt. 13.

Waiver of right to object that items are not proper subjects of book-charge, see Fassett *v.* Vincent, 8 Vt. 73.

84. Slasson *v.* Davis, 1 Aik. (Vt.) 73.

85. Terrill *v.* Beecher, 9 Conn. 344 [*following* Bradley *v.* Goodyear, 1 Day (Conn.) 104; Brewster *v.* Norwich, 1 Root (Conn.) 146]; Slasson *v.* Davis, 1 Aik. (Vt.) 73.

86. Hall *v.* Peck, 10 Vt. 474.

Accountability as a test.— "Whenever property is delivered, to be accounted for upon a future adjustment of book-accounts, it may properly be charged, although no right of action may exist at the time, but it may be charged upon the ground of accountability alone." Hall *v.* Peck, 10 Vt. 474, 478. A right to make the charge does not require that there should be an immediate and present right of action upon it. It is sufficient, in any case, if an obligation to account for the money or property received results directly from the transaction between the parties (Jackman *v.* Partridge, 21 Vt. 558); but articles delivered with no contemplation of creating a debt, or any obligation to pay for them, cannot be charged on book or recovered in this form of action (Bailey *v.* Bailey, 16 Vt. 656). [*Compare*, however, cases cited *supra*, note 83.]

87. Myers *v.* Baptist Soc., 38 Vt. 614; Kent *v.* Bowker, 38 Vt. 148; Smith *v.* Foster,

agreement to that effect, express or implied, may render subject to charge on book matters which are not strictly so chargeable.[88]

(II) *Manner of Charging.* Provided the subject-matter forms an appropriate item for charge on book, the right of action will not be affected by the fact that the entry was loosely made[89] or that the book or paper containing the account may have been lost.[90] It has been held that a book comprising charges regularly made is not indispensable to plaintiff's right of recovery.[91]

(III) *Time of Charging.* A charge on book need not necessarily have been made at the time when the right to charge accrued.[92]

36 Vt. 705; Waterman *v.* Stimpson, 24 Vt. 508; Porter *v.* Munger, 22 Vt. 191; Eddy *v.* Stafford, 18 Vt. 235; Eaton *v.* Whitcomb, 17 Vt. 641; Weller *v.* McCarty, 16 Vt. 98; Austin *v.* Wheeler, 16 Vt. 95; Stearns *v.* Haven, 16 Vt. 87; Wilkins *v.* Stevens, 8 Vt. 214; Blish *v.* Granger, 6 Vt. 340; Whiting *v.* Corwin, 5 Vt. 451; Fry *v.* Slyfield, 3 Vt. 246; Newton *v.* Higgins, 2 Vt. 366; Boardman *v.* Keeler, 2 Vt. 65. *Contra,* Stocking *v.* Sage, 1 Conn. 75; Harris *v.* Baker, 1 Root (Conn.) 220; Whelpley *v.* Higley, Brayt. (Vt.) 39.

See Johnson *v.* Gunn, 2 Root (Conn.) 130, wherein it was held that plaintiff "might not be admitted to prove, by his own testimony, any special agreement or promise in virtue of which he would entitle himself to recover." To the same effect see Peck *v.* Jones, Kirby (Conn.) 289. The reason assigned for the holding in these cases was that such special agreement could not be sworn to by the parties, and hence could not be enforced in this form of action.

Contract for payment in specific articles when the term of credit has expired has been held not to defeat plaintiff's right to make a book-charge provided the contract was expressed in dollars. Wilkins *v.* Stevens, 8 Vt. 214.

That the contract is in writing does not defeat plaintiff's right to make a book-charge. Wilkins *v.* Stevens, 8 Vt. 214.

88. Noyes *v.* Hall, 28 Vt. 645; Gleason *v.* Briggs, 28 Vt. 135; Chamberlain *v.* Farr, 23 Vt. 265; Scott *v.* Lance, 21 Vt. 507; Hall *v.* Eaton, 12 Vt. 510; Case *v.* Berry, 3 Vt. 332.

For facts insufficient to show an agreement allowing charges on book of items not in themselves proper subjects of charge on books see Winn *v.* Sprague, 35 Vt. 243.

89. Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253; Porter *v.* Munger, 22 Vt. 191; Tobias *v.* Blin, 21 Vt. 544; Scott *v.* Lance, 21 Vt. 507.

Form of the charge on book does not affect the right to recover in book-account. Scott *v.* Lance, 21 Vt. 507; Gassett *v.* Andover, 21 Vt. 342; Stone *v.* Pulsipher, 16 Vt. 428.

Charging article instead of its use.— In Stone *v.* Pulsipher, 16 Vt. 428, the fact that the charge was made for the thing itself instead of for the use thereof was held unobjectionable where the facts showed a right of recovery.

Charging in gross.— In Newel *v.* Keith, 11 Vt. 214, it was held no legal objection to a charge that it was made in gross, but that such matter was for the consideration of the auditor.

Erasures and alterations in the book-account do not destroy its character as an original. Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

Joint charge in account.— It is no objection to plaintiff's right of recovery for goods sold that he first charged the goods to defendant and another person whom he considered jointly liable, and it appears that the defendant is liable individually. Porter *v.* Munger, 22 Vt. 191. But items due from plaintiffs severally cannot be allowed in a joint action of book-account against defendant. Gleason *v.* Vermont Cent. R. Co., 25 Vt. 37.

Mistaken charge.— In Goodrich *v.* Drew, 10 Vt. 137, it was held that though charges were made on book to one person they might be recovered in an action against another if it appeared that the first charge was a mistake and defendant was in truth the debtor.

Single item may be charged on book and constitute the account. Loomis *v.* Wainwright, 21 Vt. 520; Kingsland *v.* Adams, 10 Vt. 201. *Contra,* however, see Ames *v.* Fisher, Brayt. (Vt.) 39, where the charge was a single item, "the domestic spinning-jenny."

Where the charges were made on slips of paper filed, according to plaintiff's custom in his business, they were held sufficient to sustain the action. Bell *v.* McLeran, 3 Vt. 185.

90. Reed *v.* Talford, 10 Vt. 568, wherein it was held that the failure to produce part of the account which had originally been written on a slip of paper and lost would not defeat the action.

91. Palmer *v.* Green, 6 Conn. 14.

92. Kingsland *v.* Adams, 10 Vt. 201; Whiting *v.* Corwin, 5 Vt. 451. See also *supra,* III, A, 2, b, (II).

Charging in advance items on book to await their subsequent application has been upheld in some cases, as where there has been a conditional sale of property to be paid for in services rendered from time to time. Martin *v.* Eames, 26 Vt. 476; Stone *v.* Pulsipher, 16 Vt. 428.

Charging subsequently to the accrual of the right has been upheld where plaintiff failed to make the charge by reason of deception practised upon him by defendant. Loomis *v.* Wainwright, 21 Vt. 520 [*distinguishing* Nason *v.* Crocker, 11 Vt. 463].

Even in court an account may be made up for the first time. Bell *v.* McLeran, 3 Vt. 185. See also Palmer *v.* Green, 6 Conn. 14, cited *supra,* note 91.

Items omitted in the first book-account may

(IV) *Subjects of Charge*—(A) *Rule Stated.* The general rule is that the subjects of charge on book to support an action of book-account within the scope of such action, as above explained, must be confined to transactions between the parties, where, in the usual course of their business, they make such charges on book.[93]

(B) *Applications of Rule*—(1) In General. Within the rule just stated, with respect to what may be charged on book, among the items which have been considered to be the proper subjects of charge on book so as to support an action of book-account may be enumerated the following: goods sold and delivered;[94]

be subsequently charged and recovered in a second book-account, if the reasons for the omission are sufficient. Stevens *v.* Damon, 29 Vt. 521. But *compare* cases cited *infra,* note 96.

93. Field *v.* Sawyer, Brayt. (Vt.) 39 [*citing* Swift Ev. 83].

Difficulty of stating rule.—In Bradley *v.* Goodyear, 1 Day (Conn.) 104, 106, the court said: "It would be difficult, perhaps, to lay down any general principle which would determine, in all cases, what articles may and what may not be charged on book."

General usage and practice of the country are important in determining what is a proper subject of charge on book. Hall *v.* Peck, 10 Vt. 474.

It is too late to raise the question as to whether an item was a proper charge on book after pleading payment in the hearing before the auditor. Peck *v.* Soragan, 27 Vt. 92.

94. Terrill *v.* Beecher, 9 Conn. 344; Victor Sewing Mach. Co. *v.* Weeks, 49 Vt. 342; Smith *v.* Foster, 36 Vt. 705; Waterman *v.* Stimpson, 24 Vt. 508; Porter *v.* Munger, 22 Vt. 191; Dwyer *v.* Hall, 22 Vt. 142; Loomis *v.* Wainwright, 21 Vt. 520; Wolcott *v.* Wolcott, 19 Vt. 37; McNeal *v.* Strong, 16 Vt. 640; McLeran *v.* Stevens, 16 Vt. 616; Tyson *v.* Doe, 15 Vt. 571; Rogers *v.* Miller, 15 Vt. 431; Brooks *v.* Jewell, 14 Vt. 470; Mattison *v.* Wescott, 13 Vt. 258; Starr *v.* Huntley, 12 Vt. 13; Hall *v.* Peck, 10 Vt. 474; Strong *v.* McConnell, 10 Vt. 231; Kingsland *v.* Adams, 10 Vt. 201; Blish *v.* Granger, 6 Vt. 340; Whiting *v.* Corwin, 5 Vt. 451; Austin *v.* Berry, 3 Vt. 58; Fry *v.* Slyfield, 3 Vt. 246; Field *v.* Sawyer, Brayt. (Vt.) 39.

Applying the rule stated in the text, book-account has been held to be the proper action to recover for board and lodging (Wolcott *v.* Wolcott, 19 Vt. 37), foal of mare sold under agreement to pay therefor if the mare proved to be with foal (Dwyer *v.* Hall, 22 Vt. 142), lottery tickets regularly issued and authorized by law (May *v.* Brownell, 3 Vt. 463), manufactured articles (Wilkins *v.* Stevens, 8 Vt. 214), necessaries advanced by guardian to ward (Mills *v.* St. John, 2 Root (Conn.) 188; Stanton *v.* Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255), standing trees sold to be cut down and taken away by the purchaser, which are actually severed and removed by him (McLeran *v.* Stevens, 16 Vt. 616), subscription to a newspaper (Ward *v.* Powell, 3 Harr. (Del.) 379), and for wool (Leach *v.* Shepard, 5 Vt. 363).

Board and clothing furnished to an infant employed under a special contract, who left his employment contrary to the terms of the contract, have been held not to be proper subjects of book-charge. Terrill *v.* Beecher, 9 Conn. 344.

Goods sold may be charged as returnable in kind, and upon failure so to make return the plaintiff may recover for their value. Hall *v.* Ives, 11 Conn. 469; Cass *v.* McDonald, 39 Vt. 65; Way *v.* Wakefield, 7 Vt. 223. In Vermont it has been repeatedly and uniformly held that "where goods are sold or services performed under a special contract for payment in other goods or in services, and the time of payment has elapsed, and payment not made according to the contract, . . . such special agreement is no obstacle to a recovery in general assumpsit or by an action on book-account." Kent *v.* Bowker, 38 Vt. 148, 152 [*citing* Waterman *v.* Stimpson, 24 Vt. 508; Porter *v.* Munger, 22 Vt. 191; Mattocks *v.* Lyman, 16 Vt. 113; Stearns *v.* Haven, 16 Vt. 87; Way *v.* Wakefield, 7 Vt. 223].

Goods originally received under a contract of agency which was afterward abandoned, under an agreement that the agent should become the purchaser, may be charged to him on book. Starr *v.* Huntley, 12 Vt. 13.

Perfected contract, such as will pass title in the property to the person sought to be charged, seems to be necessary to entitle plaintiff to recover. Hodges *v.* Fox, 36 Vt. 74 [*following* Barlow *v.* Read, 1 Vt. 97]; Read *v.* Barlow, 1 Aik. (Vt.) 145 [*criticising* Mattison *v.* Wescott, 13 Vt. 258]. Thus it is ordinarily necessary that there shall have been an actual delivery and acceptance of the goods. Tyson *v.* Doe, 15 Vt. 571 [*following* Starr *v.* Huntley, 12 Vt. 13; Pangborn *v.* Saxton, 11 Vt. 79]; Read *v.* Barlow, 1 Aik. (Vt.) 145; Barlow *v.* Read, 1 Vt. 97. But it should appear that the delivery was in contemplation of and under an obligation to pay. Bailey *v.* Bailey, 16 Vt. 656. In Terrill *v.* Beecher, 9 Conn. 344, 349, the court said: "Perhaps it is safe to affirm that no action of debt by book can be sustained unless it be for articles the sale and delivery of which may be proved by the testimony of the parties."

Tender of goods which are not accepted will not support the action. Wilkins *v.* Stevens, 8 Vt. 214 [*following* Read *v.* Barlow, 1 Aik. (Vt.) 145].

Where a contract is made for manufacture of article to be delivered at a future day, the property does not pass until delivery and acceptance and hence cannot properly be charged in account. Hodges *v.* Fox, 36 Vt. 74 [*distinguishing* Carpenter *v.* Dole, 13 Vt. 578; Blish *v.* Granger, 6 Vt. 340].

On the other hand it has been held that in

interest;[95] money found to be due on account stated;[96] money had and received to plaintiff's use;[97] money lent to defendant;[98] money paid for the use of another;[99] proceeds of goods sold which were left in defendant's hands to be sold

the case of manufactured goods recovery may be had where the right of property has passed to the vendee, notwithstanding there has been no actual delivery. Mattison *v.* Wescott, 13 Vt. 258 [*criticised* in Hodges *v.* Fox, 36 Vt. 74, 80, wherein the court says: "The mistake arose from treating a contract for the purchase of a thing not in existence, but to be manufactured thereafter, the same as the present sale of an existing article," etc.].

95. Interest may be recovered where there is an express or implied contract to pay the same (Phenix *v.* Prindle, Kirby (Conn.) 20; Blin *v.* Pierce, 20 Vt. 25); but a special contract for interest, not in writing, cannot be enforced by book-debt three years after the contract was made, as it is barred by the statute against frauds and perjuries (Smith *v.* Purdy, 1 Root (Conn.) 129).

96. Eaton *v.* Whitcomb, 17 Vt. 641, 645, wherein it is said that "in Spear *v.* Peck, 15 Vt. 566, it was held that an account stated might be charged on book, although the account out of which the balance was ascertained was beyond the jurisdiction of the court to which the action was brought."

Balance found due on a settlement may be charged over on a new account and recovered in this form of action. Warren *v.* Bishop, 22 Vt. 607; Spear *v.* Peck, 15 Vt. 566,— in analogy, perhaps, to an *insimul computassent* for a balance so found to be due.

But items omitted by mistake in a prior account stated between the parties cannot, in Connecticut, be recovered in book-account (Remington *v.* Noble, 19 Conn. 383; Rogers *v.* Moor, 2 Root (Conn.) 58; Punderson *v.* Shaw, Kirby (Conn.) 150), assumpsit being the remedy; although in Vermont such items may be recovered in book-account (Stevens *v.* Damon, 29 Vt. 521; Wood *v.* Johnson, 13 Vt. 191 [*following* Austin *v.* Berry, 3 Vt. 58]).

97. Brown *v.* Talcott, 1 Root (Conn.) 85; Smalley *v.* Soragen, 30 Vt. 2; Stone *v.* Foster, 16 Vt. 546; Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503; Boutwell *v.* Tyler, 11 Vt. 487.

Distinguished from deposit.— The question whether the money received becomes a debt so as to warrant a charge on book, or a mere deposit, depends upon the nature of the transaction and the course of the dealings between the parties. Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503. In no case, however, can an action be maintained against a mere depositary of money unless his situation has been changed to that of debtor either by a wrongful refusal to pay over the money on proper request or by a wrongful appropriation of it. Jackman *v.* Partridge, 21 Vt. 558.

Money collected by an attorney cannot ordinarily be recovered in this form of action, but if the parties agree that the money thus received shall be charged upon book, the objection will be obviated, and such agreement may also be implied from the course of dealing between the parties. Scott *v.* Lance, 21 Vt. 507.

Money in hands of sheriff cannot be recovered in book-account unless he has agreed that it shall be charged or has promised to pay. Gleason *v.* Briggs, 28 Vt. 135.

Money paid to an agent who converts the same to his own use is a proper subject of book-charge. Brown *v.* Talcott, 1 Root (Conn.) 85; Whiting *v.* Corwin, 5 Vt. 451.

Money paid to defendant in excess of the amount of indebtedness intended to be paid may be recovered. Northrop *v.* Sanborn, 22 Vt. 433, 54 Am. Dec. 83.

Taking receipt in writing for the money has been held to constitute no objection to a charge on book for money received to be accounted for. Boutwell *v.* Tyler, 11 Vt. 487.

98. Clark *v.* Savage, 20 Conn. 258; Plimpton *v.* Gleason, 57 Vt. 604; Keeler *v.* Mathews, 17 Vt. 125.

Acceptance of memorandum note has been held not to preclude a recovery for money lent. Clark *v.* Savage, 20 Conn. 258.

When nothing has actually been paid, however, no recovery can be had, as in the case of mere indorsements. Flint *v.* Eureka Marble Co., 53 Vt. 669.

99. Chellis *v.* Woods, 11 Vt. 466 [*citing* Warden *v.* Johnson, 11 Vt. 455]. To the same effect see Walker *v.* Barrington, 28 Vt. 781.

The rule stated in the text has been applied to sustain book-account:

For expenses incurred in making improvements upon real estate at the request of proposed vendor, made by the proposed vendee upon failure of the former to fulfil his contract of sale. Minor *v.* Erving, Kirby (Conn.) 158.

For one half of certain expenditures laid out in making repairs on a vessel for the benefit of plaintiff and defendant, who were joint owners of the vessel. Bowers *v.* Dunn, 2 Root (Conn.) 59.

For postage paid by postmaster for another person. Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355.

For the purchase-price of personal property bought by plaintiff at the request of and for defendant, notwithstanding the article was not accepted by defendant. Paddock *v.* Ames, 14 Vt. 515.

Previous agreement to give security by mortgage on the part of the person for whom the money is paid will not preclude a recovery notwithstanding the security has never been demanded. Weller *v.* McCarty, 16 Vt. 98.

Taxes paid by one for another may by agreement be charged on book. Noyes *v.* Hall, 28 Vt. 645.

and accounted for;[1] use of property hired;[2] and work and labor done and performed or materials furnished.[3] No action, however, will lie to recover money or goods which have been delivered or received in payment of an existing debt, where the party receiving refuses or neglects to make the application.[4]

1. Hickok *v.* Stevens, 18 Vt. 111; Hall *v.* Peck, 10 Vt. 474.

Book-account has been extended beyond its original limits so that it will now lie "where the articles charged were delivered originally to be accounted for in a particular manner, and where they might well have been expected to be charged at the time of delivery. Hall *v.* Eaton, 12 Vt. 510, 512 [*citing* Hall *v.* Peck, 10 Vt. 474; Whiting *v.* Corwin, 5 Vt. 451].

Goods assigned to be disposed of in a certain manner cannot, it seems, be recovered in this action. So held in Allen *v.* Thrall, 10 Vt. 255.

Goods which are not sold, under a bailment for sale, and which are refused to be delivered to plaintiffs on demand, cannot be considered subjects of charge on book. Kidder *v.* Sowles, 44 Vt. 303.

2. Woodward *v.* Cutter, 33 Vt. 49.

Expense of repairs.— In Woodward *v.* Cutter, 33 Vt. 49, it was held that in addition to recovering for the use of the property hired, plaintiff might further recover the expense of repairing the injuries caused by the use. But see *supra*, note 82, as to repairs of article injured in hands of borrower.

3. Smith *v.* Gilbert, 4 Day (Conn.) 105; Minor *v.* Erving, Kirby (Conn.) 158; Proctor *v.* Wiley, 55 Vt. 344; Parker *v.* Bryant, 40 Vt. 291; Walker *v.* Norton, 29 Vt. 226; Barber *v.* Britton, 26 Vt. 112; Sargeant *v.* Sunderland, 21 Vt. 284; Wolcott *v.* Wolcott, 19 Vt. 37; Austin *v.* Wheeler, 16 Vt. 95; Stearns *v.* Haven, 16 Vt. 87; Paige *v.* Ripley, 12 Vt. 289; Newel *v.* Keith, 11 Vt. 214; Phelps *v.* Wood, 9 Vt. 399; Dunning *v.* Chamberlin, 6 Vt. 127; Fry *v.* Slyfield, 3 Vt. 246; Keyes *v.* Carpenter, 3 Vt. 209.

Application of the rule stated in the text has been made to the recovery of compensation for services rendered by:

Attorney. Territt *v.* Woodruff, 19 Vt. 182; Strong *v.* McConnel, 5 Vt. 338; Bell *v.* McLeran, 3 Vt. 185.

Blacksmith. Wait *v.* Johnson, 24 Vt. 112.

Carrier of goods. Boardman *v.* Keeler, 2 Vt. 65.

Justice of the peace. Miller *v.* French, 1 Aik. (Vt.) 99.

Physician. Smith *v.* Watson, 14 Vt. 332.

Plaintiff's minor son hired to defendant. Hennessy *v.* Stewart, 31 Vt. 486.

Probate judge. Sargeant *v.* Sunderland, 21 Vt. 284.

Previous stipulated value for services is not necessary to render them a proper subject of charge on book. Myers *v.* Baptist Soc., 38 Vt. 614.

Services rendered in part payment under a conditional sale of property may be charged on book to await their subsequent application, and in case the property sold is received back by the vendor, the purchaser may recover for the services in book-account. Martin *v.* Eames, 26 Vt. 476; Stone *v.* Pulsipher, 16 Vt. 428.

Strict performance waived by acquiescence in contract.— A party may recover in this form of action for work and labor performed, where he has acquiesced in the contract and accepted the work, even though it may not have been performed within the strict terms of the contract as originally made (Austin *v.* Wheeler, 16 Vt. 95); and this may be true even where the special contract is under seal (Myrick *v.* Slason, 19 Vt. 121).

4. Bradley *v.* Goodyear, 1 Day (Conn.) 104; Beeman *v.* Webster, 15 Vt. 141; Downer *v.* Frizzle, 10 Vt. 541; Stevens *v.* Tuttle, 3 Vt. 519; Slasson *v.* Davis, 1 Aik. (Vt.) 73. Thus, where F delivered notes to G, a constable, to apply the proceeds thereof upon executions against F, in G's hands for collection, and the notes were paid to G, but the proceeds not applied upon the executions, it was held that these notes were not the proper subjects of a book-charge by F against G. Farrand *v.* Gage, 3 Vt. 326.

Extent and limits of rule.— But "the general rule that money paid to be applied on a particular demand cannot be made the ground of action . . . can only apply to those cases where the payment in itself operates *pro tanto* to extinguish so much of the demand upon which the money is paid, and not to cases where, by the agreement of parties, the money paid is kept on foot as a subsisting claim, but subject to a future appropriation." Chellis *v.* Woods, 11 Vt. 466, 468 [*following* Strong *v.* McConnel, 10 Vt. 231, and *followed* in Hickok *v.* Ridley, 15 Vt. 42].

Thus in Cobleigh *v.* Stone, 29 Vt. 525, where it appeared that defendant took possession of personalty belonging to plaintiff, to hold as security for a debt, and afterward he sold the same for more than sufficient to pay the debt, but did not account for the balance, it was held that plaintiff could recover in book-account for the balance of the proceeds of the sale. So, too, it has been held that promissory notes given by plaintiff to defendant to be accounted for by the latter after using them as security for a debt due him from plaintiff may be recovered in book-account, it appearing that no such debt existed. Woodward *v.* Harlow, 28 Vt. 338.

Money paid on note, but not applied, is not a subject of charge on book. Bradley *v.* Goodyear, 1 Day (Conn.) 104; Miller *v.* French, 1 Aik. (Vt.) 99. *Contra*, see Prentice *v.* Phillips, 1 Root (Conn.) 103; Hurd *v.* Fleming, 1 Root (Conn.) 132; Brown *v.* Talcott, 1 Root (Conn.) 85; McNeal *v.* Strong, 16 Vt. 640, wherein it was held that if articles of personal property are delivered to a firm under a contract that they will apply their value to the payment of a note, which application is afterward refused, the special under-

(2) Promissory Notes. It seems that promissory notes are not proper subjects of charge on books as between original parties,[5] but that they may become so after they have been assigned.[6]

(3) Unliquidated Damages. A claim for unliquidated damages is not the subject of book-charge, and cannot be recovered in that form of action.[7]

(4) Use and Occupation of Realty. As a general rule an action of book-account will not lie for the use and occupation of real estate, especially where there has been no agreement to charge.[8]

taking is converted into an obligation to pay money, and a recovery may be had in an action of book-account.

Remedy in such case.— In such case the party aggrieved must wait until the obligation is sought to be enforced, when he may compel the proper application. Downer *v.* Frizzle, 10 Vt. 541; Stevens *v.* Tuttle, 3 Vt. 519.

5. Farrand *v.* Gage, 3 Vt. 326. But see Barlow *v.* Butler, 1 Vt. 146, wherein it was held that a charge on book, by a party to a suit, of his own note, is proper if done at the time of a credit which made such charge necessary.

Balance due on promissory note which one party holds against the other is not recoverable in book-account. Stevens *v.* Damon, 29 Vt. 521.

By agreement, however, executions and notes may become proper subjects of charge on book. Gleason *v.* Briggs, 28 Vt. 135.

Orders drawn by plaintiff on a third person, for value received, in favor of defendant and delivered to him, may be charged on book. Stores *v.* Stores, 1 Root (Conn.) 139, wherein it is said: "There is a wide difference between an action brought upon an order or bill of exchange, and an action brought for an order or bill of exchange." An order upon a third person drawn by a debtor in favor of his creditor for the amount of debt due for property sold, it being understood that the order was for convenience only, not as an ordinary business transaction, and that the drawee had no funds of the drawer in his hands and was under no obligation to accept the order, will not preclude the creditor from recovering his debt in book-account. Heald *v.* Warren, 22 Vt. 409.

6. **A due-bill assigned** is a proper subject of book-charge. Hunt *v.* Pierpont, 27 Conn. 301.

"Money, bills of exchange, orders, bank checks, and promissory notes, when assigned, are, says Judge Swift (1 Dig. 582), charged on book in the regular course of business." Hunt *v.* Pierpont, 27 Conn. 301, 305.

7. Green *v.* Pratt, 11 Conn. 205; Smalley *v.* Soragen, 30 Vt. 2; Scott *v.* Lance, 21 Vt. 507; Bailey *v.* Bailey, 16 Vt. 656; Blanchard *v.* Butterfield, 12 Vt. 451; Fry *v.* Slyfield, 3 Vt. 246.

By agreement unliquidated damages may be made a subject of book-charge. Chamberlain *v.* Farr, 23 Vt. 265.

Breach of contract cannot be charged on book. Green *v.* Pratt, 11 Conn. 205; Weeks *v.* Boynton, 37 Vt. 297; Smalley *v.* Soragen, 30 Vt. 2; Hiller *v.* French, 1 Aik. (Vt.) 99. "Value of plaintiff's part of the performance" of the contract is a proper subject of a charge on book for which book-account may lie, not the "breach of defendant's promise." Wilkins *v.* Stevens, 8 Vt. 214.

Breach of duty as bailee.— "This action will never lie for damages sustained by reason of any breach of duty as a bailee, whatever be the character of the bailment." Pratt *v.* Bryant, 20 Vt. 333, 337.

Breach of special agreement cannot be charged on book. Terrill *v.* Beecher, 9 Conn. 344; Pierce *v.* Smith, 16 Vt. 166.

Damages for violation of an executory contract cannot be the ground of claim to be adjudicated in an action of book-account. Pierce *v.* Smith, 16 Vt. 166. Hence costs and expenses of arbitration in which submission was revoked by the opposite party before an award was made do not constitute a proper claim to be adjusted in book-account. Bryant *v.* Clifford, 27 Vt. 664.

Special damages for breach of a special contract are not proper subjects of book-charge. Scott *v.* Lance, 21 Vt. 507; Bailey *v.* Bailey, 16 Vt. 656; Pierce *v.* Smith, 16 Vt. 166; Smith *v.* Smith, 14 Vt. 440; Blanchard *v.* Butterfield, 12 Vt. 451. Expenses incurred in defending a suit against which plaintiff was specially indemnified by defendant are not proper subjects of book-charge. The remedy must be a suit upon the special contract. Stocking *v.* Sage, 1 Conn. 75.

8. Beach *v.* Mills, 5 Conn. 493; Stearns *v.* Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Scott *v.* Lance, 21 Vt. 507; Nichols *v.* Packard, 16 Vt. 91; Gunnison *v.* Bancroft, 11 Vt. 490; Case *v.* Berry, 3 Vt. 332; Miller *v.* French, 1 Aik. (Vt.) 99; Hitchcock *v.* Smith, Brayt. (Vt.) 39. *Compare* Lockwood *v.* Lockwood, 22 Conn. 425, where it was held, under a statute making an action of book-debt coextensive with general assumpsit, that a recovery for actual use and occupation could be had under this form of action.

Rent is not a proper subject of charge on book. Miller *v.* French, 1 Aik. (Vt.) 99.

Where there are mutual accounts, however, for articles or services rendered or delivered and intended to be applied in payment of rent, the accounts may be adjusted in this form of action. Gunnison *v.* Bancroft, 11 Vt. 490; Case *v.* Berry, 3 Vt. 332, 333, wherein the court said: "We do not mean to say, however, that rent or the use of land can under no circumstances be an admissible charge on book. The course of dealings between the parties may shew that it was intended to be a matter of account between

3. Accrual of Right of Action. Book-account cannot be commenced until plaintiff's cause of action has accrued;[9] hence it cannot be sustained where no portion of plaintiff's account against defendant had become due at the commencement of the action[10] or where the contract relied upon to support it is executory and unrescinded.[11]

4. Who May Maintain Action. Mutual actions of book-account may be maintained,[12] and it has been held that a corporation may maintain an action of book-account.[13] As a general rule, however, the action will not lie as between joint owners[14] or partners,[15] the remedy in such cases being by action of account.[16]

5. Necessity of Demanding Payment.[17] In a case where the action of book-account would otherwise be appropriate, the necessity of demanding payment before suit is no valid objection to the form of action.[18]

6. Pleadings[19] **— a. Complaint or Declaration.** Usually the proceedings are commenced by a declaration or complaint, as in an ordinary action,[20] the

them, and to be entered and adjusted on book; as where there are mutual dealings and accounts, and on one side charges are made of articles or services delivered or rendered and intended to apply in payment of rent charged on the other."

9. See Actions.

10. Wetherell *v.* Evarts, 17 Vt. 219 [*explaining* and *limiting* Martin *v.* Fairbanks, 7 Vt. 97].

11. Bailey *v.* Bailey, 16 Vt. 656.

Promissory note not due.— Where goods were sold upon a promissory note payable at a future day, upon failure to deliver over the note by the vendee the vendor cannot maintain book-account until the note has become due. Eddy *v.* Stafford, 18 Vt. 235.

That contract is partly executed does not change the operation of the rule. Smith *v.* Smith, 14 Vt. 440.

12. Gale *v.* Cooper, 11 Vt. 597, 598, wherein it appears that, immediately after plaintiff brought an action of book-account against defendant, the latter brought a similar action against plaintiff. Williams, C. J., announcing the rule, said: "It has been settled that mutual actions on book may be maintained, and that each is independent of the other, though I think a different rule and practice would have better comported with the statute."

13. Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503.

14. Formerly, in Vermont, one of two tenants in common of personal property could not recover of the other, in an action on book-account, for having used more than his share of the common property (McCrillis *v.* Banks, 19 Vt. 442 [*following* Albee *v.* Fairbanks, 10 Vt. 314]); even though the latter appropriated the amount with the consent of his cotenant and under an agreement to account therefor (Briggs *v.* Brewster, 23 Vt. 100; Scott *v.* Lance, 21 Vt. 507). This rule, however, has been changed by statute. Vt. Stat. (1894) § 1445; Gates *v.* Lockwood, 27 Vt. 286.

15. Green *v.* Chapman, 27 Vt. 236.

Extent and limits of the rule.— A party may recover for articles that have arisen from partnership dealings, when the suit does not draw the partnership balance in controversy. Sawyer *v.* Proctor, 2 Vt. 580. But the courts have no authority to settle complicated partnership matters in an action of book-account. Hydeville Co. *v.* Barnes, 37 Vt. 588. The Vermont act of Nov. 18, 1852, relating to actions of book-account, does not extend to partnership dealings. Duryea *v.* Whitcomb, 31 Vt. 395 [*citing* and *following* Green *v.* Chapman, 27 Vt. 236].

Where two parties performed a contract of labor for defendant and afterward agreed to divide the amount to be received between them, defendant agreeing to pay plaintiff his share, it was held, in the absence of a finding that they were partners, that plaintiff might recover his share in an action of book-account. Parker *v.* Bryant, 40 Vt. 291.

16. Green *v.* Chapman, 27 Vt. 236; Briggs *v.* Brewster, 23 Vt. 100; Albee *v.* Fairbanks, 10 Vt. 314.

Recovery of excess.— In Briggs *v.* Brewster, 23 Vt. 100, it was held that where several parties owned property and jointly agreed that each might use what he wished and account for any excess, such excess could be recovered only by action of account.

17. As to the necessity for demand see Actions.

18. Jackman *v.* Partridge, 21 Vt. 558 [*citing* Hall *v.* Peck, 10 Vt. 474].

To enable a tenant in common to recover of his cotenant for having received more than his share of the property in which they have a common interest, a demand must be shown; but where the claim constitutes but one of several items in the account and the whole action does not depend upon it, a demand after commencement of suit, but before the time of auditing, will be sufficient. Gates *v.* Lockwood, 27 Vt. 286.

19. As to matters of pleading, generally, see Pleading.

20. King *v.* Lacey, 8 Conn. 499. In McKoy *v.* Brown, 13 Vt. 593, it was held that a motion in arrest of judgment would not be sustained because the declaration was not drawn agreeably to the form of declarations on book-account before the county court, but according to the form used before justices of the peace.

By pleading statute of limitations before the auditor, defendant waives the right

pleadings being somewhat analogous to the action of debt on simple contract.[21]

b. Answer or Plea. In an action of book-account defendant may plead, by way of set-off, any claim he has which may reduce the plaintiff's account,[22] but it has long been settled that in this form of action no defense can be specially pleaded which depends for its effect upon plaintiff's account.[23] All such defenses must be introduced before the auditor and cannot be raised before a jury.[24]

7. Evidence and Proof[25] — a. Burden of Proof. The burden of proof in such cases is, as usual, on plaintiff,[26] unless defendant claims to have paid the account, in which case the burden of proof is upon defendant.[27]

b. Admissibility and Competency[28] — (I) *In General.* The usual rules of evidence are adhered to in trials before an auditor in book-account.[29]

(II) *Parties as Witnesses.* Both parties are made witnesses by statute, and each has a right to testify and demand the testimony of the other.[30] Both parties are competent witnesses as to payment,[31] and their testimony may be extended to all circumstances connected with the account as stated in the declaration.[32]

(III) *Documentary Evidence.* Books of account containing original entries are not indispensable,[33] but when properly identified they may be introduced in evidence in support of plaintiff's claim,[34] but when admitted they must be of the character contemplated by the statute.[35]

thereafter to object that the action should not have been in book-debt, but in some other form. Bliss *v.* Allard, 49 Vt. 350.

21. The rules of pleading adapted to the action of account are inapplicable to the action of book-account. This was evidently seen by the legislature; for in prescribing the form of the declaration in the action of book-account they adopted, so far as it goes, the form of an action of debt on simple contract, but leaving it more indefinite and uncertain. Matthews *v.* Tower, 39 Vt. 433.

22. The time within which a plea of offset shall be filed in the county court rests solely within the discretion of that court, and its determination cannot be revised in the appellate court. Ainsworth *v.* Drew, 14 Vt. 563. See also, generally, Recoupment, Set-off, and Counter-claim.

23. Matthews *v.* Tower, 39 Vt. 433; Porter *v.* Smith, 20 Vt. 344; Delaware *v.* Staunton, 8 Vt. 48, 52, wherein the court said: "As a general rule, any matter which admits defendant to have been once accountable or chargeable, although it goes in discharge, must be plead before auditors and not in bar."

24. Matthews *v.* Tower, 39 Vt. 433; Porter *v.* Smith, 20 Vt. 344.

Partnership.— In Porter *v.* Smith, 20 Vt. 344, defendants pleaded that they were not partners. The court, while holding that there might be a recovery upon proof of a joint indebtedness without proof of the partnership, put the decision on the still broader ground that the question of a joint relation could be tried only before the auditor.

25. As to matters of evidence generally see Evidence.

26. See Evidence.

Illegal charges.— Where some of the charges on book were illegal, the burden of proof is on plaintiff to show the validity and propriety of each item. Graves *v.* Ranger, 52 Vt. 424.

27. Smith *v.* Woodworth, 43 Vt. 39.

28. As to the competency of witnesses generally see Witnesses.

29. See Evidence; References; also the following cases: Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Bradley *v.* Bassett, 13 Conn. 560; Roberts *v.* Ellsworth, 11 Conn. 290; Peck *v.* Abbe, 11 Conn. 207; Weed *v.* Bishop, 7 Conn. 128; Woodbury *v.* Woodbury, 50 Vt. 152; Bacon *v.* Vaughn, 34 Vt. 73; Stanford *v.* Bates, 22 Vt. 546; Gilbert *v.* Toby, 21 Vt. 306; Clark *v.* Marsh, 20 Vt. 338; Pike *v.* Blake, 8 Vt. 400; Delaware *v.* Staunton, 8 Vt. 48; Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286; May *v.* Corlew, 4 Vt. 12; Fay *v.* Green, 2 Aik. (Vt.) 386; Stevens *v.* Richards, 2 Aik. (Vt.) 81.

30. Stevens *v.* Richards, 2 Aik. (Vt.) 81.

The extent to which parties to the action of book-account may be witnesses has been a fruitful subject of inquiry. The statute has made both parties witnesses. Keeler *v.* Mathews, 17 Vt. 125.

Where a husband and wife are joined as plaintiffs, the wife as well as the husband may be examined under oath in order to sustain the account. Gay *v.* Rogers, 18 Vt. 342.

31. Delaware *v.* Staunton, 8 Vt. 48.

32. Clark *v.* Marsh, 20 Vt. 338; Fay *v.* Green, 2 Aik. (Vt.) 386.

33. Palmer *v.* Green, 6 Conn. 14; Leavensworth *v.* Phelps, Kirby (Conn.) 71; Ward *v.* Baker, 16 Vt. 287; Read *v.* Barlow, 1 Aik. (Vt.) 145.

Discretion of auditor.— It rests within the discretion of the auditor or the county court whether the party will be required to produce his original books. Ward *v.* Baker, 16 Vt. 287.

Omission to make charge on book is presumptive evidence against the claim. Palmer *v.* Green, 6 Conn. 14.

34. Woodbury *v.* Woodbury, 50 Vt. 152. See also Evidence.

35. Woodbury *v.* Woodbury, 50 Vt. 152.

c. **Sufficiency.** In order to recover in this form of action for goods sold, plaintiff must prove an executed and perfected contract of sale, completed by delivery.[36]

8. **Preliminary Judgment.**[37] There must be a judgment to account and a reference to an auditor as a matter of course.[38] This judgment is always rendered without reference to the actual dealings between the parties, or whether any have ever existed or not,[39] and concludes nothing, it being only matter of form.[40]

ACCOUNT STATED. See Accounts and Accounting.

ACCOUPLE. To marry.[1]

ACCREDIT. In international law, to acknowledge the authority of a diplomatic agent of another country.[2]

ACCREDULITARE or **ACCREDITULARE.** To purge an offense by an oath.[3]

ACCRESCERE. To grow to; to pass to and become united with, as soil to land *per alluvionem*.[4] (See generally Waters.)

ACCRESSER. To Accrue,[5] *q. v.*

ACCRETION. See Navigable Waters; Waters.

ACCROACH. To attempt to exercise royal power.[6]

ACCROCHE. To encroach.[7]

ACCRUE. To arise;[8] to grow to or to be added to;[9] to occur.[10] In the past

36. Bundy *v.* Ayer, 18 Vt. 497.

37. As to the hearing before the auditor and the proceedings subsequent thereto see References.

38. Matthews *v.* Tower, 39 Vt. 433.

39. Hagar *v.* Stone, 20 Vt. 106.

40. Matthews *v.* Tower, 39 Vt. 433.

"From the necessity of the case the trial on book-account is mainly and usually before the auditor. The interlocutory judgment or judgment to account is little more in point of conclusiveness, when the action is founded on book-account, than an ordinary order of reference." Smith *v.* Bradley, 39 Vt. 366, 369.

Confession of judgment "to account in an action on book-account does not conclude defendant as to any article charged." Read *v.* Barlow, 1 Aik. (Vt.) 145, 147.

Province of court and auditor.— "It is said in some of the cases that the court are judges of the action, and the auditors are judges of the account; that is, the court will judge whether upon the facts the action will lie, and the auditors must find the facts. The court will not go into a preliminary inquiry into the facts, either by court or jury, as in the action of account, but only decide the law of the case upon such facts as may be found and reported by the auditor." Matthews *v.* Tower, 39 Vt. 433, 438.

1. Wharton L. Lex.

2. Burrill L. Dict.

3. Wharton L. Lex.; Adams Gloss.

4. Burrill L. Dict.

5. Kelham Dict.

6. 4 Bl. Comm. 76.

7. Jacob L. Dict.

It is derived from the French word "*accrocher*,"— to hook or grapple unto. Jacob L. Dict.

8. Emerson *v.* Steamboat Shawano City, 10 Wis. 433, 435, where it was said that "the verb 'to accrue' is often and properly used to convey the same idea as the verb 'to arise,'" as in the expression "when the cause of action shall accrue."

9. Johnson *v.* Humboldt Ins. Co., 91 Ill. 92, 95, 33 Am. Rep. 47; Strasser *v.* Staats, 59 Hun (N. Y.) 143, 13 N. Y. Suppl. 167 [*citing* Bouvier L. Dict.].

10. Steen *v.* Niagara F. Ins. Co., 61 How. Pr. (N. Y.) 144, 146; Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228. See also Johnson *v.* Humboldt Ins. Co., 91 Ill. 92, 95, 33 Am. Rep. 47, where the condition of a policy contained the clause, "nor unless such suit or action shall be commenced within twelve months next after the loss shall occur," and it was urged that the word "occur" was used in the sense of "accrue" and that such sense required the court to apply it to the suit or action. The court said: "The word 'occur' means 'to happen,' in its general and most popular sense, whilst the word 'accrue' is to be added or attached to something else, in its generally received sense; but if we were to substitute the word 'accrue,' then, in its grammatical connection, it would mean that the loss had attached to appellants, and that was when the fire destroyed the property, and would not change the obvious meaning from what it is as written. It would not be construction to say, the condition means a suit or action might be commenced within twelve months after an action had accrued. It would not only be to change the grammatical structure of the clause, but it would be to make a new and different contract for the parties."

"Accrue" distinguished from "sustain."— The word "sustain" and the word "accrue" are not only different terms, but terms of different import. The word "sustain" implies a loss, but the word "accrue" implies a gain

tense the word "accrued" is used in the sense of due and payable;[11] vested;[12] and existed.[13]

ACCRUER, CLAUSE OF. An express clause frequently occurring in the case of gifts by deed or will to persons as tenants in common, providing that, upon the death of one or more of the beneficiaries, his or their shares shall go to the survivors or survivor.[14]

ACCUMULATED SURPLUS. The fund which a corporation has in excess of its capital stock after payment of its debts.[15]

ACCUMULATION. The putting by of dividends, rents, or other income and converting it into principal by investing it and again capitalizing the income arising from the new principal, and so on. The capital and accrued interest is called the accumulations.[16] (Accumulation, Rule Limiting, see PERPETUITIES.)

ACCUMULATIVE. That accumulates or is heaped up.[17] Said of several things heaped together, or of one thing added to another.[18]

ACCUSARE. To ACCUSE,[19] *q. v.*

ACCUSARE NEMO SE DEBET NISI CORAM DEO. A maxim meaning "no one is bound to accuse himself except before God."[20]

ACCUSATION. The charging of a person with a crime.[21]

ACCUSATOR. An ACCUSER,[22] *q. v.*

ACCUSATOR POST RATIONABILE TEMPUS NON EST AUDIENDUS, NISI SE BENE DE OMISSIONE EXCUSAVERIT. A maxim meaning "an accuser ought not to be heard after the expiration of a reasonable time, unless he can account satisfactorily for his delay."[23]

ACCUSE. To make an imputation against, as of a crime.[24] (Accuse, Threats to, see THREATS.)

ACCUSED. One who is charged with a crime.[25]

or acquisition. Adams *v.* Brown, 4 Litt. (Ky.) 7, holding that where the declaration recited as a condition of the bond that complainant should pay all costs and damages which defendant should sustain, and the condition as set out on oyer was for the payment of all costs and damages which might accrue, there was a material variance.

"Accruing" distinguished from "owing."— When the words "accruing or owing" are used to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable and the other as denoting those which are. Dresser *v.* Johns, 6 C. B. N. S. 429, 98 E. C. L. 429. See also Gross *v.* Partenheimer, 159 Pa. St. 556, 558, 28 Atl. 370, where it is said that, as generally understood, "accruing" interest means running or accumulating interest as distinguished from accrued or matured interest.

11. Cutcliff *v.* McAnally, 88 Ala. 507, 509, 7 So. 331; Fay *v.* Holloran, 35 Barb. (N. Y.) 295.

12. Hartshorne *v.* Ross, 2 Disn. (Ohio) 15, 21.

13. Weber *v.* Harbor Com'rs, 18 Wall. (U. S.) 57, 68, 21 L. ed. 798.

14. Brown L. Dict.

15. State *v.* Yard, 42 N. J. L. 357, 359; State *v.* Parker, 35 N. J. L. 575, 578; State *v.* Parker, 34 N. J. L. 479, 482; State *v.* Utter, 34 N. J. L. 489, 493.

16. Rapalje & L. L. Dict.

17. Burrill L. Dict.

18. Accumulative judgment.— A second or additional judgment or sentence given against or passed upon one who has already been convicted, to go into effect after the expiration of the first. Wharton L. Lex.

Accumulative legacy.— A double or additional legacy; a legacy given in addition to another given by the same instrument or by another instrument. Burrill L. Dict.

19. Burrill L. Dict.

20. Burrill L. Dict.

21. Jacob L. Dict.

22. Burrill L. Dict.

23. Abbott L. Dict.; Ashley's Case, F. Moore 816, 817 [*citing* Bracton].

24. Century Dict.

Usually spoken of the formal preferring of a charge before an officer or tribunal competent to proceed toward the punishment of the offender. Abbott L. Dict.; People *v.* Braman, 30 Mich. 460, 468. See also the dissenting opinion of Barbour, J., in Com. *v.* Cawood, 2 Va. Cas. 527, 541, where he held that the prisoner could not be said to be accused until he was indicted. But not necessarily importing such formal charge. Robbins *v.* Smith, 47 Conn. 182; Com. *v.* O'Brien, 12 Cush. (Mass.) 84, 90; State *v.* South, 5 Rich. (S. C.) 489, 493.

25. Castle *v.* Houston, 19 Kan. 417, 426, 27 Am. Rep. 127; People *v.* Braman, 30 Mich. 460, 468. See also Mosby *v.* St. Louis Mut. Ins. Co., 31 Gratt. (Va.) 629, 634, where the court in effect said that if it had been the intention of the legislature to confine the provisions of a certain act to criminal cases alone, it would not have used the words "the

ACCUSER. One who makes an accusation.[26]

ACCUSTOMED. Usual.[27]

ACENSEMENT. A letting to farm.[28]

ACEQUIA. A canal for irrigation.[29]

ACER. In old English law, an Acre, *q. v.*[30]

ACERES. Maple-trees.[31]

AC ETIAM. Literally, "and also." The introduction to the statement of the real cause of action in cases where it was necessary to allege a fictitious cause in order to give the court jurisdiction.[32]

ACHAT, ACHATA, or ACHATE. A contract, bargain, or purchase.[33]

ACHATER. To buy.[34]

ACHERSET. An ancient measure of corn, conjectured to be the same as the English quarter, or eight bushels.[35]

ACIA. In old English law, malice or hatred.[36]

ACKNOWLEDGE. To own or admit a knowledge of.[37]

ACKNOWLEDGMENT-MONEY. A sum paid in some parts of England by the copyhold tenants on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid on the attornment of tenants.[38]

party affected" thereby, but the word "accused" or some similar word indicating a criminal offense.

Does not apply to defendant in civil cases. — An accused being one who is charged with a crime or misdemeanor, the word "accused" cannot well be said to apply to a defendant in a civil action. Castle *v.* Houston, 19 Kan. 417, 426, 27 Am. Rep. 127.

26. Bouvier L. Dict.

27. Farwell *v.* Smith, 16 N. J. L. 133, 137, holding that the word "accustomed" is synonymous with "usually."

28. Kelham Dict.

29. Century Dict.

30. Burrill L. Dict.

31. Kelham Dict.

32. Wharton L. Lex.

This clause appears to have been invented in consequence of the enactment of 13 Car. c. 2, § 1, that the particular cause of action must be expressed in the writ where more than £40 was claimed. Wharton L. Lex. [*citing* Davison *v.* Frost, 2 East 305].

33. Jacob L. Dict.; Burrill L. Dict., giving as an illustration from the Statute of Westminster I, c. 1, the expression *per colour de achate*,— by color of purchase.

Achators was the name by which purveyors were, by 34 Edw. III, c. 2, ordained to be thenceforth called. Jacob L. Dict.

34. Burrill L. Dict., giving as an example from Litt. § 177, the expression *si le villeine achate biens*,— if the villein buy goods.

35. Jacob L. Dict.

36. Burrill L. Dict.

37. Blythe *v.* Ayres, 96 Cal. 532, 577, 31 Pac. 915, 19 L. R. A. 40 [*citing* Webster Dict.].

38. Jacob L. Dict.

ACKNOWLEDGMENTS

EDITED BY GEORGE HOADLY

CROSS-REFERENCES

For Acknowledgment of:
Agreement or Deed of Adoption, see ADOPTION OF CHILDREN.
Agreement to Submit to Arbitration, see ARBITRATION AND AWARD.
Assignment, see ASSIGNMENTS.
Award, see ARBITRATION AND AWARD.
Bail-Bond, see BAIL.
Chattel Mortgage, see CHATTEL MORTGAGES.
Conveyance of the Homestead, see HOMESTEADS.
Deed by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
Deed of Assignment for the Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Map or Plat of Dedicated Land, see DEDICATION.
Power of Attorney, see PRINCIPAL AND AGENT.
Recognizance, see RECOGNIZANCES.
Release, see RELEASE.
Sheriff's Deed, see EXECUTIONS.
Tax Deed, see TAXATION.
For Effect of Unacknowledged or Defectively Acknowledged Deed as Color of Title, see ADVERSE POSSESSION.
For Registration of Instruments, see RECORDS.

I. DEFINITION.

Acknowledgment is a proceeding provided by statute whereby a person who has executed an instrument may, by going before a competent officer or court and declaring it to be his act and deed, entitle it to be recorded, or to be received in

evidence without further proof of execution, or both.[1] The term is also used to designate the certificate of the officer or court showing the performance of such act.[2]

II. NECESSITY FOR.

A. In Instruments by Persons Other Than Married Women — 1. To RENDER INSTRUMENT EFFECTIVE — a. In General. Except in the case of conveyances by married women,[3] or where the statute expressly makes the acknowledgment essential to the validity of the instrument,[4] it is universally held that the acknowledgment is no part of the contract between the parties,[5] and the instrument is valid without it.[6] Ordinarily the offices of an acknowledgment are merely to entitle the instrument to registration[7] and to authorize its admission in evidence

1. See Century Dict. As to the effect of a valid acknowledgment see *infra*, IV.

Proof by witnesses equivalent to acknowledgment.— Under the statutes of some states proof of execution made before the officer or court by the subscribing witnesses is given the same effect as an acknowledgment by the grantor. Van Cortlandt *v.* Tozer, 17 Wend. (N. Y.) 338, 20 Wend. (N. Y.) 423; Whittle *v.* Vanderbilt Min., etc., Co., 83 Fed. 48. See also Maxwell *v.* Chapman, 8 Barb. (N. Y.) 579; McIntyre *v.* Kamm, 12 Oreg. 253, 7 Pac. 27. Where, under such a statute, the instrument is acknowledged by the grantor, it need not also be proved by the subscribing witness. Shaffer *v.* Hahn, 111 N. C. 1, 15 S. E. 1033.

Georgia — Attestation.— The system in vogue in Georgia, of attesting deeds and other instruments requiring record, is the equivalent of an acknowledgment of the execution of such instruments made by the maker as required by the common law and practised in most of the states. Under the Georgia statute an attestation by one of the officers named, together with another witness, dispenses with the necessity of acknowledgment, and acknowledgment in the presence of a proper officer dispenses with the attestation of its execution by an officer. Ballard *v.* Orr, 105 Ga. 191, 31 S. E. 554.

2. Includes both act and certificate thereof. — The acknowledgment of a deed includes both the act of acknowledging and the written evidence thereof made by the officer. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75.

3. See *infra*, II, B.

4. See *infra*, II, A, 1, b.

5. *Illinois.*— Stephenson *v.* Thompson, 13 Ill. 186.

Michigan.— Brown *v.* McCormick, 28 Mich. 215; Livingston *v.* Jones, Harr. (Mich.) 165.

Minnesota.— Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111.

Mississippi.— Caruthers *v.* McLaran, 56 Miss. 371.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

Nebraska.— Burbank *v.* Ellis, 7 Nebr. 156.

New York.— Blaesi *v.* Blaesi, 14 N. Y. Civ. Proc. 216.

Ohio.— Foster *v.* Dennison, 9 Ohio 121.

Pennsylvania.— Miner *v.* Graham, 24 Pa. St. 491.

Vermont.— Wood *v.* Cochrane, 39 Vt. 544.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

Indictment for forging acknowledgment.— An information for uttering a forged power of attorney, which alleges the forgery only of the certificate of acknowledgment and the annexed clerk's certificate of authentication, but sets out the uttering as of a forged power of attorney, is sufficient. The appended certificates may fairly be regarded as so far constituting a part of the completed power as to be included in the term used to designate the instrument as a whole. People *v.* Marion, 29 Mich. 31.

6. *Indiana.*—Doe *v.* Naylor, 2 Blackf. (Ind.) 32.

Iowa.— Carleton *v.* Byington, 18 Iowa 482.

Kansas.— Rullman *v.* Barr, 54 Kan. 643, 39 Pac. 179; Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; Missouri Pac. R. Co. *v.* Houseman, 41 Kan. 300, 21 Pac. 284; Gray *v.* Ulrich, 8 Kan. 112.

Nebraska.— Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 37 L. R. A. 434; Keeling *v.* Hoyt, 31 Nebr. 453, 48 N. W. 66; Harrison *v.* McWhirter, 12 Nebr. 152, 10 N. W. 545; Kittle *v.* St. John, 10 Nebr. 605, 7 N. W. 271.

New Hampshire.— Odiorne *v.* Mason, 9 N. H. 24.

Texas.— Kimmarle *v.* Houston, etc., R. Co., 76 Tex. 686, 12 S. W. 698; Tittle *v.* Vanleer, (Tex. Civ. App. 1894) 27 S. W. 736; Frank *v.* Frank, (Tex. Civ. App. 1894) 25 S. W. 819.

Washington.— Baker-Boyer Nat. Bank *v.* Hughson, 5 Wash. 100, 31 Pac. 423.

United States.— Godfrey *v.* Beardsley, 2 McLean (U. S.) 412, 10 Fed. Cas. No. 5,497.

And see *infra*, II, A, 1, c.

Enforcement of equitable claim.— An equitable claim under an unacknowledged deed will be enforced in equity except as against a *bona fide* purchaser without notice. Price *v.* McDonald, 1 Md. 403, 54 Am. Dec. 657.

7. *Arkansas.*— Criscoe *v.* Hambrick, 47 Ark. 235, 1 S. W. 150.

California.— Landers *v.* Bolton, 26 Cal. 393.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850.

Iowa.— Blain *v.* Stewart, 2 Iowa 378.

Maine.— Gibson *v.* Norway Sav. Bank, 69 Me. 579.

Mississippi.— Hill *v.* Samuel, 31 Miss. 307.

Missouri.— Harrington *v.* Fortner, 58 Mo. 468; Black *v.* Gregg, 58 Mo. 565.

without requiring its execution to be otherwise proved at the time of its introduction.[8]

b. Where Acknowledgment Essential to Validity — (I) *In What Cases.* Sometimes the acknowledgment is by statute made an essential part of the instrument, and where this is the case an unacknowledged instrument is inoperative and incapable of enforcement. Such statutes exist or have existed in some jurisdictions in relation to assignments for the benefit of creditors,[9] sheriff's deeds,[10] tax deeds,[11] conveyances of the homestead,[12] plats of dedicated land,[13] and in a few other cases.[14]

(II) *Constitutionality of Statutes.* A statute declaring an instrument void unless acknowledged is not unconstitutional as impairing the obligation of contracts, it being within the power of the legislature to enact as to future contracts that the same shall not be binding or effective in any way without an acknowledgment of a specific kind. Such a statute simply prescribes what shall be the essentials to constitute a valid contract.[15]

c. Validity of Unacknowledged Instrument — (I) *As Between the Parties.* In the absence of any statutory provision making the acknowledgment an essential part of the instrument,[16] the title passes immediately upon the execution and delivery of the instrument; and as against the grantor, his heirs and devisees, such instrument is as valid without an acknowledgment as with one. In other

Nebraska.— Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731; Burbank *v.* Ellis, 7 Nebr. 156.

New Hampshire.— Brown *v.* Manter, 22 N. H. 468; Montgomery *v.* Dorion, 6 N. H. 250.

Tennessee.— Montgomery *v.* Hobson, Meigs (Tenn.) 437.

Vermont.— Townsend *v.* Downer, 27 Vt. 119.

Wisconsin.— Leinenkugel *v.* Kehl, 73 Wis. 238, 40 N. W. 683.

And see *infra*, II, A, 2.

8. *California.*— Landers *v.* Bolton, 26 Cal. 393.

Kansas.— Gray *v.* Ulrich, 8 Kan. 112.

Nebraska.— Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731; Burbank *v.* Ellis, 7 Nebr. 156.

Oklahoma.— Hess *v.* Trigg, 8 Okla. 286, 57 Pac. 159.

Tennessee.— Montgomery *v.* Hobson, Meigs (Tenn.) 437.

And see *infra*, II, A, 3.

9. Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111; Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92; Smith *v.* Boyle, 67 How. Pr. (N. Y.) 351; Smith *v.* Tim, 14 Abb. N. Cas. (N. Y.) 447. See also Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863. And for a full discussion see Assignment for Benefit of Creditors.

10. Adams *v.* Buchanan, 49 Mo. 64; Cabell *v.* Grubbs, 48 Mo. 353; Ryan *v.* Carr, 46 Mo. 483; Allen *v.* Moss, 27 Mo. 354; Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621; Storch *v.* Carr, 28 Pa. St. 135; Bellas *v.* McCarty, 10 Watts (Pa.) 13; Murphy *v.* McCleary, 3 Yeates (Pa.) 405. See, generally, Executions.

11. Goodykoontz *v.* Olsen, 54 Iowa 174, 6 N. W. 263; Tilson *v.* Thompson, 10 Pick. (Mass.) 359. See, generally, Taxation.

12. West *v.* Krebaum, 88 Ill. 263; Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 37 L. R. A. 434; Havemeyer *v.* Dahn, 48 Nebr. 536, 67 N. W. 489, 58 Am. St. Rep. 706, 33 L. R. A. 332. See, generally, Homesteads.

13. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Armstrong *v.* Topeka, 36 Kan. 432, 13 Pac. 843; Burton *v.* Martz, 38 Mich. 761; Detroit *v.* Detroit, etc., R. Co., 23 Mich. 173. See, generally, Dedication.

Both parties tracing title through unacknowledged plat.— Where both parties to a suit respecting lands traced their title through conveyances made with reference to a recorded plat, it was held to be immaterial that the plat had never been properly acknowledged. Quinnin *v.* Reimers, 46 Mich. 605, 10 N. W. 35. See also Johnstone *v.* Scott, 11 Mich. 232.

14. Indiana — Articles of incorporation.— Where a person subscribed to stock in a corporation to be organized, by signing the preliminary articles of the association with the amount subscribed opposite his name, but did not acknowledge the same as required by Ind. Rev. Stat. § 3851, providing that persons who desire to organize a corporation shall "make, sign, and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate, in writing," it was held that his subscription was incomplete and could not be enforced. Coppage *v.* Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591.

Kentucky — Deed of emancipation.—Under Ky. Rev. Stat. c. 93, art. 9, § 1, a deed of emancipation was ineffectual for that purpose unless acknowledged in the county court or proved as required by statute. Smith *v.* Adam, 18 B. Mon. (Ky.) 685.

15. Parrott *v.* Kumpf, 102 Ill. 423. See also Clark *v.* Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334.

16. See *supra*, II, A, 1, b.

words, there is no necessity for acknowledgment as between the parties.[17] The grantor will not be heard to question the validity of the conveyance on the ground that it was not acknowledged by him or proved at the time of its

17. *Alabama.*— McRae *v.* Pegues, 4 Ala. 158.

Arkansas.— Watson *v.* Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62; Griesler *v.* McKennon, 44 Ark. 517; Lemay *v.* Williams, 32 Ark. 166; Jackson *v.* Allen, 30 Ark. 110; Haskill *v.* Sevier, 25 Ark. 152; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732.

California.— Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596; Landers *v.* Bolton, 26 Cal. 393.

Colorado.— Crane *v.* Chandler, 5 Colo. 21; Machette *v.* Wanless, 2 Colo. 169; Holladay *v.* Dailey, 1 Colo. 460.

Illinois.— Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246; Robinson *v.* Robinson, 116 Ill. 250, 5 N. E. 118; McDowell *v.* Stewart, 83 Ill. 538; Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Forest *v.* Tinkham, 29 Ill. 141; Semple *v.* Miles, 3 Ill. 315; McConnel *v.* Reed, 3 Ill. 371.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330; Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Cole *v.* Wright, 70 Ind. 179; State *v.* Dufour, 63 Ind. 567; Perdue *v.* Aldridge, 19 Ind. 290; Melross *v.* Scott, 18 Ind. 250; Givan *v.* Doe, 7 Blackf. (Ind.) 210; Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92.

Iowa.— Kruger *v.* Walker, 94 Iowa 506, 63 N. W. 320; McMaken *v.* Niles, 91 Iowa 628, 60 N. W. 199; Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342; Morse *v.* Beale, 68 Iowa 463, 27 N. W. 461; Lake *v.* Gray, 30 Iowa 415; Carleton *v.* Byington, 18 Iowa 482; Blain *v.* Stewart, 2 Iowa 378; Brewer *v.* Crow, 4 Greene (Iowa) 520.

Kansas.— Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; Gray *v.* Ulrich, 8 Kan. 112; Simpson *v.* Mundee, 3 Kan. 172.

Kentucky.— Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

Maine.— Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34, 12 Atl. 732; Gibson *v.* Norway Sav. Bank, 69 Me. 579; Buck *v.* Babcock, 36 Me. 491; Lawry *v.* Williams, 13 Me. 281.

Massachusetts.— Hayden *v.* Peirce, 165 Mass. 359, 43 N. E. 119; Pierce *v.* Lamson, 5 Allen (Mass.) 60, 81 Am. Dec. 732; Howard Mut. Loan, etc., Assoc. *v.* McIntyre, 3 Allen (Mass.) 571; Call *v.* Buttrick, 4 Cush. (Mass.) 345; Dole *v.* Thurlow, 12 Metc. (Mass.) 157; Shaw *v.* Poor, 6 Pick. (Mass.) 86, 17 Am. Dec. 347; Marshall *v.* Fisk, 6 Mass. 24, 4 Am. Dec. 76.

Michigan.— Brown *v.* McCormick, 28 Mich. 215.

Mississippi.— Hill *v.* Samuel, 31 Miss. 307.

Missouri.— Brim *v.* Fleming, 135 Mo. 597, 37 S. W. 501; Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24; Ryan *v.* Carr, 46 Mo. 483; Caldwell *v.* Head, 17 Mo. 561; Cooley *v.* Rankin, 11 Mo. 642.

Montana.— Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558, 39 Pac. 1054; Taylor *v.* Holter, 1 Mont. 688.

Nebraska.— Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731; Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241; Galligher *v.* Connell, 46 Nebr. 372, 64 N. W. 965; Connell *v.* Galligher, 39 Nebr. 793, 58 N. W. 438; Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229; Weaver *v.* Coumbe, 15 Nebr. 167, 17 N. W. 357; Green *v.* Gross, 12 Nebr. 117, 10 N. W. 459; Blazier *v.* Johnson, 11 Nebr. 404, 9 N. W. 543; Missouri Valley Land Co. *v.* Bushnell, 11 Nebr. 192, 8 N. W. 389; Kittle *v.* St. John, 10 Nebr. 605, 7 N. W. 271.

New Hampshire.— Brown *v.* Manter, 22 N. H. 468; Merrill *v.* Gould, 16 N. H. 347; Wark *v.* Willard, 13 N. H. 389. See also Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173.

New York.— Watson *v.* Campbell, 28 Barb. (N. Y.) 421; Voorhees *v.* Amsterdam Presb. Church, 17 Barb. (N. Y.) 103; Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

Oklahoma.— Hess *v.* Trigg, 8 Okla. 286, 57 Pac. 159.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

Pennsylvania.— Cable *v.* Cable, 146 Pa. St. 451, 23 Atl. 223.

Tennessee.— Montgomery *v.* Hobson, Meigs (Tenn.) 437.

Texas.— McLane *v.* Canales, (Tex. Civ. App. 1894) 25 S. W. 29; Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

Vermont.— Pierce *v.* Brown, 24 Vt. 165; Harrington *v.* Gage, 6 Vt. 532.

Virginia.— Washington County *v.* Dunn, 27 Gratt. (Va.) 608.

Washington.— Edson *v.* Knox, 8 Wash. 642, 36 Pac. 698; Isensee *v.* Peabody, 8 Wash. 660, 36 Pac. 700.

West Virginia.— Scruggs *v.* Burruss, 25 W. Va. 670.

Wisconsin.— Leinenkugel *v.* Kehl, 73 Wis. 238, 40 N. W. 683; McMahon *v.* McGraw, 26 Wis. 614; Quinney *v.* Denney, 18 Wis. 485; Myrick *v.* McMillan, 13 Wis. 188.

United States.— Hepburn *v.* Dubois, 12 Pet. (U. S.) 345, 9 L. ed. 1111; Sicard *v.* Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342; Wood *v.* Owings, 1 Cranch (U. S.) 239, 2 L. ed. 94; Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096; Strong *v.* Smith, 3 McLean (U. S.) 362, 23 Fed. Cas. No. 13,544; Goodenough *v.* Warren, 5 Sawy. (U. S.) 494, 10 Fed. Cas. No. 5,534.

Purchase-money mortgage.— Where a deed for lands sold and a purchase-money mortgage are executed on the same date and handed to the respective parties at that time, the delivery is perfected so as to preserve the lien of the purchase-money mortgage, even though it be not acknowledged by the mortgagors till about six months after the delivery and recording of the deed. Roane *v.* Baker, 120 Ill. 308, 11 N. E. 246.

Indictment charging forgery of acknowl-

delivery ;[18] and the contract may be enforced against him,[19] and, on his death, against his administrator in preference to his general creditors.[20]

(II) *As to Third Persons With Actual Notice* — (A) *In General.* In the absence of any statute to the contrary an unacknowledged conveyance is good as against all persons having actual notice of its existence.[21]

(B) *When Instrument Invalid.* But by some statutes the acknowledgment is made essential to the validity of the instrument as against subsequent purchasers and creditors, and where this is the case actual notice will not affect the rights of such persons.[22] And so, where the statute requires that the instrument shall be

edgment.— Where a deed is valid between the parties without acknowledgment, an indictment charging forgery of a certificate of acknowledgment, without averring that the deed itself was invalid, is insufficient. State *v.* Dufour, 63 Ind. 567.

18. Washington County *v.* Dunn, 27 Gratt. (Va.) 608; Cooley *v.* Rankin, 11 Mo. 642.

Ejectment by grantor against person claiming under grantee.— Where the grantor in a conveyance brought a suit in ejectment against a person claiming under his grantee, it was held that, the execution of the deed being admitted, no question could be raised respecting the sufficiency of the acknowledgment. Holladay *v.* Dailey, 1 Colo. 460.

19. Haskill *v.* Sevier, 25 Ark. 152; Howard Mut. Loan, etc., Assoc. *v.* McIntyre, 3 Allen (Mass.) 571.

Compelling delivery of unacknowledged mortgage.— Equity has jurisdiction to compel the delivery and surrender of a mortgage which, after having been executed and delivered, though not acknowledged, has been intrusted to the mortgagor for the purpose of having it recorded, if he thereupon retains it in his own possession and refuses to deliver it up or have it recorded. Pierce *v.* Lamson, 5 Allen (Mass.) 60, 81 Am. Dec. 732.

20. Haskill *v.* Sevier, 25 Ark. 152.

21. *Arkansas.*— Griesler *v.* McKennon, 44 Ark. 517. See also Byers *v.* Engles, 16 Ark. 543.

Colorado.— Holladay *v.* Dailey, 1 Colo. 460.

Iowa.— Kruger *v.* Walker, 94 Iowa 506, 63 N. W. 320; McMaken *v.* Niles, 91 Iowa 628, 60 N. W. 199; Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342; Dussaume *v.* Burnett, 5 Iowa 95; Blain *v.* Stewart, 2 Iowa 378; Miller *v.* Chittenden, 2 Iowa 315; Brewer *v.* Crow, 4 Greene (Iowa) 520.

Kansas.— Simpson *v.* Mundee, 3 Kan. 172.

Massachusetts.— Davis *v.* Blunt, 6 Mass. 487, 4 Am. Dec. 168.

Michigan.— Brown *v.* McCormick, 28 Mich. 215.

Minnesota.— St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497, 55 N. W. 60.

Mississippi.— Bass *v.* Estill, 50 Miss. 300.

Missouri.— Ryan *v.* Carr, 46 Mo. 483.

Nebraska.— Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241; Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Weaver *v.* Coumbe, 15 Nebr. 167, 17 N. W. 357; Missouri Valley Land Co. *v.* Bushnell, 11 Nebr. 192, 8 N. W. 389.

New Hampshire.— Brown *v.* Manter, 22 N. H. 468; Wark *v.* Willard, 13 N. H. 389.

Rhode Island.— Westerly Sav. Bank *v.* Stillman Mfg. Co., 16 R. I. 497, 17 Atl. 918.

Texas.— Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

Washington.— Smith *v.* Cullen, 18 Wash. 398, 51 Pac. 1040.

United States.— New Hampshire Land Co. *v.* Tilton, 19 Fed. 73.

Grantee in open possession of land.— In Davis *v.* Blunt, 6 Mass. 487, 488, 4 Am. Dec. 168, the court said: "It is now a well-settled and generally known principle that where there has been a *bona fide* conveyance of land, and the grantee has entered under the deed and continued in the open and peaceable occupation of the land granted, a second purchaser cannot avail himself of the first purchaser's neglect to procure the acknowledgment or registry of his deed; because, as the whole object of the registry is to give notice, and as there are circumstances within the knowledge of the second purchaser, as strong as the registry of the deed, to satisfy him of a previous conveyance, his purchase will be deemed fraudulent against the first purchaser, and he shall not reap the fruits of his own iniquity."

22. Arkansas — Mortgages.— Under the Arkansas statutes an unacknowledged mortgage is not valid against subsequent creditors or purchasers for value, even though they have actual notice of its existence. Watson *v.* Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62; Dodd *v.* Parker, 40 Ark. 536; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494; Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732.

Illinois — Chattel mortgages.— Under the Illinois act in regard to chattel mortgages, declaring such mortgages, when not legally acknowledged, to be void as to third persons, the question of actual notice is immaterial. McDowell *v.* Stewart, 83 Ill. 538; Sage *v.* Browning, 51 Ill. 217; Porter *v.* Dement, 35 Ill. 478; Forest *v.* Tinkham, 29 Ill. 141; Rehkopf *v.* Miller, 59 Ill. App. 662. See, generally, CHATTEL MORTGAGES.

Mississippi — Conveyance from husband to wife.— Under Miss. Code, § 2294, declaring that conveyances between husband and wife shall not be valid as against third persons unless acknowledged and recorded, an unacknowledged deed from a husband to his wife passes no title as against an attachment creditor of the husband, though such creditor saw the instrument on record and had actual knowledge of the conveyance before the attachment. Snider *v.* Udell Woodenware Co., 74 Miss. 353, 20 So. 836.

either acknowledged or attested in order to be effective against a purchaser or encumbrancer, a purchaser may attack an unacknowledged and unattested deed without showing that he purchased in good faith and without notice.[23]

(III) *As to Third Persons Without Actual Notice*—(A) *Subsequent Creditors and Purchasers for Value.* A conveyance which was not acknowledged or proved for record is invalid as against subsequent creditors and purchasers for value without notice.[24]

(B) *Trespassers and Strangers to Title.* As against mere trespassers and strangers to the title a conveyance is valid without being acknowledged or recorded.[25]

(C) *Where Instrument Not Within Meaning of Statute.* It is only by virtue of statute that the registration of a conveyance is required in order for it to have priority over subsequent conveyances and encumbrances, and an instrument not falling within the purview of the statute need not be acknowledged to preserve its validity as against subsequent purchasers and creditors.[26]

(IV) *Where Instrument Also Unattested.* In the absence of any statute to the contrary, a deed, though neither acknowledged nor attested, is valid as between the parties thereto and their privies, and as to third persons having actual notice.[27] But in some states there are statutory provisions making one or

23. Chamberlain *v.* Spargur, 22 Hun (N. Y.) 437. And see *infra*, II, A, 1, c, (IV).

24. *Colorado.*— Crane *v.* Chandler, 5 Colo. 21.

Iowa.— Brewer *v.* Crow, 4 Greene (Iowa) 520.

Kentucky.— Mummy *v.* Johnston, 3 A. K. Marsh. (Ky.) 220.

Massachusetts.— Kellogg *v.* Loomis, 16 Gray (Mass.) 48.

Montana.— Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558, 39 Pac. 1054.

Tennessee.— McCulloch *v.* Eudaly, 3 Yerg. (Tenn.) 346.

Texas.— Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

Virginia.— Moore *v.* Auditor, 3 Hen. & M. (Va.) 232.

As to the effect of recording an unacknowledged deed see *infra*, II, A, 2, b. And see, generally, RECORDS.

25. Brown *v.* Manter, 22 N. H. 468; Montgomery *v.* Dorion, 6 N. H. 250; Strickland *v.* McCormick, 14 Mo. 166; Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096. See also Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302.

26. Clark *v.* Gellerson, 20 Me. 18; Craft *v.* Webster, 4 Rawle (Pa.) 242. And see Hatcher *v.* Clifton, 35 Ala. 275.

Assignment of right of action for deed.— An instrument assigning a right of action for a deed conveying land is not a conveyance of the land itself, and is legally sufficient to transfer such right of action without being witnessed or acknowledged. Bissell *v.* Morgan, 56 Barb. (N. Y.) 369.

Assignment by register in bankruptcy.— Where a deed of assignment was executed by the register in bankruptcy to the assignee of a bank, under § 147 of the Bankruptcy Law of 1867, it was held that no acknowledgment thereof was necessary. Harris *v.* Pratt, 37 Kan. 316, 15 Pac. 216.

Bond of special commissioner.— It is not necessary that the bond of a special commissioner to make a sale under a decree in equity should even be acknowledged or proven before the clerk, such bond not being required to be recorded. An acknowledgment in such case could only be for the protection of the officer who accepted it. Lyttle *v.* Cozad, 21 W. Va. 183.

Vermont — Statute not applicable to devises.— Under the Vermont constitution of 1777 it was required in general terms that all conveyances of land should be recorded in the town clerk's office, and in 1779 the legislature passed an act in accordance with such provision, requiring such conveyances to be acknowledged and recorded in such office. It was held that these provisions had exclusive reference to such conveyances of land only as operated *inter vivos*, and not to mere devises of land. Smith *v.* Perry, 26 Vt. 279.

27. *Arkansas.*— Jackson *v.* Allen, 30 Ark. 110. See also Stirman *v.* Cravens, 29 Ark. 548.

Indiana.— Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92.

Kentucky.— Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

Nebraska.— Prout *v.* Burke, 51 Nebr. 24, 70 N. W. 512; Holmes *v.* Hull, 50 Nebr. 656, 70 N. W. 241; Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216; Weaver *v.* Coumbe, 15 Nebr. 167, 17 N. W. 357; Missouri Valley Land Co. *v.* Bushnell, 11 Nebr. 192, 8 N. W. 389.

New Hampshire.— Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173.

Texas.— McLane *v.* Canales, (Tex. Civ. App. 1894) 25 S. W. 29.

Wisconsin.— Leinenkugel *v.* Kehl, 73 Wis. 238, 40 N. W. 683; Quinney *v.* Denney, 18 Wis. 485.

United States.— Goodenough *v.* Warren, 5 Sawy. (U. S.) 494, 10 Fed. Cas. No. 5,534.

As to the necessity of attesting witnesses see DEEDS.

Necessity as a protection to title.— Title may pass by a deed unacknowledged and unattested, but it cannot be fully protected;

the other of these things essential to the validity of the instrument,[28] and, in the absence of both, it will operate merely as an agreement to convey.[29]

2. To Entitle Instrument to Registration — a. In General. As has been stated heretofore, one of the principal objects of acknowledgment is to entitle the instrument to registration.[30] In most jurisdictions the statutes prescribe that before any deed or other instrument can be recorded it must be acknowledged or proved and certified in the proper manner.[31]

b. Effect of Recording Unacknowledged Instrument — (I) *Where Statute Requires Acknowledgment.* Where the statute prescribes acknowledgment as a prerequisite to registration, the recording of an unacknowledged instrument will not confer the benefits enjoyed by a properly recorded instrument and will not operate as constructive notice to any one.[32]

and where the granting part of an assignment created a doubt regarding the assignor's purpose to convey land it was held not to be a conveyance of the land, weight being given to the absence of acknowledgment. Price *v.* Haynes, 37 Mich. 487.

28. Alabama.— Under Ala. Code, §§ 2144–2146, a conveyance must either be acknowledged or be attested by at least one witness, and a deed without either acknowledgment or attestation is absolutely insufficient to pass the legal title. Watson *v.* Herring, 115 Ala. 271, 22 So. 28; Eureka Lumber Co. *v.* Brown, 103 Ala. 140, 15 So. 518; Caperton *v.* Hall, 83 Ala. 171, 3 So. 234; Chadwick *v.* Carson, 78 Ala. 116; Carlisle *v.* Carlisle, 78 Ala. 542; Doe *v.* Richardson, 76 Ala. 329; Stewart *v.* Beard, 69 Ala. 470; Dugger *v.* Collins, 69 Ala. 324; Kentucky Bank *v.* Jones, 59 Ala. 123; Lord *v.* Folmar, 57 Ala. 615. This statute applies to conveyances executed by ministerial officers in the consummation of sales under judicial process. Stubbs *v.* Kohn, 64 Ala. 186.

New York.— Under 4 N. Y. Rev. Stat. (8th ed.) p. 2451, § 137, a deed without acknowledgment or attestation will not take effect as against purchasers and encumbrancers until acknowledged. Chamberlain *v.* Spargur, 86 N. Y. 603; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Goodyear *v.* Vosburgh, 57 Barb. (N. Y.) 243; Genter *v.* Morrison, 31 Barb. (N. Y.) 155. See also Voorhees *v.* Amsterdam Presb. Church, 17 Barb. (N. Y.) 103. A mortgagee who purchases at a foreclosure sale under his mortgage, which is valid in equity though defectively acknowledged, is a purchaser within the meaning of this statute. Mutual L. Ins. Co. *v.* Corey, 54 Hun (N. Y.) 493, 7 N. Y. Suppl. 939.

Ohio.— A lease for a term of five years not acknowledged or attested as provided by the Ohio act of Feb. 22, 1831, is of no binding effect, and the defect is not cured by the fourth section of the statute of frauds and perjuries. Richardson *v.* Bates, 8 Ohio St. 257.

29. Eureka Lumber Co. *v.* Brown, 103 Ala. 140, 15 So. 518; Caperton *v.* Hall, 83 Ala. 171, 3 So. 234. As to the operation of a defective acknowledgment, as the attestation of a witness, see *infra*, III, A, 4.

30. See *supra*, II, A, 1, a.

31. *Arkansas.*— Griesler *v.* McKennon, 44 Ark. 517.

California.— Landers *v.* Bolton, 26 Cal. 393; Wolf *v.* Fogarty, 6 Cal. 224, 65 Am. Dec. 509.

Florida.— Cleland *v.* Long, 34 Fla. 353, 16 So. 272.

Indiana.— Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Westerman *v.* Foster, 57 Ind. 408; Allen *v.* Vincennes, 25 Ind. 531; Jordan *v.* Corey, 2 Ind. 385, 52 Am. Dec. 516; Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594.

Iowa.— Carleton *v.* Byington, 18 Iowa 482.

Kansas.— Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14.

Maine.— Brown *v.* Lunt, 37 Me. 423.

Massachusetts.— Ward *v.* Fuller, 15 Pick. (Mass.) 185.

Missouri.— Brim *v.* Fleming, 135 Mo. 597, 37 N. W. 501.

North Carolina.— Todd *v.* Outlaw, 79 N. C. 235.

Ohio.— Brannon *v.* Brannon, 2 Disn. (Ohio) 224.

Pennsylvania.— Powell's Appeal, 98 Pa. St. 403.

Texas.— Holliday *v.* Cromwell, 26 Tex. 188.

32. *Arkansas.*— Haskill *v.* Sevier, 25 Ark. 152; Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732.

District of Columbia.— Chafee *v.* Blatchford, 6 Mackey (D. C.) 459.

Iowa.— Brewer *v.* Crow, 4 Greene (Iowa) 520.

Kansas.— Wickersham *v.* Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784.

Maine.— Brown *v.* Lunt, 37 Me. 423; De Witt *v.* Moulton, 17 Me. 418.

Massachusetts.— Graves *v.* Graves, 6 Gray (Mass.) 391; Blood *v.* Blood, 23 Pick. (Mass.) 80.

Minnesota.— St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497, 55 N. W. 60.

Mississippi.— Bass *v.* Estill, 50 Miss. 300; Work *v.* Harper, 24 Miss. 517.

Missouri.— Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

Nebraska.— Heelan *v.* Hoagland, 10 Nebr. 511, 7 N. W. 282.

Pennsylvania.— Simon *v.* Brown, 3 Yeates (Pa.) 186, 2 Am. Dec. 368.

South Dakota.— Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

Texas.— Stiles *v.* Japhet, 84 Tex. 91, 19

(II) *Where Statute Does Not Require Acknowledgment.* But where the statute authorizes record, but contains no provision requiring acknowledgment as a prerequisite thereto, the instrument is entitled to record though unacknowledged, and will operate as constructive notice.[33]

3. To Render Instrument Admissible in Evidence — a. In General. As a general rule instruments which are not acknowledged or proved for record as required by statute cannot be admitted in evidence without proof of their execution;[34] and this is true even where by statute the registration of an unacknowledged instrument operates as constructive notice.[35] But such instruments are sometimes admitted as secondary evidence[36] or for other controlling reasons.[37]

S. W. 450; Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304; Kalamazoo Nat. Bank *v.* Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

Virginia.— Moore *v.* Auditor, 3 Hen. & M. (Va.) 232.

West Virginia.— Cox *v.* Wayt, 26 W. Va. 807.

United States.— Hill *v.* Gordon, 45 Fed. 276.

Massachusetts — Acknowledgment by one of several grantors.— In Massachusetts acknowledgment by one of several grantors is sufficient to entitle the instrument to registration, even where the grantors are husband and wife. Hayden *v.* Peirce, 165 Mass. 359, 43 N. E. 119; Perkins *v.* Richardson, 11 Allen (Mass.) 538; Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56; Dudley *v.* Sumner, 5 Mass. 438.

33. *Alabama.*—Schwartz *v.* Baird, 100 Ala. 154, 13 So. 947; Bickley *v.* Keenan, 60 Ala. 293; Merritt *v.* Phenix, 48 Ala. 87.

Illinois.— McCormick *v.* Evans, 33 Ill. 327; Reed *v.* Kemp, 16 Ill. 445; Joliet First Nat. Bank *v.* Adam, 34 Ill. App. 159.

Kansas.— Brown *v.* Simpson, 4 Kan. 76; Simpson *v.* Mundee, 3 Kan. 172.

Missouri.— Ryan *v.* Carr, 46 Mo. 483.

United States.— Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426; Gillespie *v.* Reed, 3 McLean (U. S.) 377, 10 Fed. Cas. No. 5,436.

Alabama — Husband's consent to wife's acting as sole trader.— Ala. Code, § 2250, prescribing that a husband's consent to his wife's acting as a *feme sole* trader shall be in writing signed by him and filed with the probate judge, since it does not expressly require acknowledgment, entitles such paper to record though unacknowledged, and invests a certified copy of it with like faith and credit as copies of acknowledged instruments so filed. Schwartz *v.* Baird, 100 Ala. 154, 13 So. 947.

California — Sheriff's certificate of sale.— Under Cal. Pol. Code, § 4237, requiring a recorder to record all certificates of sales of real estate and not providing for any acknowledgment of the same, it was held that a sheriff's certificate of sale, filed and recorded, imparted notice to the world though unacknowledged. Foorman *v.* Wallace, 75 Cal. 552, 17 Pac. 680.

Texas — Chattel mortgage.—Under Sayles' Rev. Stat. Tex. art. 3190*b*, §§ 1, 2, providing that chattel mortgages may be recorded by filing with the county clerk either the original or a copy, but that "a copy can only be filed when the original has been acknowledged," acknowledgment and proof is not required when the original is filed. Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

Vermont — Refusal of grantor to acknowledge.— Under a statute making the record of an unacknowledged deed, otherwise sufficiently executed, notice to purchasers and levying creditors for sixty days from the time of recording, and from then till the final determination of a process to compel acknowledgment, the recording of such a deed is ineffectual for any other purpose. Hoisington *v.* Hoisington, 2 Aik. (Vt.) 235.

34. *Arkansas.*— Griesler *v.* McKennon, 44 Ark. 517.

California.— Landers *v.* Bolton, 26 Cal. 393.

Indiana.— Allen *v.* Vincennes, 25 Ind. 531.

Iowa.— Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842.

New Hampshire.— Montgomery *v.* Dorion, 6 N. H. 250.

New York.— Jackson *v.* Shepard, 2 Johns. (N. Y.) 77.

Tennessee.— Cox *v.* Bowman, 2 Yerg. (Tenn.) 108.

As to the admissibility in evidence of a properly acknowledged instrument see *infra*, IV, B.

A copy of a lost instrument, to be received in evidence without further proof, must be acknowledged. Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096.

Failure to object to admission of instrument.— Where no objection is made to the introduction in evidence of an unacknowledged deed without proof of its execution the admission of such deed is not reversible error. Rullman *v.* Barr, 54 Kan. 643, 39 Pac. 179.

35. Reed *v.* Kemp, 16 Ill. 445; Gillespie *v.* Reed, 3 McLean (U. S.) 377, 10 Fed. Cas. No. 5,436. See *supra*, II, A, 2, b, (II).

36. **To show possession.**— In an action of trespass *quare clausum fregit*, a lease for fifteen years, duly signed, sealed, witnessed, and recorded, though not duly acknowledged, is admissible to show that plaintiff was in possession of the land, claiming title. Allen *v.* Holkins, 1 Day (Conn.) 17.

37. **Ancient instruments.**— As to the admissibility of ancient instruments without proof of execution see EVIDENCE.

b. Admissibility of Record Copies. A record copy of an unacknowledged instrument is held not to be admissible as evidence of title,[38] though in some cases it will be admitted as secondary evidence.[39]

c. Right to Prove Execution by Other Modes. The statutory method of proving by acknowledgment the execution of a deed or other instrument does not, in the absence of express provision to that effect, supersede the common-law modes of proof,[40] and it is permissible to prove such instrument at the time it is sought to be introduced in evidence, either by the testimony of a subscribing witness[41] or by other competent evidence, as by the testimony of a person who saw it executed,[42] or, where both the grantor and the subscribing witness are dead, by proof of their handwriting.[43]

A grant from the state of North Carolina, made in 1787, and registered in the county wherein the land was situated, was held to be admissible in evidence without any acknowledgment or order of registration thereon such as was required by statute in the case of other conveyances. Coltrane *v.* Lamb, 109 N. C. 209, 13 S. E. 784.

Connecticut — Refusal of grantor to acknowledge.— A deed not acknowledged or recorded can be given in evidence in an action of ejectment, provided a *caveat* has been recorded under the statute and it is proved that previously the grantee had required the grantor, and the grantor had refused, to acknowledge the deed. Bond *v.* Kibbe, 3 Day (Conn.) 500.

38. *Alabama.*— Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413.

Illinois.— McCormick *v.* Evans, 33 Ill. 327; Clark *v.* Wilson, 27 Ill. App. 610.

Indiana.— Starnes *v.* Allen, 151 Ind. 108, 45 N. E. 330, 51 N. E. 78; Westerman *v.* Foster, 57 Ind. 408.

Kansas.— Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14.

Maryland.— Connelly *v.* Bowie, 6 Harr. & J. (Md.) 141; Hoddy *v.* Harryman, 3 Harr. & M. (Md.) 581.

New Hampshire.— Montgomery *v.* Dorion, 6 N. H. 250.

Pennsylvania.— Velott *v.* Lewis, 102 Pa. St. 326. See also EVIDENCE.

As to the necessity of recording the acknowledgment see *infra*, IV, B, 3.

Tennessee — Probate not registered with deed.— Tenn. Act 1809, c. 14, § 8, providing that the copy of a deed shall be received as evidence, though it does not appear that the probate has been registered with the original deed, provided the court shall be satisfied that such original is not in the power of the person offering the copy, and provided also that such deed shall have been registered in the proper office, does not dispense with the necessity for proving probate or acknowledgment. McIver *v.* Robertson, 3 Yerg. (Tenn.) 84.

39. Stetson *v.* Gulliver, 2 Cush. (Mass.) 494, wherein a record copy of an instrument of defeasance which had been recorded without acknowledgment was held to be admissible against the party in whose favor it was made, he having been first called upon and neglecting to produce the original.

To show registration.— Although an original deed had not been so acknowledged and certified as to make a certified copy evidence, yet where the record of such deed was made notice to subsequent purchasers by statute it was held that a certified copy from the record was admissible to prove that such deed and memorandum had been recorded in the proper office. Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641.

To show absence of constructive notice.— The record of a mortgage not acknowledged according to law should be admitted in favor of one not a party thereto, to show that he has no record notice of it as a valid mortgage. Brewer *v.* Crow, 4 Greene (Iowa) 520.

40. *Indiana.*— Doe *v.* Naylor, 2 Blackf. (Ind.) 32.

Kansas.— Rullman *v.* Barr, 54 Kan. 643, 39 Pac. 179; Missouri Pac. R. Co. *v.* Houseman, 41 Kan. 300, 21 Pac. 284; Gray *v.* Ulrich, 8 Kan. 112.

Missouri.— Harrington *v.* Fortner, 58 Mo. 468.

Nebraska.— Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731; Kittle *v.* St. John, 10 Nebr. 605, 7 N. W. 271.

New York.— Borst *v.* Empie, 5 N. Y. 33.

Texas.— McLane *v.* Canales, (Tex. Civ. App. 1894) 25 S. W. 29.

United States.— Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096; Strong *v.* Smith, 3 McLean (U. S.) 362, 23 Fed. Cas. No. 13,544.

Where no statute requiring acknowledgment.—A deed executed before the enactment of any statute requiring an acknowledgment may be proved, like other writings, without acknowledgment. Stevens *v.* Griffith, 3 Vt. 448.

California — The map of an "addition" which is of record in the office of the county recorder is not inadmissible in evidence because not acknowledged. There is no statute requiring the recording of a map, and it is only necessary in such case to offer evidence sufficient to connect the map referred to in the complaint with the one produced. Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878.

41. Hutchinson *v.* Kelly, 10 Ark. 178; McConnel *v.* Reed, 3 Ill. 371; Borst *v.* Empie, 5 N. Y. 33.

42. Dundy *v.* Chambers, 23 Ill. 369.

43. Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794.

B. In Instruments by Married Women — 1. Origin of Doctrine. Originally at common law a married woman had no power to contract or convey.[44] To escape from the inconvenience arising from such a restraint on alienation, resort was had to the indirect proceedings known as fines and common recoveries, which long remained the only modes by which a married woman could convey her property.[45] Finally, however, they were abolished by statute, and simpler methods of conveyance by deed were substituted in their stead.[46] From this it will be seen that the right of a married woman to convey or contract is derived wholly from statute, and consequently her conveyance or contract, to be valid, must be executed in the manner prescribed by the statute.[47]

2. Where Acknowledgment Required by Statute — a. In General. Therefore, where the statute in force at the time a conveyance is executed by a married woman prescribes an acknowledgment by her separate and apart from her husband, her title does not, as in the case of other persons, pass upon delivery, but only when she acknowledges the instrument in the prescribed manner, and without such acknowledgment the instrument is absolutely void and inoperative as to her and her heirs.[48] The object of such statutes is to protect the wife against

44. For a full discussion of the rights of a married woman to contract and convey see Husband and Wife.

45. *Arkansas.*— Elliott *v.* Pearce, 20 Ark. 508; McDaniel *v.* Grace, 15 Ark. 465.

Illinois.— Hogan *v.* Hogan, 89 Ill. 427.

Iowa.— Simms *v.* Hervey, 19 Iowa 273.

Maryland.— Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545.

New York.— Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9; Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

For a full and able discussion of the origin and development of the married woman's power to convey see the opinion of Tucker, J., in Harkins *v.* Forsyth, 11 Leigh (Va.) 294.

Colonial usage in New York and Pennsylvania.— By usage in the provinces of New York and Pennsylvania married women were allowed to convey by deed, and such conveyances were upheld on the ground that *communis error facit jus.* Van Winkle *v.* Constantine, 10 N. Y. 422; Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9; Davey *v.* Turner, 1 Dall. (Pa.) 11; Lloyd *v.* Taylor, 1 Dall. (Pa.) 17.

46. Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

In England, by statutes 3 & 4 Wm. IV, c. 74, fines and recoveries were abolished, and simpler methods of conveyance were adopted allowing married women to alien their property by deed acknowledged in the prescribed manner. See Briggs *v.* Chamberlain, 11 Hare 69; Field *v.* Moore, 7 De G. M. & G. 691; Nicholl *v.* Jones, L. R. 3 Eq. 696; Crofts *v.* Middleton, 25 L. J. Ch. 513; Franks *v.* Bollans, L. R. 3 Ch. 717; *In re* Stables, 33 L. J. Ch. 422; Lassence *v.* Tierney, 1 Macn. & G. 551.

47. Elliott *v.* Pearce, 20 Ark. 508; Miller *v.* Ruble, 107 Pa. St. 395; Hollis *v.* Francois, 5 Tex. 195, 51 Am. Dec. 760; Sumner *v.* Conant, 10 Vt. 9. But see Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119 [*criticised* in Fitzgerald *v.* Turner, 43 Tex. 79], wherein it was held that the statute prescribing the mode of conveying a married woman's property did not declare absolutely void any other mode of conveyance, its only object being to secure freedom of will and action on her part; and that if she were free to act and so declared, and further declared that she did not wish to retract, all the circumstances concurred which were made necessary by law to pass her title to the property, and her conveyance would be sustained, notwithstanding the want of a privy examination under the statute, particularly in a case where the party dealing with her could not be restored to his former position.

48. *Alabama.*— Smith *v.* Pearce, 85 Ala. 264, 4 So. 616, 7 Am. St. Rep. 44; Smith *v.* McGuire, 67 Ala. 34; Balkum *v.* Wood, 58 Ala. 642; McBryde *v.* Wilkinson, 29 Ala. 662; Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349; George *v.* Goldsby, 23 Ala. 326; Beene *v.* Randall, 23 Ala. 514.

Arkansas.— Worsham *v.* Freeman, 34 Ark. 55; Wentworth *v.* Clark, 33 Ark. 432; Wood *v.* Terry, 30 Ark. 385; Stidham *v.* Matthews, 29 Ark. 650; Elliott *v.* Pearce, 20 Ark. 508.

California.— Loupe *v.* Smith, 123 Cal. 491, 56 Pac. 254; Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934; Danglarde *v.* Elias, 80 Cal. 65, 22 Pac. 69; Healdsburg Bank *v.* Bailhache, 65 Cal. 327, 4 Pac. 106; Wedel *v.* Herman, 59 Cal. 507; Landers *v.* Bolton, 26 Cal. 393; Selover *v.* American Russian Commercial Co., 7 Cal. 266.

Illinois.— Bute *v.* Kneale, 109 Ill. 652; Hogan *v.* Hogan, 89 Ill. 427; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Lindley *v.* Smith, 58 Ill. 250; Stuart *v.* Dutton, 39 Ill. 91; Patterson *v.* Kreig, 29 Ill. 514; Mariner *v.* Saunders, 10 Ill. 113.

Indiana.— Perdue *v.* Aldridge, 19 Ind. 290; Dawson *v.* Shirley, 6 Blackf. (Ind.) 531.

Iowa.— Simms *v.* Hervey, 19 Iowa 273.

Kentucky.— Louisville, etc., R. Co. *v.* Wilhite, (Ky. 1895) 29 S. W. 326; Louisville, etc., R. Co. *v.* Stephens, 96 Ky. 401, 29 S. W. 14, 49 Am. St. Rep. 303; Wood *v.* Wood, 1 Metc. (Ky.) 512; McCann *v.* Edwards, 6 B. Mon. (Ky.) 208; Smith *v.* White, 1 B. Mon. (Ky.) 16; Applegate *v.* Gracy, 9 Dana (Ky.)

coercion and to allow her to have the beneficial use of her property without being subject, as remarked by an English chancellor, "to have it kissed out of her by an improvident husband, or kicked out of her by a brutal one;"[49] and in the

215; Phillips *v.* Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76; Steffey *v.* Steffey, 19 Md. 5; Johns *v.* Reardon, 11 Md. 465; Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545.

Michigan.— Fisher *v.* Meister, 24 Mich. 447; Dewey *v.* Campau, 4 Mich. 565.

Minnesota.— Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433; Annan *v.* Folsom, 6 Minn. 500.

Mississippi.— Allen *v.* Lenoir, 53 Miss. 321; Clark *v.* Slaughter, 34 Miss. 65; Toulmin *v.* Heidelberg, 32 Miss. 268.

Missouri.— Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002; Hoskinson *v.* Adkins, 77 Mo. 537; Bartlett *v.* O'Donoghue, 72 Mo. 563; Goff *v.* Roberts, 72 Mo. 570; Devorse *v.* Snider, 60 Mo. 235; McDowell *v.* Little, 33 Mo. 523; Reaume *v.* Chambers, 22 Mo. 36.

Nebraska.— Aultman, etc., Co. *v.* Jenkins, 19 Nebr. 209, 27 N. W. 117; Roode *v.* State, 5 Nebr. 174, 25 Am. Rep. 475.

New Jersey.— Den *v.* Ashmore, 22 N. J. L. 261; Tuthill *v.* Townley, 1 N. J. L. 242; Marsh *v.* Mitchell, 26 N. J. Eq. 497 [*affirmed* in 27 N. J. Eq. 631]; Armstrong *v.* Ross, 20 N. J. Eq. 109.

New York.— Curtiss *v.* Follett, 15 Barb. (N. Y.) 337; Elwood *v.* Klock, 13 Barb. (N. Y.) 50; Van Nostrand *v.* Wright, Lalor (N. Y.) 260; Gillett *v.* Stanley, 1 Hill (N. Y.) 121; Ryerss *v.* Wheeler, 25 Wend. (N. Y.) 434, 37 Am. Dec. 243; People *v.* Galloway, 17 Wend. (N. Y.) 540; Jackson *v.* Cairns, 20 Johns. (N. Y.) 301; Jackson *v.* Stevens, 16 Johns. (N. Y.) 110; Jackson *v.* Sears, 10 Johns. (N. Y.) 435; Knowles *v.* McCamly, 10 Paige (N. Y.) 342.

North Carolina.— Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998; Thompson *v.* Smith, 106 N. C. 357, 11 S. E. 273; Southerland *v.* Hunter, 93 N. C. 310; Clayton *v.* Rose, 87 N. C. 106.

Ohio.— Dengenhart *v.* Cracraft, 36 Ohio St. 549; Worthington *v.* Young, 6 Ohio 313; Reynolds *v.* Clark, Wright (Ohio) 656.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

Pennsylvania.— Logan *v.* Gardner, 136 Pa. St. 588, 20 Atl. 625, 20 Am. St. Rep. 939; Stivers *v.* Tucker, 126 Pa. St. 74, 17 Atl. 541; Caldwell's Appeal, (Pa. 1886) 7 Atl. 211; Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Haffey *v.* Carey, 73 Pa. St. 431; Moore *v.* Cornell, 68 Pa. St. 320; Colburn *v.* Kelly, 61 Pa. St. 314; Glidden *v.* Strupler, 52 Pa. St. 400; Rumfelt *v.* Clemens, 46 Pa. St. 455; Miltenberger *v.* Croyle, 27 Pa. St. 170; Stoops *v.* Blackford, 27 Pa. St. 213; Roseburgh *v.* Sterling, 27 Pa. St. 292; McNair *v.* Com., 26 Pa. St. 388; Clark *v.* Thompson, 12 Pa. St. 274; West *v.* West, 10 Serg. & R. (Pa.) 445; Kirkland *v.* Hepselgefser, 2 Grant (Pa.) 84.

Tennessee.— Prater *v.* Hoover, 1 Coldw. (Tenn.) 544; Woodrum *v.* Kirkpatrick, 2 Swan (Tenn.) 218; Montgomery *v.* Hobson, Meigs (Tenn.) 437.

Texas.— Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503; Stephens *v.* Shaw, 68 Tex. 261, 4 S. W. 458; Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47; Tucker *v.* Carr, 39 Tex. 98; Smith *v.* Elliott, 39 Tex. 201; Nichols *v.* Gordon, 25 Tex. Suppl. 109; Gilbough *v.* Stahl Bldg. Co., 16 Tex. Civ. App. 448, 41 S. W. 535; Simpson *v.* Edens, 14 Tex. Civ. App. 235, 38 S. W. 474.

Vermont.— Harmon *v.* Taft, 1 Tyler (Vt.) 6; Sumner *v.* Wentworth, 1 Tyler (Vt.) 42.

Virginia.— Hawley *v.* Twyman, 29 Gratt. (Va.) 728; Harvey *v.* Pecks, 1 Munf. (Va.) 518.

West Virginia.— McMullen *v.* Eagan, 21 W. Va. 233; Watson *v.* Michael, 21 W. Va. 568; Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

United States.— Sewall *v.* Haymaker, 127 U. S. 719, 8 S. Ct. 1348, 32 L. ed. 299; Hollingsworth *v.* Flint, 101 U. S. 591, 25 L. ed. 1028; Meegan *v.* Boyle, 19 How. (U. S.) 130, 15 L. ed. 577; Hepburn *v.* Dubois, 12 Pet. (U. S.) 345, 9 L. ed. 1111; Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164; Drury *v.* Foster, 1 Dill. (U. S.) 460, 7 Fed. Cas. No. 4,096; Manchester *v.* Hough, 5 Mason (U. S.) 67, 16 Fed. Cas. No. 9,005; Goodenough *v.* Warren, 5 Sawy. (U. S.) 494, 10 Fed. Cas. No. 5,534.

Canada.— Malloch *v.* Derivan, 22 U. C. Q. B. 54; Doe *v.* Ten Eyck, 7 U. C. Q. B. 600; McKinnon *v.* Arnold, 5 U. C. Q. B. 604; Doe *v.* Twigg, 5 U. C. Q. B. 167; Doran *v.* Reid, 13 U. C. C. P. 393; Farquharson *v.* Morrow, 12 U. C. C. P. 311; McGill *v.* Frazer, 5 U. C. C. P. 404; Graham *v.* Meneilly, 16 Grant Ch. (U. C.) 661.

Acknowledgment of incomplete instrument. — The acknowledgment, by a married woman, of an instrument in which blanks have been left, will not make it valid as against her when the blanks are afterward filled up. Ayres *v.* Probasco, 14 Kan. 175; Cole *v.* Bammel, 62 Tex. 108; Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

Finding that instrument "executed and delivered" imports acknowledgment.— In the case of a married woman's deed the acknowledgment is part of the execution, and without it the instrument is invalid; and therefore a finding that a married woman "made, executed, and delivered" the instrument was held to import that it was "acknowledged." Joseph *v.* Dougherty, 60 Cal. 358.

California — Certificate not part of conveyance.— Under Cal. Civ. Code, § 1188, it is held that while the acknowledgment is essential to the validity of a married woman's conveyance, yet the certificate thereof does not constitute a part of the instrument. Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934.

49. Per Eakin, J., in Donahue *v.* Mills, 41 Ark. 421, 430.

absence of an acknowledgment the law presumes that the conveyance was obtained by fraud and coercion.[50]

b. In What Instruments Required — (I) *In General.* As to what instruments must be acknowledged by the wife, to be valid, is of course a question depending upon the statutes authorizing her to execute such instrument.[51] In general, acknowledgment is required in any instrument conveying real property or an interest in real property, such as a release of dower,[52] a power of attorney to convey her property,[53] a conveyance or lease of her land,[54] or a conveyance of the homestead, whether by deed of bargain and sale or by mortgage.[55]

(II) *Agreements to Convey Lands.* In the absence of statutory authority to the contrary a married woman's agreement to convey land is not binding on

50. Mariner *v.* Saunders, 10 Ill. 113; Dewey *v.* Campau, 4 Mich. 565.

Admissible in evidence to show signing by wife.— In ejectment, where the question at issue is the execution of a deed by a man and his wife, the original contract of sale, though not acknowledged as required by law, if signed by the man and his wife, is admissible in evidence for the purpose of showing that the wife really did sign the deed. Of course the original contract unacknowledged by the wife would not have been admissible to prove itself. Carr *v.* H. C. Frick Coke Co., 170 Pa. St. 62, 32 Atl. 656.

Constitutes color of title.— An unregistered deed, by a husband and wife, of the wife's property, to which a privy examination of the wife has not been taken, constitutes color of title. Perry *v.* Perry, 99 N. C. 270, 6 S. E. 86. See Adverse Possession.

51. See the statutes and the cases cited *supra*, notes 48–50. And see *infra*, II, B, 3.

Deed made in pursuance of decree of equity court.— It is not essential to the validity of the deed made by a married woman in pursuance of a decree of a court of equity that she should make the statutory acknowledgment necessary to convey property in her own right or to bar dower in her husband's land. In fact it is not necessary that she should make any conveyance at all, for the decree for conveyance executes itself under the statute. The strength of complainant's title does not rest in any deed of conveyance executed by such married woman, but in the declaration and decree of the equity court establishing his right in equity. Fee *v.* Sharkey, (N. J. 1899) 44 Atl. 673.

Covenant to reserve open space in front of lot.— An agreement among adjacent lot-owners, covenanting to reserve an open space in front of their lots, and not to build thereon, is a "conveyance" within 1 N. Y. Rev. Stat. p. 762, § 38, providing that that term embraces every instrument by which any estate or interest in real estate is created or aliened, or by which the title may be affected; and, when executed by a married woman, it must, in order to be entitled to registration, be acknowledged by her apart from her husband, under 1 N. Y. Rev. Stat. p. 758, § 10, which provides that no "estate" of a married woman shall pass by a conveyance not acknowledged by her "apart from her husband." Bradley *v.* Walker, 138 N. Y. 291, 33 N. E. 1079 [*reversing* 59 N. Y. Super. Ct. 334, 14 N. Y. Suppl. 315, wherein the lower court held that the covenant in question was "somewhat analogous to the right conferred in McLarney *v.* Pettigrew, 3 E. D. Smith (N. Y.) 111, in which it was held that an agreement that beams might be inserted in the wall of plaintiff's house, for the permanent support of the adjoining house, did not convey an interest in real estate and did not require a writing"].

52. *Iowa.*— Westfall *v.* Lee, 7 Iowa 12.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

New Jersey.— Sheppard *v.* Wardell, 1 N. J. L. 452.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

Pennsylvania.— Kirk *v.* Dean, 2 Binn. (Pa.) 341.

53. McDaniel *v.* Grace, 15 Ark. 465; Bocock *v.* Pavey, 8 Ohio St. 270; Roseburgh *v.* Sterling, 27 Pa. St. 292; Stoops *v.* Blackford, 27 Pa. St. 213; Wilson *v.* Simpson, 68 Tex. 306, 4 S. W. 839; Patton *v.* King, 26 Tex. 685, 84 Am. Dec. 596; McKinney *v.* Rodgers, (Tex. Civ. App. 1895) 29 S. W. 407. See also Principal and Agent.

54. Worthington *v.* Young, 6 Ohio 313.

A lease is a "grant or instrument" within the meaning of Cal. Civ. Code, § 1093. Carlton *v.* Williams, 77 Cal. 89, 19 Pac. 185, 11 Am. St. Rep. 243.

Statute not applicable merely to deeds of "lease and release."— The Pennsylvania act of Feb. 24, 1770, providing for the privy examination of married women executing a "grant, lease, release" of lands does not refer to deeds of "lease and release" merely, but includes ordinary leases for a longer or shorter term. Miller *v.* Harbert, 6 Phila. (Pa.) 531, 25 Leg. Int. (Pa.) 29; Harbert *v.* Miller, 4 Wkly. Notes Cas. (Pa.) 325.

Acceptance of rent.— Where a lease by a married woman is not acknowledged by her, the fact that she accepts rent does not validate it, but at most creates a tenancy terminable by proper notice. Carlton *v.* Williams, 77 Cal. 89, 19 Pac. 185, 11 Am. St. Rep. 243.

55. Smith *v.* Pearce, 85 Ala. 264, 4 So. 616, 7 Am. St. Rep. 44; Balkum *v.* Wood, 58 Ala. 642; Patterson *v.* Kreig, 29 Ill. 514; Aultman, etc., Co. *v.* Jenkins, 19 Nebr. 209, 27 N. W. 117. See also Homesteads.

her unless acknowledged,[56] and cannot be specifically enforced in equity notwithstanding it was voluntarily made for a valuable consideration.[57]

(III) *Conveyance of Personalty.* Usually a conveyance of personal property belonging to the wife must be acknowledged.[58]

c. Operation as Estoppel. Where a married woman's land is conveyed by an unacknowledged deed she will not be estopped from asserting a claim to such land, even though she has received the consideration for the transfer [59] or has knowingly allowed improvements to be made thereon.[60] But where she herself has acquired land under a contract void as to her for lack of acknowledgment she cannot keep the land without paying for it.[61]

d. How Contract Ratified. If an instrument be void, it cannot be ratified by the wife except by due acknowledgment as required by the statute,[62] and when so acknowledged the instrument takes effect only from the time of acknowledgment.[63]

e. Necessity for Acknowledgment by Husband. Where the statute expressly requires an acknowledgment by both husband and wife, the husband's acknowledgment becomes essential to the validity of the instrument, and without it no title will pass.[64] Thus, where a statute provided that no conveyance of the hus-

56. *Arkansas.*— Wood *v.* Terry, 30 Ark. 385.

California.— Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934.

Maryland.— Steffey *v.* Steffey, 19 Md. 5.

Pennsylvania.— Caldwell's Appeal, (Pa. 1886) 7 Atl. 211; Innis *v.* Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Colburn *v.* Kelly, 61 Pa. St. 314; Glidden *v.* Strupler, 52 Pa. St. 400; Kirkland *v.* Hepselgefser, 2 Grant (Pa.) 84.

West Virginia.— Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

Contract for exchange of land.—A contract by a married woman for the exchange of land belonging to her separate estate must be acknowledged by her according to law. Roseburgh *v.* Sterling, 27 Pa. St. 292.

57. *California.*— Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695.

New York.— Knowles *v.* McCamly, 10 Paige (N. Y.) 342; Martin *v.* Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

North Carolina.—Askew *v.* Daniel, 40 N. C. 321.

Pennsylvania.— Glidden *v.* Strupler, 52 Pa. St. 400; Roseburgh *v.* Sterling, 27 Pa. St. 292.

Texas.— Munk *v.* Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409.

Failure to aver acknowledgment in petition. — Where the petition in a suit against husband and wife to enforce their contract to alienate their homestead fails to show that the contract was acknowledged by the wife according to statute, a general demurrer will be sustained to the petition. The acknowledgment, being the essence and foundation of the married woman's deed, cannot be supplied by presumption or inference, but must be averred. Cross *v.* Everts, 28 Tex. 523. See *infra*, XVI.

58. Selover *v.* American Russian Commercial Co., 7 Cal. 266; Wood *v.* Wood, 1 Metc. (Ky.) 512; Clark *v.* Slaughter, 34 Miss. 65; Woodrum *v.* Kirkpatrick, 2 Swan (Tenn.) 218.

59. Curtiss *v.* Follett, 15 Barb. (N. Y.) 337; Clayton *v.* Rose, 87 N. C. 106; Kirk *v.* Clark, 59 Pa. St. 479; Rumfelt *v.* Clemens, 46 Pa. St. 455. But see Fitzgerald *v.* Turner, 43 Tex. 79, wherein it was held that a married woman may be estopped by her fraudulent act or representation from asserting title when such act or representation is relied upon and acted on at the time of purchase by an adverse claimant. See also Osborne *v.* Mull, 91 N. C. 203; Talkin *v.* Anderson, (Tex. 1892) 19 S. W. 350; Betts *v.* Simons, (Tex. Civ. App. 1896) 35 S. W. 50.

For a full discussion of the doctrine of equitable estoppel as applied to married women see Husband and Wife.

60. Stivers *v.* Tucker, 126 Pa. St. 74, 17 Atl. 541; Glidden *v.* Strupler, 52 Pa. St. 400.

61. Wood *v.* Wheeler, 106 N. C. 512, 11 S. E. 590; Burns *v.* McGregor, 90 N. C. 222.

62. George *v.* Goldsby, 23 Ala. 326; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179; Glidden *v.* Strupler, 52 Pa. St. 400.

Receiving payments not an affirmance.— Where a husband and wife conveyed certain land, but the wife did not acknowledge the instrument and she survived the husband, it was held that her interest did not pass, and that the fact that for two or three years after the death of the husband she received stipulated payments under the conveyance did not constitute an affirmance. Clark *v.* Thompson, 12 Pa. St. 274.

63. Jackson *v.* Stevens, 16 Johns. (N. Y.) 110; Moffatt *v.* Grover, 4 U. C. C. P. 402.

64. Lawrence *v.* Heister, 3 Harr. & J. (Md.) 371; Southerland *v.* Hunter, 93 N. C. 310; Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338; Den *v.* Hunter, 3 N. C. 604; Ludlow *v.* O'Neil, 29 Ohio St. 181.

As to the relative time of acknowledgment by husband and wife see *infra*, IX, E.

Homestead.— In some jurisdictions it is necessary that both husband and wife acknowledge a conveyance of the homestead. Interstate Sav., etc., Assoc. *v.* Strine, 58 Nebr. 133, 78 N. W. 377; Kalamazoo Nat. Bank *v.* Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

band's interest in the wife's land should be valid unless by deed executed by the wife jointly with her husband, and acknowledged in the manner provided for the conveyance by husband and wife of the real estate of the wife, it was held that a deed acknowledged by neither of them did not operate to convey the husband's interest.[65] But ordinarily the husband's right passes upon delivery, and his acknowledgment is necessary only to entitle the instrument to registration or to be admitted in evidence;[66] and if an acknowledgment is not expressly required by the statute an instrument executed by him in conjunction with his wife is sufficient to pass his interest without any acknowledgment by him,[67] even though it be void as to the wife.[68]

3. Where No Acknowledgment Required by Statute — a. In General. The necessity for acknowledgment being a matter of statutory regulation it naturally follows that, where the statute does not require an acknowledgment in any particular instrument, such instrument is valid without it.[69] Thus, in some states,

Acknowledgment after wife's death.— Under the Ohio and Virginia statutes a deed by husband and wife, made in either state, conveying the wife's land, was inoperative to pass her title unless the husband, she having duly acknowledged the deed, had, in her lifetime and by an acknowledgment in the form prescribed by law, signified his consent to such conveyance; and an acknowledgment made by him after her death was held to be of no effect. Sewall *v.* Haymaker, 127 U. S. 719, 8 S. Ct. 1348, 32 L. ed. 299.

65. Bartlett *v.* O'Donoghue, 72 Mo. 563; Goff *v.* Roberts, 72 Mo. 570.

Instrument not signed by husband.—A deed by husband and wife must have been signed by him when acknowledged by her. She cannot acknowledge a paper not signed by him. It must be one deed,— not separate or duplicates, one executed by the husband, the other by the wife,— though both are to the same effect. Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

66. See *supra*, II, A.

67. *New York.*— Curtiss *v.* Follett, 15 Barb. (N. Y.) 337; Ryerss *v.* Wheeler, 25 Wend. (N. Y.) 434, 37 Am. Dec. 243.

Ohio.— Reynolds *v.* Clark, Wright (Ohio) 656.

Tennessee.— Mount *v.* Kesterson, 6 Coldw. (Tenn.) 452; Montgomery *v.* Hobson, Meigs (Tenn.) 437.

Vermont.— Knappen *v.* Wooster, Brayt. (Vt.) 50.

Canada.— Allan *v.* Levesconte, 15 U. C. Q. B. 9.

Binding on other grantors.—Children agreed, without the knowledge of their father, to release to one of their number all the rights of the others to the father's land if that one would maintain him for life. Two of them, married women, did not acknowledge the deed. It was held that it was nevertheless binding on the others. Walker *v.* Walker, 67 Pa. St. 185.

Texas — Passes community interest.— In Texas a deed for property, not a homestead, in which the wife claimed a separate estate, executed by husband and wife, but not acknowledged by the wife, was held to pass whatever interest they held in community right and whatever separate interest the husband had, though an acknowledgment was required for the conveyance of the wife's separate estate. Stephens *v.* Mathews, 69 Tex. 341, 6 S. W. 567. See also Jacks *v.* Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645.

68. Wife restored to rights on husband's death.— A deed for the land of the wife, executed by the husband and wife, but not acknowledged by the latter, is of no validity as to her, and conveys only the use of the land during the coverture. Elliott *v.* Pearce, 20 Ark. 508; Curtiss *v.* Follett, 15 Barb. (N. Y.) 337; Jackson *v.* Sears, 10 Johns. (N. Y.) 435.

69. In Texas, prior to the act of 1841, no separate acknowledgment of the wife was necessary to a conveyance of land. Groesbeck *v.* Bodman, 73 Tex. 287, 11 S. W. 322.

Minnesota — Executory contract for sale of land.— Under Minn. Pub. Stat. c. 35, § 30, providing that the word "conveyance," as used in that chapter, shall not include executory contracts for the sale of lands, it was held that section 12 of the same act, requiring an acknowledgment, separate and apart from the husband, of a conveyance by a married woman, did not apply to a contract by her for the sale of her lands, and that no acknowledgment was necessary to the validity of such contract. Kingsley *v.* Gilman, 15 Minn. 59.

Georgia — Conveyance of husband's land to secure debt.— Under the Georgia code no acknowledgment is required of a wife to a conveyance of her husband's realty made to secure a debt. It is sufficient if she sign a consent in writing with no more formality than is necessary under the code in ordinary contracts relating to land. Wynn *v.* Ficklen, 54 Ga. 529.

Montana — Declaration under Sole Trader's Act.— A declaration by a married woman that she intends to carry on business in her own name under the Montana Sole Traders' Act need not be acknowledged. Shed *v.* Blakely, 6 Mont. 247, 11 Pac. 639.

North Carolina — Sale by husband of kitchen furniture.— N. C. Acts (1891), c. 91, § 1, providing that wherever household or kitchen furniture is conveyed by chattel mortgage or otherwise, as allowed by law in North Carolina, the privy examination of married women shall be taken as is now prescribed in

the wife's personal property may be conveyed without acknowledgment.[70] And in some jurisdictions it has been held that the equitable estate of a married woman under a grant or devise creating in her a separate estate without restraint upon her power of disposition may be conveyed or charged without acknowledgment.[71]

b. Statutes Enabling Wife to Convey as Feme Sole. By statutes in some jurisdictions married women are now empowered to convey and encumber their property in the same manner as if they were unmarried, and where this is the case the acknowledgment is not essential to the validity of the instrument[72] and is controlled by the same rules that apply to acknowledgments made by other persons.[73] In Pennsylvania a *feme sole* trader may contract for the sale of her land without a separate acknowledgment,[74] and the specific performance of such contract may be enforced in equity.[75]

III. EFFECT OF DEFECTIVE ACKNOWLEDGMENT.

A. In Instruments by Persons Other Than Married Women — 1. VALIDITY OF INSTRUMENT — a. In General. As has been stated heretofore acknowledgment is not ordinarily essential to the validity of an instrument.[76] Consequently an

the conveyance of land, does not apply to an absolute sale, by the husband, of such property; and in such case no acknowledgment by the wife is essential to pass title. Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81.

Canada — Release of dower.—Under 2 Vict. c. 6, § 3, a married woman may release her dower in her husband's land without acknowledgment. Hill *v.* Greenwood, 23 U. C. Q. B. 404; McNally *v.* Church, 27 U. C. Q. B. 103; Heward *v.* Scott, 2 Ch. Chamb. (Ont.) 274.

70. Texas — Personalty may be conveyed by parol.— In Texas a married woman may transfer her personal property by parol, and consequently no acknowledgment is required where the conveyance is in that mode (Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Wilkinson *v.* Rowland, 3 Tex. App. Civ. Cas. § 11), but if in writing, the conveyance must be acknowledged (McDaniel *v.* Garrett, 11 Tex. Civ. App. 57, 31 S. W. 721). An unlocated "land certificate" is personal property and consequently may be conveyed by parol without acknowledgment (Ikard *v.* Thompson, 81 Tex. 285, 16 S. W. 1019; Arnold *v.* Attaway, (Tex. Civ. App. 1896) 35 S. W. 482; Bennett *v.* Virginia Ranch, etc., Co., 1 Tex. Civ. App. 321, 21 S. W. 126), but where such certificate has been located and surveyed, the rights thereunder can be conveyed only as real property by a duly acknowledged instrument (Ballard *v.* Carmichael, (Tex. 1891) 17 S. W. 393; Groesbeck *v.* Bodman, 73 Tex. 287, 11 S. W. 322).

Pennsylvania — Assignment of choses in action.— In Pennsylvania, a married woman, in conjunction with her husband, may assign her choses in action without acknowledgment. Powell's Appeal, 98 Pa. St. 403; Bond *v.* Bunting, 78 Pa. St. 210.

71. Small *v.* Field, 102 Mo. 104, 14 S. W. 815; Peterson *v.* Richman, 93 Tenn. 71, 23 S. W. 53; Warren *v.* Freeman, 85 Tenn. 513, 3 S. W. 513; Menees *v.* Johnson, 12 Lea (Tenn.) 561.

For a discussion of the powers of the wife over her equitable separate estate see HUSBAND AND WIFE.

New York.— Under the New York act of 1848 allowing a married woman to control her separate property as a *feme sole*, it was held that her conveyance thereof was valid though not acknowledged. Wiles *v.* Peck, 26 N. Y. 42; Yale *v.* Dederer, 18 N. Y. 265, 72 Am. Dec. 503; Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9; McIlvaine *v.* Kadel, 3 Rob. (N. Y.) 429.

72. *Arizona.*— Miller *v.* Fisher, 1 Ariz. 232, 25 Pac. 651; Charauleau *v.* Woffenden, 1 Ariz. 243, 25 Pac. 652.

Arkansas.— Criscoe *v.* Hambrick, 47 Ark. 235, 1 S. W. 150; Stone *v.* Stone, 43 Ark. 160; Bryan *v.* Winburn, 43 Ark. 28; Donahue *v.* Mills, 41 Ark. 421.

Illinois.— Bradshaw *v.* Atkins, 110 Ill. 323; Bute *v.* Kneale, 109 Ill. 652; Hogan *v.* Hogan, 89 Ill. 427; Terry *v.* Eureka College, 70 Ill. 236.

Indiana.— Mays *v.* Hedges, 79 Ind. 288; Hubble *v.* Wright, 23 Ind. 322.

Iowa.— Lake *v.* Gray, 30 Iowa 415; Simms *v.* Hervey, 19 Iowa 273.

Nebraska.— Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731.

United States.— Knight *v.* Paxton, 124 U. S. 552, 8 S. Ct. 592, 31 L. ed. 518; Hawes *v.* Mann, 8 Biss. (U. S.) 21, 11 Fed. Cas. No. 6,239.

73. See *supra*, II, A.

Unnecessary acknowledgment not operative as estoppel.— Under the Alabama act of 1850 allowing a married woman's separate estate to be conveyed without a private examination apart from the husband, it was held that, the taking of her acknowledgment to such a deed on a private examination being unnecessary, such acknowledgment would not estop her from afterward avoiding the deed for duress. Fisk *v.* Stubbs, 30 Ala. 335.

74. Ewing's Appeal, 101 Pa. St. 371.

75. Ewing's Appeal, 101 Pa. St. 371; Reed *v.* Stouffer, 14 Pa. Co. Ct. 505.

76. See *supra*, II, A, 1, a.

instrument properly executed in other respects but defectively acknowledged is good against everybody except subsequent creditors and purchasers without notice.[77] No one else can take advantage of the defect.[78]

b. Where Acknowledgment Essential to Validity. Where, by statute, the acknowledgment is made an essential part of the instrument,[79] a defective acknowledgment will render it void.[80]

c. As between the Parties. The fact that an instrument is defectively acknowledged will not affect its operative force as against the grantor and his heirs.[81]

d. As to Third Persons With Actual Notice. Except in cases where it is expressly provided otherwise by statute,[82] a defectively acknowledged instrument is valid as against all persons having actual knowledge of its existence.[83]

77. *California.*— Ricks *v.* Reed, 19 Cal. 551; Hastings *v.* Vaughn, 5 Cal. 315.

Kansas.—Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Gray *v.* Ulrich, 8 Kan. 112.

Michigan.—Taylor *v.* Youngs, 48 Mich. 268, 12 N. W. 208.

Minnesota.— Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

New York.— Fryer *v.* Rockefeller, 63 N. Y. 268.

An interlineation or erasure in the certificate of acknowledgment of a deed affects the proof of execution, but not the validity of the deed. Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 328.

Ancient deed.— Where a deed has been recorded for forty years, during which time transactions of great importance have been based on it, and no title hostile to that derived through such deed has been asserted, the fact that the acknowledgment of the deed is defective does not constitute a defect in the title. Bucklen *v.* Hasterlik, 155 Ill. 423, 40 N. E. 561.

78. As to taking objections to defective acknowledgments see *infra*, III, A, 1, f.

79. See *supra*, II, A, 1, b.

80. Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111; Dunlap *v.* Henry, 76 Mo. 106; Samuels *v.* Shelton, 48 Mo. 444; Hout *v.* Hout, 20 Ohio St. 119.

Subsequent purchaser acquires good title.— Where the statute provides that a defectively acknowledged deed of land shall not be binding on any one but the parties and their heirs, a subsequent purchaser for value from the grantor may acquire a good title to land previously conveyed under a defective acknowledgment. Richards *v.* Randolph, 5 Mason (U. S.) 115, 20 Fed. Cas. No. 11,772.

81. *Arkansas.*— Leonhard *v.* Flood, (Ark. 1900) 56 S. W. 781; Martin *v.* O'Bannon, 35 Ark. 62; Conner *v.* Abbott, 35 Ark. 365.

California.— Hastings *v.* Vaughn, 5 Cal. 315.

Florida.— Stewart *v.* Stewart, 19 Fla. 846; Hogans *v.* Carruth, 18 Fla. 587.

Illinois.— Hathorn *v.* Lewis, 22 Ill. 395.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Hubble *v.* Wright, 23 Ind. 322.

Iowa.— Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Haynes *v.* Seachrest, 13 Iowa 455; Gould *v.* Woodward, 4 Greene (Iowa) 82.

Maine.— Beaman *v.* Whitney, 20 Me. 413; Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34, 12 Atl. 732.

Massachusetts.— Gibbs *v.* Swift, 12 Cush. (Mass.) 393.

Minnesota.—Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

Missouri.— Staples *v.* Shackleford, 150 Mo. 471, 51 S. W. 1032; Hannah *v.* Davis, 112 Mo. 599, 20 S. W. 686; Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62; Bennett *v.* Shipley, 82 Mo. 448; Harrington *v.* Fortner, 58 Mo. 468; Black *v.* Gregg, 58 Mo. 565; Dalton *v.* St. Louis Bank, 54 Mo. 105; Ryan *v.* Carr, 46 Mo. 483; Stevens *v.* Hampton, 46 Mo. 404.

Nebraska.— Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229.

New York.— Fryer *v.* Rockefeller, 63 N. Y. 268; Hutton *v.* Webber, 60 N. Y. Super. Ct. 247, 17 N. Y. Suppl. 463.

Oklahoma.— Hess *v.* Trigg, 8 Okla. 286, 57 Pac. 159.

Oregon.— Manaudas *v.* Mann, 14 Oreg. 450, 13 Pac. 449.

South Carolina.—Webb *v.* Chisolm, 24 S. C. 487.

Virginia.— Davis *v.* Beazley, 75 Va. 491.

Washington.— Mann *v.* Young, 1 Wash. Terr. 454.

Wisconsin.— McPherson *v.* Featherstone, 37 Wis. 632.

See also *supra*, II, A, 1, c, (I).

82. See *supra*, II, A, 1, c, (II), (B).

Arkansas — Mortgage.— In Arkansas a defectively acknowledged mortgage is void as to all persons except the parties to it, although such persons have actual notice of its existence. Wright *v.* Graham, 42 Ark. 140; Ford *v.* Burks, 37 Ark. 91; Conner *v.* Abbott, 35 Ark. 365; Carnall *v.* Duval, 22 Ark. 136.

Illinois — Chattel mortgage.— In Illinois a defectively acknowledged chattel mortgage is void as to creditors and purchasers, notwithstanding actual notice (Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201; Hunt *v.* Bullock, 23 Ill. 320; Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154), except where the mortgagee is in possession of the mortgaged property (Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646). See, generally, CHATTEL MORTGAGES.

83. *Iowa.*— Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Haynes *v.* Seachrest, 13 Iowa 455; Dussaume *v.* Burnett, 5 Iowa 95.

e. As to Third Persons Without Actual Notice. A defectively acknowledged instrument has no validity as against a subsequent purchaser for value and without notice.[84]

f. Raising Objections — (I) *When to Be Taken.* An objection to the acknowledgment of an instrument must be raised in the trial court, and is not available for the first time on appeal.[85]

(II) *Who May Take.* A defectively acknowledged instrument being usually valid as against every one except a subsequent creditor or purchaser without notice, it follows that such creditor or purchaser is the only one who can object to the acknowledgment.[86]

(III) *Sufficiency of.* An objection to the introduction in evidence of an instrument, on the ground that it is not properly acknowledged, must point out the specific ground of the objection, else it will be deemed to be waived.[87]

2. Effect of Registration — a. In General. Where, by statute, acknowledgment is required as a prerequisite to the registration of the instrument,[88] a defectively acknowledged instrument is not entitled to be recorded,[89] and the recording

Maryland.— Dyson *v.* Simmons, 48 Md. 207; Johnston *v.* Canby, 29 Md. 211.

Missouri.— Hannah *v.* Davis, 112 Mo. 599, 20 S. W. 686; Harrington *v.* Fortner, 58 Mo. 468; Stevens *v.* Hampton, 46 Mo. 404; Ryan *v.* Carr, 46 Mo. 483.

Nevada.— Johnson *v.* Badger Mill, etc., Co., 13 Nev. 351.

Oregon.— Manaudas *v.* Mann, 14 Oreg. 450, 13 Pac. 449; Musgrove *v.* Bonser, 5 Oreg. 313, 20 Am. Rep. 737.

Pennsylvania.— Parker *v.* Wood, 1 Dall. (Pa.) 436.

Washington.— Mann *v.* Young, 1 Wash. Terr. 454.

See *supra*, II, A, 1, c, (II), (A).

One who has seen the record of a defectively acknowledged instrument is affected with actual notice. Musgrove *v.* Bonser, 5 Oreg. 313, 20 Am. Rep. 737.

Purchaser incurring contingent liability.— A mortgage properly executed and acknowledged, but having a defective certificate, is valid against a subsequent purchaser having knowledge of it as recorded, though not of its proper acknowledgment, where he parted with no value and incurred no liability except a contingent liability which never became fixed. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

84. *Illinois.*— Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460.

Iowa.— Wickersham *v.* Reeves, 1 Iowa 413.

Mississippi.—Buntyn *v.* Shippers' Compress Co., 63 Miss. 94.

Ohio.— Smith *v.* Hunt, 13 Ohio 260, 42 Am. Dec. 201.

United States.— Richards *v.* Randolph, 5 Mason (U. S.) 115, 20 Fed. Cas. No. 11,772.

Subsequent purchase at sheriff's sale.— Where the acknowledgment of a recorded mortgage was defective, it was held that the purchaser of the land at a sheriff's sale under a judgment took free of the lien of the mortgage, if the judgment creditor had no notice of it at the time the judgment was entered; and this notwithstanding the holder of the mortgage gave notice thereof at the sheriff's sale. Uhler *v.* Hutchinson, 23 Pa. St. 110.

Texas — Certificate must be recorded.— Under the Texas Recording Act the certificate of acknowledgment is a necessary part of the record, and if omitted the record will not operate as notice of such conveyance to subsequent purchasers from the administrator of the former grantor. Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

85. *Colorado.*—Mills *v.* Angela, 1 Colo. 334.

Illinois.— Harvey *v.* Dunn, 89 Ill. 585.

Kansas.— Ogden *v.* Walters, 12 Kan. 282.

Missouri.— Rogers *v.* Gage, 59 Mo. App. 107.

New York.— Sheldon *v.* Stryker, 27 How. Pr. (N. Y.) 387, 42 Barb. (N. Y.) 284.

Texas.— Blanton *v.* Ray, 66 Tex. 61, 17 S. W. 264.

86. Moore *v.* Little Rock, 42 Ark. 66; Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. Rep. 330; Mastin *v.* Halley, 61 Mo. 196; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533; Chouteau *v.* Burlando, 20 Mo. 482.

A person having actual knowledge of the existence of an instrument cannot take advantage of a defect in the acknowledgment. Johnson *v.* Badger Mill, etc., Co., 13 Nev. 351.

A person not claiming under the grantor cannot object that the deed from him was not properly acknowledged, there being no question as to its due execution. Ricks *v.* Reed, 19 Cal. 551; Welch *v.* Sullivan, 8 Cal. 165.

87. Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646.

Objection too general in character.— An objection to a deed sought to be introduced in evidence, on the ground that it "was not acknowledged as required by law," is too general. Leon, etc., Land Co. *v.* Dunlap, 4 Tex. Civ. App. 315, 23 S. W. 473.

Not available on motion for new trial.— An objection to a certificate of proof which does not specify the defect upon which it is founded is unavailable on a motion for a new trial, as not being sufficiently definite. Norman *v.* Wells, 17 Wend. (N. Y.) 136.

88. See *supra*, II, A, 2, b.

89. *Arkansas.*— Leonhard *v.* Flood, (Ark. 1900) 56 S. W. 781; Green *v.* Abraham, 43 Ark. 420.

thereof will be of no effect as against persons having no actual notice.[90] But the fact that it has been recorded may be considered by a jury in determining whether the instrument has been delivered.[91]

b. As Constructive Notice — (1) *In General.* Where the statute requires an instrument to be acknowledged or proved before it can be entitled to registration,[92] the record of an instrument which appears on its face to have been defectively acknowledged or proved will not impart constructive notice to subsequent creditors and purchasers in good faith.[93]

California.— McMinn *v.* O'Connor, 27 Cal. 238.

Michigan.— Buell *v.* Irwin, 24 Mich. 145.

Mississippi.— Wasson *v.* Connor, 54 Miss. 351.

Ohio.— Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 437.

Texas.— McDaniel *v.* Needham, 61 Tex. 269.

West Virginia.— Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256.

An acknowledgment taken before a disqualified officer is invalid as authority to admit the instrument to record. Davis *v.* Beazley, 75 Va. 491; Dias *v.* Glover, Hoffm. (N. Y.) 71.

As to who may take acknowledgments see *infra*, V.

Acknowledgment taken in another state.— An instrument is not entitled to record in a state whose laws have not been complied with in taking the acknowledgment in another state. Pope *v.* Cutler, 34 Mich. 150; People *v.* Register of New York, 6 Abb. Pr. (N. Y.) 180; Fleming *v.* Ervin's Committee, 6 W. Va. 215.

As to the mode of taking acknowledgments in other states see *infra*, X, A, 3.

Proof by attesting witnesses.—A deed executed while the provincial statute of Wm. III, c. 7, was in force, requiring, in lieu of acknowledgment by the grantor, proof by two of the attesting witnesses, is improperly admitted to record upon proof of its execution by one of them only. Pidge *v.* Tyler, 4 Mass. 541.

90. *Arkansas.*— Leonhard *v.* Flood, (Ark. 1900) 56 S. W. 781; Martin *v.* O'Bannon, 35 Ark. 62; Conner *v.* Abbott, 35 Ark. 365.

Florida.— Sanders *v.* Pepoon, 4 Fla. 465.

Georgia.—McCandless *v.* Yorkshire Guarantee, etc., Corp., 101 Ga. 180, 28 S. E. 663.

Iowa.— Wickersham *v.* Reeves, 1 Iowa 413.

Kentucky.— Miller *v.* Henshaw, 4 Dana (Ky.) 325.

Maryland.— Johns *v.* Reardon, 3 Md. Ch. 57.

Michigan.— Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108; Dewey *v.* Campau, 4 Mich. 565.

New York.— Smith *v.* Tim, 14 Abb. N. Cas. (N. Y.) 447.

North Carolina.— Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884; Todd *v.* Outlaw, 79 N. C. 235; Suddereth *v.* Smyth, 35 N. C. 452.

West Virginia.— Tavenner *v.* Barrett, 21 W. Va. 656.

91. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

92. See *supra*, II, A, 2.

93. *Arkansas.*— Green *v.* Abraham, 43 Ark. 420; Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Hurlbutt *v.* Butenop, 27 Cal. 50; Kelsey *v.* Dunlap, 7 Cal. 160; Wolf *v.* Fogarty, 6 Cal. 224, 65 Am. Dec. 509.

Georgia.—White *v.* Magarahan, 87 Ga. 217, 13 S. E. 509; MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77; Herndon *v.* Kimball, 7 Ga. 432, 50 Am. Dec. 406.

Illinois.— Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460.

Indiana.— Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594.

Iowa.— Smith *v.* Clark, 100 Iowa 605, 69 N. W. 1011; City Bank *v.* Radtke, 87 Iowa 363, 54 N. W. 435; Wilson *v.* Traer, 20 Iowa 231; Newman *v.* Samuels, 17 Iowa 528; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Reynolds *v.* Kingsbury, 15 Iowa 238; Brinton *v.* Seevers, 12 Iowa 389; Suiter *v.* Turner, 10 Iowa 517; Dussaume *v.* Burnett, 5 Iowa 95; Gould *v.* Woodward, 4 Greene (Iowa) 82.

Kansas.— Sanford *v.* Weeks, 38 Kan. 319, 16 Pac. 465, 5 Am. St. Rep. 748.

Kentucky.— Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 252; Herd *v.* Cist, (Ky. 1889) 12 S. W. 466.

Maryland.— Sitler *v.* McComas, 66 Md. 135, 6 Atl. 527; Cockey *v.* Milne, 16 Md. 200; Johns *v.* Scott, 5 Md. 81; Johns *v.* Reardon, 3 Md. Ch. 57.

Michigan.— Brown *v.* McCormick, 28 Mich. 215; Galpin *v.* Abbott, 6 Mich. 17.

Minnesota.— Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449; Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619; Baze *v.* Arper, 6 Minn. 220.

Mississippi.— Wasson *v.* Connor, 54 Miss. 351; Tillman *v.* Cowand, 12 Sm. & M. (Miss.) 262.

Missouri.— Hainey *v.* Alberry, 73 Mo. 427; Musick *v.* Barney, 49 Mo. 458; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533; Stevens *v.* Hampton, 46 Mo. 404.

Nebraska.— Kelling *v.* Hoyt, 31 Nebr. 453, 48 N. W. 66.

New York.— Armstrong *v.* Combs, 15 N. Y. App. Div. 246, 44 N. Y. Suppl. 171.

North Carolina.— Lony *v.* Crews, 113 N. C. 256, 18 S. E. 499.

Ohio.— Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 437.

Oregon.— Musgrove *v.* Bonser, 5 Oreg. 313, 20 Am. Rep. 737.

Pennsylvania.— Powells' Appeal, 98 Pa. St. 403; McKean, etc., Land Imp. Co. *v.* Mitchell, 35 Pa. St. 269, 78 Am. Dec. 335; Green *v.* Drinker, 7 Watts & S. (Pa.) 440; Barney *v.*

(II) *Where Defect Not Apparent on Face of Certificate.* But where an instrument bearing a certificate of acknowledgment or proof which is regular on its face is presented to the recording officer, it becomes his duty to record it, and the record thereof will operate as constructive notice notwithstanding there be a hidden defect in the acknowledgment.[94]

3. Admissibility in Evidence — a. In General. Where an instrument is defectively acknowledged it is not entitled to be introduced as evidence of title without proof of its execution,[95] nor will the fact that it has been admitted to record have any weight in this respect.[96] To admit such an instrument as evidence of title

Sutton, 2 Watts (Pa.) 31; Kerns *v.* Swope, 2 Watts (Pa.) 75; Heister *v.* Fortner, 2 Binn. (Pa.) 40, 4 Am. Dec. 417.

South Carolina.— Woolfolk *v.* Graniteville Mfg. Co., 22 S. C. 332.

South Dakota.— Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

Tennessee.— Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497; Henderson *v.* McGhee, 6 Heisk. (Tenn.) 55.

Texas.— Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366; Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866; Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304; Berry *v.* Donley, 26 Tex. 737; Kalamazoo Nat. Bank *v.* Johnson, 5 Tex. Civ. App. 535, 24 S. W. 350.

Vermont.— Wood *v.* Cochrane, 39 Vt. 544.

Virginia.— Iron Belt Bldg., etc., Assoc. *v.* Groves, 96 Va. 138, 31 S. E. 23; Nicholson *v.* Gloucester Charity School, 93 Va. 101, 24 S. E. 899; Davis *v.* Beazley, 75 Va. 491.

West Virginia.— Tavenner *v.* Barrett, 21 W. Va. 656.

Wisconsin.— Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

United States.— Morton *v.* Smith, 2 Dill. (U. S.) 316, 17 Fed. Cas. No. 9,867; Shults *v.* Moore, 1 McLean (U. S.) 520, 22 Fed. Cas. No. 12,824.

94. *Minnesota.*— Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

Missouri.— Stevens *v.* Hampton, 46 Mo. 404.

New Jersey.— Morrow *v.* Cole, 58 N. J. Eq. 203, 42 Atl. 673.

Pennsylvania.— Angier *v.* Schieffelin, 72 Pa. St. 106, 13 Am. Rep. 659.

Texas.— Titus *v.* Johnson, 50 Tex. 224; Peterson *v.* Lowry, 48 Tex. 408.

Virginia.— Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.

United States.— National Bank *v.* Conway, 1 Hughes (U. S.) 37, 17 Fed. Cas. No. 10,037.

Acknowledgment taken outside jurisdiction. — The recording of an assignment of a mortgage was held to be notice to a subsequent mortgagee, though in fact the acknowledgment was taken in New Jersey by a notary public of New York, the certificate being in due form and purporting to have been taken in New York. Heilbrun *v.* Hammond, 13 Hun (N. Y.) 474.

95. *Alabama.*— Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928; Keller *v.* Moore, 51 Ala. 340.

Colorado.— McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652.

Connecticut.— Stanton *v.* Button, 2 Conn. 527.

Illinois.— Vance *v.* Schuyler, 6 Ill. 160.

Louisiana.— Seymour *v.* Cooley, 3 Mart. N. S. (La.) 396.

Minnesota.— Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967.

Pennsylvania.— Duncan *v.* Duncan, 1 Watts (Pa.) 322.

Tennessee.— Bone *v.* Greenlee, 1 Coldw. (Tenn.) 29.

Texas.— Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47; Andrews *v.* Marshall, 26 Tex. 212; Baxter *v.* Howell, 7 Tex. Civ. App. 198, 26 S. W. 453.

United States.— Wetmore *v.* Laird, 5 Biss. (U. S.) 160, 29 Fed. Cas. No. 17,467.

See *supra*, II, A, 3.

As to the effect of a valid acknowledgment as dispensing with proof of execution see *infra*, IV, A.

Instrument not under seal.— An instrument which was in all respects a deed conveying land, except that it was not under seal, and which was acknowledged before the probate judge and recorded, was offered in evidence, with the certificate of the acknowledgment of its execution and recordation. It was held that the instrument was inadmissible, because, considering it as a mere contract,— the probate judge having no authority to take an acknowledgment of an instrument not under seal,— there was no proof of its execution. Alexander *v.* Polk, 39 Miss. 737.

Acknowledgment taken in wrong county.— Where the statute specifies in what county an acknowledgment shall be taken, a deed acknowledged in another county is not admissible in evidence without proof of execution. Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502.

See *infra*, VIII.

Proper acknowledgment by one of several grantors.— A conveyance by several grantors is admissible in evidence in behalf of one of them who properly acknowledged the same, although the acknowledgment of another grantor be defective. Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Edens *v.* Simpson, (Tex. 1891) 17 S. W. 788. In Hendon *v.* White, 52 Ala. 597, it was held that where two only of three signers of a deed were mentioned therein as grantors, and they alone acknowledged its execution, such facts dispensed with the necessity of further evidence of its execution by them.

96. *Alabama.*— Roney *v.* Moss, 76 Ala. 491.

Michigan.— Pope *v.* Cutler, 34 Mich. 150.

Mississippi.— Wasson *v.* Connor, 54 Miss. 351.

Texas.— Coffey *v.* Hendricks, 66 Tex. 676,

without proof of execution constitutes reversible error;[97] but it may be admitted for secondary purposes,[98] such as to show color of title.[99]

b. Admissibility of Record Copies. A record copy of a defectively acknowledged instrument is not admissible as evidence of title except upon proof of the execution of the original and the truth of the copy,[1] nor can such copy be proved in the common-law form by the testimony of the attesting witnesses: for that purpose the original must be produced.[2] But copies will sometimes be admitted for other purposes than as evidence of title.[3]

c. Right to Prove Execution by Other Modes. The sufficiency of the acknowledgment is material only where it is relied on as the sole proof of execution, and the instrument is admissible if otherwise proven by competent evidence.[4]

4. Operation as Attestation. In Alabama it is held that a defective certificate of acknowledgment signed by the officer is equivalent to the attestation of one witness.[5] But in New York the contrary has been held.[6]

2 S. W. 47; Threadgill *v.* Bickerstaff, 7 Tex. Civ. App. 406, 26 S. W. 739.

Virginia.— Turner *v.* Stip, 1 Wash. (Va.) 319.

97. Munn *v.* Lewis, 2 Port. (Ala.) 24.

Harmless error in admission.— Where the record of a mortgage acknowledged in another state was erroneously admitted in evidence, although bearing no certificate of authenticity, it was held that since it was shown that the subsequent purchaser had actual notice of the mortgage the judgment would not be reversed on that account. Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753. Where a deed is insufficient for want of a proper acknowledgment it is not reversible error to receive it in evidence where the deed is pleaded in the complaint and not denied in the answer, and defendant acquired the interest in the land which he claimed before the deed was executed and was not affected by any want of notice of the deed or by any defect in its acknowledgment. Hewitt *v.* Morgan, 88 Iowa 468, 55 N. W. 478.

98. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Gould *v.* Woodward, 4 Greene (Iowa) 82; Smith *v.* Perry, 26 Vt. 279. See also *supra*, II, A, 3, a.

To show ownership in grantee.— Since a defectively acknowledged deed is good between the parties, it is competent evidence, in an action against a tenant, to show ownership in the grantee. Banbury *v.* Sherin, 4 S. D. 88, 55 N. W. 723.

99. Campbell *v.* Laclede Gas Light Co., 84 Mo. 352. See Adverse Possession.

1. *California.*— McMinn *v.* O'Connor, 27 Cal. 238.

Florida.— L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213.

Georgia.— Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

Kentucky.— Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 252.

Michigan.— Pope *v.* Cutler, 34 Mich. 150; Brown *v.* McCormick, 28 Mich. 215; Buell *v.* Irwin, 24 Mich. 145; Dewey *v.* Campau, 4 Mich. 565.

Missouri.— Musick *v.* Barney, 49 Mo. 458.

Nebraska.— Maxwell *v.* Higgins, 38 Nebr. 671, 57 N. W. 388; Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753.

New York.— Blackman *v.* Riley, 63 Hun (N. Y.) 521, 18 N. Y. Suppl. 476.

Ohio.— Johnston *v.* Haines, 2 Ohio 55.

Texas.— Cavit *v.* Archer, 52 Tex. 166. See also Baxter *v.* Howell, 7 Tex. Civ. App. 198, 26 S. W. 453.

Wisconsin.— Smith *v.* Garden, 28 Wis. 685.

Plat of dedicated lands.— A record copy of a plat, the acknowledgment of which bears no notarial seal, is not sufficient to prove the existence of a highway by dedication by the proprietors. Grand Rapids *v.* Hastings, 36 Mich. 122.

Not admissible on ground of antiquity.— Where a deed is defectively acknowledged the lapse of time does not render a certified copy thereof from the record admissible in evidence as an ancient instrument. Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366.

2. Brogan *v.* Savage, 5 Sneed (Tenn.) 689.

3. See *supra*, II, A, 3, b.

To show character of possession.—Where a deed has been recorded for thirty years, a certified copy is admissible, in an action of ejectment, as tending to show the character of the grantor's possession and that there had been no ouster, although the acknowledgment thereof be defective in form. Robidoux *v.* Cassilegi, 10 Mo. App. 516.

To show execution of instrument.— Where the record of a deed was insufficient as such because of a defective acknowledgment it was held that a certified copy of such deed was nevertheless admissible to show the execution of the instrument, it having been sufficiently recorded to operate as an agreement between the parties to it. Guinn *v.* Musick, (Tex. Civ. App. 1897) 41 S. W. 723.

4. Tranum *v.* Wilkinson, 81 Ala. 408, 1 So. 201; Griesler *v.* McKennon, 44 Ark. 517; Hogans *v.* Carruth, 18 Fla. 587; Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65. See also Hastings *v.* Vaughn, 5 Cal. 315. And see *supra*, II, A, 3, c.

5. Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320; Rogers *v.* Adams, 66 Ala. 600; Merritt *v.* Phenix, 48 Ala. 87.

Where officer's name not signed.— A printed form of certificate of acknowledgment, to which the officer's name is not signed, though his name and style of office are written by him in the body of the paper, cannot operate as an attestation. Carlisle *v.* Carlisle, 78 Ala. 542.

6. Mutual L. Ins. Co. *v.* Corey, 54 Hun (N. Y.) 493, 7 N. Y. Suppl. 939.

B. In Instruments by Married Women — 1. Where Acknowledgment Required by Statute — a. Effect on Validity of Instrument. Where a statute authorizing a married woman to contract or convey prescribes the manner in which the instrument shall be acknowledged by her, an acknowledgment which is defective in substance gives the instrument no more operative force than if it were not acknowledged at all.[7] It is absolutely void as to her, and will not operate to convey any interest of hers, either legal or equitable.[8] In the absence of

7. See *supra*, II, B.

8. *Alabama.*— New England Mortg. Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164; Edinburgh-American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656; Boykin *v.* Smith, 65 Ala. 294.

Arkansas.— McGehee *v.* McKenzie, 43 Ark. 156; Conner *v.* Abbott, 35 Ark. 365; Stillwell *v.* Adams, 29 Ark. 346.

California.— Danglarde *v.* Elias, 80 Cal. 65, 22 Pac. 69; Bollinger *v.* Manning, 79 Cal. 7, 21 Pac. 375; Tolman *v.* Smith, 74 Cal. 345, 16 Pac. 189; Durfee *v.* Garvey, 65 Cal. 406, 4 Pac. 377; McLeran *v.* Benton, 43 Cal. 467; Ewald *v.* Corbett, 32 Cal. 493.

Illinois.— Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529; Murphy *v.* Williamson, 85 Ill. 149; Ridgeway *v.* Underwood, 67 Ill. 419; Board of Trustees *v.* Davison, 65 Ill. 124; Lindley *v.* Smith, 58 Ill. 250; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711; Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490; Hughes *v.* Lane, 11 Ill. 123, 50 Am. Dec. 436.

Indiana.— Woods *v.* Polhemus, 8 Ind. 60.

Kentucky.— Sutton *v.* Pollard, (Ky. 1891) 16 S. W. 126; Jefferson County Bldg. Assoc. *v.* Heil, 81 Ky. 513; McCormack *v.* Woods, 14 Bush (Ky.) 78; Pribble *v.* Hall, 13 Bush (Ky.) 61; Smith *v.* Shackleford, 9 Dana (Ky.) 452.

Maryland.— Greene *v.* Muse, 2 Harr. & J. (Md.) 62; Heath *v.* Eden, 1 Harr. & J. (Md.) 751; Roman Catholic Clergymen *v.* Hammond, 1 Harr. & J. (Md.) 580; Jacob *v.* Kraner, 1 Harr. & J. (Md.) 291; Peddicoart *v.* Rigges, 1 Harr. & J. (Md.) 293; Lewis *v.* Waters, 3 Harr. & M. (Md.) 430; Johns *v.* Reardon, 3 Md. Ch. 57.

Michigan.—Dewey *v.* Campau, 4 Mich. 565; Sibley *v.* Johnson, 1 Mich. 380.

Minnesota.— Edgerton *v.* Jones, 10 Minn. 427.

Missouri.—Bagby *v.* Emberson, 79 Mo. 139; Hoskinson *v.* Adkins, 77 Mo. 537; Reaume *v.* Chambers, 22 Mo. 36.

Montana.— American Sav., etc., Assoc. *v.* Burghardt, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507.

New Jersey.— Earle *v.* Earle, 16 N. J. L. 273; Armstrong *v.* Ross, 20 N. J. Eq. 109; Chandler *v.* Herrick, 11 N. J. Eq. 497.

New York.— Elwood *v.* Klock, 13 Barb. (N. Y.) 50.

North Carolina.— Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443; Southerland *v.* Hunter, 93 N. C. 310; Malloy *v.* Bruden, 88 N. C. 305; Scott *v.* Battle, 85 N. C. 184, 39 Am. Rep. 694; Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338; Rich *v.* Beeding, 24 N. C. 240.

Pennsylvania.— Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724; Thompson *v.* Morrow, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

Rhode Island.—Churchill *v.* Monroe, 1 R. I. 209.

South Carolina.— McLaurin *v.* Wilson, 16 S. C. 402.

Tennessee.— Brothers *v.* Harrison, (Tenn. Ch. 1897) 45 S. W. 446; Garth *v.* Fort, 15 Lea (Tenn.) 683; Wright *v.* Dufield, 2 Baxt. (Tenn.) 218; McCallum *v.* Petigrew, 10 Heisk. (Tenn.) 394; Henderson *v.* Rice, 1 Coldw. (Tenn.) 223.

Texas.— Harris *v.* Wells, 85 Tex. 312, 20 S. W. 68; Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866; Davis *v.* Agnew, 67 Tex. 206, 2 S. W. 43, 376; Johnson *v.* Bryan, 62 Tex. 623; Berry *v.* Donley, 26 Tex. 737; Stone *v.* Sledge, (Tex. Civ. App. 1894) 24 S. W. 697.

Vermont.— Pratt *v.* Battels, 28 Vt. 685.

Virginia.— Harrisonburg First Nat. Bank *v.* Paul, 75 Va. 594, 40 Am. Rep. 740; Healy *v.* Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94. But see Bryan *v.* Stump, 8 Gratt. (Va.) 241, 56 Am. Dec. 139, in which a defectively acknowledged deed of partition was held valid.

West Virginia.— Laidley *v.* Knight, 23 W. Va. 735; Tavenner *v.* Barrett, 21 W. Va. 656; McMullen *v.* Eagan, 21 W. Va. 233; Watson *v.* Michael, 21 W. Va. 568; Linn *v.* Patton, 10 W. Va. 187; Bartlett *v.* Fleming, 3 W. Va. 163.

Canada.— Amey *v.* Card, 25 U. C. Q. B. 501.

Equity will protect wife's rights.— Where a mortgage by husband and wife is defectively acknowledged a court of equity will protect the wife in a suit to foreclose such mortgage, although she make no defense against it. Conner *v.* Abbott, 35 Ark. 365.

Mortgage of both real and personal property.— Where husband and wife execute a mortgage conveying both real and personal property, an acknowledgment by the wife that she has relinquished her right of dower in the land is not sufficient to make the mortgage a valid encumbrance on her interest in the personalty as to third persons. Carle *v.* Wall, (Ark. 1891) 16 S. W. 293.

Where defect immaterial.— Where a married woman intervened in an action of trespass to try title against her husband, expressly admitting the execution of a deed from herself and husband to plaintiff, but alleging that it was in fact a mortgage, it was held that plaintiff need not introduce the deed, and the fact that the certificate to the wife's separate acknowledgment thereof was defective was immaterial. Urquhart *v.* Womack, 53 Tex. 616.

statutory authority to the contrary a court of equity will not compel her to perform specifically a defectively acknowledged agreement to convey,[9] and a subsequent conveyance by her of the same property will be valid.[10] Nor will the recording of the defective instrument give it any validity.[11]

b. Operation as Estoppel. It seems to be the general rule that a married woman will not be estopped to deny a defectively acknowledged contract or conveyance, even though she may have enjoyed the benefits.[12] But sometimes courts of equity will apply the doctrine of estoppel in such cases to avoid gross injustice.[13]

c. How Contract Ratified. Where a married woman's deed is void because defectively acknowledged it cannot be ratified during the coverture except by reacknowledgment,[14] in which case the instrument takes effect only from the time when properly acknowledged.[15] After the death of her husband it seems that she

Kentucky — Necessity to record certificate. — Under the Kentucky act of 1748 the certificate of a married woman's acknowledgment was required to be recorded in order to pass her title. Barnett *v.* Shackleford, 6 J. J. Marsh. (Ky.) 532, 22 Am. Dec. 100; Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114; Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164.

9. Koltenbrock *v.* Cracraft, 36 Ohio St. 584; Callahan *v.* Patterson, 4 Tex. 61, 51 Am. Dec. 712.

Virginia — Specific performance by virtue of statute.— Where a deed by husband and wife is defective as to its acknowledgment, so as not to be a valid instrument of conveyance, yet under the Virginia act of April 4, 1876, it may be a valid executory contract of sale which equity may specifically enforce. Clinch River Veneer Co. *v.* Kurth, 90 Va. 737, 19 S. E. 878; Virginia Coal, etc., Co. *v.* Roberson, 88 Va. 116, 13 S. E. 350.

Where purchaser's equity vested before marriage.— A purchaser in partition who pays the price into court has an equitable right to a specific performance against the tenant in common who was a minor when the partition was had, and who afterward, when married, received her share of the proceeds without a privy examination. The equity of the purchaser vested in the payment of the purchase-money into court, and the fact that the woman afterward married was a matter with which he had no concern. Farmer *v.* Daniel, 82 N. C. 152.

10. Brothers *v.* Harrison, (Tenn. Ch. 1897) 45 S. W. 446.

11. *Kentucky.*—Jefferson County Bldg. Assoc. *v.* Heil, 81 Ky. 513.

New York.— Bradley *v.* Walker, 138 N. Y. 291, 33 N. E. 1079 [*reversing* 60 N. Y. Super. Ct. 324, 22 N. Y. Civ. Proc. 1, 17 N. Y. Suppl. 383].

North Carolina.— Southerland *v.* Hunter, 93 N. C. 310.

Tennessee.— Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497.

West Virginia.— Tavenner *v.* Barrett, 21 W. Va. 656.

To give priority to estate by curtesy.— The recording of a mortgage by husband and wife of lands belonging to her separate estate is proper to give priority upon the estate by curtesy which might vest in the husband at the death of the wife, although the instrument be void as to her for a defect in the acknowledgment. Armstrong *v.* Ross, 20 N. J. Eq. 109.

12. Barrett *v.* Tewksbury, 9 Cal. 13; Stone *v.* Sledge, (Tex. Civ. App. 1894) 24 S. W. 697. And see *supra*, II, B, 2, c.

For a full discussion of the doctrine of equitable estoppel as applied to married women see HUSBAND AND WIFE.

13. Norton *v.* Nichols, 35 Mich. 148; Shivers *v.* Simmons, 54 Miss. 520, 28 Am. Rep. 372; McKinney *v.* Matthews, (Tex. 1888) 6 S. W. 793; Clayton *v.* Frazier, 33 Tex. 91. In McKinney *v.* Matthews, (Tex. 1888) 6 S. W. 793, 797, the court said: "The law extends its protection to the rights of married women, but it will not permit them to act fraudulently or inequitably to the injury of others."

14. Wentworth *v.* Clark, 33 Ark. 432; Drury *v.* Foster, 1 Dill. (U. S.) 460, 7 Fed. Cas. No. 4,096.

Where instrument incapable of ratification. — Where, six weeks after the husband had signed or procured someone to sign the name of his wife to a mortgage on the homestead, and had procured a notary to certify to the acknowledgment of the same by the wife, when in truth no such acknowledgment had been made, the wife, in the absence of her husband and at the solicitation and upon representations of the notary, signed and acknowledged before another notary an instrument attempting to ratify the mortgage, it was held that the act of the husband in signing his wife's name to the mortgage, or in procuring someone to do so, and the act of the notary certifying to its acknowledgment when in fact no such acknowledgment had been made, were criminal acts incapable of ratification. Howell *v.* McCrie, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584.

Instrument not curing defective acknowledgment.— A husband and wife executed a deed of trust reciting their inability to pay a mechanic's lien on their homestead, that the lien was duly executed and recorded, and that the deed was given in consideration of an extension of the debt. It was held that such instrument did not cure a defect in the acknowledgment to the mechanic's lien, since it was not executed for that purpose. Starnes *v.* Beitel, 20 Tex. Civ. App. 524, 50 S. W. 202.

15. Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497.

may ratify and confirm the deed by redelivery.[16] But it has been held that a mere parol adoption is not sufficient, the statute of frauds requiring a writing.[17]

d. Effect as to Husband. A conveyance by husband and wife which is void as to the wife by reason of a defect in the acknowledgment may yet be sufficient as a transfer of the husband's interest,[18] and a grantee may elect to take such interest in full satisfaction of the contract.[19] But the wife will not be prevented thereby from proceeding to enforce her own rights even against an innocent purchaser from the husband.[20]

2. Where No Acknowledgment Required by Statute. Under the statutes of some states a married woman is now empowered to transfer and encumber her property as if she were unmarried, and where this is the case a defective acknowledgment will not render the instrument void, but will have the same effect as in the case of instruments executed by other persons.[21]

16. Smith *v.* Shackleford, 9 Dana (Ky.) 452.

Parol evidence to show ratification.— Though a wife's deed is void for defect of acknowledgment, parol evidence may be given that she ratified it after her husband's death. Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724.

Tacit ratification.— Where an acknowledgment by a married woman was defective in substance, but she lived several years after her husband's death and never contradicted the deed, but received under it and did not assert her right of dower, she ratified the deed. Conklin *v.* Bush, 8 Pa. St. 514.

17. Price *v.* Hart, 29 Mo. 171. But see O'Keefe *v.* Handy, 31 La. Ann. 832, wherein a widow who had voluntarily ratified a mortgage debt by paying the interest thereon was held to be precluded from asserting that the statutory preliminary examination was not made.

Insufficient ratification.— Where a married woman conveys her interest in certain lands, and the conveyance is void because of a defective acknowledgment, and after her husband's death she states that she has a life-estate in the premises and conveys the same, these recitals do not validate the former deed, though by it she retains a life-interest. Sutton *v.* Casselleggi, 5 Mo. App. 111.

Defect cured by pleading in subsequent suit.— Where a married woman's acknowledgment was taken and certified by a deputy in his own name, it was held that the insufficiency of the certificate was cured by the subsequent averment of the married woman, in a suit brought by her when *discovert* and *sui juris*, that she united in the conveyance and acknowledged it before the regular deputy who was authorized to take her acknowledgment. Beuley *v.* Curtis, 92 Ky. 505, 18 S. W. 357.

18. *Arkansas.*—Shryock *v.* Cannon, 39 Ark. 434.

Illinois.— Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529.

Michigan.— Conrad *v.* Long, 33 Mich. 78.

Missouri.— Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209.

Ohio.— Dengenhart *v.* Cracraft, 36 Ohio St. 549.

Virginia.— Scott *v.* Gibbon, 5 Munf. (Va.) 86.

A deed purporting to be made by an attorney in fact for a husband and wife, but whose power of attorney is defectively acknowledged as to the wife, is nevertheless a good deed from the husband. Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

Where wife's joinder unnecessary.— The fact that an instrument bears an invalid acknowledgment by the wife will not prevent it from being admitted in evidence if there were no necessity for the wife to have joined in such instrument and it is properly acknowledged by the husband. Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587.

When statute of limitations begins to run. — Where a deed by husband and wife of a wife's land was not acknowledged and certified so as to pass the wife's right, it was held that she had no cause of action during the husband's life, and therefore the statute of limitations did not begin to run against her until his death. Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Where instrument valid as to another grantor.— The fact that a deed was not admissible to show a conveyance of the interest of one of the grantors, a married woman, because of its failure to show a proper acknowledgment on her part, is no ground for excluding it as a conveyance of the interest of another grantor therein whose acknowledgment was in proper form. Edens *v.* Simpson, (Tex. 1891) 17 S. W. 788.

19. Watson *v.* Michael, 21 W. Va. 568.

20. Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242; Pribble *v.* Hall, 13 Bush (Ky.) 61; Smith *v.* Shackleford, 9 Dana (Ky.) 452; Churchill *v.* Monroe, 1 R. I. 209; Harrisonburg First Nat. Bank *v.* Paul, 75 Va. 594, 40 Am. Rep. 740.

Suit by next friend during husband's life. — In Tennessee a conveyance, by husband and wife, of the wife's land, which is defectively acknowledged by the wife, does not estop her from suing by next friend, during the life of her husband, to regain possession. McCallum *v.* Petigrew, 10 Heisk. (Tenn.) 394.

21. Roberts *v.* Wilcoxson, 36 Ark. 355; Wedel *v.* Herman, 59 Cal. 507; Terry *v.* Eureka College, 70 Ill. 236; Andrews *v.* Shaffer, 12 How. Pr. (N. Y.) 441. See *supra*, III, A.

IV. Effect of Valid Acknowledgment.

A. To Entitle Instrument to Registration — 1. In General. As has been stated heretofore, the statutes usually require that an instrument shall be acknowledged or proved before it can be properly recorded.[22] Where the statute has been complied with in this respect the instrument is of course entitled to registration[23] and will operate as constructive notice[24] from the date of its deposit with the recording officer.[25]

2. Acknowledgment by One of Several Grantors. Under the statutes in several jurisdictions it has been held that an instrument executed by several grantors, even where they are husband and wife, may be recorded so as to give constructive notice on an acknowledgment by one of them alone.[26]

3. Acknowledgment Taken Outside the State. Provision is usually made by statute for taking acknowledgments outside the state, and an acknowledgment taken and certified in accordance with the laws of the state where the land lies will entitle the instrument to be recorded in that state.[27]

22. See *supra*, II, A, 2.

23. *Alabama.*— Herbert *v.* Hanrick, 16 Ala. 581.

Arkansas.— Griesler *v.* McKennon, 44 Ark. 517.

Nebraska.— Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434.

New Hampshire.— Brown *v.* Manter, 22 N. H. 468; Wark *v.* Willard, 13 N. H. 389.

North Carolina.— Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917.

Virginia.— Hassler *v.* King, 9 Gratt. (Va.) 115.

West Virginia.— Cox *v.* Wayt, 26 W. Va. 807. See, generally, Records.

As to the effect of recording where the acknowledgment is defective see *supra*, III, A, 2.

Married woman's acknowledgment.—Where a married woman's acknowledgment is duly and regularly taken, the deed so acknowledged is an assurance of record like a fine at common law. Paul *v.* Carpenter, 70 N. C. 502.

Where recording required within prescribed time.—Where the statute requires the instrument to be recorded within a prescribed time after the acknowledgment, registration after the expiration of such period is ineffectual (Butler *v.* Wheeler, 82 Ky. 475; Williams *v.* Wilson, 4 Dana (Ky.) 507; Anderson *v.* Turner, 2 Litt. (Ky.) 237); but a subsequent acknowledgment amounts to a reëxecution, and the instrument may be recorded within the prescribed time thereafter (Roanes *v.* Archer, 4 Leigh (Va.) 550).

Where mode of acknowledgment changed by statute.— Where an instrument is properly acknowledged under the existing statute, but before it is offered for record the mode of acknowledgment is altered by a new statute, the instrument is nevertheless entitled to be recorded without reacknowledgment under the later statute. Butler *v.* Dunagan, 19 Tex. 559.

24. Fryer *v.* Rockefeller, 63 N. Y. 268; Shults *v.* Moore, 1 McLean (U. S.) 520, 22 Fed. Cas. No. 12,824.

Maryland — Instrument not attested.— Under Md. Code, art. 24, § 19, a duly acknowledged deed, when recorded, operates as constructive notice, although the instrument be not attested as required by Md. Act 1856, c. 154, § 25. Brydon *v.* Campbell, 40 Md. 331.

25. Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Attachment before making of certificate.— Where a deed of real estate was acknowledged before the register of deeds and handed to him to be recorded, but no certificate of the acknowledgment was made, and at the same instant a creditor of the grantor attached the estate, it was held that the attachment had priority, as the deed was not entitled to registration until the certificate was made. Sigourney *v.* Larned, 10 Pick. (Mass.) 72.

26. *Illinois.*— Ayres *v.* McConnel, 3 Ill. 307.

Massachusetts.— Hayden *v.* Peirce, 165 Mass. 359, 43 N. E. 119; Perkins *v.* Richardson, 11 Allen (Mass.) 538; Palmer *v.* Paine, 9 Gray (Mass.) 56; Shaw *v.* Poor, 6 Pick. (Mass.) 86, 17 Am. Dec. 347; Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56; Dudley *v.* Sumner, 5 Mass. 438.

Michigan.— Rayner *v.* Lee, 20 Mich. 384.

Missouri.— Meyer *v.* Campbell, 12 Mo. 603.

Oregon.— Fleschner *v.* Sumpter, 12 Oreg. 161, 6 Pac. 506.

Contra, Sanders *v.* Pepoon, 4 Fla. 465.

Husband and wife — Defective execution by husband.— Where a deed from two grantors is properly acknowledged as to one only, the record of such deed is evidence of its execution only as to the one by whom it has been properly executed, and so, where a deed by husband and wife was properly executed and acknowledged by the wife, but was imperfectly executed by the husband, it was held that the recording was not proof of the existence of such deed. Hall *v.* Redson, 10 Mich. 21.

27. *Alabama.*— Toulmin *v.* Austin, 5 Stew. & P. (Ala.) 410.

Indiana.— Doe *v.* Vandewater, 7 Blackf. (Ind.) 6.

Kentucky.— McCullock *v.* Myers, 1 Dana (Ky.) 522; Calvert *v.* Fitzgerald, Litt. Sel. Cas. (Ky.) 388; Taylor *v.* Shields, 5 Litt.

4. Acknowledgment Taken in Another County. Usually an acknowledgment properly taken and certified in a county other than that in which the land lies entitles the instrument to record in the latter county.[28]

5. Refusal of Grantor to Acknowledge. By statute in some states, where the grantor refuses to acknowledge his deed, it may be recorded without acknowledgment upon proof by a subscribing witness.[29]

B. To Render Instrument Admissible in Evidence — 1. In General. Usually it is provided by statute that an instrument duly acknowledged or proved before a proper officer by the subscribing witnesses[30] may be received in evidence without further proof of its execution,[31] even though the execution thereof be

(Ky.) 295; Barbour *v.* Watts, 2 A. K. Marsh. (Ky.) 290; Ewing *v.* Savary, 3 Bibb (Ky.) 235.

Nebraska.—Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645.

New Hampshire.— Southerin *v.* Mendum, 5 N. H. 420.

Tennessee.— Murdock *v.* Memphis, etc., R. Co., 7 Baxt. (Tenn.) 557; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146.

Virginia.— Cales *v.* Miller, 8 Gratt. (Va.) 6.

For other questions relating to acknowledgments taken outside the state see *infra*, X, A, 3, and cross-references there given.

An acknowledgment taken in a foreign country according to the laws of the state in which the land lies entitles the deed to be registered in such state. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

A power of attorney for the conveyance of land was held to fall within 1 Va. Rev. Code, c. 99, § 7, authorizing deeds to be acknowledged before any two justices of the peace for any county or corporation of the United States. Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

Compliance with laws of place where taken. — Under the Wisconsin territorial statutes of 1839 a deed executed in the District of Columbia, conveying land lying in Wisconsin, was entitled to record in the latter territory if executed, acknowledged, and certified in accordance with the laws then in force in the District of Columbia. Smith *v.* Garden, 28 Wis. 685.

28. Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; Johns *v.* Reardon, 3 Md. Ch. 57; People *v.* Hascall, 18 How. Pr. (N. Y.) 118; McKissick *v.* Colquhoun, 18 Tex. 148.

North Carolina — Statute directory.—N. C. Code, § 1246, subsec. 2, providing that the clerk of the superior court for the county in which the land lies shall pass upon acknowledgments taken in other counties, is directory only, and a failure to comply therewith will not avoid the probate. Darden *v.* Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46; Young *v.* Jackson, 92 N. C. 144; Holmes *v.* Marshall, 72 N. C. 37. But where the adjudication that the acknowledgment was in due form and the order of registration were made by a clerk who was the mortgagee in the mortgage acknowledged, it was held that such adjudication and order and the registration thereunder were void. White *v.* Connelly, 105 N. C. 65, 11 S. E. 177; Turner *v.* Connelly, 105 N. C. 72, 11 S. E. 179.

29. Wendell *v.* Abbot, 43 N. H. 68; Catlin *v.* Washburn, 3 Vt. 25.

As to compelling acknowledgment see *infra*, XI.

Need not certify as to refusal.— In such case the magistrate's certificate need not recite the grantor's refusal to acknowledge. Catlin *v.* Washburn, 3 Vt. 25.

30. Proof equivalent to acknowledgment. — The statutes admitting acknowledged instruments usually apply as well to instruments proved by the subscribing witnesses. Van Cortlandt *v.* Tozer, 17 Wend. (N. Y.) 338, 20 Wend. (N. Y.) 423; Ballard *v.* Perry, 28 Tex. 347. And see McDill *v.* McDill, 1 Dall. (Pa.) 63, in which a deed with an ink seal, attested by one witness only and proved by him before a justice, was held to be admissible in evidence.

Where proof by witnesses necessary.—Under a statute requiring a deed to be proved by one or more of the subscribing witnesses it was held that such instrument was not admissible on the acknowledgment of the grantor alone. Denn *v.* Reid, 10 Pet. (U. S.) 524, 9 L. ed. 519.

31. *California.*— Wedel *v.* Herman, 59 Cal. 507; Wetherbee *v.* Dunn, 32 Cal. 106; Landers *v.* Bolton, 26 Cal. 393.

Georgia.— Doe *v.* Roe, 1 Ga. 3.

Illinois.— Holbrook *v.* Nichol, 36 Ill. 161; Reed *v.* Kemp, 16 Ill. 445; McConnel *v.* Johnson, 3 Ill. 522.

Iowa.— Morse *v.* Beale, 68 Iowa 463, 27 N. W. 461.

Kansas.— Andrews *v.* Reed, 57 Kan. 912, appendix, 48 Pac. 29; Wilkins *v.* Moore, 20 Kan. 538; Simpson *v.* Mundee, 3 Kan. 172; Anglo-American Land, etc., Co. *v.* Hegwer, 7 Kan. App. 689, 51 Pac. 915.

Maryland.— Hutchins *v.* Dixon, 11 Md. 29.

Minnesota.— McMillan *v.* Edfast, 50 Minn. 414, 52 N. W. 907; Ferris *v.* Boxell, 34 Minn. 262, 25 N. W. 592.

Missouri.— Tully *v.* Canfield, 60 Mo. 99; Smith *v.* Mounts, 1 Mo. 714.

Nebraska.—Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731; Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645; Honbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434.

Nevada.— Sharon *v.* Davidson, 4 Nev. 416.

New Jersey.— Den *v.* Wade, 20 N. J. L. 291.

New York.— Simmons *v.* Havens, 101 N. Y. 427, 5 N. E. 73; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Canandarqua

denied under oath in the answer.[32] But such instrument is not admissible for any purpose for which it would not be competent at common law.[33]

2. To What Instruments Rule Applies. The substitution of acknowledgment for the common-law proof of execution being of statutory creation, it follows that the admissibility of any particular instrument without further proof depends upon whether or not it falls within the meaning of the statute.[34] In the absence of

Academy *v.* McKechnie, 19 Hun (N. Y.) 62 [*affirmed* in 90 N. Y. 618]; Morris *v.* Wadsworth, 17 Wend. (N. Y.) 103.

North Carolina.— Coltrane *v.* Lamb, 109 N. C. 209, 13 S. E. 784.

Tennessee.— Henderson *v.* Crawford, 7 Yerg. (Tenn.) 439.

Texas.— Hancock *v.* Tram Lumber Co., 65 Tex. 225; Ballard *v.* Perry, 28 Tex. 347; Andrews *v.* Marshall, 26 Tex. 212.

Washington.— Gardner *v.* Port Blakely Mill Co., 8 Wash. 1, 35 Pac. 402.

Wisconsin.— Hinchliff *v.* Hinman, 18 Wis. 130.

United States.—Houghton *v.* Jones, 1 Wall. (U. S.) 702, 17 L. ed. 503; Marx *v.* Hanthorn, 30 Fed. 579; Edmondson *v.* Lovell, 1 Cranch C. C. (U. S.) 103, 8 Fed. Cas. No. 4,286.

In Indiana, however, it was held in two early cases that a deed was not admissible in favor of the grantee therein without proof of its execution, though duly acknowledged. Mullis *v.* Cavins, 5 Blackf. (Ind.) 77; Bowser *v.* Warren, 4 Blackf. (Ind.) 522.

Where record admissible, original admissible.— Under a statute or rule of court allowing the introduction in evidence of a record copy of a duly acknowledged instrument, the original itself is admissible without proof of execution. Knox *v.* Silloway, 10 Me. 201; Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Several grantors — Proper acknowledgment by some.— Where the acknowledgments of some of the grantors in a deed are regular, but those of the others are not, the deed is admissible as to the former, but not as to the latter. Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Edens *v.* Simpson, (Tex. 1891) 17 S. W. 788; Minor *v.* Powers, (Tex. Civ. App. 1896) 38 S. W. 400. See also Spect *v.* Gregg, 51 Cal. 198.

Wisconsin — Where grantor dead.— Wis. Rev. Stat. c. 86, 31, authorizing to be read in evidence a deed executed, witnessed, and acknowledged with all the formalities essential to entitle it to record, applies though the grantor be dead. Hinchliff *v.* Hinman, 18 Wis. 130.

Texas — Filing and three days' notice required.— The fact that the acknowledgment of a deed by the grantor is sufficient to entitle it to record does not render it admissible in evidence without filing and three days' notice to the opposite party as required by statute. Wiggins *v.* Fleishel, 50 Tex. 57.

Unnecessary acknowledgment.— Where an assignee in bankruptcy conveyed land belonging to a bankrupt estate by an order of the bankruptcy court, and the certificate of acknowledgment of the officer taking the same showed that the assignee personally appeared before the said officer, that his signature was subscribed to the said conveyance, and that he acknowledged the same to be his act and deed, it was held not error to admit the said deed in evidence without further proof, although no acknowledgment was necessary. Harris *v.* Pratt, 37 Kan. 316, 15 Pac. 216.

32. Wilkins *v.* Moore, 20 Kan. 538; Anglo-American Land, etc., Co. *v.* Hegwer, 7 Kan. App. 689, 51 Pac. 915.

33. Ferris *v.* Boxell, 34 Minn. 262, 25 N. W. 592.

34. Notes secured by mortgage.— In the trial of an action for the foreclosure of a mortgage, the mortgage itself, with the certificate of acknowledgment attached, is *prima facie* evidence as well of the signature and execution of the instrument by the mortgagor as of the notes secured thereby and described therein. Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587.

New York — *Assignment for benefit of creditors.*— An assignment of property in trust for the benefit of creditors, a bill of sale, and an agreement may be admitted in evidence without further proof if duly acknowledged as required by law. Sheldon *v.* Stryker, 42 Barb. (N. Y.) 284.

Assignment of patent.—Under the statutes of New York an assignment of a patent, duly acknowledged before a notary public, is sufficiently proved, and it is not incumbent upon complainant in an action for infringement to prove the signature of the assignor. New York Pharmical Assoc. *v.* Tilden, 21 Blatchf. (U. S.) 190, 14 Fed. 740.

Power of attorney to transfer stock.— Under the act of 1833 relative to proceedings in suits and authorizing the acknowledging of written instruments, a power of attorney duly acknowledged by a subscribing witness, giving authority to transfer stock, and an assignment thereunder, is competent evidence of the transfer. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

California — *Statute retrospective.*— The California conveyance act authorizing the admission in evidence of instruments proved in the manner prescribed is not limited to instruments executed after its passage, but applies to those previously executed. Clark *v.* Troy, 20 Cal. 219.

Tax deed.— A properly acknowledged tax deed is admissible in evidence without further proof. Wetherbee *v.* Dunn, 32 Cal. 106.

Alabama — Deed by foreign corporation.— Ala. Code, § 1798, providing for the admission in evidence of conveyances acknowledged and recorded within twelve months, without further proof, applies to a deed by a foreign corporation, bearing the corporate seal, signed by its officers and acknowledged by them before a United States consul. Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91.

any statute authorizing it the instrument cannot be admitted by virtue of the acknowledgment, but must be duly proved.[35] Thus, where the only purpose of the statute is to authorize the registration of the instrument, the acknowledgment has no probative effect.[36]

3. Necessity for Registration. Under some statutes an instrument must be recorded as well as acknowledged, to be admissible without proof of execution.[37] But under others the acknowledgment alone renders it admissible regardless of registration.[38]

Minnesota — Indemnity bond.— An official certificate of acknowledgment of the execution of an indemnity bond constitutes *prima facie* proof of its execution. Romer *v.* Conter, 53 Minn. 171, 54 N. W. 1052.

Idaho — Bill of sale.— A bill of sale made and executed June 23, 1890, cannot be introduced in evidence unless it complies with the Idaho act of Feb. 7, 1889 (15 Sess. Laws, p. 49), in that it must be acknowledged before a notary public, or other officer authorized to take acknowledgments, and must be recorded in the office of the county recorder in the same manner as a deed. Ferbrache *v.* Martin, (Ida. 1893) 32 Pac. 252.

35. Webber *v.* Stratton, 89 Me. 379, 36 Atl. 614; Eichelberger *v.* Sifford, 27 Md. 320; Benzien *v.* Lenoir, 5 N. C. 194.

A will is not a conveyance, within the act relating to conveyances, so that it can be read in evidence on the certificate of proof or of acknowledgment by a notary. Carpentier *v.* Gardiner, 29 Cal. 160.

Deed conveying equitable interest.— The ordinance of 1787 for the government of the Northwestern Territory, providing that real estate may be conveyed by an instrument signed, sealed, and delivered, and proved by two witnesses, provided it be acknowledged, refers only to legal conveyances, and a deed purporting to convey an equitable interest in land is not proved by an acknowledgment. Lewis *v.* Baird, 3 McLean (U. S.) 56, 15 Fed. Cas. No. 8,316.

Power of attorney not affecting land.— In some states a power of attorney which does not affect real estate is not required to be recorded, and the fact of such instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of execution. Stevens *v.* Irwin, 12 Cal. 306; Oppenheimer *v.* Giershofer, 54 Ill. App. 38.

Power of attorney by partnership.— The execution of a power of attorney by a partnership cannot be proven by a notary's acknowledgment alone, since, under Cal. Civ. Code, § 1185, the notary is not required to know or to certify who are included as members in the partnership, but only that the person making the acknowledgment is the one he claims to be; and outside evidence is therefore necessary in order to show the existence of the partnership and that the person mentioned is a partner. Malloye *v.* Coubrough, 96 Cal. 649, 31 Pac. 622.

36. Hogans *v.* Carruth, 18 Fla. 587; Winlock *v.* Hardy, 4 Litt. (Ky.) 272.

Alabama — Trust deeds.— Under the Alabama act of 1838 directing that trust deeds which are not recorded within the time limited shall be void as to creditors and subsequent purchasers without notice, it was held that the acknowledgment and registration have effect only as to notice and did not entitle the instrument to admission in evidence without further proof, there being no provision in the statute to that effect, as there is in the case of deeds of real estate. Ravisies *v.* Alston, 5 Ala. 297; Bradford *v.* Dawson, 2 Ala. 203.

Texas — Chattel mortgages.— Under the Texas act of April 22, 1879, permitting the registration of chattel mortgages without acknowledgment, such mortgage, though registered, is not in any case admissible in evidence except upon proof as at common law. Betterton *v.* Echols, 85 Tex. 212, 20 S. W. 63.

37. Griesler *v.* McKennon, 44 Ark. 517; Wilson *v.* Spring, 38 Ark. 181; Watson *v.* Billings, 38 Ark. 278, 42 Am. Rep. 1; Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523, 9 S. W. 479; Hancock *v.* Tram Lumber Co., 65 Tex. 225; Gaines *v.* Ann, 26 Tex. 340; Dennis *v.* Sanger, 15 Tex. Civ. App. 411, 39 S. W. 997; Joplin *v.* Johnson, 4 N. Brunsw. 541.

In Kentucky the instrument must be recorded within the time prescribed by statute, else it cannot be given in evidence without due proof of its execution. Butler *v.* Wheeler, 82 Ky. 475; Williams *v.* Wilson, 4 Dana (Ky.) 507; Anderson *v.* Turner, 2 Litt. (Ky.) 237.

Alabama — Must be recorded within a year from date.— The certificate of acknowledgment in substantial compliance with the prescribed form makes the deed self-proving if recorded within twelve months from its date. If not so recorded its execution must be proved. Carlisle *v.* Carlisle, 78 Ala. 542; Coker *v.* Ferguson, 70 Ala. 284.

38. *Alabama.*— Toulmin *v.* Austin, 5 Stew. & P. (Ala.) 410.

Indiana.— Jordan *v.* Corey, 2 Ind. 385, 52 Am. Dec. 516.

Pennsylvania.— Keichline *v.* Keichline, 54 Pa. St. 75; Hamilton *v.* Galloway, 1 Dall. (Pa.) 93.

Virginia.— Hassler *v.* King, 9 Gratt. (Va.) 115.

West Virginia.— Wise *v.* Postlewait, 3 W. Va. 452.

Record failing to show acknowledgment.— An original deed bearing a proper certificate of acknowledgment is admissible in evidence without further proof, notwithstanding the record thereof fails to show any acknowledgment. Gardner *v.* Port Blakely Mill Co., 8 Wash. 1, 35 Pac. 402.

4. Instruments Acknowledged Outside the State. A deed acknowledged in another state according to the laws of the state where the land lies is entitled to be received in evidence without further proof of execution;[39] and this is usually true although the instrument be not recorded.[40] Under some statutes the instrument is admissible in evidence if the acknowledgment conforms to the laws of the place where taken,[41] and where this is the case it is incumbent upon the party seeking to introduce the instrument to show conformity with such laws.[42]

5. Acknowledgment after Commencement of Suit. In the case of persons other than married women an instrument may be admitted in evidence, though not acknowledged or proved before the commencement of the suit; it is sufficient if the acknowledgment is made at any time before the instrument is actually offered in evidence.[43] But since, in the case of a married woman's deed, no title passes until it is duly acknowledged, such a deed is not admissible on an acknowledgment made after suit was brought, for plaintiff cannot avail himself of a title which did not subsist in him until after he commenced his suit.[44]

6. Admissibility of Record Copies. As a general principle in the law of evidence a party offering to prove a fact by a deed must produce the deed and prove its existence.[45] But by virtue of statute in most states a record copy of a duly acknowledged instrument is admissible as original evidence without proof of the execution of the instrument.[46] And where a deed is acknowledged in another

39. *Alabama.*— Hart *v.* Ross, 57 Ala. 518.
Illinois.— Dawson *v.* Hayden, 67 Ill. 52; Phillips *v.* People, 11 Ill. App. 340.
Louisiana.— Fellows *v.* Jeter, 10 La. Ann. 181.
Michigan.— Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.
Nebraska.— Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645.
Pennsylvania.— Sandford *v.* Decamp, 8 Watts (Pa.) 542.
Tennessee.— McGuire *v.* Hay, 6 Humphr. (Tenn.) 419.
United States.— Little *v.* Herndon, 10 Wall. (U. S.) 26, 19 L. ed. 878; Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153.
For other questions relating to acknowledgments taken outside the state see *infra*, X, A, 3.
Where no statute authorizing admission.— The record of a deed in Colorado, acknowledged in Canada when Colorado was a territory and when there was no law authorizing proof by acknowledgment of the execution of a deed to land therein by acknowledgment taken outside the United States, is not admissible in evidence. Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.
Tennessee — Act prospective in operation. — The Tennessee act of 1856 authorizing the admission in evidence of deeds acknowledged before clerks of courts in other states was prospective in its operation. McEwen *v.* Den, 24 How. (U. S.) 242, 16 L. ed. 672.

40. Toulmin *v.* Austin, 5 Stew. & P. (Ala.) 410; Wise *v.* Postlewait, 3 W. Va. 452.

41. Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586; Brownson *v.* Scanlan, 59 Tex. 222. See also *infra*, X, A, 3, b.

42. Kruger *v.* Walker, 94 Iowa 506, 63 N. W. 320. But see Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130, wherein it was held that the burden was on the person questioning the admissibility of the instrument to show that the certificate was not in due form.

43. *Illinois.*— Riggs *v.* Henneberry, 58 Ill. 134.
Kansas.— Babbitt *v.* Johnson, 15 Kan. 252.
New York.— Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; Wetterer *v.* Soubirous, 22 Misc. (N. Y.) 739, 49 N. Y. Suppl. 1043; Sheldon *v.* Stryker, 27 How. Pr. (N. Y.) 387, 42 Barb. (N. Y.) 284.
Pennsylvania.— Kelly *v.* Dunlap, 3 Penr. & W. (Pa.) 136.
Tennessee.— Ward *v.* Daniel, 10 Humphr. (Tenn.) 603.
Vermont.— Pitkin *v.* Leavitt, 13 Vt. 379.
United States.—Lanning *v.* Dolph, 4 Wash. (U. S.) 624, 14 Fed. Cas. No. 8,073.

44. Carn *v.* Haisley, 22 Fla. 317; Perry *v.* Calhoun, 8 Humphr. (Tenn.) 551; Hollingsworth *v.* Flint, 101 U. S. 591, 25 L. ed. 1028.

45. For a full discussion of the admissibility of record copies see Evidence.

46. *Kansas.*— Simpson *v.* Mundee, 3 Kan. 172.
Maryland.— Gassaway *v.* Dorsey, 4 Harr. & M. (Md.) 405.
Massachusetts.— Samuels *v.* Borrowscale, 104 Mass. 207.
Minnesota.—Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659.
Tennessee.— Owen *v.* Owen, 5 Humphr. (Tenn.) 352.
United States.—Marx *v.* Hanthorn, 30 Fed. 579.
Inability to produce the original.— Under Tex. Rev. Stat. art. 2257, a certified copy of an instrument duly acknowledged and recorded is admissible in evidence without further proof if it is shown that the party offering it is unable to produce the original. Hancock *v.* Tram Lumber Co., 65 Tex. 225; Andrews *v.* Marshall, 26 Tex. 212.
In Maine, under a rule of court, an office copy of a deed is made admissible as evidence without proof, where the realty is the subject-matter of the suit. Hutchinson *v.* Chadbourne, 35 Me. 189. But it is admissible

state in accordance with the laws of the state where the land lies, and is recorded in the latter state, a record copy is admissible in evidence.[47]

C. As Raising Presumption of Due Execution — 1. In General. The acknowledgment of an instrument raises a presumption of its due execution,[48] and is a fact entitled to consideration in determining whether there has been a delivery,[49] though it will not be taken as conclusive evidence of delivery.[50]

2. Adoption of Signature. Where a grantor in a deed acknowledges the same he thereby adopts the signature as his own, although his name may have been signed by another without his authority.[51] And so, under a statute not requiring

only where the original has been lost, and it is not sufficient to show that the original is in the hands of defendant's attorney. Bird *v.* Bird, 40 Me. 392.

Missouri — Military bounty land.— Where deeds conveying military bounty land in Missouri are executed in other states and acknowledged in accordance with the laws of such states, but not in accordance with the laws of Missouri, certified copies thereof can be read in evidence on proof of the loss of the original (Barton *v.* Murrain, 27 Mo. 235, 72 Am. Dec. 259); but if duly acknowledged according to the laws of Missouri a certified copy is to be received on the same terms as deeds with valid acknowledgment (Tully *v.* Canfield, 60 Mo. 99 [*overruling* Totten *v.* James, 55 Mo. 494]; Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096).

A certified copy of a lost instrument, if duly acknowledged, is to be received on the same terms as other deeds with valid acknowledgments. Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096.

As secondary evidence.— Where a statute which provides for the recording of a deed upon proof by the witness contains no provision regarding the admission of such deed or a record copy thereof in evidence, a certified copy may be read, if not as primary, at least as secondary evidence to show that the original is lost or not within the control of the party. Trammell *v.* Thurmond, 17 Ark. 203.

47. Harris *v.* Price, 14 B. Mon. (Ky.) 414; Peterson *v.* Ankrom, 25 W. Va. 56.

48. Van Orman *v.* McGregor, 23 Iowa 300; Lennon *v.* White, 61 Minn. 150, 63 N. W. 620; Albany County Sav. Bank *v.* McCarty, 71 Hun (N. Y.) 227, 24 N. Y. Suppl. 991.

As to the conclusiveness of the certificate see *infra*, XV, A.

Presumption that officer performed his duty. — The officer will be presumed to have performed his duty, and will not, without proof, be supposed to have taken the acknowledgment before the deed was executed. Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

49. Alexander *v.* Kermel, 81 Ky. 345; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459; Hutchins *v.* Dixon, 11 Md. 29; Stewart *v.* Redditt, 3 Md. 67. And see *infra*, IX, D.

50. Hawes *v.* Hawes, 177 Ill. 409, 53 N. E. 78; Alexander *v.* Kermel, 81 Ky. 345; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459; Den *v.* Farlee, 21 N. J. L. 279; Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

Where no acceptance by grantee.— Where an agreement was made for the sale of land at a certain sum per rod, and a deed was made out, but not acknowledged and delivered, because the land had not been measured, and the owner afterward acknowledged the deed and sent it to the registry without the knowledge of the grantee, the grantee had no title as against a creditor of the grantor who had attached the land before the grantee had accepted the deed, and had afterward levied an execution upon it. Samson *v.* Thornton, 3 Metc. (Mass.) 275, 37 Am. Dec. 135.

Deed found in grantor's possession.—Where a deed shows upon its face that it was signed and acknowledged, but does not show that it was ever delivered, and it is found in the possession of the grantor at the time of his death, the presumption is that the deed was never delivered, and it is upon the party claiming that it was delivered to prove that such was a fact. Burton *v.* Boyd, 7 Kan. 17.

51. *Alabama.*— McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30.

Colorado.—Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

Illinois.— Tunison *v.* Chamblin, 88 Ill. 378; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; O'Donnell *v.* Kelliher, 62 Ill. App. 641.

Iowa.— Morris *v.* Sargent, 18 Iowa 90.

Pennsylvania.— Duff *v.* Wynkoop, 74 Pa. St. 300.

South Dakota.— Northwestern Loan, etc., Co. *v.* Jonasen, 11 S. D. 566, 79 N. W. 840.

Signature misspelled.— The facts that "Charles Y. Rogers" was named as grantor in the deed and in the certificate of acknowledgment, and that for many years afterward he asserted no claim to the land, warranted a finding against his denial that he executed the deed, though the signature of the grantor as recorded was "Charles F. Roggers." Rogers *v.* Manley, 46 Minn. 403, 49 N. W. 194. *Compare* Boothroyd *v.* Engles, 23 Mich. 19, in which a deed signed by "Harmon S." was acknowledged by "Hiram S."

Finding of due acknowledgment.— On an issue as to the execution of an instrument the officer who certified the acknowledgment testified that he took it at his office and that he was not certain that the person who acknowledged the instrument was the grantor therein. The signature was not in the latter's handwriting, and it appeared almost certain that when the acknowledgment was taken such grantor was too ill to leave the house, and there was some evidence that she was unable to execute the papers at her home. There was, however, evidence that on that date the grantor acknowledged another writing before the same officer, and her phy-

a deed to be subscribed at the end by the grantor, it was held that a deed wholly written by another, at the request of the grantor, wherein the grantor's name appeared only in the granting clause, was valid and operative when acknowledged by him before the proper officer.[52]

3. Where Instrument Void When Acknowledged. Where a deed is void when acknowledged, the acknowledgment will not render it effective.[53]

D. As Dispensing with Witnesses. Usually, where the statute requires attesting witnesses to a deed, a proper acknowledgment will operate as a substitute for such attestation.[54]

E. In Deeds by Married Women. A married woman's deed properly acknowledged in the mode prescribed by the statute is as effectual to convey her interest as if she were unmarried.[55] But if, at the time of acknowledgment, the instrument be incomplete by reason of blanks therein, it will not be binding on her when afterward filled up.[56] And so a proper acknowledgment by the wife will not render valid an instrument which is void for other reasons,[57] as, for

sician testified that she was then able to execute papers. It was held that a finding by a referee that the paper was duly acknowledged was supported by the evidence. Albany County Sav. Bank *v.* McCarty, 71 Hun (N. Y.) 227, 24 N. Y. Suppl. 991.

52. Newton *v.* Emerson, 66 Tex. 142, 18 S. W. 348.

53. Helton *v.* Asher, (Ky. 1898) 46 S. W. 22; Drury *v.* Foster, 1 Dill. (U. S.) 460, 7 Fed. Cas. No. 4,096.

As to the effect of the acknowledgment of a void instrument by a married woman see *infra*, IV, E.

Illinois — Chattel mortgage.— Ill. Stat. (1856), p. 136, provides that chattel mortgages shall be invalid against third persons when the possession is not delivered to and does not remain with the mortgagee, unless made, acknowledged, and recorded as provided; that in such case the mortgage must be acknowledged before a justice of the peace of the district in which the mortgagor resides; that the justice shall enter in his docket a memorandum of his acknowledgment, containing a description of the mortgaged property; and that the mortgage shall be recorded in the county recorder's office. It was held that the fact that a chattel mortgage on a stock of goods was so acknowledged and recorded did not validate it as to third persons, where it permitted the mortgagor not only to retain possession but to sell the same in the usual course of trade. Davis *v.* Ransom, 18 Ill. 396.

Pennsylvania — Sheriff's deed.— The acknowledgment, by a sheriff, of a deed of lands sold by him under execution, will cure irregularities in the sale (McFee *v.* Harris, 25 Pa. St. 102; Shields *v.* Miltenberger, 14 Pa. St. 76); but it will not cure a want of authority on his part to make the sale (St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96; Cash *v.* Tozer, 1 Watts & S. (Pa.) 519).

54. Sharpe *v.* Orme, 61 Ala. 263; Blair *v.* Campbell, (Ky. 1898) 45 S. W. 93; Pearson *v.* Davis, 41 Nebr. 608, 59 N. W. 885; U. S. Deposit Fund Com'rs *v.* Chase, 6 Barb. (N. Y.) 37. But see White *v.* Denman, 1 Ohio St. 110, wherein it was held that where a mortgage was defective by having but one attesting witness the signature of the justice of the peace to his certificate of acknowledgment would not supply the deficiency.

As to the necessity for subscribing witnesses see Deeds.

55. Morris *v.* Harris, 9 Gill (Md.) 19; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Rollins *v.* Menager, 22 W. Va. 461.

Mortgage to secure husband's debt.— A mortgage of the wife's real estate, executed by husband and wife to secure the debt of the former, and acknowledged by the wife in the manner required by law in respect to absolute conveyances, is sufficient to bind her estate. Jamison *v.* Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536.

Operates only to convey wife's interest.— Where husband and wife execute a deed of the husband's land with covenants, the acknowledgment of the wife operates only to convey her interest; and therefore she should not be joined as a co-defendant with her husband in an action for breach of the covenants. Whitbeck *v.* Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272.

56. Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

As to when the acknowledgment should properly be made see *infra*, IX.

Fraudulent delivery by husband.—Where a husband who joins his wife in a deed in which the grantee's name is left blank fraudulently delivers the same to a purchaser for a smaller sum than that specified therein, which the wife agreed to take when she acknowledged the instrument, no title passes. Cole *v.* Bammel, 62 Tex. 108.

Where a husband and wife signed and acknowledged a blank mortgage, and authorized a third person to fill up the blanks by making it payable to one C for a certain amount, and he afterward filled it up in the absence and without the knowledge of the wife, so as to make it payable to A in a larger amount, it was not the mortgage of the wife. Ayres *v.* Probasco, 14 Kan. 175.

57. Linsley *v.* Brown, 13 Conn. 192; Switzer *v.* Switzer, 26 Gratt. (Va.) 574.

Unsigned deed.— A notary public annexed a formal acknowledgment to an unsigned deed in his possession, and took it to the purported grantors, wife and husband, for their signatures. The property described was the

instance, an attempted conveyance by husband and wife which is properly acknowledged by her, but in which she has not joined as a grantor.[58]

V. Who May Acknowledge.

A. In General. No one can acknowledge a deed except the grantor or some one duly authorized to act for him.[59] Under some statutes the acknowledgment of an instrument by one of several grantors is sufficient to entitle it to registration[60] and to render it admissible in evidence as against the one who acknowledges.[61]

B. Attorney or Agent — 1. In General. Generally authority given to an attorney or agent to execute an instrument includes by implication the power to make the acknowledgment,[62] and it has been held that the power under which he acts need not be proved.[63]

2. For Married Woman. In the absence of statutory authority a married woman cannot authorize an attorney to make for her the acknowledgment required by statute: she must acknowledge her deed in person.[64]

wife's statutory estate, and the deed was invalid unless signed by the husband as required by Code, § 2348. The wife signed the deed, but the husband would not. Without correcting the acknowledgment the notary delivered the deed to the grantee, who some days afterward prevailed on the husband to sign it, but no acknowledgment was made. It was held, that the acknowledgment was void for lack of jurisdiction. Cheney *v.* Nathan, 110 Ala. 254, 20 So. 99, 55 Am. St. Rep. 26.

Mortgage to non-existent corporation.— A husband and wife gave a bond and mortgage to secure a subscription for certain bank stock, payable to the president of the bank. It was held that, as there was no such corporation as the bank at the time of the execution of the mortgage, the bond and mortgage, though valid as to the husband upon a delivery subsequent to organization, were invalid as to the wife, no new acknowledgment as to her being shown. Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

58. Hawkins *v.* Gould, 3 Harr. & J. (Md.) 243.

Relinquishment of dower.— Though a married woman set forth in her acknowledgment that she had relinquished dower, if the deed itself contain no relinquishment a purchaser will not be required to accept the deed. Beavers *v.* Baucum, 33 Ark. 722; Witter *v.* Biscoe, 13 Ark. 422.

59. Boothroyd *v.* Engles, 23 Mich. 19, in which it was held that where a deed purporting to be signed by "Harmon S." was acknowledged by "Hiram S.," it was held that the record was not admissible in the absence of proof that the two names belonged to the same person. But see *supra*, IV, C, 2.

Acknowledgment by guardian.— Where a deed was executed and acknowledged "W. M. D., guardian for M. B.," and was acknowledged by the guardian "to be his act and deed as guardian aforesaid, and thereby the act and deed of the said M.," it was held a sufficient acknowledgment. Van Ness *v.* U. S. Bank, 13 Pet. (U. S.) 17, 10 L. ed. 38.

Alabama — Trust deed.— The act of 1828 (Aikin's Dig. p. 208, § 5) provides that all trust deeds shall be void against creditors and subsequent purchasers without notice unless recorded within thirty days in the office of the county where the estate may be situated. Section 7 provides that such deeds are to be proved or acknowledged as deeds and conveyances of real estate. The act of 1812 provides a form of the certificate of acknowledgment, which is that the grantor acknowledges, before the proper officer, that he signed, sealed, and delivered the deed, on the day and year therein mentioned, to the grantee. It was held that a trust deed acknowledged by the grantor need not be acknowledged also by the trustee or *cestui*. Bradford *v.* Dawson, 2 Ala. 203; Williams *v.* Jones, 2 Ala. 314.

60. See *supra*, IV, A, 2.

61. See *supra*, IV, B, 1.

62. Robinson *v.* Mauldin, 11 Ala. 977; Talbert *v.* Stewart, 39 Cal. 602; Elliott *v.* Osborn, 1 Harr. & M. (Md.) 146; Onion *v.* Hall, 1 Harr. & M. (Md.) 173; Lowenstein *v.* Flaurand, 11 Hun (N. Y.) 399; Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54.

Acknowledged as act of principal.— Where a deed is executed by three attorneys in fact, the acknowledgment should be made by all of the attorneys as an act of their principal, not of their own. Peters *v.* Condron, 2 Serg. & R. (Pa.) 80.

Plats of dedicated land.—The owner of the land sought to be made part of a city must himself acknowledge the map or plat of such land (Armstrong *v.* Topeka, 36 Kan. 432, 13 Pac. 843), and, in the absence of statutory authority, an acknowledgment under a power of attorney is not sufficient (Gosselin *v.* Chicago, 103 Ill. 623). See, generally, Dedication.

63. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

As to what the certificate must show where the acknowledgment is made by an attorney or agent see *infra*, XII, G, 1, a, (II), (A), (2).

As to the necessity for acknowledging a power of attorney see Principal and Agent.

64. *Alabama.*—Waddell *v.* Weaver, 42 Ala. 293.

C. Infant Married Woman. Where a married woman is also a minor the disability arising from her infancy remains, though she execute and acknowledge a deed in the form prescribed by statute for married women. Such instrument will be governed by the same rules that apply to other deeds by infants, and the statutory acknowledgment gives it no additional force.[65]

D. Deputy. Where an official deed is executed by a deputy he is the proper person to make the acknowledgment;[66] but as a general rule the deputy must act in the name of his principal.[67]

E. Officer Whose Authority Has Expired. Since the acknowledgment of a deed for most purposes relates back to the time of its execution, a deed executed by an officer in his official capacity may properly be acknowledged by him after his term of office has expired or his authority has been revoked.[68]

F. Corporation. An acknowledgment of a deed or other instrument in behalf of a corporation can be made only by an officer or representative authorized by the corporation to execute such instrument,[69] which authority is generally required to be shown.[70] An acknowledgment by individuals in such cases is

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Delaware.— Lewis *v.* Coxe, 5 Harr. (Del.) 401.

Indiana.— Dawson *v.* Shirley, 6 Blackf. (Ind.) 531.

United States.— Mexia *v.* Oliver, 148 U. S. 664, 13 S. Ct. 754, 37 L. ed. 602; Holladay *v.* Daily, 19 Wall. (U. S.) 606, 22 L. ed. 187. But see Patton *v.* King, 26 Tex. 685, 84 Am. Dec. 596.

65. Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114; Porch *v.* Fries, 18 N. J. Eq. 204; Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Priest *v.* Cummings, 16 Wend. (N. Y.) 617; Sandford *v.* McLean, 3 Paige (N. Y.) 117; Card *v.* Patterson, 5 Ohio St. 319.

As to whether such deeds are void or voidable only see INFANTS.

When deed open to impeachment.— Under the North Carolina act of 1751 which provided proceedings for the execution and registration of a deed made by a wife and husband, and declared that when so executed, etc., it "shall be valid to convey all the estate and title which such wife may or shall have in any lands, tenements, or hereditaments so conveyed as if done by fine and recovery or any other ways or means whatsoever," it was held that a deed by an infant wife, having the effect of a fine and recovery, might be impeached during her minority, but not afterward. Kidd *v.* Venable, 111 N. C. 535, 16 S. E. 317.

Ratification after coming of age.— Where the certificate of a married woman's acknowledgment stated that she was of full age when in fact she was a minor, it was held that she could ratify the instrument only by a separate acknowledgment after coming of age. Ledger Loan, etc., Assoc. *v.* Cook, 6 Wkly. Notes Cas. (Pa.) 428.

Presumption that wife of full age.—Where the certificate does not show that the *feme covert* grantor was of the age of twenty-one years it will be presumed that she was of full age until the contrary appears. Battin *v.* Bigelow, Pet. C. C. (U. S.) 452, 2 Fed. Cas. No. 1,108.

66. Terrell *v.* Martin, 64 Tex. 121; Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817; Huey *v.* Van Wie, 23 Wis. 613. And see Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645, wherein a certificate of sale executed in the sheriff's name by the deputy was acknowledged by the latter.

67. Samuels *v.* Shelton, 48 Mo. 444; Marx *v.* Hanthorn, 30 Fed. 579. See, generally, OFFICERS.

68. Foster *v.* Dugan, 8 Ohio 87; Lemington *v.* Stevens, 48 Vt. 38; New Hampshire Land Co. *v.* Tilton, 19 Fed. 73. Youngblood *v.* Cunningham, 38 Ark. 571, wherein it was held that acknowledgment of a deed by a sheriff, after the expiration of his term, for land sold under execution from a chancery court, would not invalidate the sale; and that the purchaser might apply to the court to confirm the sale, if it had not been done, and order the sheriff in office to make him a deed.

Person appointed to execute sheriff's deed. — An officer appointed, under Mo. Rev. Stat. § 2400, to execute and acknowledge a deed to a purchaser at a sale made by a sheriff since removed or deceased, has only the powers that the latter would have had if not removed or deceased. *In re* Guenzler, 70 Mo. 39.

69. Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111; Hopper *v.* Lovejoy, 47 N. J. Eq. 573, 21 Atl. 298, 12 L. R. A. 588.

As to the mode of taking the acknowledgment of a corporation see *infra*, X, A. 2.

As to what the certificate must show where the acknowledgment was made by a corporation see *infra*, XII, G, 1, a, (II), (A), (3).

As to the right of a stockholder to take the acknowledgment see *infra*, VI, B, 1, d.

Tax deed in name of state and county.—A certificate of acknowledgment of a tax deed executed by a county clerk, which stated that the instrument was "the deed of the state and county," is sufficient, under Wis. Laws (1859), c. 22, § 50, requiring the county clerk to execute a tax deed in the name of the state and county as grantors. Wilson *v.* Henry, 40 Wis. 594.

70. Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111. But see Canandarqua Academy *v.* McKechnie, 19 Hun (N. Y.) 62, wherein it

a nullity.[71] Usually the person authorized by the corporation to affix its corporate seal is the proper one to make the acknowledgment.[72] Thus deeds have been held sufficient where acknowledged in behalf of the corporation by its president,[73] president and secretary,[74] vice-president,[75] secretary,[76] or cashier.[77] Where the seal has not been confided to any particular officer, a deed executed and acknowledged by the board of directors is sufficient.[78]

G. Partnership. In the absence of any statute to the contrary an acknowledgment may be made in behalf of a partnership by one of the partners describing himself as such[79] and with a proper showing of his authority to act in behalf of the firm.[80] But where it is necessary for all the partners to join in the execution of the instrument the acknowledgment should be made by all.[81]

VI. Who May Take Acknowledgments.

A. What Persons Qualified — 1. Officers Designated by Statute — a. In General. An acknowledgment can be taken by no one except a person authorized by statute for that purpose, and if taken by any other is of no effect.[82] But

was held that N. Y. Rev. Laws (1813), p. 369, § 1, did not require that a person before whom a corporate deed was acknowledged should take evidence that the corporate seal was affixed by due authority, or as to the title of the officer executing it.

71. Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154; Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884.

Deed signed and acknowledged by treasurer. — Where a deed was signed "C. C., Treasurer of New Eng. Silk Co.," and acknowledged by "C. C., Treasurer," etc., to be his free act and deed, it was held not to be the deed of the corporation, although the corporation was described therein as grantor. Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669.

Where deed signed in official capacity.— Where a deed was expressly signed by two officers of a corporation in their official capacity, it was held that an acknowledgment by them personally was sufficient. Tenney *v.* East Warren Lumber Co., 43 N. H. 343.

72. Merrill *v.* Montgomery, 25 Mich. 73; Bowers *v.* Hechtman, 45 Minn. 238, 47 N. W. 792; Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54; Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544.

Where resolution of board of directors necessary.— Where, by statute, a resolution of the board of directors of a corporation is necessary to authorize an assignment of corporate property by the officers of such corporation, a certificate of proof before the acknowledging officer that the corporate seal was affixed by the officer intrusted with such seal by the corporation is not alone sufficient to authorize such assignment to be recorded or to be read in evidence without further proof. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

73. Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54.

Acknowledgment outside the state.— The president of a New Jersey corporation, being authorized to acknowledge instruments in behalf of the corporation, may properly do so in another state. Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288.

74. Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

75. Sawyer *v.* Cox, 63 Ill. 130.

76. Pruyne *v.* Adams Furniture, etc., Co., 92 Hun (N. Y.) 214, 36 N. Y. Suppl. 361.

77. Merrell *v.* Montgomery, 25 Mich. 73; Sheehan *v.* Davis, 17 Ohio St. 571.

78. Gordon *v.* Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75.

79. *Florida.*—McCoy *v.* Boley, 21 Fla. 803.

Iowa.— Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551.

Minnesota.— Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441.

New York.—Klumpp *v.* Gardner, 114 N. Y. 153, 21 N. E. 99.

Texas.— McCulloch County Land, etc., Co. *v.* Whitefort, 21 Tex. Civ. App. 314, 50 S. W. 1042. See, generally, Partnership.

Silent partner.— A mortgage by a partnership may be signed in the firm name by a partner whose name does not appear in the style of the firm, and may be acknowledged by him for the partnership. Keck *v.* Fisher, 58 Mo. 532.

80. Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

As to the sufficiency of the certificate as showing the acknowledging partner's authority see *infra*, XII, G, 1, a, (II), (A), (4).

81. Sanders *v.* Pepoon, 4 Fla. 465; Treadwell *v.* Sackett, 50 Barb. (N. Y.) 440.

82. *Alabama.*— Pioneer Sav., etc., Co. *v.* Barclay, 108 Ala. 155, 19 So. 308; Hatcher *v.* Clifton, 35 Ala. 275.

Georgia.— Bosworth *v.* Davis, 26 Ga. 406.

Idaho.— Ferbrache *v.* Martin, (Ida. 1893) 32 Pac. 252.

Illinois.— Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201; Oppenheimer *v.* Giershofer, 54 Ill. App. 38.

Kentucky.— Miller *v.* Henshaw, 4 Dana (Ky.) 325; Garrison *v.* Haydon, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70.

where, at the time the acknowledgment is taken, the officer is authorized by statute, the fact that such power is subsequently taken away from him will not affect the validity of the acknowledgment.[83]

b. Particular Officers Authorized. As to what particular officers are authorized to take acknowledgments is of course a question depending upon the terms of the statutes.[84] Those most frequently designated are judges,[85] justices of the

Louisiana.— Seymour *v.* Cooley, 3 Mart. N. S. (La.) 396.

Michigan.— Clink *v.* Russell, 58 Mich. 242, 25 N. W. 175.

Minnesota.— Baze *v.* Arper, 6 Minn. 220.

Missouri.— Cravens *v.* Moore, 61 Mo. 178; Musick *v.* Barney, 49 Mo. 458.

New York.— Ridabock *v.* Levy, 8 Paige (N. Y.) 197, 35 Am. Dec. 682; Dias *v.* Glover, Hoffm. (N. Y.) 71.

Ohio.— Bernier *v.* Becker, 37 Ohio St. 72; State *v.* Lee, 21 Ohio St. 662.

Pennsylvania.— Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610; Peters *v.* Condron, 2 Serg. & R. (Pa.) 80.

Tennessee.— McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209.

Virginia.— Davis *v.* Beazley, 75 Va. 491.

Canada.— Amey *v.* Card, 25 U. C. Q. B. 501.

As for the necessity for the certificate to show the officer's authority see *infra*, XII, D.

Nebraska — United States commissioner.— In Nebraska a United States commissioner has no authority to take acknowledgments of real-estate conveyances executed in that state. Interstate Sav., etc., Assoc. *v.* Strine, 58 Nebr. 133, 78 N. W. 377.

Pennsylvania — Member of supreme executive council.— An acknowledgment taken in Pennsylvania in 1783 before a member of the supreme executive council was invalid under the statute existing at that time which provided that all acknowledgments should be taken before a judge of the supreme court or a justice of the court of common pleas of the proper county. Shields *v.* Buchannan, 2 Yeates (Pa.) 219.

Maryland — Acknowledgment by non-resident.— Under Md. act (1756), c. 14, § 4, one justice of the peace had no authority to take the probate of a letter of attorney for the acknowledgment of the deed of a non-resident grantor. Such probate was required to be either in the provincial or county court, or before one justice of the provincial court or two justices of the peace. Beall *v.* Lynn, 6 Harr. & J. (Md.) 336; Sim *v.* Deakins, 2 Harr. & M. (Md.) 46.

83. Durst *v.* Daugherty, 81 Tex. 650, 17 S. W. 388.

84. See the statutes.

As to who may take acknowledgments outside the state see *infra*, VI, A, 4.

Master in chancery.— In New York, prior to the act of July 1, 1818, a master in chancery was authorized to take proof and acknowledgment of deeds. Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153.

Dakota — Any public officer having official seal.— Under the Dakota act of 1873 the acknowledgment of any deed might be made either within or without that territory, and within the United States, before any public officer having an official seal, including notaries public. Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521.

Iowa — County auditor.— Under Iowa Code, § 277, county auditors are authorized to take acknowledgments. Long *v.* Schee, 86 Iowa 619, 53 N. W. 331. But *compare* Goodykoontz *v.* Olsen, 54 Iowa 174, 6 N. W. 263, wherein it was held that an incumbent of the office of county judge on Jan. 1, 1869, who by the act abolishing the office became on that date *ex officio* county auditor and clerk of the board of supervisors, ceased from that time to have the power to take acknowledgments which he had only through his office as judge.

The superintendent of the city of Washington, D. C., to whom was transferred the powers of the original board of commissioners, was authorized to take acknowledgments of deeds of land within the city (Peltz *v.* Clarke, 5 Pet. (U. S.) 481, 8 L. ed. 199 [*affirming* 2 Cranch C. C. (U. S.) 703, 19 Fed. Cas. No. 10,914]), and this authority was subsequently transferred to the commissioners of public buildings for the city (Middleton *v.* Sinclair, 5 Cranch C. C. (U. S.) 409, 17 Fed. Cas. No. 9,534.)

85. Teackle *v.* Nicols, 3 Harr. & J. (Md.) 574.

Judge acting ministerially.— Under an early Alabama statute the county court acting judicially had no authority to take an acknowledgment of a deed of land; but the judge and clerk of such court had such authority when acting ministerially. Munn *v.* Lewis, 2 Port. (Ala.) 24.

In Louisiana a parish judge, as such, and when not acting as a notary public assisted by two witnesses, cannot receive and certify a vendor's acknowledgment of a deed. Marie Louise *v.* Cauchoix, 11 Mart. (La.) 243; Seymour *v.* Cooley, 3 Mart. N. S. (La.) 396.

Probate judges.— In Mississippi a probate judge has no authority to take the acknowledgment of an instrument not under seal. Alexander *v.* Polk, 39 Miss. 737. In Minnesota, by the act of March 6, 1852, such power was given to probate judges, but previous to that time they had no such authority. Baze *v.* Arper, 6 Minn. 220.

Under statutes authorizing a "justice" to take acknowledgments it has been held that an acknowledgment taken by a judge of a court of record is valid. Strauss *v.* Maddox, 109 Ga. 223, 34 S. E. 355; Middlebury College *v.* Cheney, 1 Vt. 336. And see McKeen *v.* Delancy, 5 Cranch (U. S.) 22, 3 L. ed. 25, wherein an acknowledgment taken before a supreme court judge, under a statute giving the power to a justice of the peace for the county in which the lands were situated, was sustained on the ground of long usage.

peace,[86] notaries public,[87] clerks of court [88] (the power extending in some states to clerks of probate courts),[89] commissioners of deeds,[90] recorders,[91] and mayors of cities.[92]

86. Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201; Brown *v.* Lunt, 37 Me. 423; Bosworth *v.* Bryan, 14 Mo. 575; Heighway *v.* Pendleton, 15 Ohio 735.

Maryland — Two justices.—Under a Maryland statute requiring an acknowledgment to be taken before two justices of the peace it was held that if taken by the justices separately and at different times it was not sufficient. Ridgely *v.* Howard, 3 Harr. & M. (Md.) 321.

Police magistrates.— Under the Illinois act of Feb. 27, 1854, police magistrates are empowered to take acknowledgments wherever they could be taken by a justice of the peace. Herkelrath *v.* Stookey, 58 Ill. 21; Ticknor *v.* McClelland, 84 Ill. 471.

Justice holding incompatible office.— A mortgage is not rendered invalid because the justice taking the acknowledgment held at the same time another office, and the law declared the two offices to be incompatible, it not being declared which should be forfeited. Adam *v.* Mengel, (Pa. 1887) 8 Atl. 606.

87. Holbrook *v.* Nichol, 36 Ill. 161; Wingo *v.* Parker, 19 S. C. 9.

Notary has no power under some statutes. — Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201; Oppenheimer *v.* Giershofer, 54 Ill. App. 38; Dunlap *v.* Henry, 76 Mo. 106; Cravens *v.* Moore, 61 Mo. 178; State *v.* Lee, 21 Ohio St. 662; McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209.

In New York notaries public can take acknowledgments of deeds anywhere within the county for which they are appointed and in which they reside. Utica, etc., R. Co. *v.* Stewart, 33 How. Pr. (N. Y.) 312. And this is true though the county be one in which there are no commissioners of deeds. People *v.* Hascall, 18 How. Pr. (N. Y.) 118.

Judge acting as notary ex officio.— An acknowledgment of a power of attorney to convey land, before a primary judge who was *ex officio* a notary public, in July, 1836, was sufficient to admit it to record, under the act of 1841, without other acknowledgment or proof. Butler *v.* Dunagan, 19 Tex. 559.

88. Sherry *v.* Sampson, 11 Kan. 611; Adair *v.* Smith, 5 B. Mon. (Ky.) 426; Franklin *v.* Kelley, 2 Nebr. 79.

Clerk of court "having a seal."— The California statute allowing acknowledgments to be taken by the clerk of any court "having a seal" does not prevent a clerk of a court of record from taking acknowledgments, though in fact he has no seal. The general phrase "having a seal" is used merely to denote a court of record, which is defined to be a court having a seal. Ingoldsby *v.* Juan, 12 Cal. 564.

Acknowledgment after resignation of clerk. —A deed acknowledged before a person designating himself as clerk of court, and attested by the seal of the court, is not rendered invalid by a showing that such person had resigned his office a few days before he took the acknowledgment, where there is nothing to show when the resignation took effect and it affirmatively appears that his successor did not assume the duties of his office until some time thereafter. Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088; Macey *v.* Pitillo, (Mo. 1893) 21 S. W. 1094.

Acknowledgment by judge before clerk of court.— As, under Kan. Laws (1858), p. 202, the probate court was a court of record and had a seal, the probate judge could acknowledge a deed executed by him before the clerk of such court. Sherry *v.* Sampson, 11 Kan. 611.

89. Pioneer Sav., etc., Co. *v.* Barclay, 108 Ala. 155, 19 So. 308; Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232; Hood *v.* Powell, 73 Ala. 171; Halso *v.* Seawright, 65 Ala. 431; James *v.* Fisk, 9 Sm. & M. (Miss.) 144, 47 Am. Dec. 111; Young *v.* Boardman, 97 Mo. 181, 10 S. W. 48.

But in Illinois the taking of acknowledgments is not a duty imposed by law upon clerks of probate courts. People *v.* Bartels, 38 Ill. App. 428.

90. Second M. E. Church *v.* Humphrey, 66 Hun (N. Y.) 628, 21 N. Y. Suppl. 89; First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605.

Jurisdiction of commissioner for city of New York.— A person appointed commissioner of deeds for the city of New York, by the board of aldermen of that city acting under the provisions of the municipal charter (Laws (1897), c. 378, § 58), has power to take acknowledgments in any of the boroughs of the said city. People *v.* Haggerty, 22 Misc. (N. Y.) 296, 50 N. Y. Suppl. 32.

Where judge a commissioner ex officio.— Under the New York act of 1813 it was held that the first judge of a court of common pleas, being a counselor of the supreme court, was a commissioner *ex officio*, and therefore entitled to take acknowledgments. Jackson *v.* Phillips, 9 Cow. (N. Y.) 94.

Commissioner holding incompatible office. — Under the New York acts of April 19, 1823, and March 24, 1818, a commissioner who was at the same time a master in chancery could not take the acknowledgment or proof of deeds. *Ex p.* Raymond, 5 Cow. (N. Y.) 421.

Judicial notice of commissioner's authority.— The courts of a state will take judicial notice of the fact that a person taking an acknowledgment as a commissioner of deeds was such officer at the time the certificate was made. Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323.

91. Hopkins *v.* Delaney, 8 Cal. 85; Hamilton *v.* Mitchell, 6 Blackf. (Ind.) 131; State *v.* Hoover, 5 Nev. 141.

92. Daviess *v.* Fairbairn, 3 How. (U. S.) 636, 11 L. ed. 760 (decided under the Virginia statutes); Shults *v.* Moore, 1 McLean (U. S.) 520, 22 Fed. Cas. No. 12,824 [*reversing* Wright (Ohio) 280].

c. Acknowledgments of Particular Instruments. Where a statute providing for the acknowledgment of any particular instrument designates the person or officer who may take such acknowledgment, it must be taken before such person or officer and no other.[93] But where the statute fails to specify the persons who may take the acknowledgment it may be taken by one who has the power in other cases.[94]

2. Officers De Facto. The acts of officers *de facto* are as valid and effectual, when they concern the public or the rights of third persons, as though they were performed by officers *de jure*,[95] and therefore an acknowledgment taken by a *de facto* officer is not invalid on that account[96] and will not render the instrument

Under the Illinois statute a mayor of a "town" in the state cannot take an acknowledgment, though the mayor of a "city" may. Dundy *v.* Chambers, 23 Ill. 369.

93. Certificate of incorporation.— In Ohio an acknowledgment of a certificate of incorporation before a notary public, instead of before a justice of the peace as required by statute, was held to be invalid. State *v.* Lee, 21 Ohio St. 662.

Certificate of incorporation of religious society.— In New York the certificate of incorporation of a religious society is properly acknowledged before a commissioner of deeds. Second M. E. Church *v.* Humphrey, 66 Hun (N. Y.) 628, 21 N. Y. Suppl. 89; First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605.

Chattel mortgage.— In Illinois a chattel mortgage must be acknowledged before a justice of the peace or police magistrate of the town or district where the mortgagor resides. Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201; Ticknor *v.* McClelland, 84 Ill. 471; Herkelrath *v.* Stookey, 58 Ill. 21; Frank *v.* Miner, 50 Ill. 444; Henderson *v.* Morgan, 26 Ill. 431. See, generally, Chattel Mortgages.

Plats of dedicated lands.— Under Ill. Rev. Stat. (1845), c. 25, § 20, which provides that plats shall be acknowledged before "a justice of the supreme court, judge of a circuit court, or a justice of the peace," an acknowledgment of a plat before a notary in 1855 was held to be a nullity. Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602.

Power of attorney to confess judgment.— Since the authority of a notary public to take acknowledgments (Ill. Rev. Stat. c. 30, § 20) relates only to acknowledgments of instruments relating to realty, an acknowledgment, before a notary, to a power of attorney to enter judgment by confession on a note, is of no probative force to prove the validity of the power. Oppenheimer *v.* Giershofer, 54 Ill. App. 38.

Railroad preëmption claims.— Under the provisions of the Missouri act of March 5, 1859, for the assignment of railroad preëmption claims, such claims must be acknowledged before a justice of the peace, and could not, in 1870, be acknowledged before a notary public. Cravens *v.* Moore, 61 Mo. 178.

Tax deed.— Under Mo. Gen. Stat. (1865) p. 129, § 124, tax deeds were required to be acknowledged before a county clerk and were void if acknowledged before a notary public. Dunlap *v.* Henry, 76 Mo. 106.

94. Blagg *v.* Hunter, 15 Ark. 246.

Authority to take the acknowledgment of mortgages is conferred by authority to take the acknowledgment of deeds. Canandarqua Academy *v.* McKechnie, 90 N. Y. 618 [*affirming* 19 Hun (N. Y.) 62].

95. See Officers.

96. *District of Columbia.*— Crutchfield *v.* Hewett, 2 App. Cas. (D. C.) 373.

Illinois.— Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Woodruff *v.* McHarry, 56 Ill. 218; Nelson *v.* Kessinger, 16 Ill. App. 185.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Maine.— Brown *v.* Lunt, 37 Me. 423.

Missouri.— Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24; Hamilton *v.* Pitcher, 53 Mo. 334.

New Hampshire.— Prescott *v.* Hayes, 42 N. H. 56.

South Carolina.— Kottman *v.* Ayer, 3 Strobh. (S. C.) 92.

Tennessee.— Farmers', etc., Bank *v.* Chester, 6 Humphr. (Tenn.) 458, 44 Am. Dec. 318.

Texas.—Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784.

Washington.—Bullene *v.* Garrison, 1 Wash. Terr. 587.

Officer whose commission has expired.— An acknowledgment taken before one who had acted as justice of the peace for many years, but whose last commission had in fact expired, he himself being in ignorance of this, continuing to act as justice in perfect good faith, is nevertheless good, as made before an officer *de facto*. Brown *v.* Lunt, 37 Me. 423. And see Kottman *v.* Ayer, 3 Strobh. (S. C.) 92, wherein the officer had neglected to take the oath of office on his reappointment.

Acknowledgment taken in another county.— A chattel mortgage was acknowledged before one duly commissioned as a police magistrate of a village situated partly in one county and partly in another. He lived in one county in such village, and his office was in the other county, where the acknowledgment was taken. The grantor resided outside the village, but in the township the office was in. Such officer had the reputation of being, and was believed to be, a police magistrate of the village. It was held that he was an officer *de facto* and that the acknowledgment was valid. Nelson *v.* Kessinger, 16 Ill. App. 185.

Alien commissioned as notary.— Although one not a citizen of the United States is ineligible as a notary public, under Mo. Const. art. 8, § 12, and Rev. Stat. (1889), § 7107,

liable to collateral attack.[97] But it is not enough that the person who takes an acknowledgment assumes to act in an official capacity: he must act under color of authority.[98]

3. Deputies — a. In General. It is generally held that wherever an officer who is authorized by statute to take acknowledgments has the power of appointing a deputy, his deputy may also take acknowledgments, although not specifically designated in the statute;[99] though it would seem that in those jurisdictions where the act is deemed judicial[1] a deputy can have no such power, in the absence of express statutory authority.[2]

yet an alien who has been duly commissioned as such is a *de facto* notary and has authority to take acknowledgments. Wilson *v.* Kimmel, 109 Mo. 260, 19 S. W. 24.

A verbally appointed deputy clerk is a *de facto* officer, and an acknowledgment taken by him is valid. Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Farmers', etc., Bank *v.* Chester, 6 Humphr. (Tenn.) 458, 44 Am. Dec. 318; Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784.

97. Hamilton *v.* Pitcher, 53 Mo. 334; Bullene *v.* Garrison, 1 Wash. Terr. 587.

Officer living in another state.— One J was duly appointed and qualified as a justice of the peace for the county of S. in New Hampshire, and acted as such for several years. He then removed his family to Maine, but he had an office and continued in business in said county of S., and acted as justice of the peace for said county occasionally during the term for which he was originally appointed, and, as one of those acts, took the acknowledgment of the deed under which defendant claimed title. It was held that as between third persons having an interest therein his acts could not be inquired into. Prescott *v.* Hayes, 42 N. H. 56.

98. One who has not been appointed and sworn in as deputy, but who, as the clerk's brother, attended office for him in his absence with his assent, has no authority to certify the probate of an instrument as deputy clerk. Suddereth *v.* Smyth, 35 N. C. 452.

Where commission had long expired.— Where a mortgage was acknowledged before a person who acted as a notary public, it appearing that such person's commission had expired nearly two years before, it was held that such person could not be regarded a notary *de facto*, it not being shown that he attempted to act as a notary public, after his commission expired, until the probate of such mortgage. Hughes *v.* Long, 119 N. C. 52, 25 S. E. 743.

Officer appointed by non-existent government.— An acknowledgment of a deed taken before one appointed as clerk of a county by the "provisional government of Kentucky" in 1862, was held to be invalid, such provisional government having never been recognized as an existing *de facto* government by the political power of either the United States or the state of Kentucky. Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 252.

99. *Alabama.*— Pinkard *v.* Ingersol, 11 Ala. 9; Kemp *v.* Porter, 7 Ala. 138.

California.— Emmal *v.* Webb, 36 Cal. 197; Muller *v.* Boggs, 25 Cal. 175; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

Georgia.— Ballard *v.* Orr, 105 Ga. 191, 31 S. E. 554.

Iowa.— Abrams *v.* Ervin, 9 Iowa 87.

Kansas.— Babbitt *v.* Johnson, 15 Kan. 252.

Kentucky.— Drye *v.* Cook, 14 Bush (Ky.) 459; Talbott *v.* Hooser, 12 Bush (Ky.) 408.

Mississippi.— McCraven *v.* Doe, 23 Miss. 100; McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34.

Missouri.— Stewart *v.* Perkins, 110 Mo. 660, 19 S. W. 989; Small *v.* Field, 102 Mo. 104, 14 S. W. 815; Springer *v.* McSpadden, 49 Mo. 299; Gibbons *v.* Gentry, 20 Mo. 468.

Pennsylvania.— Com. *v.* Read, 2 Ashm. (Pa.) 261.

Tennessee.— Ament *v.* Brennan, 1 Tenn. Ch. 431.

Texas.— Herndon *v.* Reed, 82 Tex. 647, 18 S. W. 665; Wert *v.* Schneider, 64 Tex. 327; Frizzell *v.* Johnson, 30 Tex. 31; Rose *v.* Newman, 26 Tex. 131, 80 Am. Dec. 646 [*overruling* Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172].

Virginia.— Gate City *v.* Richmond, 97 Va. 337, 33 S. E. 615.

As to the power of a deputy to take the acknowledgment of his principal see *infra*, VI, B, 2, c.

Kentucky — Certificate written by principal.— Under Ky. Gen. Stat. c. 24, § 38, where a deputy clerk takes an acknowledgment but does not write out the certificate, the clerk may do so. See *infra*, XII, A, 3.

Wherever the duties of a public officer are ministerial in their nature they may be discharged by a deputy, and so, where the taking of an acknowledgment is deemed a ministerial act, a deputy clerk may, in the name of his principal, take any acknowledgment which the principal is authorized to take. Abrams *v.* Ervin, 9 Iowa 87.

Deputy verbally appointed.—The fact that the appointment of a deputy clerk was verbal will not invalidate an acknowledgment taken by him, he being a *de facto* officer. Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Farmers, etc., Bank *v.* Chester, 6 Humphr. (Tenn.) 458, 44 Am. Dec. 318; Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784.

1. See *infra*, VII.

2. See Piland *v.* Taylor, 113 N. C. 1, 18 S. E. 70; Coltrane *v.* Lamb, 109 N. C. 209, 13 S. E. 784; Tatom *v.* White, 95 N. C. 453.

As to the power of deputies to exercise judicial functions see Officers, and the cross-references there given.

b. Acknowledgment Taken in Another State. Where an instrument has been acknowledged in another state before the deputy of an officer authorized to take such acknowledgment, the deputy signing himself as such and affixing the seal of office, it will be presumed, in support of the certificate, that the officer had authority to appoint a deputy.[3]

c. In Whose Name Taken. It has been held that the deputy should act in the name of his principal,[4] and that course would seem to be proper in any event.[5] But it has been directly held in several cases that an acknowledgment taken by a deputy in his own name is sufficient;[6] and where by statute the deputy is an independent officer, clothed with certain powers and duties separate and distinct from his principal, he may, of course, act in his own name.[7]

4. Acknowledgments Taken Outside the State — a. In Other States — (I) *In General.* An acknowledgment taken in another state is effective in the state where the land lies only when taken before a person authorized by the laws of the latter state to take acknowledgments.[8] The most usual officers designated by the statutes for this purpose are courts[9] or the individual judges thereof,[10] justices

3. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Hope *v.* Sawyer, 14 Ill. 254; Piper *v.* Chippewa Iron Co., 51 Minn. 495, 53 N. W. 870.

For other questions relating to acknowledgments taken outside the state see *infra*, X, A, 3, and cross-references there given.

4. Beuley *v.* Curtis, 92 Ky. 505, 18 S. W. 357; Talbott *v.* Hooser, 12 Bush (Ky.) 408. See also Abrams *v.* Ervin, 9 Iowa 87.

Deputy signing only principal's name.— Where a deputy clerk who took an acknowledgment omitted, after signing his principal's name, to add "by" himself, "D. C.," it was held that the certificate was not invalid on that account, since by the same proof which showed that the clerk did not sign the same it was also shown that it was signed by the deputy, who was authorized to do so. Talbott *v.* Hooser, 12 Bush (Ky.) 408.

Signing as "special deputy."— Where an acknowledgment was properly taken by a deputy clerk who had authority to take it, it was held that his signing the certificate as "special deputy" (no such office being provided for by law) would not invalidate the certificate, such words being treated as surplusage. Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784.

5. Muller *v.* Boggs, 25 Cal. 175; Springer *v.* McSpadden, 49 Mo. 299; Gibbons *v.* Gentry, 20 Mo. 468; Ament *v.* Brennan, 1 Tenn. Ch. 431.

6. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; McCraven *v.* Doe, 23 Miss. 100; Beaumont *v.* Yeatman, 8 Humphr. (Tenn.) 542.

7. Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177; Willamette Falls Canal, etc., Co. *v.* Gordon, 6 Oreg. 175.

8. *Arkansas.*— Elliott *v.* Pearce, 20 Ark. 508.

California.— Kimball *v.* Semple, 25 Cal. 440.

Indiana.— Woods *v.* Polhemus, 8 Ind. 60; Dawson *v.* Shirley, 6 Blackf. (Ind.) 531.

New Jersey.— Earle *v.* Earle, 16 N. J. L. 273.

New York.— Dias *v.* Glover, Hoffm. (N. Y.) 71.

As to who may take a married woman's acknowledgment outside the state see *infra*, VI, A, 5.

For other questions relating to acknowledgments taken outside the state see *infra*, X, A, 3, and cross-references there given.

A master in chancery is not one of those authorized by the California statute to take acknowledgments in another state. Kimball *v.* Semple, 25 Cal. 440.

A United States consul for a foreign city is not authorized by the Georgia statutes to attest a deed for lands lying in Georgia, executed in another of the United States. McCandless *v.* Yorkshire Guarantee, etc., Corp., 101 Ga. 180, 28 S. E. 663.

9. Taylor *v.* Shields, 5 Litt. (Ky.) 295 (acknowledgment before county court in Virginia).

The Virginia act of 1819 did not authorize a court of another state to take acknowledgments. Lockridge *v.* Carlisle, 2 Leigh (Va.) 186.

"Supreme or superior court."— An acknowledgment taken before a county court is not sufficient under a statute empowering "the supreme or superior court of any state" to take it. Tillman *v.* Cowand, 12 Sm. & M. (Miss.) 262.

Must be taken by whole court.— Under a statute requiring the acknowledgment to be taken before a "court," one taken before a part only of the judges constituting such court is invalid. Loree *v.* Abner, 57 Fed. 159, 6 U. S. App. 649, 6 C. C. A. 302.

10. Sandford *v.* Decamp, 8 Watts (Pa.) 542 (judge of court of common pleas); Criswell *v.* Altemus, 7 Watts (Pa.) 565 (associate judge of county court in Maryland).

Judge not authorized by Texas statute.— Talbert *v.* Dull, 70 Tex. 675, 8 S. W. 530.

Judge of a "superior court."—An acknowledgment before one certifying himself to be "president judge of the ninth judicial district of the commonwealth of Pennsylvania" was valid under a statute requiring foreign acknowledgments to be before a judge of a "superior court." May *v.* McKeenon, 6 Humphr. (Tenn.) 207.

Meaning of "superior."— By the term "su-

of the peace,[11] notaries public,[12] clerks of court,[13] mayors of cities or towns,[14] and commissioners of deeds appointed for that purpose.[15] The matter being one

perior" in such a statute is meant a court having jurisdiction throughout the state. Therefore a judge of the court of common pleas of the city and county of Philadelphia has no authority thereunder. Wells *v.* Wright, 12 N. J. L. 152.

11. Gillespie *v.* Johnston, Wright (Ohio) 231.

Two justices.— Harris *v.* Price, 14 B. Mon. (Ky.) 414; Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108; Lockridge *v.* Carlisle, 2 Leigh (Va.) 186. But under the Maryland act of 1856 two justices of the District of Columbia could not take the acknowledgment of a conveyance of personalty. Berry *v.* Matthews, 13 Md. 537.

No authority under some statutes.— *Arkansas.*— Worsham *v.* Freeman, 34 Ark. 55; Elliott *v.* Pearce, 20 Ark. 508.

Kentucky.—Fowke *v.* Darnall, 5 Litt. (Ky.) 316.

New Jersey.—Chandler *v.* Herrick, 11 N. J. Eq. 497.

Pennsylvania.— Sweigart *v.* Frey, 8 Serg. & R. (Pa.) 299.

South Carolina.— Woolfolk *v.* Graniteville Mfg. Co., 22 S. C. 332; Wingo *v.* Parker, 19 S. C. 9.

Virginia.— Sexton *v.* Pickering, 3 Rand. (Va.) 468.

The words "chief justice, mayor, or other justice," in a statute, comprehend justices of the peace. Helms *v.* O'Bannon, 26 Ga. 132.

An "alderman" of a city who is clothed with the authority of a justice of the peace falls within a statute allowing acknowledgments to be taken by a "magistrate" (Gordon *v.* Hobart, 2 Sumn. (U. S.) 401, 10 Fed. Cas. No. 5,609), and, in the absence of evidence to the contrary, it will be presumed that an alderman is a justice of the peace when he undertakes to act as such (Welles *v.* Cole, 6 Gratt. (Va.) 645).

Mayor or other chief magistrate.— Under a statute requiring acknowledgments to be taken before the mayor or other chief magistrate or officer of the place where taken, an acknowledgment taken before a justice is not valid unless it appears that he is the chief magistrate (Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610); and where such statute provides that, in case there be no city or town in the county of the grantor's residence, the acknowledgment may be taken by two magistrates of the county, an acknowledgment taken by such magistrates is not sufficient if it appears that there is in fact a city or town in the county (Miller *v.* Henshaw, 4 Dana (Ky.) 325). But where it was shown that there was no mayor or chief magistrate in the place it was held that an acknowledgment taken by two justices was valid, although the statute did not provide for such a contingency. McIntire *v.* Ward, 5 Binn. (Pa.) 296, 6 Am. Dec. 417.

12. *Alabama.*—Toulmin *v.* Austin, 5 Stew. & P. (Ala.) 410. In Goree *v.* Wadsworth, 91 Ala. 416, 8 So. 712, an instrument certified to have been acknowledged before an officer styling himself "J. P. and *ex officio* notary public" was sufficient.

Illinois.— Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153.

Indiana.— Woods *v.* Polhemus, 8 Ind. 60.

Nebraska.— Galley *v.* Galley, 14 Nebr. 174, 15 N. W. 318.

New Hampshire.— Bellows *v.* Copp, 20 N. H. 492; Southerin *v.* Mendum, 5 N. H. 420.

No authority under some statutes.— Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Lamarque *v.* Langlais, 8 Mo. 328.

13. Bowman *v.* Wettig, 39 Ill. 416; Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124, wherein it was held that the clerk had such authority whether or not the person making the acknowledgment was a resident of the state in which it was taken.

No authority under some statutes.— Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; McEwen *v.* Den, 24 How. (U. S.) 242, 16 L. ed. 672.

A deputy clerk may take such acknowledgment in the name of his principal. See cases cited *supra*, VI, A, 3.

14. McCullock *v.* Myers, 1 Dana (Ky.) 522; Ewing *v.* Savary, 3 Bibb (Ky.) 235; Moore *v.* Moore, 3 Ohio St. 154; Rigler *v.* Cloud, 14 Pa. St. 361; Cales *v.* Miller, 8 Gratt. (Va.) 6.

No authority under some statutes.— Fleming *v.* Ervin's Committee, 6 W. Va. 215.

Presumed to have power of a "magistrate." — Under a statute authorizing a "magistrate" to take acknowledgments it was held that one taken before a mayor was sufficient in the absence of anything to show that he was not vested with the powers of a magistrate. Palmer *v.* Stevens, 11 Cush. (Mass.) 147.

15. Puckett *v.* Law, 25 La. Ann. 595.

North Carolina — Residence of grantor immaterial.— Under N. C. Code, § 632, relating to the appointment of commissioners of deeds resident in other states, it is immaterial whether the persons whose acknowledgments are taken by a commissioner are domiciled in the state where the acknowledgments are taken or not. Maphis *v.* Pegram, 107 N. C. 505, 12 S. E. 235; James, etc., Buggy Co. *v.* Pegram, 102 N. C. 540, 9 S. E. 412. But under an earlier statute the commissioner's authority was confined to deeds by non-residents. De Courcy *v.* Barr, 45 N. C. 181.

Commissioner for another state.— Where a deed was acknowledged in Pennsylvania before a commissioner of deeds appointed and acting under the laws of New York it was held that a certificate by a prothonotary that the acknowledgment was in accordance with the laws of Pennsylvania was insufficient to make the acknowledgment valid under the Illinois conveyance act, which provides that the certificate of the clerk of any court of record, under the seal of such court, that such deed was acknowledged or proved in

dependent entirely upon the language of the statutes, a more detailed discussion would serve no useful purpose.[16]

(11) *Where Laws of Other State Govern.* By statute in some states it is provided that an acknowledgment taken in another state by an officer authorized by the laws of the latter state to take acknowledgments is sufficient.[17] Where this is the case it must be shown that the officer was so authorized.[18]

b. In Foreign Countries. For an acknowledgment taken in a foreign country to be effective in one of the United States it must have been taken before a person authorized by the laws of the latter state to take acknowledgments.[19] It is not enough that an acknowledgment was made before someone who assumed some official capacity to take it; his authority cannot be presumed without proof.[20] Ordinarily such authority is given by statute to notaries public,[21]

conformity with the laws of such state, shall be sufficient proof of that fact. Lyon *v.* Kain, 36 Ill. 362.

Lack of authority fatal to validity.—Where a deed was recorded purporting to have been acknowledged before the commissioner of a county in another state, who did not appear to have been authorized to take acknowledgments for the state where the land lay, the defect was fatal. Uhler *v.* Hutchinson, 29 Pa. St. 110.

How long authority continues.— An acknowledgment before a commissioner of deeds appointed by the governor to take acknowledgments in another state is not impaired by the fact that the governor had gone out of office at the time the acknowledgment was taken. The authority of such commissioner continues until he is removed by the governor. Thorn *v.* Frazer, 60 Tex. 259.

16. See the statutes.

17. Esker *v.* Heffernan, 159 Ill. 38, 41 N. E. 1113; Matter of Wilcox, 1 Misc. (N. Y.) 55, 21 N. Y. Suppl. 780; Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153.

18. McCormick *v.* Evans, 33 Ill. 327; Buckmaster *v.* Job, 15 Ill. 328; Crispen *v.* Hannavan, 50 Mo. 415; Moore *v.* Nelson, 3 McLean (U. S.) 383, 17 Fed. Cas. No. 9,771. But see Middlebury College *v.* Cheney, 1 Vt. 336, wherein it was held that a court might take judicial notice of the fact that under the law of a neighboring state a justice of the peace was authorized to take acknowledgments.

As to the necessity for showing the officer's authority see *infra*, XIII, A.

Acknowledgment not valid in either state. — The Connecticut act of 1855 validating all "deeds and other conveyances of real estate in this state which have been executed and acknowledged in any other state or territory in conformity with the laws of such state or territory relative to the conveyance of lands therein situated" does not validate a deed executed in New York, purporting to convey land in Connecticut and acknowledged in New York before a commissioner for Connecticut, but defective under the laws of Connecticut, although such acknowledgment, if made before a proper officer, would be sufficient to convey land situated in New York; because a commissioner of Connecticut has no power, under the laws of New York, to take acknowledgments of deeds of land situated in the latter state, and consequently any deed there acknowledged before him would not be acknowledged "in conformity with the laws" of New York "relative to the conveyance of lands therein situated." Farrel Foundry *v.* Dart, 26 Conn. 376.

19. McMinn *v.* O'Connor, 27 Cal. 238; Birdseye *v.* Rogers, (Tex. Civ. App. 1894) 26 S. W. 841; Sartor *v.* Bolinger, 59 Tex. 411, wherein it was further held that the fact that an officer who was himself competent to take such acknowledgment certified that the person who did take it was commissioned to do such acts did not validate the acknowledgment; Randolph *v.* Adams, 2 W. Va. 519.

A deed acknowledged before the mayor of London, and by him certified with his seal of office annexed, and recorded in the county where the land lies, is sufficiently authenticated to be read as evidence. Bell *v.* Fry, 5 Dana (Ky.) 341.

"Sovereign of Carlo, Ireland."— An acknowledgment taken before a person described as "Sovereign of Carlo, Ireland" and shown to be "a magistrate in the chief office of said town of Carlo, in the county of Carlo, Ireland," was held sufficient under a statute empowering the "chief magistrate of the place" to take acknowledgments. Bowser *v.* Cravener, 56 Pa. St. 132.

"Kanzlei Director" of Stuttgart.— A person styling himself "Kanzlei Director" of the city of Stuttgart, Germany, is not such an officer as was authorized by the Texas statutes to take acknowledgments in 1875. Sartor *v.* Bolinger, 59 Tex. 411, 413.

Canada — Deputy mayor of borough in Great Britain.— A deed acknowledged before a deputy mayor of a borough in Great Britain, with the common seal of the borough affixed, was a sufficient acknowledgment under Act of Assembly 52 Geo. III, c. 20. Blair *v.* Armour, 5 N. Brunsw. 341.

20. De Segond *v.* Culver, 10 Ohio 188.

Judge of court of record.— Under a statute of the republic of Texas providing that deeds might be acknowledged without the republic "before any judge of a superior court of record," the court cannot judicially know that an acknowledgment was properly taken before an "associate judge of the sixth judicial district of the state of Maryland." Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366.

21. Mott *v.* Smith, 16 Cal. 533.

No authority under some statutes.— Griffith *v.* Black, 10 Serg. & R. (Pa.) 160; Birds-

and to the consuls,[22] vice-consuls,[23] and commercial agents of the United States.[24]

5. Acknowledgments by Married Women. The statutes authorizing married women to make acknowledgments specify the persons before whom such acknowledgments may be taken, and no one else has such authority.[25] Among the officers most commonly designated are notaries public,[26] clerks of court,[27] and justices of the peace,[28] — some statutes requiring two justices[29] or two commissioners.[30] Where a married woman acknowledges an instrument outside the state in which the land lies, the acknowledgment, to be valid, must be taken by an officer authorized by the laws of such state.[31]

eye *v.* Rogers, (Tex. Civ. App. 1894) 26 S. W. 841; Randolph *v.* Adams, 2 W. Va. 519.

22. Under Ala. Code, § 1800, "any diplomatic, consular, or commercial agent of the United States" has authority to take an acknowledgment in a foreign country. Jinwright *v.* Nelson, 105 Ala. 399, 405, 17 So. 91.

But under the California laws existing in 1859 a consular agent of the United States in a foreign port was not authorized to take acknowledgments of deeds conveying real estate in California. McMinn *v.* O'Connor, 27 Cal. 238.

Consul a "magistrate."—An American consul at a foreign port was held to be a "magistrate" within the meaning of Mass. Stat. (1783) c. 37, § 4. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

An assignment of a debt under seal is a deed, and therefore the acknowledgment of such an instrument, when executed in a foreign country, may be taken by a United States consul under a statute allowing such officer to take acknowledgments of deeds. Mitander *v.* Sonneborn, 29 Hun (N. Y.) 407.

23. Evans *v.* Lee, 11 Nev. 194; Brown *v.* Landon, 30 Hun (N. Y.) 57.

Where statute authorizes "any consul."— Under a statute authorizing "any consul," etc., to take acknowledgments it was held that a vice-consul also had the power. Mott *v.* Smith, 16 Cal. 533.

24. Moore *v.* Miller, 147 Pa. St. 378, 23 Atl. 601.

25. Kendall *v.* Miller, 9 Cal. 591; Patton *v.* Stewart, 19 Ind. 233; Tarr *v.* Glading, 1 Phila. (Pa.) 370, 9 Leg. Int. (Pa.) 110; Giddings *v.* Smith, 15 Vt. 344.

Texas — Chief justice of county.— An acknowledgment of a conveyance of paraphernal property by a married woman before a chief justice of the county, in 1837, was valid. Harvey *v.* Hill, 7 Tex. 591.

26. Siemers *v.* Kleeburg, 56 Mo. 196; Daly *v.* Hamilton Perpetual Bldg., etc., Assoc., (Tenn. Ch. 1897) 48 S. W. 114.

27. Fleming *v.* Nix, 14 Fla. 268; Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; Pendergast *v.* Gwathmey, 2 A. K. Marsh. (Ky.) 67; Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164.

Not authorized under some statutes.—Patton *v.* Stewart, 19 Ind. 233.

28. Goode *v.* Smith, 13 Cal. 81; Mitchell *v.* Peoples, 46 Mo. 203 [*overruling* West *v.* Best, 28 Mo. 551]; Campbell *v.* Moon, 16 S. C. 107.

Not authorized under some statutes.—Kendall *v.* Miller, 9 Cal. 591; Tarr *v.* Glading, 1 Phila. (Pa.) 370, 9 Leg. Int. (Pa.) 110; Giddings *v.* Smith, 15 Vt. 344.

29. Shelton *v.* Deering, 10 B. Mon. (Ky.) 405; Gray *v.* Patton, 2 B. Mon. (Ky.) 12; Still *v.* Swan, Litt. Sel. Cas. (Ky.) 155; Phillips *v.* Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; Stansberry *v.* Pope, 4 Bibb (Ky.) 492.

Aldermen vested with powers of justices.— Under the Virginia statute of conveyances of 1785, requiring the privy examination of a *feme covert* before two justices, aldermen of the city of Richmond had no authority to make privy examinations and take such acknowledgments, though by act incorporating that city they were vested with the powers of justices of the peace. Currie *v.* Page, 2 Leigh (Va.) 617.

30. Malloy *v.* Bruden, 88 N. C. 305; Barfield *v.* Combs, 15 N. C. 514; Burgess *v.* Wilson, 13 N. C. 306.

31. Any court of record in United States. — Grove *v.* Zumbro, 14 Gratt. (Va.) 501.

Justices of the peace.— Under some statutes justices of the peace are authorized to take such acknowledgments (Sexton *v.* Pickering, 3 Rand. (Va.) 468), but under others they have no such power (Chandler *v.* Herrick, 11 N. J. Eq. 497; Wingo *v.* Parker, 19 S. C. 9).

Chief magistrate or officer.— Under a statute requiring married women's acknowledgments taken outside the state to be taken before the mayor or chief magistrate or officer of the place where taken, an acknowledgment taken before two justices of the peace of a certain county in another state was held not to be sufficient where it did not appear that they were the chief officers of the place (Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610; Sweigart *v.* Frey, 8 Serg. & R. (Pa.) 299); but where it was shown that there was no mayor or chief magistrate in the place, an acknowledgment taken before two justices was deemed sufficient, as being as close a compliance with the statute as was possible under the circumstances (McIntire *v.* Ward, 5 Binn. (Pa.) 296, 6 Am. Dec. 417).

United States commercial agent.— A married woman's acknowledgment taken before a commercial agent of the United States in Canada was held valid under the Pennsylvania act of Jan. 16, 1827, allowing such acknowledgment to be taken before "any consul or vice-consul of the United States." Moore *v.* Miller, 147 Pa. St. 378, 23 Atl. 601.

B. Disqualification by Interest — 1. Persons Financially or Beneficially Interested — a. In General. Because of the probative force accorded to the certificate, as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgment should be exercised by a person financially or beneficially interested in the transaction.[32] And it has been held that the fact that an officer disqualified by interest is the only person authorized to take such acknowledgment will not render it more effective.[33] It is the general rule that an acknowledgment taken before an interested person is void for all purposes[34] and cannot be reformed or corrected;[35] but it has been held that where the disqualifying interest is not apparent on the face of the certificate the registration of the instrument will operate as constructive notice.[36] The amount of interest which would disqualify an officer is a question which must be largely determined by the facts and circumstances of the case in which it is presented rather than by any hard and fast rule.[37]

Provost-marshal of Confederate city.—Under N. C. Rev. Code, c. 37, providing that an acknowledgment by a husband and wife residing in a foreign country might be taken by the mayor or other chief officer of any state or town, it was held that an acknowledgment taken by the provost-marshal of a Confederate city while in possession of the United States military authorities during the war of secession was good; the provost-marshal being the chief officer of the town under the military rule, and such town being deemed a foreign country. Paul *v.* Carpenter, 70 N. C. 502.

32. *Alabama.*— Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527.

Florida.— Florida Sav. Bank *v.* Rivers, 36 Fla. 575, 18 So. 850.

Illinois.— Hammers *v.* Dole, 61 Ill. 307.

Iowa.— Wilson *v.* Traer, 20 Iowa 231.

Kansas.— Wills *v.* Wood, 28 Kan. 400.

Minnesota.— Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

Missouri.— Hainey *v.* Alberry, 73 Mo. 427; Stevens *v.* Hampton, 46 Mo. 404.

Virginia.— Iron Belt Bldg., etc., Assoc. *v.* Groves, 96 Va. 138, 31 S. E. 23; Davis *v.* Beazley, 75 Va. 491.

A beneficiary under a trust deed is disqualified to take the acknowledgment thereto. Groesbeck *v.* Seeley, 13 Mich. 329; Wasson *v.* Connor, 54 Miss. 351; Lony *v.* Crews, 113 N. C. 256, 18 S. E. 499.

A partner in a firm secured by a mortgage is disqualified to take the acknowledgment thereto. Baxter *v.* Howell, 7 Tex. Civ. App. 198, 26 S. W. 453.

Surety protected by mortgage.— Where a mortgage is made to the payee of a note for the protection of a surety thereon, the surety has such an interest in the mortgage as to render the acknowledgment of the mortgagor before him void and the record of the mortgage without effect. Leonhard *v.* Flood, (Ark. 1900) 56 S. W. 781.

A magistrate who is bound to make title by a conveyance from a third person is disqualified by interest from receiving the acknowledgment of the grantor's wife. Withers *v.* Baird, 7 Watts (Pa.) 227, 32 Am. Dec. 754.

A married woman may not waive incompetency on the part of the officer taking the separate examination required in the alienation of a homestead, the statutes enlarging her capacities not having given her such power. Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527.

33. Hammers *v.* Dole, 61 Ill. 307. But see Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242; Lewis *v.* Curry, 74 Mo. 49,— in which cases acknowledgments taken by the grantee were upheld.

34. Leonhard *v.* Flood, (Ark. 1900) 56 S. W. 781; Hubble *v.* Wright, 23 Ind. 322; Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594; Armstrong *v.* Combs, 15 N. Y. App. Div. 246; 44 N. Y. Suppl. 171; Davis *v.* Beazley, 75 Va. 491. But see National Bank *v.* Conway, 1 Hughes (U. S.) 37, 17 Fed. Cas. No. 10,037, in which it is said that where the taking of an acknowledgment is deemed a ministerial act an interested person may properly take such acknowledgment.

Contrary doctrine in Tennessee.— In Tennessee it is held that while the practice of taking acknowledgments before interested persons should not be encouraged, yet an acknowledgment so taken is voidable only and will not be deemed absolutely invalid where there is no imputation of improper conduct, bad faith, or undue advantage arising out of such interest. Cooper *v.* Hamilton Perpetual Bldg., etc., Assoc., 97 Tenn. 285, 37 S. W. 12, 56 Am. St. Rep. 795, 33 L. R. A. 338; Reed Fertilizer Co. *v.* Thomas, 97 Tenn. 478, 37 S. W. 220.

35. Bexar Bldg., etc., Assoc. *v.* Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583.

36. Morrow *v.* Cole, 58 N. J. Eq. 203, 42 Atl. 673; Corey *v.* Moore, 86 Va. 721, 11 S. E. 114. And see *supra*, III, A, 2, b, (II).

37. Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434.

Persons owning distinct interests in tract of land.— One owning an interest in a tract of land is not so far interested in the entire tract as to prevent him, in his official character, from taking the acknowledgment of a deed conveying to a third party another and distinct interest in the same land. Dussaume *v.* Burnett, 5 Iowa 95.

b. Grantor or Promisor. As a rule, the grantor in a deed is disqualified to take acknowledgment or proof thereof.[38]

c. Grantee or Promisee. The grantee in an instrument is disqualified on grounds of public policy from acting in an official capacity in taking and certifying the acknowledgment of the grantor;[39] and the same principle applies to a mortgagee,[40] a trustee,[41] or an assignee.[42] But in some cases, where there was no one else qualified to take it, an acknowledgment taken before the grantee has been sustained.[43] Where there are several grantees the acknowledgment will be good as to all except the one who took it;[44] and the defect may be cured as to

38. Hainey *v.* Alberry, 73 Mo. 427; Davis *v.* Beazley, 75 Va. 491.

Deed executed in official capacity.— Where the clerk of a circuit court, in his official capacity, executed a tax deed in which he had no private interest, it was held that he was not disqualified to take proof of the execution of such deed, and that the record thereof was legal. Mundee *v.* Freeman, 23 Fla. 529, 3 So. 153.

39. *California.*— Murray *v.* Tulare Irrigation Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586.

Florida.— Florida Sav. Bank *v.* Rivers, 36 Fla. 575, 18 So. 850; Hogans *v.* Carruth, 18 Fla. 587.

Illinois.— West *v.* Krebaum, 88 Ill. 263.

Iowa.— Wilson *v.* Traer, 20 Iowa 231.

Kansas.— Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60; Greenlee *v.* Smith, 4 Kan. App. 733, 46 Pac. 543.

Maine.— Beaman *v.* Whitney, 20 Me. 413.

Ohio.— Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 437.

Virginia.— Iron Belt Bldg., etc., Assoc. *v.* Groves, 96 Va. 138, 31 S. E. 23.

West Virginia.— Tavenner *v.* Barrett, 21 W. Va. 656.

40. *Arkansas.*—Green *v.* Abraham, 43 Ark. 420.

California.— Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955.

Illinois.— Hammers *v.* Dole, 61 Ill. 307.

Indiana.— Hubble *v.* Wright, 23 Ind. 322.

Iowa.— City Bank *v.* Radtke, 87 Iowa 363, 54 N. W. 435.

North Carolina.— White *v.* Connelly, 105 N. C. 65, 11 S. E. 177; Turner *v.* Connelly, 105 N. C. 72, 11 S. E. 179.

Ohio.— Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 437.

41. *Illinois.*— Darst *v.* Gale, 83 Ill. 136.

Mississippi.— Holden *v.* Brimage, 72 Miss. 228, 18 So. 383.

Missouri.—Bennett *v.* Shipley, 82 Mo. 448; Black *v.* Gregg, 58 Mo. 565; Dail *v.* Moore, 51 Mo. 589; Stevens *v.* Hampton, 46 Mo. 404.

Texas.— Rothschild *v.* Daugher, 85 Tex. 332, 20 S. W. 142, 34 Am. St. Rep. 811, 16 L. R. A. 719; Brown *v.* Moore, 38 Tex. 645.

Virginia.—Nicholson *v.* Gloucester Charity School, 93 Va. 101, 24 S. E. 899; Clinch River Veneer Co. *v.* Kurth, 90 Va. 737, 19 S. E. 878; Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873.

Where trustee has not accepted trust.— The acknowledgment of a deed of trust taken before the trustee is void, though the latter has not accepted the trust; for since the deed is for his benefit his acceptance will be presumed until his dissent is shown, and such dissent will not be implied from the fact of his taking the acknowledgment. Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873. And in Iron Belt Bldg., etc., Assoc. *v.* Groves, 96 Va. 138, 31 S. E. 23, such acknowledgment was held invalid though the officer taking the acknowledgment did not know he was named as a trustee, and, on learning it, refused to serve. To the same effect see Rothschild *v.* Daugher, 85 Tex. 332, 20 S. W. 142, 34 Am. St. Rep. 811, 16 L. R. A. 719, wherein the trustee, who had no pecuniary interest in the deed, declined to act and another trustee was substituted for him.

No showing that officer same person as trustee.— To a deed to "L. Triplett, Jr.," as trustee, was attached a certificate of the grantor's acknowledgment, in the body of which the notary taking the same was described as "L. Triplett, Jr.," but the certificate was signed simply "L. Triplett, N. P." It was held, that it did not appear that the notary was the same person as the trustee. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.

42. Armstrong *v.* Combs, 15 N. Y. App. Div. 246, 44 N. Y. Suppl. 171.

43. **Kentucky — County clerk.**— In Kentucky no one but the county clerk and his deputies are authorized to take the acknowledgment of a deed, and therefore it is held in that state that the clerk may take the acknowledgment of a deed in which he is a grantee, for otherwise there would be no one qualified to take it. Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242.

Missouri — Sheriff's deed.— It is no objection to a sheriff's deed that the judge of the court, before whom it was acknowledged, is the grantee therein. Such deed must be acknowledged in open court, and of necessity has to be acknowledged in the court whence the execution issued, there being no statute authorizing the judge of an adjoining circuit to be called in to sit and hold court for the mere purpose of taking acknowledgment of a sheriff's deed. Therefore the rule ordinarily applicable where an acknowledgment is taken before the grantee does not apply to such a case. Lewis *v.* Curry, 74 Mo. 49.

44. Darst *v.* Gale, 83 Ill. 136.

Deed treated as if executed to each separately.— While the grantee in a deed cannot take and certify the acknowledgment of his grantor, yet where there are several grantees named in a deed, each receiving a separate and defined interest, and the grantor's ac-

him by a reacknowledgment before a duly qualified officer,[45] or by other proof of the instrument.[46]

d. Stockholder in Corporation. The acknowledgment of an instrument in which a corporation is financially interested cannot be taken by a stockholder in such corporation.[47]

2. Agent or Attorney of Party in Interest — a. In General. Ordinarily an agent or attorney of a party beneficially interested is not disqualified to take the acknowledgment if he himself have no interest in the transfer.[48] But it has been held that one who identifies himself with the transaction by placing his name on the face of the instrument as agent of one of the parties is disqualified to take the acknowledgment.[49]

b. Officer or Agent of Corporation. An officer or agent of a corporation who is not a stockholder therein or beneficially interested in the transaction is not disqualified from taking the acknowledgment of an instrument to which the corporation is a party,[50] and in the absence of any evidence to show that an officer of

knowledgment is taken by one of them, the deed must be treated as if executed separately to each of such grantees and good as to each of them except the one taking the acknowledgment. Murray *v.* Tulare Irrigation Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586.

45. Brady *v.* Cole, 164 Ill. 116, 45 N. E. 438.

46. Darst *v.* Gale, 83 Ill. 136.

47. Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527; Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594; Smith *v.* Clark, 100 Iowa 605, 69 N. W. 1011; Workman's Mut. Aid Assoc. *v.* Monroe, (Tex. Civ. App. 1899) 53 S. W. 1029; Bexar Bldg., etc., Assoc. *v.* Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; Miles *v.* Kelley, 16 Tex. Civ. App. 147, 40 S. W. 599. But see Horton *v.* Columbian Bldg., etc., Soc., 6 Cinc. L. Bul. 141, 8 Ohio Dec. (Reprint) 169, wherein an acknowledgment of a mortgage to a corporation taken before a stockholder and officer of such corporation was upheld.

As to the authority of an officer or agent of a corporation, who is not a stockholder, to take acknowledgments, see *infra*, VI, B, 2, b.

For other questions relating to acknowledgments by corporations see *supra*, V, F, and cross-reference there given.

48. *Arkansas.*— Penn *v.* Garvin, 56 Ark. 511, 20 S. W. 410.

Kansas.— Bierer *v.* Fretz, 32 Kan. 329, 4 Pac. 284.

Minnesota.— Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

Montana.— Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 23 Pac. 718.

North Carolina.— Wachovia Nat. Bank *v.* Ireland, 122 N. C. 571, 29 S. E. 835.

In Georgia it is held that the attestation of a deed by an attorney representing both the grantor and grantee in negotiations leading up to the execution of the instrument is sufficient probate to entitle the deed to record. Sloss *v.* Southern Mut. Bldg., etc., Assoc., 97 Ga. 401, 23 S. E. 849; Wardlaw *v.* Mayer, 77 Ga. 620. But see Nichols *v.* Hampton, 46 Ga. 253, wherein an affidavit probating a mortgage before the attorney of the mortgagee was held to be invalid.

Attorney holding claim secured by mortgage.— An attorney who is a notary public is not disqualified from taking an acknowledgment of a mortgage made to his client merely because he holds for collection the claim secured by such mortgage; it not appearing that the attorney had any beneficial interest in having the mortgage made, nor that the amount of his compensation in any manner depended upon such mortgage being made. Havemeyer *v.* Dahn, 48 Nebr. 536, 67 N. W. 489, 33 L. R. A. 332 [*following* Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434].

Attorney for husband of acknowledgor.— A married woman's acknowledgment may properly be taken by the husband's attorney, where such attorney derives no benefit from the conveyance and his name does not appear on the face of the instrument as agent for either of the parties. Kutch *v.* Holley, 77 Tex. 220, 14 S. W. 32; Daniels *v.* Larendon, 49 Tex. 216; Romanes *v.* Fraser, 16 Grant Ch. (U. C.) 97, 17 Grant Ch. (U. C.) 267.

Partner of mortgagee.— The fact that the officer taking the acknowledgment of a chattel mortgage was the partner of the mortgagee and negotiated the loan secured does not render the mortgage fraudulent and void as to other mortgage creditors, when it is not shown that he was a party in interest to either the lien or the note. Brereton *v.* Bennett, 15 Colo. 254, 25 Pac. 310.

49. Sample *v.* Irwin, 45 Tex. 567.

Undertaking to discharge attachment.—An undertaking given by a defendant upon an application to discharge an attachment cannot be acknowledged before defendant's attorney. Bliss *v.* Molter, 8 Abb. N. Cas. (N. Y.) 241.

50. Florida Sav. Bank *v.* Rivers, 36 Fla. 575, 18 So. 850; Sawyer *v.* Cox, 63 Ill. 130; Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434; Home Bldg., etc., Assoc. *v.* Evans, (Tenn. Ch. 1899) 53 S. W. 1104.

But where such officer is a stockholder in the corporation he is disqualified by interest. See *supra*, VI, B, 1, d.

Cashier employed on fixed salary.—A cashier of a bank who is not a stockholder and is employed on a fixed salary with an agreement that he may receive whatever fees he may

a corporation is a stockholder therein it will not be presumed, as a matter of law, that such is the case.[51]

c. Deputy of Officer Interested in Instrument. Where a deputy is authorized to take acknowledgments[52] it is held that he is not disqualified by reason of the fact that his principal is a party to the instrument.[53] On the other hand an instrument executed by an under-sheriff may be acknowledged before the sheriff, acting as a notary public.[54]

3. Person Related to Party in Interest. Where the taking of an acknowledgment is deemed a ministerial act, an officer who is not beneficially interested in the conveyance will not be disqualified by reason of relationship to one of the parties therein.[55] Thus the husband of the grantee may take the acknowledgment[56] unless he have a beneficial interest in the conveyance.[57] But it has been held that while such acknowledgment is not *per se* void, yet it is open to attack, and the court will lend a ready ear to evidence of undue advantage, fraud, or oppression arising out of such relationship.[58]

C. Territorial Extent of Officer's Jurisdiction — 1. Outside the State. It is the general rule that in the absence of special statutory authority an officer empowered to take acknowledgments cannot exercise that power outside his own state.[59] But in Ohio it has been held that an acknowledgment affecting lands situated within the territory over which the officer has jurisdiction may be taken by him anywhere in the United States.[60]

2. Outside County or District. Usually an officer is not authorized to take acknowledgments outside the county or district over which he exercises jurisdiction.[61] But in some jurisdictions justices of the peace and notaries are empowered to perform such acts in any county of the state.[62]

make as a notary is not disqualified to take an acknowledgment to a mortgage given to the bank. Woodland Bank *v.* Oberhaus, 125 Cal. 320, 57 Pac. 1070.

Officer of eleemosynary corporation.— The recordation of a deed of trust given to secure the debt of an eleemosynary corporation is not invalid because the officer who took the acknowledgment was a corporator, and as such entitled to a small fee *per diem* for his services while attending meetings of the board. Nicholson *v.* Gloucester Charity School, 93 Va. 101, 24 S. E. 899.

51. Florida Sav. Bank *v.* Rivers, 36 Fla. 575, 18 So. 850.

52. As to the power of deputies to take acknowledgments see *supra*, VI, A, 3.

53. Ewing *v.* Vannewitz, 8 Mo. App. 602; Piland *v.* Taylor, 113 N. C. 1, 18 S. E. 70; Tipton *v.* Jones, 10 Heisk. (Tenn.) 564.

54. Cook *v.* Foster, 96 Mich. 610, 55 N. W. 1019.

55. *Georgia.*— Welsh *v.* Lewis, 71 Ga. 387.

Minnesota.— Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

Montana.— Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 23 Pac. 718.

New York.— Lynch *v.* Livingston, 6 N. Y. 422 [*affirming* 8 Barb. (N. Y.) 463].

North Carolina.— McAllister *v.* Purcell, 124 N. C. 262, 32 S. E. 715.

56. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23; Kimball *v.* Johnson, 14 Wis. 674.

57. Husband beneficiary in deed of trust. — An absolute deed acknowledged before the husband of the grantee therein, and given in satisfaction of a debt secured by a deed of trust in which such husband is the beneficiary, is void. Jones *v.* Porter, 59 Miss. 628.

58. Cooper *v.* Hamilton Perpetual Bldg., etc., Assoc., 97 Tenn. 285, 37 S. W. 12, 56 Am. St. Rep. 795, 33 L. R. A. 338.

59. Harris *v.* Burton, 4 Harr. (Del.) 66; Cowan *v.* Beall, 1 MacArthur (D. C.) 270; Jackson *v.* Colden, 4 Cow. (N. Y.) 266; Jackson *v.* Humphrey, 1 Johns. (N. Y.) 498; Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922.

As to the place of taking acknowledgments generally see *infra*, VIII.

For other questions regarding acknowledgments taken outside the state see *infra*, X, A, 3, and cross-references there given.

60. Kinsman *v.* Loomis, 11 Ohio 475; Moore *v.* Vance, 1 Ohio 1.

61. *Alabama.*— New England Mortg. Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656.

Florida.— Stewart *v.* Stewart, 19 Fla. 846.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

Michigan.— Brown *v.* McCormick, 28 Mich. 215.

Missouri.— Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

New York.— Mutual L. Ins. Co. *v.* Corey, 54 Hun (N. Y.) 493, 7 N. Y. Suppl. 939; People *v.* Globe Mut. L. Ins. Co., 65 How. Pr. (N. Y.) 239.

North Carolina.— Dixon *v.* Robbins, 114 N. C. 102, 19 S. E. 239.

Pennsylvania.— Share *v.* Anderson, 7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421.

Tennessee.— Bostick *v.* Haynie, (Tenn. Ch. 1896) 36 S. W. 856; Garth *v.* Fort, 15 Lea (Tenn.) 683.

62. Biscoe *v.* Byrd, 15 Ark. 655; Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49; Learned

VII. Nature of Officer's Act — Judicial or Ministerial.

In some jurisdictions it is held that the act of the officer in taking and certifying an acknowledgment is judicial, or, as it is sometimes called, quasi-judicial, in its nature.[63] This holding is based on the theory that the determination by the officer whether the person appearing before him really is the grantor, or a person authorized to act for him, and whether such person does actually and truly acknowledge before him that he executed the instrument, is the exercise of a judicial function.[64] But as a rule the courts are not inclined to give so great force to an act which is usually performed by officers of an inferior grade with but little formality or solemnity, and the weight of authority holds the act to be ministerial only.[65] Where this latter doctrine obtains, the act of a clerk or other

v. Riley, 14 Allen (Mass.) 109; Odiorne *v.* Mason, 9 N. H. 24.

In Ohio a justice of the peace may take acknowledgments in a county other than that for which he was appointed, the cases of Moore *v.* Vance, 1 Ohio 1, and Kinsman *v.* Loomis, 11 Ohio 475, being deemed to have established the doctrine, as a rule of property. Crumbaugh *v.* Kugler, 2 Ohio St. 373. And in that state a mayor may take the acknowledgment of a deed without the limits of his city, no territorial limit being fixed by the statute investing him with the power to take acknowledgments. Moore *v.* Moore, 3 Ohio St. 154.

63. *Alabama.*— Thompson *v.* New England Mortg. Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; Pioneer Sav., etc., Co. *v.* Barclay, 108 Ala. 155, 19 So. 308; Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58 [*overruling* the earlier doctrine as held in Halso *v.* Seawright, 65 Ala. 431; Munn *v.* Lewis, 2 Port. (Ala.) 24].

Kansas.— Wills *v.* Wood, 28 Kan. 400.

Mississippi.— Harmon *v.* Magee, 57 Miss. 410; Wasson *v.* Connor, 54 Miss. 351.

New Jersey.— Homœopathic Mut. L. Ins. Co. *v.* Marshall, 32 N. J. Eq. 103. But see Morrow *v.* Cole, 58 N. J. Eq. 203, 42 Atl. 673.

Pennsylvania.— Heilman *v.* Kroh, 155 Pa. St 1, 25 Atl. 751; Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Com. *v.* Haines, 97 Pa. St. 228, 39 Am. Rep. 805; Singer Mfg. Co. *v.* Rook, 84 Pa. St. 442, 24 Am. Rep. 204; Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Jamison *v.* Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; Withers *v.* Baird, 7 Watts (Pa.) 227, 32 Am. Dec. 754; Share *v.* Anderson, 7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421; Richart *v.* Wisner, 2 Kulp (Pa.) 395.

Tennessee.— Burem *v.* Winstead, 103 Tenn. 285, 52 S. W. 1070; Cooper *v.* Hamilton Perpetual Bldg., etc., Assoc., 97 Tenn. 285, 37 S. W. 12, 56 Am. St. Rep. 795, 33 L. R. A. 338. But see Beaumont *v.* Yeatman, 8 Humphr. (Tenn.) 542.

Texas.— Bexar Bldg., etc., Assoc. *v.* Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583.

Virginia.— Murrell *v.* Diggs, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893.

West Virginia.— Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139.

Sheriff's deed.— In Pennsylvania the acknowledgment by a sheriff of a deed executed in pursuance of the sale by him under execution, being required to be made in open court, is a part of the judicial proceedings of the tribunal which its record must show. Bellas *v.* McCarty, 10 Watts (Pa.) 13; Patterson *v.* Stewart, 10 Watts (Pa.) 472.

64. Wasson *v.* Connor, 54 Miss. 351.

65. *Arkansas.*— Biscoe *v.* Byrd, 15 Ark. 655.

California.— Woodland Bank *v.* Oberhaus, 125 Cal. 320, 57 Pac. 1070. But see Wedel *v.* Herman, 59 Cal. 507.

Georgia.— Wardlaw *v.* Mayer, 77 Ga. 620.

Illinois.— People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091 [*reversing* 38 Ill. App. 428]; Hill *v.* Bacon, 43 Ill. 477. But see Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Lickmon *v.* Harding, 65 Ill. 505.

Iowa.— Abrams *v.* Ervin, 9 Iowa 87.

Kentucky.— Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114.

Maryland.— Lewis *v.* Waters, 3 Harr. & M. (Md.) 430.

Massachusetts.— Learned *v.* Riley, 14 Allen (Mass.) 109; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

Minnesota.— Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

Nebraska.— Horbach *v.* Tyrrell, 48 Nebr. 514, 67 N. W. 485, 489, 37 L. R. A. 434.

New Hampshire.— Odiorne *v.* Mason, 9 N. H. 24.

New York.— Lynch *v.* Livingston, 6 N. Y. 422 [*affirming* 8 Barb. (N. Y.) 463].

Ohio.— Ford *v.* Osborne, 45 Ohio St. 1, 12 N. E. 526; Williamson *v.* Carskadden, 36 Ohio St. 664; Truman *v.* Lore, 14 Ohio St. 144.

United States.— Loree *v.* Abner, 57 Fed. 159, 6 U. S. App. 649, 6 C. C. A. 302; Shults *v.* Moore, 1 McLean (U. S.) 520, 22 Fed. Cas. No. 12,824.

The North Carolina doctrine in this regard is rather difficult of ascertainment. The act was held to be judicial in Paul *v.* Carpenter, 70 N. C. 502, and Wright *v.* Player, 72 N. C. 94. But the doctrine stated in those cases

officer in certifying to the official character of the officer who took the acknowledgment, and to the genuineness of the signature, is also regarded as ministerial.[66]

VIII. PLACE OF TAKING.

A. In General. The question as to where an acknowledgment may be taken is dependent almost entirely upon statute.[67] Generally an officer authorized to take acknowledgments in a certain county or district may exercise such power in any part of his county or district.[68] Sometimes the acknowledgment is required to be taken in the county in which the grantor resides.[69]

B. County or District in Which Land Lies. Sometimes the statute empowering an officer to take acknowledgments of deeds confines his authority to cases where the land conveyed lies in the county or district over which he has jurisdiction, and where this is the case an acknowledgment before such officer of a conveyance of land lying in another county or district is of no effect.[70] But

was distinctly disapproved in Jones *v.* Cohen, 82 N. C. 75. See also Ware *v.* Nesbit, 94 N. C. 664. Then in the later case of Piland *v.* Taylor, 113 N. C. 1, 3, 18 S. E. 70, the court said: "Such an act has been decided in this state to be judicial in its character;" and a ruling practically to the same effect is found in Nimocks *v.* McIntyre, 120 N. C. 325, 26 S. E. 922. But the recent case of McAllister *v.* Purcell, 124 N. C. 262, 32 S. E. 715, is at least persuasive authority to the effect that the act is ministerial.

Taking acknowledgment not "public business."— The act of a notary public in taking the acknowledgment of a deed is private business, and hence not within Minn. Gen. Stat. (1878) prohibiting transactions of "public business" on the 22d of February. Slater *v.* Schack, 41 Minn. 269, 43 N. W. 7.

66. Lynch *v.* Livingston, 6 N. Y. 422 [*affirming* 8 Barb. (N. Y.) 463].

As to further certificates of conformity and authenticity see *infra*, XIII.

67. See the statutes.

As to the power of an officer to take acknowledgments outside the territorial limits of his jurisdiction see *supra*, VI, C.

As to the necessity for the certificate to show where the acknowledgment was taken see *infra*, XII, C.

A deed given by a United States marshal in 1825 was properly acknowledged before the district court of which he was an officer. Baker *v.* Underwood, 63 Mo. 384.

A deed of swamp land by a county judge may be acknowledged in a county other than that of his residence or of which he is judge. Henderson *v.* Robinson, 76 Iowa 603, 41 N. W. 371.

Missouri—Chattel mortgage.—By Mo. Rev. Stat. § 2503, when construed in connection with § 676, a chattel mortgage must be acknowledged in the county where the chattels are situated. McDaniel *v.* Harris, 27 Mo. App. 545.

68. Durfee *v.* Grinnell, 69 Ill. 371; Hill *v.* Bacon, 43 Ill. 477; Talbott *v.* Hooser, 12 Bush (Ky.) 408; Janesville Hay Tool Co. *v.* Boyd, 35 W. Va. 240, 13 S. E. 381.

Acknowledgment outside clerk's office.— That a clerk of the county court indorsed on a deed that it was on that day exhibited in his office and acknowledged, while in point of fact it was acknowledged and the certificate indorsed thereon out of his office, does not render the deed invalid. Carper *v.* McDowell, 5 Gratt. (Va.) 212.

69. Rehkopf *v.* Miller, 59 Ill. App. 662.

Where land lay or grantor resided.—Under an early Maryland statute a deed was required to be acknowledged before two justices of the peace in the county where the land lay or the grantor resided (Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502; Johns *v.* Reardon, 3 Md. Ch. 57); and registration in the proper county would not cure the defect if the acknowledgment was taken before justices of another county (Johns *v.* Reardon, 3 Md. Ch. 57).

Temporary residence.—Under a statute requiring an acknowledgment to be taken in the county of the acknowledgor's residence it was held that one who permanently resided in one county, but spent certain seasons of the year at his country residence in another county, might acknowledge a deed of lands lying in a third county while temporarily sojourning at his country residence. Hall *v.* Gittings, 2 Harr. & J. (Md.) 380.

Proof by subscribing witness.— By N. C. Code, § 1246, a subscribing witness to a deed, who does not reside in the county in which the land is, must prove it in the county where he resides. An attestation clause stated that the deed was signed, sealed, and delivered in the witness's presence, and the certificate of probate, taken in a county other than that in which the land was, stated that "the execution of the annexed deed was . . . proven before me by . . . S, the subscribing witness thereto, who says that the deed was signed and delivered in his presence," etc. It was held, that the fair inference, and the presumption from the duty of the officer, were that the witness resided in the county in which the proof was taken. Devereux *v.* McMahon, 102 N. C. 284, 285, 9 S. E. 635.

70. Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 60; McCullock *v.* Myers, 1 Dana (Ky.) 522; Hughes *v.* Wilkinson, 37 Miss. 482; Musick *v.* Barney, 49 Mo. 458; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

usually a deed conveying lands situated in one county or district of the state may properly be acknowledged before an officer of another county or district.[71]

C. Acknowledgment Taken in Other States. It is generally provided by statute that an acknowledgment taken in one state of a conveyance of land lying in another state shall be valid if acknowledged according to the laws of the latter.[72] Under some statutes such acknowledgment is valid only where the grantor is a resident of the state wherein it is taken,[73] and sometimes the acknowledgment must be taken in the county of his residence.[74]

IX. TIME OF TAKING.

A. In General. Ordinarily an acknowledgment is not required to be taken at any specified time, and if taken at any time subsequent to the execution of the instrument it is effective from the time of taking.[75] But where the statute requires the instrument to be recorded within a specified time after its execution, an acknowledgment and registration of the instrument after the expiration of such period will not affect rights which have vested in the meantime.[76]

71. *Alabama.*— Johnson *v.* McGehee, 1 Ala. 186.

California.— Colton *v.* Seavey, 22 Cal. 496.

Indiana.— Doe *v.* Vandewater, 7 Blackf. (Ind.) 6; Schoolcraft *v.* Campbell, 6 Blackf. (Ind.) 481.

Kentucky.— Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; Gray *v.* Patton, 2 B. Mon. (Ky.) 12; Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41; Stansberry *v.* Pope, 4 Bibb (Ky.) 492.

Maryland.— Johns *v.* Reardon, 3 Md. Ch. 57.

Mississippi.— Love *v.* Taylor, 26 Miss. 567; Dennistoun *v.* Potts, 26 Miss. 13.

Missouri.— Duly *v.* Brooks, 30 Mo. 515.

New York.— Van Cortlandt *v.* Tozer, 17 Wend. (N. Y.) 338.

Pennsylvania.— McFerran *v.* Powers, 1 Serg. & R. (Pa.) 102; Davey *v.* Ruffel, 14 Pa. Co. Ct. 272.

South Carolina.— Campbell *v.* Moon, 16 S. C. 107.

72. Toulmin *v.* Austin, 5 Stew. & P. (Ala.) 410; McCullock *v.* Myers, 1 Dana (Ky.) 522; Southerin *v.* Mendum, 5 N. H. 420; Murdock *v.* Memphis, etc., R. Co., 7 Baxt. (Tenn.) 557; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146; McCulloch *v.* Eudaly, 3 Yerg. (Tenn.) 346. See also cases cited *infra*, X, A, 3, and the cross-references there given.

The acknowledgments of articles of incorporation may be made without as well as within the state. Humphreys *v.* Mooney, 5 Colo. 282.

Assignment for benefit of creditors.—Under the Illinois statute requiring an assignment for the benefit of creditors to be recorded in the county where the assignor resides, etc., it is not necessary that it be acknowledged in such county, and it may be acknowledged in another state. Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70.

Acknowledgment for corporation.— The president of a New Jersey corporation, being authorized to acknowledge instruments in behalf of the corporation, may properly do so in another state. Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288.

73. Graham *v.* Whitely, 26 N. J. L. 254; Richards *v.* Randolph, 5 Mason (U. S.) 115, 20 Fed. Cas. No. 11,772.

Temporary residence.— Under Va. Acts (1792), c. 90, § 5, a mere temporary residence was held sufficient to authorize the acknowledgment of a deed in another state by a nonresident of Virginia. Cales *v.* Miller, 8 Gratt. (Va.) 6.

74. Harris *v.* Price, 14 B. Mon. (Ky.) 414.

75. Hood *v.* Powell, 73 Ala. 171; Johnson *v.* McGehee, 1 Ala. 186; Smith *v.* Porter, 10 Gray (Mass.) 66; Fisher *v.* Butcher, 19 Ohio 406, 53 Am. Dec. 436.

As to the admissibility in evidence of an instrument acknowledged after the commencement of the suit see *supra*, IV, B, 5.

As to the necessity for the certificate to show the date of the acknowledgment see *infra*, XII, B.

As to the effect of a reacknowledgment see *infra*, XII, H, 2.

An administrator's deed passes title if executed and delivered within one year from the sale, duly made, although not acknowledged within the year. Poor *v.* Larrabee, 58 Me. 543.

Acknowledgment taken on Sunday.—In Tennessee an acknowledgment taken on Sunday is not void for that reason. Lucas *v.* Larkin, 85 Tenn. 355, 3 S. W. 647. And see Tracy *v.* Jenks, 15 Pick. (Mass.) 465, wherein the acknowledgment was taken after sunset on Sunday.

When court not in session.— Under N. C. Acts (1868–69), c. 35, a married woman's acknowledgment taken by the chairman of a court of common pleas when the court was not in session was held to be valid. Spivey *v.* Rose, 120 N. C. 163, 26 N. E. 701.

76. Johnson *v.* McGehee, 1 Ala. 186.

Under a former Kentucky statute requiring an instrument to be recorded within eight months after its execution it was held that an acknowledgment taken thereafter did not entitle the instrument to be recorded or to be admitted in evidence without proof. Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 60; Speed *v.* Brooks, 7 J. J. Marsh. (Ky.) 119; Lyne *v.* Bank of Kentucky, 5 J. J. Marsh. (Ky.) 545;

B. When Instrument Incomplete. It has been held that if a deed and its acknowledgment are regular on their face the effect of the record will not be impaired by the fact that the acknowledgment was in fact taken before the deed was completed, as where the name of the grantee was left blank.[77] But a married woman's deed will derive no validity from being acknowledged while in such condition.[78]

C. From What Time Instrument Takes Effect — 1. Instruments by Persons Other Than Married Women. Instruments executed by persons other than married women being usually binding between the parties without acknowledgment, it follows that an acknowledgment subsequently made will relate back to the time of execution,[79] except in cases where the rights of third persons have intervened.[80] But where the acknowledgment is made essential to the operative force of the instrument it seems that such instrument will take effect, not from the time of execution, but from the time of acknowledgment.[81]

2. Instruments by Married Women. Where the acknowledgment of the wife is absolutely necessary to the effective force of the instrument executed by her, it would seem that such instrument would take effect only from the time of the acknowledgment,[82] and such is certainly the case where rights of third parties have intervened between the execution and the acknowledgment.[83] But in some cases where no rights have intervened a subsequent acknowledgment by the wife has been held to relate back to the date of the original delivery of the instrument.[84]

D. Presumption as to Time of Delivery. It is the general rule that an

Hog *v.* Perry, 1 Litt. (Ky.) 171; Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41.

Where instrument not recorded after acknowledgment.— Where the statute requires the instrument to be recorded within a specified time after acknowledgment it cannot be recorded after the expiration of that period unless reacknowledged. Butler *v.* Wheeler, 82 Ky. 475. And see Roanes *v.* Archer, 4 Leigh (Va.) 550.

77. Roussain *v.* Norton, 53 Minn. 560, 55 N. W. 747.

Grantor estopped to deny deed.— Where a grantor signed a printed form of deed, leaving the name and the description, the consideration and the date blank, and on the same day caused a proper officer to certify that the grantor appeared before him and acknowledged the execution of the deed, and then delivered the instrument to an agent to enable him to fill up the blanks and convey to a purchaser on sale of the land, and the agent filled the blanks, inserting his own name as grantee, and afterward sold the lot to another and executed a conveyance, it was held that the grantor was estopped to deny that the deed, when first seen by his agent's grantee, was not in the same condition as when acknowledged. Pence *v.* Arbuckle, 22 Minn. 417.

78. Ayres *v.* Probasco, 14 Kan. 175; Cole *v.* Bammel, 62 Tex. 108; Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780. And see *supra*, IV, E.

79. Speed *v.* Brooks, 7 J. J. Marsh. (Ky.) 119; Hall *v.* Chang, 47 N. C. 440; Owen *v.* Owen, 5 Humphr. (Tenn.) 352.

In Wood *v.* Owings, 1 Cranch (U. S.) 239, 2 L. ed. 94, it was held that where a deed was signed, sealed, and delivered on May 30, 1800, but not acknowledged until June 14, the passage of a statute applying to deeds executed after June 1, 1800, did not affect such deed.

80. Hendon *v.* White, 52 Ala. 597; Johnson *v.* McGehee, 1 Ala. 186; Lincoln *v.* Thompson, 75 Mo. 613.

81. Chadwick *v.* Carson, 78 Ala. 116; Balkum *v.* Wood, 58 Ala. 642. As to when an acknowledgment is essential to the validity of the instrument see *supra*, II, A, 1, b.

82. Hood *v.* Powell, 73 Ala. 171; Balkum *v.* Wood, 58 Ala. 642.

Reacknowledgment after death of husband. — Where conveyance by husband and wife, defective as to the wife, is reacknowledged by her after the death of her husband, it takes effect only from the time of such reacknowledgment. Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497.

83. Jackson *v.* Stevens, 16 Johns (N. Y.) 110; Moffatt *v.* Grover, 4 U. C. C. P. 402; Beattie *v.* Mutton, 14 Grant Ch. (U. C.) 686.

84. Chester *v.* Breitling, (Tex. Civ. App. 1895) 30 S. W. 464.

Conveyance of homestead.— In Alabama it has been held that where a conveyance of the homestead, invalid by reason of a defect in the wife's acknowledgment, is subsequently acknowledged by her in a proper manner, such acknowledgment will date back to the time of delivery, no rights of third parties having intervened. Vancleave *v.* Wilson, 73 Ala. 387; Cahall *v.* Citizens Mut. Bldg. Assoc., 61 Ala. 232.

After death of grantee.— A deed made by a husband and wife to one who dies previously to the probate and privy examination of the wife is good from the time of its execution and delivery to the bargainee, provided that after his death it is duly acknowledged and the privy examination of the wife taken and the deed registered. Hall *v.* Chang, 47 N. C. 440.

instrument will be presumed to have been delivered on the day it bears date, notwithstanding the acknowledgment bears a later date.[85] Thus, where two deeds bearing different dates were acknowledged at the same time, it was presumed, in the absence of proof to the contrary, that they were delivered on their respective dates, and not that both were delivered at the time of acknowledgment.[86] But sometimes it has been held that the date of the subsequent acknowledgment should be presumed to be the date of delivery,[87] and where the instrument bears date subsequent to that of the acknowledgment the date of the acknowledgment may be taken as the time of delivery.[88] Such presumptions as to the time of delivery may always be overcome by evidence to the contrary.[89]

E. Relative Time of Acknowledgment by Husband and Wife — 1. In General. It is not usually necessary that an instrument executed jointly by husband and wife should be acknowledged by both of them at the same time and place, and the fact that the wife's acknowledgment is taken a considerable time after the execution and acknowledgment of the deed by the husband will not invalidate it in the absence of any intervening rights of third persons.[90]

2. Acknowledgment after Death of Husband. Where, after the death of the

85. Hardin *v.* Crate, 78 Ill. 533; Darst *v.* Bates, 51 Ill. 439; Blake *v.* Fash, 44 Ill. 302; Jayne *v.* Gregg, 42 Ill. 413; Deininger *v.* McConnel, 41 Ill. 227; Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459; People *v.* Snyder, 41 N. Y. 397; Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794; Raines *v.* Walker, 77 Va. 92; Harman *v.* Oberdorfer, 33 Gratt. (Va.) 497. For a full discussion see Deeds.

As to the effect of an acknowledgment as raising a presumption of due execution see *supra*, IV, C.

Delivery as early as acknowledgment.— Where a deed bears one date, and the acknowledgment thereof a subsequent date, and the date of the recording is subsequent to either, in the absence of evidence to the contrary it will be held that the deed was delivered as early as the day of acknowledgment. Clark *v.* Akers, 16 Kan. 166.

86. Renick *v.* Ludington, 20 W. Va. 511.

87. Johnson *v.* Moore, 28 Mich. 3; Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57. See also Henry County *v.* Bradshaw, 20 Iowa 355; Loomis *v.* Pingree, 43 Me. 299. In Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249, the instrument bore date June 20, 1860, but the certificate of acknowledgment was dated June 20, 1864. It was held that the latter date would be presumed to be the date of delivery.

88. Gorman *v.* Stanton, 5 Mo. App. 585; Buck *v.* Gage, 27 Nebr. 306, 43 N. W. 110.

A deed will not be excluded from evidence because of the fact that it bears a date subsequent to that of the acknowledgment. Munroe *v.* Eastman, 31 Mich. 283.

89. Barry *v.* Hoffman, 6 Md. 78; Eaton *v.* Trowbridge, 38 Mich. 454.

Death of grantee before date of acknowledgment.—Where a grantee died between the date of the deed and that of its acknowledgment it was presumed that the deed had been delivered in his lifetime. Eaton *v.* Trowbridge, 38 Mich. 454.

Presumption overcome by certificate.— Where a deed is executed and acknowledged by parties in different counties and on different days, the presumption arising from its date that it was delivered on that day cannot stand against the positive averment in the acknowledgment that it was executed afterward. Henderson *v.* Baltimore, 8 Md. 352, 353.

90. Lineberger *v.* Tidwell, 104 N. C. 506, 10 S. E. 758; Ludlow *v.* O'Neil, 29 Ohio St. 181; Williams *v.* Robson, 6 Ohio St. 510; Montgomery *v.* Hobson, Meigs (Tenn.) 437; Chester *v.* Breitling, (Tex. Civ. App. 1895) 30 S. W. 464; Halbert *v.* Hendrix, (Tex. Civ. App. 1894) 26 S. W. 911.

As to the necessity for an acknowledgment by the husband of an instrument executed by husband and wife see *supra*, II, B, 2, e.

As to curing defects by reacknowledgment see *infra*, XII, H, 2.

Execution by wife at different time from husband.— Under the Illinois act of 1869, allowing a married woman to acknowledge as if sole an instrument executed by her and her husband, it was held that execution and delivery by her, years after it was executed by her husband, was sufficient. Stiles *v.* Probst, 69 Ill. 382.

Acknowledgment by wife after registration.— Where a deed was first acknowledged by the husband and recorded as to him, and afterward the wife on privy examination made due acknowledgment, it was held that the deed was thereby perfected as to her, though it did not appear that she had signed and sealed it at the time when it was recorded as to the husband. Langhorne *v.* Hobson, 4 Leigh (Va.) 224.

South Carolina — Renunciation of inheritance.— Under the South Carolina statute, in order for a married woman to release her inheritance, seven days must elapse between the execution of the deed by husband and wife and the renunciation of the wife. Where the wife's renunciation was made within seven days from the execution of the deed, such conveyance was held to be null and void. Bruce *v.* Perry, 11 Rich. (S. C.) 121; Wingo *v.* Parker, 19 S. C. 9.

husband, the wife properly acknowledges an instrument executed during the coverture, it operates as a reëxecution, and is sufficient to pass her interest from that time.[91]

X. MODE OF TAKING.

A. Of Persons Other Than Married Women — 1. PRIVATE PERSONS — a. In General. The authentication of documents by acknowledgment being of statutory origin, it naturally follows that an acknowledgment must be taken in the mode prescribed by the statute existing at the time of its taking.[92] A substantial compliance with the statutory provisions is all that is usually required;[93] and where a statute providing for the acknowledgment of a particular instrument does not point out the mode in which it is to be taken, an acknowledgment according to the mode prescribed for other cases is sufficient.[94] Under some statutes an acknowledgment, to be valid, must be made in open court.[95]

b. Ascertainment of Grantor's Identity. The statutes generally require that the officer taking the acknowledgment shall know, or have satisfactory evidence, that the person acknowledging the instrument is the grantor mentioned therein,[96]

91. Doe *v.* Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445; Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497; Breitling *v.* Chester, 88 Tex. 586, 32 S. W. 527 [*reversing* 30 S. W. 464]; Riggs *v.* Boylan, 4 Biss. (U. S.) 445, 20 Fed. Cas. No. 11,822. But see Richardson *v.* Woodstock Iron Co., 90 Ala. 266, 8 So. 7, 9 L. R. A. 348, wherein it was held that under Ala. Code, § 2508, providing that no conveyance of a homestead by a married man shall be valid unless separately acknowledged by the wife, if she failed to acknowledge it at the time of its execution or subsequently during the husband's life her acknowledgment after his death could not affect the title of the decedent's heirs.

As to ratification by wife of defectively acknowledged instrument see *supra*, III, B, 1, c.

As to curing defects by reacknowledgment see *infra*, XII, H, 2.

92. Butler *v.* Dunagan, 19 Tex. 559.

Repeal of former statute.—The Illinois act of 1853 in regard to the acknowledgment of deeds repealed so much of the act of 1847 as conflicted with its provisions; and after the passage of the act of 1853 an acknowledgment, to be good, must be in accordance with its terms rather than with those of the earlier statute. Lyon *v.* Kain, 36 Ill. 362.

Statutes providing different modes.—While the Oklahoma statute regarding conveyances and that relating to transfers provide different modes of acknowledgment, they are each, when conformed to, effective and sufficient. Inasmuch as these statutes relate to the same subject-matter they should be construed together, and effect should be given to each, especially as they were both enacted at the same legislative session. Garton *v.* Hudson-Kimberly Pub. Co., 8 Okla. 631, 58 Pac. 946; Hess *v.* Trigg, 8 Okla. 286, 57 Pac. 159.

Iowa — Agreement to submit to arbitration.— Iowa Rev. § 3677, regarding acknowledgments of agreements to submit to arbitration, does not demand the same degree of particularity in the acknowledgment of such instruments as is required in acknowledgments of deeds. McKnight *v.* McCullough, 21 Iowa 111.

93. Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544. But see Munn *v.* Lewis, 2 Port. (Ala.) 24, 28, wherein the court said: "The acts authorizing the acknowledgment of deeds, though of great public convenience, are yet in derogation of the common law, taking away the right of a personal examination of the party who made and of the witnesses who saw the execution of the deed; and therefore they must be strictly complied with."

94. Blagg *v.* Hunter, 15 Ark. 246.

Alabama — Declaration of adoption.— Where it is provided by statute that a declaration of adoption should be acknowledged, but no form of acknowledgment is prescribed, the acknowledgment provided for ordinary conveyances may be followed. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

Instrument in nature of deed of trust.— An instrument by which the transfer and transmission of land is effected, though in the nature of a deed of trust or power of appointment, may be acknowledged as a conveyance of land. Wells *v.* Wright, 12 N. J. L. 152.

95. Fail *v.* Goodtitle, 1 Ill. 201; Allen *v.* King, 35 Mo. 216; Exendine *v.* Morris, 8 Mo. App. 383; Bellas *v.* McCarty, 10 Watts (Pa.) 13; Patterson *v.* Stewart, 10 Watts (Pa.) 472; Murphy *v.* McCleary, 3 Yeates (Pa.) 405.

An administrator's deed, not acknowledged in open court, as required by the law in force at the time of its execution, is insufficient to convey title. Campbell *v.* Laclede Gas Light Co., 84 Mo. 352.

96. Pinckney *v.* Burrage, 31 N. J. L. 21; Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

As to recitals in the certificate regarding identity see *infra*, XII, G, 1, a, (II), (B).

The identity of the grantor, and not that of the person who merely signs the deed, is a fact the officer must know before he is authorized to grant his certificate. Lyon *v.* Kain, 36 Ill. 362.

Fact of acknowledgment.—The person who

and a failure to comply with such requirement renders the acknowledgment defective.[97] The grantor's identity may be established by the oath of a subscribing witness[98] or other person known to the officer,[99] and it has been held that an introduction by a common friend is sufficient.[1] But it seems that the identification cannot properly be made by a person interested in sustaining the instrument.[2]

c. Explanation of Instrument to Grantor. It is the duty of the officer to ascertain that the grantor understands the nature of the instrument he is executing, and where the grantor is ignorant or illiterate the officer must read or make known its contents to him,[3] or use other means to enable him to comprehend the character and effect of his act.[4]

d. Where Instrument Proved by Witness. Where an instrument is proved for record by a subscribing witness it is generally required that such witness shall testify that he was present and saw the instrument executed.[5]

executes the deed must in fact acknowledge it to the officer to be his deed, either by the use of that word or by some other equivalent word or expression (Short *v.* Conlee, 28 Ill. 219), and a mere statement by the grantee, in the absence of the grantor, that the latter executed the deed, is not sufficient to warrant the officer in certifying the acknowledgment (Mays *v.* Hedges, 79 Ind. 288).

97. Several grantors — Some unknown to officer.— An acknowledgment by several persons, some of whom are unknown to the officer, is defective, even though the others are well known to him. Treadwell *v.* Sackett, 50 Barb. (N. Y.) 440.

98. Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153.

99. Dibble *v.* Rogers, 13 Wend. (N. Y.) 536.

1. Nippel *v.* Hammond, 4 Colo. 211; Wyllis *v.* Haun, 47 Iowa 614; Rexford *v.* Rexford, 7 Lans. (N. Y.) 6. But see Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

Sufficient if officer's conscience satisfied.— An introduction by a common friend is sufficient to satisfy a statutory requirement that the officer taking an acknowledgment shall know or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed the instrument, if such introduction satisfies the conscience of the officer as to the identity of the party. Wood *v.* Bach, 54 Barb. (N. Y.) 134 [*overruling* Jones *v.* Bach, 48 Barb. (N. Y.) 568].

2. Goodhue *v.* Berrien, 2 Sandf. Ch. (N. Y.) 630.

3. Hyer *v.* Little, 20 N. J. Eq. 443; Suffern *v.* Butler, 19 N. J. Eq. 202.

As to the necessity for the certificate to recite that the instrument was explained to the acknowledgor see *infra*, XII, G, 1, a, (II), (C).

Where mere reading insufficient.— Where the grantor is old, decrepit, and ignorant, it is the duty of the officer authenticating the execution of the deed to make known to him its contents by such means as will enable him to comprehend the nature and effect of his act. A simple, formal reading of the instrument is insufficient. Lyons *v.* Van Riper, 26 N. J. Eq. 337.

Transfer procured under suspicious circumstances.— Where the officer, when summoned to attest a transfer of property procured by the transferee under suspicious circumstances, neglects to investigate carefully the condition of things in the beneficiary's absence, his testimony that the donor seemed to be in full possession of his faculties is less satisfactory than if he had taken such precautions. Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149.

4. Grantor deaf and dumb.— The deed of an uneducated deaf and dumb man, acknowledged before a justice and recorded, will be sustained on proof that the deed was explained to him by signs and that he was believed to understand it, there being no evidence of fraud on the part of the grantee. Morrison *v.* Morrison, 27 Gratt. (Va.) 190.

Grantor ignorant of English language.— A notary's certificate of acknowledgment is of little force when the person purporting to make the acknowledgment does not understand English, and the notary has not explained the effect of the act in such person's own language and has not seen to it himself that it was understood. Harrison *v.* Oakman, 56 Mich, 390, 23 N. W. 164.

Right to employ interpreter.— In the absence of statutory authority, an officer who is ignorant of the grantor's vernacular language cannot take the acknowledgment through a sworn interpreter. Dewey *v.* Campau, 4 Mich. 565.

5. Norman *v.* Wells, 17 Wend. (N. Y.) 136. But see Ballard *v.* Perry, 28 Tex. 347, wherein the witness was procured by the maker to subscribe the instrument subsequent to its execution.

As to the certificate of proof by witnesses see *infra*, XII, G, 2.

Instrument signed in presence of witness.— Under Tex. Rev. Stat. art. 4314, a declaration by the subscribing witness that the grantor signed the instrument in his presence is equivalent to a declaration that the witness saw the grantor sign it. and it is not necessary that the witness should further declare that he signed the instrument at the request of the grantor. Jones *v.* Robbins, 74 Tex. 615, 12 S. W. 824.

Not required to testify as to date.— In proving an instrument for record the witness

2. Corporations. Ordinarily the manner of taking an acknowledgment by a corporation is not different from that provided in a case of an individual grantor,[6] except that such acknowledgment must be made by some person or persons authorized to act in behalf of the corporation.[7] Where a special mode of acknowledgment is provided by statute, such mode must of course be pursued.[8]

3. Acknowledgments Taken Outside the State — a. Must Conform to Laws of State Where Land Lies. Where a conveyance is acknowledged in a state other than that in which the land lies, the acknowledgment must be taken in accordance with the laws of the latter state.[9]

is not required to testify to its date or to the date of his signature to it as a witness. Ballard *v.* Perry, 28 Tex. 347.

6. Pruyne *v.* Adams Furniture, etc., Co., 92 Hun (N. Y.) 214, 36 N. Y. Suppl. 361.

As to other matters relating to acknowledgments by corporations see *supra*, V, F.

General statutes applicable to corporations. — The provisions of Ala. Code, §§ 1799–1804, in regard to the acknowledgment of conveyances, apply to conveyances by corporations as well as by individuals. Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91.

Ascertaining identity of grantor.— The requirement that the officer must be satisfied that the person executing and acknowledging the deed is the grantor mentioned therein, when applied to the deed of a corporation, means that he must be satisfied that the person making the acknowledgment is in the eye of the law the grantor mentioned in it; that is, authorized to represent the corporation in executing and acknowledging the conveyance. Being so satisfied, he accepts the acknowledgment of the representative as that of the grantor itself. Hopper *v.* Lovejoy, 47 N. J. Eq. 573, 21 Atl. 298, 12 L. R. A. 588.

7. As to who may acknowledge in behalf of a corporation see *supra*, V, F.

8. **Sufficient acknowledgments.**— Where the president of a corporation affixes the corporate seal and signs his name as president to a mortgage, and acknowledges the execution thereof, testifying that the seal is the common seal of the corporation and attached by him to the mortgage under the authority of the corporation, the acknowledgment is sufficient to entitle the mortgage to record. Lovett *v.* Steam Saw Mill Assoc., 6 Paige (N. Y.) 54. Under the Missouri statutes prior to the act of April 2, 1883, a deed signed with the corporate name by the secretary and treasurer and with the name of the president, acknowledged before a notary public with the recital that the corporation, by its president and secretary, personally came before the officer, was held to be a properly acknowledged deed of the corporation. Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

California — Articles of incorporation.—Cal. Civ. Code, § 292, provides that articles of incorporation must be subscribed by five or more persons and acknowledged by each. Where the articles of incorporation were signed by five persons, but acknowledged by four only, it was held that the defect was fatal to the existence of the corporation in a proceeding against it by quo warranto. People *v.* Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172.

9. *Alabama.*— Hart *v.* Ross, 57 Ala. 518; Keller *v.* Moore, 51 Ala. 340.

Georgia.— Hearn *v.* Smith, 59 Ga. 704.

Indiana.— Woods *v.* Polhemus, 8 Ind. 60.

Kentucky.— Herd *v.* Cist, (Ky. 1889) 12 S. W. 466; Harris *v.* Price, 14 B. Mon. (Ky.) 414.

Louisiana.— Botto *v.* Berges, 47 La. Ann. 959, 17 So. 428; Leibe *v.* Hebersmith, 39 La. Ann. 1050, 3 So. 283. See also Langley *v.* Burrows, 15 La. Ann. 392.

Maryland.— Haney *v.* Marshall, 9 Md. 194.

Massachusetts.— Gibbs *v.* Swift, 12 Cush. (Mass.) 393.

North Carolina.— Evans *v.* Etheridge, 99 N. C. 43, 5 S. E. 386. And see Simmons *v.* Gholson, 50 N. C. 401.

Ohio.— Brannon *v.* Brannon, 2 Disn. (Ohio) 224.

Tennessee.— McGuire *v.* Hay, 6 Humphr. (Tenn.) 419.

Vermont.—Townsend *v.* Downer, 27 Vt. 119.

Virginia.— Cales *v.* Miller, 8 Gratt. (Va.) 6.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

United States.— U. S. *v.* Crosby, 7 Cranch (U. S.) 115, 3 L. ed. 287; Morton *v.* Smith, 2 Dill. (U. S.) 316, 17 Fed. Cas. No. 9,867.

As to the recording of an instrument properly acknowledged outside the state see *supra*, IV, A, 3.

As to admissibility in evidence of an instrument acknowledged outside the state see *supra*, IV, B, 4.

As to who may take acknowledgments outside the state see *supra*, VI, A, 4.

As to power of an officer to take acknowledgments outside his own state see *supra*, VI, C, 1.

As to place of taking such acknowledgments see *supra*, VIII, C.

As to the mode of taking a married woman's acknowledgment outside the state see *infra* X, B, 1, f.

As to the effect of curative statutes on defective acknowledgments taken outside the state see *infra*, XII, H, 3, e, (II).

As to the further certificate of authenticity and conformity where the acknowledgment is taken outside the state see *infra*, XIII, A.

Laws presumed to be the same.— In the absence of proof to the contrary it will be presumed that the requirements of another state in which an acknowledgment is taken are the same as those of the state where the land lies. Hewitt *v.* Morgan, 88 Iowa 468, 55 N. W. 478.

b. Adoption of Laws of Other State. In some jurisdictions the statutes provide that an acknowledgment in conformity with the laws of the state where taken shall be sufficient,[10] and where this is the case it is usually necessary to show that such laws have been complied with.[11] But the provisions of the statute of the state in which the land lies cannot be so combined with those of the state in which the conveyance was acknowledged that, by their joint operation, such acknowledgment, though defective under the provisions of either statute, will be sufficient under the combination.[12]

B. Of Married Women — 1. Where Acknowledgment Made Essential by Statute — a. Necessary Compliance with Statute. As has been stated heretofore, where a statute authorizing a married woman to convey her property requires her to acknowledge the instrument, such acknowledgment is absolutely essential to the validity of the conveyance even as between parties.[13] Hence it follows that the acknowledgment must be taken in compliance with the provisions of the existing statute,[14] else it will be of no force.[15] But it seems that a substan-

10. *Florida.*— Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

Illinois.— Esker *v.* Heffernan, 159 Ill. 38, 41 N. E. 1113; Garrick *v.* Chamberlain, 97 Ill. 620; Bowman *v.* Wettig, 39 Ill. 416.

Iowa.— Kruger *v.* Walker, 94 Iowa 506, 63 N. W. 320.

Kansas.— Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586.

Michigan.— Galpin *v.* Abbott, 6 Mich. 17; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Nebraska.— Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645; Green *v.* Gross, 12 Nebr. 117, 10 N. W. 459; Roode *v.* State, 5 Nebr. 174, 25 Am. Rep. 475; Hoadley *v.* Stephens, 4 Nebr. 431.

Ohio.— Allen *v.* Parish, 3 Ohio 107.

Texas.— Brownson *v.* Scanlan, 59 Tex. 222.

Wisconsin.— Smith *v.* Garden, 28 Wis. 685.

United States.— Little *v.* Herndon, 10 Wall. (U. S.) 26, 19 L. ed. 878; Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153; Root *v.* Brotherson, 4 McLean (U. S.) 230, 20 Fed. Cas. No. 12,036; Farmers' L. & T. Co. *v.* McKinney, 6 McLean (U. S.) 1, 8 Fed. Cas. No. 4,667.

11. Rehkopf *v.* Miller, 59 Ill. App. 662; Phillips *v.* People, 11 Ill. App. 340; Kreuger *v.* Walker, 80 Iowa 733, 45 N. W. 871, 94 Iowa 506, 63 N. W. 320; Crispen *v.* Hannavan, 50 Mo. 415; Hoadley *v.* Stephens, 4 Nebr. 431. See also, generally, *infra*, XIII.

12. Adams *v.* Bishop, 19 Ill. 395; Montag *v.* Linn, 19 Ill. 399.

13. See *supra*, II, B; III, B.

14. Alabama act repealing all prior statutes.— The Alabama act of April 23, 1873 (Sess. Acts (1872–73), p. 65), having reference to married women's acknowledgments, was intended as a substitute for, and a repeal of, all prior statutes on the subject. Scott *v.* Simons, 70 Ala. 352.

Pennsylvania — Sale of husband's property.— The provision of the Pennsylvania married woman's act of 1848 prescribing the acknowledgment, etc., requisite to the sale of property by a husband does not apply where the husband and wife unite in the sale. In such case an acknowledgment according to the law as it stood previous to the act of 1848 is sufficient, the latter statute applying only where the sale is by the husband. Haffey *v.* Carey, 73 Pa. St. 431.

15. *Alabama.*— Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527.

California.— Healdsburg Bank *v.* Bailhache, 65 Cal. 327, 4 Pac. 106; Landers *v.* Bolton, 26 Cal. 393; Selover *v.* American Russian Commercial Co., 7 Cal. 266.

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Idaho.— Wilson *v.* Wilson, (Ida. 1899) 57 Pac. 708.

Illinois.— Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490.

Louisiana.— Gremillon's Succession, 4 La. Ann. 411.

Maryland.— Lewis *v.* Waters, 3 Harr. & M. (Md.) 430.

Missouri.— Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731; Wannell *v.* Kem, 57 Mo. 478; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

New York.— Doe *v.* Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445.

North Carolina.— McCaskill *v.* McKinnon, 121 N. C. 214, 28 S. E. 343; Rich *v.* Beeding, 24 N. C. 240; Burgess *v.* Wilson, 13 N. C. 306.

Pennsylvania.— Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

Texas.— McKellar *v.* Peck, 39 Tex. 381.

United States.— Sewall *v.* Haymaker, 127 U. S. 719, 8 S. Ct. 1348, 32 L. ed. 299; Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164; Lane *v.* Dolick, 6 McLean (U. S.) 200, 14 Fed. Cas. No. 8,049.

Mortgage on separate estate.—A mortgage given by a married woman on her separate estate is an "instrument" and a "conveyance" within the meaning of Cal. Civ. Code, §§ 1186, 1189, and, to be valid, must be acknowledged with the formalities therein prescribed. Tolman *v.* Smith, 74 Cal. 345, 16 Pac. 189.

The former practice in North Carolina was to require an acknowledgment by husband and wife in open court (Barfield *v.* Combs, 15 N. C. 514; Burgess *v.* Wilson, 13 N. C. 306; Fenner *v.* Jasper, 18 N. C. 34), unless

tial compliance is sufficient.[16] If the statute requiring an acknowledgment of a particular instrument prescribes no form, such acknowledgment may be taken in the manner prescribed for other cases.[17]

b. Ascertainment of Grantor's Identity. The officer taking a married woman's acknowledgment must know personally or from satisfactory proof that the woman making the acknowledgment is the grantor who executed the instrument.[18]

c. Voluntary Nature of Act. In the absence of any statute allowing a married woman to convey her property as if sole, an acknowledgment, to be binding on her, must be made on her declaration that she has freely and voluntarily executed the instrument.[19] Before the officer can lawfully certify the acknowledgment, it is his duty to ascertain from the wife personally that she is acting of her own free will and not under coercion or compulsion,[20] and if she state that she is

the wife were unable to travel to court, in which case a commission was issued to two commissioners to take her acknowledgment (Malloy *v.* Bruden, 88 N. C. 305; Pierce *v.* Wanett, 51 N. C. 162; Hathaway *v.* Davenport, 47 N. C. 152; Etheridge *v.* Ferebee, 31 N. C. 312; Skinner *v.* Fletcher, 23 N. C. 313; Fenner *v.* Jasper, 18 N. C. 34).

16. Nantz *v.* Bailey, 3 Dana (Ky.) 111; Bohan *v.* Casey, 5 Mo. App. 101; Langhorne *v.* Hobson, 4 Leigh (Va.) 224.

17. **Alabama — Alienation of homestead.**— Where, by statute, the wife's acknowledgment was required to an alienation of the homestead by the husband, but no form was prescribed for her acknowledgment, it was held sufficient where taken in conformity with the statutes regulating other conveyances by husband and wife. Scott *v.* Simons, 70 Ala. 352.

Where unnecessary to follow other statutes.— The Rhode Island statute prescribing the mode of barring estates tail by acknowledgment in open court provides no different form of acknowledgment for a married woman. It was held that in proceeding under this statute it was unnecessary to follow the formula required by another statute in taking the acknowledgments of married women. Lippitt *v.* Huston, 8 R. I. 415, 94 Am. Dec. 115.

18. Lyon *v.* Kain, 36 Ill. 362. And see *supra*, X, A, 1, b.

As to recitals in the certificate regarding the grantor's identity see *infra*, XII, G, 1, b, (II), (B).

Where a wife was introduced to the officer taking the acknowledgment by her husband in the presence of his brother, both being known to the officer, there is sufficient ground for his certificate of knowledge of the grantor's identity. Rexford *v.* Rexford, 7 Lans. (N. Y.) 6.

Sufficient acknowledgment of execution.— A statement by a married woman to the notary who took her acknowledgment, that the signature to the deed was hers, was held to be sufficient evidence of the execution to justify the notary in making his certificate, and such facts may be proved by the officer. Jansen *v.* McCahill, 22 Cal. 563, 83 Am. Dec. 84.

19. *Arkansas.*— Mickel *v.* Gardner, 41 Ark. 491; Russell *v.* Umphlet, 27 Ark. 339.

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Illinois.— Lyon *v.* Kain, 36 Ill. 362.

Kansas.— Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60.

Kentucky.— Moorman *v.* Board, 11 Bush (Ky.) 135; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Minnesota.—Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433.

Pennsylvania.— McCandless *v.* Engle, 51 Pa. St. 309; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

As to recitals in the certificate touching the voluntary nature of the act see *infra*, XII, G, 1, b, (II), (D).

Meaning of word "freely."— The word "freely," as used in a statute regulating acknowledgments by married women, does not import that the married woman shall execute the deed without a motive, or as a mere act of generosity and without any hope of present or future benefit; but that she shall execute it without constraint or coercion or fear of injury from her husband. Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232.

20. Fisher *v.* Meister, 24 Mich. 447; Wannell *v.* Kem, 57 Mo. 478. In McCaskill *v.* McKinnon, 121 N. C. 214, 28 S. E. 343, where there was no evidence that defendant, a married woman, had assented to the examination or expressed her voluntary assent in any other way than by verbal statement, it was held not error to charge that if defendant "did not state" to the examining magistrate that she voluntarily signed a mortgage sued upon, the jury should find that she did not voluntarily execute it and was not examined separately touching her voluntary execution thereof.

Need not use the words of the statute.— It is not necessary that an officer taking the acknowledgment of a married woman should ask, in the words of the statute, whether "she wished to retract it." It is sufficient if he elicits from her that it was her present purpose willingly to execute the instrument. Adams *v.* Pardue, (Tex. Civ. App. 1896) 36 S. W. 1015.

Assent implied from silence.— Where the wife making the acknowledgment made no reply to the questions put to her by the officer as to her free execution of the deed, her

not willing to convey, the officer has of course no right to certify that she assented to the conveyance.[21]

d. Explanation of Instrument — (I) *In General.* It is a usual statutory requirement that the officer taking a married woman's acknowledgment shall make her acquainted with the contents of the instrument, and where this is the case such requirement must be observed in order for the acknowledgment to be effective.[22] The explanation by the officer must be sufficiently full and accurate to give the woman an understanding of the nature of her act,[23] but he is not obliged to go into a detailed explanation of collateral matters.[24]

(II) *Where Wife Already Acquainted with Contents.* The primary object of such statutory directions is that the woman shall understand the nature of her act and its consequences, and if that object is accomplished a failure to comply literally with the statute is not material. Therefore it is generally held that where a wife already understands the contents and effect of the instrument, and so informs the officer, no further explanation on his part is necessary.[25] But

assent might be implied from her silence. Rexford *v.* Rexford, 7 Lans. (N. Y.) 6.

21. Etheridge *v.* Ferebee, 31 N. C. 312, wherein the wife stated that she had been willing to convey when she executed the deed, but had since changed her mind.

22. *Idaho.*— Wilson *v.* Wilson, (Ida. 1899) 57 Pac. 708.

Illinois.— Stuart *v.* Dutton, 39 Ill. 91; Lyon *v.* Kain, 36 Ill. 362.

Kentucky.— Woodhead *v.* Foulds, 7 Bush (Ky.) 222.

Louisiana.— Gremillon's Succession, 4 La. Ann. 411.

Ohio.— Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387; Connell *v.* Connell, 6 Ohio 353.

Pennsylvania.— Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722; Graham *v.* Long, 65 Pa. St. 383.

Texas.— Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430; Cole *v.* Bammel, 62 Tex. 108.

As to recitals in the certificate regarding the explanation of the instrument see *infra*, XII, G, 1, b, (II), (E).

Not applicable to deed by widow.— The statutory requirement that a deed executed by a married woman must be read and explained to her by the officer who takes her acknowledgment does not apply to a deed executed by a widow. Beville *v.* Jones, 74 Tex. 148, 11 S. W. 1128.

Explanation through interpreter.— Where the instrument is explained through the medium of an interpreter to a married woman who does not understand English, it is the proper practice for the interpreter to be sworn. Waltee *v.* Weaver, 57 Tex. 569.

23. What not a "full explanation."— Where a deed of a married woman on its face conveys an absolute title in fee, an explanation by the acknowledging officer that such instrument conveys only a life-estate is not a "full explanation" of its legal effect within the meaning of the statute relating to the acknowledgment of deeds by married women. Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430.

Unsound mental condition.— Where a married woman's mental condition was such that her privy examination could not properly be made it was held that the deed was void. Garth *v.* Fort, 15 Lea (Tenn.) 683.

24. Morrison *v.* McKee, 11 Mo. App. 594.

Collateral instrument executed same day.— Where a notary, in taking a married woman's acknowledgment to a deed, complete in itself, conveying the husband's homestead, explained the effect of the act as passing the fee, it was not necessary for him also to explain to her another instrument executed on the same day, as part of the same transaction, by her husband and the grantee, whereby the grantee agreed to reconvey at a certain price within three years and the husband agreed to pay a certain rent during such time. Andrews *v.* Bonham, 19 Tex. Civ. App. 179, 46 S. W. 902.

Nature and extent of title.— Wag. Stat. Mo. p. 275, § 13, requiring the officer taking the acknowledgment of a married woman to a deed "to make her acquainted with the contents" of the instrument, does not require the officer to inform her of the nature and extent of her title, unless by special covenant made a part of the deed. Ray *v.* Crouch, 10 Mo. App. 321.

25. La Société Française, etc. *v.* Beard, 54 Cal. 480; Moorman *v.* Board, 11 Bush (Ky.) 135; Drew *v.* Arnold, 85 Mo. 128; Belo *v.* Mayes, 79 Mo. 67 [*overruling* Wannell *v.* Kem, 57 Mo. 478]; Morrison *v.* McKee, 11 Mo. App. 594; Ray *v.* Crouch, 10 Mo. App. 321; Bohan *v.* Casey, 5 Mo. App. 101.

Knowledge of instrument sufficiently shown. — A debt of a husband, for which the wife's property was bound by a mortgage, was being pressed, and arrangements were made to discharge it by means of a new mortgage to plaintiff. The parties, with their counsel, met and discussed the matter, the wife taking an active part, and she signed the mortgage only after each item had been fully discussed and after she had been advised by her counsel. It was held that the mortgage was valid although the notary taking her acknowledgment failed to inform her as to the contents of the paper. Kaufmann *v.* Rowan, 189 Pa. St. 121, 42 Atl. 25.

the officer must be satisfied that she really understands it,[26] and it seems that her mere statement that she knows its contents is not sufficient.[27]

e. Privy Examination — (I) *In General.* Where a statute authorizing a married woman to alien her property provides that the instrument shall be acknowledged by her on a private examination separate and apart from her husband, such provision must be considered as mandatory, and unless she be so examined her acknowledgment will be of no effect;[28] and the fact that the officer was ignorant

26. Morrison *v.* McKee, 11 Mo. App. 594.

27. Bohan *v.* Casey, 5 Mo. App. 101. But see Ronner *v.* Welcker, 99 Tenn. 623, 42 S. W. 439, where, under a statute merely requiring the officer to examine the wife touching her knowledge of the contents and effect of the instrument, and, if satisfied that she fully understood it, to take her acknowledgment, it was held that although the officer did not read or state the contents of the instrument to the wife, but stated that it was a deed of trust, whereupon she replied that she knew about it and at once prepared to sign it, this was sufficient to satisfy the officer that she already understood the instrument.

28. *Alabama.*— Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; Balkum *v.* Wood, 58 Ala. 642; Doe *v.* Wilkinson, 21 Ala. 296.

Arkansas.— Stillwell *v.* Adams, 29 Ark. 346; Stidham *v.* Matthews, 29 Ark. 650; Russell *v.* Umphlet, 27 Ark. 339.

California.— Kendall *v.* Miller, 9 Cal. 591.

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Delaware.— Lewis *v.* Coxe, 5 Harr. (Del.) 401.

Florida.— Carn *v.* Haisley, 22 Fla. 317; Hartley *v.* Ferrell, 9 Fla. 374.

Illinois.— Lyon *v.* Kain, 36 Ill. 362.

Indiana.— Dawson *v.* Shirley, 6 Blackf. (Ind.) 531; Clark *v.* Redman, 1 Blackf. (Ind.) 379.

Kentucky.— Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Pendergast *v.* Gwathmey, 2 A. K. Marsh. (Ky.) 67.

Louisiana.— Bowers *v.* Hale, 14 La. Ann. 419.

Maryland.— Webster *v.* Hall, 2 Harr. & M. (Md.) 19, 1 Am. Dec. 370.

Minnesota.— Edgerton *v.* Jones, 10 Minn. 427; Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721; Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191.

Missouri.— Wannell *v.* Kem, 57 Mo. 478; Rogers *v.* Woody, 23 Mo. 548.

New Jersey.— Den *v.* Ashmore, 22 N. J. L. 261; Marsh *v.* Mitchell, 26 N. J. Eq. 497 [*affirmed* in 27 N. J. Eq. 631]; Armstrong *v.* Ross, 20 N. J. Eq. 109.

New York.— Elwood *v.* Klock, 13 Barb. (N. Y.) 50.

North Carolina.— Wachovia Nat. Bank *v.* Ireland, 122 N. C. 571, 29 S. E. 835; Farthing *v.* Shields, 106 N. C. 289, 10 S. E. 998; Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443; Scott *v.* Battle, 85 N. C. 184, 39 Am. Rep. 694; Gilchrist *v.* Buie, 21 N. C. 346; Burgess *v.* Wilson, 13 N. C. 306; Den *v.* Barfield, 6 N. C. 391.

Pennsylvania.— Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722; Graham *v.* Long, 65 Pa. St. 383; McCandless *v.* Engle, 51 Pa. St. 309; Haines *v.* Ellis, 24 Pa. St. 253; Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724; Thompson *v.* Morrow, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; Tarr *v.* Glading, 1 Phila. (Pa.) 370, 9 Leg. Int. (Pa.) 110.

South Carolina.— McKenzie *v.* Sifford, 52 S. C. 104, 29 S. E. 388; Townsend *v.* Brown, 16 S. C. 91.

Tennessee.— Huff *v.* Glenn, 101 Tenn. 112, 46 S. W. 766; Robinson *v.* Queen, 87 Tenn. 445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214; Woodrum *v.* Kirkpatrick, 2 Swan (Tenn.) 218; Mount *v.* Kesterson, 6 Coldw. (Tenn.) 452; Prater *v.* Hoover, 1 Coldw. (Tenn.) 544; Davis *v.* Bowman, (Tenn. Ch. 1898), 46 S. W. 1039.

Texas.— Cole *v.* Bammel, 62 Tex. 108; Smith *v.* Elliott, 39 Tex. 201; Berry *v.* Donley, 26 Tex. 737; Callahan *v.* Patterson, 4 Tex. 61, 51 Am. Dec. 712.

West Virginia.— Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

United States.— Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164; Manchester *v.* Hough, 5 Mason (U. S.) 67, 16 Fed. Cas. No. 9,005; Raverty *v.* Fridge, 3 McLean (U. S.) 245, 20 Fed. Cas. No. 11,587; Elliott *v.* Peirsoll, 1 McLean (U. S.) 11, 8 Fed. Cas. No. 4,395.

As to recitals in the certificate regarding the privy examination see *infra*, XII, G, 1, b, (II), (C).

Release of equitable right.— A wife cannot release her equitable right in land, without privy examination of her, any more than she can a legal title. Countz *v.* Geiger, 1 Call (Va.) 190.

Where executed before marriage.— A deed, when executed by an unmarried woman, may be acknowledged by her as *feme sole* after she marries. King *v.* Davis, 13 Pa. Co. Ct. 657. In Darden *v.* Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46, it was held that an executrix who while sole entered into an agreement to lease land belonging to the estate was competent to acknowledge the lease for registration after her marriage, without being privily examined. But see Johnson *v.* Walton, 1 Sneed (Tenn.) 258, wherein it was held that an acknowledgment of a marriage contract, taken after the marriage without the privy examination of the wife, was a nullity, though the contract were executed before the marriage.

In North Carolina the privy examination

of the necessity to examine her privately will not prevent the acknowledgment from being invalid.[29]

(II) *What Privacy Required.* The object of the private examination is to discover whether the wife is acting of her own volition,[30] and therefore it should properly be taken so far out of the presence of the husband that he cannot communicate with her by word, look, or motion, or see or hear any intimation of unwillingness on her part, for otherwise she has no opportunity to escape coercion.[31] Where it appears that the husband was present during the examination, the presumption that the wife did not act freely and without constraint arises as a matter of law.[32]

f. Acknowledgment Taken Outside the State. The general rule that an acknowledgment taken outside the state where the land lies must conform to the laws of that state applies to acknowledgments by married women.[33]

2. Where Separate Acknowledgment Not Required — a. Statutory Authority to Convey as Feme Sole. Where, by statute, a married woman is authorized to

of the wife is required to be taken after the instrument has been acknowledged in open court by both husband and wife. Barrett *v.* Barrett, 126 N. C. 127, 26 S. E. 691, 36 L. R. A. 226; Southerland *v.* Hunter, 93 N. C. 310; Ferguson *v.* Kinsland, 93 N. C. 337; McGlennery *v.* Miller, 90 N. C. 215; Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338; Gilchrist *v.* Buie, 21 N. C. 346; Sutton *v.* Sutton, 18 N. C. 582; Burgess *v.* Wilson, 13 N. C. 306.

29. Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242.

30. In Garth *v.* Fort, 15 Lea (Tenn.) 683, 687, the court said: "The guard thrown around the married woman by the law requiring the privy examination is intended to furnish her the means of information necessary to a perfect understanding of the act she is called on to perform, and to protect her against her own ignorance of what may be the legal effect of her act as well as against the superior knowledge, cunning, and undue influences of others."

31. Belo *v.* Mayes, 79 Mo. 67; McCandless *v.* Engle, 51 Pa. St. 309.

Presence of third person.— A separate acknowledgment of a married woman is not invalidated by the fact that a third person was present with her and the magistrate after the husband had withdrawn. Jones *v.* Maffet, 5 Serg. & R. (Pa.) 523.

32. Moorman *v.* Board, 11 Bush (Ky.) 135; Woodhead *v.* Foulds, 7 Bush (Ky.) 222; Allen *v.* Shortridge, 1 Duv. (Ky.) 34; Fisher *v.* Meister, 24 Mich. 447. But see Norton *v.* Nichols, 35 Mich. 148, wherein it was held that the wife, by her deliberate conduct, had estopped herself from taking advantage of the technicality.

Coercive presence.— Where a married woman objected to signing a deed of real property, and was thereupon addressed by her husband in harsh, threatening, and abusive language (though not in the presence of the acknowledging officer), and immediately thereafter in the presence of her husband she acknowledged the same to be her voluntary act, etc., it was held that the presence of the husband was a coercive presence and that the acknowledgment was not taken "separately apart" from him in the spirit and meaning of the statute, and therefore the instrument was ineffectual to pass her interest in the land. Edgerton *v.* Jones, 10 Minn. 427.

Sufficient privacy.— Where the wife's examination was taken on a porch outside the room in which the husband was lying down with his head toward her, it was held that she was examined separate and apart from him as required by law. Webb *v.* Webb, 87 Mo. 540.

Where presence in room immaterial.— In the separate acknowledgment of a deed by a married woman it is not necessary to the validity of her examination that her husband should go out of the room if he goes far enough away from her to leave her free to express to the clerk her desire with respect to the deed. Hall *v.* Castleberry, 101 N. C. 153, 7 S. E. 706.

33. McDaniel *v.* Grace, 15 Ark. 465; Woods *v.* Polhemus, 8 Ind. 60; Dalton *v.* Murphy, 30 Miss. 59; Harmon *v.* Taft, 1 Tyler (Vt.) 6.

For other matters regarding acknowledgments taken outside the state see *supra*, X, A, 3.

Privy examination.— The deed of a married woman, proved in a court of another state without privy examination, is insufficient to convey lands lying in Kentucky. Steele *v.* Lewis, 1 T. B. Mon. (Ky.) 48.

Instrument effective where acknowledged. — A deed made in Massachusetts in 1805 by a husband and wife, and acknowledged by the wife only, passes the wife's interest in land in Ohio because it has that effect in Massachusetts. Foster *v.* Dennison, 9 Ohio 121. But a deed of lands in Missouri, executed by a husband and wife in Illinois, and acknowledged before a notary, though not in compliance with the statute regulating conveyances then in force in Illinois, is of no validity as against the wife. Reaume *v.* Chambers, 22 Mo. 36.

New York — May acknowledge as feme sole.— Under the New York statutes the acknowledgment of deeds by married women living out of the state may be made as if they were sole. Andrews *v.* Shaffer, 12 How. Pr. (N. Y.) 441. See also Platt *v.* Brown, 30 Conn. 336, construing the New York statute.

convey as a *feme sole*, the acknowledgment ceases to be essential to the validity of the instrument[34] and may be taken and certified in the same manner as one by any other person under no legal disability.[35] Consequently, where such statutes exist, a privy examination of the wife separate and apart from her husband is no longer requisite[36] nor is a disclaimer of coercion or compulsion essential to the validity of her acknowledgment.[37]

b. Wife Living Apart from Husband. Sometimes the statutory separate acknowledgment is not required in the case of a married woman abandoned by her husband[38] or living apart from him under a decree of separation.[39] Thus in California it has been held that a married woman living under her maiden name, apart from her husband, and representing herself to be a single woman, could not avoid a deed acknowledged by her as a *feme sole*.[40]

34. See *supra*, II, B, 3, b.

35. Fisk *v.* Stubbs, 30 Ala. 335; Bradshaw *v.* Atkins, 110 Ill. 323; Spurgin *v.* Traub, 65 Ill. 170; Blood *v.* Humphrey, 17 Barb. (N. Y.) 660; Allen *v.* Reynolds, 36 N. Y. Super. Ct. 297.

California — Declaration of homestead.— A wife may acknowledge a declaration of homestead, selected by her alone, in the manner provided by law for the acknowledgment of conveyances of real property by persons other than married women. It need not be acknowledged in the manner required by law in the case of the conveyance by a married woman of her separate real property. Clements *v.* Stanton, 47 Cal. 60.

South Carolina — Separate property.—S. C. Gen. Stat. c. 100, § 2, giving a married woman power to execute deeds, etc., in the same manner as if sole, relates only to the separate property of married women. Townsend *v.* Brown, 16 S. C. 91.

36. *Arkansas.*— Stone *v.* Stone, 43 Ark. 160.

Arizona.— Miller *v.* Fisher, 1 Ariz. 232, 25 Pac. 651; Charauleau *v.* Woffenden, 1 Ariz. 243, 25 Pac. 652.

Iowa.— Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Michigan.— Watson *v.* Thurber, 11 Mich. 457.

New York.—Yale *v.* Dederer, 18 N. Y. 265, 72 Am. Dec. 503; Richardson *v.* Pulver, 63 Barb. (N. Y.) 67; Blood *v.* Humphrey, 17 Barb. (N. Y.) 660; Andrews *v.* Shaffer, 12 How. Pr. (N. Y.) 441; Allen *v.* Reynolds, 36 N. Y. Super. Ct. 297.

Wisconsin.— Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

Alabama — Conveyance of wife's separate estate.— The statute which makes the private examination of a wife apart from her husband essential to the validity of a conveyance by her has no application to conveyance of her separate estate under the Alabama act of 1850, which makes no distinction in the mode of acknowledgment by the husband and wife in such case. Fisk *v.* Stubbs, 30 Ala. 335; Dawson *v.* Burrus, 73 Ala. 111 (a conveyance of the homestead which was the wife's separate property).

Georgia — Property owned by wife.— Ga. Code, § 2706*a*, providing that when a *feme covert* has any right in lands to be conveyed, and consents to join her husband in a deed, she must be examined separately in regard to her free consent and make a separate acknowledgment, applies only to her interest in land of her husband by virtue of the marital relation, and not to a conveyance of property owned by the wife severally or jointly, in which the husband joins. Haines *v.* Fort, 93 Ga. 24, 18 S. E. 994.

Minnesota — Wife's real estate.— Minn. Rev. Stat. (1851), c. 46, § 12, requiring the acknowledgment by the wife of a deed, executed jointly, to be separate and apart from her husband, does not apply to a deed (under c. 71, § 105) of her own real estate, which he consents to. In such case it is sufficient if she simply acknowledges it to be her voluntary act and deed. Merrill *v.* Nelson, 18 Minn. 366.

Texas — Release of interest in father's estate.— An instrument executed by a married woman, releasing her interest in her father's estate, is not "a deed or other writing purporting to be a conveyance" within the Texas statute requiring a married woman to be privily examined apart from her husband when acknowledging such a writing. French *v.* Strumberg, 52 Tex. 92.

Equitable separate estate.— In some states a married woman may convey her equitable separate estate, where there is no restraint on the powers of alienation, without an acknowledgment or privy examination separate and apart from her husband. Sharpe *v.* McPike, 62 Mo. 300; Sherman *v.* Turpin, 7 Coldw. (Tenn.) 382. See also cases cited *supra*, II, B, 3, a.

37. Stone *v.* Stone, 43 Ark. 160.

38. Wright *v.* Hays, 10 Tex. 130, 60 Am. Dec. 200.

39. Delafield *v.* Brady, 38 Hun (N. Y.) 404.

40. Reis *v.* Lawrence, 63 Cal. 129, 49 Am. Rep. 83. In Hand *v.* Hand, 68 Cal. 135, 8 Pac. 705, 58 Am. Rep. 5, wherein a married woman had lived for twenty years apart from her husband, who had never been in the country, and a part of the time had lived under her maiden name, it was held that a deed, executed by her as an unmarried woman, to certain of her separate property acquired in the United States could not be avoided by her. But see Danglarde *v.* Elias, 80 Cal. 65, 22 Pac. 69, wherein a conveyance by a married woman, separated from her husband, was held to be void because not ac-

XI. Compelling Acknowledgment.

Sometimes, where a grantor, not a married woman, after executing and delivering a deed, refuses to acknowledge it, the court will compel him to do so.[41]

XII. Certificate of Acknowledgment or Proof of Execution.

A. Writing Out the Certificate — 1. When to Be Written. While it is the proper course for the officer to write out his certificate immediately after taking an acknowledgment, yet it seems that a certificate made at any time thereafter will be sufficient, provided no rights of innocent third parties have intervened.[42]

2. Position of Certificate with Relation to Instrument. In the absence of express statutory regulations the position of the certificate in relation to the instrument acknowledged is not material,[43] and it may be written on a separate piece of paper and appended to the instrument,[44] unless it be expressly required to be written on the same sheet with the instrument.[45] Where two contracts, both part of the same transaction, were written on the same sheet of paper, it was held that a certificate at the end of the sheet reciting an acknowledgment of "the foregoing instrument" was sufficient.[46] But in a conveyance by husband and wife the contrary has been held.[47]

3. Acknowledgment before Deputy — Certificate by Principal. In Kentucky, if a deputy clerk takes an acknowledgment and indorses a memorandum on the instrument, but fails to write out and sign the certificate, his principal may do so,

knowledged in accordance with the statute regulating married women's conveyances.

41. As to registration on refusal to acknowledge see *supra*, IV, A, 5.

Arrest and imprisonment.— Under R. I. Pub. Stat. c. 173, §§ 6, 7, a grantor may be compelled by arrest and imprisonment to acknowledge his deed. Sullivar. *v.* Chambers, 18 R. I. 799, 31 Atl. 167.

Deed decreed by court.— A *feme covert* trustee by descent will be compelled to acknowledge a deed decreed by the court as conveying title to her successor in the trust. Dundas *v.* Biddle, 2 Pa. St. 160.

When acknowledgment not compelled.— Equity will not compel a widow to acknowledge a deed made by herself and husband, where it appears that the sale was made without her consent and that she received no part of the purchase-money. Providence *v.* Manchester, 5 Mason (U. S.) 59, 20 Fed. Cas. No. 11,450. Where it appeared that land had been sold on execution, but it did not appear that the purchase-money had ever been paid or the sale had been perfected, the court refused to direct a deed to be acknowledged after a lapse of twenty years and after the land had gone into the hands of purchasers for value without notice. Richards *v.* Dutot, 7 Pa. St. 431.

42. Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861; Harmon *v.* Magee, 57 Miss. 410; Stevens *v.* Martin, 18 Pa. St. 101. See also Hutchinson *v.* Kelly, 10 Ark. 178. But *compare* the cases cited *infra*, XII, H, 1, a.

43. An acknowledgment in the body of the instrument, signed by the grantor, the notary, and two witnesses, will admit to record. Snowden *v.* Rush, 69 Tex. 593, 6 S. W. 767.

Certificate in margin of instrument.— It is no objection that the certificate of acknowledgment is written in the margin on the face of the instrument. Simpson *v.* Hartman, 27 U. C. Q. B. 460.

44. Thurman *v.* Cameron, 24 Wend. (N. Y.) 87; Schramm *v.* Gentry, 63 Tex. 583.

45. Winkler *v.* Higgins, 9 Ohio St. 599, wherein a certificate on a separate strip of paper attached to the deed by a wafer was held to be insufficient. To the same effect see Poor *v.* Scanlan, 7 Cinc. L. Bul. (Ohio) 15, 8 Ohio Dec. (Reprint) 275.

Where instrument on two sheets.—A mortgage deed, otherwise valid, written on two sheets of paper attached one to the other, the latter of which contains the signature and certificate of the officer taking the acknowledgment, is not invalid under the Ohio act of Feb. 22, 1831, requiring the certificate of the officer to be on the same sheet on which the deed is written or printed. Norman *v.* Shepherd, 38 Ohio St. 320.

46. Bosley *v.* Pease, (Tex. Civ. App. 1893) 22 S. W. 516.

47. Certificate applying to but one conveyance.— Where the deed of a husband and wife, and a relinquishment of dower by the wife, were written on the same sheet of paper, and the officer's certificate of the wife's acknowledgment was written under the relinquishment, it was held that the certificate applied only to the conveyance immediately preceding it and could not be made to apply to the other by a court of equity on the ground of mistake. McBryde *v.* Wilkinson, 29 Ala. 662; Doe *v.* Wilkinson, 21 Ala. 296.

setting forth the facts and the deputy's indorsement.[48] To be sufficient, such certificate must include the deputy's indorsement.[49]

B. Date. Where a certificate of acknowledgment is sufficient in other respects, it will not be invalidated by a mistake as to the date,[50] nor by the entire want of a date,[51] for the true date of the acknowledgment may be shown by parol.[52] It is sufficient that such date appears by evidence within the instrument itself,[53] and in the absence of proof to the contrary it will be presumed that the acknowledgment was taken on the date of the execution of the instrument,[54] or at least before the recording thereof.[55]

C. Venue — 1. Necessity to Show. To be valid, a certificate of acknowledgment should show, either of itself or in connection with the instrument, in what state and county the acknowledgment was taken.[56] But it has been held in some

48. Ky. Gen. Stat. c. 24, § 38.

May be written by another deputy.—Where one deputy clerk of a county court takes an acknowledgment of a deed, indorsing on it a memorandum thereof, another deputy may write out and sign the certificate, setting forth the facts including the indorsement, as provided in Ky. Gen. Stat. c. 24, § 38. Drye *v.* Cook, 14 Bush (Ky.) 459.

49. Waters *v.* Davis, (Ky. 1887) 2 S. W. 695; McCormack *v.* Woods, 14 Bush (Ky.) 78; Franklin *v.* Becker, 11 Bush (Ky.) 595.

Where memorandum amounts to certificate. — Where the deputy's indorsement was as follows: "Acknowledged by ——, this May 5, 1873, ——, D. C. M. C. C.," it was held that this memorandum amounted to a certificate, and it was not necessary for the clerk to set forth the indorsement in his certificate. Woods *v.* James, 87 Ky. 511, 9 S. W. 513.

Validity of certificate not affected by memorandum.— The fact that the deputy clerk noted on a mortgage, executed by a husband and wife, a memorandum of the acknowledgment which did not state that the parties were husband and wife, did not affect the validity of a certificate in due form, written by the deputy on the same day, and signed by the clerk. Hawkins *v.* Pugh, (Ky. 1891) 16 S. W. 277.

50. Durfee *v.* Grinnell, 69 Ill. 371; Fisher *v.* Butcher, 19 Ohio 406, 53 Am. Dec. 436; Yorty *v.* Paine, 62 Wis. 154, 22 N. W. 137.

As to the time of taking acknowledgment see *supra*, IX.

Certificate reciting different dates.—Where the certificate to the wife's acknowledgment recited that she appeared and acknowledged the deed on a specified date (the same as the date of her husband's acknowledgment), and then affirmed that the certificate was made on a previous date, the date in the body of the certificate is the true one, the second date being clearly a mistake. Homer *v.* Schonfeld, 84 Ala. 313, 4 So. 105.

51. Irving *v.* Brownell, 11 Ill. 402; Webb *v.* Huff, 61 Tex. 677.

Recording prior to opposing title.— A deed is admissible in evidence, though there be no date to the acknowledgment, where the recording of the deed with the acknowledgment is prior to the opposing title. Galusha *v.* Sinclear, 3 Vt. 394.

Where date material.—A deed dated March 15, 1786, and acknowledged without date before one styling himself "justice of the common pleas for B county," for land lying in the county, which was formerly B county, afterward H, and finally C county, is not admissible in evidence, since the acknowledgment does not show that the officer who took it was at the time authorized to do so. Downing *v.* Gallagher, 2 Serg. & R. (Pa.) 455.

52. Jordan *v.* Mead, 12 Ala. 247; Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462; Hoit *v.* Russell, 56 N. H. 559; Gest *v.* Flock, 2 N. J. Eq. 108. But see Greene *v.* Godfrey, 44 Me. 25.

As to the admissibility of parol evidence in aid of the certificate see *infra*, XIV.

53. **Reference to date of instrument.**— A recital that the acknowledgment was made on the day of which the instrument bears date is sufficient. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Carter *v.* Doe, 21 Ala. 72.

Registration on date of execution.— Where a deed was received for record on the day it bore date, it was held that the time of the acknowledgment appeared with sufficient certainty. Kelly *v.* Rosenstock, 45 Md. 389; Dahlem's Estate, 175 Pa. St. 454, 34 Atl. 807, 52 Am. St. Rep. 848.

Obvious mistake.— Where the officer wrote the year 1868 instead of 1867, but the certificate stated that the acknowledgment was of the above deed and was appended to the deed itself, it clearly showed the mistake. Attaway *v.* Carter, 1 Tex. Unrep. Cas. 73.

Clerical error in recording.— The record of a mortgage acknowledged February 6 was dated January 6. It was held that the lien was not affected by the clerical error in recording. Brooke's Appeal, 64 Pa. St. 127.

54. Doe *v.* Roe, 1 Ga. 3; Rackleff *v.* Norton, 19 Me. 274.

55. Wickes *v.* Caulk, 5 Harr. & J. (Md.) 36; Chase *v.* Whiting, 30 Wis. 544.

56. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Illinois.— Vance *v.* Schuyler, 6 Ill. 160.

Maryland.— Connelly *v.* Bowie, 6 Harr. & J. (Md.) 141.

Tennessee.—Patton *v.* Brown, Cooke (Tenn.) 126.

United States.— Patton *v.* Brown, Brunn. Col. Cas. (U. S.) 185, 18 Fed. Cas. No. 10,832.

cases that a failure of the certificate to show where the acknowledgment was taken may be supplied by evidence *aliunde*.[57]

2. SUFFICIENCY OF SHOWING — a. In General. The place where the acknowledgment was taken need not be recited in the body of the instrument; the recital of the venue in the caption is sufficient,[58] and an omission of the names of the county or state from the caption is not a fatal defect where such name is sufficiently shown by the seal attached to the certificate.[59] A variance in regard to the county as stated in the certificate and in the suffix to the officer's signature will not invalidate the certificate.[60]

b. Appearing from Inspection of Whole Instrument. Where it can be ascertained with sufficient certainty from an inspection of the whole instrument at what place the acknowledgment was made, it is not material that such fact does not fully appear in the certificate itself.[61]

But see Briggs *v.* McBride, 17 N. Brunsw. 663.

As to where an acknowledgment should be taken see *supra*, VIII.

Name of state omitted.— A certificate of an acknowledgment taken outside the state, entitled simply "County of New York" without giving the state, is not sufficient to entitle the instrument to record in Illinois. Hardin *v.* Osborne, 60 Ill. 93; Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 579. But in Robidoux *v.* Cassilegi, 10 Mo. App. 516, it was held that a certificate of acknowledgment to a deed of land lying in the state, beginning "County of St. Louis ss.," was not rendered insufficient by the fact that it did not show that the county of St. Louis was in the state of Missouri. See also Ross's Appeal, 106 Pa. St. 82, in which it was held that where the acknowledgment of a mortgage of land in the state recited that it was taken before a justice of the peace, but did not state in what county he was a justice, the presumption was that he was in some county in the state, and, in absence of proof to the contrary, the acknowledgment was good.

Georgia — Presumption as to place of taking.— An acknowledgment failing to state where it was taken will not be fatally defective on that account, as, in the absence of proof to the contrary, the court will presume it to have been taken in the county where the deed purports to have been made. Doe *v.* Roe, 1 Ga. 3.

57. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89. See also Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92.

As to the admissibility of parol evidence in aid of a certificate see *infra*, XIV.

To show acknowledgment in different county.— The acknowledgment, by a justice of C county, of a land mortgage recorded in that county, was: "Erie County ss. Before the subscriber, a justice of the peace of said county." It was held that parol evidence was admissible to show that it had been acknowledged in C county. Angier *v.* Schieffelin, 72 Pa. St. 106, 13 Am. Rep. 659.

58. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Dunlap *v.* Daugherty, 20 Ill. 397; Wright *v.* Wilson, 17 Mich. 192. See also Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

In Canada the place where the acknowledgment was made is sufficiently indicated by the marginal venue in the certificate, as, for instance, "Province of Upper Canada, Eastern District, to wit." Monk *v.* Farlinger, 17 U. C. C. P. 41; Simpson *v.* Hartman, 27 U. C. Q. B. 460; Robinson *v.* Byers, 13 Grant Ch. (U. C.) 388.

59. Stephens *v.* Motl, 81 Tex. 115, 16 S. W. 731; Chiniquy *v.* Catholic Bishop, 41 Ill. 148. *Contra*, Willard *v.* Cramer, 36 Iowa 22; Greenwood *v.* Jenswold, 69 Iowa 53, 28 N. W. 433.

Wrong county stated in caption.— The county laid in the caption of the certificate of acknowledgment of a deed which recited that the notary public was a notary of "said county" was a different one from that for which the notary was appointed. The signature of the notary was followed by words describing him as a notary of the county of his appointment, and a seal with the name of the latter county was attached. It was held that the certificate was sufficient to admit the deed to record. Alexander *v.* Houghton, 86 Tex. 702, 26 S. W. 937.

60. Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; Blythe *v.* Houston, 46 Tex. 65. But see Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356, wherein the caption recited one county while the official seal showed another in which the officer was authorized to act. It was held that the certificate was fatally defective [Beatty, C. J., dissenting].

61. Beckel *v.* Petticrew, 6 Ohio St. 247; Fuhrman *v.* Loudon, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608; Brooks *v.* Chaplin, 3 Vt. 281, 23 Am. Dec. 209; Oney *v.* Clendenin, 28 W. Va. 34.

Name of state omitted from certificate.— The acknowledgment of a deed to lands lying in Vermont, the certificate to which is merely headed "Providence." is sufficient where it reasonably appears, from an inspection of the whole instrument, that such acknowledgment was taken in Providence, R. I. Ives *v.* Allyn, 12 Vt. 589.

Venue given in certificate of authenticity.— Where a certificate of acknowledgment taken in another state was defective because it did not give the name of the state, it was held that the defect was cured by the certificate of authenticity reciting city, county, and state for which the officer was commis-

c. Officer Presumed to Act within Jurisdictional Limits. Where an instrument appears to have been acknowledged before an officer authorized to take acknowledgments within the limits of his jurisdiction, it will be presumed that an acknowledgment was actually taken within such limits without an averment to that effect in the certificate.[62] And where the certificate shows that the acknowledgment was taken in a certain county it need not appear that the officer was authorized to act in that county, such fact being presumed.[63] The court will take judicial notice of who are officers authorized to take acknowledgments in the county in which it sits.[64]

D. Official Character of Officer — 1. Necessity to Show. Where the statute does not require the certificate to show the official character of the person who took the acknowledgment, such fact need not appear,[65] and it is held that evidence *aliunde* may be admitted to prove his authority.[66] But under most statutes it is necessary that the certificate should show in some way that the acknowledgment was taken by a person authorized to do so.[67]

sioned and in which he acted. Hardin *v.* Osborne, 60 Ill. 93; Harding *v.* Curtis, 45 Ill. 252; Adams *v.* Medsker, 25 W. Va. 127.

62. *Alabama.*— McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3.

Illinois.— Dunlap *v.* Daugherty, 20 Ill. 297.

Kansas.— Douglass *v.* Carmean, 49 Kan. 674, 31 Pac. 371; Douglass *v.* Bishop, 45 Kan. 200, 25 Pac. 628, 10 L. R. A. 857.

Maine.— Rackleff *v.* Norton, 19 Me. 274.

Missouri.— Bradley *v.* West, 60 Mo. 33.

New York.— People *v.* Snyder, 41 N. Y. 397.

West Virginia.— Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

United States.— Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426.

As to the power of an officer to take acknowledgments outside the territorial limits of his jurisdiction see *supra*, VI, C.

Acknowledgment taken outside the state. — It is a sufficient statement of venue in the certificate of an acknowledgment taken in a foreign state to recite merely the name of the state, where the certifying officer is one whose authority is limited in territorial extent, as a presumption arises that he performed the duties of his office within the limits for which he was commissioned. Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426. See also Morrison *v.* White, 16 La. Ann. 100.

Authority extending over whole state.— Where an officer has authority to take acknowledgments anywhere in the state, the addition, in the venue, to the certificate, of a wrong county or a county which does not exist, will not affect its validity. Roussain *v.* Norton, 53 Minn. 560, 55 N. W. 747.

63. Livingston *v.* Kettelle, 6 Ill. 116, 41 Am. Dec. 166; Colby *v.* McOmber, 71 Iowa 469, 32 N. W. 459; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

Sufficient showing of officer's county.— Where a certificate began, "State of Missouri, Schuyler County, ss.: Be it remembered that before the undersigned, circuit clerk, comes" etc., it was held that it sufficiently appeared that the person who took the acknowledgment was the clerk of the circuit court of Schuyler county. Sidwell *v.* Birney, 69 Mo. 144.

64. Irving *v.* Brownell, 11 Ill. 402. In Watson *v.* Hay, 5 N. Brunsw. 559, the certificate was subscribed "G. D. L.," without any description of his official character either in the body of the certificate or following his signature. It was held that the court would take judicial notice that a person named G. D. L. was chief justice of the province in which the court sat at the time the deed appeared to have been executed, and that it was competent for the registrar of deeds to recognize the certificate as an authentic act of the chief justice.

Judicial notice of county.— Where the caption of an acknowledgment omits the name of the county, but the officer signs himself as justice of the peace for a certain incorporated town, it is a valid acknowledgment, since the court will take notice of the county in which the town is located and that the officer is a justice in that county. Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22.

65. Kidd *v.* Venable, 111 N. C. 535, 16 S. E. 317; Den *v.* Hunter, 3 N. C. 604; Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426; Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153; Van Ness *v.* U. S. Bank, 13 Pet. (U. S.) 17, 10 L. ed. 38.

As to the necessity of showing the official character of the officer where the acknowledgment was taken in another state or county see *infra*, XIII.

As to who is authorized to take acknowledgments see *supra*, VI.

66. As to the admissibility of parol evidence to show the authority of the officer see *infra*, XIV.

67. *Alabama.*— Keller *v.* Moore, 51 Ala. 340; Hines *v.* Chancey, 47 Ala. 637.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Florida.— Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

Illinois.— Booth *v.* Cook, 20 Ill. 129.

Maryland.—Connelly *v.* Bowie, 6 Harr. & J. (Md.) 141.

2. Sufficiency of Showing — a. In General. Strict technical accuracy is not required, and if the certificate fairly shows that the acknowledgment was taken by a person authorized to take it, it is sufficient.[68] And though the certificate, standing alone, does not disclose the official character of the person taking the acknowledgment, yet where that fact appears from an inspection of the whole instrument it is enough.[69]

b. Appearing Either in Body or Subscription. Where the official character of the officer is stated in the body of the certificate it need not appear in the subscription thereto,[70] and on the other hand it is sufficient if the title of the officer be suffixed to the signature, though his official character be not given in the body of the certificate.[71]

c. Abbreviation of Official Title. Abbreviations in general use and generally

North Carolina.— Barbee *v.* Taylor, 51 N. C. 40.

Ohio.— Johnston *v.* Haines, 2 Ohio 55.

Pennsylvania.— Downing *v.* Gallagher, 2 Serg. & R. (Pa.) 455.

Tennessee.—Patton *v.* Brown, Cooke (Tenn.) 126.

Texas.— Whitehead *v.* Foley, 28 Tex. 268; Gulf, etc., R. Co. *v.* Carter, 5 Tex. Civ. App. 675, 24 S. W. 1083.

United States.— Patton *v.* Brown, Brunn. Col. Cas. (U. S.) 185, 18 Fed. Cas. No. 10,832.

Canada.— McCammon *v.* Beaupre, 25 U. C. Q. B. 419.

Official character nowhere shown.— A bond for title, the certificate of which is subscribed by the officer's name alone, without any addition denoting his official character, and that character being nowhere shown in the body of the certificate, is inadmissible in evidence without proof of its execution, as at common law, whether the bond be of record or not. Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47.

Authority in special cases.— Under a statute providing, as a general rule, that the acknowledgments of deeds and conveyances shall be taken before a magistrate, but excepting certain cases in which proof may be taken before a judge, the certificate must, where the proof is taken before the judge, state the existence of those facts which take the case out of the general rule and bring it within the statutory exception. Pearl *v.* Howard, 1 D. Chipm. (Vt.) 173.

Presumption from lapse of time.— A registry copy of a deed, recorded more than one hundred years before, being produced in evidence, it appeared that the deed purported to have been acknowledged before a justice of the peace of another state. It was held that in the absence of evidence to the contrary the presumption was that the register who recorded the deed had sufficient evidence, at the time of record, of the official character of the magistrate. Forsaith *v.* Clark, 21 N. H. 409.

68. As to recitals regarding the territorial jurisdiction of the officer who took the acknowledgment see *supra*, XII, C.

An acknowledgment before "a" clerk of the county court within and for a certain county is sufficient to authorize the presumption that the acknowledgment was taken before "the" clerk, as there was but one clerk of that court. Walker *v.* Owens, 25 Mo. App. 587.

Acknowledgment before judge instead of "court."— An acknowledgment of a deed by a sheriff, certified to by a clerk of court, and stated by him to have been taken before the "judge of the court," instead of before "the court," as required by Wag. Stat. Mo. p. 612, §§ 55, 56, is not invalid. McClure *v.* McClurg, 53 Mo. 173.

Judge of court of record.— Under the Missouri act of Feb. 14, 1825, requiring a married woman, in acknowledging a deed conveying her real estate, to appear before some court of record, a certificate of an acknowledgment taken before the judge of a court having no clerk, stating that "before me, M. P. L., judge of said court, personally appeared M. G., wife, etc.," was held sufficient. Garnier *v.* Barry, 28 Mo. 438, 439.

Florida — Seal sufficient evidence.— The Florida act of Feb. 24, 1873 (McClellan's Dig. pp. 218, 219), in relation to the acknowledgment of deeds, does not require other evidence of the official character of an officer taking an acknowledgment when he affixes his official seal to such acknowledgment. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

69. Broussard *v.* Dull, 3 Tex. Civ. App. 59, 21 S. W. 937.

Suffix controlling recital in body of certificate.— Where the title of office stated in the body of the certificate of acknowledgment is one which the law did not authorize to take the acknowledgment, and the suffix to the signature, read in connection with the deed, indicates an office having such authority, the suffix will control. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

70. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612; Canandarqua Academy *v.* McKechnie, 90 N. Y. 618 [*affirming* 19 Hun (N. Y.) 62]; Second M. E. Church *v.* Humphrey, 66 Hun (N. Y.) 628, 21 N. Y. Suppl. 89; Brown *v.* Farran, 3 Ohio 140.

71. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Russ *v.* Wingate, 30 Miss. 440; Robinson *v.* Wilson, 5 N. Brunsw. 301.

understood, written after the signature of the officer, are sufficient to show his official capacity,[72] especially where the signification of the abbreviation appears from an inspection of the body of the certificate in connection with the statute and the purpose of the official act.[73]

d. Person Holding Two Offices. Where the certifying officer describes himself as holding two offices, if by virtue of one of them he is authorized to take acknowledgments the title of the other may be rejected as surplusage.[74]

e. Acknowledgments Taken Outside State. Where the certificate of an acknowledgment taken outside the state clearly shows that such acknowledgment was taken before a person authorized to take the same, it is sufficient notwithstanding slight informalities.[75] But it has been held that, under a statute requir-

72. **The initials "J. P.,"** attached to the signature of the officer taking an acknowledgment, are a sufficient designation of his official character. Russ *v.* Wingate, 30 Miss. 440; Final *v.* Backus, 18 Mich. 218.

"J. of Peace."— Where there was no statement in the body of the certificate as to the official character of the officer, but it was signed "Josephus Moore, J. of Peace," this was held to be a sufficient showing as to the official character. Robinson *v.* Wilson, 5 N. Brunsw. 301.

73. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; McDonald *v.* Morgan, 27 Tex. 503, wherein the initials "R. L. C.," following the officer's certification, were held to show sufficiently that the acknowledgment was made before the recorder of Liberty county.

74. **Justice of the peace and notary public.** — Where the certificate shows that the person who took the acknowledgment was both a justice of the peace and a notary public, the description of him in the latter capacity may be rejected as surplusage, where he is authorized to take such acknowledgment as a justice of the peace and not as a notary public. Buntyn *v.* Shippers' Compress Co., 63 Miss. 94.

Clerk also ex officio recorder.— By Mo. Rev. Stat. (1835) (3d ed.) p. 525, § 2, the clerk of the circuit court was *ex officio* recorder of deeds, and p. 120, § 8, authorized the clerk, as clerk, but not as recorder, to take acknowledgments. A certificate of acknowledgment signed by J, "Recorder," recited: "I have hereunto set my hand and the seal of said court," in testimony that there "appeared in open court" B, "who is personally known to the court." It was held that the acknowledgment would be considered to have been taken before him as clerk, the word "recorder" being treated as mere description. Owen *v.* Baker, 101 Mo. 407, 409, 14 S. W. 175, 20 Am. St. Rep. 618.

75. As to the sufficiency of a further certificate of authenticity of an acknowledgment taken outside the state see *infra*, XIII, A, 3.

And for other matters relating to acknowledgments taken outside the state see *supra*, X, A, 3.

Clerical error.— Where it is clear that it was by a clerical error that the officer taking the acknowledgment of a deed in another state is made to appear to have had no commission at the time, the deed will not be deemed defectively acknowledged. Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462.

Aldermen presumed to be justices of the peace.— A deed acknowledged before "aldermen" in the city of New York was held to have been properly admitted to record in Virginia under a statute specifying "two justices of the peace" as the proper persons to take acknowledgments, though their certificates did not describe them as justices of the peace. The court held it to be a warrantable presumption that aldermen of a city in the United States are justices of the peace when they undertake to act as such. Welles *v.* Cole, 6 Gratt. (Va.) 645.

Sufficient showing of authority.— A power of attorney to convey lands, sufficient in form, acknowledged before one who subscribed himself as "Sovereign of Carlo, Ireland," and attested by the seal of the town, the certificate setting forth his official character to be "a magistrate in the chief office of said town of Carlo, in the county of Carlo, Ireland," is sufficiently acknowledged under the statute allowing such acknowledgments to be taken by the chief magistrate of the place where taken. Bowser *v.* Cravener, 56 Pa. St. 132. A commissioner of deeds in a certificate of acknowledgment described himself as "a commissioner in the state of Michigan, within and for said county." It was signed "Com. for the State of Michigan in New York." The official seal attached was full and clear in the same respect, but the impression only showed the commissioner's first name. It was held sufficient to entitle the deed to which it was attached to be received in evidence. Sparrow *v.* Hovey, 41 Mich. 708, 3 N. W. 198.

Georgia — How authority may be shown.— Where a deed acknowledged in another state is offered in evidence it must be shown that the court presided over by the judge before whom the deed was executed as an attesting witness is a court of record; and this fact may be shown either by a statement to that effect in the clerk's certificate or by other proof. Wood *v.* Bewick Lumber Co., 103 Ga. 235, 29 S. E. 820.

Person holding two offices.— Under Ala. Code, §§ 1800, 1801, providing that powers of attorney may be acknowledged in other states before notaries public, a power of attorney purporting to have been acknowledged in another state before one who signs the certificate as "J. P. and *ex officio* notary

ing such acknowledgments to be taken before a court of record, a failure to show that the court was one of record rendered the certificate defective.[76]

3. Certificate Prima Facie Evidence of Authority. The statement in the certificate of the officer's official character is *prima facie* evidence of that fact,[77] and it is not necessary for him to state in addition that he is an officer authorized to take acknowledgments.[78]

E. Signature of Officer. Where it is provided by statute that a certificate of acknowledgment shall be subscribed by the officer who took the acknowledgment, a certificate not so subscribed is of no force,[79] and the defect will not be remedied by the fact that the officer's name appears in the body of the certificate[80] or that his seal is attached thereto.[81] But a substantial compliance with the statute is all that is required of the certificate,[82] and it will not be invalidated by

public," which is impressed with his notarial seal and gives the name of the state, county, and office as required by the statute, is *prima facie* valid and is admissible in evidence. Goree *v.* Wadsworth, 91 Ala. 416, 8 So. 712.

76. Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111. But see Pierce *v.* Hakes, 23 Pa. St. 231, wherein it was held that under the Pennsylvania act of April 10, 1849, allowing an acknowledgment taken in another state to be taken before the judge of a court of record if the laws of the state in which the acknowledgment was taken showed that the court was a court of record, the omission of the judge to certify that fact would not invalidate the certificate. See also Hurst *v.* Leckie, 97 Va. 550, 34 S. E. 464, holding that, under a statute authorizing commissioners in chancery of courts of record to take acknowledgments, a failure to state that the court was one of record was not material, where there were no commissioners in chancery except for courts of record.

77. *Alabama.*— Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91.

California.— Mott *v.* Smith, 16 Cal. 533.

Florida.— Tuten *v.* Gazan, 18 Fla. 751.

Minnesota.— Piper *v.* Chippewa Iron Co., 51 Minn. 495, 53 N. W. 876; Thompson *v.* Morgan, 6 Minn. 292; Baze *v.* Arper, 6 Minn. 220.

North Carolina.— Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Piland *v.* Taylor, 113 N. C. 1, 18 S. E. 70.

Pennsylvania.— Keichline *v.* Keichline, 54 Pa. St. 75.

United States.— Elwood *v.* Flannigan, 104 U. S. 562, 26 L. ed. 842; Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653; Willink *v.* Miles, Pet. C. C. (U. S.) 429, 30 Fed. Cas. No. 17,768; Rhoades *v.* Selin, 4 Wash. (U. S.) 715, 20 Fed. Cas. No. 11,740.

Acknowledgment made during civil war.— Where a certificate of acknowledgment purported to be made in B county, Ala., Jan. 9, 1864, before H, justice of the peace, it will be presumed that he was elected before the war and held over, and not that he was an officer of the rebel government then existing, in the absence of proof as to his official character. Holleman *v.* De Nyse, 51 Ala. 95.

New Jersey — Acknowledgment in other state.— Under the New Jersey statute allowing an acknowledgment of a deed for lands lying in that state to be taken in another state only where the grantor resided in such state, it was held that where the residence of the grantor appeared, either on the face of the deed or in the certificate of acknowledgment, it was sufficient *prima facie* evidence of the jurisdiction of the officer taking the acknowledgment. Graham *v.* Whitely, 26 N. J. L. 254.

78. Elwood *v.* Flannigan, 104 U. S. 562, 26 L. ed. 842; Livingston *v.* McDonald, 9 Ohio 168.

California — Ex officio clerk of several courts.— In California, acknowledgments must be taken before the clerk of a court having a seal. By statute the county clerk is made *ex officio* clerk of all courts having a seal except the supreme court. Where a certificate of acknowledgment taken by a county clerk is attested by him in his official capacity, with the seal of the court affixed, it is immaterial that he does not state in which of the courts he was acting in his *ex officio* capacity. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

79. *Alabama.*— Munn *v.* Lewis, 2 Port. (Ala.) 24.

Illinois.— Clark *v.* Wilson, 127 Ill. 449, 19 N. E. 860, 11 Am. St. Rep. 143.

Kentucky.— Fitzgerald *v.* Milliken, 83 Ky. 70; Jefferson County Bldg. Assoc. *v.* Heil, 81 Ky. 513.

Michigan.— Marston *v.* Brashaw, 18 Mich. 81, 100 Am. Dec. 152.

Ohio.— Hout *v.* Hout, 20 Ohio St. 119.

Texas.— Andrews *v.* Marshall, 26 Tex. 212.

80. Marston *v.* Brashaw, 18 Mich. 81, 100 Am. Dec. 152.

81. Clark *v.* Wilson, 27 Ill. App. 610.

82. Sufficient signing.— A certificate of acknowledgment to a deed made by a commissioner of deeds, closing with the words "before me, Benjamin Pinney, Commissioner of Deeds for the State of Illinois," is sufficiently signed. Fisk *v.* Hopping, 169 Ill. 105, 107, 48 N. E. 323. A certificate of acknowledgment in the probate court, which recites that the grantor, naming him, acknowledged the deed, and concluding, "In testimony whereof I" (with name of grantor inserted), "Judge of said court, have hereunto set my hand," and signed with the judge's true name, is sufficient. Agan *v.* Shannon, 103 Mo. 661, 667, 15 S. W. 757, Barclay, J., dissenting [*overruling* Lincoln *v.* Thompson, 75 Mo. 613].

such a discrepancy as the use by the officer of the initials of his christian name instead of writing such name in full.[83] And where the name is subscribed to the certificate it need not appear in the body thereof unless the statute so requires.[84]

F. Seal — 1. Necessity for. Where the statute in force at the time an acknowledgment is taken does not expressly require the certificate to be under seal, none is necessary.[85] But where the officer is required by statute to authenticate his certificate with his official seal a failure to affix such seal will render the acknowledgment fatally defective.[86]

Signature of different officer.—An acknowledgment to a deed purporting to have been taken before the mayor of Liverpool, and to be his official certificate, and which bears the corporate seal, is sufficient, although not signed by the mayor, but by the town clerk. The corporate seal must be regarded as imparting the requisite authenticity, and is proof that his character is truly stated in the instrument itself. Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130.

One signature to two certificates.— Attached to a deed were two acknowledgments, one that of the grantor and the other that of the grantor's wife. The acknowledgments were executed in due form, except that the signature of the justice appeared only under the second certificate, which followed immediately after the first and did not state the county for which he was justice. Each certificate contained the caption of the state and county. It was held that, the certificates of acknowledgment being in effect one certificate, the single signature was sufficient. Wright *v.* Wilson, 17 Mich. 192.

83. Denny *v.* Ashley, 12 Colo. 165, 20 Pac. 331; Briggs *v.* McBride, 17 N. Brunsw. 663.

84. Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111.

Sufficient certificate.— Where an officer taking an acknowledgment certified "that before me, a register of deeds," and signed his name "L. J. T., Register of Deeds," the certificate was sufficient, though the officer had not inserted his name in the body thereof. McCauslin *v.* McGuire, 14 Kan. 234.

85. *Alabama.*—Harrison *v.* Simons, 55 Ala. 510; Powers *v.* Bryant, 7 Port. (Ala.) 9.

California.— Ingoldsby *v.* Juan, 12 Cal. 564.

Georgia.— Nichols *v.* Hampton, 46 Ga. 253.

Illinois.— Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323; Irving *v.* Brownell, 11 Ill. 402.

Kentucky.— Thompson *v.* Robertson, 9 B. Mon. (Ky.) 383.

Massachusetts.— Farnum *v.* Buffum, 4 Cush. (Mass.) 260.

Minnesota.— Baze *v.* Arper, 6 Minn. 220; Thompson *v.* Morgan, 6 Minn. 292.

Ohio.— Ashley *v.* Wright, 19 Ohio St. 291; Fund Com'rs *v.* Glass, 17 Ohio 542; Paine *v.* French, 4 Ohio 318.

Pennsylvania.— Whitmire *v.* Napier, 4 Serg. & R. (Pa.) 290; Jaques *v.* Weeks, 7 Watts (Pa.) 261.

United States.— Fellows *v.* Pedrick, 4 Wash. (U. S.) 477, 8 Fed. Cas. No. 4,724.

Where officer has no seal.— As a justice of the peace has no seal of office, and private seals are abolished, a seal need not be added to his signature to a certificate of acknowledgment, although the statute speaks of a certificate "under hand and seal." Lucas *v.* Larkin, 85 Tenn. 355, 3 S. W. 647. See also Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323 (commissioner of deeds not required to have official seal).

North Carolina — Statute directory.— Under N. C. Code, § 1246, subsec. 7, providing that certificates of the privy examination of married women should be "substantially" in a certain form; the form given concluding with the words "Witness my hand and seal (private or official)," as the case may be, it was held that where the acknowledgment was taken by a justice of the peace of the county in which the land was situated the provision for the use of a seal was merely directory, not mandatory. Lineberger *v.* Tidwell, 104 N. C. 506, 10 S. E. 758.

86. *Arkansas.*— Worsham *v.* Freeman, 34 Ark. 55; Little *v.* Dodge, 32 Ark. 453; Blagg *v.* Hunter, 15 Ark. 246.

California.— Hastings *v.* Vaughn, 5 Cal. 315.

Illinois.— Holbrook *v.* Nichol, 36 Ill. 161; Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490; Stout *v.* Slattery, 12 Ill. 162.

Indiana.— Watson *v.* Clendenin, 6 Blackf. (Ind.) 477.

Iowa.— Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480.

Kansas.— Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14.

Kentucky.— Herd *v.* Cist, (Ky. 1889) 12 S. W. 466; Kemper *v.* Hughes, 7 B. Mon. (Ky.) 255; Miller *v.* Henshaw, 4 Dana (Ky.) 325.

Michigan.— Grand Rapids *v.* Hastings, 36 Mich. 122; Pope *v.* Cutler, 34 Mich. 150; Buell *v.* Irwin, 24 Mich. 145.

Minnesota.—Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619; De Graw *v.* King, 28 Minn. 118, 9 N. W. 636.

Missouri.— Hammond *v.* Coleman, 4 Mo. App. 307.

Pennsylvania.— Barney *v.* Sutton, 2 Watts (Pa.) 31; Duncan *v.* Duncan, 1 Watts (Pa.) 322.

South Carolina.— Bratton *v.* Burris, 51 S. C. 45, 28 S. E. 13; McLaurin *v.* Wilson, 16 S. C. 402; McCreary *v.* McCreary, 9 Rich. Eq. (S. C.) 34.

Texas.— Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Texas Land Co. *v.* Williams, 51 Tex. 51; Ballard *v.* Perry, 28 Tex. 347; Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682.

United States.— Wetmore *v.* Laird, 5 Biss.

2. SUFFICIENCY OF — a. In General. The question as to what seal is sufficient is one depending largely upon the statutes.[87] It is no objection that the seal precedes instead of following the signature of the officer.[88]

b. Right to Use Private Seal. Where the officer is provided with an official seal, and the statute requires it to be used in certifying an acknowledgment, if the officer substitutes therefor his private seal or a scroll it will render the acknowledgment defective.[89] But it has been held in some cases that, where no official

(U. S.) 160, 29 Fed. Cas. No. 17,467; Richards *v.* Randolph, 5 Mason (U. S.) 115, 20 Fed. Cas. No. 11,772.

Two certificates on same page.—An assignment for the benefit of creditors had indorsed on it a notary's certificate of its acknowledgment, signed by the notary, but with no notarial seal attached to it. Following this certificate and on the same page was the same notary's certificate of the assignee's acknowledgment of the execution of the acceptance of the trust. Attached to this certificate was the notary's seal. It was held that the first certificate was void for want of a seal, and the seal on the second certificate did not cure the defect. De Graw *v.* King, 28 Minn. 118, 9 N. W. 636.

Party objecting must show absence of seal. — A party objecting to the introduction of a deed in evidence, on the ground that the certificate of acknowledgment is not sealed, must, if the objection be overruled, make it appear by the record on appeal not only that it bore no seal when exhibited, but that it was not sealed when executed; for a seal may have been placed on it, but become detached. Clark *v.* Sawyer, 48 Cal. 133.

87. Arkansas — Statute directory.— Notwithstanding Gantt's Ark. Dig. § 4302, providing that a notarial seal shall be engraved so as to present certain specified emblems, the absence of them from the seal does not invalidate the certificate of acknowledgment. The statute is regarded as directory only. Sonfield *v.* Thompson, 42 Ark. 46, 48 Am. Rep. 49.

Nebraska — Need not bear notary's initials.— Under Nebr. Comp. Stat. c. 61, § 5, the seal to the notary's certificate of acknowledgment need not contain his name or initials. Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797.

Office not indicated by usual characters.— When the record of a deed is offered in evidence, and the notary who took the acknowledgment declares in his certificate that he has affixed his seal thereto, it is to be presumed that his seal was properly attached, although his office is not indicated by the characters ordinarily used for that purpose. Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47.

Impression on paper sufficient.— A certificate of the acknowledgment of a deed before the clerk of a court is sufficiently authenticated by an impression of the seal of the court upon the paper, without any wax, wafer, or other tenacious substance. Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228.

Seal obliterated — Question for jury.— Attached to a notary's certificate, in the place where the notary's seal is usually found, was a circle defined by a reddish discoloration of the paper with a few particles of wax adhering to it, but the paper did not show the impression of a notary's seal. There was testimony tending to show that at the time the deed was executed the notary used a seal which would leave no impression on paper, though it would on wax; but there was also evidence that he used a seal that would leave an impression on paper. It was held error to charge, under this state of facts, that acts purporting to have been done by public officers in their official capacity and within the scope of their duty will be presumed regular, as this amounted to a statement that the instrument was *prima facie* evidence that the officer affixed to his certificate the seal required by law, and was therefore an instruction on the weight of the evidence. Stooksbury *v.* Swan, 85 Tex. 563, 22 S. W. 963 [*affirming* (Tex. Civ. App. 1893) 21 S. W. 694].

88. Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572.

Seal on opposite side of paper.— Where a certificate of acknowledgment is duly signed by a notary public, and his notarial seal is impressed upon the same paper, though "on the opposite side and end thereof," and there is but one certificate to which the seal could be made applicable, there is a sufficient authentication. Evans *v.* Smith, 43 Minn. 59, 44 N. W. 880.

89. Moore *v.* Titman, 33 Ill. 358.

Florida — Private seal sufficient.— The acknowledgment of deeds and other writings before a commissioner appointed to take acknowledgments, etc., in other states need not be certified by such commissioner under an official seal, his private seal only being required by the statute. Tuten *v.* Gazan, 18 Fla. 751.

Notary's duty to procure official seal.— A notary cannot use a scrawl or private seal for the purpose of authenticating a certificate of acknowledgment The provision of law permitting certain officers to use their private seals until they shall be provided with public seals had no application to a notary. He has to provide himself with an official seal. Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490.

Notary using county court seal.— In order for a notarial act to be valid, the notarial seal must be affixed, and the notary's use of the seal of a county court vitiates his act. Therefore, where the certificate of a married woman's acknowledgment, taken before a notary, bore the seal of the county court instead of the notarial seal, although regular in other respects, it was held to be a nullity. McKellar *v.* Peck, 39 Tex. 381.

Seal presumed to be official.— Where the

seal has been provided, the use of a private seal by the officer who takes the acknowledgment will not render it invalid.[90]

3. Recitals as to Seal. A statement that the certificate is given under the officer's hand and seal, without stating that it is his "official" seal, is sufficient where the official seal is in fact affixed.[91] And it has been held that the mere affixing of the seal after the officer's signature is sufficient proof that the certificate was executed under his hand and seal without any recital to that effect.[92]

4. Showing of Record as to Seal. Ordinarily the provisions of recording acts do not contemplate that the recorder shall copy official seals in his record.[93] Hence, where a certificate of acknowledgment as recorded indicates by its language that the official seal was properly affixed, the absence from the record of the seal, or of anything to represent it, will not overcome the presumption that the original was duly sealed by the officer;[94] and a record copy of the instrument is admissible in evidence though containing no copy of the seal, nor any *locus sigilli* or scroll.[95] In any event a literal transcription of the seal is not required, and it is

notary who took the acknowledgment signed it "Geo. Theo. Sommer," but the name on the seal was "Theo. Sommer," it was held that it would be presumed that the seal was the notary's official seal. Deans *v.* Pate, 114 N. C. 194, 19 S. E. 146.

Sufficient showing that seal official.—Where the certificate of an acknowledgment taken before the mayor of the town of S, in England, bore a seal having the words "S. Villa" inscribed around what appeared to be the city arms, it was held that it imported to be the corporate seal of S, and not the private seal of the mayor, and therefore the acknowledgment was sufficient. Deveber *v.* Britain, 9 N. Brunsw. 330.

90. Fogarty *v.* Sawyer, 23 Cal. 570, wherein the notary stated in his certificate that he had no public official seal; Stark *v.* Barrett, 15 Cal. 361; Collins *v.* Boyd, 5 Dana (Ky.) 316; Creigh *v.* Beelin, 1 Watts & S. (Pa.) 83; Morgan *v.* Cox, 27 Fed. 36. But see Geary *v.* Kansas City, 61 Mo. 378, wherein, under a city charter giving the mayor authority to take acknowledgments "and certify the same under the seal of the city," it was held that a certificate by him concluding with the words "Given under my hand and private seal, there being no official seal of office provided," was insufficient, although the scroll would have been sufficient if he had stated in his certificate that it was under the "seal of the city."

91. Moore *v.* Titman, 33 Ill. 358; Doe *v.* Vandewater, 7 Blackf. (Ind.) 6; Monroe *v.* Arledge, 23 Tex. 478. But see Wetmore *v.* Laird, 5 Biss. (U. S.) 160, 29 Fed. Cas. No. 17,467, wherein it was held that as nothing is to be presumed in favor of a notary's certificate of acknowledgment it must be stated therein that he has affixed his notarial official seal, else the certificate is insufficient.

Surplusage.— A justice's certificate of acknowledgment is not invalidated by the use of the word "notarial" before the word "seal," such former word being treated as surplusage. Foster *v.* Latham, 21 Ill. App. 165.

Omission of word "seal."— Where a certificate recited that it was given under the officer's "hand and of office," it was held that the omission of the word "seal" before "of office" was manifestly a clerical error and would not vitiate the certificate. Nichols *v.* Stewart, 15 Tex. 226.

92. Harrington *v.* Fish, 10 Mich. 415; Dale *v.* Wright, 57 Mo. 110; Webb *v.* Huff, 61 Tex. 677.

93. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Addis *v.* Graham, 88 Mo. 197; Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521. See, generally, Records.

94. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Morfleet *v.* Russell, 64 Mo. 176; Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 33 N. Y. Suppl. 664. But see Buckmaster *v.* Job, 15 Ill. 328, wherein it was held that where the record of an instrument acknowledged in another state failed to show that any seal was affixed to the certificate, no presumption would be indulged that a seal was annexed, although the certificate recited that it was made under seal.

Seal appearing on original instrument.— Where the record of a deed showed no evidence of a notarial seal having been affixed to its acknowledgment, but the deed itself bore such seal, and it was shown that the seal was not added subsequently to the execution of the deed, it was held that the deed was admissible in evidence. Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661; Parkinson *v.* Caplinger, 65 Mo. 290.

95. Jones *v.* Martin, 16 Cal. 165; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Mitchner *v.* Holmes, 117 Mo. 185, 22 S. W. 1070; Addis *v.* Graham, 88 Mo. 197; Parkinson *v.* Caplinger, 65 Mo. 290; Geary *v.* Kansas City, 61 Mo. 378; Minor *v.* Powers, (Tex. Civ. App. 1896) 38 S. W. 400; Witt *v.* Harlan, 66 Tex. 660, 2 S. W. 41; Ballard *v.* Perry, 28 Tex. 347. In Hammond *v.* Gordon, 93 Mo. 223, 6 S. W. 93, where the parties had been in possession for forty years under a sheriff's deed, it was presumed that a seal had been attached, the certificate reciting that it was given under the officer's hand and seal.

Where no evidence that seal ever attached. — The existence of a tax deed is not proved

enough if there be anything to represent it,[96] such as a scroll inclosing the word "seal,"[97] or the letters "L. S."[98]

G. Contents and Sufficiency — 1. Of Certificate of Acknowledgment — a. Acknowledgments by Persons Other Than Married Women — (I) *Substantial Compliance with Statute* — (A) *Necessity for* — (1) In General. A certificate of acknowledgment must conform substantially to the requirements of the statute under which it is drawn,[99] and if the language of the statute is not followed, words of the same force and import must be employed.[1] It is not sufficient to state mere legal conclusions,[2] but the officer must set out enough to show a valid official act on his part.[3] The omission of material words or recitals cannot be

by a supposed record copy of the same, found in the office of the register of deeds, purporting to show that the deed was acknowledged before a probate judge, where it does not show that such judge ever attached the seal of his office to the acknowledgment, and there is no evidence that such seal was ever attached. Kelley *v.* McBlain, 42 Kan. 764, 22 Pac. 994.

96. "No seal."— Where, in a certified copy of a deed, the acknowledgment bore, in the place where the seal is usually found, the words "[no seal]" but in the body of the acknowledgment itself there was a statement that the official seal had been affixed, it was held that the words "[no seal]" instead of implying that no seal was affixed, was merely a note, by the recorder, of the place of the notarial seal which he probably had no means of copying. Jones *v.* Martin, 16 Cal. 165. To same effect see Equitable Mortg. Co. *v.* Kempner, 84 Tex. 102, 19 S. W. 358.

97. Moore *v.* Titman, 33 Ill. 358; Dale *v.* Wright, 57 Mo. 110.

98. Bucklen *v.* Hasterlik, 155 Ill. 423, 40 N. E. 561 [*affirming* 51 Ill. App. 132]; Benefiel *v.* Aughe, 93 Ind. 401.

Need not recite that seal was affixed.— Where the record of a deed shows that the notarial seal was affixed to the notary's certificate by an "[L. S.]," it is not necessary that the *testimonium* clause should show that the seal was affixed, or that it should be stated in the body of the certificate that it was executed under the seal of the notary. Kansas City *v.* Hannibal, etc., R. Co., 77 Mo. 180.

99. *Alabama.*— Davidson *v.* Alabama Iron, etc., Co., 109 Ala. 383, 19 So. 390; Shelton *v.* Armor, 13 Ala. 647.

Arkansas.—Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

Idaho.— Co-operative Sav., etc., Assoc. *v.* Green, (Ida. 1897) 51 Pac. 770.

Iowa.— Wickersham *v.* Reeves, 1 Iowa 413.

New York.— Fryer *v.* Rockefeller, 63 N. Y. 268; Smith *v.* Tim, 14 Abb. N. Cas. (N. Y.) 447.

South Dakota.—Holt *v.* Metropolitan Trust Co., 11 S. D. 456, 78 N. W. 947.

Tennessee.—Peacock *v.* Tompkins, 1 Humphr. (Tenn.) 135; Bone *v.* Greenlee, 1 Coldw. (Tenn.) 29.

Texas.— Salmon *v.* Huff, 80 Tex. 133, 15 S. W. 1047.

Alabama — Insufficient compliance.—A certificate reciting that the grantors, being personally known to the officer, appeared before him on the day of the certificate's date "and thereupon acknowledged the signing and sealing thereof to be their voluntary act and deed, for the uses and purposes therein stated," was held not to be a substantial compliance with the form prescribed in Ala. Rev. Code, § 1548, as follows: "I, (name and style of the officer) hereby certify that ——, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily, on the day the same bears date." Keller *v.* Moore, 51 Ala. 340, 343.

Acknowledgment in another state.— The form of certificate given in Ala. Rev. Code, § 1548, must be substantially followed where the acknowledgment is taken in another state. Keller *v.* Moore, 51 Ala. 340.

1. Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494; Wickersham *v.* Reeves, 1 Iowa 413.

2. Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177 (recital of acknowledgment "according to law"); Flanagan *v.* Young, 2 Harr. & M. (Md.) 38 (recital of acknowledgment "according to the act of assembly in that case made and provided").

3. Wetmore *v.* Laird, 5 Biss. (U. S.) 160, 29 Fed. Cas. No. 17,467.

A mere statement of the fact of acknowledgment is insufficient. Blanchard *v.* Taylor, 7 B. Mon. (Ky.) 645; Ryerson *v.* Eldred, 18 Mich. 12; Gaines *v.* Catron, 1 Humphr. (Tenn.) 514; Crutchfield *v.* Stewart, 10 Yerg. (Tenn.) 237; Malone *v.* Stevens, 2 Yerg. (Tenn.) 520; Lipe *v.* Mitchell, 2 Yerg. (Tenn.) 400.

Necessary recitals.— In Iowa the certificate of acknowledgment should show the following acts of the grantor: (1) that he personally appeared before the officer: (2) that he acknowledged the signing of the deed; (3) that it was his voluntary act. It should also show the following conclusions of the officer: (1) that the party who thus appeared is personally known to him; (2) that he is the same party who signed the deed as the grantor; (3) that he acknowledged the signing to be his voluntary act. Bell *v.* Evans, 10 Iowa 353.

In South Dakota the following essential facts must substantially appear in the certificate of acknowledgment: (1) that the person making the acknowledgment personally appeared before the officer who makes the certificate; (2) that there was an acknowl-

supplied by intendment,[4] nor can such deficiencies usually be aided by parol proof.[5]

(2) Where No Form Prescribed. Where the statute merely requires an instrument to be acknowledged, without prescribing any form of certificate or providing what it shall contain, a certificate is sufficient which fairly shows that the grantor personally appeared before the officer and acknowledged the instrument to be his act and deed.[6]

(B) *Sufficiency of* — (1) In General. It is a rule of universal application that a literal compliance with the statute is not to be required of a certificate of acknowledgment, and that, if it substantially conforms to the statutory provisions as to the material facts to be embodied therein, it is sufficient.[7] Acknowledgments

edgment; (3) that the person who makes the acknowledgment is identified as the one executing the instrument; and (4) that such identity was either personally known or proved to the officer taking the acknowledgment. Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

4. Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494; Wetmore *v.* Laird, 5 Biss. (U. S.) 160, 29 Fed. Cas. No. 17,467.

5. As to the admissibility of evidence in aid of a certificate see *infra*, XIV.

6. Russell *v.* Whiteside, 5 Ill. 7; Brunswick-Balke-Collender Co. *v.* Brackett, 37 Minn. 58, 33 N. W. 214.

Sufficient certificate.— The certificate of acknowledgment of a deed made and recorded in New Jersey before 1799, stating that the grantor signed, sealed, and delivered the deed in the presence of the officer authorized to receive acknowledgments, was held sufficient, the existing statute specifying no form. Hoboken Land, etc., Co. *v.* Kerrigan, 31 N. J. L. 13.

7. *Alabama.*— McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3; Frederick *v.* Wilcox, 119 Ala. 355, 24 So. 582, 72 Am. St. Rep. 925; Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Sharpe *v.* Orme, 61 Ala. 263.

Arkansas.— Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

California.— Goode *v.* Smith, 13 Cal. 81.

District of Columbia.— Black *v.* Aman, 6 Mackey (D. C.) 131.

Florida.— Jackson *v.* Haisley, 35 Fla. 587, 17 So. 631; Einstein *v.* Shouse, 24 Fla. 490, 5 So. 380.

Idaho.— Curtis *v.* Bunnell, etc., Invest. Co., (Ida. 1898) 55 Pac. 659.

Illinois.— Schroder *v.* Keller, 84 Ill. 46; Alvis *v.* Morrison, 63 Ill. 181, 14 Am. Rep. 117; Delaunay *v.* Burnett, 9 Ill. 454; Vance *v.* Schuyler, 6 Ill. 160.

Iowa.— Dickerson *v.* Davis, 12 Iowa 353; Tiffany *v.* Glover, 3 Greene (Iowa) 387.

Maryland.— Frostburg Mut. Bldg. Assoc. *v.* Brace, 51 Md. 508.

Minnesota.— Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111.

Mississippi.— Russ *v.* Wingate, 30 Miss. 440.

Missouri.— Alexander *v.* Merry, 9 Mo. 514.

Nebraska.— Spitznagle *v.* Vanhessch, 13 Nebr. 338, 14 N. W. 417; Becker *v.* Anderson, 11 Nebr. 493, 9 N. W. 640; Burbank *v.* Ellis, 7 Nebr. 156.

Nevada.— Johnson *v.* Badger Mill, etc., Co., 13 Nev. 351.

New Jersey.— Den *v.* Hamilton, 12 N. J. L. 126; Den *v.* Geiger, 9 N. J. L. 281.

New York.— West Point Iron Co. *v.* Reymert, 45 N. Y. 703; Cuykendall *v.* Douglas, 19 Hun (N. Y.) 577; Canandarqua Academy *v.* McKechnie, 19 Hun (N. Y.) 62 [*affirmed* in 90 N. Y. 618]; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87; Sheldon *v.* Stryker, 27 How. Pr. (N. Y.) 387, 42 Barb. (N. Y.) 284; Troup *v.* Haight, Hopk. (N. Y.) 239.

Oklahoma.— Garton *v.* Hudson-Kimberly Pub. Co., 8 Okla. 631, 58 Pac. 946.

Rhode Island.— Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 691.

Tennessee.— Garth *v.* Fort, 15 Lea (Tenn.) 683.

Texas.— Johnson *v.* Thompson, (Tex. Civ. App. 1898) 50 S. W. 1055; Harlowe *v.* Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21; Salmon *v.* Huff, 80 Tex. 133, 15 S. W. 1047; Talbert *v.* Dull, 70 Tex. 675, 8 S. W. 530; Schramm *v.* Gentry, 63 Tex. 583; Watkins *v.* Hall, 57 Tex. 1; Monroe *v.* Arledge, 23 Tex. 478; Deen *v.* Wills, 21 Tex. 642.

Virginia.— Welles *v.* Cole, 6 Gratt. (Va.) 645.

Wisconsin.— Smith *v.* Garden, 28 Wis. 685.

As to the sufficiency of a substantial compliance in the case of particular recitals see the following subdivisions:

Statutory form not mandatory.— Where the statute provides a form for the certificate such provision is usually regarded as permissive and not mandatory. Cone *v.* Nimocks, 78 Minn. 249, 80 N. W. 1056; Huse *v.* Ames, 104 Mo. 91, 15 S. W. 965. But see Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154, 158, wherein it was held that under Ill. Rev. Stat. c. 95, § 2, providing that "the certificate of acknowledgment may be in the following form;" etc., the word "may" as used in the statute was imperative and not directory.

Certificate in form of jurat.— The certificate of an officer authorized to take the acknowledgment of deeds, that the grantor made oath that he signed, sealed, and delivered the deed as his proper act, though in the form of a jurat, is not thereby deprived of the character of an acknowledgment. Ingraham *v.* Grigg, 13 Sm. & M. (Miss.) 22; Starke *v.* Etheridge, 71 N. C. 240.

Sufficient forms.— For forms of certificates

are of necessity frequently made before, and certified by, inexperienced or illiterate persons, and it would be far from subserving the purposes of justice to determine the validity of such certificates by the application of critical or technical rules. Therefore it is the policy of the law to construe them liberally, and not to allow a conveyance to be defeated by unsubstantial objections to the certificate of acknowledgment.[8] If words of equivalent import to those of the statute are employed it is sufficient,[9] and the certificate will not be vitiated by unsubstantial clerical errors,[10]

held to be in substantial compliance with the statutes under which drawn see:

Illinois.— McConnel *v.* Reed, 3 Ill. 371.

Nebraska.— Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685.

New York.— Duval *v.* Covenhoven, 4 Wend. (N. Y.) 561.

Tennessee.— Estell *v.* Miller, 10 Yerg. (Tenn.) 480; Love *v.* Shields, 3 Yerg. (Tenn.) 405.

Texas.— Hays *v.* Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479.

Sheriff's deed — Missouri.— A certificate of acknowledgment to a sheriff's deed, in which the clerk of court certified that the sheriff "appeared in open court . . . and acknowledged the execution of the foregoing deed, which was duly entered of record," is sufficient. Bray *v.* Marshall, 75 Mo. 327, 328. See also Huxley *v.* Harrold, 62 Mo. 516.

Legality inferred after great lapse of time. — Where enough is stated in the certificate to show that a witness was sworn or the deed was acknowledged by the bargainor, the court will, after great length of time, infer the legality of the probate, however informally the certificate be expressed. After a great lapse of time, evidence of the due execution of the instrument being difficult to obtain, every reasonable presumption should be indulged in favor of the old probate. Cox *v.* Bowman, 2 Yerg. (Tenn.) 108.

Acknowledgments taken in other states.— For certificates of acknowledgments taken in other states held to be in compliance with the laws of the state in which the land lay see Lockwood *v.* Mills, 39 Ill. 602; Commonwealth Bank *v.* Portman, 9 Dana (Ky.) 112; Robinson *v.* Nolan, 152 Mo. 560, 54 S. W. 469.

Need not conform to laws of place where made.— Where the statute regarding acknowledgments executed out of the state did not prescribe a form for the certificate or require it to be made in accordance with the laws of the place where it was made, it was held that a certificate executed outside of the state wherein the land lay, in substantial compliance with the laws of that state, was sufficient notwithstanding it did not conform to the laws of the place where made. Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

8. *Florida.*— Cleland *v.* Long, 34 Fla. 353, 16 So. 272.

Kentucky.— Gregory *v.* Ford, 5 B. Mon. (Ky.) 471.

Minnesota.— Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111; Wells *v.* Atkinson, 24 Minn. 161.

Nebraska.— Becker *v.* Anderson, 11 Nebr. 493, 9 N. W. 640.

New York.— Abrams *v.* Rhoner, 44 Hun (N. Y.) 507, 9 N. Y. St. 207; Canandarqua Academy *v.* McKechnie, 19 Hun (N. Y.) 62 [*affirmed* in 90 N. Y. 618].

Pennsylvania.— Shaller *v.* Brand, 6 Binn. (Pa.) 435, 6 Am. Dec. 482.

United States.— Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544; Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426.

Canada.— Morgan *v.* Sabourin, 27 U. C. Q. B. 230.

An ambiguity in a certificate of acknowledgment should be construed in the light of the surrounding circumstances. Smith *v.* Boyd, 101 N. Y. 472, 5 N. E. 319.

9. *Arkansas.*— Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

Iowa.— Bell *v.* Evans, 10 Iowa 353; Cavender *v.* Smith, 5 Iowa 157; Wickersham *v.* Reeves, 1 Iowa 413.

Mississippi.— Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373.

Missouri.— Alexander *v.* Merry, 9 Mo. 514.

Oklahoma.— Garton *v.* Hudson-Kimberly Pub. Co., 8 Okla. 631, 58 Pac. 946.

Tennessee.— Davis *v.* Bogle, 11 Heisk. (Tenn.) 315.

United States.— Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653.

Use of "I" instead of "before me."— Under Tex. Rev. Stat. art. 4312, providing that the certificate of acknowledgment "must be substantially as follows: Before me, ——, known to me," a certificate using "I" instead of the words, "before me," is good. Belbaze *v.* Ratto, 69 Tex. 636, 7 S. W. 501.

Sufficient form.— A certificate that one "whose name appears signed to the within deed came this day before me, ——, acting justice for said county, and acknowledged the same to be his act and deed, and desired me to certify the same to the clerk of the county court of said county, that it may be duly recorded," is a substantial compliance with Va. Code 1860, c. 121, § 3, requiring such certificate to be to the following effect: "I, ——, a justice of the peace in the county aforesaid, in the state of ——, do certify that ——, whose name is signed to the writing above (or hereto annexed), bearing date on the —— day of ——, has acknowledged the same before me, in my county aforesaid." and is sufficient. McCormack *v.* James, 36 Fed. 14.

10. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Ives *v.* Kimball, 1 Mich. 308, a certificate describing a deed as "the foregoing mortgage;" Claflin *v.* Smith, 15 Abb. N. Cas. (N. Y.) 241.

Mere inaccuracy of expression in a certifi-

nor by the omission of words not essential to an intelligent understanding of its meaning.[11]

(2) Surplusage. Where the certificate of acknowledgment contains everything required by the statute to be included therein, it will not be vitiated by the insertion of unnecessary words, but such words may be rejected as surplusage.[12]

(3) Certificate Construed in Connection with Instrument. In determining the validity of a certificate, reference may be had to the instrument itself, or to any part of it, and if the two together show a substantial compliance with the statute it is sufficient.[13]

cate of acknowledgment will be disregarded. Frostburg Mut. Bldg. Assoc. *v.* Brace, 51 Md. 508, wherein an acknowledgment by a corporation was certified as being "his," instead of "its," act and deed; Nelson *v.* Graff, 44 Mich. 433, 6 N. W. 872.

11. Hartshorn *v.* Dawson, 79 Ill. 108.

Omission of the word "appeared."—Where, in an acknowledgment of a mortgage, the word "appeared" was omitted after the phrase "before me personally," it was held that the omission was not fatal to the validity of the mortgage. Scharfenburg *v.* Bishop, 35 Iowa 60.

Immaterial recital.—Where the form of the certificate given in a statute recited that the party desired the justices "to certify the acknowledgment to the clerk of the county or corporation court of ——, in order that the same may be recorded," it was held that a failure to express this desire of the grantor in the certificate would not invalidate the recordation of the deed if it were made in the proper county; the only object in expressing such desire being to show the county or corporation in which the law required the deed to be recorded. Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 117, 50 Am. Dec. 108.

Illinois — Chattel mortgage.— In Illinois a certificate of the acknowledgment of a chattel mortgage, correct in everything except that it omits the words "and entered by me," is not insufficient on that account. If the justice has in fact made the entry on his docket as required by statute it is sufficient, and that fact may be shown by the docket itself. Harvey *v.* Dunn, 89 Ill. 585; Schroder *v.* Keller, 84 Ill. 46.

12. Stuart *v.* Dutton, 39 Ill. 91; Chester *v.* Rumsey, 26 Ill. 97; Crowley *v.* Wallace, 12 Mo. 143; Shults *v.* Moore, 1 McLean (U. S.) 520, 22 Fed. Cas. No. 12,824.

Clerical error.— Where the certificate of acknowledgment of a deed to J. C. Caskey recited that the grantor "acknowledged that he had executed the same J. C. for Caskey all the uses, purposes, and considerations therein set forth," it was held that the certificate was substantially sufficient, as the name "J. C. Caskey" might be treated as surplusage, and the writing of the word "for" in the connection shown was due to a clerical error. Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

Misdescription of grantor.— A testator devised land to his wife, but the will named no executor, and no administrator was appointed. The devisee in a conveyance of the land described herself as executrix and devisee of the will, but signed only as an individual. The certificate recited that she acknowledged the deed as executrix "for the purposes therein mentioned." It was held that the words "as such executrix" might be disregarded as surplusage, and, the certificate being otherwise correct, the conveyance was sufficient to pass her title. Bauer *v.* Schmelcher, 5 N. Y. Suppl. 423.

13. *Alabama.*— Frederick *v.* Wilcox, 119 Ala. 355, 24 So. 582, 72 Am. St. Rep. 925; Sharpe *v.* Orme, 61 Ala. 263; Bradford *v.* Dawson, 2 Ala. 203.

California.— Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

Maryland.— Basshor *v.* Stewart, 54 Md. 376; Kelly *v.* Rosenstock, 45 Md. 389.

Michigan.— Nelson *v.* Graff, 44 Mich. 433, 6 N. W. 872.

Minnesota.—Brunswick-Balke-Collender Co. *v.* Brackett, 37 Minn. 58, 33 N. W. 214; Wells *v.* Atkinson, 24 Minn. 161.

Missouri.— Hughes *v.* Morris, 110 Mo. 306, 19 S. W. 481; Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618.

New York.— Bauer *v.* Schmelcher, 5 N. Y. Suppl. 423; Claflin *v.* Smith, 15 Abb. N. Cas. (N. Y.) 241.

Wisconsin.— Hiles *v.* La Flesh, 59 Wis. 465, 18 N. W. 435.

United States.— Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426; Geekie *v.* Kirby Carpenter Co., 10 Fed. Cas. No. 5,295.

Certificate referring to instrument.—Where the certificate of acknowledgment or proof of the execution of a deed refers to the instrument itself in such manner as to connect the two, they may be considered together in determining the sufficiency of the proof of execution. Cleland *v.* Long, 34 Fla. 353, 16 So. 272.

Place of taking acknowledgment.— It is not indispensable that the place of taking the acknowledgment of a deed should appear from the certificate of acknowledgment, if it appear with sufficient certainty from an inspection of the whole instrument. Fuhrman *v.* Loudon, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608; Brooks *v.* Chaplin, 3 Vt. 281, 23 Am. Dec. 209.

Grantor's name defectively stated.— Although the name of the grantor in a deed is defectively stated in the certificate of the acknowledgment, yet if, from the whole instrument, it appear with reasonable certainty that it was acknowledged by the grantor, it is sufficient. Chandler *v.* Spear, 22 Vt. 388.

Instrument "proved or acknowledged."— A clerk's certificate attached to a deed, reciting that it was executed and "proved or

(II) *Particular Recitals* — (A) *Naming or Describing Acknowledgor* — (1) Ackowledgment by Private Person — (a) In General. The certificate should show that the person who appeared before the officer and acknowledged the instrument was the one who executed it.[14] The certificate will not be very strictly construed in this respect, and if it is shown with reasonable certainty that the grantor made the acknowledgment it will be sufficient.[15]

(b) Omission of Name. A certificate which omits the name of the person making the acknowledgment, without otherwise showing that such person was the grantor therein, is usually regarded as fatally defective.[16] But the omission of the acknowledgor's name is not material where it sufficiently appears that the grantor and no one else appeared and acknowledged the instrument.[17]

(c) Variance as to Name. A material variance between the name of the grantor as given in the instrument and as given in the certificate will render the certificate invalid, where it does not otherwise appear that the two names apply to the

acknowledged" according to the laws of the state, will be held to be a certificate that it was properly acknowledged, a reference to the deed showing a certificate of acknowledgment but no certificate of proof. Nelson *v.* Graff, 44 Mich. 433, 6 N. W. 872.

14. Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154; Torrens *v.* Currie, 22 N. Brunsw. 342.

Where more than one grantor.— A certificate stating that more than one person appeared before the officer to acknowledge the instrument, and that "he" acknowledged that he executed it, does not entitle the instrument to record. Threadgill *v.* Bickerstaff, 7 Tex. Civ. App. 406, 26 S. W. 739.

15. Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645; Hughes *v.* Morris, 110 Mo. 306, 19 S. W. 481.

The acknowledgment of a deed by a trustee, who signed the instrument as trustee, is not void because the certificate describes him simply by his individual name without adding his title. Dail *v.* Moore, 51 Mo. 589.

Acknowledgment by deputy clerk.— Where a tax deed is executed by the deputy county clerk, an acknowledgment reciting that such deputy county clerk appeared before the acknowledging officer, and that he acknowledged the execution of the deed by him "as such county clerk," is sufficient; the words, "as such county clerk" meaning "as such deputy county clerk." Ward *v.* Walters, 63 Wis. 39, 22 N. W. 844.

Acknowledgment of instrument "as a party thereto."— A certificate of acknowledgment of a sheriff's deed, stating that the sheriff, "to me personally known to be the same person described in, and whose name is subscribed to, the above instrument, appeared before me and acknowledged that he executed the same as sheriff aforesaid;" sufficiently shows that the person who subscribed the deed subscribed and acknowledged it "as a party thereto." Cavender *v.* Smith, 5 Iowa 157.

Sufficient statement of identity.— A certificate which shows that "on the 29th day of September, 1862, personally appeared before me, D., of Fall City," is a sufficient statement of the identity of the grantor in a deed by the town. Burbank *v.* Ellis, 7 Nebr. 156.

Colorado — Construction of statute.— Colo. Rev. Stat. c. 14, § 2, provides that the justice, taking the acknowledgment of a chattel mortgage, "shall certify the same in substance as follows: This mortgage was acknowledged before me by A. B., (the mortgagor) this —— day of ——." It was held that a certificate which omitted the words "the mortgagor," but gave the name of the party, was sufficient, as the words given in parentheses in the statute were merely intended to indicate the name to be inserted. Chapin *v.* Whitsett, 3 Colo. 315, 316.

16. Hayden *v.* Westcott, 11 Conn. 129; Hiss *v.* McCabe, 45 Md. 77; Smith *v.* Hunt, 13 Ohio 260, 42 Am. Dec. 201. But see Philips *v.* Ruble, Litt. Sel. Cas. (Ky.) 221 (acknowledgment made in open court presumed to have been made by the grantor); Den *v.* Bryan, 6 N. C. 178, 5 Am. Dec. 526 (presumption that the officer did his duty in the absence of any showing to the contrary).

17. Magness *v.* Arnold, 31 Ark. 103; Milner *v.* Nelson, 86 Iowa 452, 53 N. W. 405, 41 Am. St. Rep. 506, 19 L. R. A. 279; Wilcoxon *v.* Osborn, 77 Mo. 621; Wise *v.* Postlewait, 3 W. Va. 452.

Sufficient certificate.— A certificate of acknowledgment, "Personally appeared ——, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed, before me," was held to show sufficiently that it was the grantor who appeared. Sanford *v.* Bulkley, 30 Conn. 344.

Sheriff's deed.— In the certificate of an acknowledgment of a deed from a sheriff taken by a probate clerk, the clerk inadvertently omitted the name of the sheriff from the acknowledgment, which read as follows: "Personally appeared before me, G. C., clerk of the probate court in and for said county, whose name is subscribed to the within deed, as such, who acknowledged that he signed, sealed, and delivered the same," etc., being perfectly regular in other respects. It was held that as it was clearly apparent from the certificate that the sheriff was the person who made the acknowledgment, the omission of his name did not vitiate it. Pickett *v.* Doe, 5 Sm. & M. (Miss.) 470, 472, 43 Am. Dec. 523.

same person.[18] But where, from an inspection of the whole instrument, it appears with reasonable certainty that the person who acknowledged was the one who executed it, the clerical error in stating the name of the grantor will not invalidate the instrument.[19] And where the grantor signs the instrument using only the initial of his christian name, the fact that in the certificate such name is spelled out in full will not constitute a defect.[20]

(2) Acknowledgment by Agent or Attorney. Where an instrument is acknowledged by an agent or attorney, no particular set of words is necessary, in the absence of express statutory requirement, to show that he made the acknowledgment in his representative and not his private capacity. If that fact can be gathered from a consideration of the certificate in connection with the deed it is enough.[21] Thus, where an instrument by husband and wife is acknowledged by the husband in his own behalf and as attorney in fact for the wife, the certificate is sufficient if it clearly shows that the husband acknowledged in both his individual and representative capacities, and that in the latter capacity he acknowledged the deed in behalf of his principal named in the certificate.[22]

18. Instances of fatal variance.— Deed signed by "Geo. H. Case;" certificate reciting execution by "Geo. H. Crane." Heil *v.* Redden, 38 Kan. 255, 16 Pac. 743.

Deed signed by "F. W. Chandler;" certificate reciting acknowledgment by "T. W. Chandler." Carleton *v.* Lombardi, 81 Tex. 355, 16 S. W. 1081.

Deed signed by "Jonas B.;" certificate reciting acknowledgment by "James B." Stephens *v.* Motl, 81 Tex. 115, 16 S. W. 731.

Deed signed by "Robert Gaines;" certificate reciting acknowledgment by "Robert Lewis." Minor *v.* Powers, (Tex. Civ. App. 1896) 38 S. W. 400.

Deed signed "F. M. McKinzie;" certificate reciting acknowledgment by "F. M. McKezie." McKinzie *v.* Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790.

19. Cheek *v.* Herndon, 82 Tex. 146, 17 S. W. 763; Chandler *v.* Spear, 22 Vt. 388.

Presumed that variance due to clerical error.— Where the certificate of acknowledgment of a deed identifies the party as known to the officer to be the person who executed the same, the fact that the name of such party appears in the certificate as "Strieber," whereas the name signed to the deed is "Schrieber," will be presumed to be the result of a clerical error merely and will not vitiate the acknowledgment. Rodes *v.* St. Anthony, etc., El. Co., 49 Minn. 370, 52 N. W. 27.

The certificate may refer to the body of the deed, identifying the grantor named therein as the one referred to in the certificate. Bell *v.* Evans, 10 Iowa 353.

20. Paxton *v.* Ross, 89 Iowa 661, 57 N. W. 428; Copelin *v.* Shuler, (Tex. 1887) 6 S. W. 668; Briggs *v.* McBride, 17 N. Brunsw. 663.

Sufficient showing that both names belong to same person.— Where one of the grantors was described in the body of the deed as Robert P. McC. but the deed was signed R. Parker McC., it was held that a statement in the certificate of acknowledgment that the deed was acknowledged by Robert P. McC. was sufficient to show that he and R. Parker McC. were one and the same person. Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541.

21. Robinson *v.* Mauldin, 11 Ala. 977; Little *v.* Weatherford, 63 Tex. 638.

As to the power of an attorney or agent to acknowledge an instrument see *supra*, V, B.

Sufficient certificates.— A certificate reciting: "Before the undersigned, ——, came A. B., agent for C. D. and E. F., who are personally known to me to be the identical persons whose names are affixed to the foregoing bill of sale as grantors, and they acknowledged the same to be their voluntary act and deed." Sowden *v.* Craig, 26 Iowa 156, 96 Am. Dec. 125.

A certificate reciting: "Personally came before me G., by his attorney in fact, W., the signer and sealer of the foregoing deed, and acknowledged the same to be his own free act and deed." Bigelow *v.* Livingston, 28 Minn. 57, 60, 9 N. W. 31.

A certificate reciting: "Personally appeared before me, ——, A. B., by C. D., one of his attorneys in fact, and who is personally known to me to be the person described in," etc. McAdow *v.* Black, 6 Mont. 601, 13 Pac. 377.

A certificate reciting: "Came R., by his attorney, J., the grantor, with whom I am personally acquainted, and acknowledged that he signed, sealed, and delivered the foregoing instrument," etc. Ferguson *v.* Ricketts, (Tex. Civ. App. 1900) 55 S. W. 975.

A certificate reciting: "Personally appeared A., agent and attorney in fact for B. and C., of Pike County, Georgia, to me well known, formerly of the county of Freestone, to me personally known, who signed the names of said B. and C. as their agent and attorney in fact, and being by me duly sworn, signed and acknowledged the execution of the foregoing deed . . . and delivered the same as their binding act," etc. Moses *v.* Dibrell, 2 Tex. Civ. App. 457, 460, 21 S. W. 414.

22. Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273.

Sufficient certificate.— A certificate of acknowledgment to a mortgage, executed by a husband for himself and as attorney in fact for his wife, which, after the usual acknowledgment by him, continues, "And I do further certify that personally appeared A. B., per-

(3) Acknowledgment by Corporation. The certificate of an acknowledgment by a corporation must contain enough to show that the acknowledgment was the act of the corporation and not of the individuals who made it.[23] Thus the certificate should state that the officer knew the acknowledgor or had satisfactory evidence of his identity,[24] and should show, when read in connection with the deed, that such person was authorized to act in behalf of the corporation.[25] Where the conveyance purports to have been executed and acknowledged by persons duly authorized to act in behalf of the corporation, and the certificate recites that they were such, a presumption arises in favor of their authority,[26] though

sonally known to me to be the same person whose name is subscribed to the within instrument as the attorney in fact of C. D., his wife, and the said A. B. duly acknowledged to me that he subscribed the name of C. D., thereto as principal, and his own name as attorney in fact," sufficiently shows his acknowledgment in behalf of his wife as well as in his own behalf. Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014.

23. Howe Mach. Co. *v.* Avery, 16 Hun (N. Y.) 555.

For other questions relating to acknowledgments by corporations see *supra*, V, F, and cross-references there given.

Defective certificate.— Where the grantor in a chattel mortgage was a corporation, and the certificate stated that the acknowledgment was made by "J. B. R., secretary, and F. W. C., president, the mortgagors therein named," it was held to be fatally defective. Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154.

"Act of the corporation."— Under Tex. Rev. Stat. art. 600, requiring that an officer of a corporation executing a deed in behalf of such corporation shall acknowledge such instrument to be "the act of the corporation," an acknowledgment by the officer stating that he executed the deed for the purpose therein expressed is a sufficient compliance with the statute. Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Muller *v.* Boone, 63 Tex. 91.

24. As to recitals regarding the identity of the acknowledgor see *infra*, XII, G, 1, a, (II), (B).

Officer "satisfied."— A certificate of acknowledgment reciting the appearance of R., "who is, I am satisfied, the president of the R. M. Company," was held to show sufficiently that the officer knew the acknowledgor or had satisfactory evidence of his identity. Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92.

Clerical error.— Where a certificate recited that the acknowledgment was made by "H. G. R., known to me to the president," it was held that the omission of the word "be" was a mere clerical error which would not invalidate the certificate. Johnson *v.* Badger Mill, etc., Co., 13 Nev. 351.

25. Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111; Holt *v.* Metropolitan Trust Co., 11 S. D. 456, 78 N. W. 947.

Sufficient showing of authority.— A notary's certificate of acknowledgment of a conveyance by a corporation is not defective which states that it was acknowledged by "Thomas L. Rosser, Pres.," where the conveyance was signed by the "Minneapolis Improvement Company, by Thomas L. Rosser, President." Banner *v.* Rosser, 96 Va. 238, 31 S. E. 67.

Acknowledged as "their voluntary act and deed."—A certificate of acknowledgment stating that M. C., president, and A. M., cashier, of a corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed," etc., is sufficient to show an acknowledgment by the corporation. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239 [*affirming* Eppright *v.* Nickerson, 78 Mo. 482]. To the same effect see Zimpleman *v.* Stamps, 21 Tex. Civ. App. 129, 51 S. W. 341.

The certificate of the acknowledgment of a corporate deed in these words, "Personally appeared W. W., agent of the Flower Brook Mfg. Co., signer and sealer of the above written instrument, and acknowledged the same to be his free act and deed," was held to show sufficiently that the acknowledgment was made by him on the part and behalf of the corporation. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

Certificate not stating official character.— An acknowledgment on a deed signed by F., as president, and C., as treasurer, of a corporation, and acknowledged, "Personally appearing, F. and C. acknowledge the foregoing instrument to be their free act and deed," is sufficient as a deed of the corporation. Tenney *v.* East Warren Lumber Co., 43 N. H. 343. But see Klemme *v.* McLay, 68 Iowa 158, 26 N. W. 53, wherein the certificate was held invalid because not stating the official character of the acknowledgors, although they are so designated in the instrument.

Mayor pro tem. of city.— Where a city charter authorizes the appointment of a mayor *pro tempore*, a certificate of acknowledgment purporting to have been executed by such an officer, wherein it is stated that the person executing the deed for a corporation was personally known to the officer as the identical person whose name was affixed to the deed as president *pro tempore* of the city council and acting mayor of the city, and that he acknowledged the instrument to be his voluntary act and deed as such president and acting mayor, etc., was held to show sufficiently the official character of the acknowledging party. Middleton Sav. Bank *v.* Dubuque, 19 Iowa 467.

26. Morris *v.* Keil, 20 Minn. 531; Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207; Shaffer *v.* Hahn, 111 N. C. 1, 15 S. E. 1033.

this may be overcome by proof to the contrary.[27] It has been held that where no special form is prescribed by statute [28] a certificate is sufficient which identifies the subscriber, specifies the writing subscribed, states the capacity in which he executes, and certifies his acknowledgment thereof.[29]

(4) Acknowledgment by Partnership. A certificate of an acknowledgment by a partnership, to be effectual, must identify the person or persons who made the acknowledgment.[30] In the absence of any special form prescribed by statute [31] it is usually sufficient if the certificate recites that the person acknowledging the instrument is a member of the firm,[32] without stating that such person was authorized by the other members to acknowledge in behalf of the partnership.[33]

(b) *Knowledge of Acknowledgor's Identity* — (1) Necessity for. Usually the statutes require the officer to certify that the person making the acknowledgment was to him personally known, or proved on satisfactory evidence, to be the individual who executed the instrument. Under such a statute a certificate which fails to show in some way that the acknowledgor was known to the officer is fatally defective.[34] But where the statute in force at the time the acknowledg-

27. Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

28. **In New York no special form** is necessary for the certificate of an acknowledgment by a corporation. Pruyne *v.* Adams Furniture, etc., Co., 92 Hun (N. Y.) 214, 36 N. Y. Suppl. 361; Hoopes *v.* Auburn Water-Works Co., 37 Hun (N. Y.) 568.

Failure to comply with statute.— A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by W. Va. Code, c. 73, § 5, is fatally defective and does not entitle such deed to be recorded. Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256.

Substantial compliance with statute.— An instrument executed by a corporation was signed by the vice-president, attested by the secretary, and the corporate seal attached. Both officers acknowledged the execution of the instrument by them as the act and deed of the corporation, and the secretary made affidavit that he was such officer and that the seal was the corporate seal and was affixed by order of the board of directors. This was held to be a substantial compliance with Minn. Laws (1883), c. 99, *as amended* Laws (1889), c. 118. Bowers *v.* Hechtman, 45 Minn. 238, 47 N. W. 792.

29. Banner *v.* Rosser, 96 Va. 238, 31 S. E. 67.

30. Hughes *v.* Morris, 110 Mo. 306, 19 S. W. 481; Sloan *v.* Owens, etc., Mach. Co., 70 Mo. 206.

As to who may make an acknowledgment in behalf of a partnership see *supra*, V, G.

Sufficient certificate.— Where a deed of assignment was executed by "D. F.," and by "D. F. as surviving partner," a certificate of acknowledgment reciting that "D. F." personally appeared and acknowledged the deed "to be his free act" is sufficient without a statement that it was acknowledged by him "as surviving partner" also. Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441.

31. **California — Certificate of partnership.** — Under Cal. Civ. Code, § 2648, requiring an acknowledgment of a certificate of partnership, any form is sufficient which indicates that the partners have acknowledged before a proper officer that the instrument is theirs. Fabian *v.* Callahan, 56 Cal. 159.

32. Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551; McNeal Pipe, etc., Co. *v.* Woltman, 114 N. C. 178, 19 S. E. 109.

Sufficient certificate.— Where the certificate of acknowledgment of a deed under which plaintiff claimed title stated that a specified firm personally appeared before the notary "by S. B., partner of said firm, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same," it was held to be sufficient; it appearing on the face of the deed that S. B. was a member of the firm whose act it purported to be. Leon, etc., Land Co. *v.* Dunlap, 4 Tex. Civ. App. 315, 316, 23 S. W. 473.

33. Troy National Bank *v.* Scriven, 63 Hun (N. Y.) 375, 18 N. Y. Suppl. 277. McCulloch County Land, etc., Co. *v.* Whitefort, 21 Tex. Civ. App. 314, 50 S. W. 1042, wherein it was held that the recital in the acknowledgment that the person acknowledging the deed was a member of the firm was sufficient evidence of the fact. But see Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375, wherein it was held that the authority of the acknowledging parties must be shown.

34. *Alabama.*— Davidson *v.* Alabama Iron, etc., Co., 109 Ala. 383, 19 So. 390; East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349; Rogers *v.* Adams, 66 Ala. 600; Merritt *v.* Phenix, 48 Ala. 87.

California.— McMinn *v.* O'Connor, 27 Cal. 238; Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714; Henderson *v.* Grewell, 8 Cal. 581; Kelsey *v.* Dunlap, 7 Cal. 160.

District of Columbia.— Black *v.* Aman, 6 Mackey (D. C.) 131.

Illinois.— Gage *v.* Wheeler, 129 Ill. 197, 21 N. E. 1075; Fell *v.* Young, 63 Ill. 106; Lindley *v.* Smith, 46 Ill. 523; Tully *v.* Davis, 30 Ill. 103, 83 Am. Dec. 179; Blain *v.* Rivard, 19 Ill. App. 477.

Iowa.— Brinton *v.* Seevers, 12 Iowa 389.

Missouri.— Callaway *v.* Fash, 50 Mo. 420.

ment was taken did not prescribe such recital, its omission, of course, can have no effect upon the validity of the certificate.[35]

(2) Sufficiency of — (a) In General. In certifying his knowledge of the acknowledgor's identity it is not necessary that the officer should follow the words of the statute literally, and if he uses language substantially complying therewith it is sufficient.[36] Thus a recital merely that the acknowledgor was known to the officer has been held sufficient, though the certificate did not set forth in the terms of the statute that he was known to the officer to be the person described in and who executed the instrument.[37] And a recital that the officer is "satisfied" that

New Jersey.— Pinckney *v.* Burrage, 31 N. J. L. 21.

New York.— Fryer *v.* Rockefeller, 63 N. Y. 268; Goddard *v.* Schmoll, 24 Misc. (N. Y.) 381, 53 N. Y. Suppl. 402.

South Dakota.— Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

Tennessee.— Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535; Bone *v.* Greenlee, 1 Coldw. (Tenn.) 29; Fall *v.* Roper, 3 Head (Tenn.) 485; Johnson *v.* Walton, 1 Sneed (Tenn.) 258; Garnett *v.* Stockton, 7 Humphr. (Tenn.) 84; Peacock *v.* Tompkins, 1 Humphr. (Tenn.) 135.

Texas.— Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; Salmon *v.* Huff, 80 Tex. 133, 15 S. W. 1047; McKie *v.* Anderson, 78 Tex. 207, 14 S. W. 576; Hines *v.* Lumpkin, 19 Tex. Civ. App. 556, 47 S. W. 818.

As to the necessity for the officer to ascertain the grantor's identity see *supra*, X, A, 1, b.

35. Logan *v.* Williams, 76 Ill. 175; Holton *v.* Kemp, 81 Mo. 661; Baker *v.* Underwood, 63 Mo. 384; Laughlin *v.* Stone, 5 Mo. 43; Northrop *v.* Wright, 7 Hill (N. Y.) 476; Crowder *v.* Hopkins, 10 Paige (N. Y.) 183; Copelin *v.* Shuler, (Tex. 1887) 6 S. W. 668; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; Driscoll *v.* Morris, 2 Tex. Civ. App. 603, 21 S. W. 629.

Colorado — Articles of incorporation.— In Colorado it is not necessary that the acknowledgment of articles of incorporation should show that the persons acknowledging were personally known to the officer to be the persons who executed the articles, the statute providing for such acknowledgment containing no requirement in that regard. People *v.* Cheeseman, 7 Colo. 376, 3 Pac. 716.

Florida — Acknowledgment outside state. — The statutory requirement that the officer taking an acknowledgment shall certify as to his knowledge of the identity of the acknowledgor applies only to acknowledgments taken outside the state. McCoy *v.* Boley, 21 Fla. 803.

Kansas — Sheriff's deed.— A defect in the acknowledgment of a sheriff's deed, in which the person before whom it was acknowledged failed to state that "the sheriff was personally known to him," does not avoid the instrument. Ogden *v.* Walters, 12 Kan. 282.

36. Livingston *v.* Kettelle, 6 Ill. 116, 41 Am. Dec. 166; Wiley *v.* Bean, 6 Ill. 302; Warner *v.* Hardy, 6 Md. 525; Wilson *v.* Quigley, 107 Mo. 98, 17 S. W. 891; West Point Iron Co. *v.* Reymert, 45 N. Y. 703.

"Know personally" equivalent to "personally acquainted with."— In the certificate of acknowledgment, to be "personally acquainted with" and to "know personally" are equivalent phrases. Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544.

Grammatical error.— A deed of land is not invalidated by a recital in the certificate of acknowledgment that the three grantors "is personally known to me as the same person whose name are subscribed," etc. Cairo, etc., R. Co. *v.* Parrott, 92 Ill. 194, 195.

Surplusage.— Under Tex. Stat. (1879) art. 4309, it was held that a certificate in the precise form of the statute, reciting "Personally appeared before me J. A. and N. A., his wife, both known to me (or proven to me on oath of ——) to be the persons whose names are subscribed," etc., was sufficient, as it was evident that the officer intended to certify that the parties to the deed were known to him, and the parenthetical clause could be rejected as surplusage. Adams *v.* Pardue, (Tex. Civ. App. 1896) 36 S. W. 1015.

Identification by introduction.— An acknowledgment of a deed reciting that the grantor is known to the officer taking the acknowledgment by introduction sufficiently complies with the statute requiring a statement that the grantor is known to such officer; the words "by introduction" being regarded as surplusage. Lindley *v.* Lindley, (Tex. Civ. App. 1899) 50 S. W. 159.

As to the sufficiency of the knowledge acquired by an introduction see *supra*, X, A, 1, b.

Construed in connection with instrument. — In Hiles *v.* La Flesh, 59 Wis. 465, 18 N. W. 435, it was held that the deed and attestation might be resorted to in aid of the certificate to show that the acknowledgor was known to the officer.

Aided by another certificate.—Where it did not clearly appear that the acknowledgor was personally known to the officer, it was held that resort might be had to another certificate bearing the same date, which contained a proper recital that the same acknowledgor was personally known to such officer. Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92.

37. Bell *v.* Evans, 10 Iowa 353; Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552; Troup *v.* Haight, Hopk. (N. Y.) 239; Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120; Schramm

the person making the acknowledgment is the grantor in the instrument has been held sufficient to show that he was acquainted with the grantor's identity.[38] But while the certificate is liberally construed in this regard, yet, to be sufficient, it must contain enough to show that the acknowledgor was actually known to the officer.[39]

(b) Omission of Word "Personally." Where the officer recites that the acknowledgor was known to him, the omission of the word "personally" will not render the certificate defective, personal knowledge being necessarily implied in the absence of anything to show that such knowledge came from information.[40]

(c) Identification by Proof. It is usually provided by statute that where the officer is not personally acquainted with the acknowledgor he must state in the certificate the proof by which the identity of such person was made known to him.[41]

(c) *Informing Grantor of Contents.* Where the statute requires the certificate to recite that the grantor was informed of the contents of the conveyance, the omission of such recital renders the certificate fatally defective.[42] But the

v. Gentry, 63 Tex. 583; Watkins *v.* Hall, 57 Tex. 1.

Known as person who executed deed.— Where the certificate stated that the officer knew the person making the acknowledgment to be the person who executed the deed it was held to be a sufficient compliance with the requirements that he should certify that he knew the person to be the grantor described in the deed. Avervill *v.* Wilson, 4 Barb. (N. Y.) 180; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87.

Known as person described in deed.—A certificate of acknowledgment stating that the parties acknowledging were known to the officer as the persons described in the deed, but not stating that they were known to him as the persons who executed the deed, was held sufficient under 1 N. Y. Rev. Laws (1813), p. 369, § 1. Hunt *v.* Johnson, 19 N. Y. 279.

38. Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92; Culbertson *v.* H. Witbeck Co., 127 U. S. 326, 8 S. Ct. 1136, 32 L. ed. 134. *Contra*, Shephard *v.* Carriel, 19 Ill. 313.

39. **Omission of word "known."**— A certificate is fatally defective which omits the word "known," as, for instance, where it reads, "before me, etc., personally appeared A. B. C., to be the individual described in," etc. Wolf *v.* Fogarty, 6 Cal. 224, 65 Am. Dec. 509; Tully *v.* Davis, 30 Ill. 103, 83 Am. Dec. 179; Blain *v.* Rivard, 19 Ill. App. 477.

"Personally appeared."— It has been held that a recital that the person who executed the instrument "personally appeared" before the officer is not sufficient to show that he was known to the officer. Miller *v.* Link, 2 Thomps. & C. (N. Y.) 86; Smith *v.* Garden, 28 Wis. 685. But the contrary view was maintained in Munroe *v.* Eastman, 31 Mich. 283; Warder *v.* Henry, 117 Mo. 530, 23 S. W. 776; Hughes *v.* McDivitt, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756.

40. *California.*— Henderson *v.* Grewell, 8 Cal. 581; Welch *v.* Sullivan, 8 Cal. 511; Hopkins *v.* Delaney, 8 Cal. 85.

Iowa.— Rosenthal *v.* Griffin, 23 Iowa 263; Todd *v.* Jones, 22 Iowa 146. But see Gould *v.* Woodward, 4 Greene (Iowa) 82.

Michigan.— Brown *v.* McCormick, 28 Mich. 215.

Missouri.— Robson *v.* Thomas, 55 Mo. 581; Alexander *v.* Merry, 9 Mo. 514.

Tennessee.— Davis *v.* Bogle, 11 Heisk. (Tenn.) 315.

Sufficient showing of personal knowledge. — A recital in a certificate of acknowledgment of a deed that "personally came" the grantors, naming them, "known to me to be the persons who executed the foregoing instrument," satisfies the requirement of Ill. Rev. Stat. (1845), p. 107, § 20, that the certificate shall state that the person making the acknowledgment was personally known to the officer to be the real person executing the deed. Schley *v.* Pullman's Palace Car Co., 120 U. S. 575, 7 S. Ct. 730, 30 L. ed. 789.

41. See the statutes.

In California, where the certificate states that the acknowledging party was proven to the officer to be the person who executed the instrument, it must also state that such proof was by the sworn testimony of a credible witness, giving the name of the witness. Kimball *v.* Semple, 25 Cal. 440.

In New York, under 1 Rev. Stat., p. 758, § 9, it was held that a certificate stating that the identity of the acknowledgor was proved to the officer by a witness named, and that such witness, on being sworn, stated his place of residence and that he knew the acknowledgor to be the grantor described in the deed, was sufficient although it did not state specifically that the officer had satisfactory evidence of the acknowledgor's identity. Ritter *v.* Worth, 58 N. Y. 627 [*affirming* 1 Thomps. & C. (N. Y.) 406]. And in that state it has been held that the certificate need not state the name of the identifying witness (Jackson *v.* Phillips, 9 Cow. (N. Y.) 94) or his place of residence (Norman *v.* Wells, 17 Wend. (N. Y.) 136; Dibble *v.* Rogers, 13 Wend. (N. Y.) 536).

42. Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928; Roney *v.* Moss, 76 Ala. 491; Pinckney *v.* Burrage, 31 N. J. L. 21.

As to the necessity for an explanation of the instrument to the grantor see *supra*, X, A, 1, c.

certificate will be liberally construed in this regard and a substantial compliance with the language of the statute is sufficient.[43]

(D) *Execution of Instrument* — (1) In General. To be valid, the certificate must recite that the grantor acknowledged executing the instrument,[44] but the exact language of the statute need not be used, and any recital is sufficient which clearly shows an acknowledgment of execution.[45] The omission of the personal pronoun in reciting the fact of execution will not ordinarily vitiate the certificate if it appears from the context that it was the grantor who acknowledged such execution.[46]

(2) Delivery. It has been held that a certificate is defective which fails to show that the grantor "delivered" as well as "signed" the instrument,[47] but it

Acknowledgment proof of knowledge.— An acknowledgment according to the statute, before an officer designated by law, is equivalent to proof that the grantor had knowledge of the contents, if it contains the certificate that the officer made known the contents before the acknowledgment was taken. Hyer *v.* Little, 20 N. J. Eq. 443.

43. "Explained" equivalent to "fully explained."— A recital that the deed was "explained" is sufficient under a statute requiring it to be "fully explained." Johnson *v.* Thompson, (Tex. Civ. App. 1898) 50 S. W. 1055.

Sufficient compliance with statutory form. — A recital that the acknowledgor, "being informed of the contents," acknowledged that "he executed the same voluntarily on the day the same bears date," sufficiently conforms to a statutory form reading that the signer acknowledged that, being informed of the contents of the conveyance, he executed the same voluntarily. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

44. People *v.* Harrison, 8 Barb. (N. Y.) 560.

Kentucky — Subscription in presence of justices.— Under the Kentucky act of 1792 a certificate of acknowledgment was required to show that the instrument was subscribed as well as acknowledged before the justices who took the acknowledgment. Brown *v.* Swift, (Ky. 1886) 1 S. W. 474; Harris *v.* Price, 14 B. Mon. (Ky.) 414; Smith *v.* White, 1 B. Mon. (Ky.) 16; Kay *v.* Jones, 7 J. J. Marsh. (Ky.) 38; Hyne *v.* Campbell, 6 T. B. Mon. (Ky.) 286; Womack *v.* Hughes, Litt. Sel. Cas. (Ky.) 292; McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459.

Omission not cured.— That the concluding words of a certificate are "according to an act of assembly in such case made and provided" will not cure an omission to certify that the grantor acknowledged the instrument to be his deed. Lewis *v.* Waters, 3 Harr. & M. (Md.) 430, 431.

45. Davar *v.* Cardwell, 27 Ind. 478.

"Signed, sealed, and delivered."— Instead of certifying that the party had executed the deed, the words "signed, sealed, and delivered the same" may be used. Hobson *v.* Kissam, 8 Ala. 357; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

Acknowledgment as grantor's "act and deed."—A statute requiring a recital that the grantor "acknowledged that he signed, sealed, and delivered the foregoing deed" is satisfied by a recital that the maker "acknowledged the foregoing instrument to be his act and deed." Hall *v.* Thompson, 1 Sm. & M. (Miss.) 443, 444; Den *v.* Hamilton, 12 N. J. L. 126; Brown *v.* Farran, 3 Ohio 140.

46. Omission of personal pronoun.— A certificate by the officer that the grantors "acknowledged to me that —— signed and executed the within deed" was held not to be defective on that account, it being evident that the omission of the word "they" was a clerical mistake. Musgrove *v.* Bonser, 5 Oreg. 313, 315, 20 Am. Rep. 737; Tew *v.* Henderson, 116 Ala. 545, 23 So. 128. But see, *contra*, Buell *v.* Irwin, 24 Mich. 145; Huff *v.* Webb, 64 Tex. 284,— in which cases a recital that the grantor appeared and "acknowledged that —— executed the deed" was held to be insufficient.

Omission of word "their."— Where the acknowledgment to a mortgage was regular in all respects except that it provided as follows: "And each for themselves acknowledge the execution thereof to be —— free and voluntary act for the purposes named," it was held that the omission of the word "their" did not make the acknowledgment void. Garton *v.* Hudson-Kimberly Pub. Co., 8 Okla. 631, 58 Pac. 946.

"The" instead of "he."— Though in a certificate of acknowledgment by the grantor of land the word "the" was used where it should appear that "he" executed the same, yet where, from the certificate as a whole, it appeared that the officer intended to write "he" and that the omission was a clerical mistake, the certificate was held to be admissible in evidence. Durst *v.* Daugherty, 81 Tex. 650, 17 S. W. 388. To the same effect see Montgomery *v.* Hornberger, 16 Tex. Civ. App. 28, 40 S. W. 628, wherein "the" was written by mistake for "they."

47. Shelton *v.* Armor, 13 Ala. 647; Buntyn *v.* Shippers' Compress Co., 63 Miss. 94.

Recital of delivery to wrong person.— Where the acknowledgment of a trust deed for the benefit of creditors was of the delivery of the deed to the *cestui que trust*, and not to the trustee, who was the grantee named in the deed, it was a substantial compliance with the statute relating to acknowledgments of such instruments. Stewart *v.* Fowler, 3 Ala. 629.

Need not fix date of delivery.— As it is not necessary that the acknowledgment of a deed should fix the date of delivery, the failure to add in the acknowledgment of a deed, follow-

would seem that the acknowledgment of signing, taken in connection with other circumstances, might be sufficient to show delivery.[48]

(3) Designation of Instrument. Where it clearly appears to what instrument the certificate is intended to apply, it is sufficient, although there be no specific reference to such instrument,[49] and it has been held that a certificate reciting that the party acknowledged the execution of "the same," instead of "the within instrument" or other equivalent expression, was not invalid on that account, where the surrounding circumstances sufficiently showed what instrument was meant.[50]

(E) *Fact of Acknowledgment.* The certificate, to be valid, must recite the fact that the instrument was acknowledged by the grantor,[51] and the omission of such recital cannot be supplied by intendment,[52] nor will the lapse of time raise any presumption of acknowledgment so as to render the record of the deed legal.[53] But it is not essential that the word "acknowledged" be used, provided an equivalent expression be substituted therefor.[54]

(F) *Voluntary Nature of Act.* Where the statute requires a recital that the grantor voluntarily executed the instrument, a certificate which fails to state that

ing the statement of delivery, the words, "on the day and year therein mentioned," is not a material defect affecting the validity of the instrument. Caruthers *v.* McLaran, 56 Miss. 371; Garth *v.* Fort, 15 Lea (Tenn.) 683.

48. Johnson *v.* Thompson, (Tex. Civ. App. 1898) 50 S. W. 1055.

Registration includes delivery.— An omission to state, in the certificate of an acknowledgment, that the deed was delivered, is not essential, for the fact that it was registered on the acknowledgment of the grantor necessarily included delivery. Robinson *v.* Mauldin, 11 Ala. 977.

Delivery appearing from attestation.— An acknowledgment, made by the maker of a chattel mortgage, of "the foregoing instrument, by them signed, to be their free act," such instrument also appearing upon its face, by the attestation clause, to have been "delivered," is a sufficient acknowledgment of both the signing and delivering to entitle such instrument to be recorded. Einstein *v.* Shouse, 24 Fla. 490, 5 So. 380. See also L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213.

49. Samuels *v.* Shelton, 48 Mo. 444.

"The within indenture."— In a certificate of acknowledgment to a deed, a reference thereto as "the within indenture" is sufficient to identify it as the deed acknowledged, without giving its date and stating that the grantor signed it, when those facts are shown by the deed itself. Adams *v.* Medsker, 25 W. Va. 127.

50. Smith *v.* Boyd, 101 N. Y. 472, 5 N. E. 319 [*reversing* 67 How. Pr. (N. Y.) 351]; Claflin *v.* Smith, 35 Hun (N. Y.) 372, 15 Abb. N. Cas. (N. Y.) 241.

51. Bryan *v.* Ramirez, 8 Cal. 461, 68 Am. Dec. 340; Henderson *v.* Grewell, 8 Cal. 581; Short *v.* Conlee, 28 Ill. 219; Cabell *v.* Grubbs, 48 Mo. 353; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

Insufficient certificate.— A certificate of acknowledgment as follows: "Personally appeared A. B. signer of the above instrument —— to be his free act and deed, before me, C. D., Justice of Peace," was held to be fatally defective, as there was nothing to show that the grantor acknowledged the instrument. Stanton *v.* Button, 2 Conn. 527.

For a certificate sufficiently showing that the grantor acknowledged the instrument see Blair *v.* Valliant, 4 Harr. & M. (Md.) 62.

Acknowledgment by two.— A certificate that "personally appeared A. P. and N. P., acknowledged," etc., sufficiently shows that the acknowledgment was by both. Brown *v.* Corbin, 121 Ind. 455, 23 N. E. 276.

Personal appearance of grantor.— The certificate must show that the grantor personally appeared before the officer. East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349. But see Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70.

52. Stanton *v.* Button, 2 Conn. 527; Short *v.* Conlee, 28 Ill. 219. But see Basshor *v.* Stewart, 54 Md. 376, wherein the words "and acknowledged the said mortgage" were omitted. It was held that, the omitted words being supplied with positive certainty by the context, the certificate was not insufficient on that account.

53. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797. But see Jackson *v.* Gilchrist, 15 Johns. (N. Y.) 89.

54. Equivalent expression.— Under N. Y. Laws (1848), c. 40, relating to the increase of stock of manufacturing corporations, and providing for a certificate stating certain facts to be acknowledged by the chairman of the meeting, the acknowledgment in the words "subscribed and sworn to before me" is sufficient, though the word "acknowledged" does not appear therein. Cuykendall *v.* Douglas, 19 Hun (N. Y.) 577. In Chouteau *v.* Allen, 70 Mo. 290, a certificate of an acknowledgment by the president of a corporation, reciting that, being duly sworn, he "deposes and says" that he, by authority of the board, did subscribe, and that the seal was affixed by authority, was held sufficient although the word "acknowledge" was not used.

fact in some way is defective.[55] It is not necessary, however, to follow the exact words of the statute; a substantial compliance therewith is sufficient.[56]

(G) *Purpose or Consideration.* Sometimes, where the statute requires a recital that the grantor acknowledged the execution of the instrument "for the consideration and purposes therein set forth," such recital is regarded as essential to the validity of the certificate,[57] though the language of the statute need not be literally followed.[58] In Texas, however, it is held that the omission of such statement is not a fatal defect.[59]

b. Acknowledgments by Married Women — (I) *Substantial Compliance with Statute* — (A) *Necessity for* — (1) In General. As has been stated heretofore, where a statute allowing a married woman to alien or encumber her property prescribes that the instrument shall be acknowledged, an acknowledgment in the mode pointed out by the statute is absolutely essential to the validity of the instrument.[60] Under such statutes it has been very generally held that the officer's certificate must show affirmatively that all the statutory requirements have been substantially complied with, else the instrument will be invalid.[61] A certifi-

55. Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928; Newman *v.* Samuels, 17 Iowa 528; Dickerson *v.* Davis, 12 Iowa 353; Wickersham *v.* Reeves, 1 Iowa 413; Keeling *v.* Hoyt, 31 Nebr. 453, 48 N. W. 66; Spitznagle *v.* Vanhessch, 13 Nebr. 338, 14 N. W. 417; Becker *v.* Anderson, 11 Nebr. 493, 9 N. W. 640. But see Henderson *v.* Grewell, 8 Cal. 581, wherein it was held that the acknowledgment of the execution of the instrument implied that the act was free and voluntary; Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345; Kley *v.* Geiger, 4 Wash. 484, 30 Pac. 727.

Correction by recorder.— Where the certificate of acknowledgment is defective by reason of omitting the word "voluntary" or any equivalent, the fact that the recorder corrects such omission in the recorded copy will not cure the defect. Newman *v.* Samuels, 17 Iowa 528.

56. Dickerson *v.* Davis, 12 Iowa 353.

Need not use word "voluntarily."— A certificate of acknowledgment need not state that the grantors executed the deed "voluntarily," if it contains words giving an equivalent meaning. Den *v.* Geiger, 9 N. J. L. 281.

Omission of words "and deed."— A certificate of acknowledgment showing that the grantors appeared and acknowledged the instrument to be "their voluntary act," omitting the words "and deed," is a substantial compliance with the statute. Spitznagle *v.* Vanhessch, 13 Nebr. 338, 14 N. W. 417.

57. Wright *v.* Graham, 42 Ark. 140; Conner *v.* Abbott, 35 Ark. 365; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

Omission of word "purposes."— An acknowledgment which does not show that the mortgage was executed for the "purposes" expressed therein will not entitle it to be admitted to record. Ford *v.* Burks, 37 Ark. 91.

The omission of the word "consideration" renders the certificate fatally defective. Griesler *v.* McKennon, 44 Ark. 517; Johnson *v.* Godden, 33 Ark. 600.

"Uses" not equivalent to "consideration." — Under a statute requiring the certificate to state that the instrument was executed for the "consideration" and purposes therein specified, it was held that a recital that it was executed for the "uses" therein specified was not sufficient, the word "uses" not being the same or of similar import as the word "consideration." Martin *v.* O'Bannon, 35 Ark. 62.

58. Equivalent phrases.— Where a certificate of acknowledgment, pursued the statutory form except that, instead of the statutory words, "who acknowledged that he executed the within instrument for the purpose therein contained," the words "who acknowledged his signature to the annexed deed for all the purposes therein expressed" were substituted, the two phrases are equivalent in meaning. Hughes *v.* Powers, 99 Tenn. 480, 42 S. W. 1.

59. Stephens *v.* Motl, 81 Tex. 115, 16 S. W. 731; Butler *v.* Brown, 77 Tex. 342, 14 S. W. 136; Monroe *v.* Arledge, 23 Tex. 478.

60. *Supra*, II, B; III, B.

As to the manner of taking a married woman's acknowledgment see *supra*, X, B.

61. *Alabama.*— Boykin *v.* Smith, 65 Ala. 294.

Arkansas.— Little *v.* Dodge, 32 Ark. 453.

Idaho.— Co-operative Sav., etc., Assoc. *v.* Green, (Ida. 1897) 51 Pac. 770.

Illinois.— Merritt *v.* Yates, 71 Ill. 636, 22 Am. Rep. 128; Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490; Hughes *v.* Lane, 11 Ill. 123, 50 Am. Dec. 436.

Kentucky.— Sutton *v.* Pollard, (Ky. 1891) 16 S. W. 126; Jefferson County Bldg. Assoc. *v.* Heil, 81 Ky. 513; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Maryland.— Heath *v.* Eden, 1 Harr. & J. (Md.) 751; Roman Catholic Clergymen *v.* Hammond, 1 Harr. & J. (Md.) 580; Lewis *v.* Waters, 3 Harr. & M. (Md.) 430.

Michigan.— Dewey *v.* Campau, 4 Mich. 565.

Minnesota.— Baker *v.* St. Paul, 8 Minn. 491.

Missouri.— Wannell *v.* Kem, 57 Mo. 478; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

Ohio.— Dengenhart *v.* Cracraft, 36 Ohio St. 549; Ludlow *v.* O'Neil, 29 Ohio St. 181; Ward *v.* McIntosh, 12 Ohio St. 231 [*overruling* Card *v.* Patterson, 5 Ohio St. 319].

Pennsylvania.— Myers *v.* Boyd, 96 Pa. St. 427; Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.)

cate which merely leads to the inference that the acknowledgment was made in accordance with the statute is insufficient.[62] If it fail to show affirmatively that essential acts were done the presumption arises that such acts were omitted,[63] and usually parol evidence will not be admitted to supply the omission.[64]

(2) Presumption that Officer Did His Duty. Sometimes, where the statute prescribing the mode in which a married woman's acknowledgment shall be

268, 11 Am. Dec. 724; Fowler *v.* McClurg, 6 Serg. & R. (Pa.) 143; Watson *v.* Mercer, 6 Serg. & R. (Pa.) 49, 9 Am. Dec. 411; Evans *v.* Com., 4 Serg. & R. (Pa.) 272, 8 Am. Dec. 711; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

Rhode Island.—Bateman's Petition, 11 R. I. 585.

South Carolina.— Williams *v.* Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714; Wingo *v.* Parker, 19 S. C. 9.

Tennessee.— Anderson *v.* Bewley, 11 Heisk. (Tenn.) 29; Perry *v.* Calhoun, 8 Humphr. (Tenn.) 551.

Texas.— Jones *v.* Robbins, 74 Tex. 615, 12 S. W. 824; Davis *v.* McCartney, 64 Tex. 584; Belcher *v.* Weaver, 46 Tex. 293, 26 Am. Rep. 267; Rork *v.* Shields, 16 Tex. Civ. App. 640, 42 S. W. 1032.

Virginia.—Virginia Coal, etc., Co. *v.* Roberson, 88 Va. 116, 13 S. E. 350; Grove *v.* Zumbro, 14 Gratt. (Va.) 501.

West Virginia.— Watson *v.* Michael, 21 W. Va. 568.

United States.— Raverty *v.* Fridge, 3 McLean (U. S.) 230, 20 Fed. Cas. No. 11,586.

As to a substantial compliance with the statute in the case of particular recitals see *infra*, XII, G, 1, b, (II).

Where wife living apart from husband.—A certificate of acknowledgment of a deed for real estate, made by a married woman alone as one living separate and apart from her husband, must state that it has been proven to the satisfaction of the officer that the real estate is the sole and separate property of the woman, and that she was at the date of the deed, and still is at the date of the certificate, living separate and apart from her husband, otherwise the deed is void. Bennett *v.* Pierce, 45 W. Va. 654, 31 S. E. 972.

Relinquishment of dower.— A certificate of acknowledgment of a wife to a deed is fatally defective as to her right of dower where it does not state that she relinquished her dower, such recital being matter of substance. Russell *v.* Rumsey, 35 Ill. 362; Owen *v.* Robbins, 19 Ill. 545; Thomas *v.* Meier, 18 Mo. 573. But see Byrne *v.* Taylor, 46 Miss. 95, wherein it was held unnecessary to incorporate in the body of the deed or acknowledgment a recital that the wife united in the conveyance for the purpose of alienating her right of dower; that being presumed.

Conveyance of wife's land.— Where different forms of acknowledgment were provided for a release of dower by a married woman, and for a transfer by her of her estates of inheritance, it was held that where a married woman was the owner of real estate in fee, and executed a deed with her husband purporting to convey the estate, and the acknowledgment to the deed was in substance a mere relinquishment of the dower, the deed did not convey the estate of the wife. Lane *v.* Dolick, 6 McLean (U. S.) 200, 14 Fed. Cas. No. 8,049.

Mortgage of both real and personal property.— Where the certificate of the wife's acknowledgment to a mortgage by a husband and wife, conveying both real and personal property, recited merely that she relinquished her dower in the land, it was held not to be sufficient to make the mortgage a valid encumbrance on her interest in the personalty as to third persons. Carle *v.* Wall, (Ark. 1891) 16 S. W. 293.

Failure to show acknowledgment with husband.— A certificate of acknowledgment by husband and wife recited that the husband "acknowledged the signing and sealing," and that the wife, being examined apart from her husband, declared "that she did voluntarily sign, seal, and acknowledge the same," is insufficient in that it does not show that she acknowledged it separately or jointly with her husband. Moorman *v.* Schwein, 5 Cinc. L. Bul. 353, 8 Ohio Dec. (Reprint) 55, 56.

South Carolina — Relinquishment of inheritance.— In South Carolina a certificate of a married woman's release of her inheritance stating that she relinquished "all her interest and estate," omitting to use the word "inheritance," was held insufficient. Williams *v.* Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714; Wingo *v.* Parker, 19 S. C. 9.

North Carolina — Transfer of wife's land to husband.—Where, under N. C. Code, § 1835, a married woman conveys her land to her husband, the officer's certificate of acknowledgment must state that he considered the conveyance to be not unreasonable or injurious to her; and the omission of such recital renders the deed void. Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443.

62. Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Hanley *v.* National Loan, etc., Co., 44 W. Va. 450, 29 S. E. 1002.

63. Danglarde *v.* Elias, 80 Cal. 65, 22 Pac. 69; Co-operative Sav., etc., Assoc. *v.* Green, (Ida. 1897) 51 Pac. 770.

Where a set form is prescribed for the certificate of a married woman's acknowledgment, no implication will be indulged as to any material fact made necessary by the law. Henderson *v.* Rice, 1 Coldw. (Tenn.) 223.

64. Elwood *v.* Klock, 13 Barb. (N. Y.) 50; Harrisonburg First Nat. Bank *v.* Paul, 75 Va. 594. As to the admissibility of parol evidence in aid of the certificate see *infra*, XIV.

taken did not expressly require the certificate to show affirmatively the particular facts, it has been held that the simple recital that she acknowledged having voluntarily executed the deed was sufficient; it being presumed that the officer properly performed his duty in taking the acknowledgment.[65]

(B) *Sufficiency of* — (1) In General. A literal adherence to the language of the statute is not exacted of such certificates. It is the policy of the law to construe them liberally, and where a substantial compliance appears clearly and affirmatively the certificate will be held sufficient, no matter what the language employed.[66] It will not be vitiated by a slight informality incapable of misleading,[67] such as a grammatical inaccuracy,[68] or the obviously mistaken use of one word for another,[69] or the omission of a word not affecting the meaning.[70] Where

65. Fleming *v.* Potter, 14 Ind. 486; Stevens *v.* Doe, 6 Blackf. (Ind.) 475; Locke *v.* Lafitte, 28 La. Ann. 232.

Under the Illinois statute of 1819 the officer was required only to certify that the wife acknowledged that she voluntarily executed the instrument. Coleman *v.* Billings, 89 Ill. 183. But under subsequent statutes a recital of the facts was necessary. See cases cited in preceding section.

Under the Ohio acts of 1805 and 1818 it was held that the certificate need not recite the particulars of the acknowledgment. Ruffner *v.* McLenan, 16 Ohio 639; Chesnut *v.* Shane, 16 Ohio 599 [*overruling* Connell *v.* Connell, 6 Ohio 353; Good *v.* Zercher, 12 Ohio 364; Meddock *v.* Williams, 12 Ohio 377; Silliman *v.* Cummins, 13 Ohio 116]. But under subsequent statutes such recitals were expressly required. See cases cited in preceding section.

66. *Alabama.*— Frederick *v.* Wilcox, 119 Ala. 355, 24 So. 582, 72 Am. St. Rep. 925; Gates *v.* Hester, 81 Ala. 357, 1 So. 848.

Arkansas.— Tubbs *v.* Gatewood, 26 Ark. 128.

California.—Muir *v.* Galloway, 61 Cal. 498.

Idaho.— Curtis *v.* Bunnell, etc., Invest. Co., (Ida. 1898) 55 Pac. 659; Christensen *v.* Hollingsworth, (Ida. 1898) 53 Pac. 211; Northwestern, etc., Hypotheek Bank *v.* Rauch, (Ida. 1898) 51 Pac. 764.

Illinois.— Edwards *v.* Schoeneman, 104 Ill. 278; Calumet, etc., Canal, etc., Co. *v.* Russell, 68 Ill. 426; Tourville *v.* Pierson, 39 Ill. 446; Stuart *v.* Dutton, 39 Ill. 91; Moore *v.* Titman, 33 Ill. 358; Hughes *v.* Lane, 11 Ill. 123, 50 Am. Dec. 436.

Indiana.— Pardun *v.* Dobesberger, 3 Ind. 389; Davis *v.* Bartholomew, 3 Ind. 485; Owen *v.* Norris, 5 Blackf. (Ind.) 479.

Kentucky.— Shaw *v.* Shaw, (Ky. 1894) 24 S. W. 630; Martin *v.* Davidson, 3 Bush (Ky.) 572; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Nantz *v.* Bailey, 3 Dana (Ky.) 111.

Maryland.— Young *v.* State, 7 Gill & J. (Md.) 253; Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545; Pattison *v.* Chew, 1 Harr. & J. (Md.) 586, note *a*.

Mississippi.— Bernard *v.* Elder, 50 Miss. 336; Russ *v.* Wingate, 30 Miss. 440; Love *v.* Taylor, 26 Miss. 567.

Missouri.— Wannell *v.* Kem, 57 Mo. 478; Bohan *v.* Casey, 5 Mo. App. 101.

New Jersey.— Thayer *v.* Torrey, 37 N. J. L. 339.

New York.— Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232.

North Carolina.— Robbins *v.* Harris, 96 N. C. 557, 2 S. E. 70.

Ohio.— Browder *v.* Browder, 14 Ohio St. 589; Ward *v.* McIntosh, 12 Ohio St. 231; Card *v.* Patterson, 5 Ohio St. 319; Barton *v.* Morris, 15 Ohio 408; Brown *v.* Farran, 3 Ohio 140.

Pennsylvania.— Gable's Appeal, (Pa. 1886) 7 Atl. 52; Miller *v.* Wentworth, 82 Pa. St. 280; Jamison *v.* Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; Shaller *v.* Brand, 6 Binn. (Pa.) 435, 6 Am. Dec. 482; McIntire *v.* Ward, 5 Binn. (Pa.) 296, 6 Am. Dec. 417.

South Carolina.— Campbell *v.* Moon, 16 S. C. 107.

Texas.— Mullins *v.* Weaver, 57 Tex. 5; Solyer *v.* Romanet, 52 Tex. 562; Belcher *v.* Weaver, 46 Tex. 293, 26 Am. Rep. 267; Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668.

Virginia.—Virginia Coal, etc., Co. *v.* Roberson, 88 Va. 116, 13 S. E. 350; Hairston *v.* Doe, 12 Leigh (Va.) 445.

West Virginia.— Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622.

United States.— Dundas *v.* Hitchcock, 12 How. (U. S.) 256, 13 L. ed. 978; Northwestern, etc., Hypotheek Bank *v.* Berry, 89 Fed. 408; Raverty *v.* Fridge, 3 McLean (U. S.) 245, 20 Fed. Cas. No. 11,587; Talbot *v.* Simpson, Pet. C. C. (U. S.) 188, 23 Fed. Cas. No. 13,730; Battin *v.* Bigelow, Pet. C. C. (U. S.) 452, 2 Fed. Cas. No. 1,108.

Canada.— Simpson *v.* Hartman, 27 U. C. Q. B. 460; Monk *v.* Farlinger, 17 U. C. C. P. 41; Jackson *v.* Robertson, 4 U. C. C. P. 272.

Need not state that wife of age.— The certificate of a married woman's acknowledgment need not state that she was of age when she executed the deed. The presumption is that parties who convey or contract are under no legal disability until the contrary appears. Morgan *v.* Sabourin, 27 U. C. Q. B. 230.

67. Gordon *v.* Leech, 81 Ky. 229.

68. Merritt *v.* Yates, 71 Ill. 636, 22 Am. Rep. 128.

69. Belcher *v.* Weaver, 46 Tex. 293, 26 Am. Rep. 267; Broussard *v.* Dull, 3 Tex. Civ. App. 59, 21 S. W. 937 ("assigned" used instead of "signed").

70. Gorman *v.* Stanton, 5 Mo. App. 585 (word "husband" omitted); Campbell *v.* Moon, 16 S. C. 107 (word "actually" omitted).

the statute requires an acknowledgment, by the wife, of a particular instrument, but prescribes no form, a certificate in the form provided for ordinary conveyances is sufficient.[71]

(2) SURPLUSAGE. Where a certificate of a married woman's acknowledgment contains everything essential to its validity, the insertion of unnecessary words will not vitiate it, but such words will be rejected as surplusage.[72] Thus a certificate of an acknowledgment, by the wife, of a conveyance of land owned by her in fee, if sufficient in other respects, will not be vitiated by a recital that she relinquished her dower in the premises, the recital being regarded as surplusage.[73]

(II) *PARTICULAR RECITALS*— (A) *Naming or Describing Acknowledgor.* The certificate of a married woman's acknowledgment must contain enough to show that it was the wife who made the acknowledgment.[74] But where it is perfectly clear who acknowledged, the certificate will not be vitiated by mistakes as to the wife's name,[75] nor by the fact that a space for the insertion of such name is left blank.[76]

71. Miller *v.* Marx, 55 Ala. 322 (mortgage of the homestead).

72. La Société Française, etc. *v.* Beard, 54 Cal. 480.

Defective recital of unnecessary matter.— As a wife who joins in a mortgage of her husband's land, not a part of the homestead, need not be examined separate and apart from him, as required by Ala. Code, § 2508, in case of homesteads, a defective recital of a separate examination in the acknowledgment may be rejected as surplusage, without affecting the sufficiency of the remainder, where that complies with the form prescribed by § 1802. Orr *v.* Blackwell, 93 Ala. 212, 8 So. 413.

73. *Florida.*— Evans *v.* Summerlin, 19 Fla. 858; Hartley *v.* Ferrell, 9 Fla. 374.

Illinois.— Stuart *v.* Dutton, 39 Ill. 91; Tourville *v.* Pierson, 39 Ill. 446; Chester *v.* Rumsey, 26 Ill. 97.

Iowa.— Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 236.

Mississippi.— Stone *v.* Montgomery, 35 Miss. 83.

Missouri.— Siemers *v.* Kleeburg, 56 Mo. 196; Miller *v.* Powell, 53 Mo. 252; Chauvin *v.* Lownes, 23 Mo. 223; Perkins *v.* Carter, 20 Mo. 465; Delassus *v.* Poston, 19 Mo. 425; Chauvin *v.* Wagner, 18 Mo. 531 [*overruling* McDaniel *v.* Priest, 12 Mo. 544].

Recital applicable to part of lands conveyed.— A certificate of a married woman's acknowledgment reciting that she relinquished "her dower in the lands and tenements" conveyed is not invalid because of the fact that she is owner in fee of one of the parcels conveyed, if she has only a dower right in another of the parcels, the release of dower being applied to the latter parcel only. Hughes *v.* Lane, 11 Ill. 123, 133, 50 Am. Dec. 436; Barker *v.* Circle, 60 Mo. 258.

74. **Failure to show who acknowledged.**— A certificate of acknowledgment which described plaintiff's husband and plaintiff, "his wife," as having personally appeared before the notary and being to him known to be "the person described in and who executed the same as his free act and deed" was held to be insufficient as not showing that the wife acknowledged the instrument. Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92.

Name left blank.—A certificate of acknowledgment stated that the grantors, naming them, personally appeared and acknowledged the deed, and then proceeded: "And the said ——, wife of the said ——, having been by me examined," "acknowledged that she freely executed the deed and relinquished her dower, etc., without the compulsion of her said husband." It was held that the deed could not be read in evidence, because the certificate did not show who, as wife, acknowledged. Merritt *v.* Yates, 71 Ill. 636, 22 Am. Rep. 128.

75. **Mistake as to wife's name.**— A wife having signed a mortgage of a homestead as S. E. S., and the officer's certificate of acknowledgment in due form stating that S. E. S., whose name was signed to the mortgage, and who acknowledged its execution, was "known to me to be the wife of" the mortgagor, the mortgage is valid though the true name of the wife is L. E. S. Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 318, 8 So. 232.

Wrong name rejected as surplusage.— A and wife made a deed and duly acknowledged the same. The deed was recorded, but the certificate was not, and a blank was left in the record immediately after the record of the deed. The certificate of privy examination had inserted in it the name of Sarah Going instead of Sarah Rich, the wife of the grantor. It was held that as the certificate was sufficient without the word "Going," and as it was evidently a mistake, this word should be rejected and the certificate might still be recorded in the blank space left in record. Gedges *v.* Western Baptist Theological Institute, 13 B. Mon. (Ky.) 530.

76. **Sufficient description of acknowledgor.** — A certificate of acknowledgment by husband and wife recited that before the officer "personally appeared T. B. M. and H. A. M., his wife, grantors in the foregoing deed of conveyance, to me well known, who acknowledge that he had executed the same for the consideration and purposes mentioned. And on this day voluntarily appeared before me ——, to me well known as the person whose name appears upon the within and foregoing deed, and in the absence —— said husband declared that —— had of her own free will executed," etc. It was held that the blanks

(B) *Knowledge of Acknowledgor's Identity.* Where the statute provides that the certificate of a married woman's acknowledgment shall recite that she was personally known to the officer, or that her identity was proved to him by satisfactory evidence, the omission of such recital will render the instrument fatally defective.[77] But under the Tennessee statute it has been held that the certificate need not contain such recital.[78]

(C) *Privy Examination* — (1) NECESSITY FOR. Where the statute provides that the wife's acknowledgment shall be taken on privy examination separate and apart from the husband,[79] a recital showing that such provision has been complied with is usually held to be absolutely essential.[80] In the absence of such a

could not vitiate the certificate, as it was perfectly clear who made the acknowledgment. Donahue *v.* Mills, 41 Ark. 421.

Husband's name left blank.— A justice's certificate of acknowledgment of husband and wife to a mortgage, reciting: "Came before me the within named A. E. F., known to me to be the wife of the within named ——," was followed by an acknowledgment of husband and wife, regular in all respects except the words "and his wife" were employed instead of the name of the wife. This was held to be a substantial compliance with the statute. Frederick *v.* Wilcox, 119 Ala. 355, 357, 24 So. 582, 72 Am. St. Rep. 925.

77. Illinois.— Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517; Coburn *v.* Herrington, 114 Ill. 104, 29 N. E. 478; Murphy *v.* Williamson, 85 Ill. 149; Ridgeway *v.* Underwood, 67 Ill. 419; Heinrich *v.* Simpson, 66 Ill. 57; Lindley *v.* Smith, 58 Ill. 250; Becker *v.* Quigg, 54 Ill. 390; Lindley *v.* Smith, 46 Ill. 523; Lyon *v.* Kain, 36 Ill. 362; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711.

Iowa.— Reynolds *v.* Kingsbury, 15 Iowa 238.

Missouri.— Garnier *v.* Barry, 28 Mo. 438.

Texas.— Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866.

As to the necessity for such recital generally, see *supra*, XII, G, 1, a, (II), (B).

As to the necessity for the officer to ascertain the grantor's identity see *supra*, X, B, 1, c.

Insufficient certificate.— The requirement that a certificate of acknowledgment should state that the person making it was known to the notary is not satisfied in a certificate of acknowledgment by a married woman stating that she appeared in person, that she was the same party who signed the instrument, and that she was the wife of the one who signed with her. Beitel *v.* Wagner, 11 Tex. Civ. App. 365, 32 S. W. 366.

Sufficient certificate.— A certificate of acknowledgment, "On this day personally appeared Mrs. S. F., wife of E. F., known to me [proved to me on the oath of ——] to be the person," was held sufficient, a pen-stroke through the blank showing that the words within brackets, all of which were printed, were not intended to be part of the certificate. Farrell *v.* Palestine Loan Assoc., (Tex. Civ. App. 1895) 30 S. W. 814.

Immaterial omission.— In a certificate stating that the grantor and his wife personally appeared before the officer, and that such persons "who —— personally known to me to be," etc., acknowledged the instrument, it was held that the omission of "are" after "who" would not impair the deed, as "who" might be disregarded as surplusage, and the certificate would then be correct. Hartshorn *v.* Dawson, 79 Ill. 108, 109.

78. Tenn. Code, § 2076; Bell *v.* Lyle, 10 Lea (Tenn.) 44; Mount *v.* Kesterson, 6 Coldw. (Tenn.) 452.

79. As to necessity for a privy examination see *supra*, X, B, 1, e.

80. *Alabama.*— Cox *v.* Holcomb, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79.

Arkansas.— Stillwell *v.* Adams, 29 Ark. 346; Russell *v.* Umphlet, 27 Ark. 339.

California.— Kennedy *v.* Gloster, 98 Cal. 143, 32 Pac. 941; McLeran *v.* Benton, 43 Cal. 467.

Illinois.— Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529; Lyon *v.* Kain, 36 Ill. 362; Garrett *v.* Moss, 22 Ill. 363; Mason *v.* Brock, 12 Ill. 273, 52 Am. Dec. 490.

Kentucky.— Blackburn *v.* Pennington, 8 B. Mon. (Ky.) 217; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721; Garrison *v.* Fisher, 26 Miss. 352; Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191.

Missouri.— Krieger *v.* Crocker, 118 Mo. 531, 24 S. W. 170; Rogers *v.* Woody, 23 Mo. 548.

New York.— Elwood *v.* Klock, 13 Barb. (N. Y.) 50.

North Carolina.— Etheridge *v.* Ashbee, 31 N. C. 353; Ives *v.* Sawyer, 20 N. C. 51; Den *v.* Barfield, 6 N. C. 391.

Ohio.— Ludlow *v.* O'Neil, 29 Ohio St. 181; Carney *v.* Hopple, 17 Ohio St. 39. But see Ruffner *v.* McLenan, 16 Ohio 639.

Oregon.— Harty *v.* Ladd, 3 Oreg. 353.

Pennsylvania.— Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722; Dampf's Appeal, 97 Pa. St. 371; Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724; Tarr *v.* Glading, 1 Phila. (Pa.) 370, 9 Leg. Int. (Pa.) 110.

Tennessee.— Ellett *v.* Richardson, 9 Baxt. (Tenn.) 293.

Texas.— Breitling *v.* Chester, 88 Tex. 586, 32 S. W. 527; Williams *v.* Ellingsworth, 75 Tex. 480, 12 S. W. 746; Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503; Davis *v.* McCartney, 64 Tex. 584; Cole *v.* Bammel, 62 Tex. 108; Looney *v.* Adamson, 48 Tex. 619; Reagam *v.* Holliman, 34 Tex. 403.

recital the defect will not be cured by a statement that she voluntarily consented to the conveyance,[81] and usually parol evidence will not be admitted to supply such omission.[82] But under some statutes it has been held unnecessary for the certificate to recite the fact of a private examination.[83] And where the wife is allowed to convey as a *feme sole* this is, of course, true.[84]

(2) SUFFICIENCY OF. No more is required than a substantial compliance with the language of the statute,[85] and where the certificate shows that a wife was examined separate and apart from her husband it will not be rendered fatally defective by the omission of such statutory words as "private,"[86] "out of the

Vermont.— Pratt *v.* Battels, 28 Vt. 685.

Virginia.— Healy *v.* Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94.

West Virginia.— Laidley *v.* Knight, 23 W. Va. 735; Laughlin *v.* Fream, 14 W. Va. 322.

United States.— Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164.

Canada.— Stayner *v.* Applegate, 8 U. C. C. P. 133, 451.

A certificate which is indefinite and uncertain as to whether the wife was examined separate and apart from her husband is insufficient. Minor *v.* Powers, (Tex. Civ. App. 1896) 38 S. W. 400.

Presumption from long lapse of time.— Where the certificate of an acknowledgment by husband and wife taken in 1711 was silent as to the private examination of the wife, it was held that after the lapse of more than one hundred years such private examination would be presumed. Jackson *v.* Gilchrist, 15 Johns. (N. Y.) 89.

Necessity to show separate acknowledgment.— A certificate of acknowledgment of a deed by a married woman, which shows a separate examination, is not insufficient because it fails to show a separate acknowledgment. Kenneday *v.* Price, 57 Miss. 771. But see Robinson *v.* Noel, 49 Miss. 253.

81. Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724.

82. *Alabama.*— Cox *v.* Holcomb, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721.

New York.— Elwood *v.* Klock, 13 Barb. (N. Y.) 50.

Oregon.— Harty *v.* Ladd, 3 Oreg. 353.

Pennsylvania.— Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724.

Texas.— Looney *v.* Adamson, 48 Tex. 619.

Canada.— Stayner *v.* Applegate, 8 U. C. C. P. 133, 451.

As to the admissibility of evidence in aid of the certificate see *infra*, XIV.

83. Kentucky.— Under Ky. Gen. Stat. c. 24, § 2, providing that the certificate of an officer to the acknowledgment of a deed by a married woman "shall be evidence that she had been examined separate and apart from her husband," it has been held that the provisions of the statute must be considered as a part of the officer's certificate, and that he need not certify that the wife was actually examined separate and apart from her husband. Dowell *v.* Mitchell, 82 Ky. 47; Ford *v.* Teal, 7 Bush (Ky.) 156.

Presumption that officer did his duty.— In Indiana it has been held that a failure to recite that the wife was examined separate and apart from her husband would not invalidate the certificate, it being presumed, in the absence of any showing to the contrary, that the officer did his duty. Fleming *v.* Potter, 14 Ind. 486; Stevens *v.* Doe, 6 Blackf. (Ind.) 475. But see Butterfield *v.* Beall, 3 Ind. 203 (an acknowledgment taken in another state).

The same doctrine seems to obtain in Louisiana. Locke *v.* Lafitte, 28 La. Ann. 232.

Divorce from bed and board.— When a decree of divorce from bed and board divests the husband of any interest or control over the person or estate of the wife, a deed of her property, executed by the wife during the husband's life, is not invalid by its failure to state in the acknowledgment that the grantor was examined apart from her husband and executed the deed without compulsion. Delafield *v.* Brady, 108 N. Y. 524, 15 N. E. 428.

84. Platt *v.* Brown, 30 Conn. 336.

85. *New York.*— Dennis *v.* Tarpenny, 20 Barb. (N. Y.) 371.

North Carolina.— Beckwith *v.* Lamb, 35 N. C. 400; Skinner *v.* Fletcher, 23 N. C. 313.

Tennessee.— Rainey *v.* Gordon, 6 Humphr. (Tenn.) 345.

Texas.— Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668.

Canada.— Monk *v.* Farlinger, 17 U. C. C. P. 41.

Equivalent phrases.— In the North Carolina statutes, the phrases "privy examination," "private examination," and "examination separate and apart from her husband" are indifferently used, and the use of any one of them in the certificate is sufficient. Skinner *v.* Fletcher, 23 N. C. 313.

86. *Mississippi.*— Bernard *v.* Elder, 50 Miss. 336; Love *v.* Taylor, 26 Miss. 567 [*overruling* Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191].

New Jersey.— Thayer *v.* Torrey, 37 N. J. L. 339.

New York.— Dennis *v.* Tarpenny, 20 Barb. (N. Y.) 371.

Texas.— Combes *v.* Thomas, 57 Tex. 321.

Canada.— Buck *v.* McCallum, 13 U. C. C. P. 163. But see Stayner *v.* Applegate, 8 U. C. C. P. 133, 451.

But see Sibley *v.* Johnson, 1 Mich. 380, wherein a certificate stating that "separate and apart from her husband she acknowledged," etc., without stating that it was on private examination, was held to be void.

presence,"[87] or "out of the hearing of her husband."[88] And so it has been held that a certificate is sufficient though not reciting that the examination was "separate" as well as "apart" from her husband.[89] But enough must be stated to show that the wife's examination was in fact conducted as directed by the statute,[90] and where the private examination is required to precede the acknowledgment a certificate is defective which does not show that the examination came first in point of time.[91]

(D) *Voluntary Nature of Act* — (1) NECESSITY FOR. As has been stated hitherto, for a married woman's acknowledgment to be binding on her it must be made on her declaration that she executed the instrument voluntarily, without coercion or compulsion.[92] Therefore it is essential to the validity of the certificate that it shall show on its face the voluntary nature of the act.[93]

(2) SUFFICIENCY OF. It is not essential that the exact language of the statute be followed, and if the words employed convey the same meaning it is sufficient.[94]

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

Sufficient certificate.— Where a statute requires that the examination of a wife in the acknowledgment of a deed should be "out of the presence of her husband," a certificate signed by the proper officers that the examination was "private and out of the hearing of her husband" is sufficient. Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653.

88. Muir *v.* Galloway, 61 Cal. 498; Pardun *v.* Dobesberger, 3 Ind. 389; Webster *v.* Hall, 2 Harr. & M. (Md.) 19, 1 Am. Dec. 370.

89. Belo *v.* Mayes, 79 Mo. 67. But see Dewey *v.* Campau, 4 Mich. 565, wherein the omission of the word "separately" was held to be a fatal defect.

90. Shryock *v.* Cannon, 39 Ark. 434; Hutchinson *v.* Ainsworth, 63 Cal. 286; Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442.

Insufficient certificate.— A certificate that a wife "acknowledged herself party to the annexed deed of trust, and, being examined separate and apart from her husband, acknowledged that she signed, sealed, and delivered the same, for the purpose and consideration therein expressed," is void in that it does not necessarily import that the wife was examined separate and apart from the husband, or by whom she was examined. Rice *v.* Peacock, 37 Tex. 392.

Reciting examination of husband.— A deed by a husband and wife, whereof the acknowledgment certified that the husband was examined separate and apart from his wife, and relinquished dower, was void as to the wife. Board of Trustees *v.* Davison, 65 Ill. 124.

91. Virginia Coal, etc., Co. *v.* Roberson, 88 Va. 116, 13 S. E. 350; Hockman *v.* McClanahan, 87 Va. 33, 12 S. E. 230; Laidley *v.* Knight, 23 W. Va. 735; McMullen *v.* Eagan, 21 W. Va. 233.

92. See *supra*, X, B, 1, c.

93. *Arkansas.*— Chaffe *v.* Oliver, 39 Ark. 531; Stillwell *v.* Adams, 29 Ark. 346; Russell *v.* Umphlet, 27 Ark. 339.

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

District of Columbia.— Black *v.* Aman, 6 Mackey (D. C.) 131.

Illinois.— Lyon *v.* Kain, 36 Ill. 362; Vanzant *v.* Vanzant, 23 Ill. 536; Garrett *v.* Moss, 22 Ill. 363.

Iowa.— O'Ferrall *v.* Simplot, 4 Iowa 381.

Kentucky.— Blackburn *v.* Pennington, 8 B. Mon. (Ky.) 217; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Ohio.— Ludlow *v.* O'Neil, 29 Ohio St. 181. But see Ruffner *v.* McLenan, 16 Ohio 639, holding that such recital was unnecessary under the Ohio act of 1818.

Pennsylvania.— Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Fowler *v.* McClurg, 6 Serg. & R. (Pa.) 143; Watson *v.* Mercer, 6 Serg. & R. (Pa.) 49, 9 Am. Dec. 411; Evans *v.* Com., 4 Serg. & R. (Pa.) 272, 8 Am. Dec. 711.

Rhode Island.—Bateman's Petition, 11 R. I. 585; Churchill *v.* Monroe, 1 R. I. 209.

Tennessee.— Wright *v.* Dufield, 2 Baxt. (Tenn.) 218; Laird *v.* Scott, 5 Heisk. (Tenn.) 314.

Texas.— Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866; Davis *v.* McCartney, 64 Tex. 584; Cole *v.* Bammel, 62 Tex. 108; Rice *v.* Peacock, 37 Tex. 392.

Virginia.— Clinch River Veneer Co. *v.* Kurth, 90 Va. 737, 19 S. E. 878.

West Virginia.— Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139; Laughlin *v.* Fream, 14 W. Va. 322; Leftwich *v.* Neal, 7 W. Va. 569; Bartlett *v.* Fleming, 3 W. Va. 163.

Acknowledged in "due form."— A certificate, by commissioners in another state, that a *feme covert* acknowledged a deed in "due form," is not a compliance with a statute requiring a certificate that she executed the instrument freely and voluntarily assented thereto. Lucas *v.* Cobbs, 18 N. C. 228.

Appearance before officer.— In Arkansas the certificate of a married woman's acknowledgment is not required to state that she came before the officer voluntarily. Mickel *v.* Gardner, 41 Ark. 491.

94. *California.*— Goode *v.* Smith, 13 Cal. 81 (omitting words "undue influence").

Kentucky.— Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

New Jersey.— Den *v.* Geiger, 9 N. J. L. 281 (omitting word "fear").

North Carolina.— Robbins *v.* Harris, 96 N. C. 557, 2 S. E. 70 (omitting words "and doth voluntarily assent thereto"); Etheridge *v.* Ferebee, 31 N. C. 312.

Pennsylvania.— Jamison *v.* Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536 (omitting

Thus, where the language used in the certificate expresses an equivalent import, it will not be vitiated by the omission of such statutory words as "voluntarily," [95] "freely," [96] or "willingly," [97] and clerical errors will not invalidate where the meaning is clear.[98] But it is essential that there shall be at least a substantial compliance with the statute,[99] and the omission from the certificate of material statutory words or expressions, without substituting therefor others of the same signification, will render it fatally defective.[1]

word "compulsion"); Shaller *v.* Brand, 6 Binn. (Pa.) 435, 6 Am. Dec. 482.

Canada.— Monk *v.* Farlinger, 17 U. C. C. P. 41.

Equivalent expressions.— The word "voluntary" is equivalent to the statutory expression "of her own will and accord." Gates *v.* Hester, 81 Ala. 357, 1 So. 848. A recital that the wife acknowledged having "signed said deed freely, and of her own consent, but not by the persuasion or compulsion of her husband," is equivalent to a recital that she had "of her own free will executed the deed without compulsion or undue influence of her husband." Little *v.* Dodge, 32 Ark. 453. "Without undue influence or compulsion of her husband" is equivalent to "of her own free will without undue influence or compulsion of her husband." Tubbs *v.* Gatewood, 26 Ark. 128. "Freely and of her own accord" is equivalent to "as her voluntary act and deed, freely." Dundas *v.* Hitchcock, 12 How. (U. S.) 256, 13 L. ed. 978. "Knowing the contents and freely consenting thereto" is equivalent to "voluntarily and of her own free will and accord — without any coercion." Talbot *v.* Simpson, Pet. C. C. (U. S.) 188, 23 Fed. Cas. No. 13,730.

"Compulsion" equivalent to "constraint." —Gates *v.* Hester, 81 Ala. 357, 1 So. 848.

Voluntary act and deed.— A recital that the wife acknowledged the instrument to be her "voluntary act and deed" sufficiently shows that she acknowledged without any fear or coercion of her husband. Brown *v.* Farran, 3 Ohio 140.

Omission of word "husband."—A certificate of a married woman's acknowledgment, stating that she acknowledged the same "without undue influence of her said ——," was held to be valid, notwithstanding the omission of the word "husband," since it was evident that no other word would supply the blank. Gorman *v.* Stanton, 5 Mo. App. 585.

95. Hunt *v.* Harris, 12 Heisk. (Tenn.) 243; Battin *v.* Bigelow, Pet. C. C. (U. S.) 452, 2 Fed. Cas. No. 1,108. But see Wright *v.* Dufield, 2 Baxt. (Tenn.) 218.

96. Allen *v.* Lenoir, 53 Miss. 321; Bernard *v.* Elder, 50 Miss. 336; Dennis *v.* Tarpenny, 20 Barb. (N. Y.) 371; Meriam *v.* Harsen, 2 Barb. Ch. (N. Y.) 232.

97. Thompson *v.* Johnson, 84 Tex. 548, 19 S. W. 784; Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40; Belcher *v.* Weaver, 46 Tex. 293, 26 Am. Rep. 267.

98. "With" instead of "without."— The use by mistake of the word "with" instead of "without," in the phrase "without fear or compulsion," will not invalidate the certificate, it being evidently a mere clerical error. King *v.* Merritt, 67 Mich. 194, 34 N. W. 689; Durst *v.* Daugherty, 81 Tex. 650, 17 S. W. 388; Johnson *v.* Thompson, (Tex. Civ. App. 1898) 50 S. W. 1055.

"Restraint" instead of "constraint."—The use of the word "restraint" in place of "constraint" will not vitiate the certificate. Homer *v.* Schonfeld, 84 Ala. 313, 4 So. 105; Mullens *v.* Big Creek Gap Coal, etc., Co., (Tenn. Ch. 1895) 35 S. W. 439.

99. Durham *v.* Stephenson, 41 Fla. 112, 25 So. 284; Henderson *v.* Rice, 1 Coldw. (Tenn.) 223; Laidley *v.* Central Land Co., 30 W. Va. 505, 4 S. E. 705; Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97.

Expressions not equivalent.— The word "voluntary" is not equivalent to the statutory phrase "of her own free will and accord, and without fear, constraint, or persuasion of her husband." Scott *v.* Simons, 70 Ala. 352.

A certificate that she "acknowledged the instrument to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it," is fatally defective under a statute requiring an execution by her "freely, voluntarily, without compulsion, constraint, or coercion by her husband." Henderson *v.* Rice, 1 Coldw. (Tenn.) 223.

An acknowledgment stating that the instrument was executed freely, voluntarily, and understandingly and "without fear or compulsion from any person," instead of "without constraint from her husband and for the purposes therein expressed," as required by statute, is fatally defective. Cox *v.* Railway Bldg., etc., Assoc., 101 Tenn. 490, 48 S. W. 226.

The words "of her own will and accord" are not equivalent to the statutory expression "freely and voluntarily, without any threat, fear, or compulsion from" her husband. Allison *v.* Smith, 17 N. Brunsw. 199.

"Persuasion" not equivalent to "threats." — Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352; Strauss *v.* Harrison, 79 Ala. 324.

Fear or compulsion "from anyone."— Under a statute requiring the certificate to state that the wife acknowledged executing the deed without fear or compulsion "from anyone," it was held that a recital that she executed it without fear or compulsion "from her husband" was not a sufficient compliance with the statute. Barstow *v.* Smith, Walk. (Mich.) 394.

1. Motes *v.* Carter, 73 Ala. 553 (omitting the words "or threats"); Hawkins *v.* Burress, 1 Harr. & J. (Md.) 513 (omitting the words "ill usage"); Menees *v.* Johnson, 2 Lea (Tenn.) 561 (omitting the words "without compulsion or restraint from her husband"); Wright *v.* Dufield, 2 Baxt. (Tenn.)

(3) Absence of Desire to Retract. As a rule the certificate must recite, either in the words of the statute or in equivalent language,[2] that the wife declared she did not wish to retract her deed.[3] But in Illinois it is held that such a recital is not material to the validity of the certificate.[4]

(E) *Explanation of Instrument* — (1) Necessity for. Usually the statutes in reference to acknowledgments by married women provide that the instrument shall be explained to her by the officer who takes the acknowledgment.[5] Under such statutes it has been held in a few jurisdictions that a certificate need not recite that such explanation was made, it being presumed that the officer did his duty in that respect;[6] but in a very great majority of states such recital is required, and its omission renders the certificate fatally defective.[7]

218 (omitting the words "voluntarily and understandingly").

Omission of word "fear."—Where the statute requires an acknowledgment by the wife that she executed the instrument "without any fear, threats, or compulsion of her husband," an omission of the word "fear" without an equivalent substitute renders the certificate defective. Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349; Alabama L. Ins., etc., Co. *v.* Boykin, 38 Ala. 510; Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545.

2. Equivalent expression.— A recital that "she still voluntarily assents thereto" is equivalent to the prescribed statutory form that "she does not wish to retract it." Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430.

3. Chauvin *v.* Wagner, 18 Mo. 531; Le Bourgeoise *v.* McNamara, 5 Mo. App. 576; Williams *v.* Ellingsworth, 75 Tex. 480, 12 S. W. 746; Davis *v.* Agnew, 67 Tex. 206, 2 S. W. 43; Ruleman *v.* Pritchett, 56 Tex. 482; Freeman *v.* Preston, (Tex. Civ. App. 1895) 29 S. W. 495; Murphy *v.* Reynaud, 2 Tex. Civ. App. 470, 21 S. W. 991; Grove *v.* Zumbro, 14 Gratt. (Va.) 501; Linn *v.* Patton, 10 W. Va. 187.

4. Stuart *v.* Dutton, 39 Ill. 91; Tourville *v.* Pierson, 39 Ill. 446; Hughes *v.* Lane, 11 Ill. 123, 50 Am. Dec. 436.

5. See *supra*, X, B, 1, d.

6. Indiana.— Fleming *v.* Potter, 14 Ind. 486; Stevens *v.* Doe, 6 Blackf. (Ind.) 475.

Kentucky.— Gregory *v.* Ford, 5 B. Mon. (Ky.) 471; Shaw *v.* Shaw, (Ky. 1894) 24 S. W. 630, wherein a recital that the acknowledgment was made "understandingly" was held sufficient.

Ohio.— Williams *v.* Robson, 6 Ohio St. 510; Card *v.* Patterson, 5 Ohio St. 319; Ruffner *v.* McLenan, 16 Ohio 639; Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387 [*overruling* Connell *v.* Connell, 6 Ohio 353; Silliman *v.* Cummins, 13 Ohio 116].

7. *California.*— Hutchinson *v.* Ainsworth, 63 Cal. 286; McLeran *v.* Benton, 43 Cal. 467; Pease *v.* Barbiers, 10 Cal. 436.

Iowa.— Heaton *v.* Fryberger, 38 Iowa 185; O'Ferrall *v.* Simplot, 4 Iowa 381, 4 Greene (Iowa) 162.

Illinois.— Lyon *v.* Kain, 36 Ill. 362; Garrett *v.* Moss, 22 Ill. 363; Owen *v.* Robbins, 19 Ill. 545.

Missouri.— Burnett *v.* McCluey, 78 Mo. 676.

Ohio.— Ludlow *v.* O'Neil, 29 Ohio St. 181.

Pennsylvania.— Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722; Powell's Appeal, 98 Pa. St. 403; Graham *v.* Long, 65 Pa. St. 383; Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516; Steele *v.* Thompson, 14 Serg. & R. (Pa.) 84; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

Rhode Island.— Paine *v.* Baker, 15 R. I. 100, 23 Atl. 141.

Texas.— Williams *v.* Ellingsworth, 75 Tex. 480, 12 S. W. 746; Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866; Cole *v.* Bammel, 62 Tex. 108; Johnson *v.* Bryan, 62 Tex. 623; Ruleman *v.* Pritchett, 56 Tex. 482.

Virginia.— Bolling *v.* Teel, 76 Va. 487; Hairston *v.* Doe, 12 Leigh (Va.) 445.

West Virginia.— Laidley *v.* Knight, 23 W. Va. 735; Tavenner *v.* Barrett, 21 W. Va. 656; Bartlett *v.* Fleming, 3 W. Va. 163.

Defect not curable by evidence aliunde.— As a general rule evidence is not admissible to show that the wife in fact knew the contents of the instrument where the certificate fails to state that fact. Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516. But see Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430.

As to the admissibility of evidence in aid of the certificate see *infra*, XIV.

Where recital not required by statute.— Where the statute specifying what shall be included in a certificate requires no mention of the explanation of the instrument to the wife, the certificate need not contain a recital in that regard. Tod *v.* Baylor, 4 Leigh (Va.) 498.

Equivalent expressions.—A recital that the wife "was made acquainted with the contents" is equivalent to one that the contents "were made known and explained to her." Hughes *v.* Lane, 11 Ill. 123, 50 Am. Dec. 436. A recital, "the contents of said deed being fully made known to her," etc., is sufficient under a statute requiring the officer to certify that the contents "and effect" of the deed were "explained" to her. Martin *v.* Davidson, 3 Bush (Ky.) 572. A recital that the contents were "fully made known to her" is equivalent to one that the contents were "made known and explained to her." Lane *v.* Dolick, 6 McLean (U. S.) 200, 14 Fed. Cas. No. 8,049.

(2) Sufficiency of. No more than a substantial compliance with the statute is required, and it is sufficient if words of equivalent meaning to the statutory language be employed.[8] A statement that the wife was fully acquainted with the contents of the instrument at the time she acknowledged it is usually sufficient, though it be not stated that such information was imparted to her by the certifying officer.[9] Clerical errors or omissions will not vitiate the certificate where its meaning is clear.[10] But while a strict compliance with the statute is not exacted, yet the certificate must show clearly in some way that the wife understood the contents of the instrument, else it will be insufficient;[11] and where the statute

8. Calumet, etc., Canal, etc., Co. *v.* Russell, 68 Ill. 426; McIntire *v.* Ward, 5 Binn. (Pa.) 296, 6 Am. Dec. 417; Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 691; Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668.

Deed subject to another instrument.— A deed is duly acknowledged by a married woman when the notary certifies, in accordance with Cal. Civ. Code, § 119, that he "made her acquainted with the contents of the instrument," though the deed shows that it is subject to conditions contained in another instrument not signed by her, and not then executed, the contents of which were unknown to the notary. Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

9. Jansen *v.* McCahill, 22 Cal. 563, 83 Am. Dec. 84; Chauvin *v.* Wagner, 18 Mo. 531; Thomas *v.* Meier, 18 Mo. 573; Talbot *v.* Simpson, Pet. C. C. (U. S.) 188, 23 Fed. Cas. No. 13,730. But see Langton *v.* Marshall, 59 Tex. 296, wherein it was held that, under a statute requiring that a deed shall be fully explained to the wife by the officer taking her acknowledgment, it was not enough that the certificate recited that the wife, "being examined by me privily and apart from her husband, declared that she fully understood the contents of said deed," etc. Langton *v.* Marshall, 59 Tex. 296.

Surplusage.— Where the certificate recited that the wife "having been by me first made acquainted with the contents of such instrument," duly acknowledged, etc.; it was held that the words "by me" might be discarded as surplusage. La Société Française, etc. *v.* Beard, 54 Cal. 480, 483.

"Fully understanding the contents."— A statement in a certificate of a married woman's acknowledgment that she executed the deed freely and without compulsion from any one, "fully understanding the contents" of it, is equivalent to a statement that she was informed of its contents. Schley *v.* Pullman's Palace Car Co., 120 U. S. 575, 7 S. Ct. 730, 30 L. ed. 789.

Explanation through interpreter.— Where a certificate of acknowledgment to a deed by a married woman stated that she was made acquainted with the contents of the conveyance through a sworn interpreter, it was held that it was not necessary to show that the contents were made known to her by the officer himself, such information being imparted by the interpreter in the officer's presence and by his direction. Norton *v.* Meader, 4 Sawy. (U. S.) 603, 18 Fed. Cas. No. 10,351.

Explanation to deaf and dumb woman.— Where the commissioners certified "that, the said S. H. being deaf and dumb, the nature, purport, and contents of the said deed, previously to her acknowledgment thereof, were fully explained to her in our presence by W. W., being a person accustomed to, and competent to, hold conversation by signs with the said S. H.; and from such explanation and the interpretation thereof to us by the said W. W. we further certify that the said S. H. freely and voluntarily consented to the same," this was held to show that the explanation had been properly communicated. Matter of Harper, 6 M. & G. 732, 733, 7 Scott N. R. 431.

10. **Word "husband" used instead of "deed."**— Where the certificate of a married woman's acknowledgment was formal in all respects except that it recited that "the contents and meaning of said husband were fully explained and made known to her" instead of using the word "deed" in place of the word "husband," it was held that the meaning of the certificate was clear, notwithstanding the clerical mistake, and that it was sufficient. Calumet, etc., Canal, etc., Co. *v.* Russell, 68 Ill. 426.

Omission of word "known."— In a certificate of acknowledgment by a married woman, a recital, "the contents of said indenture being first made fully to her," is not rendered fatally defective by omission of the word "known." Hornbeck *v.* Mutual Bldg., etc., Assoc., 88 Pa. St. 64.

Omission of word "effect."— Under a statute requiring an explanation to the wife of "the contents, meaning the effect," of the instrument, a certificate reciting that "the contents and meaning" were "made known and fully explained to her" was held to be sufficient notwithstanding the omission of the word "effect," that idea being necessarily included in the recital. Nippel *v.* Hammond, 4 Colo. 211. To same effect see Martin *v.* Davidson, 3 Bush (Ky.) 572.

Texas — "Fully explained."—Under a statute requiring the instrument to be "fully explained" to the wife, the omission of the word "fully" will not vitiate the certificate. Johnson *v.* Thompson, (Tex. Civ. App. 1898) 50 S. W. 1055. But a recital, "the said instrument having been fully to her," etc., omitting the word "explained," is fatally defective. Moores *v.* Linney, 2 Tex. Civ. App. 293, 21 S. W. 709.

11. Black *v.* Aman, 6 Mackey (D. C.) 131; Anderson *v.* Bewley, 11 Heisk. (Tenn.) 29.

No presumption of knowledge.— No presumption arises that the wife knew the contents of the instrument from the fact of her executing it. Pease *v.* Barbiers, 10 Cal. 436.

requires the explanation to be made on privy examination, a certificate reciting that such explanation was made before the privy examination is insufficient.[12]

(F) *Execution of Instrument.* It is generally essential to the validity of a certificate of a married woman's acknowledgment that it should recite that she acknowledged the execution of the instrument.[13] But a certificate need not follow the exact language of the statute; a substantial compliance therewith is all that is necessary.[14] Thus a recital that a wife acknowledged "signing" the instrument is usually regarded as a sufficient showing that she acknowledged "executing" it.[15] And so it has been held that the word "executed" is equivalent to the statutory expression "signed, sealed, and delivered."[16]

What not "full explanation."— A statement in the officer's certificate of acknowledgment of a deed by a married woman, that "she was examined and interrogated by me touching the same," is not sufficient under a statute requiring the certificate to state that a "full explanation" of the deed was made to her. Runge *v.* Sabin, (Tex. Civ. App. 1895) 30 S. W. 568.

"Read" instead of "fully explained."— A certificate of acknowledgment of a married woman to a deed, reciting that the deed was "read to her," instead of that it was "fully explained" to her, as required by statute, is fatally defective, rendering the deed void as to her. Watson *v.* Michael, 21 W. Va. 568.

12. Bollinger *v.* Manning, 79 Cal. 7, 21 Pac. 375; Beck *v.* Soward, 76 Cal. 527, 18 Pac. 650; Watson *v.* Michael, 21 W. Va. 568.

13. Lewis *v.* Waters, 3 Harr. & M. (Md.) 430; Davis *v.* McCartney, 64 Tex. 584; Smith *v.* Elliott, 39 Tex. 201. But see Tod *v.* Baylor, 4 Leigh (Va.) 498, wherein it was held that where the wife had in fact signed the deed the certificate was not defective because not expressly reciting that fact.

Insufficient recital.—A recital that the wife acknowledged "that she freely and voluntarily relinquished her right of dower" is not sufficient. Sutton *v.* Pollard, (Ky. 1891) 16 S. W. 126; Miller *v.* Shackleford, 3 Dana (Ky.) 289.

Kentucky — Subscribed in presence of justices.— In Kentucky, where the acknowledgment is taken in a county other than that in which the land lies, the certificate must show that the instrument was subscribed as well as acknowledged in the presence of the justices. Smith *v.* White, 1 B. Mon. (Ky.) 16; Taylor *v.* Bush, 5 T. B. Mon. (Ky.) 84; Kay *v.* Jones, 7 J. J. Marsh (Ky.) 38.

South Carolina — Renunciation of inheritance.— In South Carolina, where the certificate of a married woman's renunciation of inheritance, though regular in other respects, omitted the declaration required by statute "that she did at least seven days before such examination actually join her husband in executing such release," it was held that such omission was fatal. Wingo *v.* Parker, 19 S. C. 9, 10; McLaurin *v.* Wilson, 16 S. C. 402; Kottman *v.* Ayer, 1 Strobh. (S. C.) 552.

14. Stuart *v.* Dutton, 39 Ill. 91; Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; Gable's Appeal, (Pa. 1886) 7 Atl. 52; Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668.

"Acknowledged" equivalent to "executed." —In Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622, it was held that the phrase "willingly acknowledged the same" was a sufficient substitute for "willingly executed the same." *Contra,* Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866.

"Seal and acknowledge" equivalent to "seal and deliver."— A recital, in a certificate of a married woman's acknowledgment, that she "did voluntarily, of her own free will and accord, seal and acknowledge" the instrument, instead of "seal and deliver," is sufficient. Jamison *v.* Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536.

"Sign, seal, and acknowledge."— Under a statute requiring the officer to certify that the wife "declared that she did freely and voluntarily execute and deliver the same to be her act and deed, and consented that the same may be recorded," a recital that she "declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith," is a substantial compliance. Martin *v.* Davidson, 3 Bush (Ky.) 572.

Immaterial omissions.— Where a certificate was in proper form except that the word "she" was omitted from the phrase "declared that —— executed the same freely," it was held that the omission did not invalidate the certificate. Johnson *v.* Thompson, (Tex. Civ. App. 1898) 50 S. W. 1055. See also Rork *v.* Shields, 16 Tex. Civ. App. 640, 42 S. W. 1032. A certificate reciting that the wife "acknowledged said instrument to be —— act and deed" is not vitiated by the omission of the word "her." Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

"Stated" not equivalent to "acknowledged."— Where the statute requires the certificate of a married woman's acknowledgment to recite that she "acknowledged," etc., a substitution of the word "stated" renders the certificate defective, such word not being equivalent to "acknowledged." Dewey *v.* Campau, 4 Mich. 565.

15. Stuart *v.* Dutton, 39 Ill. 91; Barton *v.* Morris, 15 Ohio 408; Mullins *v.* Weaver, 57 Tex. 5; Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

But in Mississippi it is held that a certificate merely to the effect that she "signed" the deed is defective, and cannot be aided by reference to the words "sealed and delivered" in the husband's acknowledgment. Robinson *v* Noel, 49 Miss. 253; Toulmin *v.* Heidelberg, 32 Miss. 268.

16. Smith *v.* Williams, 38 Miss. 48. But see, *contra,* Stuart *v.* Dutton, 39 Ill. 91, in

(G) *Purpose or Consideration.* Where the statute requires the wife to acknowledge that she executed the instrument for the purpose and consideration therein set forth, it is essential to the validity of the certificate that it should show a substantial compliance with the statute in this respect.[17]

2. Of Certificate of Proof of Execution — a. Substantial Compliance with Statute. Where an instrument is proved for record by a subscribing witness it is not sufficient for the officer to certify in general terms that it was proved. He must state facts sufficient to show that the statute was substantially complied with.[18] But no more is necessary than a substantial compliance with the statutory requirements,[19] and where the meaning is otherwise clear the certificate will not be vitiated by surplusage [20] or mere clerical errors.[21]

b. Recitals as to Identity — (I) *Officer's Knowledge of Witness's Identity.* Where the execution of an instrument is proved by the testimony of a subscribing witness, the certificate is usually required to show that such witness was personally known to the officer or that his identity was satisfactorily proved to him.[22]

which it is held that delivery is subsequent to, and not a part of, the execution of the instrument.

"Signed and sealed" equivalent to "signed, sealed, and delivered."— In the certificate of a married woman's acknowledgment the words "signed and sealed" constitute an equivalent expression for "signed, sealed, and delivered," or "executed." Tubbs *v.* Gatewood, 26 Ark. 128.

17. Shryock *v.* Cannon, 39 Ark. 434; Little *v.* Dodge, 32 Ark. 453; Currie *v.* Kerr, 11 Lea (Tenn.) 138; Hayden *v.* Moffatt, 74 Tex. 647, 12 S. W. 820, 15 Am. St. Rep. 866.

Sufficient acknowledgment.— Where a wife joined in a mortgage with her husband, an acknowledgment by her, as provided by statute, that she executed it "for the purpose of conveying and mortgaging all of my estate *in esse* and *in futuro*" in the lands therein described, was held to bar her dower interest. Hart *v.* Sanderson, 18 Fla. 103, 104.

18. Fipps *v.* McGehee, 5 Port. (Ala.) 413; Trammell *v.* Thurmond, 17 Ark. 203; Smith *v.* Boren, 2 Yerg. (Tenn.) 238; Ross *v.* McLung, 6 Pet. (U. S.) 283, 8 L. ed. 400.

Omission of material matter.— Where the clerk of a court of record certifies the manner in which an instrument was proved, and omits a material circumstance required by law, the certificate is invalid because showing on its face that the instrument was not in fact duly proved. Horton *v.* Hagler, 8 N. C. 48.

19. Whitney *v.* Arnold, 10 Cal. 531; Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373; Yerger *v.* Young, 9 Yerg. (Tenn.) 37; Greer *v.* Smith, 7 Yerg. (Tenn.) 487; Myrick *v.* McMillan, 13 Wis. 188.

Sufficient showing of official character.— Where a deed executed in another state was attested by two witnesses, one of whom was a commissioner of deeds for the state of Georgia, the fact that he did not describe himself as such when he subscribed his name as a witness is not material, where his official character is set forth in his certificate attached to the deed. Baird *v.* Evans, 58 Ga. 350.

Sufficient showing of date.— Though the certificate of probate of a deed did not recite that the witness swore that the grantor acknowledged it on the day of its date, yet, as the deed itself bore the date, and the certificate recited that the grantor acknowledged it for the purposes therein contained, the probate was sufficient, under the Tennessee registry act of 1846. Lea *v.* Polk County Copper Co., 21 How. (U. S.) 493, 16 L. ed. 203.

Vermont — Refusal of grantor to acknowledge.— Vt. Comp. Laws (1824), p. 168, § 7, provides that, in case a grantor refuses to acknowledge an instrument, proof may be made by a subscribing witness before a justice of the peace, upon notice to the grantor. It was held that a certificate of the magistrate stating that proof of execution had been made by a subscribing witness, and that the grantor had appeared by attorney at the examination, is sufficient to entitle the deed to be recorded, without certifying also that the grantor had refused to acknowledge the same. Catlin *v.* Washburn, 3 Vt. 25.

20. Whitney *v.* Arnold, 10 Cal. 531.

21. Talbert *v.* Dull, 70 Tex. 675, 8 S. W. 530 (the word "says" omitted); Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. 91 (the name of a subscribing witness substituted by mistake for that of the grantee).

Erroneous description of witness.— Under the Illinois Conveyance Act, § 20, a certificate of proof of the execution of a deed referred to a certain person as a subscribing witness to the deed, but it appeared that he was not in fact a subscribing witness, but was one of the witnesses by whom the handwriting of the grantors and of the subscribing witnesses was proved. It was held that this was a mere clerical error which would not vitiate the certificate. Skinner *v.* Fulton, 39 Ill. 484.

22. Hines *v.* Chancey, 47 Ala. 637; Adams *v.* Bishop, 19 Ill. 395; Montag *v.* Linn, 19 Ill. 399; Morgan *v.* Curtenius, 4 McLean (U. S.) 366, 17 Fed. Cas. No. 9,799.

But under some statutes such a recital is not necessary. Johnson *v.* Prewitt, 32 Mo. 553; Hunt *v.* Johnson, 19 N. Y. 279; Maxwell *v.* Chapman, 8 Barb. (N. Y.) 579; Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602; Jackson *v.* Harrow, 11 Johns. (N. Y.) 434.

Sufficient certificate.— Under a statute requiring that the officer taking proof of the

But the certificate will be liberally construed and no more than a substantial compliance with the statute is necessary.[23]

(II) *Witness's Knowledge of Maker's Identity.* Generally there must be a recital that the witness testified that he knew the maker of the instrument.[24]

c. Showing Who Made Proof — (I) *Subscribing Witness.* It should appear that the person who proved the deed was a subscribing witness;[25] and it has been held that the fact that the name of such person is identical with one appearing in the attestation clause is not sufficient in the absence of a recital that such person was a subscribing witness.[26]

(II) *When Subscribing Witness Not Obtainable.* Some statutes provide that where the subscribing witnesses are dead or cannot be had, the instrument may be proved by testimony as to the handwriting of such witnesses.[27]

execution of a deed shall know or have satisfactory evidence that the person making such proof is a subscribing witness to such deed, conveyance, or writing and that such witness knows the person who executed the same, it was held that a certificate reciting the appearance before the officer of "M. H. S., to me known to be the subscribing witness to the foregoing deed, and who, being by me duly sworn, deposes that he knows J. G., the person described in and who has executed the said deed, and that he saw the said J. G. execute the same," was sufficient. Canandarqua Academy *v.* McKechnie, 90 N. Y. 618, 621.

Insufficient recital.— Under a statute prescribing that the officer shall ascertain that the person who offers to prove the instrument is a subscribing witness, either from his own knowledge or from the testimony of a credible witness, a bare recital that such person was "known" to the officer is insufficient. Job *v.* Tebbetts, 9 Ill. 143.

Identity of witness proved by third party. — A commissioner's certificate of the proof of a deed by one of the subscribing witnesses, reciting that said witness appeared before him, "proved to his satisfaction by the oath of J. K. to be the same person," is sufficient to authorize the deed to be read in evidence, though it be not stated that the officer knew J. K. Jackson *v.* Vickory, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522.

An omission to state the residence of the subscribing witness is not material where it sufficiently appears that such witness was known to the officer and knew the person who executed the instrument. Irving *v.* Campbell, 56 N. Y. Super. Ct. 224, 4 N. Y. Suppl. 103.

23. Sheldon *v.* Stryker, 27 How. Pr. (N. Y.) 387, 42 Barb. (N. Y.) 284.

Sufficient compliance with statute.—Where a deed showed that the officer taking the certificate was one of the subscribing witnesses, and the certificate of probate recited that the other, to the officer known, came before him, and, being sworn, said that he saw the grantor execute and acknowledge the deed, there is a substantial compliance with the requirements of a statute that the officer certified that he knew affiant to be one of the subscribing witnesses. Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426.

24. Jackson *v.* Gould, 7 Wend. (N. Y.) 364; Jackson *v.* Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; Harrison *v.* Wade, 3 Coldw. (Tenn.) 505; Brogan *v.* Savage, 5 Sneed (Tenn.) 689.

But in New York, prior to 1801, such a recital was not necessary. Hunt *v.* Johnson, 19 N. Y. 279; Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602.

Sufficient certificate.— The proof of a deed before a master in chancery, made by the oath of a subscribing witness, who stated that he saw the grantor execute the deed and sincerely believed he was the same person named in the deed, on which the master certified that he was satisfied of the due execution of the deed, was held sufficient to allow the deed, which had been recorded, to be read in evidence. Jackson *v.* Livingston, 6 Johns. (N. Y.) 149.

25. Trammell *v.* Thurmond, 17 Ark. 203; Harker *v.* Gustin, 12 N. J. L. 49.

Affidavit signed by different person.— Where, in an affidavit for the probate of a power of attorney before a United States consul, the consul described an individual, naming him, as being the one whose signature was affixed to the annexed deed as a witness, and who was present at the time of execution, but the affidavit was signed by another and different person from the one mentioned therein, it was held to be insufficient to entitle the instrument to record in Georgia. Dodge *v.* American Freehold Land Mortg. Co., 109 Ga. 394, 34 S. E. 672.

26. Gillett *v.* Stanley, 1 Hill (N. Y.) 121. *Contra,* Luffborough *v.* Parker, 12 Serg. & R. (Pa.) 48.

27. Sufficient showing that witness "cannot be had."—Where a certificate recited that one of the subscribing witnesses had gone to a specified place about forty years before that time and had not since been heard from, it was held sufficient to show that such subscribing witness "could not be had." Skinner *v.* Fulton, 39 Ill. 484.

Showing acquaintance with subscribing witness.— A statement, in the certificate of proof of an instrument by testimony as to the handwriting of the subscribing witness thereto, that the witness called to prove such handwriting "was well acquainted with" such subscribing witness, is substantially in compliance with the statutory declaration that he "personally knew" him. Delaunay *v.* Burnett, 9 Ill. 454.

Need not state that witness "competent and credible."— Where a deed is proved by testimony as to the handwriting of the sub-

d. Showing That Witness Was Sworn. A certificate of proof by a subscribing witness should show that such witness was duly sworn.[28]

e. Showing Execution of Instrument. The certificate should show that the witness testified that the party whose name appeared in the instrument signed it, or executed it, or acknowledged that he had done so, or some such language showing that the execution of the instrument was proved by the testimony of the witness in substantial compliance with the statute.[29] Under some statutes the certificate is required to show that the witnesses testified that they subscribed the instrument in the presence of the maker and of each other.[30]

H. Curing Defective Certificate — 1. Correction or Amendment — a. By Officer or Court before Whom Taken. In the absence of statutory authority to the contrary it is held by the weight of authority that where the officer has certified the

scribing witness it is not necessary for the certificate to state that the person called to prove such handwriting was "competent and credible." Delaunay *v.* Burnett, 9 Ill. 454; Job *v.* Tebbetts, 9 Ill. 143.

28. Trammell *v.* Thurmond, 17 Ark. 203; McIntyre *v.* Kamm, 12 Oreg. 253, 7 Pac. 27.

Insufficient statement.— Under the Illinois act of Feb. 19, 1819, a mere statement that the subscribing witnesses appeared before the officer and acknowledged that the grantor executed the deed in their presence was held to be insufficient. Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460.

29. Trammell *v.* Thurmond, 17 Ark. 203.

In Alabama, the certificate is required to show that the witnesses declared on oath that they saw the grantor sign, seal, and deliver the same to the grantee, and that they subscribed their names, as witnesses thereto, in the presence of the grantor. Hines *v.* Chancey, 47 Ala. 637; McCaskle *v.* Amarine, 12 Ala. 17.

Delivery as well as signing.— The affidavit of a subscribing witness, in order to entitle a deed to record, must show that the witness saw the grantor deliver as well as sign it. Doe *v.* Lewis, 29 Ga. 45.

Error as to maker of instrument.— Where a deed purported to be executed by one M as attorney in fact for G, but the certificate of proof stated that the subscribing witness swore he saw G sign as attorney in fact for M, it was held that the certificate was defective. Cavit *v.* Archer, 52 Tex. 166.

Attestation and affidavit construed together. — By the attestation clause of a deed it appeared that the same was "signed, sealed, and delivered" in the presence of two witnesses. One of the subscribing witnesses, making affidavit for the purpose of having the deed admitted to record, swore merely that the grantor signed the same and "acknowledged that he did so for the purpose therein mentioned," and that affiant and the other subscribing witness "signed the same as witnesses." Construing this affidavit together with the attestation, it was held that the execution of the deed was sufficiently proved to admit it to record. Jackson *v.* Haisley, 35 Fla. 587, 17 So. 631.

Tennessee — Substantial compliance with statute.—Under Mill. & V. Tenn. Code, § 2873, requiring the county clerk, on probating a deed, to certify that the subscribing witnesses deposed that the grantor "acknowledged the same in their presence to be his act and deed," a certificate reciting that they "saw" the grantor "sign and acknowledge that he executed" the deed is sufficient. McGuire *v.* Gallagher, 95 Tenn. 349, 32 S. W. 209.

Texas — Signing at request of grantor.— A recital in a certificate of proof, under the Texas act of 1846, that the witness stated that he saw the person who executed the instrument subscribe the same, is sufficient without a further statement that he signed the same as a witness at the request of such person. The latter recital is necessary only where the witness was not present at the execution of the instrument. Deen *v.* Wills, 21 Tex. 642; Dorn *v.* Best, 15 Tex. 62.

Statement in alternative.— Where a certificate recited that the subscribing witness testified that either he saw the grantor execute the instrument, or the grantor requested him to witness the same after its execution, it was held insufficient because in the alternative. Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513; Riley *v.* Pool, 5 Tex. Civ. App. 346, 24 S. W. 85.

30. Hines *v.* Chancey, 47 Ala. 637; Dolin *v.* Gardner, 15 Ala. 758; Brock *v.* Headen, 13 Ala. 370; Fipps *v.* McGehee, 5 Port. (Ala.) 413, wherein a certificate was held insufficient which merely recited testimony by the subscribing witness that he saw the instrument signed, sealed, and delivered, for the purposes therein mentioned, and that B and H signed the same, at the time said deed was executed, as witnesses. But in Illinois it is not necessary to state in the certificate of proof of a deed by a subscribing witness that he subscribed his name, as such, in the presence and at the request of the grantor. The proof made by the witness, which is required to be stated in the certificate, has reference to the execution of the deed by the grantor, and not to the subscription of the name of the subscribing witness thereto, as such. Job *v.* Tebbetts, 9 Ill. 143.

Sufficient showing of presence of witness.— The affidavit of one of two witnesses was that he saw the execution and "saw the other witness sign as witness, that he signed as a witness, and that they signed in the presence of each other." It was held that it sufficiently appeared that the other witness was present at the execution. Green *v.* Glass, 29 Ga. 246.

acknowledgment, and the instrument has passed from his custody, his powers are exhausted and he cannot thereafter correct the certificate or make a new one without a reacknowledgment by the grantor.[31] But in quite a number of jurisdictions the doctrine obtains that where the acknowledgment has in fact been properly taken a defective certificate thereof may be corrected by the officer at any time while he remains in office.[32] By statute in Tennessee the officer may correct his certificate to conform to the facts,[33] even after he has gone out of office,[34] and the amendment relates back to the execution of the instrument except as against intervening rights of purchasers and creditors.[35]

b. By Judicial Proceeding — (1) *Jurisdiction in Equity.* A court of equity will not, under pretext of correcting a mistake, make a valid conveyance of a void instrument. And so, in cases where a proper acknowledgment is absolutely essential to the validity of an instrument, equity has no jurisdiction to correct a defective certificate of acknowledgment so as to make it conform to the facts.[36] But where the acknowledgment is not essential to the operative force of the instrument it seems that equity may correct a mistake in the certificate.[37]

31. *Alabama.*— Hodges *v.* Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; Griffith *v.* Ventress, 91 Ala. 366, 8 So. 312, 24 Am. St. Rep. 918, 11 L. R. A. 193 [*overruling dictum* in Cox *v.* Holcomb, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79]. See also Carlisle *v.* Carlisle, 78 Ala. 542.

California.—Wedel *v.* Herman, 59 Cal. 507; Bours *v.* Zachariah, 11 Cal. 281, 70 Am. Dec. 779.

Florida.— Durham *v.* Stephenson, 41 Fla. 112, 25 So. 284.

Illinois.— Merritt *v.* Yates, 71 Ill. 636, 22 Am. Rep. 128.

Pennsylvania.— Enterprise Transit Co. *v.* Sheedy, 103 Pa. St. 492, 49 Am. Rep. 130.

Texas.— Stone *v.* Sledge, (Tex. Civ. App. 1894) 24 S. W. 697.

West Virginia.— McMullen *v.* Eagan, 21 W. Va. 233.

United States.— Elliott *v.* Peirsoll, 1 McLean (U. S.) 11, 8 Fed. Cas. No. 4,395.

32. *Delaware.*— Hanson *v.* Cochran, 9 Houst. (Del.) 184, 31 Atl. 880.

Indiana.— Jordan *v.* Corey, 2 Ind. 385, 52 Am. Dec. 516. See also Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330.

Iowa.— Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842.

Mississippi.— Harmon *v.* Magee, 57 Miss. 410.

Missouri.— Wannall *v.* Kem, 51 Mo. 150; Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7. See also Miller *v.* Powell, 53 Mo. 252, wherein it was intimated that the officer might be compelled by mandamus to correct his certificate.

New York.— Camp *v.* Buxton, 34 Hun (N. Y.) 511. See also Jackson *v.* Lewis, 13 Johns. (N. Y.) 504.

Certificate of authenticity.— A proper certificate of authentication of the due execution of a deed dated 1839, made and attached to it in 1875, will remove any defects which previously existed in the proof of its formal execution and render the instrument admissible in evidence as a complete and valid conveyance. Healey *v.* Worth, 35 Mich. 166.

No power after going out of office.— One who has certified a married woman's acknowledgment of her deed cannot, after he has gone out of office, correct a defect in the certificate. Fitzgerald *v.* Milliken, 83 Ky. 70; Gilbraith *v.* Gallivan, 78 Mo. 452.

33. Garth *v.* Fort, 15 Lea (Tenn.) 683; Brinkley *v.* Tomeny, 9 Baxt. (Tenn.) 275.

Statute not retrospective.— Tenn. Code, § 2081, allowing the clerk to correct any "mistake or omission of words" in the certificate, is not retrospective in its operation. Fall *v.* Roper, 3 Head (Tenn.) 485.

34. Grotenkemper *v.* Carver, 4 Lea (Tenn.) 375; Vaughn *v.* Carlisle, 2 Lea (Tenn.) 525.

35. Stroud *v.* McDaniel, 12 Lea (Tenn.) 617; Grotenkemper *v.* Carver, 9 Lea (Tenn.) 280; Harrison *v.* Wade, 3 Coldw. (Tenn.) 505.

36. Conveyances by married women.

California.— Selover *v.* American Russian Commercial Co., 7 Cal. 266.

Illinois.— Lindley *v.* Smith, 58 Ill. 250.

Iowa.— Heaton *v.* Fryberger, 38 Iowa 185.

Missouri.— Wannall *v.* Kem, 51 Mo. 150; Chauvin *v.* Wagner, 18 Mo. 531.

Virginia.— Jones *v.* Porter, Jeff. (Va.) 62.

England.— Matter of Millard, 5 C. B. 753.

As to the power of a court of equity to compel specific performance of a defectively acknowledged contract of a married woman see *supra*, III, B, 1, a.

Conveyance of homestead.— Stodalka *v.* Novotny, 144 Ill. 125, 33 N. E. 534; Johnston *v.* Dunavan, 17 Ill. App. 59.

Defective execution of statutory power.— The officer, in taking the acknowledgment, acts under a statutory power, and a court of equity cannot aid the defective execution of such a power. Miller *v.* Powell, 53 Mo. 252.

37. Officer misdescribing himself.— Where a deed was acknowledged before a commissioner of deeds for one state, who was also a commissioner for another state, and who inadvertently signed as a commissioner of deeds for the wrong state, equity will relieve against the mistake. Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228.

Where married woman may convey as feme sole.—Since the Illinois act of March 27, 1869, whereby the acknowledgment is made a non-essential to the validity of a married woman's

(II) *Jurisdiction by Statute.* Under the statutes of some states, where an acknowledgment has been properly taken but defectively certified, the certificate may be reformed in a proceeding brought for that purpose so as to make it state the facts correctly.[38] But such statutes apply only to cases where the act of taking the acknowledgment has been properly performed and the only defect lies in the certificate.[39] A denial of the allegation that the acknowledgment was properly taken puts upon the party alleging such fact the burden of proving it,[40] and unless it is shown by a preponderance of the evidence the certificate will not be reformed.[41]

2. Reacknowledgment — a. In General. Where an instrument has been defectively acknowledged, a subsequent acknowledgment taken and certified in proper fashion amounts to a redelivery;[42] and such reacknowledgment will relate

deed, equity will reform her deeds the same as if she were sole. Bradshaw *v.* Atkins, 110 Ill. 323.

38. *California.*—Danglarde *v.* Elias, 80 Cal. 65, 22 Pac. 69; Hutchinson *v.* Ainsworth, 63 Cal. 286, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823; Wedel *v.* Herman, 59 Cal. 507.

Idaho.— Bunnell, etc., Invest. Co. *v.* Curtis, (Ida. 1897) 51 Pac. 767.

Kentucky.— Ralston *v.* Moore, 83 Ky. 571; Edmunds *v.* Leavell, (Ky. 1887) 3 S. W. 134.

Ohio.— Kilbourn *v.* Fury, 26 Ohio St. 153.

Pennsylvania.— Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722; Hand *v.* Weidner, 151 Pa. St. 362, 25 Atl. 38; Cressona Sav. Fund, etc., Assoc. *v.* Sowers, 134 Pa. St. 354, 19 Atl. 686.

Intervening rights of third persons.— Under the Pennsylvania act of May 25, 1878, a court of equity will not correct a defect in the acknowledgment of a mortgage when the rights of third parties without notice have intervened. Stewart *v.* Dampman, 4 Pa. Super. Ct. 540.

Who proper party to bill.—Under the Pennsylvania act of May 25, 1878, in a suit for reformation of an acknowledgment to a lease, a claimant under a second lease is a proper party to the bill. Manufacturers Natural Gas Co. *v.* Douglass, 130 Pa. St. 283, 18 Atl. 630.

Officer not necessary defendant.— In a suit for reformation of a certificate of acknowledgment the notary who took the acknowledgment is not a necessary party defendant. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Insufficient defense.—Where a bill is brought to review the acknowledgment of a deed, as provided by the Pennsylvania act of May 25, 1878, it is not a sufficient defense that the part of the acknowledgment which is in proper form, and which would not be affected by the proposed correction, is not true in fact. It was not the intention of the act to allow the defendant in such suit to assail that part of his certificate which was good on its face. Cressona Sav. Fund, etc., Assoc. *v.* Sowers, 134 Pa. St. 354, 19 Atl. 686.

California—Certificate made before passage of act.— No action can be maintained under Cal. Civ. Code, §§ 1202, 1203, to correct a defective notarial certificate of acknowledgment of a wife's deed, made prior to the enactment thereof. Judson *v.* Porter, 53 Cal. 482.

Pennsylvania — Suits begun before passage of act.— The Pennsylvania act of May 25, 1878, authorizes the courts to reform defective acknowledgments to deeds, and provides that it shall not apply where "suits have already been commenced" to recover the real estate conveyed by the instrument to which the defective acknowledgment is attached. It was held that the proviso referred to suits begun before the passage of the act, and that a bill for reformation of an acknowledgment to a lease was within the act, though ejectment was brought for the leased property before the filing of the bill but after the passage of the act. Manufacturers Natural Gas Co. *v.* Douglass, 130 Pa. St. 283, 18 Atl. 630.

Texas — Statute of limitations.— Under Tex. Rev. Stat. art. 3358, a party's right to have a certificate of acknowledgment reformed in a legal proceeding is barred after four years. Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430; Starnes *v.* Beitel, 20 Tex. Civ. App. 524, 50 S. W. 202; McKinney *v.* Rodgers, (Tex. Civ. App. 1895) 29 S. W. 407; Stone *v.* Sledge, (Tex. Civ. App. 1894) 24 S. W. 697.

39. Carney *v.* Hopple, 17 Ohio St. 39; Johnson *v.* Taylor, 60 Tex. 360.

40. Hand *v.* Weidner, 151 Pa. St. 362, 25 Atl. 38.

41. Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722; Hand *v.* Weidner, 151 Pa. St. 362, 25 Atl. 38.

Officer's testimony sufficient.— In an action to reform a defective certificate of acknowledgment of a mortgage, the notary who took the acknowledgment testified explicitly to the observance of all the requisites to a valid acknowledgment and to the mistake in attaching the defective certificate. This was held sufficient to sustain a decree of reformation. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Acts and declarations of acknowledgor admissible.— In an action brought under the Ohio act of April 17, 1857, to correct a mistake in the certificate of a married woman's acknowledgment, her acts and declarations at the time of and after the execution of the instrument in relation thereto are admissible in evidence. Kilbourn *v.* Fury, 26 Ohio St. 153.

42. Brady *v.* Cole, 164 Ill. 116, 45 N. E. 438; McMullen *v.* Fagan, 21 W. Va. 233; Roanes *v.* Archer, 4 Leigh (Va.) 550; Eppes *v.* Randolph, 2 Call (Va.) 125.

Two certificates together sufficient.—A deed

back to the date of the original delivery of the instrument,[43] except where rights of third persons have intervened.[44] If the first acknowledgment was in fact valid, the making of a subsequent one will not impair its force.[45]

b. By Wife after Death of Husband. An instrument executed by husband and wife, which is invalid as to the wife because improperly acknowledged, will, on a reacknowledgment by her after her husband's death, become valid from the time of such reacknowledgment.[46]

3. Curative Statutes — a. In General. From time to time statutes have been passed in various states validating defective acknowledgments[47] and making them operative as *prima facie* evidence of the due execution of the instrument[48] and as constructive notice to subsequent creditors and purchasers.[49] Under such a statute it has been held that where no rights of third persons have vested in the meantime the instrument is to be regarded as having been properly acknowledged originally.[50]

was acknowledged by husband and wife in 1815, but the acknowledgment was defective as to the wife. In 1829 she again acknowledged it in the proper manner, and the certificate thereof was written on the same sheet of paper as the first certificate. It was held that the two together were sufficient. Newell *v.* Anderson, 7 Ohio St. 12.

Reacknowledgment of appeal bond.— The objection that an appeal bond was not acknowledged before an authorized officer being merely technical, the court will retain the appeal and permit the bond to be properly acknowledged upon the usual terms, if a dismissal would sacrifice any substantial right of the appellant; but not when the appeal itself rests on merely technical grounds. Ridabock *v.* Levy, 8 Paige (N. Y.) 197, 35 Am. Dec. 682.

Kentucky — Perfecting deeds by married women.— The Kentucky act of 1831 provided for perfecting the deeds of married women by reacknowledgment, and privy examination, and by suit in chancery, in which there must be proof of her execution of the deed and of seven years' possession under it. Applegate *v.* Gracy, 9 Dana (Ky.) 215.

43. Vancleave *v.* Wilson, 73 Ala. 387; Cahall *v.* Citizens Mut. Bldg. Assoc., 61 Ala. 232.

44. Smith *v.* Pearce, 85 Ala. 264, 4 So. 616, 7 Am. St. Rep. 44; Durfee *v.* Garvey, 65 Cal. 406, 4 Pac. 377.

45. Ballard *v.* Perry, 28 Tex. 347.

46. Doe *v.* Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445; Coal Creek Min. Co. *v.* Heck, 15 Lea (Tenn.) 497; Breitling *v.* Chester, 88 Tex. 586, 32 S. W. 527 [*reversing* (Tex. Civ. App. 1895) 30 S. W. 464]; Riggs *v.* Boylan, 4 Biss. (U. S.) 445, 20 Fed. Cas. No. 11,822.

As to the effect of an acknowledgment by the wife after the death of her husband see *supra*, IX, E, 2.

As to the ratification by the wife of an unacknowledged or defectively acknowledged instrument see *supra*, II, B, 2, d; III, B, 1, c.

Need not re-sign instrument.— Where, after the death of the husband, the wife reacknowledged a deed executed by her during the coverture, it is not necessary that she should re-sign the same; it is sufficient that she acknowledge it to be her deed. Riggs *v.* Boylan, 4 Biss. (U. S.) 445, 20 Fed. Cas. No. 11,822.

47. See the statutes and the cases cited in the following subdivisions of this section.

California — All recorded instruments.— The California act of April 30, 1860, applied to all instruments in writing recorded in the proper books of the proper county, and was not limited to such as, by reason of noncompliance with some provision of the registry act, failed to impart notice. Wallace *v.* Moody, 26 Cal. 387.

Iowa — Instruments "duly recorded."—The phrase "duly recorded," as used in Iowa Laws (1858), c. 30, § 2, applies to all deeds defectively acknowledged and actually recorded, and is not restricted to those lawfully recorded. Brinton *v.* Seevers, 12 Iowa 389. See also Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Buckley *v.* Early, 72 Iowa 289, 33 N. W. 769; Greenwood *v.* Jenswold, 69 Iowa 53, 28 N. W. 433.

Tennessee — Instruments recorded twenty years.— Under the Tennessee act of 1839, after twenty years of registration all defects of probate are cured, and the presumption is conclusive that the registration was on lawful authority. Stroud *v.* McDaniel, 12 Lea (Tenn.) 617; Stephenson *v.* Walker, 8 Baxt. (Tenn.) 289; Anderson *v.* Bewley, 11 Heisk. (Tenn.) 29; Murdock *v.* Leath, 10 Heisk. (Tenn.) 166; Green *v.* Goodall, 1 Coldw. (Tenn.) 404; Mathewson *v.* Spencer, 4 Sneed (Tenn.) 383; Webb *v.* Den, 17 How. (U. S.) 576, 15 L. ed. 35.

District of Columbia — "Parties in actual possession."— The act of Congress of March 3, 1865, curing defective acknowledgments of deeds "in favor of parties in actual possession," was held not to be restricted to persons in actual physical possession of property. Seizin is presumed to accompany title, and parties are presumed to be in possession under their deeds until the contrary is shown. Hevner *v.* Matthews, 4 App. Cas. (D. C.) 380, 381.

48. Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111; Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670; Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

49. Brown *v.* McCormick, 28 Mich. 215; Ferguson *v.* Bartholomew, 67 Mo. 212; Gatewood *v.* Hart, 58 Mo. 261; Journeay *v.* Gibson, 56 Pa. St. 57.

50. East *v.* Pugh, 71 Iowa 162, 32 N. W. 309.

b. Constitutionality of Statutes — (I) *In General.* In the absence of any constitutional prohibition[51] the legislature of a state has the power, by retroactive legislation, to cure defective acknowledgments of instruments so as to make them valid as against the grantors and those claiming under them with no greater equities.[52] Such a statute creates no new title and affects no rights except such as equitably flow from the grantor, but merely provides a new rule of evidence whereby the intention of the parties may be effectuated.[53]

(II) *As Regards Vested Rights of Third Persons.* Such a statute cannot operate retrospectively so as to interfere with rights of third persons vested at the time of its taking effect.[54] Thus it will not be allowed to affect rights acquired under a judgment or decree rendered before the passage of such act.[55]

(III) *Acknowledgments by Married Women.* In some states it has been held that a statute attempting to cure a material defect in the acknowledgment of a married woman is unconstitutional, because, a proper acknowledgment being absolutely essential to the operative force of her deed, the effect of such statute, instead of merely establishing a new rule of evidence, is to divest a title

Ohio — Certificate of incorporation.— The Ohio act of March 10, 1859, provides for curing defects in the mode of organizing building associations and correcting defects in the acknowledgment of the certificate of incorporation. Where such instrument was acknowledged before an improper officer, but subsequently the mistake was corrected under this act, it was held that the effect of the correction was to make the association a corporation *de jure* from the date of its organization, not only as against persons dealing directly with the association, but as against all others. Spinning *v.* Home Bldg., etc., Assoc., 26 Ohio St. 483.

Two deeds recorded at same instant.— Where two deeds were both recorded on acknowledgments so defective as not to entitle them to record, it was held that a curative statute enacted thereafter had the effect to record both deeds at the same instant of time, and left the operation of the deeds as at common law; and that the first executed passed a title to the land described in it. Deininger *v.* McConnel, 41 Ill. 227.

51. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876.

52. *Arkansas.*— Cupp *v.* Welch, 50 Ark. 294, 7 S. W. 139; Johnson *v.* Richardson, 44 Ark. 365.

Florida.— Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

Iowa.— Newman *v.* Samuels, 17 Iowa 528; Brinton *v.* Seevers, 12 Iowa 389.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

North Carolina.— Gordon *v.* Collett, 107 N. C. 362, 12 S. E. 332.

Ohio.— Barton *v.* Morris, 15 Ohio 408.

Pennsylvania.— Journeay *v.* Gibson, 56 Pa. St. 57; Tate *v.* Stooltzfoos, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546; Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516.

Tennessee.— Hughes *v.* Cannon, 2 Humphr. (Tenn.) 589.

Washington.—Skellinger *v.* Smith, 1 Wash. Terr. 369.

United States.— Webb *v.* Den, 17 How. (U. S.) 576, 15 L. ed. (U. S.) 35; Raverty *v.* Fridge, 3 McLean (U. S.) 230, 20 Fed. Cas. No. 11,586; Moore *v.* Nelson, 3 McLean (U. S.) 383, 17 Fed. Cas. No. 9,771.

Can dispense with acknowledgment altogether.— It is within the power of the legislature to dispense with acknowledgments altogether, and consequently it has also the power to cure defective acknowledgments. Ferguson *v.* Williams, 58 Iowa 717, 13 N. W. 49.

53. Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387; Montgomery *v.* Hobson, Meigs (Tenn.) 437; Johnson *v.* Taylor, 60 Tex. 360.

No vested right in rule of evidence.— "Laws regulating evidence may embrace past transactions. One cannot have a vested right in a rule of evidence." Per Eakin, J., in Reid *v.* Hart, 45 Ark. 41, 51.

No effect on situation of parties.— The statute curing defective acknowledgments has effect only to legalize the certificate and make it competent evidence of the execution of the deed. The situation of the parties is no different from what it would have been if no certificate at all had been indorsed on the deed, but its execution had been proven by parol. Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111.

54. *Arkansas.*— McGehee *v.* McKenzie, 43 Ark. 156.

Iowa.— Newman *v.* Samuels, 17 Iowa 528; Brinton *v.* Seevers, 12 Iowa 389.

Missouri.— Gatewood *v.* Hart, 58 Mo. 261.

North Carolina.— Gordon *v.* Collett, 107 N. C. 362, 12 S. E. 332.

Pennsylvania.— Green *v.* Drinker, 7 Watts & S. (Pa.) 440; Stewart *v.* Dampman, 4 Pa. Super. Ct. 540.

55. Ralston *v.* Moore, 83 Ky. 571; Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516; Garnett *v.* Stockton, 7 Humphr. (Tenn.) 84; Gaines *v.* Catron, 1 Humphr. (Tenn.) 514.

out of one person and vest it in another.[56] But the weight of authority, if not of reason, is to the effect that defects in acknowledgments of married women may properly be cured by statute, such holding being based on the ground that the statute gives to the acts of the parties merely the effect which they intended, but which, from mistake or accident, was not effected.[57]

c. How Construed. Statutes curing defective acknowledgments, being remedial in their nature, should be liberally construed so as to extend to all cases falling plainly within their spirit and policy.[58]

d. To What Instruments Applicable — (I) *Acknowledgments Prior to Passage of Act.* While these curative statutes are sometimes not retroactive in their operation,[59] yet as a rule they are intended to apply only to acknowledgments taken prior to their enactment and do not affect those taken thereafter.[60]

(II) *Instruments Involved in Pending Suits.* Unless it is expressly provided that the statute shall not apply to pending suits[61] it will be held to operate on an instrument involved in a suit which has been commenced, but in which judgment has not been rendered prior to the taking effect of the act.[62]

56. Alabama L. Ins., etc., Co. *v.* Boykin, 38 Ala. 510; Pearce *v.* Patton, 7 B. Mon. (Ky.) 162, 45 Am. Dec. 61; Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76 [*distinguishing* Dulany *v.* Tilghman, 6 Gill & J. (Md.) 461; Hollingsworth *v.* McDonald, 2 Harr. & J. (Md.) 230, 3 Am. Dec. 545]; Den *v.* Barfield, 6 N. C. 391.

Dower cannot be divested by statute.—The Illinois act of Feb. 11, 1853, was designed to dispense with the requirements in reference to the statement, in a certificate of acknowledgment by husband and wife, that the wife had relinquished her dower in a conveyance, made after its passage, as well as to bar all claim of dower, where the statement had been omitted in certificates already made before the passage of the act. It was held that while the statute was competent to accomplish the former purpose, yet the latter was not within the legislative power to declare, the right of dower being a vested right of which the wife cannot be divested by legislative enactment, but only by her own voluntary act in the prescribed manner. Russell *v.* Rumsey, 35 Ill. 362.

57. *Arkansas.*— Williamson *v.* Lazarus, (Ark. 1899) 49 S. W. 974; Johnson *v.* Parker, 51 Ark. 419, 11 S. W. 681; Johnson *v.* Richardson, 44 Ark. 365.

New York.— Constantine *v.* Van Winkle, 6 Hill (N. Y.) 177; Jackson *v.* Gilchrist, 15 Johns. (N. Y.) 89.

Ohio.— Dengenhart *v.* Cracraft, 36 Ohio St. 549; Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387 [*overruling* Silliman *v.* Cummins, 13 Ohio 116; Good *v.* Zercher, 12 Ohio 364].

Pennsylvania.— Shrawder *v.* Snyder, 142 Pa. St. 1, 21 Atl. 796; Lycoming *v.* Union, 15 Pa. St. 166; Mercer *v.* Watson, 1 Watts (Pa.) 330 (wherein land in the possession of the wife's heirs was restored to her grantees); Tate *v.* Stooltzfoos, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546; Underwood *v.* Lilly, 10 Serg. & R. (Pa.) 97.

Tennessee.— Matthewson *v.* Spencer, 3 Sneed (Tenn.) 513, Totten, J., dissenting; Rainey *v.* Gordon, 6 Humphr. (Tenn.) 345.

Texas.— Johnson *v.* Taylor, 60 Tex. 360; McDannell *v.* Horrell, 1 Tex. Unrep. Cas. 521.

Washington.— Skellinger *v.* Smith, 1 Wash. Terr. 369.

United States.— Webb *v.* Den, 17 How. (U. S.) 576, 15 L. ed. 35; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876 [*following* Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458]; Raverty *v.* Fridge, 3 McLean (U. S.) 245, 20 Fed. Cas. No. 11,587.

58. Wallace *v.* Moody, 26 Cal. 387; Hevner *v.* Matthews, 4 App. Cas. (D. C.) 380; Journeay *v.* Gibson, 56 Pa. St. 57.

59. Bernier *v.* Beckier, 37 Ohio St. 72.

60. Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Reynolds *v.* Kingsbury, 15 Iowa 238; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533; Davis *v.* Ruggles, 2 Pinn. (Wis.) 477.

Registration after passage of act.— The Texas act of Feb. 5, 1841, validating the registration of all deeds and conveyances registered before the date of the act, did not apply to a defective acknowledgment made prior to the passage of the act, but not registered until after it. McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691 [*disapproving* Waters *v.* Spofford, 58 Tex. 115].

61. Second action brought by unsuccessful party.— The Pennsylvania act of May 12, 1891, curing defective acknowledgments of married women, provided "that this act shall not apply to suits now pending." It was held that the statute applied to a second action of ejectment brought under a rule by the unsuccessful party to a former ejectment, which was undetermined at the passage of the act. New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557.

Suit incidentally affecting former suit.— Wis. Laws, (1891) c. 288, providing that it should not affect pending suits, was held to apply to a suit, brought after its passage, to quiet title and incidentally to restrain an ejectment suit, although the latter suit was instituted prior to the enactment. Gratz *v.* Land, etc., Imp. Co., 82 Fed. 381, 53 U. S. App. 499, 27 C. C. A. 305, 40 L. R. A. 393.

62. Reid *v.* Hart, 45 Ark. 41; Johnson *v.* Richardson, 44 Ark. 365.

e. What Defects Cured — (I) *In General.* As to what defects are cured by such statute is of course a question depending upon the language of the statute.[63] Among those which have been held to be cured by particular statutes may be mentioned a lack of authority in the officer who took the acknowledgment,[64] the absence of a seal,[65] a failure to show the official character of the officer[66] or that the grantor was known to him to be the person executing the instrument.[67] As a rule these statutes will only cure defects in the acknowledgment, and will not supply an entire lack of acknowledgment[68] or remedy defects in the instrument itself.[69] And so, where the acknowledgment is made an essential part of the instrument,[70] it has been held that a curative statute will not remedy a material defect in such acknowledgment.[71]

(II) *Acknowledgments Taken Outside State.* By many of the curative statutes, defects in acknowledgments taken outside the state are cured.[72] Thus such statutes have been held to remedy a lack of authority on the part of the

63. Omission of matter of substance.—The Illinois act of 1853 was designed to apply to acknowledgments wherein the particulars were defectively set forth, not to those from which a matter of substance was entirely omitted. Lindley *v.* Smith, 46 Ill. 523; Russell *v.* Rumsey, 35 Ill. 362; Short *v.* Conlee, 28 Ill. 219. See also Tourville *v.* Pierson, 39 Ill. 446.

Tenn. Acts (1846), c. 78, providing that the omission of words from a certificate did not vitiate it provided "the substance of the probate" were contained therein, did not cure a certificate which omitted to state that the officer personally knew the acknowledgor, such statement being of the substance. Fall *v.* Roper, 3 Head (Tenn.) 485.

Certificate not showing who executed instrument.—The Michigan curative act of 1861 cures defects in the certificate only when it sufficiently appears by the certificate that the person making the same was legally authorized and that the grantor was personally known to him and acknowledged such deed to be his free act, and it will not cure a certificate which lacks a seal and does not show who executed the instrument. Buell *v.* Irwin, 24 Mich. 145.

Kentucky — Failure of clerk to set forth facts.— The Kentucky act of May 10, 1884, cured a certificate defective because of a failure on the part of the clerk to set forth the facts and include the indorsement made on the instrument by the deputy. Ralston *v.* Moore, 83 Ky. 571.

Acknowledgment by one only of two attorneys.— The acts of Congress of April 20, 1838, and March 3, 1865, cured an acknowledgment defective because executed by only one of two persons who were given a power of attorney to make such acknowledgment. Hevner *v.* Matthews, 4 App. Cas. (D. C.) 380.

64. *Arkansas.*— Bryan *v.* Bryan, 62 Ark. 79, 34 S. W. 260; Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Green *v.* Abraham, 43 Ark. 420.

California.—Wallace *v.* Moody, 26 Cal. 387.

Illinois.— Logan *v.* Williams, 76 Ill. 175.

North Carolina.— Gordon *v.* Collett, 107 N. C. 362, 12 S. E. 332. But see Freeman *v.* Person, 106 N. C. 251, 10 S. E. 1037 (clerk disqualified by interest).

Texas.— Crayton *v.* Hamilton, 37 Tex. 269; McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691.

65. *Indiana.*— Maxey *v.* Wise, 25 Ind. 1.

Minnesota.— Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

Texas.— Waters *v.* Spofford, 58 Tex. 115.

Washington.— Kenyon *v.* Knipe, 2 Wash. Terr. 422, 7 Pac. 854.

Wisconsin.— Williams *v.* Milwaukee Industrial Exposition Assoc., 79 Wis. 524, 48 N. W. 665.

66. Bledsoe *v.* Wiley, 7 Humphr. (Tenn.) 507; Carson *v.* Railsback, 3 Wash. Terr. 168, 13 Pac. 618.

67. Baker *v.* Woodward, 12 Oreg. 3, 6 Pac. 173.

68. Armijo *v.* New Mexico Town Co., 3 N. M. 244, 5 Pac. 709.

69. Greenwood *v.* Jenswold, 69 Iowa 53, 28 N. W. 433; Bowden *v.* Bland, 53 Ark. 53, 13 S. W. 420, 22 Am. St. Rep. 179, wherein an instrument intended to convey the wife's land passed only a dower interest.

Deed not signed nor sealed by wife.— A deed of the lands of a wife, duly acknowledged by the husband under the act of 1820, but not signed or sealed by the wife, is not her "deed or other conveyance" within the curative provision of 75 Ohio Laws, p. 783, § 6, though privately acknowledged by her before an officer. Koltenbrock *v.* Cracraft, 36 Ohio St. 584.

70. See *supra*, II, A, 1, b.

71. Tax deed.— Goodykoontz *v.* Olsen, 54 Iowa 174, 6 N. W. 263.

Sheriff's deed.— Ryan *v.* Carr, 46 Mo. 483.

72. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815; Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111; Brooks *v.* Fairchild, 36 Mich. 231; Bigelow *v.* Livingston, 28 Minn. 57, 9 N. W. 31.

For defects not cured by the statute see Kruger *v.* Walker, (Iowa 1894) 59 N. W. 65; Buell *v.* Irwin, 24 Mich. 145; Brown *v.* Cady, 11 Mich. 535.

For other questions regarding acknowledgments taken outside the state see *supra*, X, A, 3, and cross-references there given.

officer who took the acknowledgment,[73] or the absence of a seal,[74] or of a further certificate of authenticity.[75] But a curative act passed in the state in which the acknowledgment is taken cannot operate to cure defects therein so as to make it valid in the state wherein the land lies.[76]

XIII. Further Certificate of Authenticity and Conformity.

A. Where Acknowledgment Taken Outside State — 1. Necessity for. Under statutes providing for the acknowledgment of instruments in other states it is usually necessary that the authority of the officer who took the acknowledgment be shown,[77] and where the statute recognizes the validity of acknowledgments conforming to the laws of the state in which taken, it must be shown that the officer was authorized by such laws to take the acknowledgment,[78] and that it was taken in accordance therewith.[79] To show these facts, provision is usually made for a further certificate by some specified person authenticating the signature and official character of the officer who took the acknowledgment and the manner in which it was taken; and where this is prescribed, an acknowledgment not so authenticated is of no effect.[80] But where the statute contains no provision requiring such a certificate none is necessary,[81] and the statement of the

73. Stevens *v.* Martin, 18 Pa. St. 101; Baker *v.* Westcott, 73 Tex. 129, 11 S. W. 157; Carson *v.* Thompson, 10 Wash. 295, 38 Pac. 1116.

74. Cole *v.* Wright, 70 Ind. 179.

75. *District of Columbia.*— Hevner *v.* Matthews, 4 App. Cas. (D. C.) 380.
Indiana.— Steeple *v.* Downing, 60 Ind. 478.
Michigan.— Healey *v.* Worth, 35 Mich. 166.
Wisconsin.— Fallass *v.* Pierce, 30 Wis. 443.
United States.— Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521.

76. Wright *v.* Taylor, 2 Dill. (U. S.) 23, 30 Fed. Cas. No. 18,096.

77. De Segond *v.* Culver, 10 Ohio 188; Wallace *v.* Dewey, 3 McLean (U. S.) 548, 29 Fed. Cas. No. 17,099; Moore *v.* Nelson, 3 McLean (U. S.) 383, 17 Fed. Cas. No. 9,771.
As to the necessity of showing the official character of the officer who took the acknowledgment and the sufficiency of such showing see *supra*, XII, D.
For other questions touching acknowledgments taken outside the state see *supra*, X, A, 3, and cross-references there given.

78. McCormick *v.* Evans, 33 Ill. 327; Buckmaster *v.* Job, 15 Ill. 328; Crispen *v.* Hannavan, 50 Mo. 415.

79. Rehkopf *v.* Miller, 59 Ill. App. 662; Phillips *v.* People, 11 Ill. App. 340; Kreuger *v.* Walker, 80 Iowa 733, 45 N. W. 871, 94 Iowa 506, 63 N. W. 320; Crispen *v.* Hannavan, 50 Mo. 415; Hoadley *v.* Stephens, 4 Nebr. 431.

80. *District of Columbia.*— Chafee *v.* Blatchford, 6 Mackey (D. C.) 459.
Georgia.— Wood *v.* Bewick Lumber Co., 103 Ga. 235, 29 S. E. 820.
Illinois.— Booth *v.* Cook, 20 Ill. 129.
Iowa.— Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412.
Kentucky.— Harris *v.* Price, 14 B. Mon. (Ky.) 414; Coleman *v.* Casey, 4 Bibb (Ky.) 516; Johnson *v.* Fowler, 4 Bibb (Ky.) 521.
Michigan.— Dohm *v.* Haskin, 88 Mich. 144, 50 N. W. 108; Pope *v.* Cutler, 34 Mich. 150.
Nebraska.— O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274.
New York.— Goddard *v.* Schmoll, 24 Misc. (N. Y.) 381, 53 N. Y. Suppl. 402; Smith *v.* Smeltzer, 4 Abb. Pr. (N. Y.) 469, 1 Hilt. (N. Y.) 287.
Oregon.— Fleschner *v.* Sumpter, 12 Oreg. 161, 6 Pac. 506; Musgrove *v.* Bonser, 5 Oreg. 313, 20 Am. Rep. 737; Knighton *v.* Smith, 1 Oreg. 276.
Wisconsin.— Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436.
United States.— Morton *v.* Smith, 2 Dill. (U. S.) 316, 17 Fed. Cas. No. 9,867; Goodenough *v.* Warren, 5 Sawy. (U. S.) 494, 10 Fed. Cas. No. 5,534.

81. *Arkansas.*—Ferguson *v.* Peden, 33 Ark. 150.
District of Columbia.— Williams *v.* Ten Eyck, 5 Mackey (D. C.) 168.
Georgia.— Dodge *v.* American Freehold Land Mortg. Co., 109 Ga. 394, 34 S. E. 672.
Illinois.— Irving *v.* Brownell, 11 Ill. 402; Thompson *v.* Schuyler, 7 Ill. 271; Vance *v.* Schuyler, 6 Ill. 160.
Michigan.— Galpin *v.* Abbott, 6 Mich. 17.
Virginia.—Cales *v.* Miller, 8 Gratt. (Va.) 6.
United States.— Carpenter *v.* Dexter, 8 Wall. (U. S.) 513, 19 L. ed. 426.
Nebraska — Officer using official seal.— In Nebraska, where the acknowledgment is taken by an officer using an official seal, no further authentication is necessary, but in all other cases a further certificate of authenticity and conformity is required. O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274; Green *v.* Gross, 12 Nebr. 117, 10 N. W. 459; Hoadley *v.* Stephens, 4 Nebr. 431.
Georgia — Commissioner of deeds.—For the purpose of admitting to record a deed executed in another state, the attestation of a commissioner of deeds for the state of Georgia in such other state is sufficient without a certificate verifying his identity and official character. Dodge *v.* American Freehold Land Mortg. Co., 109 Ga. 394, 34 S. E. 672.

officer's official character in the certificate of acknowledgment will constitute *prima facie* evidence of that fact.[82]

2. Who May Make. No one can make such certificate except an officer authorized to do so by the laws of the state in which the land lies.[83] Authority to a clerk of court to make the certificate extends to his deputy where the act is considered as ministerial.[84]

3. Sufficiency of — a. In General. The certificate must show on its face, and without the aid of extrinsic proof, all the material matters required by the statute.[85] But no more than a substantial compliance with the statute is required, and technical or unsubstantial objections will not be allowed to defeat it.[86]

b. Necessity for Seal. Usually such certificate is required to be under seal,[87] and it has been held that the use of a scroll or private seal instead of the official seal will render the certificate defective.[88]

c. Showing Authority of Officer to Make Certificate. The certificate of authenticity should show on its face that the person who made it was authorized by law to do so.[89]

82. Ives *v.* Kimball, 1 Mich. 308; Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130; St. John *v.* Croel, 5 Hill (N. Y.) 573. And see Gillespie *v.* Johnston, Wright (Ohio) 231.

As to the *prima facie* force of the officer's statement of his official character see *supra*, XII, D, 3.

83. **Clerk of wrong court.**— Under a statute allowing the certificate to be made by the clerk of the county court, district court, or court of common pleas, a certificate by the clerk of a circuit court is not sufficient. People *v.* Register of New York, 6 Abb. Pr. (N. Y.) 180.

Officer of different state.— A certificate by an officer of a foreign state different from the one in which the acknowledgment was taken is of no force in the state in which the land lies. Lyon *v.* Kain, 36 Ill. 362.

Where judge also clerk of court.— Where a deed conveying land is executed out of the state it may be attested by a judge of a court of record who is also clerk of the court, and he may, as clerk of court, certify under the seal of the court to his attestation as judge. Moore *v.* Hill, 59 Ga. 760.

"Chief of the Cherokee Nation."— The certificate of the "Chief of the Cherokee Nation," under its great seal, that the judge before whom the acknowledgment was made was the officer he described himself to be, complies with Battle's Rev. N. C., c. 35, § 8, requiring the certificate of authenticity to be made by the "governor of the state or territory." Whitsett *v.* Forehand, 79 N. C. 230.

Indiana — Secretary of state not authorized. — Where a deed for land lying in Indiana was executed out of the state and acknowledged before a justice of the peace, it was held that under the Indiana statute the clerk of the county, and not the secretary of state, should certify as to the authority of the justice. Strong *v.* Smith, 3 McLean (U. S.) 362, 23 Fed. Cas. No. 13,544.

84. Lynch *v.* Livingston, 6 N. Y. 422 [*affirming* 8 Barb. (N. Y.) 463].

Georgia — Deputy must act in own name. — While it may be true that a deputy clerk may make a certificate of authenticity under a statute authorizing his principal to make it, yet he must make it in his own name and not in the name of his principal. MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77.

85. People *v.* Register of New York, 6 Abb. Pr. (N. Y.) 180.

86. Morse *v.* Hewett, 28 Mich. 481; Harrington *v.* Fish, 10 Mich. 415; Wells *v.* Atkinson, 24 Minn. 161.

For forms of certificates held to be in substantial compliance with the statute see Harding *v.* Curtis, 45 Ill. 252; Winston *v.* Gwathmey, 8 B. Mon. (Ky.) 19.

Presumption that authentication in usual manner.— Where a Virginia deed bore a certificate of acknowledgment signed by two justices of a Pennsylvania court, accompanied by the certificate of a prothonotary that the signers of the first certificate were in fact such justices and entitled to full credit as such, the fact that the prothonotary's certificate was under his seal as such was sufficient to raise a presumption that the certification was "in the manner such acts are usually authenticated by them," as required by the Virginia statute. Loree *v.* Abner, 57 Fed. 159, 6 U. S. App. 649, 6 C. C. A. 302.

87. Buckmaster *v.* Job, 15 Ill. 328; Pope *v.* Cutler, 34 Mich. 150; Musgrove *v.* Bonser, 5 Oreg. 313, 20 Am. Rep. 737; Fisher *v.* Vaughn, 75 Wis. 609, 44 N. W. 831, 833.

But the Michigan statutes in force in 1837 did not require a seal. Hogelskamp *v.* Weeks, 37 Mich. 422.

88. Skinner *v.* Fulton, 39 Ill. 484, wherein the clerk stated that the scroll was used because the seal of the court had been lost. But see Creigh *v.* Beelin, 1 Watts & S. (Pa.) 83, wherein it was held that a certificate under the private seal of the clerk was sufficient, there being no seal of court.

89. Donahue *v.* Klassner, 22 Mich. 252; People *v.* Register of New York, 6 Abb. Pr. (N. Y.) 180.

Failure to show that court one "of record." — Under a statute providing that the certificate of authentication may be made by "any clerk of a court of record within such state," and that it should be under the seal of such court, a certificate purporting to be by the "clerk of the county," and attested by the

d. Showing Authority of Officer Who Took Acknowledgment. The certificate is usually required to show that the officer before whom the acknowledgment was taken was duly authorized to take it.[90] Thus it is not sufficient to state that the acknowledgment was taken before a notary public duly commissioned and sworn, there being no presumption that a notary has the power to take acknowledgments under the laws of another state.[91] And it must appear that the authority of the officer existed at the time the acknowledgment was taken.[92]

e. Showing Genuineness of Signature. The statutes usually require the certificate to state that the person making it is acquainted with the handwriting of the officer who took the acknowledgment[93] and believes his signature to be genuine.[94]

"seal of the county," is not in compliance with the statute. Shephard *v.* Carriel, 19 Ill. 313, 319. But in Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541, it was held that under a statute requiring the certificate to be made by "the proper clerk" it was not necessary for the clerk to show that he was the clerk of a court of record.

Judicial notice that court one of record.— In Michigan it is held that judicial notice may be taken of the fact that a court of a sister state is one of record, so as to sustain a certificate of authenticity by the clerk of such court which fails to show that it is a court of record. Morse *v.* Hewett, 28 Mich. 481; Shotwell *v.* Harrison, 22 Mich. 410.

90. Matter of Wilcox, 1 Misc. (N. Y.) 55, 21 N. Y. Suppl. 780; Matter of Wisner, 3 Dem. Surr. (N. Y.) 11.

Commissioner for another state.— Where a deed to lands lying in Illinois was acknowledged in Pennsylvania, and the certificate of authenticity showed that the acknowledgment was taken before a commissioner of deeds for New York, it was held that the instrument was not entitled to record in Illinois. Lyon *v.* Kain, 36 Ill. 362.

Georgia — Judge of court of record.—Under the section of the code requiring a deed executed in another state to be attested by, *inter alios,* a judge of a court of record, with a certificate of the clerk as to the genuineness of the judge's signature, the clerk's certificate must show that the judge is a judge of a court of record. MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77.

Pennsylvania — Chief officer of place where taken.— Under a statute authorizing the taking of acknowledgments by the chief magistrate or officer of the place where taken, a certificate of authenticity to an instrument acknowledged before a justice of the peace is insufficient which fails to show that such justice was the chief officer of the place. Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610; Rhoades *v.* Selin, 4 Wash. (U. S.) 715, 20 Fed. Cas. No. 11,740. But a certificate stating that the persons who took the acknowledgment were justices of the peace, and that there were no magistrates superior to them in the county, was held to be sufficient. McIntire *v.* Ward, 5 Binn. (Pa.) 296, 6 Am. Dec. 417.

Sufficient showing of authority.— A certificate of acknowledgment of a deed headed "State of Maryland to wit," recited that the grantor personally appeared "before us, two justices of the peace of the State of Maryland for Washington County." The clerk of the county court certified, under the heading, "State of Maryland, Washington County, ss:." that the persons "whose names are signed to the above acknowledgment were, at the time of signing thereof, and still are, justices of the peace for the county aforesaid, duly commissioned and qualified, and to all their acts as such full faith and credit is and ought to be given, as well in courts of justice as thereout." It was held that the two certificates, taken together, sufficiently showed that the justices had been sworn into office and were justices of the county for which they took the acknowledgment. Deery *v.* Cray, 5 Wall. (U. S.) 795, 800, 18 L. ed. 653.

91. Brown *v.* Stilwell, 1 N. Y. St. 132.

92. Phillips *v.* People, 11 Ill. App. 340; Goddard *v.* Schmoll, 24 Misc. (N. Y.) 381, 53 N. Y. Suppl. 402; Hilgendorf *v.* Ostrom, 46 Ill. App. 465, wherein it was held that a certificate of a clerk of court that a certain person "is" a commissioner duly authorized to take proof and acknowledgment of deeds was not sufficient to show that he was such commissioner on the day preceding, when the acknowledgment was taken.

Sufficient recital.— A certificate that the justices "before whom the annexed acknowledgment was made, and who have thereto subscribed their names, were, at the time of so doing," justices duly commissioned and sworn, was held to be sufficient, the words "were at the time of so doing" relating as well to the act of acknowledgment as to the signing of the certificate by the justices. Warner *v.* Hardy, 6 Md. 525.

93. Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753; Brown *v.* Stilwell, 1 N. Y. St. 132. But in Wells *v.* Atkinson, 24 Minn. 161, 165, where the certificate by the clerk stated that "the signature attached to the annexed instrument is genuine," it was held that this necessarily implied the clerk's knowledge of the handwriting of the officer and his belief in its genuineness.

94. Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753.

In Georgia he must certify positively that the signature is genuine, and it is not sufficient to state that he "believes" it to be so. MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77.

f. Showing Conformity with Laws of State Where Taken. Where the statutes of the state in which the land lies allow the acknowledgment to be in accordance with the laws of the state where taken, the certificate must state that such laws were complied with in taking the acknowledgment.[95] A certificate proper in this regard is conclusive of any question as to the form of the acknowledgment.[96]

B. Where Acknowledgment Taken in Other County — 1. Necessity for. Under some statutes, where an acknowledgment is taken in a county other than that in which the land lies, a further certificate of authenticity is required in order to entitle the instrument to registration in the latter county.[97] The registration of an instrument without such certificate is of no effect and becomes operative only from the time the certificate is filed.[98]

2. Sufficiency of. A substantial compliance with the statute is sufficient, and the certificate will not be vitiated by technical defects.[99]

XIV. Admissibility of Evidence in Aid of Certificate.

A. To Remedy Material Defects. It is the general rule that the official certificate is the only competent evidence of the fact of acknowledgment; and where such certificate is defective in a matter of substance, evidence *aliunde* is not admissible to show that the statute was in fact complied with, and that the officer, through mistake, failed to certify the acknowledgment correctly.[1] If such

95. Irwin *v.* Welch, 10 Nebr. 479, 6 N. W. 753; Morton *v.* Smith, 2 Dill. (U. S.) 316, 17 Fed. Cas. No. 9,867.

For a certificate sufficient under the Michigan statutes see Morse *v.* Hewett, 28 Mich. 481.

"Existing" law of the state.— Where the certificate of authenticity was made and attached several years after the acknowledgment of the instrument, and in it the officer certified that the instrument was executed and acknowledged according to the "existing" law of the state, it was held that this would be taken to mean the law existing at the time of the acknowledgment, and the certificate would be upheld. Harrington *v.* Fish, 10 Mich. 415.

96. Culbertson *v.* H. Witbeck Co., 127 U. S. 326, 8 S. Ct. 1136, 32 L. ed. 134.

97. Semple *v.* Miles, 3 Ill. 315; Sitler *v.* McComas, 66 Md. 135, 6 Atl. 527; Milligan *v.* Mayne, 2 Cranch C. C. (U. S.) 210, 17 Fed. Cas. No. 9,606.

Under the New York Act of 1830 an instrument acknowledged before a county court judge not of the degree of counselor at law in the supreme court, or before any commissioner of deeds or notary public, could not be recorded or read in evidence in another county without a further certificate of authenticity by the clerk of his county. Wood *v.* Weiant, 1 N. Y. 77; Campbell *v.* Hoyt, 23 Barb. (N. Y.) 555; Utica, etc., R. Co. *v.* Stewart, 33 How. Pr. (N. Y.) 312; Smith *v.* Smeltzer, 4 Abb. Pr. (N. Y.) 469, 1 Hilt. (N. Y.) 287. But an acknowledgment taken by a county judge of the degree of counselor at law in the supreme court did not require such authentication. People *v.* Hurlbutt, 44 Barb. (N. Y.) 126; Jackson *v.* Phillips, 9 Cow. (N. Y.) 94; Jackson *v.* Chapin, 5 Cow. (N. Y.) 485. The statute was held not to affect an acknowledgment taken prior to its enactment. Hunt *v.* Johnson, 19 N. Y. 279.

Indiana — Acknowledgment taken by notary.— Under Ind. Rev. Stat. 1838, pp. 420, 421, a notary's certificate and seal required no support by the attestation and seal of the clerk of the circuit court where he had taken an acknowledgment of a conveyance of lands lying without his county. Doe *v.* Vandewater, 7 Blackf. (Ind.) 6.

98. Reasoner *v.* Edmundson, 5 Ind. 393; Fersner *v.* Bradley, 87 Md. 488, 40 Atl. 58.

99. Beall *v.* Lynn, 6 Harr. & J. (Md.) 336.

Words equivalent to statutory language.— The words "legally authorized and assigned" are equivalent to the statutory expression "duly commissioned and sworn." Hall *v.* Gittings, 2 Harr. & J. (Md.) 380.

Omission to state name and official character of officer.— The omission of the county clerk's certificate to state the name and official character of the officer who took the acknowledgment may be supplied from the certificate of acknowledgment. Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 33 N. Y. Suppl. 664.

The absence of a date from the clerk's certificate of authenticity does not vitiate it where there is no statute requiring a date. Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 33 N. Y. Suppl. 664.

Absence of seal from record.— The mere absence, from the record of a deed, of the seal of the county clerk to his certificate of authenticity does not vitiate it, notwithstanding the statute requires the certificate to be under seal as a condition of allowing the record of such deed to be admitted in evidence; the presumption that the clerk performed his duty, with a recital in the certificate that the seal was attached, being sufficient evidence thereof. Thorn *v.* Mayer, 12 Misc. (N. Y.) 487, 33 N. Y. Suppl. 664.

1. *Alabama.*— Scott *v.* Simons, 70 Ala. 352.

Connecticut.—Hayden *v.* Westcott, 11 Conn. 129; Pendleton *v.* Button, 3 Conn. 406.

Illinois.— Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Lindley *v.* Smith, 46 Ill. 523; Ennor *v.* Thompson, 46 Ill. 214.

evidence were allowed to supply a material part of the certificate, then logically it would be admissible to supply an entire certificate, and the acknowledgment might therefore rest in parol.[2] Thus it has been held that parol evidence is not admissible to show who made the acknowledgment[3] or to remedy an omission to state that the acknowledgor was known to the officer.[4] And so it cannot be shown by parol in support of a defective certificate of a married woman's acknowledgment that she was in fact privately examined as required by the statute,[5] or that the instrument was explained to her,[6] or that she acknowledged having executed it voluntarily.[7]

B. To Remedy Unsubstantial Objections. But parol evidence is admissible to supply matters not deemed to be of the substance of the certificate,[8] and in cases where it is not admissible to validate the acknowledgment such evidence will sometimes be admitted for other purposes.[9]

Iowa.— O'Ferrall *v.* Simplot, 4 Greene (Iowa) 162, 4 Iowa 381.

Missouri.— McClure *v.* McClurg, 53 Mo. 173; Chauvin *v.* Wagner, 18 Mo. 531.

New York.— Elwood *v.* Klock, 13 Barb. (N. Y.) 50.

North Carolina.— Harrell *v.* Elliott, 1 N. C. 86.

Pennsylvania.— Williams *v.* Baker, 71 Pa. St. 476; Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724; Watson *v.* Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462.

Tennessee.— Mount *v.* Kesterson, 6 Coldw. (Tenn.) 452; Garnett *v.* Stockton, 7 Humphr. (Tenn.) 84.

Texas.— Looney *v.* Adamson, 48 Tex. 619; McKellar *v.* Peck, 39 Tex. 381.

Vermont.— Wood *v.* Cochrane, 39 Vt. 544.

Virginia.— Harrisonburg First Nat. Bank *v.* Paul, 75 Va. 594.

West Virginia.—Leftwich *v.* Neal, 7 W. Va. 569.

United States.— Elliott *v.* Piersol, 1 Pet. (U. S.) 328, 7 L. ed. 164 [*affirming* 1 McLean (U. S.) 11, 8 Fed. Cas. No. 4,395].

Failure to show release of homestead.— An acknowledgment which fails to show a release of the homestead exemption cannot be varied by parol evidence that at the time it was made the homestead was in fact waived, and that the justice neglected to so certify. Ennor *v.* Thompson, 46 Ill. 214.

2. Hayden *v.* Westcott, 11 Conn. 129.

3. Wood *v.* Cochrane, 39 Vt. 544.

4. Lindley *v.* Smith, 46 Ill. 523.

But in New York extrinsic evidence has been held to be admissible for this purpose. Hutton *v.* Webber, 60 N. Y. Super. Ct. 247, 17 N. Y. Suppl. 463. In Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92, the defect was remedied by reference to another certificate, made on the same day, which contained a proper recital as to the acknowledgor's identity.

5. *Alabama.*— Cox *v.* Holcomb, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721.

New York.— Elwood *v.* Klock, 13 Barb. (N. Y.) 50.

Oregon.— Harty *v.* Ladd, 3 Oreg. 353.

Pennsylvania.—Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268 11 Am. Dec. 724.

Texas.— Looney *v.* Adamson, 48 Tex. 619.

Canada.— Stayner *v.* Applegate, 8 U. C. C. P. 133, 451.

6. Silliman *v.* Cummins, 13 Ohio 116; Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516.

7. Stone *v.* Sledge, (Tex. Civ. App. 1894) 24 S. W. 697.

8. Claflin *v.* Smith, 35 Hun (N. Y.) 372, wherein evidence was admitted to supply the omission of a single word.

Date.— The true date of an acknowledgment may be shown by parol. Jordan *v.* Mead, 12 Ala. 247; Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462; Hoit *v.* Russell, 56 N. H. 559; Gest *v.* Flock, 2 N. J. Eq. 108. But see Greene *v.* Godfrey, 44 Me. 25.

Place of taking acknowledgment.— Where an acknowledgment was objected to on the ground that the name of the county was omitted from the caption of the certificate, it was held that the objection was obviated by proof that the subscribing justice was, at the time of taking the acknowledgment, a justice for the county wherein it was taken. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89. See also Rogers *v.* Pell, 47 N. Y. App. Div. 240, 62 N. Y. Suppl. 92, wherein parol evidence was admitted to show that the acknowledgment was taken at a place other than that laid in the venue of the certificate.

9. **Two instruments written on same sheet.** — Where a joint deed by husband and wife, of the wife's land, dated May 16, and a relinquishment by the wife of her dower in the same lands, dated May 17, appear on the same sheet of paper with the certificate of a justice to the effect that the wife on private examination "acknowledged that she signed, sealed, and delivered the foregoing instrument as her voluntary act and deed," it cannot be shown by the parol testimony of the officer that the acknowledgment was intended by himself and the wife to apply to the deed and not to the relinquishment; but it may be thus shown that at the time the acknowledgment was taken the relinquishment of dower had not been made. Doe *v.* Wilkinson, 35 Ala. 453.

To prove execution of deed.— The testimony of a notary as to the acknowledgment of a deed to which he had omitted to affix his seal is competent to prove the execution of

C. To Show Officer's Authority. The admissibility of extrinsic evidence to show the official character of the person who took the acknowledgment depends upon whether or not the statute requires such fact to be shown by the certificate.[10] If there is such a requirement, evidence cannot be admitted to supply the omission;[11] but where the official character is not required to appear from the certificate, the officer's authority to take acknowledgments may be shown by parol.[12]

XV. Impeachment of Certificate.

A. Conclusiveness — 1. Where Some Kind of Acknowledgment Made — a. As to Facts Which Officer Required to Certify — (I) *When Prima Facie Only.* Under the statutes of some states a certificate of acknowledgment regular on its face is only *prima facie* evidence of the facts recited therein, and may always be rebutted by competent proof that such recitals are not true in fact, without showing fraud or imposition.[13] And in one state the same seems to have been held independently of statute.[14]

the deed, but not to affect the validity of its record as notice to other parties. King *v.* Russell, 40 Tex. 124.

To show when indorsement made.— The person who, at the instance of the clerk, indorsed on a deed the certificate of a married woman's relinquishment, is a competent witness to prove the time when such indorsement was made. Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114.

10. As to the necessity for the officer's official character to appear from the certificate see *supra*, XII, D.

11. Johnston *v.* Haines, 2 Ohio 55; Coffey *v.* Hendricks, 66 Tex. 676, 2 S. W. 47; Gulf, etc., R. Co. *v.* Carter, 5 Tex. Civ. App. 675, 24 S. W. 1083.

A further certificate of authenticity must show on its face that the person who made it was authorized by statute to do so; and extrinsic proof is not admissible to show that fact. People *v.* Register of New York, 6 Abb. Pr. (N. Y.) 180.

12. *California.*— Fabian *v.* Callahan, 56 Cal. 159.

Maryland.— Byer *v.* Etnyre, 2 Gill (Md.) 150, 41 Am. Dec. 410.

Mississippi.— Russ *v.* Wingate, 30 Miss. 440.

New Hampshire.—Bellows *v.* Copp, 20 N. H. 492.

Pennsylvania.— Bennet *v.* Paine, 7 Watts (Pa.) 334, 32 Am. Dec. 765; Scott *v.* Gallagher, 11 Serg. & R. (Pa.) 347.

South Carolina.— Carolina Sav. Bank *v.* McMahon, 37 S. C. 309, 16 S. E. 31.

United States.— U. S. Bank *v.* Benning, 4 Cranch C. C. (U. S.) 81, 2 Fed. Cas. No. 908; Shults *v.* Moore, 1 McLean (U. S.) 520, 22 Fed. Cas. No. 12,824; Rhoades *v.* Selin, 4 Wash. (U. S.) 715, 20 Fed. Cas. No. 11,740.

Canada.—Robinson *v.* Wilson, 5 N. Brunsw. 301.

Residence of grantor as affecting officer's authority.— The acknowledgment of a deed of lands lying in New Jersey can be taken in another state only when the grantor resides in such other state. Where the face of the deed or the certificate of acknowledgment shows the residence of the grantor it is *prima facie* evidence of the authority of the officer taking the acknowledgment. If it do not so appear the grantor's residence may be proved by other evidence. Graham *v.* Whitely, 26 N. J. L. 254. See also Rehkopf *v.* Miller, 59 Ill. App. 662, wherein parol testimony was admitted to show that the officer was a justice of the town in which the mortgagor resided.

13. Woods *v.* Polhemus, 8 Ind. 60; Romer *v.* Conter, 53 Minn. 171, 54 N. W. 1052; Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433; Annan *v.* Folsom, 6 Minn. 500; Drury *v.* Foster, 1 Dill. (U. S.) 460, 7 Fed. Cas. No. 4,096 [construing the Minnesota statute]; Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804; Barrett *v.* Davis, 104 Mo. 549, 16 S. W. 377; Pierce *v.* Georger, 103 Mo. 540, 15 S. W. 848; Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731; Rust *v.* Goff, 94 Mo. 511, 7 S. W. 418; Webb *v.* Webb, 87 Mo. 540; Drew *v.* Arnold, 85 Mo. 128; Belo *v.* Mayes, 79 Mo. 67; Clark *v.* Edwards, 75 Mo. 87; Steffen *v.* Bauer, 70 Mo. 399; Sharpe *v.* McPike, 62 Mo. 300; Wannell *v.* Kem, 57 Mo. 478. But see Springfield Engine, etc., Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500, wherein it was held that a married woman who, at the time the acknowledgment was taken, informed the officer that she was acting freely and voluntarily, could not, as against an innocent grantee, show that she was coerced by her husband into executing the deed, neither the grantee nor the officer having knowledge of such coercion. The court attempted to distinguish the foregoing cases.

California — Release from liability for breach of promise.— The certificate of acknowledgment or proof of a receipt and release from liability for breach of promise of marriage, taken before a notary public, is, under Cal. Code Civ. Proc. § 1948, only *prima facie* evidence of the execution of the writing; and plaintiff in an action for such breach may, by her own testimony, controvert the facts therein contained, under Code Civ. Proc. § 1961, providing that "a presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect." Moore *v.* Hopkins, 83 Cal. 270, 272, 23 Pac. 318, 17 Am. St. Rep. 248.

14. Hays *v.* Hays, 5 Rich. (S. C.) 31. See also *dictum* of Brewer, J., in Wilkins *v.* Moore, 20 Kan. 538.

(II) *When Conclusive.* But independently of statute it is a well-settled rule that where a grantor has appeared and made some kind of acknowledgment before an officer having jurisdiction, a certificate, regular in form, is conclusive as to all those matters which the officer is required by law to certify, and, in the absence of any showing of fraud or imposition in the procurement of the acknowledgment, cannot be impeached by merely denying that the acknowledgment was taken in the manner certified by the officer.[15] In order to render parol evidence

15. *Alabama.*— Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663, 26 So. 527; American Freehold Land Mortg. Co. *v.* Thornton, 108 Ala. 258, 19 So. 529; Read *v.* Rowan, 107 Ala. 366, 18 So. 211; American Freehold Land Mortg. Co. *v.* James, 105 Ala. 347, 16 So. 887; Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91; Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; Shelton *v.* Aultman, etc., Co., 82 Ala. 315, 8 So. 232; Downing *v.* Blair, 75 Ala. 216; Moog *v.* Strang, 69 Ala. 98; Worrell *v.* McDonald, 66 Ala. 572; Cahall *v.* Citizens Mut. Bldg. Assoc., 61 Ala. 232; Coleman *v.* Smith, 55 Ala. 368; Miller *v.* Marx, 55 Ala. 322.

Arkansas.— Petty *v.* Grisard, 45 Ark. 117; Donahue *v.* Mills, 41 Ark. 421; Meyer *v.* Gossett, 38 Ark. 377.

California.— Banning *v.* Banning, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156. But see Moore *v.* Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248, which was decided under a statute making the certificate only *prima facie* evidence in regard to certain instruments.

Illinois.— Massey *v.* Huntington, 118 Ill. 80, 7 N. E. 269; Strauch *v.* Hathaway, 101 Ill. 11, 40 Am. Rep. 193; Fitzgerald *v.* Fitzgerald, 100 Ill. 385; Blackman *v.* Hawks, 89 Ill. 512; Monroe *v.* Poorman, 62 Ill. 523; Hill *v.* Bacon, 43 Ill. 477; Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89; Young *v.* Harris, 74 Ill. App. 667; O'Donnell *v.* Kelliher, 62 Ill. App. 641.

Maine.— Greene *v.* Godfrey, 44 Me. 25.

Maryland.—Bissett *v.* Bissett, 1 Harr. & M. (Md.) 211. See also Hutchins *v.* Dixon, 11 Md. 29.

Michigan.— Saginaw Bldg., etc., Assoc. *v.* Tennant, 111 Mich. 515, 69 N. W. 1118.

Mississippi.—Johnston *v.* Wallace, 53 Miss. 331, 24 Am. Rep. 699.

Nebraska.— Council Bluffs Sav. Bank *v.* Smith, 59 Nebr. 90, 80 N. W. 270; Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235.

New Jersey.— Homœopathic Mut. L. Ins. Co. *v.* Marshall, 32 N. J. Eq. 103 [in effect *overruling* Marsh *v.* Mitchell, 26 N. J. Eq. 497, 27 N. J. Eq. 631].

New York.— Mutual L. Ins. Co. *v.* Corey, 135 N. Y. 326, 31 N. E. 1095. But see Thurman *v.* Cameron, 24 Wend. (N. Y.) 87; Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

North Carolina.— Ware *v.* Nesbit, 94 N. C. 664.

Ohio.— Williamson *v.* Carskadden, 36 Ohio St. 664; Baldwin *v.* Snowden, 11 Ohio St. 203, 78 Am. Dec. 303; Lemmon *v.* Hutchins, 1 Ohio Cir. Ct. 388.

Oregon.— Moore *v.* Fuller, 6 Oreg. 272, 25 Am. Rep. 524; Dolph *v.* Barney, 5 Oreg. 191.

Pennsylvania.— Carr *v.* H. C. Frick Coke Co., 170 Pa. St. 62, 32 Atl. 656; Heilman *v.* Kroh, 155 Pa. St. 1, 25 Atl. 751; Citizen's Sav., etc., Assoc. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733; Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Miller *v.* Wentworth, 82 Pa. St. 280; Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Williams *v.* Baker, 71 Pa. St. 476; Jamison *v.* Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; Creighton *v.* Ladley, 6 Phila. (Pa.) 209, 24 Leg. Int. (Pa.) 92; Richart *v.* Wisner, 2 Kulp (Pa.) 395.

Rhode Island.— Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 691.

Tennessee.— Shields *v.* Netherland, 5 Lea (Tenn.) 193; Vaughn *v.* Carlisle, 2 Lea (Tenn.) 525; Campbell *v.* Taul, 3 Yerg. (Tenn.) 548.

Texas.— Waltee *v.* Weaver, 57 Tex. 569; Kocourek *v.* Marak, 54 Tex. 201, 38 Am. Rep. 623; Williams *v.* Pouns, 48 Tex. 141; Wiley *v.* Prince, 21 Tex. 637; Hartley *v.* Frosh, 6 Tex. 208, 55 Am. Dec. 772; Atkinson *v.* Reed, (Tex. Civ. App. 1898) 49 S. W. 260; Summers *v.* Sheern, (Tex. Civ. App. 1896) 37 S. W. 246; Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151; Herring *v.* White, 6 Tex. Civ. App. 249, 25 S. W. 1016.

Virginia.— Murrell *v.* Diggs, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893; Burson *v.* Andes, 83 Va. 445, 8 S. E. 249; Carper *v.* McDowell, 5 Gratt. (Va.) 212; Harkins *v.* Forsyth, 11 Leigh (Va.) 294. But see Hutchison *v.* Rust, 2 Gratt. (Va.) 394.

West Virginia.— Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; Rollins *v.* Menager, 22 W. Va. 461; Ocheltree *v.* McClung, 7 W. Va. 232.

United States.— Hitz *v.* Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 L. ed. 156.

As to the effect of a certificate, regular on its face, as raising a presumption that the instrument was duly executed and delivered, see *supra*, IV, C.

Fraud or mistake.— Under Ky. Gen. Stat. c. 81, § 17, a certificate is, except in a direct proceeding against the officer or his sureties, impeachable only for fraud infecting the party benefited or mistake on the part of the officer. Keith *v.* Silberberg, (Ky. 1895) 29 S. W. 316; Shaw *v.* Shaw, (Ky. 1894) 24 S. W. 630; Davis *v.* Jenkins, 93 Ky. 353, 20 S. W. 283, 40 Am. St. Rep. 197; Razor *v.* Dowan, (Ky. 1890) 13 S. W. 914; Tichenor *v.* Yankey, 89 Ky. 508, 12 S. W. 947; Ritter *v.* Bell, (Ky. 1887) 2 S. W. 675; Cox *v.* Gill, 83 Ky. 669; Dowell *v.* Mitchell, 82 Ky. 47; Harpending *v.* Wylie, 14 Bush (Ky.) 380; Pribble *v.* Hall, 13 Bush (Ky.) 61. Under an earlier statute, however, the certificate was merely *prima facie* evidence, and extra-

admissible the pleading must contain allegations showing such fraud or imposition.[16] Thus, where the certificate of a married woman's acknowledgment is in the form prescribed by statute, it is not sufficient, in order to impeach it, to allege that she was not privately examined, or that the instrument was not explained to her, or that she did not release her homestead right: there must be some allegation of fraud or imposition practised upon her, some fraudulent combination between the parties interested and the officer who took the acknowledgment.[17]

(III) *Impeachment for Fraud or Imposition*—(A) *As to Persons With Notice.* As between the immediate parties to a conveyance, evidence is admissible to impeach the certificate for fraud, duress, or imposition in which the grantee participated or of which he had notice before parting with his money.[18] Where

neous evidence was admissible to show that its recitals were untrue. Hughes *v.* Coleman, 10 Bush (Ky.) 246; Woodhead *v.* Foulds, 7 Bush (Ky.) 222; Ford *v.* Teal, 7 Bush (Ky.) 156.

What constitutes "mistake."— That the officer did not in fact take the acknowledgment in the manner certified does not constitute a "mistake" within the meaning of Ky. Gen. Stat. c. 81, § 17, being a mere failure of the officer to do his duty. Tichenor *v.* Yankey, 89 Ky. 508, 12 S. W. 947; Cox *v.* Gill, 83 Ky. 669.

Acknowledgment taken through telephone. — Evidence that a married woman's acknowledgment was taken by a notary through a telephone when she was three miles distant is not admissible to dispute the official certificate of the notary in due form, in the absence of any allegations of fraud, duress, or mistake. Banning *v.* Banning, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156.

Acknowledgment taken by interpreter.— Where the deed was explained to the married woman through the medium of an interpreter selected by herself, it was held that she could not be heard to impeach the certificate on the ground that such interpreter was incompetent or corrupt or had failed to interpret correctly. Waltee *v.* Weaver, 57 Tex. 569. See also Herring *v.* White, 6 Tex. Civ. App. 249, 25 S. W. 1016.

Acknowledgment in open court by county treasurer.— Parol evidence is not admissible to contradict the record of an acknowledgment made in open court by a county treasurer. Duff *v.* Wynkoop, 74 Pa. St. 300.

Acknowledgment of sheriff's deed.— Parol evidence is not admissible to show that the sheriff's acknowledgment of a deed had been fraudulently altered by the prothonotary's clerk. Hoffman *v.* Coster, 2 Whart. (Pa.) 453.

16. Dowell *v.* Mitchell, 82 Ky. 47; Moore *v.* Fuller, 6 Oreg. 272, 25 Am. Rep. 524; Dolph *v.* Barney, 5 Oreg. 191.

When not a question for jury.— In the absence of evidence tending to impeach the genuineness of the certificate it should not be left to the jury to determine whether the instrument was executed and acknowledged in the manner certified. Hultz *v.* Ackley, 63 Pa. St. 142. The sufficiency of the acknowledgment is a question for the court. Bullock *v.* Narrott, 49 Ill. 62.

Objection to admission must be taken at trial.— The objection that parol testimony was inadmissible to impeach a certificate of acknowledgment cannot be raised for the first time on appeal. Le Mesnager *v.* Hamilton, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81.

17. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89; Hartley *v.* Frosh, 6 Tex. 208, 55 Am. Dec. 772; Hitz *v.* Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 L. ed. 156.

18. *Alabama.*— Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; Smith *v.* McGuire, 67 Ala. 34.

Arkansas.— Holt *v.* Moore, 37 Ark. 145.

Colorado.— Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

Illinois.— Fitzgerald *v.* Fitzgerald, 100 Ill. 385; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537.

Maryland.— Davis *v.* Hamblin, 51 Md. 525; Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Massachusetts.— O'Neil *v.* Webster, 150 Mass. 572, 23 N. E. 235; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Mississippi.— Allen *v.* Lenoir, 53 Miss. 321.

Ohio.— Williamson *v.* Carskadden, 36 Ohio St. 664.

Pennsylvania.— Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Hall *v.* Patterson, 51 Pa. St. 289; Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, 27 Pa. St. 22, 67 Am. Dec. 442; Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538; Richart *v.* Wisner, 2 Kulp (Pa.) 395.

Texas.— Pierce *v.* Fort, 60 Tex. 464; Westbrooks *v.* Jeffers, 33 Tex. 86; Wiley *v.* Prince, 21 Tex. 637. See also Breitling *v.* Chester, 88 Tex. 586, 32 S. W. 527.

West Virginia.— Rollins *v.* Menager, 22 W. Va. 461.

Where no innocent purchasers have intervened.— The certificate of a magistrate to the acknowledgment of a deed to her separate estate by a married woman to her husband will not avail, where innocent purchasers have not intervened, to prevent her heir from avoiding the deed on the ground of undue influence on the part of the husband. Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726.

Where the agent of the mortgagee conspired with the husband to coerce the wife

the grantee has knowledge of circumstances such as would put an honest man on inquiry as to the manner in which the acknowledgment was obtained, but wilfully shuts his eyes so that he may not see any fraudulent element in the transaction, he will be affected with notice of the fraud as much as if he had joined in it.[19]

(B) *As to Persons Without Notice.* As against an innocent party who, relying on the certificate, has in good faith parted with an adequate consideration, without knowing or having any reason to believe that such certificate is false, parol evidence is not admissible even to show fraud, duress, or imposition in the procurement of the acknowledgment.[20] A purchaser is not obliged to see that the officer does his duty in taking the grantor's acknowledgment: he is required only to act fairly in the transaction and not to take advantage knowingly of the fraudulent conduct of others.[21] And so, where a purchaser has in good faith relied on a certificate of a married woman's acknowledgment, regular on its face,

into executing a mortgage on her separate estate it was held that evidence of such facts was admissible to impeach the certificate. Wiley *v.* Prince, 21 Tex. 637.

Husband as agent of mortgagee.— A married woman's right to avoid a mortgage because of duress is not impaired, nor is the mortgagee's right to set the mortgage up as valid strengthened, because the mortgagee personally took no part in procuring its execution, but its execution was obtained by the husband to secure his debt to the mortgagee; the husband being deemed the agent of the mortgagee. Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Kentucky — What fraud within meaning of statute.— The fraud which, under the Kentucky statute, will let in the inquiry into the truth of the officer's certificate, must relate to the obtaining of the certificate itself, and not to the making of the instrument acknowledged. Pribble *v.* Hall, 13 Bush (Ky.) 61.

Defense must be set up in answer.— In a suit for the specific performance of a married woman's contract to convey her land, if defendant desires to attack the certificate of acknowledgment the defense must be set up in the answer. Marsh *v.* Mitchell, 26 N. J. Eq. 497 [*affirmed* in 27 N. J. Eq. 631].

19. Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, 27 Pa. St. 22, 67 Am. Dec. 442; Pierce *v.* Fort, 60 Tex. 464.

20. *Alabama.*— Giddens *v.* Bolling, 99 Ala. 319, 13 So. 511; Moses *v.* Dade, 58 Ala. 211.

Arkansas.— Holt *v.* Moore, 37 Ark. 145.

California.— De Arnaz *v.* Escandon, 59 Cal. 486.

Illinois.— Ladew *v.* Paine, 82 Ill. 221; Marston *v.* Brittenham, 76 Ill. 611; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634.

Iowa.— McHenry *v.* Day, 13 Iowa 445, 81 Am. Dec. 438.

Kentucky.—Pribble *v.* Hall, 13 Bush (Ky.) 61.

Mississippi.— Kenneday *v.* Price, 57 Miss. 771; Johnston *v.* Wallace, 53 Miss. 331, 24 Am. Rep. 699.

Ohio.— Baldwin *v.* Snowden, 11 Ohio St. 203, 78 Am. Dec. 303.

Oregon.— Moore *v.* Fuller, 6 Oreg. 272, 25 Am. Rep. 524.

Pennsylvania.— Singer Mfg. Co. *v.* Rook, 84 Pa. St. 442, 24 Am. Rep. 204; Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Williams *v.* Baker, 71 Pa. St. 476; Hall *v.* Patterson, 51 Pa. St. 289; Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538; Richart *v.* Wisner, 2 Kulp (Pa.) 395.

Tennessee.— Shields *v.* Netherland, 5 Lea (Tenn.) 193; Shell *v.* Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. 909; Finnegan *v.* Finnegan, 3 Tenn. Ch. 510.

Texas.— Webb *v.* Burney, 70 Tex. 322, 7 S. W. 841; Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206; Henderson *v.* Terry, 62 Tex. 281; Pierce *v.* Fort, 60 Tex. 464; Davis *v.* Kennedy, 58 Tex. 516; Waltee *v.* Weaver, 57 Tex. 569; Kocourek *v.* Marak, 54 Tex. 201, 38 Am. Rep. 623; Pool *v.* Chase, 46 Tex. 207; Forbes *v.* Thomas, (Tex. Civ. App. 1899) 51 S. W. 1097; Summers *v.* Sheern, (Tex. Civ. App. 1896) 37 S. W. 246; McDannell *v.* Horrell, 1 Tex. Unrep. Cas. 521.

A subsequent grantee will not be affected by fraud, mistake, or imposition attending the procurement of the grantor's title, unless he participated therein or had notice thereof. Forbes *v.* Thomas, (Tex. Civ. App. 1899) 51 S. W. 1097; Summers *v.* Sheern, (Tex. Civ. App. 1896) 37 S. W. 246.

Missouri — Limitation of doctrine.— In Springfield Engine, etc., Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500, it was held that a married woman who, at the time her acknowledgment was taken, declared to the officer that she was acting freely and voluntarily, could not show, as against an innocent purchaser for value, that she was coerced by her husband into executing the deed. This case would seem to modify the rule established by a long line of decisions in Missouri to the effect that a certificate is only *prima facie* evidence of the facts recited. See cases cited *supra*, XV, A, 1, a, (I).

21. Pierce *v.* Fort, 60 Tex. 464.

Adequacy of consideration.— Unless the consideration for the conveyance is so grossly inadequate and unreasonable as to excite suspicion of unfairness and undue influence and put the purchaser on inquiry, the certificate cannot be impeached for fraud of which the purchaser has no notice. Webb *v.* Burney, 70 Tex. 322, 7 S. W. 841.

she cannot avoid her deed by showing fraud or coercion on the part of her husband,[22] or misconduct on the part of the officer who took the acknowledgment.[23]

(IV) *Impeachment for Lack of Jurisdiction.* An acknowledgment taken by an officer outside his jurisdiction is usually held to be void,[24] and where this is the case the lack of jurisdiction may be shown by parol even against an innocent purchaser, though it appears on the face of the certificate that such acknowledgment was taken inside the officer's jurisdictional limits.[25]

b. As to Facts Which Officer Not Required to Certify — (I) *In General.* A certificate of acknowledgment is not conclusive as to matters regarding which the officer is not required by law to certify.[26]

(II) *Mental Incapacity of Grantor.* Therefore it may be shown by parol that the grantor was mentally incapable of contracting at the time the acknowledgment was made.[27]

(III) *Infancy of Grantor.* And so it has been held that a statement, in the certificate of a married woman's acknowledgment, that she was of full age when the acknowledgment was taken, may be impeached by evidence showing that in fact she was a minor.[28]

2. Where No Acknowledgment Ever Made. Where, in fact, the grantor has never appeared before the officer and acknowledged the instrument, evidence to show that the certificate, though regular on its face, is a forgery or an entire fabrication of the officer, is admissible even as against an innocent purchaser for value and without notice.[29] A simple denial that the alleged grantor ever made

22. *Alabama.*— Moses *v.* Dade, 58 Ala. 211.
California.— De Arnaz *v.* Escandon, 59 Cal. 486.
Illinois.— Ladew *v.* Paine, 82 Ill. 221; Marston *v.* Brittenham, 76 Ill. 611.
Ohio.— Baldwin *v.* Snowden, 11 Ohio St. 203, 78 Am. Dec. 303.
Tennessee.— Shields *v.* Netherland, 5 Lea (Tenn.) 193.
Texas.— Webb *v.* Burney, 70 Tex. 322, 7 S. W. 841; Pool *v.* Chase, 46 Tex. 207.
Threat of husband to kill himself.— Testimony detailing the conversation between a husband and wife, not had in the presence of the mortgagee, in an action wherein the wife attacks the validity of a mortgage on the ground that she was induced to sign it by false representations and duress, tending to show that the husband had threatened to leave her and kill himself if she did not sign it, is inadmissible to impeach the certificate. Shell *v.* Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. 909.

23. McHenry *v.* Day, 13 Iowa 445, 81 Am. Dec. 438; Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

24. See *supra*, VI, C.

25. Cheney *v.* Nathan, 110 Ala. 254, 20 So. 99, 55 Am. St. Rep. 26; New England Mortg. Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656.
Showing lack of authority in officer.— A certificate of a county clerk that the person whose name was subscribed to a certificate of acknowledgment as justice of the peace did not hold such office at the date of the acknowledgment was held to be admissible to show that fact, though not conclusive evidence thereof. Ross *v.* Hole, 27 Ill. 104.

26. Thompson *v.* New England Mortg. Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; Williams *v.* Baker, 71 Pa. St. 476.

27. Thompson *v.* New England Mortg. Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 161.

28. Williams *v.* Baker, 71 Pa. St. 476; Ledger Loan, etc., Assoc. *v.* Cook, 6 Wkly. Notes Cas. (Pa.) 428.
In North Carolina it was formerly held that a married woman's acknowledgment operated as a conveyance of record and could not be impeached on the ground of infancy or mental incapacity of the grantor. Wright *v.* Player, 72 N. C. 94; Woodbourne *v.* Gorrel, 66 N. C. 82. But under N. C. Rev. Code, c. 37, § 8, the certificate is no longer given such conclusive force and may be impeached on the ground of infancy or other disability of the grantor. Epps *v.* Flowers, 101 N. C. 158, 7 S. E. 680; Ware *v.* Nesbit, 94 N. C. 664; Jones *v.* Cohen, 82 N. C. 75.

29. *Alabama.*— Giddens *v.* Bolling, 99 Ala. 319, 13 So. 511; Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58.
Arkansas.— Petty *v.* Grisard, 45 Ark. 117; Donahue *v.* Mills, 41 Ark. 421; Meyer *v.* Gossett, 38 Ark. 377.
California.— Le Mesnager *v.* Hamilton, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81.
Connecticut.— Smith *v.* Ward, 2 Root (Conn.) 374, 1 Am. Dec. 80.
Iowa.— Borland *v.* Walrath, 33 Iowa 130; Van Orman *v.* McGregor, 23 Iowa 300; Morris *v.* Sargent, 18 Iowa 90.
Massachusetts.— O'Neil *v.* Webster, 150 Mass. 572, 23 N. E. 235.
Michigan.— Camp *v.* Carpenter, 52 Mich. 375, 18 N. W. 113.
Minnesota.— Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433.

any such acknowledgment is sufficient to let in parol evidence without charging that the grantee acted in bad faith or had notice of the fraud.[30]

B. Evidence to Impeach — 1. Presumption and Burden of Proof. Where a certificate of acknowledgment is regular on its face, a strong presumption exists in favor of its truth,[31] and the burden of proof rests on the party assailing it.[32]

2. Sufficiency of — a. In General. The proof to overthrow a certificate regular on its face must be so clear, strong, and convincing as to exclude every reasonable doubt as to the falsity of the certificate.[33] The presumption in favor of the

Mississippi.— Allen *v.* Lenoir, 53 Miss. 321.
Missouri.— Pierce *v.* Georger, 103 Mo. 540, 15 S. W. 848.
New York.— Blaesi *v.* Blaesi, 14 N. Y. Civ. Proc. 216.
North Carolina.— Spivey *v.* Rose, 120 N. C. 163, 26 S. E. 701.
Ohio.— Williamson *v.* Carskadden, 36 Ohio St. 664.
Pennsylvania.— Michener *v.* Cavender, 38 Pa. St. 334, 80 Am. Dec. 486.
Texas.— Wheelock *v.* Cavitt, 91 Tex. 679, 45 S. W. 796, 66 Am. St. Rep. 920.

30. Le Mesnager *v.* Hamilton, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81; Williamson *v.* Carskadden, 36 Ohio St. 664; Michener *v.* Cavender, 38 Pa. St. 334, 80 Am. Dec. 486.

31. *Alabama.*— Barnett *v.* Proskauer, 62 Ala. 486.
California.— Baldwin *v.* Bornheimer, 48 Cal. 433.
Kentucky.— Willis *v.* Woodward, 2 Bush (Ky.) 215.
Michigan.— Hourtienne *v.* Schnoor, 33 Mich. 274.
Missouri.— Addis *v.* Graham, 88 Mo. 197.
Pennsylvania.— Hultz *v.* Ackley, 63 Pa. St. 142.
Canada.— Orser *v.* Vernon, 14 U. C. C. P. 573; Tiffany *v.* McCumber, 13 U. C. Q. B. 159.

32. *Alabama.*— Barnett *v.* Proskauer, 62 Ala. 486.
Arkansas.— Meyer *v.* Gossett, 38 Ark. 377.
California.— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270.
Georgia.— Granniss *v.* Irvin, 39 Ga. 22.
Illinois.—O'Donnell *v.* Kelliher, 62 Ill. App. 641.
Iowa.— Morris *v.* Sargent, 18 Iowa 90.
Kansas.— Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866.
Louisiana.— Oriol *v.* His Creditors, 22 La. Ann. 32.
Michigan.—Hourtienne *v.* Schnoor, 33 Mich. 274.
Missouri.— Ray *v.* Crouch, 10 Mo. App. 321; Rohan *v.* Casey, 5 Mo. App. 101.
New York.— Boyd *v.* Boyd, 21 N. Y. App. Div. 361, 47 N. Y. Suppl. 522.
Ohio.— Ford *v.* Osborne, 45 Ohio St. 1, 12 N. E. 526.

Notary attorney for plaintiffs.—Where the notary who signed a certificate of acknowledgment to a mortgage, and other witnesses, testify that defendant acknowledged the mortgage, which defendant denies, the fact that the notary was also attorney for plaintiffs does not alter the presumption in favor of the certificate, and the burden is still on defendant to show that he did not acknowledge it. Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

33. *Alabama.*— Moog *v.* Strang, 69 Ala. 98; Barnett *v.* Proskauer, 62 Ala. 486.
Colorado.— Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.
Florida.— Hart *v.* Sanderson, 18 Fla. 103.
Idaho.— Gray *v.* Law, (Ida. 1899) 57 Pac. 435.
Illinois.— Massey *v.* Huntington, 118 Ill. 80, 7 N. E. 269; Warrick *v.* Hull, 102 Ill. 280; Strauch *v.* Hathaway, 101 Ill. 11, 40 Am. Rep. 193; Fitzgerald *v.* Fitzgerald, 100 Ill. 385; Blackman *v.* Hawks, 89 Ill. 512; Sisters of Loretto *v.* Catholic Bishop, 86 Ill. 171; Crane *v.* Crane, 81 Ill. 165; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Calumet, etc., Canal, etc., Co. *v.* Russell, 68 Ill. 426; Young *v.* Harris, 74 Ill. App. 667; O'Donnell *v.* Kelliher, 62 Ill. App. 641.
Iowa.— Bailey *v.* Landingham, 53 Iowa 722, 6 N. W. 76.
Kentucky.— Hughes *v.* Coleman, 10 Bush (Ky.) 246.
Louisiana.— Oriol *v.* His Creditors, 22 La. Ann. 32.
Michigan.— Shelden *v.* Freeman, 116 Mich. 646, 74 N. W. 1004; Saginaw Bldg., etc., Assoc. *v.* Tennant, 111 Mich. 515, 69 N. W. 1118.
Minnesota.— Lennon *v.* White, 61 Minn. 150, 63 N. W. 620; Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.
Missouri.— Springfield Engine, etc., Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500; Barrett *v.* Davis, 104 Mo. 549, 16 S. W. 377; Webb *v.* Webb, 87 Mo. 540; Brocking *v.* Straat, 17 Mo. App. 296; Morrison *v.* McKee, 11 Mo. App. 594; Riecke *v.* Westenhoff, 10 Mo. App. 358.
Nebraska.— Barker *v.* Avery, 36 Nebr. 599, 54 N. W. 989; Phillips *v.* Bishop, 35 Nebr. 487, 53 N. W. 375.
North Carolina.—Nimocks *v.* McIntyre, 120 N. C. 325, 26 S. E. 922.
Ohio.— Ford *v.* Osborne, 45 Ohio St. 1, 12 N. E. 526; Williamson *v.* Carskadden, 36 Ohio St. 664.
Pennsylvania.— Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.
West Virginia.— Rollins *v.* Menager, 22 W. Va. 461.
Wisconsin.— Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155.
United States.— Young *v.* Duvall, 109 U. S. 573, 3 S. Ct. 414, 27 L. ed. 1036; Northwestern Mut. L. Ins. Co. *v.* Nelson, 103 U. S. 544, 26 L. ed. 436; Mather *v.* Jarel, 33 Fed. 366.

Insufficient proof of duress.— An angry command by the husband to the wife, "Dry

certificate cannot be overcome by loose and inconclusive evidence merely creating a doubt as to the truth of the certificate[34] or contradicting it by implication only,[35] and where the evidence is conflicting the certificate will be upheld.[36]

b. Testimony of Interested Witnesses — (1) *In General.* The testimony of parties to the suit, while carefully scrutinized, is admissible to impeach the certificate and is entitled to the same weight as that of any other interested witness.[37] But the testimony of interested witnesses unsupported by other positive and credible evidence will usually not be allowed to overcome the certificate.[38] Thus it has been held that the certificate of a married woman's acknowledgment, regular in form, will be sustained against the testimony of the husband,[39]

up that crying, and go write your name," unaccompanied by threats or personal violence or any attempt to exercise it, does not show duress so as to render an acknowledgment of a mortgage on the homestead thus obtained invalid, as procured by threats of personal violence in the presence of the mortgagee. Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866.

The testimony of one witness is not sufficient to overcome the presumption, arising from the certificate of an official, that a mortgage was properly acknowledged by the mortgagor's wife. Warrick *v.* Hull, 102 Ill. 280.

Self-contradicting testimony of one witness.— Where the only evidence of fraud in the procurement of a mortgage eight years before, to secure a debt of the mortgagor's son, is the testimony of the mortgagor's grandson, then eight years old, which testimony is self-contradicting, as to whether the mortgagor understood what she was about to sign, it is insufficient to overcome the notary's certificate of acknowledgment. Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514.

Testimony as to grantor's signature.— Testimony that the signature to the instrument is not in the grantor's handwriting is not sufficient to overcome the certificate. Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Tunison *v.* Chamblin, 88 Ill. 378.

As to the adoption of the signature by acknowledging the instrument see *supra*, IV, C, 2.

Cross-examination of grantor.— Where a married woman testifies, in contradiction to the certificate of her acknowledgment, as to what occurred before the officer, she may properly be cross-examined in reference to all that occurred at that time. Drew *v.* Arnold, 85 Mo. 128.

Testimony as to who accompanied officer. — In an action to enjoin the sale of property under a trust deed the validity of which is attacked on the ground that it was not acknowledged by the wife, testimony as to who accompanied the notary who certified to the acknowledgment at the time it was taken is competent. Shell *v.* Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. 909.

34. Griffin *v.* Griffin, 125 Ill. 430, 17 N. E. 782; Myers *v.* Parks, 95 Ill. 408; Williamson *v.* Carskadden, 36 Ohio St. 664.

Inability of grantor and officer to recollect transaction.— A certificate of acknowledgment containing all the statutory requirements cannot be affected by the fact that neither the grantor nor the officer has any recollection of the transaction. Tooker *v.* Sloan, 30 N. J. Eq. 394.

35. Bird *v.* Adams, 56 Iowa 292, 9 N. W. 224, wherein the evidence tended to show that the grantor was not in the county on the date given in the certificate.

36. Young *v.* Duvall, 109 U. S. 573, 3 S. Ct. 414, 27 L. ed. 1036.

Conflict as to presence of grantor.— Where the evidence to show that a person signing a mortgage was not at a certain place at the time the acknowledgment purports to have been made is about balanced by evidence that she was at such place at the particular time, and such person and her husband testify that she did not acknowledge the instrument, while two disinterested witnesses testify that she did, the evidence is insufficient to impeach the certificate of acknowledgment. Phillips *v.* Bishop, 35 Nebr. 487, 53 N. W. 375 [*reversing* 31 Nebr. 853, 48 N. W. 1106].

37. Barnett *v.* Proskauer, 62 Ala. 486.

38. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75. In Pierce *v.* Feagans, 39 Fed. 587, the testimony of a disinterested witness, corroborating that of the interested parties, but positively contradicted by the officer who took the acknowledgment, was held to be insufficient to overcome the certificate.

Where supported by officer's testimony.— A jury have a right to believe a certificate that a married woman had properly acknowledged a deed, against the evidence of both the woman and the notary, given eight years after the acknowledgment, and a finding in favor of the certificate in such case will not be set aside on appeal. Riecke *v.* Westenhoff, 10 Mo. App. 358.

Question for jury.—Where both the grantor and the officer testified that the certificate was false, a decision by the trial judge that this was conclusive against the validity of the acknowledgment was held to be erroneous, the question being one for the jury. Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46.

39. Huffnagle *v.* Etter, 2 Pearson (Pa.) 350. Shell *v.* Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. 909, wherein testimony of the husband that he used every means known to him to procure his wife's acknowledgment was held to be too general to show duress.

Supported by testimony of two interested witnesses.— The certificate of a married woman's acknowledgment is not overcome by the testimony of the husband, on recollection, thirty-two years thereafter, that she was not

or of both husband and wife,[40] especially where such testimony is contradicted by other evidence.[41]

(II) *Unsupported Testimony of Grantor.* It is very generally held that the testimony of the grantor unsupported and uncorroborated is not sufficient to overcome a certificate regular on its face,[42] especially where the certificate is sup-

present when the deed was executed by him, and testimony of two interested persons that the signature did not resemble her handwriting. Sassenberg *v.* Huseman, 182 Ill. 341, 55 N. E. 346.

40. Grotenkemper *v.* Carver, 9 Lea (Tenn.) 280.

Testimony of doubtful credibility.— After twenty-four years the certificate of two justices of the peace, who have since died, to the acknowledgment of a deed by a husband and wife, should prevail over the wife's doubtfully made assertion that she never heard of the deed, and the husband's testimony that he signed his wife's name and that they never acknowledged the instrument, he being of doubtful credibility. Hammond *v.* Hopkins, 143 U. S. 224, 12 S. Ct. 418, 36 L. ed. 134.

Corroborated by one other witness.— The testimony of a wife that she neither signed nor acknowledged the instrument in question, corroborated only by evidence from one witness, acquainted with her signature, to the effect that it was forged, and from her husband that he does not know whether she acknowledged it or not, is insufficient to overcome the presumption that the officer's certificate is true. Blackman *v.* Hawks, 89 Ill. 512. In an action in which the issue was whether the wife was separately examined by the notary who took her acknowledgment she and her husband testified that they were both in the room together; that the notary asked the husband if the wife understood the instrument, and, on his reply that she did, made her sign the deed by her mark. A neighbor testified that she went with the husband and wife to the notary's office and stopped at the door; that the husband and wife went into the office together, and the wife came out first; and that the husband was in the office when the wife was. She did not identify the deed in question and testified that she did not know whether the notary was in the office or not, and also that she thought she heard a man they called the notary ask the husband if the wife understood the matter. It was held that this was insufficient to impeach the certificate made nearly three years before the trial, and regular in form. Thompson *v.* Southern Bldg., etc., Assoc., (Tenn. Ch. 1896) 37 S. W. 704.

41. Smith *v.* McGuire, 67 Ala. 34.

Contradicted by testimony of officer.—The testimony of a husband and wife that the latter, who was unable to read or write, affixed her mark to a mortgage of land, the title to which was in her name, in ignorance of its contents, and that the wife was not privily examined, is insufficient to entitle her to have it canceled, where she practically admits its execution by her husband and it appears that it was prepared by a justice of the peace and commissioner of deeds, in whose hands a debt owed by the husband was placed to be collected or secured, while they were at his office, and the officer testifies that he either read the mortgage to the wife or explained it to her, and that she acknowledged it while her husband was absent from the room. Black *v.* Purnell, 50 N. J. Eq. 365, 24 Atl. 548.

42. *Colorado.*— Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

Florida.— Hart *v.* Sanderson, 18 Fla. 103.

Idaho.— Gray *v.* Law, (Ida. 1899) 57 Pac. 435.

Illinois.— Tuschinski *v.* Metropolitan West Side El. R. Co., 176 Ill. 420, 52 N. E. 920; Davis *v.* Howard, 172 Ill. 340, 50 N. E. 258; Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Watson *v.* Watson, 118 Ill. 56, 7 N. E. 95; Heacock *v.* Lubuke, 107 Ill. 396; Jackson *v.* Miner, 101 Ill. 550; Fitzgerald *v.* Fitzgerald, 100 Ill. 385; Tunison *v.* Chamblin, 88 Ill. 378; McPherson *v.* Sanborn, 88 Ill. 150; Knowles *v.* Knowles, 86 Ill. 1; Crane *v.* Crane, 81 Ill. 165; Marston *v.* Brittenham, 76 Ill. 611; Russell *v.* Baptist Theological Union, 73 Ill. 337; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Calumet, etc., Canal, etc., Co. *v.* Russell, 68 Ill. 426; Lickmon *v.* Harding, 65 Ill. 505; Fisher *v.* Stiefel, 62 Ill. App. 580; O'Donnell *v.* Kelliher, 62 Ill. App. 641; Foster *v.* Latham, 21 Ill. App. 165; Washburn *v.* Roesch, 13 Ill. App. 268.

Iowa.— Herrick *v.* Musgrove, 67 Iowa 63, 24 N. W. 594.

Maryland.— Ramsburg *v.* Campbell, 55 Md. 227.

Michigan.— Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

Minnesota.— Rogers *v.* Manley, 46 Minn. 403, 49 N. W. 194; Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.

Missouri.—Riggers *v.* St. Louis Mut. House-Bldg. Co., 9 Mo. App. 210.

Nebraska.— Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235.

Rhode Island.— Earle *v.* Chace, 12 R. I. 374.

Tennessee.— Shell *v.* Holston Nat. Bldg., etc., Assoc., (Tenn. Ch. 1899) 52 S. W. 909.

Wisconsin.— Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155.

United States.— Northwestern Mut. L. Ins. Co. *v.* Nelson, 103 U. S. 544, 26 L. ed. 436.

Where grantor admits signing instrument. — Public policy requires a certificate of acknowledgment, if in proper form, to prevail over the unsupported evidence of the grantor, and especially is this true where the grantor admits signing the instrument. Gray *v.* Law, (Ida. 1899) 57 Pac. 435.

Where officer dead.— Where a magistrate who certified to an acknowledgment is dead, and he was of good character, the certificate cannot be impeached, a quarter of a century

ported by the testimony of the officer who took the acknowledgment,[43] or by other competent evidence.[44]

c. Testimony of Officer. The testimony of the officer who took an acknowledgment is admissible in support of his certificate when its truth is attacked.[45] But it has been held in several jurisdictions that the officer is not a competent witness to contradict or impeach his certificate.[46] In other jurisdictions, however, such testimony is held admissible,[47] and in a case where the officer was a bene-

thereafter, by the grantor alone, who testified that the conveyance was not explained to her by the magistrate. Earle *v.* Chace, 12 R. I. 374.

Mere want of recollection of signing and acknowledging the execution of a deed should have but little weight against the certificate of the officer that such execution was duly acknowledged. Morris *v.* Sargent, 18 Iowa 90.

43. Ramsburg *v.* Campbell, 55 Md. 227; Oppenheimer *v.* Wright, 106 Pa. St. 569.

44. **Proof of signatures.**— Where, after the death of an alleged mortgagee, the signature was denied by the alleged mortgagor, but the subscribing witnesses identified their signatures, and the signature of the notary was established by several witnesses, it was held that the genuineness of the mortgage was not disproved. Cameron *v.* Culkins, 44 Mich. 531, 7 N. W. 157.

Evidence of grantor's connection with transaction.— A mortgage purported to be signed by the wife by making her mark, and the certificate of acknowledgment was in due form; but she denied the execution and testified that the justice, with whom she was well acquainted, called at her house and signed her name to the mortgage, and executed the certificate in her presence, but without addressing her or asking her consent. There was evidence that she had taken part in the negotiation for the loan, and she admitted being present with her husband when the money was obtained. It was held that the evidence was not sufficient to impeach the execution of the mortgage. Mather *v.* Jarel, 33 Fed. 366.

Showing grantor's knowledge of instrument.— A widower, who was about to marry again, conveyed to his three children, in consideration of love and affection, land worth $10,000 subject to a life-estate in himself and the payment of $1,000 to his intended wife on his death. He afterward duly acknowledged the deed, and a certified copy of it was sent to his intended wife. In a suit brought by him to set aside the deed on the ground of fraud, he testified that he signed and acknowledged the deed supposing it to be a will. The three children and one other witness swore that he read the deed and knew what it was when he signed it. It was held that the evidence did not warrant a decree for the complainant. Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334.

Where original deed lost.—A widow brought an action for dower, denying that she ever joined with her husband in acknowledging the deed of trust under which defendant held. Defendant, after showing that diligent search had been made for the original deed and that it could not be found, the record having been burned, introduced an abstract of title showing that the deed as recorded had her name to it; also testimony that the form of deed used was one which had the statutory acknowledgment for both husband and wife. The trustee testified that he would not have made the sale unless the deed had been acknowledged in the usual mode, and it was shown that he was familiar with such business. It was held that, twenty-eight years having elapsed, such evidence was sufficient to overcome the denial of the plaintiff that she ever acknowledged the deed. Berdel *v.* Egan, 125 Ill. 298, 17 N. E. 709.

45. Jansen *v.* McCahill, 22 Cal. 563, 83 Am. Dec. 84.

46. *Colorado.*— Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108.

Kentucky.— Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241.

Maryland.— Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Mississippi — Stone *v.* Montgomery, 35 Miss. 83.

Texas.— McKellar *v.* Peck, 39 Tex. 381.

Virginia.—Hockman *v.* McClanahan, 87 Va. 33, 12 S. E. 230; Harkins *v.* Forsyth, 11 Leigh (Va.) 294.

Harmless error in admitting testimony.— Where the officer's testimony tended as much to sustain as to impeach his certificate it was held that the error in admitting the testimony was harmless. Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108.

To show that acknowledgment not taken by him.— In New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557, the deposition of the officer was held to be inadmissible to show that he did not take the acknowledgment.

Oral declarations of officer.— Oral declarations out of court, by the officer who took the acknowledgment, are not admissible to impeach his certificate (Allen *v.* Lenoir, 53 Miss. 321), but they may be admitted to impeach his testimony where he has testified in support of his certificate (Kranichfelt *v.* Slattery, 12 Misc. (N. Y.) 96, 33 N. Y. Suppl. 27).

47. McCurley *v.* Pitner, 65 Ill. App. 17; Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731; Garth *v.* Fort, 15 Lea (Tenn.) 683.

As between parties or their privies.— As between the parties to a deed or their privies, public policy does not make the justice who took the acknowledgment incompetent to impeach his certificate by showing that he knew a tract was fraudulently included in the deed, and that he took the acknowledgment without saying anything to the parties defrauded. Davis *v.* Monroe, 187 Pa. St. 212, 41 Atl. 44.

ficiary under the instrument he was allowed to testify that through ignorance on his part the acknowledgment was defectively taken, on the ground that such testimony was against his own interest.[48] But the officer's testimony in contradiction of his certificate is not ordinarily entitled to much weight,[49] and a mere inability to remember incidents connected with the transaction is not sufficient to overcome the recitals of the certificate.[50]

d. When Certificate Overcome. Where, after making all proper allowances for the official knowledge and fidelity of the officer, and giving proper effect to the legal presumption that he did his duty, it appears from a clear and decided preponderance of the evidence that the certificate is false or fraudulent, it will be declared invalid.[51]

XVI. Declaring on Instrument.

A. Necessity to Allege Acknowledgment. Where the acknowledgment is not an essential part of an instrument, a pleading which declares on such instrument, alleging its due execution, is not insufficient on demurrer because failing to allege that it was acknowledged.[52] But where, as in the case of a

Compare New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557.

To prove legal incapacity of grantor.— A magistrate who certifies that the grantor in a deed acknowledged the same to be his voluntary act is not precluded from testifying to the legal incapacity of the grantor. Truman *v.* Lore, 14 Ohio St. 144.

As to surrounding circumstances.—An officer who certifies that the grantors in a deed personally appeared before him and acknowledged the execution thereof is a competent witness to testify to the circumstances surrounding such execution and acknowledgment, notwithstanding the testimony may tend to show that the execution of the deed was obtained by duress or undue influence. Heaton *v.* Norton County State Bank, 59 Kan. 281, 52 Pac. 876.

48. Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242.

49. Wilson *v.* South Park Com'rs, 70 Ill. 46.

Denial that seal was affixed.— A mortgage bore the notarial seal and signature of S. S., but S. S. testified that, to the best of his recollection, he never affixed his seal to it, and that he believed himself to have been the only S. S., notary, in Cincinnati. It was held that the seal *prima facie* proved itself, and that the presumption in favor of the deed was not rebutted. Wright *v.* Bundy, 11 Ind. 398.

50. Morris *v.* Sargent, 18 Iowa 90.

Uncertainty as to identity of grantor.— Where the officer testified that he was not certain that the person in whose name a deed was executed was the same whose acknowledgment he took, and that he thought acknowledgor was a smaller person, it was held not to be sufficient to overcome his certificate made at the time, especially where possession had been immediately afterward delivered to the grantee without objection. Sisters of Loretto *v.* Catholic Bishop, 86 Ill. 171.

No recollection of married woman's examination.—Where, after the death of one of the justices who took a married woman's acknowledgment, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the court gave credit to the certificate notwithstanding the evidence. Romanes *v.* Fraser, 16 Grant Ch. (U. C.) 97, 17 Grant Ch. (U. C.) 267.

51. Myers *v.* Parks, 95 Ill. 408; Hughes *v.* Coleman, 10 Bush (Ky.) 246; Marden *v.* Dorthy, 12 N. Y. App. Div. 188, 42 N. Y. Suppl. 827; Williamson *v.* Carskadden, 36 Ohio St. 664. Wiley *v.* Prince, 21 Tex. 637, wherein it was shown that a married woman was induced to execute a mortgage by the threats and violence of the husband, the agent of the grantor conspiring with the husband.

Testimony corroborated by three witnesses. — Testimony of a married woman that she never acknowledged a certain trust deed, that she was not able to read, that her husband brought her a paper and she then made her mark, and that no one asked her anything about it, was sufficient to overcome the certificate of acknowledgment, where it was fully corroborated by the testimony of her husband and three disinterested witnesses. Lowell *v.* Wren, 80 Ill. 238.

Evidence of five witnesses, two of whom were physicians, that on the day an acknowledgment to a deed is alleged to have been taken the grantor was sick in bed and was subjected to a surgical operation, is sufficient to contradict the certificate of acknowledgment. Paxton *v.* Marshall, 18 Fed. 361.

Showing lack of authority in officer.— Where a deed purported to be acknowledged before a justice of the peace in the city of New York in 1835, it was held that proof made by a party claiming adversely to such deed, that by the laws of New York, in 1828, justices of the peace had no authority to take acknowledgments of deeds, and that in 1840 the legislature of that state conferred such authority upon such officers, created a presumption that they did not possess it in 1835 sufficient to overcome the certificate. Eaton *v.* Woydt, 32 Wis. 277.

52. Munger *v.* Baldridge, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; Laurent *v.* Lanning, 32 Oreg. 11, 51 Pac. 80.

married woman's deed, the acknowledgment is made essential to the operative force of the instrument, a pleading is bad on demurrer which sets up such instrument without alleging that the grantor made the required acknowledgment.[53]

B. Sufficiency of Allegation. An allegation that the instrument was "duly acknowledged" is sufficient to show that it was acknowledged in the manner prescribed by law, and the particulars of the acknowledgment need not be set out.[54]

XVII. LIABILITY OF OFFICER FOR MAKING FALSE CERTIFICATE.

A. In General. If the officer who takes an acknowledgment makes a false certificate, an action on his official bond for the damages sustained by reason thereof will lie against him[55] or his sureties,[56] though it seems that such recovery may be had only where the damages sustained are the proximate result of the false certificate.[57]

Want of acknowledgment matter of defense.— In an action to foreclose a mortgage, failure of the complaint — alleging that the mortgage had been duly executed and recorded, and setting out a copy thereof, which did not show any certificate of acknowledgment — to allege that it had been acknowledged, does not render it bad on demurrer. The want of acknowledgment, if any, should be set up affirmatively as a defense. Sturgeon *v.* Daviess County, 65 Ind. 302.

After judgment on a mortgage, its execution in due form of law is a matter adjudicated, and it is not necessary to recite the acknowledgment in a scire facias. Miner *v.* Graham, 24 Pa. St. 491.

53. Tuthill *v.* Townley, 1 N. J. L. 242; Cross *v.* Everts, 28 Tex. 523; Nichols *v.* Gordon, 25 Tex. Suppl. 109. But see Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934, wherein it was held that the fact that a married woman's contract for the sale of land, as set out in her complaint in an action for its enforcement, contained no certificate of acknowledgment, did not make it appear to have been unacknowledged, and control allegations that she "entered into a contract with defendant," whereby she "agreed to sell to defendant," and "said defendant agreed to purchase."

54. Livingston *v.* Jones, Harr. (Mich.) 165; Roy *v.* Bremond, 22 Tex. 626.

Demurrer — Failure to append copy of instrument.—Where, in a suit against husband and wife to foreclose a mortgage, the bill averred that defendants made, executed, acknowledged, and delivered the mortgage to the complainant, but no copy of the mortgage was attached to the bill, it was held that a demurrer to the bill did not raise objections to the sufficiency of the certificate of acknowledgment appended to the mortgage. Mills *v.* Angela, 1 Colo. 334.

Legality of registration not raised by demurrer.— Where a petition to enforce the lien of a recorded deed to "Fayette Mauzy," as trustee, showed that the deed was acknowledged before "F. Mauzy, clerk," the question whether the deed was illegally admitted to record because of the identity of the trustee and the clerk was not raised by demurrer since it was not to be assumed that the officer was guilty of improper conduct. Bell *v.* Wood, 94 Va. 677, 27 S. E. 504.

55. Heidt *v.* Minor, 113 Cal. 385, 45 Pac. 700; People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091 [*reversing* 38 Ill. App. 428]; People *v.* Colby, 39 Mich. 456; State *v.* Balmer, 77 Mo. App. 463.

For a full discussion of the liability of public officers on their official bonds see OFFICERS.

Omission to state material fact.— In California a notary who omits to state in his certificate that the party acknowledging was known to him or identified is guilty of gross and culpable negligence, and is liable on his official bond to the party injured for all damages resulting from such negligence. Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714.

Where loss merely nominal.— A notary will not be held liable for neglect in taking the acknowledgment to a mortgage where the property intended to be conveyed as security by such mortgage is totally valueless. McAllister *v.* Clement, 75 Cal. 182, 16 Pac. 775.

Where damages might have been reduced. — A notary's liability on his bond for falsely certifying to the acknowledgment of a mortgage cannot be affected by the fact that the mortgagee might have redeemed a prior mortgage and thus reduced the damages. People *v.* Colby, 39 Mich. 456.

Pleading must set out false statement.— In a penal action against a clerk for falsely certifying an acknowledgment, the particular part of the certificate or the particular fact therein stated which it is claimed the clerk knew to be false should be particularly set out in the declaration. People *v.* Bartels, 38 Ill. App. 428.

56. People *v.* Bartels, 138 Ill. 322, 27 N. E. 1091; People *v.* Butler, 74 Mich. 643, 42 N. W. 273.

57. Wyllis *v.* Haun, 47 Iowa 614; Oakland Sav. Bank *v.* Murfey, 68 Cal. 455, 9 Pac. 843 (party's own negligence the proximate cause of his loss).

Injured party instrumental in causing loss. — Where a person executing a mortgage has been introduced to a notary by the mortgagee's agent, and the notary sees the person so introduced execute the mortgage by signing it with the name given him by the mortgagee's agent, who witnesses the signature, the mortgagee cannot, on discovery that the mortgage was not executed by the owner of

B. Who May Recover. In the absence of any statute to the contrary the right of action extends only to the person taking directly under the conveyance and does not pass to a subsequent grantee.[58] But under some statutes the officer is liable to all persons damaged by reason of such false certificate.[59]

C. What Necessary to Recovery. Where the taking of an acknowledgment is considered a ministerial act, the absence of any wrongful intent on the part of the officer will not prevent a recovery against him.[60] But where the act is regarded as judicial in nature it must be shown, in order to a recovery, that the officer was guilty of an intentional dereliction of duty.[61] And under some statutes a recovery is permissible only in case the officer "knowingly misstates some material fact."[62]

ACLEA. In old English law, a field or place where oaks grew.[1]

ACOIGNE. Favor; association.[2]

A COMMUNI OBSERVANTIA NON EST RECEDENDUM. A maxim meaning "from common observance there should be no departure."[3]

ACORD. Agreement; consent.[4]

ACOULPER. To Accuse,[5] *q. v.*

ACQUAINTANCE. The state of being acquainted, or of being more or less intimately conversant.[6]

the land, maintain an action against the notary's sureties for his alleged negligence in taking and certifying to the acknowledgment of the pretended owner. Overacre *v.* Blake, 82 Cal. 77, 22 Pac. 979.

58. Ware *v.* Brown, 2 Bond (U. S.) 267, 29 Fed. Cas. No. 17,170.

59. State *v.* Meyer, 2 Mo. App. 413.

60. Bartels *v.* People, 45 Ill. App. 306; State *v.* Meyer, 2 Mo. App. 413.

61. Com. *v.* Haines, 97 Pa. St. 228, 39 Am. Rep. 805; Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139.

62. Browne *v.* Dolan, 68 Iowa 645, 27 N. W. 795, wherein it was held that the mere fact that the person who signed a mortgage was not the owner of the land would not authorize a recovery in the absence of any showing that the officer knowingly misstated the facts.

Failure of proof.— An action was brought on the official bond of a notary because of an alleged false certificate of acknowledgment wherein the notary recited that the person who acknowledged the instrument was personally known to him to be R. H. S., and the same R. H. S. who executed the instrument. There was evidence to show that the land described in the instrument did belong to one R. H. S., but he was not the same R. H. S. who executed the instrument. There was no direct evidence or circumstances tending to show that the name of the person who signed the mortgage was not R. H. S. It was held that there was a failure of proof which would prevent plaintiff from recovering. State *v.* Ryland, 72 Mo. App. 468.

Insufficient averment.— An averment that a notary "falsely executed and issued his certificate" is not sufficient to accuse him of having acted in bad faith, under a statute providing that an officer who "knowingly misstates a material fact" in his certificate shall be liable for damages. Scotten *v.* Fegan, 62 Iowa 236, 17 N. W. 491.

1. Burrill L. Dict.

2. Kelham Dict.

3. Burrill L. Dict. [*citing* 2 Coke 74; Coke Litt. 186*a*, 229*b*, 365*a*].

The maxim is also quoted *A communi observantia non est recedendum; et minime mutandae sunt quae certam interpretationem habet*,— common observance is not to be departed from; and things which have a certain interpretation are to be changed as little as possible. Adams Gloss [*citing* Coke Litt. 365].

The maxim is applied to the practice of the courts, to the ancient and established forms of pleading, and to professional usage generally. Burrill L. Dict.

4. Kelham Dict.

5. Kelham Dict.

6. Century Dict.

Distinguished from mere knowledge.— In Wyllis *v.* Haun, 47 Iowa 614, 621, the court said: "Acquaintance is familiar knowledge, a state of being acquainted, or of having intimate, or more than slight or superficial knowledge, as, I know the man, but have no acquaintance with him." And in Chauvin *v.* Wagner, 18 Mo. 531, 544, it was said: "'Acquainted' means 'familiarly known.'" But to be "personally acquainted with" and "to know personally" have been held to be equivalent phrases. Delaunay *v.* Burnett, 9 Ill. 454, 489; Kelly *v.* Calhoun, 95 U. S. 710, 24 L. ed. 544.

Distinguished from "intimate acquaintance."— The phrase "intimate acquaintance" cannot include all acquaintances. Worcester, under the word "acquaintance," has the following: "Acquaintance expresses less than familiarity; familiarity less than intimacy. Acquaintance springs from occasional intercourse; familiarity from daily intercourse;

ACQUEST. An estate acquired by purchase or donation.[7]

ACQUETS AND CONQUETS. The property jointly acquired by a husband and wife during coverture.[8]

ACQUIESCENCE. A resting satisfied with or submission to an existing state of things.[9] The term implies both knowledge[10] and power to contract[11] on the part of the person acquiescing. (Acquiescence: As Ground of Estoppel, see ESTOPPEL. In Appropriation of Property to Public Use, see EMINENT DOMAIN. In Infringement of Patent or Trade-Mark, see PATENTS; TRADE-MARKS AND TRADE-NAMES. In Judgment or Order, see APPEAL AND ERROR. In Location of Boundary, see BOUNDARIES. In Modification or Construction of Contract, see ALTERATIONS OF INSTRUMENTS; CONTRACTS. See also LACHES; RATIFICATION.)

ACQUIETANDIS PLEGIIS. A writ of justices, lying for a surety against a creditor who refuses to acquit him after the debt is satisfied.[12]

ACQUIETANTIA. In old English law, an ACQUITTANCE,[13] *q. v.*

ACQUIETARE. In old English law, to acquit.[14]

ACQUIETATUS. In old English law, acquitted, discharged, or released from a criminal charge.[15]

ACQUIRE. To get or gain by some lawful title; to make one's own according to some rule of law.[16]

intimacy from unreserved intercourse. Acquaintance, having some knowledge; familiarity, from long habit; intimacy, by close connection." Carpenter's Estate, 94 Cal. 406, 414, 29 Pac. 1101.

7. Wharton L. Lex.

8. Picotte *v.* Cooley, 10 Mo. 312, 318. See also La. Rev. Civ. Code (1875), art. 2399.

9. Lux *v.* Haggin, 69 Cal. 255, 270, 10 Pac. 674.

Failure to interfere.— Scott *v.* Jackson, 89 Cal. 258, 262, 26 Pac. 898 [*citing* Rapalje & L. L. Dict.] defines the term thus: "'Acquiescence' is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right." And in Leeds *v.* Amherst, 2 Phil. 117, 16 L. J. Ch. 5, 10 Jur. 956 [*approved* in De Bussche *v.* Alt, 8 Ch. Div. 286, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370], the court said: "If a party, having a right, stands by and sees another dealing with a property in a manner which he ought not, and does not interfere, that may be called acquiescence."

In Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 187, and Rabe *v.* Dunlap, 51 N. J. Eq. 40, 48, 25 Atl. 959, the court, speaking of acquiescence to *ultra vires* acts, said: "We suppose 'acquiescence' or 'tacit assent' to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss."

Distinguished from "laches."—"While the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. Laches import a merely passive, while acquiescence implies active, assent." Lux *v.* Haggin, 69 Cal. 255, 270, 10 Pac. 674 [*citing* Wood Limitations, § 62].

10. Pence *v.* Langdon, 99 U. S. 578, 581, 25 L. ed. 420, where it is said: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not wilfully shut his eyes to what he might readily and ought to have known." Life Assoc. of Scotland *v.* Siddal, 3 De G. F. & J. 58, 74, where the following language is used: "Acquiescence, as I conceive, imports knowledge; for I do not see how a man can be said to have acquiesced in what he did not know, and in cases of this sort I think that acquiescence imports full knowledge."

11. "Acquiescence — that is, assent — is tantamount to an agreement. It is an implied contract, and it requires for its validity power to contract." Matthews *v.* Murchison, 17 Fed. 760, 766.

12. Jacob L. Dict.

13. Burrill L. Dict.

14. Jacob L. Dict.

15. Burrill L. Dict. [*citing* 9 Coke 56; Cro. Car. 420].

This word had the peculiar meaning of a discharge by a jury from a very early period. Burrill L. Dict.

16. Burrill L. Dict.; Matter of Miller, 2 Lea (Tenn.) 54, 60, holding that the word "acquired" was used in the broad sense, so as to cover lands which might come to the intestate in any other way than "by gift, devise, or descent from the parent or ancestor of the parent."

Includes taking by devise.— In Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 390, 6 N. E. 183, 56 Am. Rep. 776, the point being made that the word "acquire" is not

ACQUISITION. The act of procuring property,[17] and also the thing in which the property is secured.[18]

ACQUISITUM. In old English law, a purchase.[19]

ACQUISSER. To receive; to gather.[20]

ACQUITTAL. A judicial deliverance from an accusation of guilt; a deliverance or setting free from a criminal charge by the process of a trial at law and the verdict of a jury pronouncing the party not guilty.[21] (Acquittal: Operation and Effect as Adjudication, see JUDGMENTS. Plea of Former, see CRIMINAL LAW. Verdict and Judgment of, see CRIMINAL LAW.)

ACQUITTAL CONTRACT. A discharge from an obligation, either by deed, prescription, or tenure.[22]

ACQUITTANCE. A discharge in writing of a sum of money or debt due.[23] (Acquittance: As Evidence of Payment or Release, see PAYMENT; RELEASE. Forgery of, see FORGERY.)

ACQUITTED. Set free or judicially discharged from an accusation; released from a debt, duty, obligation, charge, or suspicion of guilt.[24] The word has reference to both civil and criminal prosecutions[25] but must be understood in a technical sense as importing an acquittal on a trial before a jury.[26]

ACRA. In old English law, an ACRE,[27] *q. v.*

ACRE. A quantity of land containing one hundred and sixty square rods of land in whatever shape.[28] (See also ACRE FIGHT.)

ACRE FIGHT or **ACRE.** An old sort of duel fought, with sword and lance, by single combatants, English and Scotch, between the frontiers of their kingdoms.[29]

broad enough to include a taking by devise,—that the word implies some element of effort on the part of the one who acquires,—it was said that "in judicial opinions, and by law writers, the term is not infrequently used otherwise, and as coming to property by devise or descent, as well as in any other mode."

17. Wharton L. Lex.

18. Bouvier L. Dict.

19. Burrill L. Dict.

20. Kelham Dict.

21. Burrill L. Dict.

"The word 'acquittal' is verbum æquivocum. It is generally said that a party is acquitted by the jury, but, in fact, the acquittal is by the judgment of the court." Burgess *v.* Boetefeur, 7 M. & G. 481, 49 E. C. L. 481.

Not necessarily on merits.—In Junction City *v.* Keeffe, 40 Kan. 275, 278, 19 Pac. 735, the court said: "Ordinarily in criminal jurisprudence it means a discharge after a trial, or an attempt to have one, upon its merits; but has 'acquittal' as used in our statute no other or different signification than a judgment for defendant on a trial on the facts and merits of the action? . . . The wording of § 298 [Comp. Laws (1879), c. 31, § 298] fairly implies that acquittal is not confined in its meaning to a judgment in favor of defendant after a trial on the merits and facts of a case, but may also, and as there used does have the broader signification of a discharge by a judgment rendered for other reasons."

Distinguished from "pardon."—"To the prisoner a pardon is not equal to an acquittal. . . . His reputation and character are much more affected by the one than the other. A pardon discharges from punishment; an acquittal from guilt. Pardon may rescue him from the penitentiary or a halter, but it cannot redeem him from the infamy of conviction." Younger *v.* State, 2 W. Va. 579, 584, 98 Am. Dec. 791.

22. Wharton L. Lex.

23. Jacob L. Dict.

Includes "receipt."—"The word 'acquittance,' although perhaps not strictly speaking synonymous with 'receipt,' includes it. . . . It is not questioned but that a receipt in full is an acquittance. Why, therefore, is not a receipt for a part of a demand or obligation an acquittance *pro tanto?* We are aware that lexicographers do not fully agree as to this; but, in legal proceedings, a receipt is regarded as an acquittance." State *v.* Shelters, 51 Vt. 102, 104, 31 Am. Rep. 679.

24. Webster Dict. [*cited* in Morgan County *v.* Johnson, 31 Ind. 463, 466; Dolloway *v.* Turrill, 26 Wend. (N. Y.) 383, 400].

25. Dolloway *v.* Turrill, 26 Wend. (N. Y.) 383, 400.

26. Hester *v.* Hagood, 3 Hill (S. C.) 195; Teague *v.* Wilks, 3 McCord (S. C.) 461; Thomas *v.* De Graffenreid, 2 Nott & M. (S. C.) 143; Morgan *v.* Hughes, 2 T. R. 225, 231.

Distinguished from "discharged."—The word "discharged" is not equivalent in pleading to "acquitted," which term alone expresses a discharge upon trial. Law *v.* Franks, Cheves (S. C.) 9; Morgan *v.* Hughes, 2 T. R. 225, 231. Although in common parlance they are, perhaps, expressive of the same idea. Teague *v.* Wilks, 3 McCord (S. C.) 461, 465.

27. Burrill L. Dict., giving as an example, from Bracton fol. 16*a*, the expression *do tibi decem acras in tali loco*,—I give you ten acres in such a place.

28. Bouvier L. Dict.

29. Jacob L. Dict.

ACROSS. The word "across" imports from side to side,[30] and, unless qualified by some prefix as "diagonally" or "obliquely," there is attached to the word in ordinary use but one meaning, and that is directly opposite to length.[31] In some cases, however, the word may mean "over." [32]

ACT. In a general sense, something done; the exercise of power, or an effect produced thereby.[33] In a more special sense the word is used to denote the result of a public deliberation, the decision of a prince, of a legislative body, of a council, court of justice, or magistrate. Also a decree, edict, law, judgment, resolve, award, determination.[34] In speaking of a legislative act, while the word in its ordinary acceptation would include the entire statute, it is not so definite in its meaning that it may not be applied to a complete and independent section if found in connection with it.[35]

ACTA. In old English law, acts; actions; the acts of individuals.[36]

ACTA EXTERIORA INDICANT INTERIORA SECRETA. A maxim meaning "acts indicate the intention." [37]

ACTA IN UNO JUDICIO NON PROBANT IN ALIO NISI INTER EASDEM PERSONAS. A maxim meaning "things done in one action cannot be taken as evidence in another unless it be between the same parties." [38]

ACT BOOK. In Scotch practice, a minute-book, kept by the court, registering the proceedings of each day.[39]

ACTING. A term employed to designate one performing the duties of an office to which he does not himself claim title.[40] The word is also sometimes

30. Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242, 251. See also Comstock *v.* Van Deusen, 5 Pick. (Mass.) 163, where, under a grant of a right of way across plaintiff's lot of land, it was held that the grantee had not a right to enter at one place, go partly across, and then come out at another place at the same side of the lot.

31. Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 271, 8 S. Ct. 874, 31 L. ed. 731, where this is said to be "especially true when it is used in connection with parallel lines."

32. Brown *v.* Meady, 10 Me. 391, 395, 25 Am. Dec. 248, where the court said: "It does not necessarily exclude the idea of passing over a parallelogram in a longitudinal direction. To pass across a bridge, is a common expression; but does not mean, to pass from one side of it to the other."

33. Abbott L. Dict.; Spencer *v.* Marriott, 1 B. & C. 458, 459, 8 E. C. L. 195, 2 D. & R. 665, where, in a covenant that a lessee should hold without any interruption by or from the lessor, or by or through her acts, means, etc., the word "acts" was held to mean something done by the person against whose acts the covenant was made.

Implies intention.— In this sense the word "act" necessarily implies intention. Adkins *v.* Columbia L. Ins. Co., 70 Mo. 27, 31, 35 Am. Rep. 410; Chapman *v.* Republic L. Ins. Co., 6 Biss. (U. S.) 238, 5 Fed. Cas. No. 2,606, 4 Ins. L. J. 511, 7 Chic. Leg. N. 186, 5 Big. Ins. Cas. 110.

34. Chumasero *v.* Potts, 2 Mont. 242, 284 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Webster Dict.].

Act in legislation is a statute, or law, made by a legislative body. People *v.* Tiphaine, 3 Park. Crim. (N. Y.) 241, 244, 13 How. Pr. (N. Y.) 74; Southwark Bank *v.* Com., 26 Pa. St. 446, 450.

Distinguished from "bill" or "law."— The words "bill" and "law" are sometimes used as synonymous with "act." Sedgwick County *v.* Bailey, 13 Kan. 600, 608; Durkee *v.* Janesville, 26 Wis. 697, 703. The word "act" is the best word to use, however, for it includes no action of the legislature or of any person prior to the final passage of the act by the legislature, and it includes the whole of the act, nothing more and nothing less. Sedgwick County *v.* Bailey, 13 Kan. 600, 608. A "bill" is a draft or form of an act presented to the legislature, but not enacted." Southwark Bank *v.* Com., 26 Pa. St. 446, 450. And the word "law" is peculiarly inappropriate, for a portion of any act may be law as well as the whole of the act. Sedgwick County *v.* Bailey, 13 Kan. 600, 608.

"Legislative" distinguished from "judicial" act.— "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." Field, J., in Sinking-Fund Cases, 99 U. S. 700, 761, 25 L. ed. 496 [*cited* in People *v.* Board of Education, 54 Cal. 375].

35. Satcher *v.* Satcher, 41 Ala. 26, 91 Am. Dec. 498; Rawls *v.* Doe, 23 Ala. 240, 249, 58 Am. Dec. 289.

36. Burrill L. Dict.

37. Broom Leg. Max. [*citing* 8 Coke 291].

38. Trayner Lat. Max.

39. Ayton *v.* Haig, 1 Swin. Jus. Cas. 78, 81.

40. Fraser's Case, 16 Ct. Cl. 507, 514, where, in speaking of an officer who invariably styled himself "acting supervising archi-

used in the sense of "operating," as in a provision that one of two companies should be the "acting and controlling" company.[41]

ACT IN PAIS. An act done out of court and not a matter of record.[42]

ACTIONABLE. That which may be the subject of an action.[43]

ACTIONARE. To bring an action; to prosecute or sue.[44]

ACTIONARY. A commercial term used in Europe to denote a proprietor of shares or actions in a joint-stock company.[45]

ACTIONEM NON HABERE. See Actio Non.

ACTIONES NOMINATÆ. Literally, "named actions." Writs for which, prior to Statute of Westminster II, c. 24, there existed precedents in the English chancery.[46]

ACTION OF BOOK DEBT. See Accounts and Accounting.

ACTIO NON. An abbreviation of *actionem non*, the emphatic words anciently used at the commencement of a special plea in bar, the defendant first averring generally that the plaintiff "ought not to have or maintain his action," — *actionem non habere.*[47] These words are literally translated in modern forms,[48] and the entire preliminary formula is technically termed the "*actio non.*" [49]

ACTIO NON ACCREVIT INFRA SEX ANNOS. Literally, "the action did not accrue within six years." The emphatic words of the old plea of the statute of limitations, literally translated in the modern forms, and retained as the distinctive name of the plea.[50] (See Limitations of Actions.)

ACTIO NON DATUR NON DAMNIFICATO. A maxim meaning "an action is not given to one who is not injured." [51]

ACTIO NON ULTERIUS. In English pleading, a name given to the distinctive clause in the new plea to the further maintenance of the action, introduced in place of the plea *puis darrein continuance*, the averment being that the plaintiff ought not further (*ulterius*) to have or maintain his action.[52]

tect," the court said this is "a form of expression in constant use and well understood in all the executive departments of the government as designating, not an appointed incumbent, but merely a *locum tenens.*"

41. Meyer *v.* Johnston, 64 Ala. 603, 665.
42. Brown L. Dict.
43. Abbott L. Dict.
44. Burrill L. Dict.
45. Bouvier L. Dict.
46. Wharton L. Lex.
47. Burrill L. Dict.

Abolished in England by 15 & 16 Vict. c. 76, § 66.

48. In Berry *v.* Osborn, 28 N. H. 279, 288, Bell, J., in discussing the use of the words "*actio non*" in a plea said: "The introduction of the supposed Latin words '*actio non*' is obviously nothing but a mistake or error of the draftsman of the plea in another respect. Instead of doing what the words '*actio non*' were probably, for brevity's sake, designed in some book of forms to remind him to do, that is, to insert the usual introduction of special pleas in bar, that 'the plaintiff his action aforesaid thereof against the defendant ought not to have and maintain,' the copyist transcribed the former words; now it requires no skill to see that this was a mere error and mistake, arising from ignorance or inattention."

49. Wharton L. Lex.
50. Burrill L. Dict.
51. Burrill L. Dict. [*citing* Jenk. Cent. 69].
52. Burrill L. Dict.

ACTIONS

EDITED BY JOSEPH F. RANDOLPH

CROSS-REFERENCES

For Actions:
Abatement of, see ABATEMENT AND REVIVAL.
Accrual of, see LIMITATIONS OF ACTIONS.
Adjournment of, see CONTINUANCES.
Agreement Not to Bring, see CONTRACTS.
Change of Venue of, see VENUE.
Compromise of, see COMPROMISE AND SETTLEMENT.
Consolidation of, see CONSOLIDATION AND SEVERANCE OF ACTIONS.
Continuance of, see CONTINUANCES.
Criminal, see CRIMINAL LAW.
Discontinuance of, see DISMISSAL AND NONSUIT.
Dismissal of, see DISMISSAL AND NONSUIT.
Election between, see ELECTION OF REMEDIES.
Equitable, see EQUITY.
Injunction against, see INJUNCTIONS.
Joinder of, see JOINDER AND SPLITTING OF ACTIONS.
Jurisdiction of, see COURTS; VENUE.
Limitation of, see CONTRACTS; LIMITATIONS OF ACTIONS.
Local, see VENUE.
Merger of, see JUDGMENTS.
Nonsuit in, see DISMISSAL AND NONSUIT.
Notice of, see PROCESS.
Parties to, see PARTIES.
Penal, see PENALTIES.
Pendency of, see ABATEMENT AND REVIVAL; LIS PENDENS.
Place of Bringing, see VENUE.
Qui Tam, see PENALTIES.
Removal of Causes, see COURTS; REMOVAL OF CAUSES.
Revival of, see ABATEMENT AND REVIVAL.
Severance of, see CONSOLIDATION AND SEVERANCE OF ACTIONS.
Splitting of, see JOINDER AND SPLITTING OF ACTIONS.
Survival of, see ABATEMENT AND REVIVAL.
Time of Bringing, see LIMITATIONS OF ACTIONS.
Transitory, see VENUE.
Venue of, see VENUE.

For Actions By or Against:
Administrator, see EXECUTORS AND ADMINISTRATORS.
Agent, see PRINCIPAL AND AGENT.

For Actions By or Against — (*continued*)
Alien, see Aliens.
Assignee or Assignor, see Assignments; Assignments for Benefit of Creditors; Bankruptcy; Insolvency.
Association, see Associations.
Auctioneer, see Auctions and Auctioneers.
Attorney, see Attorney and Client.
Bank or Banker, see Banks and Banking.
Bankrupt, see Bankruptcy,
Beneficial Association, see Beneficial Societies.
Bridge-Owner, see Bridges.
Broker, see Factors and Brokers.
Building and Loan Association, see Building and Loan Societies.
Canal Company, see Canals.
Carrier, see Carriers.
Child, see Infants; Parent and Child.
City, see Municipal Corporations.
Client, see Attorney and Client.
Club, see Clubs.
College or University, see Colleges and Universities.
Convict, see Convicts.
Corporate Officer, see Corporations.
Corporation, see Corporations.
Cotenant, see Joint Tenancy; Partition; Tenancy in Common.
County, see Counties.
Devisee, see Wills.
Distributee, see Descent and Distribution.
Exchange, see Exchanges.
Executor, see Executors and Administrators.
Factor, see Factors and Brokers.
Fellow Servant, see Master and Servant.
Ferry Company, see Ferries.
Foreign Corporation, see Corporations.
Gas Company, see Gas.
Guardian, see Guardian and Ward.
Heir, see Descent and Distribution.
Husband, see Husband and Wife.
Indian, see Indians.
Infant, see Infants.
Innkeeper, see Innkeepers.
Insane Person, see Insane Persons.
Insurance Company, see Insurance.
Joint Adventurer, see Joint Adventures.
Joint Debtors, see Contribution.
Joint-Stock Company, see Joint-Stock Companies.
Joint Tenant, see Joint Tenancy; Partition.
Landlord, see Landlord and Tenant.
Legatee, see Wills.
Limited Partnership, see Partnership
Livery-Stable Keeper, see Livery-Stable Keepers.
Loan Association, see Building and Loan Societies.
Married Woman, see Husband and Wife.
Master, see Master and Servant.
Mercantile Agency, see Mercantile Agencies.
Municipal Corporation, see Municipal Corporations.
Parent, see Parent and Child.

For Actions By or Against — (*continued*)
Partner, see PARTNERSHIP.
Partnership, see PARTNERSHIP.
Pawnbroker, see PAWNBROKERS.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Pilot, see PILOTS.
Principal, see FACTORS AND BROKERS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY.
Public Officer, see OFFICERS.
Railroad Company, see RAILROADS; STREET RAILROADS.
Receiver, see RECEIVERS.
Religious Society, see RELIGIOUS SOCIETIES.
School or School District, see SCHOOLS AND SCHOOL DISTRICTS.
Seaman, see SEAMEN.
Servant, see MASTER AND SERVANT.
Ship-Owner, see SHIPPING.
State, see STATES.
Stockholder, see CORPORATIONS.
Surety, see PRINCIPAL AND SURETY.
Telegraph or Telephone Company, see TELEGRAPHS AND TELEPHONES.
Tenant, see LANDLORD AND TENANT.
Town, see TOWNS.
Trade Union, see LABOR-UNIONS.
Trustee, see TRUSTS.
Turnpike or Toll-Road Company, see TOLL ROADS.
United States, see UNITED STATES.
Village, see MUNICIPAL CORPORATIONS.
Ward, see GUARDIAN AND WARD.
Warehouseman, see WAREHOUSEMEN.
Water Company, see WATERS.
Wharfinger, see WHARVES.
Wife, see HUSBAND AND WIFE.

For Particular Forms of Actions and Proceedings see ACCOUNTS AND ACCOUNTING; ADMIRALTY; APPEAL AND ERROR; ARREST; ASSUMPSIT, ACTION OF; ATTACHMENT; AUDITA QUERELA; CANCELLATION OF INSTRUMENTS; CASE, ACTION ON; CERTIORARI; CONTEMPT; COVENANT, ACTION OF; CREDITORS' SUITS; DEBT, ACTION OF; DETINUE; DISCOVERY; DIVORCE; DOWER; EJECTMENT; ENTRY, WRIT OF; EQUITY; FORCIBLE ENTRY AND DETAINER; GARNISHMENT; INJUNCTIONS; INTERPLEADER; LIENS; MARSHALING ASSETS AND SECURITIES; NE EXEAT; NEW TRIAL; NUISANCES; PARTITION; QUIETING TITLE; QUO WARRANTO; REAL ACTIONS; REFORMATION OF INSTRUMENTS; REPLEVIN; REVIEW; SCIRE FACIAS; SEQUESTRATION; SPECIFIC PERFORMANCE; SUPERSEDEAS; TRESPASS; TRESPASS TO TRY TITLE; TROVER AND CONVERSION.

I. CAUSE OF ACTION.

A. Definition. The term "cause of action," in law, is generally understood as meaning the whole cause of action; that is, every fact which it is necessary to establish in order to support the right to judicial relief.[1] As otherwise defined it

1. Read *v.* Brown, 22 Q. B. D. 128; Cooke *v.* Gill, L. R. 8 C. P. 107; Borthwick *v.* Walton, 15 C. B. 501; Buckley *v.* Hann, 5 Exch. 43; Connolly *v.* Brannen, 1 Quebec 204; Wurtele *v.* Lenghan, 1 Quebec 61; Rousseau *v.* Hughes, 8 L. C. Rep. 187; Warren *v.* Kay, 6 L. C. Rep. 492.

"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed — every fact that the defendant would have a right to traverse. Cooke *v.* Gill, L. R. 8 C. P. 107. The term does not comprise every piece of evidence which is necessary to

consists in a right in the plaintiff, a correlative duty or obligation resting on the defendant, and some act or omission done by the latter in violation of the right.[2]

B. Terminology — 1. Compared with Other Legal Terms — a. "Right of Action" — "Chose in Action." The words "right of action" are sometimes used interchangeably and as synonymous with "cause of action."[3] In other cases the words "right of action" are held to refer only to the right to remedial relief, the right to sue, which arises upon the cause of action being complete.[4]

prove a fact, but only every fact which is necessary to be proved. Read *v.* Brown, 22 Q. B. D. 128.

2. Pomeroy Rem. and Rem. Rights, § 452 *et seq.*

California.— Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Connecticut.— Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1.

Kansas.— Atchison, etc., R. Co. *v.* Rice, 36 Kan. 593, 14 Pac. 229.

Michigan.— Post *v.* Campau, 42 Mich. 90, 3 N. W. 272.

New York.— Veeder *v.* Baker, 83 N. Y. 156.

South Carolina.— Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406; Hayes *v.* Clinkscales, 9 S. C. 441.

United States.—Foot *v.* Edwards, 3 Blatchf. (U. S.) 310, 9 Fed. Cas. No. 4,908.

England.— Howell *v.* Young, 5 B. & C. 259.

But see Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539 [*criticising* Pomeroy Rem. and Rem. Rights, § 452 *et seq.*, and holding that the wrong of defendant — in other words, the breach only — is the cause of action].

For titles in which questions relating to the requisites of a cause of action frequently arise see Courts; Limitations of Actions; Recoupment, Set-Off, and Counter-Claim; Venue.

Threatened wrong.— A cause of action may be a wrong either committed or threatened. Miller *v.* Hallock, 9 Colo. 551, 13 Pac. 541; Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539.

When arising or originating.— As to contracts it has been held that the cause of action arises or originates in the contract itself, and not merely in a breach of the obligation which it creates. Alderton *v.* Archer, 14 Q. B. D. 1; Wurtele *v.* Lenghan, 1 Quebec 61; Jackson *v.* Coxworthy, 12 L. C. Rep. 416. *Contra*, Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384 [*approved* in Taylor *v.* New York, 82 N. Y. 10]; Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539 [*citing* Howell *v.* Young, 5 B. & C. 259, 266, wherein it was held that, "whatever be the form of action, the breach of duty is substantially the cause of action;" this was said, however, with respect to the time when "the cause of action accrued," under a statute of limitations making use of that word]. In the sense of "action," only, which is defined as "the right of suing in a court of justice for that to which one is entitled," can it be said that a plaintiff has no cause or right of action against a defendant on a contract until the breach of the contract sued on. Wurtele *v.* Lenghan, 1 Quebec 61.

Statutory definition.— In Georgia the doctrine stated in the text has been declared by statute. Stafford *v.* Maddox, 87 Ga. 537, 13 S. E. 559.

3. The Schooner Marinda *v.* Dowlin, 4 Ohio St. 500; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 5 Am. L. Rec. 630, 15 Nat. Bankr. Reg. 23.

So "a cause of action" has been said to be a right to prosecute an action with effect (Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384 [*cited* in Taylor *v.* New York, 82 N. Y. 10]; Douglas *v.* Forrest, 4 Bing. 686); and under the code to be the right which a party has to institute and carry through such a proceeding as falls within the definition of an action given by the code (Meyer *v.* Van Collem, 7 Abb. Pr. (N. Y.) 222). The expression *droit d'action* is more generally used in French than *cause d'action* and has the same meaning in law. Wurtele *v.* Lenghan, 1 Quebec 61.

Chose in action.— "'Chose in action,' taken in its broadest latitude, comprehends not only a demand arising on contract, but also a wrong or injury to the property or person." Cowen, J., in People *v.* Tioga C. P., 19 Wend. (N. Y.) 73, 75. It is "any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract," in the language of Goldthwaite, J., in Magee *v.* Toland, 8 Port. (Ala.) 36, 40. "It includes all rights to personal property not in possession which may be enforced by action." Bronson, C. J., in Gillet *v.* Fairchild, 4 Den. (N. Y.) 80, 82. And see 2 Bl. Comm. 288, 396. "'Cause of action' I do not think, is, now at least, synonymous with 'chose in action,' for the latter phrase, as now used, includes debts, etc., not due, and indeed stocks." Hand, J., in Bank of Commerce *v.* Rutland, etc., R., 10 How. Pr. (N. Y.) 1, 9. It is probable, too, that "chose in action" is used exclusively in relation to personal property.

4. Pomeroy Rem. and Rem. Rights, § 452, *et seq.* [*approved* in Hayes *v.* Clinkscales, 9 S. C. 441; Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406; Taylor *v.* New York, 82 N. Y. 10. In the last-named case the court said: "The phrases 'cause of action' and 'right of action' are used, because ordinarily, and in the absence of some especial circumstance, when a debt is mature it may be demanded and sued upon, and payment of right and by its terms be then exacted; because, in general, the phrases 'to be mature' and 'to be suable' both express the same fact as to the debt. It is the condition or state of the demand at the time that is looked at. . . There is a cause of action, and there is a remedy by action. They are different rights"].

b. "Subject of Action." "Cause of action," in legal terminology, is not the same as "subject of action."[5]

c. Remedy and Its Terminology. Nor is the term "cause of action" to be confounded with the terminology relating to the remedy, such as "suit," "action," "cause," and the like. The cause of action is the right to be enforced or the injury to be redressed; the action or remedy is the means which the law has provided whereby such enforcement or redress may be effected.[6]

2. Disregard of Technical Meaning and Use. As with most legal terms, it often becomes necessary, acting upon the well-settled rules of construction, to depart from the technical meaning and use of the words "cause of action," when contained in statutes and agreements, in order to carry out the intention of the legislature or of the parties.[7]

5. "Subject of action" is a code term used in the stead of what was formerly known as "subject-matter of the action," and describes the physical facts, the things real or personal, the money, land, chattels, and the like, in relation to which the suit is prosecuted. Pomeroy Rem. and Rem. Rights, § 475 [*approved* in Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406].

6. Pomeroy Rem. and Rem. Rights, § 519; Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1; Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539; Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406; Hayes *v.* Clinkscales, 9 S. C. 441.

Every action is brought in order to obtain some particular result, which is termed the "remedy." This final result is not the "cause of action;" it is rather the "object of the action." Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1. A suit is a formal method of preserving a right, not the right itself. Page *v.* Brewster, 58 N. H. 126. A case consists of a right and a wrong. The law creates not the wrong; but it does create a right and prescribes a remedy. Magill *v.* Parsons, 4 Conn. 317. Something broader than form of action seems to be meant by "nature of the action," even when used in a statute. This is a larger classification, referring to the character of relief sought rather than to the method of reaching it. The nature of the action may be, for example, the recovery of a thing taken or the recovery of damages for the taking. The appropriate form of action would be replevin or trover. "The form in which the suit is brought, and the subject-matter, or its cause of action, nature of its case, are totally distinct subjects." Truax *v.* Parvis, 7 Houst. (Del.) 330, 334, 32 Atl. 227. Between the substantive law and the law of remedy there is this important distinction: the former, *proprio vigore*, operates upon all persons within its field, while the latter may truly be said to operate only upon occasion,—when something is threatened, or has been done, in violation of a legal right. The right common to all then becomes the right of action of the party injured. Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539. *Compare* Hunter's Will, 6 Ohio 499, where the court draws a distinction between the words "action" and "suit," defining an action as an abstract legal right in one person to prosecute another in a court of justice, and a suit as the actual prosecution of such right in a court of justice. The remedy for duties imposed by contract is not the contract itself, but the suit to enforce its obligations. State *v.* Poulterer, 16 Cal. 514; State *v.* Young, 29 Minn. 474, 9 N. W. 737; U. S. *v.* Lyman, 1 Mason (U. S.) 482, 26 Fed. Cas. No. 15,647. The remedy by action on the case provided by the Statute of Westminster II, c. 24, creates no new liability, but merely gives a remedy. Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189.

Security — Not remedy.—"Remedy" is not to be confounded with "security." A mechanic's lien is a statutory security to which the term "remedy" would be as misapplied as it would be in respect to a mortgage. Atkins *v.* Little, 17 Minn. 342. To same effect is Municipal Council *v.* Wilmot Tp., 17 U. C. Q. B. 82.

7. Jurisdiction and venue laws.— Under an English statute relating to jurisdiction, which provided that a non-resident British subject might be sued in a superior court upon "a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," it has been held in some courts that the meaning of the words "cause of action," as there used, was their usual meaning, that is, the whole cause of action (Cherry *v.* Thompson, L. R. 7 Q. B. 573, 575; Allhusen *v.* Malgareio, L. R. 3 Q. B. 340; Sichel *v.* Borch, 2 H. & C. 954); while other courts have construed it in its popular meaning as the act on the part of defendant which gives plaintiff his right to sue (Durham *v.* Spence, L. R. 6 Exch. 46; Jackson *v.* Spittall, L. R. 5 C. P. 542; Fife *v.* Round, 6 Wkly. Rep. 282, 283, in which it was said: "The cases in which the construction has been placed on the words 'cause of action,' making them mean the whole cause of action, are not applicable"). And this may be regarded, since 1874, as the construction finally adopted. Vaughan *v.* Weldon, L. R. 10 C. P. 47; Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518 [*citing* Durham *v.* Spence, L. R. 6 Exch. 46, and construing N. Y. Code Proc. § 427].

Statute of limitations.— In Ohio also this construction has been sanctioned generally.

C. Parties — 1. Generally. To constitute a "cause of action" there must also be a party entitled to institute process and a party who can be subjected to such process.[8] The existence of a cause of action is not, however, dependent on the availability of means for its enforcement. It may exist between parties who cannot be reached by a common jurisdiction.

2. Same Party Both Plaintiff and Defendant. In this connection it has been frequently held at law that a person may not sue himself; even though on one side or the other he is not the sole party or appears in an official, representative, or other capacity.[9] This rule, however, is technical rather than substantial, and

without regard to the reason upon which the English courts proceeded; namely, that it was required by the language of the statutory provision construed as a whole. Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539.

Laws removing disqualification of parties as witnesses.— Thus a statute as to disqualification of parties as witnesses in cases "where one of the parties to such action has deceased" was held to intend parties to the cause of action, and to refer, not to the executor or administrator, who is technically the party to the action; but to the deceased, who was the party to the cause of action. Kimball *v.* Baxter, 27 Vt. 628, 631, the court saying that "in common parlance it is no uncommon thing for us to speak of the action when in strictness we mean the cause of action." And in a statute of the same sort in West Virginia it has been held that the words "civil action, suit, or proceeding" are to be taken as synonymous with "controversy," and not merely as designating the particular mode in which the controversy may be presented to the court by "action" (at law), "suit" (in equity), or "other proceeding." Anderson *v.* Snyder, 21 W. Va. 632, 645.

Agreement to release "all actions."—Where one releases to another all actions, not only actions pending, but also causes of actions, are released. Altham's Case, 8 Coke 148*a*.

8. *Alabama.*— *Ex p.* Collins, 49 Ala. 69.

Illinois.— Fruitt *v.* Anderson, 12 Ill. App. 421 [*citing* Angell Lim. c. 7].

Maine.— Stratton *v.* European, etc., R. Co., 74 Me. 422.

Pennsylvania.— North Branch Pass. R. Co. *v.* City Pass. R. Co., 38 Pa. St. 361.

Virginia.— Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

See, generally, Parties.

"Cause of action" implies a right to bring an action, and someone who has a right to sue, and some who may be lawfully sued. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

Non-existent person or thing.— A right is a relation of a person or persons to some thing or persons, and from its very nature it cannot arise or exist in advance of the persons or the things related, and of which it expresses the relation. Thus an act granting to a corporation the right to connect with other railways "hereafter to be constructed" gives no cause of action as to tracks of another company afterward laid under a subsequent grant made to it. North Branch Pass. R. Co. *v.* City Pass. R. Co., 38 Pa. St. 361.

9. *Alabama.*— Chandler *v.* Shehan, 7 Ala. 251.

Illinois.— Oliver *v.* Oliver, 179 Ill. 9, 53 N. E. 303; McElhanon *v.* McElhanon, 63 Ill. 457; Fruitt *v.* Anderson, 12 Ill. App. 421.

Indiana.— Mahan *v.* Sherman, 7 Blackf. (Ind.) 378.

Maryland.— State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; Grahame *v.* Harris, 5 Gill & J. (Md.) 489; Brown *v.* Stewart, 4 Md. Ch. 368.

Massachusetts.— Warren *v.* Stearns, 19 Pick. (Mass.) 73.

New Hampshire.— Blaisdell *v.* Ladd, 14 N. H. 129.

North Carolina.— Newsom *v.* Newsom, 26 N. C. 381; Pearson *v.* Nesbit, 12 N. C. 315, 17 Am. Dec. 569.

South Carolina.— Livingston *v.* Livingston, 2 Mill (S. C.) 428, 12 Am. Dec. 684.

West Virginia.— Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352.

England.— Moffat *v.* Van Millingen, 2 B. & P. 124, note *c* [*approved* in Mainwaring *v.* Newman, 2 B. & P. 120].

Illustrations of rule.— A party can have no right of action against himself, either as debtor or tort-feasor. First Soc. of M. E. Church *v.* Stewart, 27 Barb. (N. Y.) 553. The rule applies where the action, though brought in the name of a third person, as the state, is for the use and benefit of the same person who is sued. Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352. But see Blanchard *v.* Ely, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250.

Exceptions to rule.— In an action at law between a corporation and individuals composing it this identity does not exist and the rule has no application (Pearson *v.* Nesbit, 12 N. C. 315, 17 Am. Dec. 569); nor does it apply to an action upon a promissory note where the maker and the payee are the same person, if the action is brought by the indorsee (Moore *v.* Denslow, 14 Conn. 235). An action may be brought by the payee against the maker of a note, although both payee and maker are members of a commercial partnership and the note is in fact given for its use, where the note is not given to the firm, but to an individual member. Van Ness *v.* Forrest, 8 Cranch (U. S.) 30, 3 L. ed. 478.

Sometimes the question takes the form of whether the cause of action previously existing has not been extinguished; as where one who owes a debt to a decedent is made his executor. See Williams *v.* Moseley, 2 Fla. 304 [*citing* Stevens *v.* Gaylord, 11 Mass. 256; Wankford *v.* Wankford, 1 Salk. 299]. See also Executors and Administrators.

does not negative the existence of a cause of action except in the case of those rights which are not enforceable in equity.[10]

D. Damage Without Wrong — 1. General Rule. For a cause of action there must be a legal injury, an invasion of some positive right; an injury that, at some period of time, legislatures or courts have decreed to be a proper subject for judicial redress.[11] The refusal or discontinuance of a mere favor,[12] or the voluntary conferring of a benefit,[13] gives no right of action; and there is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect.[14]

10. Stone *v.* Brooks, 6 How. (Miss.) 373; Cooper *v.* Nelson, 38 Iowa 440, wherein it was held that while it is well settled at common law that a party cannot bring an action at law against a partnership or a board of trustees, or other board, of which he is a member, the reason assigned is technical, and has no foundation in the essential character of judicial proceedings; as is apparent from the fact that such person could always obtain relief in equity. See, generally, where the same person acts in distinct capacities and interests, Executors and Administrators; Partnership; Trusts.

Mandamus.— Under code provisions relating to mandamus which make the private party aggrieved the proper plaintiff instead of the state or some public official, the proceeding to be conducted as an ordinary action, it is held that since a party cannot resort to a court of equity for a mandamus the technical rule at law should not be applied to the action, as that would amount to a denial of justice; and that therefore an injured party might sue himself in such a proceeding, in his official capacity. Cooper *v.* Nelson, 38 Iowa 440.

11. Orr *v.* Home Mut. Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770; St. Louis Church *v.* Blanc, 8 Rob. (La.) 51; Fisher *v.* Clark, 41 Barb. (N. Y.) 329.

12. Randall *v.* Hazelton, 12 Allen (Mass.) 412; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Mahan *v.* Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461.

Nudum pactum.— If one trust to the mere gratuitous promise of favor from another, as a gratuitous promise by a mortgagor not to act on the power of sale contained in the mortgage, and is disappointed, the law will not protect him from the consequences of his undue confidence, nor encourage carelessness or want of prudence in affairs by giving him a right of action for its infringement. Randall *v.* Hazelton, 12 Allen (Mass.) 412. And in general, there is no right of action in one party when there is no legal obligation on the other party.

13. It is a familiar rule of law that one man cannot make another his debtor by paying even the latter's just debt to a third person voluntarily and without his request. Edgeworth Co. *v.* Wetherbee, 6 Gray (Mass.) 166. Gratuitous advice given by one person to another as to the management of his business, without consideration, and when the person giving it is under no legal obligation by contract, express or implied, relating to the subject-matter of the advice, will not create legal liability. McCausland *v.* Cresap, 3 Greene (Iowa) 161. See also Contracts.

14. Randall *v.* Hazelton, 12 Allen (Mass.) 412; Pasley *v.* Freeman, 3 T. R. 44; Haycraft *v.* Creasy, 2 East 92; Allen *v.* Flood [1898] A. C. 1, 120, per Lord Herschell, who said: "The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality."

In an action the court has nothing to do with the question whether moral right or merits be on the side of defendant or not. Clifford *v.* Hoare, 22 Wkly. Rep. 828.

Human tribunals administer justice imperfectly; even when they do their best, the results obtained, as a general rule, are only approximate to perfect justice. There are wrongs and misfortunes arising from casualties and the imperfections of human institutions against which no human law can give protection. Cook *v.* Chapman, 41 N. J. Eq. 152, 2 Atl. 286.

Illustrations.— Courts of justice sit to enforce civil obligations only; they never attempt to coerce the performance of spiritual ones. Roman Catholic Church *v.* Martin, 4 Rob. (La.) 62 [*approved* in St. Louis Church *v.* Blanc, 8 Rob. (La.) 51]. The motive or intent of a party in exercising a perfectly legal right is immaterial; and although his motives are wicked, and he is thus violating the moral law, an injury resulting from such acts cannot be the subject of an action. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666. See also *infra*, I, G. Where an employer, after honoring the order of an employee in favor of a creditor for some months, refuses longer to do so, not being prompted thereto by the employee, no action will lie by the creditor against the latter as for a tort for taking and using the money. He has not misapplied any money or other valuable thing of the plaintiff's, and so the element of fraud is lacking. McGuire *v.* Kiveland, 56 Vt. 62. "If I know that a villain intends to defraud or in any way to injure my neighbor, it is doubtless my duty as a good citizen and as a Christian man to put him on his guard; but there is no rule of law which renders me liable for his loss in case of my neglect of this duty; it is a moral duty simply, not recognized by law." Ohio, etc., R. Co. *v.* Kasson, 37 N. Y. 218, 224. To same effect is Haycraft *v.* Creasy, 2 East 92, per Kenyon, C. J.

So a railway conductor is under no legal duty to detain a passenger suspected of having stolen property which he has brought on the train with him, and is not liable for the dam-

2. By Exercise of Private Rights — a. In General. A person may suffer special and considerable damage by reason of the acts or omissions of another, but if none of his legal rights are invaded he will have no cause of action. It is a loss without a wrong, the *damnum absque injuria* of the common law. In every complicated society the most careful exercise by each member of his particular rights, or the discharge by each member of his particular duties, can hardly fail to be detrimental at times to others; but such detriment is not actionable.[15] This is still more plain if the loss suffered is that of the gain or advantage expected from the loser's own wrongful act[16] or to be derived from a contract having no legal validity.[17]

age sustained by the owner by the getting away of the thief. Randlette *v.* Judkins, 77 Me. 114, 52 Am. Rep. 747.

15. *Connecticut.*—Morris *v.* Platt, 32 Conn. 75; Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739.

Georgia.— Hendrick *v.* Cook, 4 Ga. 241.

Illinois.— Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438.

Iowa.— McMillin *v.* Staples, 36 Iowa 532; Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148, 4 Am. Rep. 205.

Louisiana.— Anselm *v.* Brashear, 2 La. Ann. 403.

Maine.— Spring *v.* Russell, 7 Me. 273.

Massachusetts.— Randall *v.* Hazelton, 12 Allen (Mass.) 412; Rockwood *v.* Wilson, 11 Cush. (Mass.) 221.

Michigan.— Post *v.* Campau, 42 Mich. 90, 3 N. W. 272.

Minnesota.— Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184.

Missouri.— McHale *v.* Heman, 28 Mo. App. 193.

New Jersey.— Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Cook *v.* Chapman, 41 N. J. Eq. 152, 2 Atl. 286; McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

North Carolina.— Thornton *v.* Thornton, 63 N. C. 211.

Vermont.— Chatfield *v.* Wilson, 28 Vt. 49.

Wisconsin.— Fahn *v.* Reichart, 8 Wis. 255, 76 Am. Dec. 237.

United States.— Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189, 29 Fed. Cas. No. 17,322.

England.— Day *v.* Brownrigg, 10 Ch. D. 294; Rex *v.* Sewer Com'rs, 8 B. & C. 355; Rogers *v.* Dutt, 13 Moore P. C. 209; Winsmore *v.* Greenbank, Willes 577.

A necessary law of society.— *Damnum absque injuria* is not a legal novelty. It does not necessarily follow that because plaintiff may have sustained a serious injury to his property, consequent upon the voluntary acts of defendant, that therefore he has a right to recover damages for that injury. Some acts may be justified by an express provision of law; or the damage may have arisen as the consequence of those acts which others might lawfully do in the enjoyment and exercise of their own rights and the management of their own business; or it may have resulted from the application of those principles by which the general good is to be consulted and promoted, though in many respects operating unfavorably to the interests of individuals in society. Such is and must be the law of society. Spring *v.* Russell, 7 Me. 273. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation. Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

The line which separates this class of acts from those which are the subjects of legal redress is often shadowy and indistinct. It rests frequently on the grounds of public policy, or upon the mere force of authority, rather than upon any clear or well-defined principle. McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

Illustrations.— A railroad has a right to alter the number or character of trains running over its route, providing it continues to furnish the public sufficient accommodation for freight and passengers; and all damages resulting from that cause alone are *damnum absque injuria.* Kinealy *v.* St. Louis, etc., R. Co., 69 Mo. 658. No action will lie against one for demolishing a house built by another, without right or title, upon the land of defendant. Anselm *v.* Brashear, 2 La. Ann. 403. No cause of action exists against one who changes the name of his residence and calls it by the same name by which that of his neighbor has been known from time immemorial, although it may cause much inconvenience and annoyance, unless a sufficient case for slander of title is made out. The law relative to trade-marks has no application. Day *v.* Brownrigg, 10 Ch. D. 294.

16. Preventing a person from doing or continuing to do an unlawful and unauthorized act does not constitute a good cause of action, although damage may have ensued; for example, preventing a railroad corporation from laying a branch track across a public highway without lawful authority (Bangor, etc., R. Co. *v.* Smith, 49 Me. 9, 77 Am. Dec. 246), or closing a pipe whereby a party has unlawfully tapped a canal to obtain water for irrigation purposes (Beekman *v.* Jones, 42 N. Y. App. Div. 328, 59 N. Y. Suppl. 138). To give information to a proper officer of any breach of law, whereby the violator has been compelled to pay a statutory penalty, cannot be recognized by a court as a wrongful act for which damages may be recovered. Thompson *v.* Williams, Tapp. (Ohio) 34.

17. No action will lie to recover damages for a failure to perform an unlawful agreement. It is a settled principle that the law will not aid a party to enforce such a contract

b. In Use of Property — (1) *Reasonable Use.* That one should so use his own as not to injure another is an approved maxim of the common law.[18] The very idea of property, however, involves the common principle of the property itself being used and enjoyed in the manner most advantageous to its possessor,[19] and the maxim is construed to mean that damage resulting from reasonable and ordinary use alone will not constitute a legal injury.[20]

or compensate him for its breach. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Jenkins *v.* Fowler, 24 Pa. St. 308, 28 Pa. St. 176. So of a contract void by the statute of frauds. Wade *v.* Newbern, 77 N. C. 460. See also, *infra*, I, I; CONTRACTS.

18. **Sic utere tuo ut alienum non lædas.**— See, generally, cases cited *infra*, notes 19–22; also:

Minnesota.— Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184.

New York.— Van Pelt *v.* McGraw, 4 N. Y. 110; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 [*affirming* 3 Barb. (N. Y.) 42]; Farrand *v.* Marshall, 21 Barb. (N. Y.) 409; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

Pennsylvania.— Woodring *v.* Forks Tp., 28 Pa. St. 355, 70 Am. Dec. 134.

Tennessee.— Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

England.— Bonomi *v.* Backhouse, E. B. & E. 622 [*reversed* on other grounds in 9 H. L. Cas. 503].

Acts may be harmless in themselves so long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maxim is based. Van Pelt *v.* McGraw, 4 N. Y. 110; South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505.

Sanctions exercise of police powers.— In upholding a statute giving a remedy against one who erects a "spite fence" upon his premises it was held that upon this common-law maxim vests what is termed the police power of the state, so far as it relates to the use which a man may make of his own property. Karasek *v.* Peier, 22 Wash. 419, 61 Pac. 33 [*citing* Tiedeman Lim. p. 423].

19. St. John Young Men's Christian Assoc. *v.* Hutchison, 18 N. Brunsw. 523.

20. *Indiana.*— Durham *v.* Musselman, 2 Blackf. (Ind.) 96, 18 Am. Dec. 133.

Missouri.— McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433.

New York.— Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444 [*reversing* 12 Barb. (N. Y.) 553]; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 [*affirming* 3 Barb. (N. Y.) 42]; Fisher *v.* Clark, 41 Barb. (N. Y.) 329; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Carhart *v.* Auburn Gas Light Co., 22 Barb. (N. Y.) 297; Farrand *v.* Marshall, 21 Barb. (N. Y.) 409; Gardner *v.* Heartt, 2 Barb. (N. Y.) 165.

Pennsylvania.— Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, 6 Atl. 453.

Vermont.— Chatfield *v.* Wilson, 28 Vt. 49; South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505.

Canada.— St. John Young Men's Christian Assoc. *v.* Hutchison, 18 N. Brunsw. 523.

A fundamental principle.— A man may use his property as he chooses, seeing to it that such use invades not the paramount right of others to the undisturbed possession and enjoyment of their property. The principle lies at the foundation of a wisely regulated social organization. Farrand *v.* Marshall, 21 Barb. (N. Y.) 409.

Legal rights must not be violated.— "I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb. Subject to this qualification I may occupy or use my own as I please." Per Gibbs, J., in Deane *v.* Clayton, 7 Taunt. 490, 529.

Landed property.— The cases have decided that where the maxim *sic utere tuo ut alienum non lædas* is applied to landed property it is subject to a certain modification, it being necessary for plaintiff to show not only that he has sustained damage, but that defendant has caused it by doing that which is unnecessary in order to enable him to have the natural use of his own land. If plaintiff only shows that his own land is damaged by defendant using his land in the natural manner he cannot succeed. West Cumberland Iron, etc., Co. *v.* Kenyon, 11 Ch. D. 782 [*reversing* 6 Ch. D. 773].

For illustrations of reasonable use of one's own property within the rule stated in the text see ADJOINING LANDOWNERS; EASEMENTS; FIRES; NEGLIGENCE; WATERS; and like special titles.

To whom the principle applies.— The principle that one may not be subjected to an action for damage resulting from the ordinary and reasonable use of property applies not only to private owners, but to the state and to municipal corporations, also to persons, other than the owner, who have obtained from him any right or title therein.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

Missouri.— McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433.

New York.— Gardner *v.* Heartt, 2 Barb. (N. Y.) 165.

South Carolina.— McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583.

England.— Rex *v.* Sewer Com'rs, 8 B. & C. 355.

Strictures upon common-law maxim.— As thus qualified, the common-law maxim *sic utere tuo ut alienum non lædas* has been characterized as superfluous. Bonomi *v.* Backhouse, E. B. & E. 622, 642 [*reversed* on other grounds in 9 H. L. Cas. 503; *cited* in St. John Young Men's Christian Assoc. *v.* Hutchison, 18

(II) *Unreasonable Use.* There are, however, limitations upon the use which one can make of his own; and damage caused by that which the law has established to be an unreasonable use is within the common-law maxim, *sic utere tuo ut alienum non lædas*, and constitutes a legal injury for which an action will lie.[21]

(III) *Negligence.* Although the use is one which the law deems reasonable, if the damage is not caused by the exercise of the legal right with due care and skill, but by negligent conduct, there is also a legal injury of which the law will take cognizance.[22]

c. In Pursuit of Legal Remedies — (I) *General Rule.* No cause of action exists for the recovery of costs or other expense or damage, occasioned by successful and *bona fide* legal process, however much it may have operated to the prejudice of another.[23] More than that, if the remedy is invoked in good faith, no legal

N. Brunsw. 523] per Earle, J., who said: "A party may damage the property of another where the law permits; and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous." Again it has been said that while the maxim "may be a very good moral precept it is utterly useless as a legal maxim; it determines no right; it defines no obligation." Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444, 445 [*reversing* 12 Barb. (N. Y.) 553].

But where a use of property is such a use as has been legally established to be unreasonable, the prohibition of the law has been said not to be uselessly or imperfectly expressed by this maxim. Per Campbell, C. J., and Coleridge, J., in Bonomi *v.* Backhouse, E. B. & E. 622 [*reversed* on other grounds in 9 H. L. Cas. 503]; Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 527, 49 Am. Rep. 666, where the court said: "The maxim *sic utere tuo ut alienum non lædas*, . . . as commonly translated, 'So use your own as not to injure another's,' . . . is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes. But strictly even then it can mean only: 'So use your own that you do no legal damage to another's.' . . . This maxim also assumes that the injury results from an unlawful act, and, paraphrased, means no more than: 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act;' or, 'Injury from an unlawful act is actionable.'"

By courts in argument.— That one party refuses to let another get water at his spring or make a road across his farm; or locks his pump or gate against him; or builds a fence upon his own land across such other's path; or builds a store, or shop, or high fence on his own land in such close proximity to the other's windows as to exclude light and view; or digs on his lot below the foundation of the other's house so as to endanger it,— will not give rise to any cause of action; since he is only exercising his undoubted right to use his own for himself and deny another all privilege in it. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666. For a similar statement of the law see Pickard *v.* Collins, 23 Barb. (N. Y.) 444.

21. *Connecticut.*— Whitney *v.* Bartholomew, 21 Conn. 213.

Illinois.— Stumps *v.* Kelley, 22 Ill. 140.

Maryland.— Scott *v.* Bay, 3 Md. 431.

Minnesota.— Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184.

New Jersey.— Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810.

New York.— Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 [*affirming* 3 Barb. (N. Y.) 42]; Forbell *v.* New York, 47 N. Y. App. Div. 371, 61 N. Y. Suppl. 1005 [*affirmed* in 164 N. Y. 522, 58 N. E. 644]; Smith *v.* Brooklyn, 18 N. Y. App. Div. 340, 46 N. Y. Suppl. 141 [*affirmed* on other grounds in 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664]; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Carhart *v.* Auburn Gas Light Co., 22 Barb. (N. Y.) 297; Farrand *v.* Marshall, 21 Barb. (N. Y.) 409.

Pennsylvania.— Woodring *v.* Forks Tp., 28 Pa. St. 355, 70 Am. Dec. 134.

Vermont.— Chatfield *v.* Wilson, 28 Vt. 49.

England.— Baird *v.* Williamson, 15 C. B. N. S. 376. But see Chasemore *v.* Richards, 7 H. L. Cas. 349 [*cited* in Bradford *v.* Pickles, [1895] A. C. 587].

For illustrations of unreasonable use of one's own property within the meaning of the rule stated in the text see Adjoining Landowners; Animals; Mines and Minerals; Nuisances; Waters; and like special titles.

22. Jacobson *v.* Van Boening, 48 Nebr. 80, 66 N. W. 993, 58 Am. St. Rep. 684, 32 L. R. A. 229; Kearney *v.* Themanson, 48 Nebr. 74, 66 N. W. 996; Vaughan *v.* Menlove, 3 Bing. N. Cas. 468. See also, generally, cases cited *supra*, I, D, 2, b, (I).

23. Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246; Nolte *v.* Lowe, 18 Ill. 437; McInnes *v.* McInnes Brick Mfg. Co., (N. J. 1897) 38 Atl. 182; and cases cited *infra*, note 24 *et seq.*

Relief in chancery against judgments.— "It is because of the artifice, trick, unfair advantage, or breach of some fiduciary duty, on the part of the holder of the judgment, or the protection of the debtor from the claims of other creditors, that this court takes jurisdiction and prevents the success of fraud." McInnes *v.* McInnes Brick Mfg. Co., (N. J. 1897) 38 Atl. 182, 187 [*explaining* Tomkins *v.* Tomkins, 11 N. J. Eq. 512, and Mechanics Nat. Bank *v.* H. C. Burnet Mfg. Co., 33 N. J. Eq. 486]. See also, generally, Judgments.

injury results, though there proves not to have been sufficient cause therefor and the suit fails.[24]

24. *Louisiana.*— Donovan *v.* New Orleans, 11 La. Ann. 711; Cade *v.* Yocum, 8 La. Ann. 477.

New Hampshire.— Enfield *v.* Colburn, 63 N. H. 218.

New Jersey.— Cook *v.* Chapman, 41 N. J. Eq. 152, 2 Atl. 286 [*approved* in McHale *v.* Heman, 28 Mo. App. 193]; Woodmansie *v.* Logan, 2 N. J. L. 86; Taylor *v.* Wilson, 1 N. J. L. 414.

North Carolina.— Williams *v.* Hunter, 10 N. C. 545, 14 Am. Dec. 597.

Texas.— Haldeman *v.* Chambers, 19 Tex. 1.

Vermont.— South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505.

England.— Davies *v.* Jenkins, 11 M. & W. 745, 1 D. & L. 321; Cotterell *v.* Jones, 11 C. B. 713, per Talfourd, J.; Goslin *v.* Wilcock, 2 Wils. C. P. 302.

The mere bringing of an unjust or unfounded suit against one is not actionable. Smith *v.* Adams, 27 Tex. 28.

Damnum absque injuria.—"Every litigation requires more or less time and trouble. The law makes it the duty of the litigants to be diligent and vigilant, but it has never been understood that a successful litigant was entitled, as against his adversary, to compensation for the time and attention which were necessary for him to bestow upon the litigation. Time and attention thus bestowed the law has always regarded as having been given by the litigant to his own business, and if he has sustained loss in consequence thereof it must be esteemed *damnum absque injuria.*" Cook *v.* Chapman, 41 N. J. Eq. 152, 161, 2 Atl. 286 [*cited with approval* in McHale *v.* Heman, 28 Mo. App. 193]. To same effect see Davies *v.* Jenkins, 11 M. & W. 745, 1 D. & L. 321. "Every man is entitled to come into a court of justice, and claim what he deems to be his right; if he fails, he shall be amerced (according to the old principle) for his false claim; and the defendant is entitled to his costs; and with these he must be content." Woodmansie *v.* Logan, 2 N. J. L. 86, 87.

Applicable to the right to defend and to sue, alike.— "The law not only gives [a party] the right to make defense, but allows him to exercise it in his own way. It is a right that courts have no authority to abridge. It could not be abridged without seriously endangering the safe administration of justice. What is true of the right to make defense is equally so of the right to maintain a suit. They are both free and unrestricted." Cook *v.* Chapman, 41 N. J. Eq. 152, 161, 2 Atl. 286.

Wrong party sued.— Where a wrong party, who has the same name as the debtor, has been sued by mistake, he has a good defense to the action and will be entitled to costs; but he has no further remedy for the inconvenience and trouble to which he has been put. Davies *v.* Jenkins, 11 M. & W. 745, 1 D. & L. 321.

Attachments.— Damages resulting from the suing out of an attachment, unless the attachment was brought with a view to oppress defendant and without probable cause, will not give a right of action although plaintiff in the first action should fail to recover. Williams *v.* Hunter, 10 N. C. 545, 14 Am. Dec. 597. See, generally, ATTACHMENT.

Loss caused by unfounded injunction.—The law secures to every citizen the right to resort *bona fide* to the courts of justice to invoke their aid in protecting him in the enjoyment of his property. Thus the mere fact that a temporary injunction has been obtained by a party to a contract will not raise a cause of action in favor of the other parties thereto, although it has had the effect of preventing them from reaping its benefits. If there has been a breach of the injunction bond a suit might be brought thereon; if there has been malice an action on the case will lie. McLaren *v.* Bradford, 26 Ala. 616. See, generally, INJUNCTIONS.

Suing in the name of third person.— In England it has been held that no action will lie by the defendant in the original suit against one who puts the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause. Cotterell *v.* Jones, 11 C. B. 713, per Williams, J. In cases in this country, however, in which the original action was brought, without authority from such third person to use his name, an action to recover the actual damages sustained by the defendant in the original suit, in loss of time and money paid to defend against it, was sustained. The court held that under such circumstances the gist of the action was not a want of probable cause or malice, for there might be a good cause of action; but the improper liberty of using the name of another person. Bond *v.* Chapin, 8 Metc. (Mass.) 31 [*approved* in Smith *v.* Hyndman, 10 Cush. (Mass.) 554; *followed* in Moulton *v.* Lowe, 32 Me. 466]. See, generally, PROCESS.

Expenses of plaintiff.— A plaintiff cannot recover for counsel fees or other disbursements in his suit unless he recovers them in the suit itself as taxable costs, though the necessity for the litigation was occasioned by the wrongful act of defendant, as by a theft of plaintiff's goods. If his action is civil, his right to costs must depend upon the law which governs the process; and if it is criminal process which he made instrumental to serve his purpose defendant is only liable for costs on account of it to the state, unless there is some special statute to the contrary; and if there is such a statute it would not be necessary to make the claim in a separate suit. Whether he is entitled to costs for the first proceeding must depend upon the laws which govern that proceeding; and it does not alter the case that the proceeding was in another state. Harris *v.* Eldred, 42 Vt. 39. To same effect see McHale *v.* Heman, 28 Mo. App. 193. Where an action was brought by another in the name of plaintiff, but without his authority or consent, an

(II) *Malicious Prosecution.* It is now well established by judicial decision that immunity for an injury caused by invoking legal remedies to redress an unfounded grievance does not extend to protect one who unsuccessfully brings an action, if the process was sued out maliciously and without probable cause.[25]

d. Damage to Business or Profession — (I) *In General.* Damage to a man in his trade, occupation, or profession, which results from a fair competition, is not actionable unless some superior right, by contract or otherwise, is interfered with.[26] The same is also true of loss caused to a man's business or occupation by any other act or omission which does not amount to a legal wrong.[27]

(II) *Motive or Intent.* It has been held that one has the right to enjoy the

action lies by such plaintiff to recover damage caused thereby, against the person so causing it. Linda *v.* Hudson, 1 Cush. (Mass.) 385; Metcalf *v.* Alley, 24 N. C. 38.

Costs and expenses as incidental element of damage.— While such damage will not give a cause of action, it is a proper element of damage in an action for a legal wrong, if it is a natural and proximate result of the wrongful act. Philpot *v.* Taylor, 75 Ill. 309, 20 Am. Rep. 241 [*citing* Dixon *v.* Fawcus, 30 L. J. Q. B. 137]; McEwen *v.* Kerfoot, 37 Ill. 530. *Compare* Cotterell *v.* Jones, 11 C. B. 713.

25. Stone *v.* Crocker, 24 Pick. (Mass.) 81; Savile *v.* Roberts, 1 Ld. Raym. 374; Goslin *v.* Wilcock, 2 Wils. C. P. 302; Chapman *v.* Pickersgill, 2 Wils. C. P. 145. See also Malicious Prosecution.

By the early common law, however, the right to appeal to a court of justice without incurring liability other than that of being amerced and taxed with the costs of the suit seems to have been absolute. Goslin *v.* Wilcock, 2 Wils. C. P. 302 [*cited* in Haldeman *v.* Chambers, 19 Tex. 1]. See, generally, cases cited *supra*, note 24.

26. Loss from such a cause is not the result of a wrongful act, but of the exercise by another of his undoubted rights, and is *damnum absque injuria.*

Georgia.— Hendrick *v.* Cook, 4 Ga. 241.

Massachusetts.— Walker *v.* Cronin, 107 Mass. 555.

New Jersey.— Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233 [*approved* in Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565].

New York.—Johnson *v.* Hitchcock, 15 Johns. (N. Y.) 185.

England.— Rogers *v.* Dutt, 13 Moore P. C. 209. See also *infra*, I, E, 2, c.

Illustrations.— The opening of a new store, tavern, mill, school, lawyer's or physician's office may materially affect the income and profits of such as were there before, but this can be no more than a *damnum absque injuria*, and no damages can be recovered therefor. Hendrick *v.* Cook, 4 Ga. 241; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233 [*approved* in Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565]; Rogers *v.* Dutt, 13 Moore P. C. 209. The construction of a canal and the improvement of the navigation of a river may materially affect the value of an existing transportation business, but for such loss the party injured can have no remedy by suit. Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233 [*approved* in Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565]. No action will lie for representing a rival ferry as not so good as that owned by defendant, although resulting in diverting travel from the latter, apart from the question of slander of title. Johnson *v.* Hitchcock, 15 Johns. (N. Y.) 185, 186, wherein it was said: "If an action would lie in this case it would in all cases of rival business where any means were used to draw custom; and if this were once admitted it would be difficult to know where to stop." A statement by a trader that his own goods were superior to those of another trader, even if untrue and made maliciously, and a cause of loss to the latter, gives no cause of action. Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86.

Competition in obtaining trade contracts.— A trader has the right to induce a person not to contract with another trader, with whom he is in negotiations, but to make a contract with himself instead; and no action lies for the damage sustained thereby. Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598 [*approved* in Allen *v.* Flood, [1898] A. C. 1, which *criticised dicta* in Bowen *v.* Hall, 6 Q. B. D. 333].

27. Illustrations.— Better means of transportation from one point to another may affect the good-will and custom of established stands for the purchase and sale of merchandise and produce, and in many respects change the whole course and kind of business of a neighborhood; but for such loss parties injured have no legal remedies. Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233 [*approved* in Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565]; Durkee *v.* Saratoga, etc., R. Co., 4 How. Pr. (N. Y.) 226. No action lies by a corn-merchant against one who, by demanding an illegal toll, wrongfully keeps away from the town persons having loads of grain for sale, where plaintiff does not show any contract or other exclusive right to the produce thus diverted. Higgins *v.* O'Donnell, 4 Ir. R. C. L. 91. That plaintiff's employer discharged him because a railroad company would not, under its rules, permit him to enter its warehouses to check off freight, or to enter behind its counters to transact business, while it might under some circumstances give an action against his employer, would certainly not do so against the company. Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

fruits and advantages of his own enterprise, industry, skill, and credit free from the merely wanton and malicious acts of others, which are not done in justifiable competition or the service of any interest or lawful purpose, yet fall short of common-law torts; in other words, that motive or intent will sometimes give a cause of action for damage where the act that caused it was not in itself a legal wrong.[28] But this amounts to making the state of mind, and not the act, the basis of the cause of action, and is contrary to the meaning of malice in law and the rules relating thereto,[29] and on both authority and principle would seem to be erroneous in the absence of legislation on the subject.[30]

28. Walker *v.* Cronin, 107 Mass. 555 [*cited* in Snow *v.* Wheeler, 113 Mass. 179; Dudley *v.* Briggs, 141 Mass. 582, 6 N. E. 717]; Moran *v.* Dunphy, (Mass. 1901) 59 N. E. 125, 126, per Holmes, C. J., who said: "In view of the series of decisions by this court . . . we cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort. . . . We see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear."

Illustration.— A manufacturer has a cause of action against a third person who, maliciously and with the unlawful purpose of injuring him in his business, wilfully induces many of his employees to leave his employment, and persuades other persons not to hire out to him, whereby he suffers loss; although those already in his employ had the right to leave when they did, not being bound by contract to serve for any particular time. Walker *v.* Cronin, 107 Mass. 555.

29. See *infra*, I, G.

30. Decisions supporting this view.— No action will lie against a railroad company for damages which result from its having notified its employees, maliciously and with the wicked and wanton intent of injuring plaintiff in his business and character, that they would be discharged should they thereafter trade with plaintiff. A party has a legal right to employ or discharge persons at his own pleasure, subject only to the contractual rights existing between him and such persons; and motive and intent alone will not constitute a cause of action. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666, two judges dissenting. A landlord, whose tenant leaves because forced by a third person to do so or be discharged from the employment of the latter, has no cause of action against the employer for the coercion, although his motives were malicious, if the tenant broke no contract of rental. Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373. Where the terms under which iron-workers are employed allow them to withdraw from the employment at the close of any day, no action will lie at the suit of the employers against third persons who induce or coerce them thus to withdraw; and an evil motive or intent, apart from legal malice, does not enter into the case. Allen *v.* Flood, [1898] A. C. 1 [*reversing* [1895] 2 Q. B. 21], Lord Halsbury, L. C., and Lords Ashbourne and Morris, dissenting. In Allen *v.* Flood, [1898] A. C. 1 [*reviewing* early decisions, *overruling* Carrington *v.* Taylor, 11 East 571, and *distinguishing* Keeble *v.* Hickeringill, 11 East 574 note, and Garret *v.* Taylor, Cro. Jac. 567] this question was discussed at length. The conclusion reached in the ruling opinions is that malice in this connection must be given its usual legal meaning; and that to induce or coerce men to do or abstain from doing acts which do not violate any legal right in third persons is not actionable, whatever may be the motive or intent, unless the means used amount in themselves to legal wrongs, as where there is violence, threats of violence sufficient to put parties in fear of great personal injury, or false statements, which in the sight of the law are actionable torts. Of the result of a legal recognition of malice in the ordinary meaning of the word it is said by Lord Herschell (p. 118): "I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own. However malice be defined, if motive be an ingredient of it, my sense of danger would not be diminished." An instance of an injury to trade which was held to be an actionable wrong and not fair competition was where the master of one of two vessels lying near each other, and engaged in the same kind of adventure, fired a cannon loaded with powder and shot against a canoe manned by natives who desired to trade with the other, and killed one of the crew, occasioning such a panic among the native tribes that the season's trade was lost to the latter vessel. Tarleton *v.* McGawley, Peake N. P. 270 [*approved* in Allen *v.* Flood, [1898] A. C. 1, 105, per Lord Watson, who said: "The case was just the same as if some person had persisted in firing bullets at all and sundry [people] who were about to enter a particular shop, with the effect of driving away its customers and ruining the shopkeeper's business"]. An act is not lawful on the narrow basis that the law sanctions acts which are done in the furtherance of trade competition; but whether it will constitute a legal wrong or not will depend upon whether the act by which the competition is pursued is a lawful act or a legal wrong. Allen *v.* Flood, [1898] A. C. 1, per Lord Herschell.

Distinguished from procuring breach of contract.— The reason for the distinction between the act of a third person who induces

e. Assent or Procurement of Party Injured. It is a rule of the common law that no one can maintain an action for an injury where he has consented to or procured the act which occasioned the loss.[31]

f. Unavoidable Accident. Where one is engaged in a lawful act, an act not mischievous, rash, reckless, or foolish, or naturally liable to result in injury to others, he is not responsible for damages due to unavoidable accident or casualty.[32]

another to break a contract, and that which only induces him to abstain from entering into a contract, is this: that in the one case the act procured is the violation of a legal right, for which the person doing the act can be sued as well as the person who procured it; while in the other case no legal right is violated by the person who did the act from which plaintiff suffered, and to hold the person who induced him to do the act liable to an action would be an entirely new departure. Per Lord Herschell in Allen *v.* Flood, [1898] A. C. 1.

Conspiracy.—As to whether inducing a person to quit his employment, or to do or abstain from doing any other act, where neither the act nor the means used to procure it are lawful, can be the foundation of an action for a conspiracy, it is said in Allen *v.* Flood, [1898] A. C. 1, per Lord Davey (p. 172): "This, I will remind your lordships, is not a case of conspiracy. I do not say whether, if it were, it would or would not make an essential difference:" and per Lord Herschell (p. 124): "I put aside the case of a conspiracy, which is anomalous in more than one respect." See State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011; and also CONSPIRACY. If the acts themselves amount to an unlawful conspiracy, of course such action will lie. Temperton *v.* Russell, [1893] 1 Q. B. 715 [*approved* in Allen *v.* Flood, [1898] A. C. 1, per Lord Watson]. "The vice of that form of terrorism commonly known by the name of 'boycotting,' and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case, conspicuously absent." Per Lord Macnaghten in Allen *v.* Flood, [1898] A. C. 1, 153.

31. *Alabama.*— Bridges *v.* Tennessee Coal, etc., R. Co., 109 Ala. 287, 19 So. 495 [*following* Birmingham, etc., Electric Co. *v.* Allen, 99 Ala. 359].

Illinois.— Illinois Cent. R. Co. *v.* Allen, 39 Ill. 205.

Indiana.— Smith *v.* Thomas, 23 Ind. 69.

Iowa.— McCausland *v.* Cresap, 3 Greene (Iowa) 161.

Louisiana.— Williams *v.* Barton, 13 La. 404.

Massachusetts.—Randall *v.* Hazelton, 12 Allen (Mass.) 412.

New York.— Hamilton *v.* White, 5 N. Y. 9 [*affirming* 4 Barb. (N. Y.) 60; *approving* Horne *v.* Widlake, Yelv. 141].

Pennsylvania.— Tibbs *v.* Brown, 2 Grant (Pa.) 39.

Texas.— Haldeman *v.* Chambers, 19 Tex. 1.

United States.— Southern Pac. Co. *v.* Johnson, 69 Fed. 559, 44 U. S. App. 1, 16 C. C. A. 317; Byam *v.* Bullard, 1 Curt. (U. S.) 100, 4 Fed. Cas. No. 2,262; Plummer *v.* Webb, 1 Ware (U. S.) 69, 19 Fed. Cas. No. 11,234.

England.— Gould *v.* Oliver, 4 Bing. N. Cas. 134; Ilott *v.* Wilkes, 3 B. & Ald. 304; Baily *v.* Merrell, 3 Bulst. 94; Bieten *v.* Burridge, 3 Campb. 140; Forseter *v.* Forseter, 1 Consist. 144; Anichini *v.* Anichini, 2 Curt. Eccl. 210; Rogers *v.* Rogers, 3 Hagg. Eccl. 57; Phillips *v.* Phillips, 1 Rob. Eccl. 144.

Legal maxim.— This rule of law is embodied in the common-law maxim *volenti non fit injuria*,— that to which a person assents is not esteemed an injury. Brown Leg. Max. (7th ed.) 268; Peacock *v.* Terry, 9 Ga. 137, cases cited *supra*, this note.

Failure to avoid consequences of wrongful act.— After a wrong has been committed it is the duty of the injured party to avoid the consequences of that wrong so far as he reasonably can. Gooden *v.* Moses, 99 Ala. 230, 13 So. 765; Lawson *v.* Price, 45 Md. 123. The failure to do so, however, does not bring him within this principle of law, that he who consents to or procures the act which occasions the loss cannot maintain an action; but the question is one which goes merely to the *quantum* of damages. Lawson *v.* Price, 45 Md. 123. See, generally, DAMAGES.

Contributory negligence.— The principle has application in actions for negligence where, though defendant was in the wrong, plaintiff's negligence materially contributed to produce the injury. Noves *v.* Shepherd, 30 Me. 173; 50 Am. Dec. 625; Byam *v.* Bullard, 1 Curt. (U. S.) 100, 4 Fed. Cas. No. 2,262; Senior *v.* Ward, 1 E. & E. 385. See, generally, NEGLIGENCE.

32. *Arkansas.*— Bizzell *v.* Booker, 16 Ark. 308.

Connecticut.— Morris *v.* Platt, 32 Conn. 75.

Illinois.— Lincoln Coal Min. Co. *v.* McNally, 15 Ill. App. 181; Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438.

Indiana.— Durham *v.* Musselman, 2 Blackf. (Ind.) 96, 18 Am. Dec. 133.

Massachusetts.— Brown *v.* Kendall, 6 Cush. (Mass.) 292.

New Jersey.— Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Cook *v.* Chapman, 41 N. J. Eq. 152, 2 Atl. 286.

New York.— Harvey *v.* Dunlop, Lalor (N. Y.) 193.

Vermont.— Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

United States.— Nitro-Glycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206.

England.— Davis *v.* Saunders, 2 Chit. 639; Wakeman *v.* Robinson, 1 Bing. 213.

See also ACT OF GOD.

All the cases concede that the injury arising from inevitable accident, or, which in all reason is the same thing, from an act that ordinary human care and foresight are incapable of guarding against, is but the misfortune of

g. Law of Necessity — (1) *In General.* A loss to individuals occasioned by the use or destruction of their property to preserve life or other property is sometimes justifiable and does not constitute legal damage. It is the exercise of the natural right of every individual, authorized by an overruling necessity; not conferred by law, but tacitly accepted by all human codes.[33] This is analogous to the

the sufferer and lays no foundation for legal liability. Harvey *v.* Dunlop, Lalor (N. Y.) 193.

Limits of this immunity from suit.— To prevent an abuse of this protection, a person is accounted negligent or careless, and blame is imputed to him, if he does not use an extraordinary degree of circumspection and prudence, greater than is commonly practised, and if he might have prevented the accident. Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

Acts of trespass.— In some of the early cases the limits of this protection are very closely drawn in the case of acts having the character of trespasses. Thus it has been held that if an injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable. Leame *v.* Bray, 3 East 593 [*citing* a case from Y. B. 21 H. 7, where one shooting at butts with a bow and arrow, in itself a lawful act, and with no unlawful purpose in view, yet, by reason of the arrow glancing from the mark, having accidentally wounded a man, was holden in trespass]. In another early case a like accidental injury was held actionable, the court holding that no man shall be excused of a trespass except it may be judged utterly without fault. As if a man by force take my hand and strike you, or if one run across a piece while it is discharging, so that it had been inevitable, and defendant had committed no negligence to give occasion to the hurt. Weaver *v.* Ward, Hob. 134. See also Winsmore *v.* Greenbank, Willes 577, 581, wherein it was said: "By *injuria* is meant a tortious act; it need not be wilful and malicious, for though it be accidental, if it be tortious, an action will lie." *Compare* Vincent *v.* Stinehour, 7 Vt. 62, 29 Am. Dec. 145, a case of trespass committed by a lunatic; but see, however, generally, Insane Persons.

33. **The rights of necessity** form a part of our law. Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357 [*approved* in Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980].

Established by dicta of early cases.— The common-law doctrine of necessity is one that is now too firmly established to be drawn in question, and yet, perhaps, necessarily from its very character, it seems somewhat undefined as to its application and extent. It may be remarked that it is not less unquestionable as an established doctrine, because its origin, as far as regards a justification at the common law, is only to be found in the illustrations and arguments of the older authorities, and not in any direct adjudication. American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420.

Common-law maxims.— *Necessitas inducit privilegium quoad jura privata*,— with respect to private rights necessity privileges a person acting under its influence. Broom Leg. Max. (7th ed.) 11; Surocco *v.* Geary, 3 Cal. 69, 58 Am. Dec. 385; American Print Works *v.* Lawrence, 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14 [*reversed* on other grounds in 21 N. J. L. 714, 47 Am. Dec. 190]. "Necessity, says Lord Coke, makes that lawful which would be otherwise unlawful. Whitlock's Case, 8 Coke 69*b*. It is the law of a particular time and place. Hale P. C. 54. It overcomes the law (Blackford *v.* Alkin, Hob. 144), and it defends what it compels (Hale, P. C. 54). In these brief maxims is written the whole reason of the law that justifies the destruction of private property for the public good." Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99, 116. It is one of those cases to which the maxim applies, *salus populi suprema est lex*. Taylor *v.* Plymouth, 8 Metc. (Mass.) 462; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Stone *v.* New York, 25 Wend. (N. Y.) 157 [*affirming* 20 Wend. (N. Y.) 139]; New York *v.* Lord, 17 Wend. (N. Y.) 285, per Bronson, J.; British Cast Plate Manufacturers *v.* Meredith, 4 T. R. 794 [*cited* in Sinnickson *v.* Johnson, 17 N. J. L. 129, 34 Am. Dec. 184]. In this connection the maxim is true, *princeps et respublica ex justa causa possunt rem meam auferre*,— the king and the state may take my property for just cause. Case of King's Prerogative in Saltpetre, 12 Coke 12. The maxim of the law is that "a private mischief is to be endured rather than a public inconvenience." Conwell *v.* Emrie, 2 Ind. 35; Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46; Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357. Lord Hale calls it *lex temporis et loci*, and one of the counsel has aptly termed it the *lex instantis*,— lawless, but not responsible. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14].

Scope of doctrine.— The principle applies as well to personal as to real estate; to goods as to houses; to life as to property; in solitude as in a crowded city; in a state of nature as in a civil society. American Print Works *v.* Lawrence, 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14 [*reversed* on other grounds in 21 N. J. L. 714, 47 Am. Dec. 190]. Such necessity is difficult of definition except in very general terms, and each case must depend upon its own facts. An unsubstantial panic is not such a necessity. Such a state of facts must be shown as to leave no doubt of an impending, imminent peril, or that reasonable cause existed for the apprehension of such a peril. Otherwise those who caused the damage will be liable therefor. Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]; Crawford *v.*

rule of the criminal law which sometimes excuses an act, on the ground of self-preservation, which would otherwise amount to a crime.[34]

(II) *For the Public Safety.* The instance most frequently alluded to in the books is the right to destroy private property to prevent the spread of a conflagration. Other common instances where the right may be lawfully exercised occur when a use or destruction is necessary to prevent the advance of a hostile army, the ravages of a pestilence, or any other great public calamity.[35]

Kastner, 26 Hun (N. Y.) 440, 63 How. Pr. (N. Y.) 90; Struve *v.* Droge, 62 How. Pr. (N. Y.) 233, 10 Abb. N. Cas. (N. Y.) 142; Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99.

Question of fact for jury.— Whether an imminent and absolute necessity exists to destroy property for the public good is a question that is to be determined by the jury on the facts of each particular case. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]; Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99.

By whom exercised.— The right to take or destroy private property, if it can be esteemed a legal right at all, does not appertain to sovereignty, but to individuals considered as individuals. It may be exercised by a single individual for his own personal safety or security or for the preservation of his own property, or by a community of individuals in defense of their common safety or in the protection of their common rights. It is essentially a private and not a public right. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99. There is no such limitation of the common-law right of necessity as that the destruction must be done only to protect the property of him who causes it, and not the property of others alone. If it were so, and such should be announced to be the rule of law, there would be an end to all efficient efforts to arrest the progress of any conflagration. American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420.

34. See Broom Leg. Max. (7th ed.) 11; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]; Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980.

Instances frequently referred to arguendo. — "If two men be on one plank, insufficient to save both, and one be thrust off and drowned, the homicide is excusable, indeed justifiable, through unavoidable necessity, upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, when one must inevitably perish. Noy's Max. pp. 25, 22. The taking of viands to satisfy urgent hunger, the necessity being made to appear, this is no felony or larceny. So a jail being on fire by casualty, and the prisoners enabled to get out, this is no escape nor breaking of the prison. 15 Vin. Abr. 534."

American Print Works *v.* Lawrence, 23 N. J. L. 590, 605, 57 Am. Dec. 420.

35. *California.*— Surocco *v.* Geary, 3 Cal. 69, 58 Am. Dec. 385.

Georgia.— Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400.

Iowa.— Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46.

Indiana.— Conwell *v.* Emrie, 2 Ind. 35.

Massachusetts.— Taylor *v.* Plymouth, 8 Metc. (Mass.) 462 [*approved* in Metallic Compression Casting Co. *v.* Fitchburg R. Co., 109 Mass. 277].

Minnesota.— McDonald *v.* Red Wing, 13 Minn. 38.

New Jersey.— American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14].

New York.— Russell *v.* New York, 2 Den. (N. Y.) 461; New York *v.* Lord, 17 Wend. (N. Y.) 285 [*affirmed* in 18 Wend. (N. Y.) 126]; Struve *v.* Droge, 62 How. Pr. (N. Y.) 233, 10 Abb. N. Cas. (N. Y.) 142.

Pennsylvania.— Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357.

South Carolina.— White *v.* Charleston, 2 Hill (S. C.) 571.

Texas.— Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

United States.— Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980.

England.— Case of King's Prerogative in Saltpetre, 12 Coke 12; Mouse's Case, 12 Coke 63; British Cast Plate Manufacturers *v.* Meredith, 4 T. R. 794; Maleverer *v.* Spinke, 1 Dyer 35*b*.

Advance of hostile army.— The destruction of a bridge or a boat, to check the advance of an army, or the explosion of a magazine of powder, or the destruction of munitions of war or military supplies or any article of contraband of war, is but the exercise of a recognized and belligerent right; and where an army is known to be uncontrolled and licentious, whose occupation of captured places in lines of march is accompanied by acts of besotted vandalism, the destruction of such private property as is calculated to increase the public peril, as intoxicating liquors, would be justifiable upon the grounds of public necessity. Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99.

Trespass justified.— If a highway be so defective as to be unsafe for travel, individual members of the public to whom its use is necessary may lawfully go through a private inclosure without incurring liability for a trespass. Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357 [*citing* 3 Bl. Comm. 36; *cited* in

(III) *To Preserve Life or Property.* Again, a use or destruction by one person of the property of another, where necessary to preserve life or even, in some cases, to preserve property, may be justified under this law. In such case the party injured has no legal redress.[36]

(IV) *Distinguished from Law of Eminent Domain.* This right to destroy property in cases of emergency is not the exercise of the right of eminent domain — the taking of property for public use within a statutory or constitutional provision requiring compensation.[37]

Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46].

Pulling down dangerous ruins.—In analogy to the doctrine of nuisances and the case of captains of ships throwing overboard the cargo to save the lives of the crews, firemen may pull down chimneys left in a ruined and dangerous state by a fire, to prevent their remaining to endanger lives, and will not be liable for damage caused by their falling. Dewey *v.* White, M. & M. 56.

A memorable instance of folly in refusing to act upon this law is recorded in the third volume of Clarendon's history. It is there mentioned that the lord mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down of forty wooden houses, or to the removal of the personalty belonging to the lawyers of the Temple, then on circuit, for fear he would be answerable for a trespass, and in consequence of this conduct half of that great city was burned. Russell *v.* New York, 2 Den. (N. Y.) 461; Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

36. To preserve life.— A right of self-defense, of self-protection, without regard to the lives or property of others, exists by necessity in every individual placed in certain situations at sea or on land, in the country or in a city. Per Randolph, J., in American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420. Thus no action will lie for trespassing on the land of another, where such use of the property was necessary in order to escape death from an enemy. American Print Works *v.* Lawrence, 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14 [*reversed* on other grounds in 21 N. J. L. 714, 47 Am. Dec. 190]; Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357. Where, for the safety of his boat and passengers in a great tempest, the ferryman and passengers throw overboard property being transported, the damage accruing only by the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man; so if a tempest arises in the sea, *levandi navis causa*, and for the salvation of the lives of men, it is lawful for passengers to cast over the merchandises. Mouse's Case, 12 Coke 63.

To preserve property.— The court will not sustain an action against anyone who appropriates or destroys the property of another with *bona fide* intention of preventing injury to himself or others. Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68. And a man may in some cases justify the destroying of his neighbor's property where such a course is necessary for the preservation of his own. So people of a neighborhood may justify a trespass on the premises of another for the purpose of destroying noxious animals. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]; Respublica *v.* Sparhawk, 1 Dall. (Pa.) 357. Familiar examples cited in the English books are, that when plaintiff's dog is killed in the act of pursuing defendant's deer in his park, or rabbits in his warren, or poultry within his own grounds, this will justify the killing without proof of any higher necessity. Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99.

37. Individuals are not liable to compensate persons thus damaged; nor are municipal corporations responsible for property destroyed by public officials to prevent the spread of a fire, both because such destruction is not an exercise of the right of eminent domain, and on the general ground that such corporations are not liable, in the absence of express statute, for damages caused by acts of their officers.

California.— Surocco *v.* Geary, 3 Cal. 69, 58 Am. Dec. 385; Dunbar *v.* San Francisco, 1 Cal. 355 [*cited* in Spring Valley Water Works *v.* San Francisco, 61 Cal. 18]; Correas *v.* San Francisco, 1 Cal. 452.

Iowa.— Field *v.* Des Moines, 39 Iowa 575, 18 Am. Rep. 46.

Minnesota.— McDonald *v.* Red Wing, 13 Minn. 38.

New York.— Russell *v.* New York, 2 Den. (N. Y.) 461.

South Carolina.— White *v.* Charleston, 2 Hill (S. C.) 571.

Tennessee.— Harrison *v.* Wisdom, 7 Heisk. (Tenn.) 99.

Texas.— Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

See, generally, EMINENT DOMAIN; MUNICIPAL CORPORATIONS.

Contra, see Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400, discussed in Dunbar *v.* San Francisco, 1 Cal. 355. In New Jersey it was held that the destruction of property by the officials of a municipal corporation to prevent the spread of a fire, under authority conferred by a statute, is the exercise of the power of eminent domain, unless the destruction is justified under the overruling law of necessity. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]; American Print Works *v.* Lawrence, 23 N. J. L. 9, 590, 57 Am. Dec. 420.

Powers of eminent domain and police.— In their leading features the powers of eminent

(v) *Statutory Powers and Liability.* In many states, statutes have been passed conferring authority upon certain officials of municipal corporations to destroy property to prevent the spread of a fire; some of these statutes affect the corporation with a limited liability.[38]

3. By Exercise of Public Rights or Powers — a. General Governmental Powers. It is necessary to the very existence of civilized communities that the state and those who exercise its powers should have a large measure of protection from liability for damage to individuals which must often result from official acts; and courts have repeatedly declared such an immunity from suit to be an established common-law principle.[39] As regards the state or other

domain and police are plainly different, the latter reaching even to destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in the case of a nuisance tending to breed disease. In the first instance the community proceeds on the ground of overwhelming calamity, and in the second because of the fault of the owner of the thing; in either case compensation is not a condition of the exercise of the power. The same general principle attends its exercise in other directions, and it is generally based upon disaster, fault, or inevitable necessity. On the other hand the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, but in public utility. These distinctions clearly mark the cases distant from the border-line between the two powers, but in or near to it they begin to fade into each other, and it is difficult to say when compensation becomes a duty and when not. Per Agnew, C. J., in Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738. See also similar discussions in American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

38. See Municipal Corporations.

A police power.— It has been said that such statutes are mere regulations of the law of necessity, appointing a municipal agent to judge of the emergency, and do not sanction any destruction which could not be justified independently of them. Wynehamer *v.* People, 13 N. Y. 378, 12 How. Pr. (N. Y.) 238, per Comstock and Selden, JJ. [*citing* Russell *v.* New York, 2 Den. (N. Y.) 461, opinion of Sherman, Senator]; Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190 [*reversing* on other grounds 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14]. By the better authority, however, the statutes are valid police regulations, and loss occasioned by a proper exercise of the power must be borne by the party injured, except in so far as the statutes may require compensation, even though no overruling necessity did in fact exist. Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738; White *v.* Charleston, 2 Hill (S. C.) 571; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980. Thus, where a statute fixes a liability on the corporation, the party injured must bring his case within the terms of the provision, or he has no cause of action. Parsons *v.* Pettingell, 11 Allen (Mass.) 507; Coffin *v.* Nantucket, 5 Cush. (Mass.) 269; Taylor *v.* Plymouth, 8 Metc. (Mass.) 462; People *v.* Buffalo, 76 N. Y. 558, 32 Am. Rep. 337; New York *v.* Stone, 20 Wend. (N. Y.) 139 [*affirmed* in 25 Wend. (N. Y.) 157]; New York *v.* Lord, 17 Wend. (N. Y.) 285 [*affirmed* in 18 Wend. (N. Y.) 126]; Bowditch *v.* Boston, 101 U. S. 16, 25 L. ed. 980.

Liability of officials.— Officers of the corporation, upon whom the authority is conferred, will be liable if they exceed their powers (Parsons *v.* Pettingell, 11 Allen (Mass.) 507); but if they act within their jurisdiction and without negligence the statutes afford a complete protection (Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420, 23 N. J. L. 9; White *v.* Charleston, 2 Hill (S. C.) 571).

Effect of statutes on natural right.— Such statutes do not deprive any citizen of his natural right to destroy buildings to prevent the spread of fire. He may still exercise that right at the peril of being held responsible, as in other cases, for an error of judgment as to the existence of the necessity. American Print Works *v.* Lawrence, 21 N. J. L. 248, 1 Code Rep. (N. Y.) 14 [*reversed* on other grounds in 21 N. J. L. 714, 47 Am. Dec. 190]. See also Parsons *v.* Pettingell, 11 Allen (Mass.) 507, where the point was not decided because not raised below.

39. **An interesting exposition of this immunity from suit,** which is a necessary attribute of every civilized government, having reference particularly to police powers, is that by Redfield, J., in an early Vermont case, Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68. See also Blair *v.* Forehand, 100 Mass. 136, 1 Am. Rep. 94, and cases cited; Wynehamer *v.* People, 13 N. Y. 378, 12 How. Pr. (N. Y.) 238 [*affirming* 20 Barb. (N. Y.) 567; *reversing* 20 Barb. (N. Y.) 168]; and, generally, Constitutional Law; Gaming; Health; Intoxicating Liquors; and like special titles.

Service of criminal process.— The maxim of the law that a man's house is his castle is applicable only to civil suits and has not effect to restrain an officer of the law from breaking into and entering a dwelling for the purpose of serving criminal process upon the occupant. Barnard *v.* Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123. See also Maleverer *v.* Spinke, 1 Dyer 35*b*; and, generally, Process; Sheriffs and Constables; Trespass.

sovereignty this privilege is absolute in the absence of consent or permission to subject it to liability by suit,[40] while judicial, ministerial, and like public officials are protected sufficiently to prevent the government from being impeded in the exercise of its functions, but not to permit damage to individuals by the flagrant misuse of power.[41]

40. See, generally, MUNICIPAL CORPORATIONS; STATES; UNITED STATES.

41. See, generally, JUDGES; JUSTICES OF THE PEACE; OFFICERS; PROCESS; SHERIFFS AND CONSTABLES; STATES; UNITED STATES; UNITED STATES MARSHALS.

Officers acting judicially — *Generally.*— Judges are not responsible to private parties in civil actions for judicial acts, however injurious may be those acts and however much they may deserve condemnation, unless, perhaps, when the acts are palpably in excess of the jurisdiction of the judge and are done maliciously and corruptly. Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285. For various other statements of the protection extended to judicial acts see:

Alabama.— Craig *v.* Burnett, 32 Ala. 728.

Connecticut.— Phelps *v.* Sill, 1 Day (Conn.) 315.

Delaware.— Bailey *v.* Wiggins, 1 Houst. (Del.) 299.

District of Columbia.— Bradley *v.* Fisher, 7 D. C. 32 [*affirmed* in 13 Wall. (U. S.) 335, 20 L. ed. 646].

New York.— Yates *v.* Lansing, 5 Johns. (N. Y.) 282.

England.— Taaffe *v.* Downes, 3 Moore P. C. 36, note *a*, discussing at length the scope of the protection and numerous early decisions; Calder *v.* Halket, 3 Moore P. C. 28; Floyd *v.* Barker, 12 Coke 23.

Motives of judge.— If the authority and jurisdiction of a court is once admitted in any case, it were a preposterous proposition to offer evidence to a jury as to its motives. Chaos would come again if the judgment of the court could be impeached and its validity tried before a jury in a collateral action on the issue as to the motives of the judge in entering the judgment. Bradley *v.* Fisher, 7 D. C. 32 [*affirmed* in 13 Wall. (U. S.) 335, 20 L. ed. 646]. To the same effect see Bailey *v.* Wiggins, 1 Houst. (Del.) 299.

Even jurors, who are judges of fact, are always exempted from prosecution by action or indictment for what they did in their judicial character. Yates *v.* Lansing, 5 Johns. (N. Y.) 282, 293, wherein it was said: "It did not escape the discernment of the early sages of the law that the principle requisite to secure a free, vigorous, and independent administration of justice, applied to render jurors, as well as judges, inviolable;" Floyd *v.* Barker, 12 Coke 23 [*cited* in Taaffe *v.* Downes, 3 Moore P. C. 36, note *a*].

Ministerial officers — *General rule.*— A ministerial officer is protected while acting within legal authority (Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Rogers *v.* Dutt, 13 Moore P. C. 209) and with due skill and caution (American Print Works *v.* Lawrence, 21 N. J. L. 248). Where, however, a ministerial officer does anything against the duty of his office, an action lies. Rogers *v.* Brewster, 5 Johns. (N. Y.) 125.

Negligent acts.— It is frequently stated as a general rule that ministerial officers charged with certain duties, their office being voluntary, and compensation being received for their services, are liable at the suit of the person injured for all damage caused by the negligent performance of their public duty.

Louisiana.— Lecourt *v.* Gaster, 50 La. Ann. 521, 23 So. 463.

Massachusetts.— Williams *v.* Adams, 3 Allen (Mass.) 171 [*citing* Nowell *v.* Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62].

New York.— Bartlett *v.* Crozier, 15 Johns. (N. Y.) 250.

Vermont.— School Dist. No. 1 *v.* Kittridge, 27 Vt. 650; Fairbanks *v.* Kittredge, 24 Vt. 9.

Virginia.— Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 99 Am. Dec. 445.

England.— Pickering *v.* James, L. R. 8 C. P. 489; Ferguson *v.* Kinnoull, 9 Cl. & F. 251.

This proposition, like many other general rules, is not of universal application, it being confined to those cases in which the duty is charged for the benefit of individual members of the community, not extending to those which are due the public as an entirety. Williams *v.* Adams, 3 Allen (Mass.) 171, wherein it was held that no action would lie against the keeper of a house of correction for mere negligence in not furnishing sufficient food and warmth of room, whereby an inmate was injured in his health, no express malice being shown, nor any such gross negligence as to authorize the inference of implied malice and intention to do bodily injury; that the effect of entertaining such an action would be to transfer to the supervision of the courts of law questions as to the proper management of such places, and to require the judiciary to pass upon all alleged abuses arising from neglect. The court distinguished actions against sheriffs and their deputies for misfeasance and non-feasance in serving processes as being cases of direct personal responsibility to the individuals affected thereby, citing as authority for this distinction Spear *v.* Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53, and Russell *v.* Devon, 2 T. R. 667, 673. In the latter case, an action brought against a county for neglect of duty, Ashhurst, J., said: "It has been said that there is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." See also BRIDGES; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.

b. Statutory Powers — (I) *General Rule.* Individuals may also suffer damage by the exercise, with due skill and caution, of powers conferred by statute for the general benefit of the public; but such damage can never be redressed in judicial proceedings, whatever consequences may follow,[42] unless positive law has decreed that compensation shall be made.[43]

(II) *Applications of Rule.* Thus, apart from the law requiring compensation, no cause of action exists for damage resulting from the proper exercise of powers conferred by statute to construct and maintain necessary public improvements, whether the damage is merely consequential or results directly from the taking of private property for the improvement under the power of eminent domain.[44]

42. See, generally, the cases cited *infra*, this note, and note 43 *et seq.*

Scope of doctrine.— To those who are exercising such power with due care and skill the statute affords a complete indemnity, notwithstanding the injury complained of is such as would be an invasion of a common-law legal right. Rigney *v.* Chicago, 102 Ill. 64. The damages held to be excusable must be "necessarily attendant on the operation" of the thing authorized (Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164 [*affirmed* in 52 N. J. L. 221, 20 Atl. 169, and *followed* in Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833]; and not such as are "essentially a direct invasion of private property" (Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 240, 23 Atl. 810). In the case last cited, in the language of Depue, J., "the distinction between those injuries incidentally and unavoidably arising in the course of the exercise of franchises conferred for those purposes, which are denominated public uses, with the consequent immunity from actions therefor, and injuries occasioned by the direct invasion of private property under color of such franchises, which are actionable wrongs, has been adopted by the supreme court of the United States, as will be made apparent upon a comparison of the opinions in Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 537; Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336; and Baltimore, etc., Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739."

43. Compensation by positive law.—To obviate the hardship and injustice caused by this well-settled principle of law it is provided in most of the states of the Union, either by the constitution or by statute law, that private property shall not be taken or damaged for public use without just compensation. Rigney *v.* Chicago, 102 Ill. 64; Stevens *v.* Middlesex Canal, 12 Mass. 466; Householder *v.* Kansas City, 83 Mo. 488; Ward *v.* Peck, 49 N. J. L. 42, 6 Atl. 805; Miller *v.* Morristown, 47 N. J. Eq. 62, 20 Atl. 61. See, generally, EMINENT DOMAIN.

Such laws preserve rather than create rights.— Laws which require compensation preserve rights which, but for the grant of power to take or damage private property for a public use, would be legal, rather than create new causes of action; and therefore only such damage can be recovered as would have been actionable had the parties who caused it not been acting under legislative authority. Hall *v.* Bristol, L. R. 2 C. P. 322 [*citing* Caledonian R. Co. *v.* Ogilvy, 2 Macq. 229]. See also Tyler *v.* Western Union Tel. Co., 54 Fed. 634.

Nominal damages.— Where compensation is thus required, an injury cannot be said to be *damnum absque injuria*, although no present or special damage can be proved; but nominal damages at least may be recovered, as in the case of the invasion of other legal rights. See Dorman *v.* Ames, 12 Minn. 451; Paris Mountain Water Co. *v.* Greenville, 53 S. C. 82, 30 S. E. 699; and *infra*, I, E.

44. Consequential damages, caused by the state and its immediate agencies, in the exercise, for instance, of the power to open, improve, and repair streets and highways, see:

Connecticut.— Munson *v.* Mallory, 36 Conn. 165.

Louisiana.— Donovan *v.* New Orleans, 11 La. Ann. 711.

Massachusetts.— Benjamin *v.* Wheeler, 15 Gray (Mass.) 486.

Missouri.— Householder *v.* Kansas City, 83 Mo. 488.

New Jersey.—Quinn *v.* Paterson, 27 N. J. L. 35; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565.

Pennsylvania.— O'Connor *v.* Pittsburgh, 18 Pa. St. 187.

England.— Boulton *v.* Crowther, 2 B. & C. 703; Sutton *v.* Clarke, 6 Taunt. 29; British Cast Plate Manufacturers *v.* Meredith, 4 T. R. 794.

Caused by private individuals or corporations in the exercise of such powers as the construction and maintenance of railroads, canals, dams for water-power, and similar public improvements, see Spring *v.* Russell, 7 Me. 273; Stevens *v.* Middlesex Canal, 12 Mass. 466; Stowell *v.* Flagg, 11 Mass. 364; Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581; Griffiths *v.* Welland Canal Co., 5 U. C. Q. B. O. S. 686.

Eminent domain.— When exercised by the state and its immediate agencies, see Rigney *v.* Chicago, 102 Ill. 64; Ward *v.* Peck, 49 N. J. L. 42, 6 Atl. 805; Miller *v.* Morristown, 47 N. J. Eq. 62, 20 Atl. 61; Boulton *v.* Crowther, 2 B. & C. 703, 710, per Littledale, J., who said: "An ejectment would not lie, because the act authorized them to take the land. If an action would be maintainable, it must be assumpsit, founded upon an implied promise.

(III) *Exceptions to Rule.* If, however, the damage is caused by unlawful acts which exceed the statutory powers conferred,[45] or from negligent conduct or

But surely the law would not imply a promise in them to pay for that from which they derive no benefit, and which the legislature authorized them to take." See also Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593. When exercised by private individuals or corporations, see McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, 66, 53 Am. Dec. 517, wherein it is said: "As an action lies not against the state for direct or consequential damage, it lies not against her *locum tenens*, clothed with her power and protected by her shield. She is not always in a condition to execute her works of public improvement with her own hand, and her prerogative would be useless did it not extend to the instrument with which she is compelled to work."

Remedy by petition.—Compensation for the loss where property is taken is the measure of redress to which natural justice entitles the injured individual, but for any obligation devolving upon the state therefor it must be appealed to by petition to the sovereign or legislature, not by action. McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583.

Contrary views.— In some states it has been held that the right to compensation where private property is taken for public purposes by the right of eminent domain is inherent in positive as well as in natural justice, and must be made even in the absence of any statutory or constitutional requirement. Brewer *v.* Bowman, 9 Ga. 37; Young *v.* McKenzie, 3 Ga. 31; Doe *v.* Georgia R., etc., Co., 1 Ga. 524; Johnston *v.* Rankin, 70 N. C. 550; Cornelius *v.* Glen, 52 N. C. 512; State *v.* Glen, 52 N. C. 321 [*approving dictum* in Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451].

In other states the immunity from liability for either direct or consequential damage is denied where the power is exercised by an individual or a corporation, for the promotion of private interests. Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Sinnickson *v.* Johnson, 17 N. J. L. 129, 34 Am. Dec. 184 [*cited* in Bordentown, etc., Turnpike Road Co. *v.* Camden, etc., R., etc., Co., 17 N. J. L. 314]; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 [*citing* Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 8 N. E. 537]. In New York it is held on general grounds which would seem to make it applicable whether the work was being prosecuted by the state directly, or by private individuals or corporations, that adjacent landowners have a cause of action for consequential damage in all cases where their legal rights have been violated, although such violation was absolutely necessary to the proper exercise of the statutory powers. As, for example, a cause of action exists for an invasion of the right of property by throwing quantities of earth, gravel, and the like upon the adjacent land in blasting, irrespective of the question of negligence and want of skill in doing the work. St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 [*affirming* 3 Barb. (N. Y.) 42]; Selden *v.* Delaware, etc., Canal Co., 24 Barb. (N. Y.) 362; Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462. *Compare* Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 [*cited* in Roemer *v.* Striker, 142 N. Y. 154, 36 N. E. 808]; Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357 [*criticising* Fletcher *v.* Auburn, etc., R. Co., 25 Wend. (N. Y.) 462]; People *v.* Albany, 5 Lans. (N. Y.) 524. And see cases cited *supra*, I, D, 3, b, (I).

Nuisances.— For damage resulting from the operation of a public improvement with due skill and caution no cause of action arises. If a nuisance is legalized by statute no action is maintainable in the absence of a statute providing compensation therefor. Thus, none will lie for damage caused by smoke, dust, vibration, and the like, in the proper use of a railroad. Burroughs *v.* Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64; Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352; Hammersmith, etc., R. Co. *v.* Brand, L. R. 4 H. L. 171; Glasgow Union R. Co. *v.* Hunter, L. R. 2 H. L. Sc. 78; Rex *v.* Pease, 4 B. & Ad. 30. The owner of real estate adjoining public land or water highways holds it subject to the right of the legislature to use the highway at will, and if, in the use of it, indirect injuries arise to such property, it is an inconvenience to which he must submit unless the state makes compensation as a mere gratuity. It is *damnum absque injuria*, a damage not merely without a remedy, but without right to a remedy. Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

45. **Statutory powers exceeded.**—Where the erection and maintenance of a public work are not conformable to the provisions and conditions of the statute authorizing it, an action will lie. This results from the plain principles of law founded on the maxim *sic utere tuo ut alienum non lædas*. Winkley *v.* Salisbury Mfg. Co., 14 Gray (Mass.) 443; Hill *v.* Sayles, 12 Metc. (Mass.) 142; Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754. See, generally, cases cited *infra*, I, E, 2. Where, by statute, a public work is authorized, like construction of a railroad, if in the course of such construction a river is obstructed without there being any real necessity therefor, but only because the engineers thought it the best mode, the easiest, and perhaps the cheapest, and injury is caused by such obstruction, it may be remedied by the appropriate common-law action, and the party injured need not conform to the statutory

unskilfulness in their exercise,[46] it will constitute a legal injury which may result in damage which may be redressed by an action.

E. Wrong Without Loss or Damage — 1. General Rule. Every injury to a legal right imports damage, and entitles an injured party to his action, and a recovery of nominal damages if none other are proved.[47]

2. Application of Rule — a. In General. Invasions of rights of this character, which import damage redressible by action, are breaches of contract,[48]

remedy. Estabrooks *v.* Peterborough, etc., R. Co., 12 Cush. (Mass.) 224.

46. **Negligent exercise.**— Where damage is not necessarily incident to the erection and maintenance of a public improvement authorized by statute, but results from an improper or negligent manner of doing it, it constitutes legal injury which may be redressed by action.

Massachusetts.— Perkins *v.* Lawrence, 136 Mass. 305 [*distinguishing* Hull *v.* Westfield, 133 Mass. 433]; Perry *v.* Worcester, 6 Gray (Mass.) 544; Cogswell *v.* Essex Mill Corp., 6 Pick. (Mass.) 94.

Missouri.— Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581.

New Hampshire.— Rowe *v.* Addison, 34 N. H. 306; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179.

Pennsylvania.—Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161.

Vermont.— Waterman *v.* Connecticut, etc., Rivers R. Co., 30 Vt. 610, 73 Am. Dec. 326.

England.— Lawrence *v.* Great Northern R. Co., 16 Q. B. 643; Boulton *v.* Crowther, 2 B. & C. 703; Jones *v.* Bird, 5 B. & Ald. 837; Sutton *v.* Clarke, 6 Taunt. 29.

47. *Alabama.*— Gooden *v.* Moses, 99 Ala. 230, 13 So. 765; Adams *v.* Robinson, 65 Ala. 586; Bagby *v.* Harris, 9 Ala. 173.

Connecticut.— Ely *v.* Stannard, 46 Conn. 124; Branch *v.* Doane, 18 Conn. 233; Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739.

Louisiana.— Dudley *v.* Tilton, 14 La. Ann. 283; Akin *v.* Bedford, 5 Mart. N. S. (La.) 502.

Maryland.— McTavish *v.* Carroll, 13 Md. 429.

New York.— Parker *v.* Foote, 19 Wend. (N. Y.) 309; Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320.

United States.— Byam *v.* Bullard, 1 Curt. (U. S.) 100, 4 Fed. Cas. No. 2,262; Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189, 29 Fed. Cas. No. 17,322.

England.— King *v.* Rochdale Co., 14 Q. B. 136 [*affirming* 14 Q. B. 122]; Ashby *v.* White, 2 Ld. Raym. 938, 955, 1 Salk. 19, 1 Bro. P. C. 62, wherein it was said: "Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary."

Intentional failure to prove special damage. — The rule stated in the text is equally so whether the absence of proof on the subject arises from design or inadvertence on the part of plaintiff. Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320.

Acts beneficial to plaintiff.—The legal right of plaintiff having been invaded, he is entitled to maintain his action although the act of defendant has conferred upon him a benefit rather than an injury. Weaver *v.* Eureka Lake Co., 15 Cal. 271; Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739; Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189, 29 Fed. Cas. No. 17,322.

Reasons for rule.—"There are some cases in which the award of merely nominal damages is perfectly consistent with this rule [that neglect of duty where no loss occurs is incapable of giving a right of action] either because the party has other substantial redress, or because the nominal damages cover all that are suffered and answer as a preventive by way of warning against further injury. An example of the first class is where a plaintiff in replevin, after obtaining his property and establishing his title, obtains only nominal damages. Examples of the second class are had in cases of technical trespass . . . where the award of costs has its effect by way of warning, and the judgment itself may establish a right before in dispute." Per Cooley, J., in Post *v.* Campau, 42 Mich. 90, 96, 3 N. W. 272.

Scope of doctrine.— It was said in a Vermont case that "the English courts have recently gone far toward breaking up the whole system of giving verdicts, when no actual injury has been done, unless there be some right in question which it is important to the plaintiff to establish." Paul *v.* Slason, 22 Vt. 231, 238, 54 Am. Dec. 75. But see discussion of this case in Fullam *v.* Stearns, 30 Vt. 443. *Compare* also Childs *v.* Seabury, 35 Hun (N. Y.) 548, 551, wherein it was said: "The law administered in this state at present does not rest upon mere technical rules, but upon the broader basis of right, and, in the investigation of claims, upon the whole law of the land, legal and equitable."

48. *Alabama.*— Treadwell *v.* Tillis, 108 Ala. 262, 18 So. 886.

California.— Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75.

Louisiana.— Kemp *v.* Nichols, 4 La. Ann. 174.

Missouri.— Fulkerson *v.* Eads, 19 Mo. App. 620.

Pennsylvania.— Bash *v.* Bash, 9 Pa. St. 260.

South Carolina.— Hayes *v.* Clinkscales, 9 S. C. 441.

England.— Clifford *v.* Hoare, 22 Wkly. Rep. 828.

Compare Newell *v.* Hoadley, 8 Conn. 381, 388, wherein it was held that no action would lie against a party for a failure to assign a bond to the plaintiff where a complete defense to an action on the bond existed, the court saying: "The law compels no man to do an

direct positive injuries to the person,[49] and violations of the right of property, real or personal.[50]

b. Rights of Property. Where a property right is invaded it is often imperative that it should be vindicated by action, irrespective of present damage, to prevent a continuance or repetition of the wrong from becoming the foundation of an adverse right;[51] as, for instance, the abridgment or misuse of an ease-

utterly vain thing. It subjects no man to damages for not doing an act perfectly nugatory."

In Georgia this is declared by the code, which provides that for every breach of contract by one of the parties thereto, a right of action results to the other party. Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 590, 15 S. E. 676.

Covenants, guaranty and indemnity contracts.— Extreme illustrations of the operation of this doctrine sometimes arise out of breaches of covenants in deeds and guaranty and indemnity contracts, where actions are sustained and nominal damages recovered although plaintiff has not yet been damnified and may never be. See Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999; also COVENANTS; GUARANTY; INDEMNITY. As to covenants, it has been vigorously assailed in Michigan by Cooley, J. After stating the general principles relating to causes of action and the reason why actions are sometimes sustained although no present damage has resulted, he said in part: "To give an action for nominal damages upon a covenant which was intended to accomplish a substantial protection is to confuse all sound ideas of legal remedy. It gives no substantial redress; it establishes no right for future protection; it cannot operate by way of warning; and it taxes the public, and taxes the time and attention of courts in enforcing an injury which as yet exists only in imagination and may never ripen into substantial wrong. It is idle to call that a remedy which redresses nothing, but leaves the real injury in existence as before, threatening to inflict the same damage and in the same way. . . . When technical rules only result in injustice it is well to consider whether others, equally consistent with certainty in the law, and more consonant to equity, may not be recognized." Post *v.* Campau, 42 Mich. 90, 96, 3 N. W. 272.

49. Illustrations given by courts arguendo. — If a man gives another a cuff on the ear, though it cost him nothing, yet he shall have his action, for it is a personal injury. Ashby *v.* White, 2 Ld. Raym. 938, 1 Salk. 19, 1 Bro. P. C. 62. The law does not upon every occasion require distinct proof that an inconvenience has been sustained. For example, if the hand of A touched the person of B, who shall declare that pain has or has not ensued? The only mode to render B secure is to infer that inconvenience has actually resulted. Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill (N. Y.) 170 [*quoting* from Hamm N. P. (Am. ed. 1823) 39].

50. Trespass on land.— A person may sustain an action of trespass for an unauthorized entry upon his land, although he shows no specific damage to have thereby accrued to him. Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739; Dudley *v.* Tilton, 14 La. Ann. 283; Ashby *v.* White, 2 Ld. Raym. 938, 1 Salk. 19, 1 Bro. P. C. 62; Marzetti *v.* Williams, 1 B. & Ad. 415. By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing. Entick *v.* Carrington, 19 How. St. Tr. 1030, 2 Wils. C. P. 275.

Personal property.— Nominal damages are frequently proper in actions of replevin, where no actual damage has been caused by the wrongful act. Per Cooley, J., in Post *v.* Campau, 42 Mich. 90, 3 N. W. 272; Coe *v.* Peacock, 14 Ohio St. 187. See, generally, REPLEVIN; and for other decisions relative to causes of action for violation of personal property rights see *infra*, I, H.

Right of common.— It is sufficient to sustain an action for an injury to a right of common that the plaintiff prove his right, and that the defendant put upon it cattle, or (if he be another commoner) more cattle than he ought to; and he need not prove any specific injury. Mellor *v.* Spateman, 1 Saund. 343, 346*a* note; Wells *v.* Watling, 2 W. Bl. 1233 [*disapproving* Marys' Case, 9 Coke 111, (*cited* in Marzetti *v.* Williams, 1 B. & Ad. 415)]; Hobson *v.* Todd, 4 T. R. 71; Pindar *v.* Wadsworth, 2 East 154.

Injuries caused by dams.— Where land belonging to one party has been overflowed by a dam erected by another, the former is entitled to at least nominal damages (Stafford *v.* Maddox, 87 Ga. 537, 13 S. E. 559; Ellington *v.* Bennett, 59 Ga. 286; Dorman *v.* Ames, 12 Minn. 451); even though it is occasioned by throwing back the water within the natural channel of the stream, whereby it is merely raised to a slightly greater height upon the banks (Hendrick *v.* Cook, 4 Ga. 241; Omelvany *v.* Jaggers, 2 Hill (S. C.) 634, 27 Am. Dec. 417). *Contra*, Chalk *v.* McAlily, 11 Rich. (S. C.) 153; Garrett *v.* McKie, 1 Rich. (S. C.) 444.

Act prohibited by statute.— Where a statute gives an action for a particular act, as the making, without right, of a machine for which another has a patent, the doing of the act imports a damage, and no actual damage is necessary to support the suit. Per Story, J., in Whittemore *v.* Cutter, 1 Gall. (U. S.) 429, 1 Robb Pat. Cas. 40, 29 Fed. Cas. No. 17,601.

Indirect injuries.— The doctrine is not limited to immediate and forcible injuries, but the same reason applies to those which are indirect and committed without violence. The difficulty lies in the form of the action, and not in the substance of the remedy. Greenleaf *v.* Ludington, 15 Wis. 558, 82 Am. Dec. 698.

51. *Alabama.*— Stein *v.* **Burden, 24 Ala.** 130, 60 Am. Dec. 453.

ment,[52] or the invasion by one of the proprietors on a stream of the right common to them all to have the water left in its natural state except in so far as it may be affected by what the law deems to be a reasonable use.[53]

c. Interference With Contract Rights — (I) *In General.* A question upon some of the phases of which there is little uniformity of opinion is to what extent and upon what grounds a loss caused by the interference, by persons not parties

Connecticut.— Chapman *v.* Thames Mfg. Co., 13 Conn. 269, 38 Am. Dec. 401.

United States.— Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189, 29 Fed. Cas. No. 17,322.

England.— Nicklin *v.* Williams, 10 Exch. 259; Hobson *v.* Todd, 4 T. R. 71; Mellor *v.* Spateman, 1 Saund. 343, 346*a* note.

Canada.— Mitchell *v.* Barry, 26 U. C. Q. B. 416.

52. An act which constitutes an abridgment of an easement must be an injury and a cause of action to the party entitled to the easement without proof of actual damage sustained (Plumb *v.* McGannon, 32 U. C. Q. B. 8); and if the party having an easement in land put it to a use other than that falling within his right, the party injured may maintain an action and recover nominal damages in order to vindicate that right (Appleton *v.* Fullerton, 1 Gray (Mass.) 186). See EASEMENTS.

53. *Alabama.*— Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

California.— Weaver *v.* Eureka Lake Co., 15 Cal. 271.

Connecticut.— Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739.

Maine.— Blanchard *v.* Baker, 8 Me. 253, 23 Am. Dec. 504.

Massachusetts.— Newhall *v.* Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Hill *v.* Sayles, 12 Metc. (Mass.) 142.

New York.— Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191 [*affirming* 39 Barb. (N. Y.) 311]; Parker *v.* Foote, 19 Wend. (N. Y.) 309.

United States.— Webb *v.* Portland Mfg. Co., 3 Sumn. (U. S.) 189, 29 Fed. Cas. No. 17,322.

England.— Dickenson *v.* Grand Junction Canal Co., 15 Beav. 260.

See, generally, and for what is an unreasonable use, MILLS; NAVIGABLE WATERS; WATERS.

Reasonable use.— The right to the benefit and advantage of water flowing past land in a natural stream is not an absolute and exclusive right to the flow of all the water in its natural state; and it is only for an unreasonable and unauthorized use of the common benefit that an action will lie. Chatfield *v.* Wilson, 28 Vt. 49; Embrey *v.* Owen, 6 Exch. 353, 15 Jur. 633. Thus there may be a diminution in the quantity, or a retardation or an acceleration of the natural current, which is indispensable for a general valuable use of the water and perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using a stream at all. Dorman *v.* Ames, 12 Minn. 451 [*citing* Palmer *v.* Mulligan, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270]; Tyler *v.* Wilkinson, 4 Mason (U. S.) 397, 24 Fed. Cas. No. 14,312. It is very difficult — indeed impossible — to define precisely the limits which separate the reasonable from the wrongful application. It is only a question of degree, and whether the use is unreasonable and actionable must depend on the facts in the case and the state of the law of the particular jurisdiction applicable thereto. On the one hand it could not be permitted that the owner of many thousands of acres of porous soil abutting on one part of the stream could be permitted to irrigate continually by canals and drains, and so cause a serious diminution of the quantity of water, though the loss to the natural stream arose only from the natural absorption and natural evaporation in such use; on the other hand one's common sense would be shocked that a riparian owner could not dip a watering-pot into the stream to water his garden or allow his cattle or family to drink. In America a very liberal use of the stream for the purposes of irrigation and for carrying on manufactories is permitted. So in France, where everyone may use it "*en bon père de famille et pour son plus grand avantage*" (Code Civil, art. 640 (*a*), by Palliett). In England a user to that extent would hardly be permitted. Embrey *v.* Owen, 6 Exch. 353, 15 Jur. 633 [*citing* Kent Comm.; Wood *v.* Waud, 3 Exch. 748, 13 Jur. 472].

Underground streams.— Rights may be acquired in subterranean waters flowing in well-defined watercourses, and violations thereof vindicated by action, where the circumstances are such as would enable plaintiff to recover if the stream was wholly above ground. Delhi *v.* Youmans, 50 Barb. (N. Y.) 316.

Other illustrations.— A deposit of sawdust in the bed of a stream or in a mill-pond is an injury to the right of one entitled to the use of the water. Delaware, etc., Canal Co. *v.* Torrey, 33 Pa. St. 143 [*approving* Jones *v.* Crow, 32 Pa. St. 398]; Mitchell *v.* Barry, 26 U. C. Q. B. 416. A person having a customary right to a continuous flow of water for domestic purposes from a spout supplied from the water of a stream has a right of action against another who, by abstracting the water from the stream in quantities, does not leave enough to meet the exigencies of him who has such right. Harrop *v.* Hirst, L. R. 4 Exch. 43. That sufficient water still continues to flow in the stream for defendant's use if he would erect a dam and open a raceway will not destroy a cause of action for an unreasonable diversion. The right of one party cannot be taken away for the sake of the convenience of another, even under such circumstances. Crooker *v.* Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555.

to a contract, with rights acquired thereby, is actionable.[54] If the act of interference whereby the breach of contract is caused is itself a legal wrong, as where there is fraud, libel, slander, violence, or actionable threats, it is not doubted but that an action lies for the resulting damage against the party guilty of the tort.[55] An action also lies, by virtue of statute, regardless of the character of the act of interference, where the relation of master and servant, in its strict sense, is thereby interrupted.[56]

(II) *Motive or Intent.* Where the elements of legal or statutory wrong are both wanting, it is held by some courts that no right whatever is violated, and the loss is *damnum absque injuria*, however malicious may have been the motive, or evil the intent, of the party interfering;[57] by others that a right is violated if the act by which the breach is induced is coupled with malice or other evil intent, stress being laid on the state of mind as the essential requisite of the cause of action.[58] Neither of these views, it is submitted, is in accord with the undisputed principles which govern malice in its legal aspect,[59] and it has been so argued in well-considered cases. These hold that a right existing by contract is a positive legal right, for an invasion of which he who causes it, although not a party, is affected with legal liability for the resulting damage. The act being wrongful, evil motive, apart from legal malice, is unimportant, as in the case of other violations of legal rights.[60] Direct decisions supporting this view are few in

54. See also, in this connection, *supra*, I, D, 2, d.

55. *California.*— Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

Kentucky.— Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545 [*followed* in Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550].

Massachusetts.— Marsh *v.* Billings, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

Missouri.— Lally *v.* Cantwell, 30 Mo. App. 524; McCann *v.* Wolff, 28 Mo. App. 447.

New York.— Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30 [*reversing* 2 Hun (N. Y.) 492, 5 Thomps. & C. (N. Y.) 14]; Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

The cases are too numerous to be cited or reviewed where interference with business or contract relations, through acts of violence, annoyance, threats, deceit, fraud, libel, or slander, have been redressed both in England and in this country. Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

56. See, generally, Master and Servant.

57. Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545; Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550; McCann *v.* Wolff, 28 Mo. App. 447; Ashley *v.* Dixon, 48 N. Y. 430, 8 Am. Rep. 559.

The rule is that only those who are parties to, or in some manner bound by, a contract, are liable for a breach of it. Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545 [*followed* in Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550].

Motive.— If to procure another to break his contract with a third person is not a legal wrong, and the means used to procure the breach are lawful, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander, or violence to effect the same purpose. Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545 [*followed* in Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550].

But two classes of exceptions.— "With this rule there can be safely and consistently made but two classes of exceptions. One such exception was made by the English 'Statute of Laborers' to apply where apprentices, menial servants, and others, whose sole means of living was manual labor, were enticed to leave their employment, and may be applied in this state by virtue of, and as regulated by, our own statutes. The other arises where a person has been procured against his will, or contrary to his purpose, by coercion or deception of another, to break his contract." Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545 [*followed* in Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550].

Judgment debt.— No action lies against one for inducing a judgment debtor not to pay a judgment, since the creditor has his remedy by execution. Platt *v.* Potts, 35 N. C. 455.

58. Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55; Lumley *v.* Gye, 2 E. & B. 216, Coleridge, J., dissenting [*discussed* in 2 Harv. L. Rev. 19]; Bowen *v.* Hall, 6 Q. B. D. 333, Coleridge, C. J., dissenting; Temperton *v.* Russell, [1893] 1 Q. B. 715; Hewitt *v.* Ontario Copper Lightning Rod Co., 44 U. C. Q. B. 287.

59. See for these rules, *infra*, I, G.

60. Walker *v.* Cronin, 107 Mass. 555 (wherein the court states that the principle of law making one who induces a servant to break a contract of employment liable in damages therefor, although sometimes supposed to

number, and, apart from principle, it cannot be said that the law is yet settled in conformity with it. Several interesting legal questions are suggested by it.[61]

have sprung from the English "Statute of Laborers," is rather founded upon the legal right which the master derives on the contract, and not merely upon the relation of master and servant; and it applies to all contracts of employment if not to contracts of other descriptions); Jones *v.* Stanly, 76 N. C. 355; Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780. In Allen *v.* Flood, [1898] A. C. 1, decided in the English House of Lords [*reversing* Flood *v.* Jackson, [1895] 2 Q. B. 21], this view is taken after an exhaustive discussion of every phase of the subject, and held applicable to all contracts irrespective of their nature. The leading cases of Lumley *v.* Gye, 2 E. & B. 216, and Bowen *v.* Hall, 6 Q. B. D. 333, and the case of Temperton *v.* Russell, [1893] 1 Q. B. 715, are approved on the ground that a legal right acquired by contract had been invaded, and the act therefore constituted a legal wrong; but those portions of the opinions of the judges in those cases which held that malice and evil intent was the gist of the cause of action were disapproved as erroneous *dicta*. It is there said by Lord Watson (p. 106): "Mr. Justice Erle [in Lumley *v.* Gye, 2 E. & B. 216] . . . said: 'The authorities are numerous and uniform that an action will lie against a person who procures that a servant shall unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same.' The learned judge went on to say: . . . 'It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong.' These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided. He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured."

Injury to contract right through negligence. — It was held in an English case that the neglect of a waterworks company to keep in repair a water-pipe imbedded in a turnpike embankment gave no cause of action to one who had contracted to cut through the embankment for the owner of adjoining land, for an injury to his contract-right by loss of time and expense caused by the escaping water; that malicious intention was the gist of such cause of action and did not appear from the facts. Cattle *v.* Stockton Waterworks Co., L. R. 10 Q. B. 453 [*following* Lumley *v.* Gye, 2 E. & B. 216]. Of this case it was said in Allen *v.* Flood, [1898] A. C. 1, 154, per Lord Macnaghten: "I should be disposed to hold that if a right has been knowingly violated, an allegation of malice is superfluous, and that if there has been no violation of any right, malice by itself is not a cause of action."

It is no answer to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Per Crompton, J., in Lumley *v.* Gye, 2 E. & B. 216. Where the proposition to be deduced from the case of Ashby *v.* White, 2 Ld. Raym. 938, Smith Lead. Cas. (7th Am. ed.) 343, is satisfied,— that is, wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such injury,— an action lies; and the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. Per Brett, L. J., in Bowen *v.* Hall, 6 Q. B. D. 333.

Lack of precedent no answer.— The fact that there is no precedent is not conclusive against the right to maintain the action. It is the function of the courts to apply well-established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbor, or of benefiting one's self at his expense, is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do, or to refrain from doing, particular acts. Per Lord Herschell in Allen *v.* Flood, [1898] A. C. 1.

61. The breach of the contract being an invasion of a positive legal right, the fact that the party interfering had no knowledge of the existence of a contract would not affect his liability except as it might bear on the *quantum* of damages. See *infra*, I, G. Again, the action would perhaps be sustained and the plaintiff entitled to a judgment for nominal damages at all events, even if no present or actual damage had resulted. See *supra*, I, E, 2, c, (1); 2 Harv. L. Rev. 21; Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780, Reade, J., dissenting. Another question is suggested in an article in 2 Harv. L. Rev. p. 21, note 1, in the following language: "One effect of the decision in Lumley *v.* Gye, 2 E. & B. 216, is to give the plaintiff two causes of action, one in tort and the other in contract, for what may be substantially the same damage. As the causes of action are distinct and consistent, the plaintiff is not obliged to elect, and a recovery upon one cannot be a bar to an action upon the other; but the plaintiff is not en-

3. Actions Ex Delicto for Negligence. Where a duty imposed by contract is negligently performed, resulting in a breach of the agreement, an action will lie, and nominal damages are recoverable, although the action is brought in form *ex delicto* for the negligence instead of *ex contractu* for the breach.[62] So, where a duty is imposed by law for the benefit of individuals, it has been held that a party injured by neglect to perform it is entitled to his action although he has not suffered any special damage.[63]

F. Wrong With Loss or Damage — 1. In General. Where legal rights have

titled to double compensation; and it would seem, in the absence of direct authority, that an actual recovery of damages in one action ought to be admissible in evidence to reduce damages in the other. But see Bird *v.* Randall, 1 W. Bl. 373, 387; Thompson *v.* Howard, 31 Mich. 309."

Laudable motive.— Since the act of interference is itself illegal, as in the case of other invasions of a positive legal right, the fact that the wrong-doer was actuated by motives of self-interest, in business, or by motives wholly laudable, is immaterial. He must be regarded as a malicious intermeddler, using the word "malicious" in its legal sense. Walker *v.* Cronin, 107 Mass. 555; Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780 [*followed* in Jones *v.* Stanly, 76 N. C. 355].

Injury disconnected from existing contract. — If the gist of the cause of action should not be the invasion of a positive legal right, but the fact that the persuasion was used for the indirect purpose of injuring plaintiff or of benefiting defendant at the expense of plaintiff, as was held by some of the judges in Bowen *v.* Hall, 6 Q. B. D. 333, and Lumley *v.* Gye, 2 E. & B. 216, it would follow as a result that any person who persuades another not to enter into a contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such third person. There would be a cause of action where a trader induces a person not to contract with a third with whom he is in negotiations, but to make a contract with himself instead, a proceeding which occurs every day and the legitimacy of which no one will question. Per Lord Herschell in Allen *v.* Flood, [1898] A. C. 1.

62. Breaches of contract.— The action being one substantially founded on a contract, it can make no difference whether it is in the form of tort or assumpsit. There is no authority for any such distinction, but, it being admitted that where there is a breach of an express contract nominal damages may be recovered, the only difference between suing on the express and on the implied contract is as to the mode of proof. The consequences resulting from the breach of it must be the same; and one is that wherever there is a breach of contract, or any injury to the right arising out of the contract, nominal damages are recoverable. Marzetti *v.* Williams, 1 B. & Ad. 415. One who employs another to present a bill for acceptance is entitled to recover nominal damages for neglect in failing to present it, although such neglect has occasioned no real damage whatever. Van Wart *v.* Woolley, M. & M. 520.

An extreme case may be put where a party who has sustained no inconvenience brings the action. Nevertheless he is entitled to his suit, and the remedy for such useless litigation would be to deprive him of his costs. Marzetti *v.* Williams, 1 B. & Ad. 415.

63. Duty imposed by law.— It is said that no action lies for negligence unless plaintiff shows special damage. But that proposition is wider than the law warrants; for, in an action of tort arising out of a breach of contract or neglect of the duty which the law imposes, nominal damages are sufficient to entitle plaintiff to judgment. This is a rule of law, and it has recently been recognized and acted upon. Godefroy *v.* Jay, 7 Bing. 413 [*approving* Marzetti *v.* Williams, 1 B. & Ad. 415].

Neglect of official duty.— Where an officer neglects to return an execution until after the return-day, nominal damages are recoverable if there is no present or actual damage. Laflin *v.* Willard, 16 Pick. (Mass.) 64, 26 Am. Dec. 629. See, generally, Damages; Sheriffs and Constables. *Contra*, McAllister *v.* Clement, 75 Cal. 182, 184, 16 Pac. 775, in which it was held of a code provision: "For the official misconduct or neglect of a notary public, he and his sureties on his official bond are liable to the parties injured thereby for all the damages sustained,"— that it did not justify the contention that the action can be sustained for nominal damages, or at any rate the case was one where the maxim *de minimis non curat lex* applied.

Action for wrongful death.— Under a statute creating a liability against an individual or corporation for causing the death of another through neglect or other wrongful act or omission, every violation of the statute will sustain a suit and calls for nominal damages if none other are proved. Quin *v.* Moore, 15 N. Y. 432; McIntyre *v.* New York Cent. R. Co., 43 Barb. (N. Y.) 532. *Contra*, Boulter *v.* Webster, 11 L. T. Rep. N. S. 598. See also Death.

Act affecting public, prohibited.— "Where a statute prohibits the doing of a particular act affecting the public, as the construction of a railway between certain points before the building of a designated branch line, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to show that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law." Chamberlaine *v.* Chester, etc., R. Co., 1 Exch. 870.

been violated it matters not that the acts or omissions of the wrong-doer are unaccompanied by negligence. Negligence is not at all the gravamen of the cause of action,[64] but individuals in the exercise of their legal rights are in duty bound to conduct themselves in a careful and prudent manner, and to act in good faith toward those with whom they have contracts or other reciprocal obligations or duties, under the penalty of being liable for all damage which is the result of negligence or *mala fides*.[65] Neither negligence, however,[66] nor fraud,[67] nor other

64. Lawson *v.* Price, 45 Md. 123; St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258.

65. **The only grounds** for a recovery in actions for tort are damages resulting from an unlawful act on the part of defendant, or from negligence or failure in the performance of a lawful act. Phares *v.* Stewart, 9 Port. (Ala.) 336, 33 Am. Dec. 317; Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438. To same effect see Bizzell *v.* Booker, 16 Ark. 308; Vandenburgh *v.* Truax, 4 Denio (N. Y.) 464, 47 Am. Dec. 268.

Lawful acts may be performed in such a manner, so carelessly, negligently, and with so little regard to the rights of others, that he who in performing them injures another must be responsible for resulting damage. Burroughs *v.* Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64.

Where the act is lawful, liability can only arise upon and for the manner of doing it, and not for the act itself. McMillin *v.* Staples, 36 Iowa 532; Slatten *v.* Des Moines Valley R. Co., 29 Iowa 148, 4 Am. Rep. 205.

66. **Negligence without damage not actionable.**— A neglect of duty where no loss occurs cannot give a right of action. Post *v.* Campau, 42 Mich. 90, 3 N. W. 272; McCurdy *v.* Swift, 17 U. C. C. P. 126. In civil proceedings, acts — including omissions — apart from their consequences are indifferent. It is only when an act occasions injury to another that the person doing the act becomes liable in damages to the person injured by it. Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772. See, generally, NEGLIGENCE.

Consistent with rule as to nominal damages.— This principle of law is perfectly consistent with that which sustains the suit and gives nominal damages where no present or special damage can be proved, in certain cases where an unquestioned legal right is invaded. Per Cooley, J., in Post *v.* Campau, 42 Mich. 90, 3 N. W. 272. See, generally, *supra*, I, E.

Act may be wrongful although not actionable.— No action will lie for negligence unless damage results from the act complained of. It is the act or omission of the party that is wrongful, and is always so described, without regard to the consequences which flow, or may flow, from them. These results or consequences may, or may not, end in a liability to sue. That depends upon whether damage or injury has ensued; but although there can be no recovery and there is no damage in the act, there may nevertheless be a wrongful act. McCurdy *v.* Swift, 17 U. C. C. P. 126.

67. **Fraud without damage not actionable.** — In the leading case, frequently quoted from, in support of this proposition, it was said by Croke, J.: "Damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth." Baily *v.* Merrell, 3 Bulst. 94, 95. To same effect see:

Alabama.— Mobile, etc., R. Co. *v.* Felrath, 67 Ala. 189.

California.— Herron *v.* Hughes, 25 Cal. 555.

Connecticut.— Ely *v.* Stannard, 46 Conn. 124; Sherwood *v.* Solmon, 5 Day (Conn.) 439, 5 Am. Dec. 167.

Massachusetts.— Freeman *v.* Venner, 120 Mass. 424; Randall *v.* Hazelton, 12 Allen (Mass.) 412.

New Jersey.— Byard *v.* Holmes, 34 N. J. L. 296.

New York.— Rice *v.* Manley, 66 N. Y. 82, 84, 23 Am. Rep. 30 (wherein it was said: "This language has been frequently quoted with approval by judges and text-writers, and the rule as thus laid down is generally applicable to the multifarious forms of fraud which come before the courts"); Ranney *v.* Warren, 17 Hun (N. Y.) 111; Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

North Carolina.— Walsh *v.* Hall, 66 N. C. 233.

United States.— Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55.

England.— Pasley *v.* Freeman, 3 T. R. 44; Waterer *v.* Freeman, Hob. 266, 267, where it is said: "There must be not only a thing done amiss, but also a damage either already fallen upon the party or else inevitable."

See, generally, FRAUD.

Illustrations.— Where plaintiff sued for $6,000 for false representations in the sale of a farm on which he still owed defendant $10,000 of the purchase-price, secured by mortgage, it was held that an action would not lie for the reason that he had not been damaged; since he could resist a suit brought to foreclose, to the extent of his just claim. Ranney *v.* Warren, 17 Hun (N. Y.) 111. A purchaser of real estate is not damnified by encumbrances existing against it, although the debts which they were given to secure are false and fraudulent, where the amount of such encumbrances was deducted from the purchase-price. Magwire *v.* Hall, 27 Mo. 146. No cause of action exists in favor of the grantee of land against the grantor for a subsequent conveyance of the same premises to a third party, which has obtained priority of record, where the second purchaser is not a *bona fide* purchaser for value; since his conveyance is void and plaintiff cannot be damaged thereby. Marshall *v.* Robert, 22 Minn. 49. Wrongful and fraudulent acts by the trustee in a trust deed, whereby the premises involved were sold for less than they would otherwise have brought, are not actionable where the sale is wholly illegal and void; since in such a case

wrong or immoral conduct or intent,[68] will give rise to a cause of action unless it has resulted in legal damage.

2. Conspiracy. An action will not lie for the greatest conspiracy if nothing is put into execution; but if it is carried into effect and the party damaged the action will lie.[69]

3. False and Fraudulent Representations. A mere naked falsehood gives no right of action; but if it be a falsehood told with the intention that it shall be

no damage can have resulted to any party. Thornburg *v.* Jones, 36 Mo. 514. Although parties to a deed may have entered into it with the purpose and intent to defraud, yet, unless the rights of complainant are affected thereby he could not be heard to complain. Cook *v.* Cook, 12 Ark. 381 [*citing* Lightfoot *v.* Colgin, 5 Munf. (Va.) 42].

68. Unlawful or immoral intent or conduct. — See Nichols *v.* Valentine, 36 Me. 322; Lambard *v.* Pike, 33 Me. 141; Morgan *v.* Bliss, 2 Mass. 111; Smith *v.* Bowler, 2 Disn. (Ohio) 153.

Illustrations — Generally.— No action for damage will lie against a bank for defacing a note, as by writing on the face thereof the words "Payment stopped." Destroying or defacing a written contract does not affect the liability of the parties to it. Had the note even been destroyed, the remedy of the holder would not have been affected in the slightest degree. McKinley *v.* American Exch. Bank, 7 Rob. (N. Y.) 663. To same effect of a judgment record, see Platt *v.* Potts, 35 N. C. 455. An action will not lie against one for assisting the mortgagor of chattels to remove them from the state where, if the chattels thus mortgaged should be sold under execution, the proceeds would have to be applied to prior liens which would more than consume them. Kemp *v.* Nichols, 4 La. Ann. 174. An invalid sale on execution, which disturbed neither the owner of the property in his possession nor his control over the title, cannot be the foundation of an action against the judgment creditor; even for twenty-five dollars which was paid to have the execution quashed, no such expense being necessary. The claim of the judgment creditor to own the judgment debtor's interest under the farcical sale was *vox et præterea nihil.* Minter *v.* Swain, 52 Miss. 174 [*cited* in Ely *v.* Stannard, 46 Conn. 124]. *v.* Legh, 3 B. & Ald. 470. "If a man forge a bond in my name I can have no action upon the case yet, but if I am sued I may for the wrong and damage, though I may avoid it by plea; but if it were a recognizance or fine I shall have a deceit presently before execution." Waterer *v.* Freeman, Hob. 266, 267 [*cited* in Ely *v.* Stannard, 46 Conn. 124]. Where a party learns that a debt due from him to another is about to be attached, although by somewhat questionable and improper means, and because of such knowledge pays the debt and thereby prevents plaintiff from obtaining the attachment, to his loss in the whole amount of his own debt, no action lies. Simpson *v.* Dall, 3 Wall. (U. S.) 460, 18 L. ed. 265.

Threats.— A threat to commit an injury is not, as a general rule, an actionable private wrong. It is only the promise of doing something which in the future may be injurious. It may never be carried into effect. It cannot be foreknown that it will be. Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373 [*citing* Cooley Torts 29]. See also Threats.

Unreasonable use of land.—Although a person uses his land otherwise than in a way which the law has determined to be natural and ordinary, no action will lie unless the unreasonable use has caused a damage to plaintiff. West Cumberland Iron, etc., Co. *v.* Kenyon, 11 Ch. D. 787 [*reversing* 6 Ch. D. 773]. Thus for one to destroy the lateral support to which an adjoining landowner is entitled in law for his land is not actionable unless appreciable damage results. Backhouse *v.* Bonomi, 9 H. L. Cas. 503 [*reversing* E. B. & E. 622]; Smith *v.* Thackerah, L. R. 1 C. P. 564.

69. *California.*— Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491; Herron *v.* Hughes, 25 Cal. 555.

Missouri.— McHale *v.* Heman, 28 Mo. App. 193.

New York.— Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104.

Tennessee.— Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

England.— Savile *v.* Roberts, 1 Ld. Raym. 374; Cotterell *v.* Jones, 11 C. B. 713.

See, generally, Conspiracy.

Legal damage must result.— No action will lie for compelling plaintiff to resort to law in order not to be deprived of his just rights, although conspiracy and wrongful acts on defendant's part are charged. The mere expenditure of money in maintaining or defending an action does not constitute legal damage. Cotterell *v.* Jones, 11 C. B. 713, per Talfourd, J.; McHale *v.* Heman, 28 Mo. App. 193, 197, wherein the court said that if the fact that a party has unlawfully withheld or denied rights of another, and thus driven him into the expenses and inconveniences of litigation, "may constitute the basis of an action, then every plaintiff who sues and recovers for a wrong done may follow up the proceeding with another suit, to compensate him for the trouble and expense of maintaining the first. He may then begin another action for indemnity on account of the last effort to vindicate his rights, and so on *ad infinitum.*" See, generally, *supra*, I, D, 2, c.

Where object of combined effort is lawful. — A conspiracy is an agreement between two or more persons to do an unlawful act. If the act to be done is not unlawful, then the agreement or combination is not a conspiracy, and injury caused thereby is not actionable. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

acted upon by the party injured, and that act must produce damage to him, and does, an action lies.[70]

4. Direct or Proximate Damage. Damages which may be recovered by action are only those which are the natural or proximate result of the wrongful act or omission of defendant.[71]

G. Motive or Intent — 1. In General. The state of mind with which a person exercises his own legal rights or invades those of another, as determining or affecting legal liability, has given rise to much discussion and some difference of opinion. There are, however, certain well-established legal principles in this connection, courts differing somewhat in their application.[72]

70. *Massachusetts.*— Randall *v.* Hazelton, 12 Allen (Mass.) 412.

New Hampshire.— Enfield *v.* Colburn, 63 N. H. 218.

New York.— Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

North Carolina.— Walsh *v.* Hall, 66 N. C. 233.

England.— Pasley *v.* Freeman, 3 T. R. 44; Langridge *v.* Levy, 2 M. & W. 519 [*affirmed* in 4 M. & W. 337]; Green *v.* Button, 2 C. M. & R. 707, Tyrw. & G. 118; Haycraft *v.* Creasy, 2 East 92.

See, generally, Fraud.

"There are certain duties the non-performance of which the jurisprudence of this country has made the subject of a civil action. It is laid down by Lord, Ch. B., Comyn Dig. tit. Action on the Case for Deceit, A, 1, that 'an action on the case for a deceit lies when a man does any deceit to the damage of another.'" Pasley *v.* Freeman, 3 T. R. 51, 64.

Instance.— A purchaser of land at a foreclosure sale under a mortgage given by one who had no title to the premises has all that any one with whom he dealt could give him. Therefore he suffers no damage, for which he can have legal redress, by the act of another in obtaining a conveyance to himself, of the property, from the owner of the genuine title; although on fraudulent representations that the conveyance was for the benefit of the judicial sale purchaser and the grantor so intended it. Waterman *v.* Seeley, 28 Mich. 77.

Fraud and damage.— It is an ancient and well-established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two concur, there an action lies. This proposition cannot safely be applied as a test by which to determine whether the facts in any case constitute an actionable wrong, beyond keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false, or does not know to be true, to another's loss or his own gain. So, in reference to the term "damage," the law is that it means a loss, brought upon the party complaining, by the violation of some legal right, or it will be considered as merely *damnun absque injuria.* Randall *v.* Hazelton, 12 Allen (Mass.) 412.

Expenses of investigating representations. — An action cannot be maintained against one for expenses incurred in investigating representations made by him, which investigation discloses that they are false and fraudulent. It is the damage which results from acting upon false representations as if they were true, and not the expense of detecting their falsity, which a plaintiff is entitled to recover. Enfield *v.* Colburn, 63 N. H. 218.

False and fraudulent suit.— Were it otherwise, a plaintiff who makes and institutes a suit upon a false and fraudulent claim and is beaten not only must satisfy the judgment against him for costs, but is also liable for an action on the case; but such is not the law. Enfield *v.* Colburn, 63 N. H. 218. See *supra*, I, D, 2, c.

71. See, generally, Damages, and particular titles in which such questions commonly arise, as Contracts; Fraud; Negligence.

It is a fundamental principle of law, applicable alike to breaches of contract, such as those of indemnity, and to torts, that in order to found a right of action there must be a wrongful act done and a loss resulting from that wrongful act; the wrongful act must be the act of defendant; and the injury suffered by plaintiff must be a natural and not merely a remote consequence of the act. Warwick *v.* Hutchinson, 45 N. J. L. 61.

In an action of deceit it must appear judicially to the court that the fraud and the damage sustain to each other the relation of cause and effect, or, at least, that the one might have resulted directly from the other. Byard *v.* Holmes, 34 N. J. L. 296.

Negligence constitutes no cause of action unless it proves to be a breach of some duty. Ewing *v.* Pittsburgh, etc., R. Co., 147 Pa. St. 40, 29 Wkly. Notes Cas. (Pa.) 248, 23 Atl. 340, 30 Am. St. Rep. 709, 14 L. R. A. 666 [*citing* Addison Torts, § 1338].

Intervening agencies.— The rule as found in the text-books is that he who does an illegal or wrongful act is answerable for all the consequences in the ordinary and natural course of events, though these consequences be directly brought about by the intervening agency of others, providing the intervening agents were set in motion by the primary wrong-doer and the acts causing the damage were the necessary or legal and natural consequences of the original wrongful act. Philpot *v.* Taylor, 75 Ill. 309, 20 Am. Rep. 241.

72. See *supra*, I, D, 2, d; I, E, 2, c.

2. **Definition of Malice.** While "malice," in common acceptation, means ill will against a person, in its legal sense it means a wrongful act done intentionally without just cause or excuse.[73]

3. **Exercise of Legal Rights.** Where damage results from the exercise, with care and skill, of perfectly legal rights, no cause of action exists therefor, no matter how malicious or wicked may be the motives or intentions of the person thus engaged toward him who is damaged.[74] Thus loss which results from the pursuit

73. Allen *v.* Flood, [1898] A. C. 1; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598; Bromage *v.* Prosser, 4 B. & C. 247.

"The root of the principle is that in any legal question malice depends, not upon the evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed." Per Lord Watson in Allen *v.* Flood, [1898] A. C. 1, 94.

Malice "in fact" and "in law."— "I am not sure that I quite understand what is meant by saying that it [a malicious act] is 'in fact' a wrong act, as distinguished from its being so 'in law,' and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality." Per Lord Herschell in Allen *v.* Flood, [1898] A. C. 1, 120.

"We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right." Per Lord Bowen in Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 612 [*quoted with approval* by Lord Watson in Allen *v.* Flood, [1898] A. C. 1].

74. *California.*— Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

Connecticut.— Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236; Oceum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529; McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278.

Florida.— Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

Kentucky.— Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545; Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550.

Louisiana.— Orr *v.* Home Mut. Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770.

Maine.— Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373.

Massachusetts.— Bond *v.* Chapin, 8 Metc. (Mass.) 31.

New Jersey.— McInnes *v.* McInnes Brick Mfg. Co., (N. J. 1897) 38 Atl. 182.

New York.— Phelps *v.* Nowlen, 72 N. Y. 39, 23 Am. Rep. 93; Forbell *v.* New York, 47 N. Y. App. Div. 371, 61 N. Y. Suppl. 1005 [*affirmed* on other grounds in 164 N. Y. 522, 58 N. E. 644]; Clinton *v.* Myers, 46 N. Y. 511, 7 Am. Rep. 373; Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444 [*reversing* 12 Barb. (N. Y.) 553]; Pickard *v.* Collins, 23 Barb. (N. Y.) 444.

North Carolina.— Thornton *v.* Thornton, 63 N. C. 211.

Ohio.— Smith *v.* Bowler, 2 Disn. (Ohio) 153.

Pennsylvania.— Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467, 15 Am. Rep. 599; Jenkins *v.* Fowler, 24 Pa. St. 308.

Tennessee.— Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

Vermont.— Chatfield *v.* Wilson, 28 Vt. 49; South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505; Humphrey *v.* Douglass, 11 Vt. 22, 34 Am. Dec. 668.

England.— Allen *v.* Flood, [1898] A. C. 1 [extensively *reviewing* common-law decisions; *overruling* Carrington *v.* Taylor, 11 East 571; *explaining* and *distinguishing* Keeble *v.* Hickeringill, 11 East 574 note, and Green *v.* London General Omnibus Co., 7 C. B. N. S. 290].

It is a truism of the law that an act which does not amount to a legal injury cannot be actionable because it is done with a bad motive: that which one has a right to do another cannot complain of. Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

Common-law maxims.— Where there is a legal right to do a certain act the motive which induces the exercise of the right is of no importance. *Nullus videtur dolo facere, qui suo jure utitur,*— no man is considered a wrong-doer who avails himself of his own right. Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236. The maxim is true, *actus non facit reum, nisi mens sit rea,*— an act does not make a man guilty unless his intentions are so: but it does not follow that the purpose to damage makes an act, otherwise lawful, injurious in a legal sense. Thornton *v.* Thornton, 63 N. C. 211.

A moral rather than a legal question.— Actions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguard is to be found in self-interest and public opinion. Much more harm than good would be done by encouraging or permitting inquiries into mo-

of his legal remedies by one having a good cause of action,[75] or from the exercise of any other right which the law recognizes as legal,[76] cannot be judicially redressed, although accompanied by malice or evil design.

tives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character, and one which any one may do or leave undone without fear of legal consequence. Such an inquisition would, I think, be intolerable, to say nothing of the possibility of injustice being done by juries in a class of cases in which there would be ample room for speculation and a wide scope for prejudice. Per Lord Macnaghten in Allen *v.* Flood, [1898] A. C. 1.

The rule applicable to every kind of legal right.— In the case of Bradford *v.* Pickles, [1895] A. C. 587, 594, it was held that acts done by defendant upon his own land were not actionable when they were within his legal rights, even though his motive was to prejudice his neighbor. It was there said by Lord Halsbury, L. C.: "This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it." In a late case decided in the house of lords, discussing this statement, it was held to apply not only to the rights of property, but to the exercise by an individual of his other rights. Per Lord Herschell in Allen *v.* Flood, [1898] A. C. 1.

Fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design, or purpose either in doing or not doing the acts complained of. Franklin Ins. Co. *v.* Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

Omissions.— Where no duty is imposed by law upon a person, an omission to do an act, whatever be the motive, will not subject him to an action. Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 400.

75. *Connecticut.*— Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350.

New Jersey.— McInnes *v.* McInnes Brick Mfg. Co., (N. J. 1897) 38 Atl. 182; McFadden *v.* Mays Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932; Davis *v.* Flagg, 35 N. J. Eq. 491.

New York.— Neudecker *v.* Kohlberg, 81 N. Y. 296; Morris *v.* Tuthill, 72 N. Y. 575; Ramsey *v.* Gould, 57 Barb. (N. Y.) 398.

North Carolina.— Thornton *v.* Thornton, 63 N. C. 211.

Pennsylvania.— Jenkins *v.* Fowler, 24 Pa. St. 308.

South Carolina.— Robinson *v.* Culp, 3 Brev. (S. C.) 302, 1 Treadw. (S. C.) 231.

Tennessee.— Macey *v.* Childress, 2 Tenn. Ch. 438.

Vermont.— Wakefield *v.* Fairman, 41 Vt. 339; Woodcock *v.* Bolster, 35 Vt. 632.

England.— King *v.* Henderson, [1898] A. C. 720; Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. 337 [*citing* Fidler *v.* London, etc., R. Co., 1 Hen. & M. (Va.) 489]; Seaton *v.* Grant, L. R. 2 Ch. 459; Robson *v.* Dodds, L. R. 8 Eq. 301; Forrest *v.* Manchester, etc., R. Co., 4 De G. F. & J. 126; Colman *v.* Eastern Counties R. Co., 10 Beav. 1; *Ex p.* Wilbran, 5 Madd. 1; Stevenson *v.* Newnham, 13 C. B. 285.

The motive of a suitor cannot be inquired into. Were it otherwise nearly every suit would degenerate into a wrangle over motives and feelings. Macey *v.* Childress, 2 Tenn. Ch. 438.

A creditor may purpose to oppress and break up his debtor; nevertheless he is entitled to recover his debt, and such damage is not actionable. Thornton *v.* Thornton, 63 N. C. 211.

The principle is involved and strongly illustrated from the case for malicious prosecution in which plaintiff cannot recover, however virulent the malice, if probable cause for prosecution existed. Wakefield *v.* Fairman, 41 Vt. 339; South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505.

Sufficiency of cause of action the only test. — The court, when the sufficiency of the cause of action is questioned, can only determine whether the party has a right which the law will enforce. His ulterior motives or purposes in bringing suit cannot be taken into account. Ramsey *v.* Gould, 57 Barb. (N. Y.) 398.

76. Calling on a bank to redeem its bills.— One who obtains possession of promises to pay in specie, issued by a bank, has a right to call upon it to redeem them whenever he sees fit; and the fact that he does so at a particular time with bad motives is immaterial. South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505.

Contract rights — Breach of unlawful contract.— The law will not inquire into the motives of the party in the exercise of a right, conferred by a valid contract, in the manner provided by its terms, although unfriendly and selfish. Randall *v.* Hazelton, 12 Allen (Mass.) 412. On the other hand, an injury resulting from the violation of an agreement to do an unlawful act, as to commit a nuisance, is not an actionable breach, and is not made so by the fact that defendant acted from motives of malice or with wicked and wanton intent to do plaintiff an injury. Jenkins *v.* Fowler, 24 Pa. St. 308, 28 Pa. St. 176.

Driving off trespassing stock.— That a person, in rightfully driving from his premises stock trespassing thereon, does not start them off in the direction least likely to cause loss to the owner, namely, toward the premises of the latter, is not the least evidence of a conversion. It is merely testimony bearing on the motive; and, the act being lawful, the motive is immaterial. Humphrey *v.* Douglass, 11 Vt. 22, 34 Am. Dec. 668.

Trade-marks.— The law does not permit exclusive use, as a trade-mark, of the name of a town: and therefore its use by one in connection with the manufacture of a certain kind of goods does not give him a cause of action

4. Invasion of Legal Rights. On the other hand a wrongful or malicious motive or intent is not a necessary element in a cause of action for the invasion of a legal right. One who is thus injured is entitled to redress though the wrong-doer intended no violation and was even actuated by good motives.[77] In such cases,

against another making the same use of it, even though the motives of the latter may be malicious. Glendon Iron Co. *v.* Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.

Use of property.— Whatever may be the motives of a person in the use to which he puts his own property while acting within his legal rights, injury caused thereby to another raises no cause of action. Walker *v.* Cronin, 107 Mass. 555; Mahan *v.* Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; Bradford *v.* Pickles, [1895] A. C. 587 [*cited* in Allen *v.* Flood, [1898] A. C. 1]. Bad motives in doing an act which violates no legal right of another cannot make that act a ground of action. Such a principle would be highly dangerous to the security and enjoyment of real property. Pickard *v.* Collins, 23 Barb. (N. Y.) 444. The common-law maxim *sic utere tuo ut alienum non lædas* — that one should so use his own as not to injure another — does not require an action for such a cause. Fisher *v.* Clark, 41 Barb. (N. Y.) 329. A valid disposition of his property by a debtor cannot be interfered with by a court, although it was made with a fraudulent motive or intent. Bancroft *v.* Blizzard, 13 Ohio 30.

Breach of agreements invalid by statute of frauds.— No action will lie for breach of a promise which is invalid because not in writing as required by the statute of frauds, or of a promise to reduce the matters agreed upon to writing; although what defendant did was with the intention of falsely, fraudulently, and deceitfully obtaining an advantage over plaintiff. Gallager *v.* Brunel, 6 Cow. (N. Y.) 347; Smith *v.* Bowler, 2 Disn. (Ohio) 153; Trammell *v.* Trammell, 11 Rich. (S. C.) 471.

Exercise of discretionary power.— No action will lie against a physician appointed by a beneficial association for unlawfully, maliciously, and wrongfully refusing to certify, in accordance with the by-laws of the association, the bill of another physician who had attended a member during an illness, so as to enable him to receive from the association certain sick benefits. The remedy is against the association, which wrongfully refused to pay. Gleavy *v.* Walker, (R. I. 1900) 46 Atl. 180.

Ultra vires act of corporation.— Where a corporation is acting within the scope of its authority, the intent with which it acts is immaterial and will not, in and of itself, give a cause of action. But there is no principle in law that will allow a corporation chartered and organized for specific purposes to purchase or lease property having no connection with its legitimate business, for the sole purpose of commencing and prosecuting a suit and harassing another under the forms of law. In determining the latter question the use it intends to make of it, and did make of it, is material. The intentions and purposes of the corporation not only qualified the character of the act, but entered into and became a part of the act itself. Occum Co. *v.* A. & W. Sprague Mfg. Co., 34 Conn. 529.

77. *Alabama.*— Hussey *v.* Peebles, 53 Ala. 432.

Arkansas.— Bizzell *v.* Booker, 16 Ark. 308.

Indiana.— Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

Kentucky.— Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545.

Massachusetts.— Adams *v.* Paige, 7 Pick. (Mass.) 542.

Minnesota.— Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184.

Mississippi.— Mhoon *v.* Greenfield, 52 Miss. 434.

New York.— Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; Bullock *v.* Babcock, 3 Wend. (N. Y.) 391.

North Carolina.— Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780.

Vermont.— Henry *v.* Edson, 2 Vt. 499.

Pennsylvania.— Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312.

England.— Allen *v.* Flood, [1898] A. C. 1, per Lord Watson; Bradford *v.* Pickles, [1895] A. C. 587; Rogers *v.* Dutt, 13 Moore P. C. 209; Haycraft *v.* Creasy, 2 East 92; Weaver *v.* Ward, Hob. 134.

Although no mischief of any kind may be intended, yet if a man do an act which is dangerous to the person and property of others, and which evinces a reckless disregard of the consequences, he will be answerable civilly, and in many cases criminally, for the injuries which may follow. Vandenburgh *v.* Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268 [*approved* in Bizzell *v.* Booker, 16 Ark. 308].

Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liabilities to repair the necessary or natural consequences in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. Per Lord Watson in Allen *v.* Flood, [1898] A. C. 1.

Distinction between answering civilly and criminally.— There is a distinction between answering *civiliter et criminaliter* for acts injurious to others; in the latter case the maxim applies, *actus non facit reum nisi mens sit rea;* but it is otherwise in civil actions, where the intention is immaterial if the action is injurious to another. Haycraft *v.* Creasy, 2 East 92. To same effect see Hussey *v.* Peebles, 53 Ala. 432; Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312; Weaver *v.* Ward, Hob. 134; Allen *v.* Flood, [1898] A. C. 1, per Lord Watson.

Damage through negligence.— A wrongful or malicious intent is not an essential element of a tort out of negligence. If a man will set about acts attended with risks to

however, the motive, intent, or design sometimes becomes material in determining the *quantum* of damage. The absence of evil intent may limit the recovery to the amount of actual loss, while its presence may justify punitive damages.[78]

5. Libel, Slander, and Malicious Prosecution. There are some actions in which malice is a very important factor, such as libel, slander, and malicious prosecution, which are sometimes referred to as evidencing that a bad motive may be an element in the composition of a civil wrong. But even in these the wrong must have its root in an act which the law regards as illegal, but excuses in certain exceptional circumstances, from considerations of public policy.[79]

H. Trivial Causes of Action — 1. In General. It is sometimes held that there is no cause of action because the law does not concern itself about trifles.[80]

2. At Law. So far, however, as this rule relates to causes of action at law, its operation is not extensive. It has reference to the character of the injury and not to the resulting damage,[81] and, as has been shown heretofore, there is always an actionable cause whenever a legal right has been invaded, although little or no

others, the law casts on him the duty of care and competence. Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21 [*citing* Pollock Torts, 433]; Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545. See, generally, Negligence.

Trespass.—Pecuniary redress is exacted for a trespass, whether committed through inadvertence or not, or whether actuated by bad motives or not. Amick *v.* O'Hara, 6 Blackf. (Ind.) 258; Mhoon *v.* Greenfield, 52 Miss. 434; Rogers *v.* Dutt, 13 Moore P. C. 209, 236, wherein it was said: "In the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, malice is not a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet if any damage, even in legal contemplation, be the consequence, an action will lie." It is upon this principle that a lunatic is liable *civiliter* for an injury to the person or property of another. Hussey *v.* Peebles, 53 Ala. 432; Amick *v.* O'Hara, 6 Blackf. (Ind.) 258; Bullock *v.* Babcock, 3 Wend. (N. Y.) 391; Weaver *v.* Ward, Hob. 134. See, generally, Insane Persons.

Trover and conversion.— It is no protection to one who has received property and disposed of it in the usual course of trade that he did so in good faith and in the belief that the person from whom he took it was the owner, if in fact the possession of such person was tortious. West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Donahue *v.* Shippee, 15 R. I. 453, 8 Atl. 541. See, generally, Trover and Conversion.

78. *Alabama.*— Hussey *v.* Peebles, 53 Ala. 432.

California.— Ball *v.* Tolman, 119 Cal. 358, 51 Pac. 546.

Connecticut.— McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278.

Massachusetts.— Bond *v.* Chapin, 8 Metc. (Mass.) 31.

Pennsylvania.— Jenkins *v.* Fowler, 24 Pa. St. 308, 310, wherein it was said: "Malicious motives make a bad act worse; but they cannot make that wrong which in its own essence is lawful."

79. Allen *v.* Flood, [1898] A. C. 1, per Lords Watson, Herschell, and Davey. This late case, decided in the English house of lords, contains an exhaustive and learned discussion of malice in law. While some of the argument, including that on the subject of libel, slander, and malicious prosecution, may perhaps be *obiter*, it is valuable as showing, by logical deduction from the general rules of law which govern intent and motive as an element in a cause of action, the proper solution of certain applications of those rules over which courts are still having much difficulty. In a note appended to this case (p. 181) by Sir Frederick Pollock he says: "The discussion of malicious prosecution and similar causes of action seems independent of the actual *ratio decidendi*, but points, it is submitted, to the conclusion that in such cases evil motive is material because the defendant's act is in itself of a wrongful nature, and is privileged when done and only when done in good faith."

Privileged from public policy.— In some of the early opinions statements may be found supporting this view. Thus, "this is an action for bringing a suit at law, and courts will be cautious how they discourage men from suing" (Goslin *v.* Wilcock, 2 Wils. C. P. 302); legal process "repels all presumption of wrong, and is itself a shield to those who use it until malice and want of probable cause are shown" (Henry *v.* Edson, 2 Vt. 499).

80. Maxim de minimis non curat lex.— Broom Leg. Max. (7th ed.) 142, and, generally, cases cited in this subdivision; French Guiana, 2 Dods. 151, 163, in which it was said by Sir William Scott: "Has this court no prudence to discourage suits about mere trifles, *de minimis non curat lex?* The law will discourage such attempts, and the parties making them would be recommended to try other modes of application. The remedy might otherwise be worse than the disease."

81. Fullam *v.* Stearns, 30 Vt. 443, holding that the maxim *de minimis non curat lex*, whenever it is applied correctly to take away a right of recovery, has reference to the injury and not to the resulting damage.

actual damage is occasioned by the act or omission.[82] Therefore its application in actions at law amounts rather to a denial of the existence of a cause of action than to a determination that a legal injury is so trifling as to be beneath the dignity of the court.[83]

3. **In Equity.** A court of equity, on the other hand, seems to have inherent

82. See *supra*, I, E, and the cases there cited. The maxim *de minimis non curat lex* is never applied to the positive and wrongful violation of another's legal right, although little if any actual damage is occasioned thereby. Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75; Wartman *v.* Swindell, 54 N. J. L. 589, 25 Atl. 356, 18 L. R. A. 44; Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill (N. Y.) 170; Clifford *v.* Hoare, 22 Wkly. Rep. 828. The maxim that the law does not concern itself about trifles is not a bar to an action brought for the vindication of a violated legal right. Per Doe, C. J., in Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794.

Invasion of personal property rights.— An action will lie for a taking and carrying away by defendant of the reins from a harness belonging to plaintiff; and it is an error for the trial court to rule that if defendant will make a tender of the reins it will dismiss the case upon the ground *de minimis non curat lex*. Plaintiff is entitled to at least nominal damages. Wartman *v.* Swindell, 54 N. J. L. 589, 25 Atl. 356, 18 L. R. A. 44. Where the maker of a promissory note not yet due induces a person other than the owner, in whose possession it has been temporarily placed, to receive as payment in full the face of the note with interest to the date of such payment, the owner of the note may bring trover for it. He is entitled to interest until maturity, however small the amount may be, and the possession of the maker is unlawful. Kingman *v.* Pierce, 17 Mass. 247. In a Vermont case it was held that an action against a constable who had used a pitchfork belonging to plaintiff, in removing from the premises of the latter property belonging to him which had been attached by the constable, the fork having been left where it was found and not injured, was for too trifling a cause to be sustained. The court said: "It is believed that no case can be found where damages have been given for a trespass to personal property when no unlawful intent or disturbance of a right or possession is shown, and when not only all probable but all possible damage is expressly disproved." Paul *v.* Slason, 22 Vt. 231, 238, 54 Am. Dec. 75 [but see this case *distinguished* in Fullam *v.* Stearns, 30 Vt. 443, the court saying of it that the property had been attached and must be removed at the expense of the owner, and in one sense the fork was used in plaintiff's business and for his benefit; that both the injury and the damage were too insignificant to be made the ground of an action]. In the case of Fullum *v.* Stearns, 30 Vt. 443, it was held that damage done to property by cutting thongs which laced or fastened together machinery bands, though the thongs were "considerably worn and of small value," could be estimated, and an action lay for the injury. Of the operation of the maxim *de minimis non curat lex* the court held it was at least safe to say that it should never be applied to a positive and wrongful invasion of another's property, where the positive and wrongful act causes damages which can be fairly valued.

Excusing depredation.— Where defendant relied, as excusing a slight invasion of another's right, on a right to believe that the latter would accept the act as a joke, the parties being in the habit of perpetrating practical jokes upon each other, such defense is a question for the jury; and it cannot be legally taken away from them by the court because of the trifling nature of the wrongful act. Wartman *v.* Swindell, 54 N. J. L. 589, 25 Atl., 356, 18 L. R. A. 44.

83. **Illustrations.**— At common law, when actions growing out of wagers were frequently permitted, it was sometimes held that a particular wager was too trivial, and the dispute growing out of it too idle, to amount to a cause of action; that if courts should occupy themselves in determining such matters, parties having large debts due them and questions of great magnitude to try would be grievously and wrongfully delayed. Hussey *v.* Crickitt, 3 Campb. N. P. 168; Eltham *v.* Kingsman, 1 B. & Ald. 683; Henkin *v.* Guerss, 12 East 247. See also Contracts. No cause of action exists against a person of whom the law requires tithes for grain harvested, for small quantities involuntarily left in the process of gathering it; otherwise if there be any particular fraud or intention to deprive the person of his full right. Glanvill *v.* Stacey, 6 B. & C. 543.

Exceptions.— Superior courts at common law exercised the power to stay proceedings for the recovery of debts where the amount involved was under forty shillings (Stutton *v.* Bament, 3 Exch. 831; Kennard *v.* Jones, 4 T. R. 496; Wellington *v.* Arter, 5 T. R. 65), but only where the debt was one which might be recovered in an inferior court. If there was no remedy except in the superior court an action would lie therein, the smallness of the sum being no reason why plaintiff should lose his claim. Harwood *v.* Lester, 3 B. & P. 617; Tubb *v.* Woodward, 6 T. R. 175; Eames *v.* Williams, 1 D. & R. 359. Where the sum claimed by plaintiff is large enough to be worthy of the attention of the court, that the amount really due is trifling will not be determined on affidavit, but he has a right to a trial. Beckitt *v.* Bilbrough, 8 Hare 188; Branker *v.* Massey, 2 Price 8; Lowe *v.* Lowe, 1 Bing. 270; Oulton *v.* Perry, 3 Burr. 1592. At the present day the jurisdiction of the superior courts is usually withheld, where the amount of debt is small, by statutes conferring upon inferior courts exclusive jurisdiction to try small causes. See Courts.

power to refuse to entertain an equitable cause of action of small moment, as being beneath its dignity;[84] and the maxim that the law does not concern itself about trifles has been said to be an equitable and not a legal maxim in this connection.[85] In most jurisdictions, however, such power has been conferred and regulated by statute or rule of court from a very early day.[86]

I. Illegal Acts or Agreements — 1. General Rule — Ex Proprio Dolo. It is a maxim of the law that no man shall be allowed to found any claim upon his own iniquity.[87] There is, however, another firmly established principle embodied

84. See U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, *sub nom.* Empire City Bank Case, 8 Abb. Pr. (N. Y.) 192; Almy *v.* Pycroft, Cary (ed. 1872) 147; Eastcourt *v.* Tanner, Cary (ed. 1872) 106; Smith *v.* Target, 2 Anstr. 529; Brace *v.* Taylor, 2 Atk. 253; Westbrooke *v.* Browett, 17 Grant Ch. (U. C.) 339, 340 [*citing* Story Eq. Pl., § 500], wherein it was said: "One of Lord Bacon's orders concludes with these words, 'and all suits under the value of ten pounds are regularly to be dismissed.' Mr. Justice Story assigns to the rule a still earlier date; he adds that a similar rule appears to prevail in the courts of equity in the United States, or at least in those which have been called upon to express any opinion upon the subject."

An objection which may be taken is that the value of the subject of the suit is too trivial to justify the court in taking cognizance of it; or, as the phrase usually is, that the suit is unworthy of the dignity of the court. Courts of equity sit to administer justice in matters of grave interest to the parties, and not to gratify their passions, or their curiosity, or their spirit of vexatious litigation. Reynolds *v.* Coppin, 19 Grant Ch. (U. C.) 627 [*quoting* from Story Eq. Pl. § 500 *et seq.*]; Westbrooke *v.* Browett, 17 Grant Ch. (U. C.) 339; Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453.

Appeals.— An appeal from a decision involving only a trifling amount, no question of principle being involved, will not be entertained. McQueen *v.* McQueen, 2 Ch. Chamb. (U. C.) 344; *Re* National Assur., etc., Assoc., 20 Wkly. Rep. 324. See Appeal and Error.

Exceptions.— A bill which, although the sum sought to be recovered is trifling, seeks to establish a right of permanent and valuable nature, falls within recognized exceptions to the rule. Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453; Hoskins *v.* Holland, 23 Wkly. Rep. 477. A bill will be retained, although the amount involved is a mere trifle, where there is no adequate remedy at law for its recovery, and it is provided by a section of the judicature act that "the superior courts in the several counties shall exercise the powers of a court of equity in all cases where a common-law remedy is not adequate." Smith *v.* Ashcraft, 25 Ga. 132, 133, 71 Am. Dec. 163. A bill to recover money for the benefit of a charity or of the poor of a town will be retained, though the sum sought to be recovered is under forty shillings per annum. Parrot *v.* Pawlet, Cary (ed. 1872) 147.

85. **An equitable maxim.**— "*De minimis non curat prætor.* The *prætor* does not concern himself about trifles; or (as the maxim may be interpreted) the *prætor* does not apply his equitable remedy in matters of small moment. This maxim, so long as it is retained in the form here given, is not likely to lead either to error or misapprehension; but latterly in England it has been common to read the maxim as *de minimis non curat lex*, which is certainly calculated, at least in its literal meaning, to mislead. It is not correct to say that the law does not concern itself about matters of small amount, or of comparatively trivial importance, either in its civil or criminal courts. In the latter, for example, theft is theft, whether it concerns the felonious abstraction of a loaf of bread or a thousand pounds; while, in the former, every legal wrong, however slight, has its appropriate remedy, and every right, no matter of what value or extent, may be enforced. . . . But while it is erroneous to say that the '*law* does not concern itself about matters of small moment,' the maxim in its proper reading expresses a rule which was acted upon in the law of Rome and is now observed in the law of Scotland. The *prætor* represented what may be termed remedial equity, but his equitable remedies were only resorted to in cases where the common law afforded no remedy and where the importance of the occasion rendered it fitting and proper that such remedies should be applied." Trayner Latin Max. 139.

86. See Reynolds *v.* Coppin, 19 Grant Ch. (U. C.) 627; Westbrooke *v.* Browett, 17 Grant Ch. (U. C.) 339; Gilbert *v.* Braithwait, 3 Ch. Chamb. (U. C.) 413; Hoskins *v.* Holland, 23 Wkly. Rep. 477; and, generally, Courts; Equity.

87. **Maxims.**— *Nullus commodum capere potest de injuria sua propria*,— no man can take advantage of his own wrong. Kinney L. Dict. 494; Broom Leg. Max. 279; Coke Litt. 148*b*; Dumpor's Case, 4 Coke 119*b*; Findon *v.* Parker, 11 M. & W. 675, per Lord Abinger, C.; Doe *v.* Bancks, 4 B. & Ald. 401, per Betts, J. See also, to the same effect, Shellenberger *v.* Ransom, 41 Nebr. 631, 59 N. W. 935, 25 L. R. A. 564 [*reversing* on rehearing 31 Nebr. 61, 47 N. W. 700, 10 L. R. A. 810]; Riggs *v.* Palmer, 115 N. Y. 506, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 599, 6 S. Ct. 877, 29 L. ed. 997.

Nemo ex proprio dolo consequitur actionem, — no man acquires a right of action from his own wrong. Kinney L. Dict. 479; Broom Leg. Max. 298; Fisher *v.* Saylor, 78 Pa. St. 84. This is true, also, as to matter of defense. Pennington *v.* Todd, 47 N. J. Eq. 569, 572, 21 Atl. 297, 24 Am. St. Rep. 419, 11 L. R. A. 589,

in several legal maxims,[88] modifying this general rule on grounds of public policy; and that is that there can be no right or duty predicated on illegal acts or relations which will give rise to a cause of action as between those who are parties thereto. To enforce an obligation to virtue by refusing encouragement to wrong, the law leaves the parties to such transactions where it finds them, entertaining no action or suit by either, even though defendant has acquired an advantage over plaintiff which he is thereby enabled to retain.[89]

wherein it was said: "When the plaintiff is blameless, and the contract on which he stands is legal and moral, no court has ever permitted a defendant to escape responsibility because of his own misconduct. 'It is an indisputable proposition,' says Mr. Broom (Leg. Max. 352) 'that, as against an innocent party, no man shall set up his own iniquity as a defense any more than as a cause of action.'" Farmer *v.* Russell, 1 B. & P. 296. See also, to the same effect, Ocean Ins. Co. *v.* Fields, 2 Story (U. S.) 59, 18 Fed. Cas. No. 10,406.

Illustrations of the application of this maxim may be found in Cousin *v.* Abat, 21 La. Ann. 705; Harvey *v.* Bush, 3 N. J. L. 529.

88. Maxims.— The principal maxim relied upon by courts in this connection is *in pari delicto potior est conditio possidentis* (*defendentis*),— in cases of equal or mutual fault (between two parties) the condition of the party in possession (or defending) is the better one. Kinney L. Dict. 376; Miller *v.* Marckle, 21 Ill. 152, and, generally, cases cited in this subdivision. As the Romans applied it the maxim is a mere logical rule that where the judgment of the law is balanced on the evidence the suit must fall. Then, *quære non potentior sit qui teneat quam qui persequitur?* Dig. 45, 1, 91, 3; Mohney *v.* Cook, 26 Pa. St. 342, 67 Am. Dec. 419.

Other maxims are:

Ex turpi causa non oritur actio,— out of a base (illegal or immoral) consideration an action does (can) not arise. Kinney L. Dict. 294; and the following cases:

Connecticut.— Finn *v.* Donahue, 35 Conn. 216; Treat *v.* Jones, 28 Conn. 334.

Illinois.— Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Arter *v.* Byington, 44 Ill. 468.

Kansas.—Ainsworth *v.* Miller, 20 Kan. 220.

Rhode Island.— Atwood *v.* Lester, 20 R. I. 660, 20 Atl. 866.

England.— Hegarty *v.* Shine, 4 L. R. Ir. 288.

Ex dolo malo non oritur actio,— out of fraud no action arises; fraud never gives a cause of action. Kinney L. Dict. 293; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Chauncy *v.* Yeaton, 1 N. H. 151; Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866.

89. *Alabama.*— Boyd *v.* Barclay, 1 Ala. 34, 34 Am. Dec. 762; Carrington *v.* Caller, 2 Stew. (Ala.) 175, 197, wherein it was said: "If the defendant in such case be deprived of this answer to the action, unless he would restore to the plaintiff what he had received the rule will be inefficient and the defense afforded by it valueless"

Connecticut.— Funk *v.* Gallivan, 49 Conn. 124, 128, 44 Am. Dec. 210, where the court said: "The law could not take any other position than that it will not lend its aid to either of the parties to an immoral or illegal transaction, but will leave them as it finds them; but to be consistent with this position it is necessary to give to either party the right to plead or prove the true nature of the transaction in bar to an action founded upon it."

Georgia.— Harrison *v.* Hatcher, 44 Ga. 638; Martin *v.* Wallace, 40 Ga. 52; Wallace *v.* Cannon, 38 Ga. 199, 95 Am. Dec. 385; Galt *v.* Jackson, 9 Ga. 151.

Illinois.— Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Arter *v.* Byington, 44 Ill. 468; Canton Masonic Mut. Benev. Soc. *v.* Rockhold, 26 Ill. App. 141.

Kansas.—Ainsworth *v.* Miller, 20 Kan. 220; Dolson *v.* Hope, 7 Kan. 161.

Kentucky.— Bibb *v.* Miller, 11 Bush (Ky.) 306; Bevil *v.* Hix, 12 B. Mon. (Ky.) 140; Gray *v.* Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. Rep. 383.

Massachusetts.— Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368.

Missouri.— Irwin *v.* Wells, 1 Mo. 9.

Nebraska.— Wilson *v.* Parrish, 52 Nebr. 6, 71 N. W. 1010; Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724.

New Hampshire.— Chauncy *v.* Yeaton, 1 N. H. 151.

New York.— Peck *v.* Burr, 10 N. Y. 294; Nellis *v.* Clark, 4 Hill (N. Y.) 424.

North Carolina.— Sherner *v.* Spear, 92 N. C. 148 [*citing* Turner *v.* Eford, 58 N. C. 106, and Pinckston *v.* Brown, 56 N. C. 494].

Pennsylvania.— Thorne *v.* Travellers Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

England.— Taylor *v.* Chester, L. R. 4 Q. B. 309 [*citing* Edgar *v.* Fowler, 3 East 222]; *Ex p.* Bell, 1 M. & S. 751.

Executed and executory transactions.— Thus the rule applies to executed transactions as well as to those which are executory merely. Clark *v.* Colbert, 67 Ala. 92; Heineman *v.* Newman, 55 Ga. 262, 21 Am. Rep. 279; Peacock *v.* Terry, 9 Ga. 137; Adams *v.* Barrett, 5 Ga. 404; Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415; Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Miller *v.* Marckle, 21 Ill. 152; Ball *v.* Gilbert, 12 Metc. (Mass.) 397. See, generally, CONTRACTS.

The object of all law is to repress vice, preserve the peace, and promote the general welfare of the state and of society, and no indi-

2. Scope of Rule. The rule has a more extensive operation in actions growing out of contracts which are contrary to law, and hence illegal and void, than in any other branch of jurisdiction;[90] but the contract relation is not absolutely essential.[91] It is not confined to causes of action at law, but applies to suits in chancery as well,[92] though no doubt included in the more comprehensive equitable maxim that he who comes into equity must come with clean hands.[93]

3. Illegality Unconnected With Transaction. Though a party is unable to assert or maintain any rights or remedies founded on an unlawful thing done or intended to be done, a general depravity or the commission of some wrong or transgression unconnected with the particular cause of action does not forfeit his right to legal protection and thus permit others to practise frauds and machinations against him with impunity.[94]

vidual has any right to its assistance in enforcing a demand originating in a violation on his part of its principles or enactments. Treat *v.* Jones, 28 Conn. 334.

Duress.— A party is not *particeps criminis* where he acts under compulsion and not from choice. Thus a plaintiff cannot be said to be *in pari delicto* with defendants, county commissioners, where they unlawfully compelled him to donate to the county a sum of money to prevent an illegal grant of a ferry license which would infringe on a legal grant formerly made to him; and he may recover back the money so paid. La Salle County *v.* Simmons, 10 Ill. 513.

90. See, generally, Contracts.

That no right of action can spring out of an illegal contract is a wise and salutary rule founded on honesty and good morals. Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866.

Transactions not inherently bad.—As a general proposition the rule applies as well where the illegal agreement or other transaction is *malum prohibitum* merely as where it is *malum in se.*

Alabama.— Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58; Lea *v.* Cassen, 61 Ala. 312; Black *v.* Oliver, 1 Ala. 449, 35 Am. Dec. 38.

Connecticut.— Finn *v.* Donahue, 35 Conn. 216.

Georgia.— Carey *v.* Smith, 11 Ga. 539.

Illinois.— Canton Masonic Mut. Benev. Soc. *v.* Rockhold, 26 Ill. App. 141.

Michigan.— Thurston *v.* Prentiss, 1 Mich. 193.

Minnesota.— Solomon *v.* Dreschler, 4 Minn. 278.

New Hampshire.— Chauncy *v.* Yeaton, 1 N. H. 151.

New York.— Peck *v.* Burr, 10 N. Y. 294.

Pennsylvania.— Thorne *v.* Travellers Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

United States.—Harris *v.* Runnels, 12 How. (U. S.) 79, 13 L. ed. 90.

England.— Cope *v.* Rowlands, 2 M. & W. 149.

See, generally, Contracts.

91. Illustration.— The communication of a venereal disease during illicit sexual intercourse is not an actionable wrong; and consent to the intercourse is not violated by the fact that it has been induced through wilful concealment of the disease. On the principle *ex turpi causa non oritur actio* such an action is unsustainable. Hegarty *v.* Shine, 4 L. R. Ir. 288 [*affirming* 2 L. R. Ir. 273], wherein it was said, per Palles, C. B., to be neither logical nor consistent to hold that the maxim applies to cases of contracts only, and that an act of such character as to vitiate, as immoral, a contract in reference to it, can itself be capable of sustaining an action. That incapacity to obtain support or audience in a court of justice which it communicates to every contract of which it is the subject-matter or the purpose is necessarily inherent in itself.

92. *Alabama.*— Treadwell *v.* Torbert, 119 Ala. 279, 24 So. 54, 72 Am. St. Rep. 918; Saltmarsh *v.* Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

Connecticut.— Funk *v.* Gallivan, 49 Conn. 124, 44 Am. Dec. 210.

Georgia.— White *v.* Crew, 16 Ga. 416; Carey *v.* Smith, 11 Ga. 539 [*citing* 1 Story, Eq. § 298]; Adams *v.* Barrett, 5 Ga. 404.

Illinois.— Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82.

Michigan.— Thurston *v.* Prentiss, 1 Mich. 193; Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35.

New York.— Bolt *v.* Rogers, 3 Paige (N. Y.) 154.

Contracts void by statute of frauds.— Although a contract is void at law by reason of the statute of frauds, equity sometimes entertains a cause of action based upon partial performance, to prevent a fraud. Harsha *v.* Reid, 45 N. Y. 415, wherein it is also held that the complainant is confined to his equitable cause of action, and cannot recover incidentally, and as a part of his relief, damages for the breach of the void contract. See also Equity; Frauds, Statute of.

93. See Equity.

94. Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547; Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82; Sullivan *v.* Ross, 113 Mich. 311, 76 N. W. Rep. 309 [*reversing* on rehearing 71 N. W. 634].

Illustrations.— A party is not precluded from enforcing his real cause of action because he has previously attempted to deceive the court into granting him relief to which he is not entitled on the same subject-matter. Thus the court will aid him in enforcing a

4. Test Applied. If a claim connected with an illegal transaction can be supported without proving, or opening to defendant to prove, the transaction, the rule has no application.[95] The test is whether plaintiff is under the necessity of show-

cause of action based on a written contract, although in a former suit he had unsuccessfully and by false representation tried to recover as upon one not in writing. Sullivan *v.* Ross, 113 Mich. 311, 76 N. W. 309 [*reversing* on rehearing 71 N. W. 634], Grant, C. J., dissenting. Perjury on the part of a plaintiff, whereby he had recovered damages against defendant in a former action, is no ground for preventing a recovery in a subsequent suit based on another and sufficient cause of action. Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547.

On the other hand it has been held that no cause of action exists in favor of one who, while having a stolen interview with a female in the woods at night, is disturbed by persons shouting, firing guns, blowing horns, and otherwise making a great noise. Lakin *v.* Gun, Wright (Ohio) 14.

95. Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18; Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866, and, generally, cases cited *infra*, this note.

Illustrations of illegal transactions not falling within the rule may be found in:

Alabama.—Moore *v.* Appleton, 26 Ala. 633; Myers *v.* Gilbert, 18 Ala. 467.

Connecticut.— Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18; Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253; Wheeler *v.* Spencer, 15 Conn. 28.

Georgia.— Wallace *v.* Cannon, 38 Ga. 199, 95 Am. Dec. 385.

Illinois.— Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82 [*citing* Smith *v.* 'Forty-Nine & 'Fifty-Six Quartz Min. Co., 14 Cal. 242].

Indiana.— Riggs *v.* Adams, 12 Ind. 199 [*approving* Cummings *v.* Henry, 10 Ind. 109].

Kansas.— Cleveland *v.* Wolff, 7 Kan. 184.

Kentucky.— Martin *v.* Richardson, 94 Ky. 183, 21 S. W. 1039, 42 Am. St. Rep. 353, 19 L. R. A. 692; Bibb *v.* Miller, 11 Bush (Ky.) 306; Gray *v.* Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. St. Rep. 383.

Louisiana.— Malady *v.* Malady, 25 La. Ann. 448; Delamour *v.* Roger, 7 La. Ann. 152.

Maine.— Brown *v.* Tuttle, 80 Me. 162, 13 Atl. 583; Stacy *v.* Foss, 19 Me. 335, 36 Am. Dec. 755 [*criticising* Yates *v.* Foot, 12 Johns. (N. Y.) 1; McKeon *v.* Caherty, 3 Wend. (N. Y.) 494].

Massachusetts.— Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Welch *v.* Wesson, 6 Gray (Mass.) 505; Ball *v.* Gilbert, 12 Metc. (Mass.) 397; Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133.

Minnesota.—Wilkinson *v.* Tousley, 16 Minn. 299, 10 Am. Rep. 139.

New Jersey.— Pennington *v.* Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589; Evans *v.* Trenton, 24 N. J. L. 764 [*approved* in Smith *v.* Blachley, 188 Pa. St. 550, 43 Wkly. Notes Cas. (Pa.) 201, 41 Atl. 619, 68 Am. St. Rep. 887].

New York.— Vischer *v.* Yates, 11 Johns. (N. Y.) 23.

Ohio.— Norton *v.* Blinn, 39 Ohio St. 145.

Pennsylvania.—McCullough *v.* Blachley, 188 Pa. St. 556, 41 Atl. 1119; Smith *v.* Blachley, 188 Pa. St. 550, 43 Wkly. Notes Cas. (Pa.) 201, 41 Atl. 619, 68 Am. St. Rep. 887; Mohney *v.* Cook, 26 Pa. St. 342, 67 Am. Dec. 419.

Rhode Island.— Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866 [*citing* Chafee *v.* A. & W. Sprague Mfg. Co., 14 R. I. 168; Wetmore *v.* Porter, 92 N. Y. 76]. *Compare* Smith *v.* Rollins, 11 R. I. 464, 23 Am. Rep. 509 [*following* Whelden *v.* Chappel, 8 R. I. 230].

United States.— Armstrong *v.* Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468.

England.— Adamson *v.* Jarvis, 4 Bing. 66.

While the law will imply no promise to pay for services rendered or money furnished by one person to another for expense incurred in the furtherance and for the continuance of illicit relations (Brown *v.* Tuttle, 80 Me. 162, 13 Atl. 583), a suit for a share of the property which is the result of the combined capital, industry, labor, and economy of persons thus living together may be maintained (Malady *v.* Malady, 25 La. Ann. 448; Delamour *v.* Roger, 7 La. Ann. 152).

See also, generally, Contracts; Executors and Administrators; Gaming; Lotteries; Principal and Agent; Sunday; Trusts.

Rule does not apply to subsequent new and independent transactions founded on new considerations apart from the original one, although between the same parties and having relation to the same property. Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18; Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253; Armstrong *v.* Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468. Thus, where an illegal contract is voluntarily rescinded, the rescission is a new and independent agreement unaffected by the illegality of the original transaction, and will be enforced by the court. Lea *v.* Cassen, 61 Ala. 312.

The illegal intention must be accompanied by an act which is immoral or prohibited by law, in order to make the transaction illegal. Thus, where one has induced a party to pay him money to be paid to third persons, whom he falsely represents to be about to begin a criminal prosecution, for the purpose of obtaining their forbearance, an action will lie to recover it back. Smith *v.* Blachley, 188 Pa. St. 550, 43 Wkly. Notes Cas. (Pa.) 201, 41 Atl. 619, 68 Am. St. Rep. 887; McCullough *v.* Blachley, 188 Pa. St. 556, 41 Atl. 1119. On the other hand an innocent member of a firm, established for the conducting of a lawful business, can call upon a partner for a share of the profits made in the partnership, and it is no defense that the partner sued realized the profits by cheating the customers of the firm. Pennington *v.* Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589. See Partnership.

The policy of the law that wrong-doers cannot have redress or contribution against each other has no application where the act is not

ing the illegal transaction, or depending in any degree upon it, in making out his case.[96]

5. Statutory Exceptions. The public interest demands, however, that relief be granted against certain illegal transactions and agreements, and they have been withdrawn by statute from the operation of the general principle so far as to give a cause of action or a defense to one of the parties thereto.[97]

J. Criminal and Penal Acts or Agreements — 1. General Rule. As a general principle, where the commission of an offense against the criminal laws of the state causes an injury to a person, peculiar to him in his individual capacity and not simply as a member of the community, the damage constitutes a civil cause of action in his favor.[98] Many crimes and misdemeanors, indeed,

manifestly illegal in itself, but was done *bona fide* and without knowledge, either actual or implied by law, that it was illegal. Moore *v.* Appleton, 26 Ala. 633; Myers *v.* Gilbert, 18 Ala. 467; Adamson *v.* Jarvis, 4 Bing. 66. See also, generally, Contribution.

Effect of pardon.— A pardon granted to some of the parties engaged in a violation of the public law, although it wipes out the offense against the government, cannot give a civil cause of action to those who have received its benefit, against the others, for injuries received in the joint commission of the wrong. Martin *v.* Wallace, 40 Ga. 52.

96. Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18; Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253; Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82; Welch *v.* Wesson, 6 Gray (Mass.) 505; Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Fivaz *v.* Nicholls, 2 C. B. 501; Simpson *v.* Bloss, 7 Taunt. 246.

97. Thus one who borrows money at usurious rates, or sustains losses in a gaming-resort, is frequently looked upon as the victim of his own necessity or infirmity and less culpable than the lender or winner, and is granted statutory relief. Saltmarsh *v.* Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525; Galt *v.* Jackson, 9 Ga. 151; Adams *v.* Barrett, 5 Ga. 404; Ferguson *v.* Sutphen, 8 Ill. 547; Gray *v.* Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. St. Rep. 383; Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Thurston *v.* Prentiss, 1 Mich. 193; Nellis *v.* Clark, 4 Hill (N. Y.) 424, affirming 20 Wend. (N. Y.) 24; Rucker *v.* Wynne, 2 Head (Tenn.) 617. See also Gaming; Usury. A party who has been bribed to cast his vote in a certain way may, for the public interest, be given a statutory cause of action against the one who instigated him to commit the offense, to recover a penal sum. State *v.* Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767 [*followed* in State *v.* Schoonover, 135 Ind. 701, 35 N. E. 121]. See also Bribery.

98. Smith *v.* Lockwood, 13 Barb. (N. Y.) 209; Foster *v.* Com., 8 Watts & S. (Pa.) 77, 79, per Gibson, J., who said: "It is written on the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong. Thus a person beaten may prosecute an action for the battery, while the commonwealth prosecutes an indictment for the breach of the peace; or a nuisance may be visited by indictment as a public wrong, while it is visited by action as a private injury; and, for reasons equally good, a libeler may be punished as a disturber of the peace, while he is made to respond in damages by the person libeled, as a defamer of his character." See also, generally, cases cited in this subdivision.

Louisiana.— Damages may arise from an offense, and the civil courts, in these cases, may interpret the criminal statutes and render judgment for actionable damage. Lecourt *v.* Gaster, 50 La. Ann. 521, 23 So. 463 [*citing* Rev. Stat. 955].

Public nuisance.— Thus, while one who maintains a common nuisance can be prosecuted criminally only for damage common to the public as a whole, to all individuals who sustain a damage peculiar, not merely in degree, but in kind, the wrong-doer is liable civilly.

Illinois.— East St. Louis *v.* O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; Chicago *v.* Union Bldg. Assoc., 102 Ill. 379, 40 Am. Rep. 598.

Massachusetts.—Harvard College *v.* Stearns, 15 Gray (Mass.) 1; Barden *v.* Crocker, 10 Pick. (Mass.) 383.

Missouri.— Kinealy *v.* St. Louis, etc., R. Co., 69 Mo. 658.

New Jersey.— Runyon *v.* Bordine, 14 N. J. L. 472.

New York.— Francis *v.* Schoellkopf, 53 N. Y. 152.

Rhode Island.— Clark *v.* Peckham, 9 R. I. 455.

Vermont.— Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

England.— Marys' Case, 9 Coke 111*b*; Ashby *v.* White, 2 Ld. Raym. 938, 1 Salk. 19; Iveson *v.* Moore, 1 Ld. Raym. 486; Paine *v.* Partrich, Carth. 191.

Canada.— Hamilton, etc., Road Co. *v.* Great Western R. Co., 17 U. C. Q. B. 567.

See also, generally, Nuisances.

Where one draws and deposits upon a highway loads of stone, earth, and rubbish, and thereby causes an injury to a person having a contract with the town to keep the highway in repair, he is liable for such damage. McNary *v.* Chamberlain, 34 Conn. 384, 91 Am. Dec. 732. It is most difficult to draw a line showing what kind of injury can be fairly treated as a particular injury, and what is such an injury only as should be looked upon as the individual's share of the public inconvenience,

involve a direct invasion of private rights of person or property and necessarily include a civil injury.[99]

2. Statutory Offenses — a. New Rights or Duties Created — (1) *Penal Statutes.* Two apparently inconsistent rules have been enunciated by the courts in deciding whether damage caused to an individual by the violation of a penal statute creating a new right or duty constitutes a civil cause of action in his favor, or whether the penal cause of action is exclusive.[1] On the one hand it has been held that, as a general rule, the wrong-doer is liable in damages to a party injured by the violation of the statutory duty, notwithstanding he may be subject to the penalty for the public wrong;[2] on the other, that the offense against the state is

for which the remedy must be sought by a public prosecution. Hamilton, etc., Road Co. *v.* Great Western R. Co., 17 U. C. Q. B. 567.

Covinous recoveries in actions for penalties partake in some degree of the nature of compounding actions on penal statutes, and constitute misdemeanors. Admitting that such a recovery is a bar to another action at law, a party who might, but for the recovery, have sued in a popular action for the penalty, has not suffered any special damage by reason of the misdeameanor, since a popular action may be brought by any member of the public, and the only remedy is to the public for the common wrong. Burnet *v.* Davidson, 32 N. C. 94.

99. For examples see Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507. See also Assault and Battery; Larceny; Mayhem; and like special titles.

Felonies.— "Every felony," says Bracton, "is a trespass, though every trespass is not a felony." 2 Pollock & M. Hist. Eng. L. 510. Where a felony is committed, it generally, and perhaps uniformly, includes a civil injury. Foster *v.* Tucker, 3 Me. 458, 14 Am. Dec. 243; Barton *v.* Faherty, 3 Greene (Iowa) 327, 54 Am. Dec. 503; Boardman *v.* Gore, 15 Mass. 331.

1. See also, in connection with matters discussed in this subdivision, Municipal Corporations; Penalties.

2. Parker *v.* Barnard, 135 Mass. 116, 46 Am. Rep. 450 [*distinguishing* Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.) 249, 74 Am. Dec. 682]; Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Aldrich *v.* Howard, 7 R. I. 199 [*cited* in Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515; and *explained* in Grant *v.* Slater Mill, etc., Co., 14 R. I. 380, and Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189]; Couch *v.* Steel, 3 E. & B. 402 [*doubted*, if not *overruled*, in Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441]. See also Municipal Corporations; Penalties.

Authority for this view.— The case of Aldrich *v.* Howard, 7 R. I. 199 [*cited* in Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515, and *explained* in Grant *v.* Slater Mill, etc., Co., 14 R. I. 380, and in Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189], was decided on the equity of the early English Statute of Westminster II. c. 50, quoted in a note to the last-mentioned case as follows: "Concerning the statutes provided where the law faileth, and for remedies, lest suitors coming to the king's court shall depart from thence without remedy, they shall have writs provided in their cases." The case of Heeney *v.* Sprague, *supra*, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189, held that the chapter did not relate to municipal ordinances or to statutes generally, and certainly not to those subsequently enacted. It could affect such statutes, if at all, only by construction or as declaratory of the common law. The Statute of Westminster II, c. 50, is not in force in Maryland. Flynn *v.* Canton Co., 40 Md. 312, 17 Am. Rep. 603.

Scope of rule.— Some cases announce the proper test to be whether the penalties are given by the statute to the party aggrieved by its violation, or confer the right to sue and recover them upon a common informer; that in the former case only is the penal action exclusive. Aldrich *v.* Howard, 7 R. I. 199; Couch *v.* Steel, 3 E. & B. 402. But this is confounding the distinction between penal actions, which are remedies given for public offenses, and civil actions or suits for private injuries. See Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441 [*reversing* L. R. 6 Exch. 404].

Rule declared by statute.— In at least two states it has been declared by express enactment that any person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or a forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages. Norfolk, etc., R. Co. *v.* Irvine, 84 Va. 553, 5 S. E. 532; Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800; Tyler *v.* Western Union Tel. Co., 54 Fed. 634. The penalty prescribed by the penal statute is not the measure of damages in such action: but the measure of damages must be the same as that applied in actions where the cause of action existed at common law. Norfolk, etc., R. Co. *v.* Irvine, 84 Va. 553, 5 S. E. 532. *Contra*, Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800, in which case the court said that such action might be in form debt, assumpsit, trespass, or case, as the particular nature of the wrong or injury might require; and that the damages need not be ascertained by a jury, but must be in the amount of the penalty provided by the statute. The provision does not create any new cause of action. Thus no damages

the only cause of action, and the penal suit in expiation thereof an exclusive remedy.[3] By the better authority the true test for determining whether or not such penal statutes confer a cause of action for private injuries resulting from the breach seems to be whether the intention of the law is to confer a right upon individuals in addition to creating a new public offense.[4]

(II) *CRIMINAL STATUTES.* What has been said of penal statutes creating new

can be recovered for disappointment and mental suffering only, any more than they could before its enactment. Tyler *v.* Western Union Tel. Co., 54 Fed. 634.

3. *Indiana.*—Lang *v.* Scott, 1 Blackf. (Ind.) 405, 12 Am. Dec. 257.

Missouri.— Riddick *v.* State, 1 Mo. 147.

New Hampshire.— Fletcher *v.* State Capital Bank, 37 N. H. 369.

New York.— Almy *v.* Harris, 5 Johns. (N. Y.) 175.

North Carolina.— McKay *v.* Woodle, 28 N. C. 352.

Tennessee.— Jones *v.* Allen, 1 Head (Tenn.) 626.

Vermont.— Brattleboro *v.* Wait, 44 Vt. 459.

A person, by absconding or secreting himself so as to escape a draft into the military service of the United States, contrary to a penal statute, does not thereby give a cause of action to one drawn as an alternate, who is compelled to perform the service. Dennis *v.* Larkin, 19 Iowa 434, Cole, J., dissenting.

Statutory construction.— Where a statute creates a new duty and provides a penalty for the violation thereof, such remedy is exclusive, and no action for damages will lie where other state statutes of similar character show that when the legislature has imposed a new duty and intended that there shall be a remedy by action for damages, in addition to the penalties imposed, it has usually, if not uniformly, said so in plain terms. So held of a statutory duty imposed upon those having charge of the construction of a new building, to have the joists or girders of each floor above the third covered with boards or other suitable material to protect workmen from falling through, or those below from falling substances. Mack *v.* Wright, 180 Pa. St. 472, 40 Wkly. Notes Cas. (Pa.) 163, 36 Atl. 913.

4. *Maine.*— Hayes *v.* Porter, 22 Me. 371.

Massachusetts.— Barden *v.* Crocker, 10 Pick. (Mass.) 383.

Michigan.— Taylor *v.* Lake Shore, etc., R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457.

Ohio.— New York, etc., R. Co. *v.* Lambright, 5 Ohio Cir. Ct. 433.

Rhode Island.— Grant *v.* Slater Mill, etc., Co., 14 R. I. 380.

England.— Gorris *v.* Scott, L. R. 9 Exch. 125 [*approved* in Ross *v.* Rugge-Price, 1 Ex. D. 269, per Huddleston, B.]; Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441 [*reversing* L. R. 6 Exch. 404].

Canada.— Little *v.* Ince, 3 U. C. C. P. 528.

See also other cases cited *infra*, this note.

Early statement of law.— This view is substantiated by early common-law authority, thus: "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, and for the recompense of a wrong done to him contrary to said law." Flynn *v.* Canton Co., 40 Md. 312, 17 Am. Rep. 603; 1 Comyn Dig. tit. Action upon Statute, (F); Anonymous, 6 Mod. 27.

Illustrations of the better rule stated in the text may be found in:

Maine.— Hayes *v.* Porter, 22 Me. 371.

Pennsylvania.— Greensburg, etc., Turnpike Road Co. *v.* Breidenthal, 1 Phila. (Pa.) 93, 7 Leg. Int. (Pa.) 170.

Vermont.— Edwards *v.* Osgood, 33 Vt. 224.

England.— Donaldsons *v.* Becket, 4 Burr. 2408; Millar *v.* Taylor, 4 Burr. 2303; Ward *v.* Bird, 2 Chit. 582; Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441 [*reversing* L. R. 6 Exch. 404, and *criticising* Couch *v.* Steel, 3 E. & B. 402]; Beckford *v.* Hood, 7 T. R. 620 [*approved* in Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055, and *cited* in Hayes *v.* Porter, 22 Me. 371].

Canada.— Little *v.* Ince, 3 U. C. C. P. 528.

See also *infra*, I, K.

Ordinances.—This test as to whether a civil as well as a penal or criminal cause of action is given by the law has been applied by some cases where the question arose upon an ordinance of a city or town. Thus it has been held that ordinances which require a lot-owner to provide a suitable and safe passageway for foot-passengers on the side of the public street, as by keeping a walk free from snow and ice or other nuisance, contemplate public duties only, and cannot be construed as going further and giving individual causes of action for a neglect of the duty imposed. Flynn *v.* Canton Co., 40 Md. 312, 17 Am. Rep. 603; Taylor *v.* Lake Shore, etc., R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457. Some decisions wholly deny that a civil cause of action for a private injury can arise out of an ordinance creating a new right or duty. Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189; Vandyke *v.* Cincinnati, 1 Disn. (Ohio) 532, 535, wherein it was said that the effect of any such rule of law "would be to invest a municipal corporation with the highest attribute of sovereignty,— that of creating, limiting, and directing the most important rights and interests of individuals in the community, and directing their relations to each other; a power that no legislature, under our constitution, can depute to or confer upon another." See ORDINANCES; STREETS AND HIGHWAYS.

Action for penalty usually a public remedy. — In cases where the public have an interest in the faithful discharge of an official duty, the penalty for neglect, unless the contrary appears, is for the protection of that interest rather than to secure private rights; and in many cases the forfeiture is entirely inade-

rights or duties is no doubt true as well of statutes which make the act or omission a crime or misdemeanor.[5]

b. New Remedy Created. A statute which merely makes that a crime, misdemeanor, or offense, punishable by a penalty or forfeiture, which before its passage was already a legal wrong to individuals injured thereby, redressible by civil action or suit, does not take away the preëxisting cause of action unless it is so declared, expressly or by necessary implication.[6]

3. Merger and Suspension — a. Felonies — (I) *In General.* Although most, if not all, criminal acts that are *mala in se* include a trespass or other private injury,[7] various legal principles have been judicially suggested which either wholly obstructed or much hampered the right to private redress.[8]

(II) *Merger of Cause of Action.* It was first considered that the private wrong and injury were merged and drowned in the public wrong where a felony had been committed, and therefore no cause of action ever arose or could arise. This principle, however, was short-lived and rests rather on remarks of judges not necessary to the point decided than on reason and actual precedent.[9] Like the rule of law that no civil cause of action can be predicated on the death of a free person, though caused by a felonious or negligent act,[10] it is probably a survival of very early English social and political conditions.[11]

quate for the latter purpose, and is not even certainly available to the injured party. Hayes *v.* Porter, 22 Me. 371.

Injury not contemplated by statute.— Under an act of parliament which provides that any ship bringing stock into the ports of Great Britain from foreign ports shall dispose of them on board in a certain way, in order that no contagious or infectious diseases shall be introduced into the kingdom, no action will lie to recover damages for stock washed overboard although the loss is due to the fact that the statutory duty was not performed. The precautions directed may be useful and advantageous in preventing animals from being washed overboard, yet they were never intended for that purpose. Gorris *v.* Scott, L. R. 9 Exch. 125.

5. Public remedy not exclusive.— "Where a thing that is an injury to a particular person is prohibited by act of parliament, the party may have his action, but yet 't is indictable also." Per Holt, C. J., in Rex *v.* Hummings, Comb. 374. To the same effect see State *v.* Poulterer, 16 Cal. 514; New York, etc., R. Co. *v.* Lambright, 5 Ohio Cir. Ct. 433; Cincinnati *v.* Beuhausen, 22 Cinc. L. Bul. 421, 10 Ohio Dec. (Reprint) 652. *Contra*, see People *v.* Raynes, 3 Cal. 366; People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331. *Compare*, however, Ward *v.* Severance, 7 Cal. 126, where the public remedy was held to be exclusive.

6. Penal statutes.— *Alabama.*— Sawyer *v.* Ballew, 4 Port. (Ala.) 116.

Indiana.— Lang *v.* Scott, 1 Blackf. (Ind.) 405, 12 Am. Dec. 257.

Iowa.— Heiserman *v.* Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903.

Maine.— Cumberland, etc., Canal Corp. *v.* Hitchings, 59 Me. 206.

Massachusetts.—Barden *v.* Crocker, 10 Pick. (Mass.) 383.

New York.— Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Farmers' Turnpike Road Co. *v.* Coventry, 10 Johns. (N. Y.) 389.

Pennsylvania.— Woodring *v.* Forks Tp., 28 Pa. St. 355, 70 Am. Dec. 134.

Rhode Island.— Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189.

South Carolina.— State *v.* Cole, 2 McCord (S. C.) 117.

England.— Caswell *v.* Worth, 5 E. & B. 849.

Criminal statutes.— Heiserman *v.* Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903; Cumberland, etc., Canal Corp. *v.* Hitchings, 59 Me. 206; Knox County *v.* Hunolt, 110 Mo. 67, 19 S. W. 628; Irwin *v.* Wells, 1 Mo. 9.

Ordinances.— There are many things forbidden by ordinances which are nuisances or torts, and actionable as such by common law; and whether an ordinance which prescribes a penalty for an act of commission or omission also gives a right to sue for damages by one injured by the violation of the ordinance is immaterial. Heeney *v.* Sprague, 11 R. I. 456, 23 Am. Rep. 502, 12 Am. L. Rev. 189.

7. See *supra*, I, J, 1.

8. Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561 (in which the different principles and decisions thereunder are reviewed at length); *Ex p.* Ball, 10 Ch. D. 667, 671, 14 Cox C. C. 237 (per Bramwell, L. J., who said: "The law on this subject is in a remarkable state. For three hundred years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way [as the result of a felonious act, namely, the misappropriation or embezzlement of money]").

9. Cannon *v.* Burris, 1 Hill (S. C.) 372; Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204, per Green, J.; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237; Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561; The Hercules, 2 Dods. 353; Prosser *v.* Rowe, 2 C. & P. 421; Higgins *v.* Butcher, Yelv. 89; Markham *v.* Cobb, W. Jones 147, Noy 82; Cooper *v.* Witham, 1 Lev. 247. See also Masters *v.* Miller, 4 T. R. 320, per Buller, J.

10. See *infra*, I, L.

11. Origin of principle.— The doctrine of merger is probably a survival of a time in the

(III) *Suspension of Cause of Action*—(A) *In General.* Later it came to be held, except in cases of homicide,[12] that there was no actual merger, but, on grounds of public policy, that the remedy for the private wrong and injury would not lie until public justice had been vindicated by the conviction or acquittal of the wrong-doer in a criminal prosecution.[13] This principle, as well as that of merger,

history of English law when actions for damages were unknown, and other actions were in a very rudimentary state, and practically every legal wrong to person or property was a crime against the king's peace and a felony. See 2 Pollock & M. Hist. Eng. L. 488, 489. There was no way of obtaining civil redress, therefore, except as it might be obtained through the criminal prosecution. At the common law, if the wrong-doer was proceeded against by appeal of felony, such redress could be had where a conviction was secured, at least in cases of theft; and this was extended by 21 Hen. VIII, c. 11, which allowed restitution of stolen property on conviction by indictment on the testimony of the true owner, or on other evidence procured by him. 1 Stephen Hist. Crim. L. 247; Foxley's Case, 5 Coke, 109*a*; Beazley *v.* Mitchell, 9 Ala. 780; Boody *v.* Keating, 4 Me. 164; Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83; Boardman *v.* Gore, 15 Mass. 331; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285; Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312, wherein it was said: "The party injured was always allowed his remedy for the particular wrong by appeal (or action of felony, as Stannford calls it), which was a proceeding of a mixed character, having respect to public justice as well as the private wrong;" Keyser *v.* Rodgers, 50 Pa. St. 275; Cannon *v.* Burris, 1 Hill (S. C.) 372; *Ex p.* Bolland, Mont. & M. 315, 396. This statute, 21 Hen. VIII, c. 11, "is part of the common law brought with them by the American colonists. . . . Statutes on the same topic have been enacted in several of the United States." Wharton Crim. L. (10th ed.) § 981, and cases cited. For an instance of such a state statute see 1 Brightly Purd. Dig. L. Pa. 562, § 76. On conviction of felony, also, all the property of the wrong-doer, both land and chattels, was confiscated by the crown, nothing remaining out of which damages might be obtained; and many cases in the United States have suggested this as the basis of the principle. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847; Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698; Adams *v.* Barrett, 5 Ga. 404; Robinson *v.* Skipworth, 23 Ind. 311; Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83; Boardman *v.* Gore, 15 Mass. 331; Newell *v.* Cowan, 30 Miss. 492; Wyatt *v.* Williams, 43 N. H. 102; White *v.* Fort, 10 N. C. 251; Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312; Cannon *v.* Burris, 1 Hill (S. C.) 372; Ballew *v.* Alexander, 6 Humphr. (Tenn.) 433. But this would not account for the fact that the rule applied as well where the wrong-doer was acquitted as where he was convicted, and is not authorized by the English decisions which established the principle. See, generally, the English cases cited in this subdivision, and Hyatt *v.* Adams, 16 Mich. 180, 186, wherein it was said: "Forfeiture does not seem to have been assigned in England as the reason of the merger, . . . at least by any of the decisions which established and settled the rule. But this idea seems to have grown up in this country only because it was thought it would have furnished a better ground for the rule denying the action than the naked ground of merger."

Capital crimes.— Another ground, open to similar criticism to that of forfeiture, given by some cases, and confining the doctrine of merger to capital crimes, is that if the felon should be convicted he would be executed; and as all felonies include a trespass the action dies with him under the common-law maxim *actio personalis moritur cum persona.* Cross *v.* Guthery, 2 Root (Conn.) 90, 1 Am. Dec. 61; Barton *v.* Faherty, 3 Greene (Iowa) 327, 54 Am. Dec. 503; Boardman *v.* Gore, 15 Mass. 331; Cannon *v.* Burris, 1 Hill (S. C.) 372. See also Robinson *v.* Culp, 3 Brev. (S. C.) 302, 1 Treadw. (S. C.) 231, dissenting opinion of Brevard, J.

12. See *infra,* I, L; Hyatt *v.* Adams, 16 Mich. 180.

13. American decisions.— For a general citation of American authorities, the principle having been, for the most part, long superseded here, see 1 Cent. Dig. tit. "Action," § 25 *et seq.*

England.— Appleby *v.* Franklin, 17 Q. B. D. 93; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237; Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561; Wells *v.* Abrahams, L. R. 7 Q. B. 554; White *v.* Spettigue, 13 M. & W. 603, 1 C. & K. 673; *Ex p.* Bolland, Mont. & M. 315; *Ex p.* Jones, 2 Mont. & A. 193, 3 Deac. & C. 525; Crosby *v.* Leng, 12 East 409; Stone *v.* Marsh, 6 B. & C. 551; Dawkes *v.* Coveneigh, Style 346. See also cases cited *infra,* I, J, 3, a, (III), (C), (2).

Canada.— For Canadian cases see *infra,* I, J, 3, a, (III), (C), (2).

Acquittal or conviction.— A conviction is unnecessary to give the right to the civil remedy, but it lies upon the termination of the prosecution, whether defendant has been acquitted or convicted.

Alabama.— Middleton *v.* Holmes, 3 Port. (Ala.) 424; Morgan *v.* Rhodes, 1 Stew. (Ala.) 70.

Kentucky.— Eden *v.* Lexington, etc., R. Co., 14 B. Mon. (Ky.) 204; Williams *v.* Hedricks, 2 Ky. Dec. 175.

Missouri.— Nash *v.* Primm, 1 Mo. 178.

North Carolina.— Smith *v.* Weaver, 1 N. C. 42, 3 N. C. 266.

United States.— Ocean Ins. Co. *v.* Fields, 2 Story (U. S.) 59, 18 Fed. Cas. No. 10,406.

England.— Crosby *v.* Leng, 12 East 409; Dudley, etc., Banking Co. *v.* Spittle, 1 Johns. & H. 14.

Canada.— Walsh *v.* Nattrass, 19 U. C. C. P. 453; Macdonald *v.* Ketchum, 7 U. C. C. P. 484.

Actions by sovereign or state.— The rule of public policy, that the party injured should

originated in *dicta* of early judges,[14] and the numerous exceptions to it, established by decision from time to time, left it without much vitality.[15]

first prosecute, upon which the rule of the suspension of the cause of action is based, can have no application to a case in which the sovereign is a party. Reg. *v.* Reiffenstein, 5 Ont. Pr. 175.

Applies to every felony.— The principle that the remedy is suspended applies to every felony, not only a common-law felony, but also one created by statute. *Ex p.* Bolland, Mont. & M. 315 [*approved* in *Ex p.* Elliott, 3 Mont. & A. 110]; Marsh *v.* Keating, 2 Cl. & F. 250, 1 Bing. N. Cas. 198, 8 Bligh N. S. 651, 1 Scott 5, 1 Mont. & A. 592. *Compare* early American decisions to the effect that the doctrine had application only to treason and such crimes as are felonies by the common law, and not to statutory felonies (Williams *v.* Fambro, 30 Ga. 232; Dacy *v.* Gay, 16 Ga. 203; McBain *v.* Smith, 13 Ga. 315; Neal *v.* Farmer, 9 Ga. 555; Adams *v.* Barrett, 5 Ga. 404; Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312), and that it has application only to the crimes of larceny and robbery (Nowlan *v.* Griffin, 68 Me. 235, 28 Am. Rep. 45; Thayer *v.* Boyle, 30 Me. 475; Crowell *v.* Merrick, 19 Me. 392; Boody *v.* Keating, 4 Me. 164; Boardman *v.* Gore, 15 Mass. 331; Ballew *v.* Alexander, 6 Humphr. (Tenn.) 433).

The civil action is not suspended where the felony is committed without the state in which the action is brought. To thus make the rule the means of enforcing the criminal law of another state or country would, in effect, make the civil courts of the commonwealth police agents for the world. Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312.

Applies to all forms of proceedings.— No distinction exists, in the application of the doctrine that the remedy is suspended, between actions in tort and those *ex contractu;* for example, an action in debt to recover money embezzled by defendant. *Ex p.* Elliott, 3 Mont. & A. 110 [*criticising* remarks of Buller, J., in Masters *v.* Miller, 4 T. R. 320]. *Compare* Ga. Code (1873) § 3054, which provides that, if a tort amounts to a crime, the person injured may agree upon and receive compensation for the personal injury, under which an action will lie on a promissory note given by the felon in liquidation of the damage caused by the crime, although no prosecution has been instituted and terminated; and Dodson *v.* McCauley, 62 Ga. 130. See also Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204, per Green, J., who held that the doctrines of merger and suspension never had been applied in actions upon contracts. It applies to suits in chancery as well as to actions at law (Cox *v.* Paxton, 17 Ves. Jr. 329 [*cited* in Ocean Ins. Co. *v.* Fields, 2 Story (U. S.) 59, 18 Fed. Cas. No. 10,406]; Chowne *v.* Baylis, 31 Beav. 351; Dudley, etc., Banking Co. *v.* Spittle, 1 Johns. & H. 14; Wickham *v.* Gatrill, 2 Smale & G. 353); and to proceedings to establish a claim in bankruptcy as well as to actions or suits (*Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237; *Ex p.* Elliott, 3 Mont. & A. 110 [*citing Ex p.* Bolland, Mont. & M. 315]; *Ex p.* Walter, 2 Mont. & A. 208 note; *Ex p.* Shaw, 1 Madd. 598 [*explaining Ex p.* Birks, 2 Mont. & A. 208 note]). A defense to an action on a policy of insurance on a vessel, that the insurer intentionally caused the loss, a felonious act, raised by bill in equity for an injunction against the law judgment, is not within the mischief of the common-law rule. A person can have no cause of action founded upon his own wrong. Ocean Ins. Co. *v.* Fields, 2 Story (U. S.) 59, 18 Fed. Cas. No. 10,406.

Evidence of felony.— Where there is no reasonable or probable cause, on the evidence, for believing defendant's act to be felonious, the case should be submitted to the jury in the ordinary way, as if no evidence of a felonious act was given. To hold that, upon allegation of felony, plaintiff's remedy should be suspended, would be to force upon him the institution of a prosecution which might in itself be a wrongful act and render him responsible in damages. Rourke *v.* Mealy, 4 L. R. Ir. 166. To same effect, Grafton Bank *v.* Flanders, 4 N. H. 239 [*citing* Gibson *v.* Minet, 1 H. Bl. 569]; Mitchell *v.* Mims, 8 Tex. 6; *Ex p.* Jones, 2 Mont. & A. 193, 3 Deac. & C. 525; Walsh *v.* Nattrass, 19 U. C. C. P. 453. If there be two causes of action, one grounded on a felony and the other not, if the latter is sufficient to support the action then it may be proceeded with notwithstanding the evidence of a felony. Walsh *v.* Nattrass, 19 U. C. C. P. 453; Hayle *v.* Hayle, 3 U. C. Q. B. O. S. 296 [*citing* Wellock *v.* Constantine, 2 H. & C. 146].

14. Wells *v.* Abrahams, L. R. 7 Q. B. 554; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237, per Baggalay, L. J.

Origin of rule.— It has been said that the qualified right given by 21 Hen. VIII, c. 11, to the owner of goods stolen, to have restitution after a conviction of the felon upon indictment, obtained by his evidence or by the evidence of other witnesses procured by him, may have suggested the rule which suspends the remedy in all cases of felony until the termination of the criminal prosecution. Boardman *v.* Gore, 15 Mass. 331; Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312; *Ex p.* Bolland, Mont. & M. 315. It has also been placed on the ground that public prosecutions for crimes are, in England, left to be instituted and conducted by the parties injured at their own risks as to costs; and not to public prosecutors legally bound to bring offenders to justice and see that gross crimes do not go unpunished. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847; Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83; Hyatt *v.* Adams, 16 Mich. 180; Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204. *Compare* Chowne *v.* Baylis, 31 Beav. 351, 357, wherein it is said: "The law is the more singular on this subject, as the nominal prosecutor, or, in fact, in the eye of the law, the only real prosecutor of the felon, is the crown itself."

15. Parties — Plaintiffs.— The principle of the suspension of the right to sue applies only

(B) *Statutory Changes* — (1) In General. In some of the courts of this country the rule that the remedy was suspended until the termination of the criminal prosecution was adopted as part of the common law; others refused to follow it, as inapplicable to conditions here existing. These decisions are now of little practical value,[16] since the rule itself has been abrogated by general statutory provisions in most of the states in which it had been recognized as binding.[17]

to the party directly injured by the felonious act. It has no application when the action is brought by one who has sustained consequential damages, as, for example, a loss of services. Appleby *v.* Franklin, 17 Q. B. D. 93; Osborn *v.* Gillett, L. R. 8 Exch. 88, opinion of Bramwell, B. *Contra*, Walsh *v.* Nattrass, 19 U. C. C. P. 453 [*citing* Vincent *v.* Sprague, 3 U. C. Q. B. 283], in which it was said: "The rule depends, not upon any consideration for the plaintiff or for the defendant, but upon the exigencies of public policy." Gordon *v.* Fluskey, Arm. Mac. & O. 155; Hayes *v.* Smith, Smith & Bat. 378; Quinlan *v.* Barber, Batty 47. Although a creditor might not be able to bring a civil action for the debt arising out of the commission of a felony, no such doctrine can be applied where the claim is brought by the assignee in bankruptcy, who represents, not the creditor, but the creditors. *Ex p.* Ball, 10 Ch. D. 667, 674, 14 Cox C. C. 237, Baggalay, L. J., dissenting from this ground for the decision, and saying: "Neither the executors nor administrators of the person injured by the felony, nor his trustee in bankruptcy, can be in any better position than he himself was in at the date of his death or at the commencement of his bankruptcy." Where bankers agree to allow a person to draw upon them, upon his depositing some bills of exchange as security for the loan, the rule is inapplicable to a claim for the money thus drawn, although the bills deposited were forged, unknown to the bankers at the time. The loan was an ordinary loan, and the contract for it was not destroyed or affected by anything which subsequently occurred. *Ex p.* Leslie, 20 Ch. D. 131, 15 Cox C. C. 125. An action to recover back money paid to a thief as purchase-money for a stolen horse which had been recovered from the purchaser by the owner is not within the rule that a civil action for damages caused by a felony cannot be begun until the felon has been prosecuted. Barton *v.* Faherty, 3 Greene (Iowa) 327, 54 Am. Dec. 503.

Parties — Defendants.— Nor has it any application where the action is not brought against the felon, and he is not a necessary party thereto; as where it is brought against a person other than the thief, to recover stolen property.

Alabama.— Beazley *v.* Mitchell, 9 Ala. 780; Martin *v.* Martin, 25 Ala. 201; Bell *v.* Troy, 35 Ala. 184.

Georgia.— McBain *v.* Smith, 13 Ga. 315.

Indiana.— Robinson *v.* Skipworth, 23 Ind. 311.

Virginia.— Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204.

England.— Stone *v.* Marsh, 6 B. & C. 551; White *v.* Spettigue, 13 M. & W. 603, 1 C. & K. 673; Marsh *v.* Keating, 1 Bing. N. Cas. 198, 1 Scott 5, 1 Mont. & A. 582 [*affirmed* in 1 Mont. & A. 592]; Lee *v* Bayles, 18 C. B. 599.

But see, *contra*, Belknap *v.* Milliken, 23 Me. 381; Gimson *v.* Woodfull, 2 C. & P. 41; Cox *v.* Paxton, 17 Ves. Jr. 329.

Prosecution by injured party.— Unlike the remedy under 21 Hen. VIII, c. 11, redress is not conditional on conviction being secured on the testimony of the party aggrieved, or other evidence obtained by him. The law is indifferent as to who procured the prosecution of the felon, and the prosecution, having terminated the suspension of the civil action, is at an end. Chowne *v.* Baylis, 31 Beav. 351; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237.

"No bill."— If a person prefer an accusation in good faith, although the bill should be rejected by the grand jury, he has done as much as he can toward prosecuting and has satisfied the policy of the rule. Morton *v.* Bradley, 27 Ala. 640; Nelson *v.* Bondurant, 26 Ala. 341; White *v.* Fort, 10 N. C. 251 [*distinguishing* Goddard *v.* Smith, 1 Salk. 21].

Various other exceptions.— Where public policy ceases to operate, the rule ceases also. Thus it does not apply where the felon dies (Wickham *v.* Gatrill, 2 Smale & G. 353; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237), or is executed for another offense (Stone *v.* Marsh, 6 B. & C. 551; *Ex. p.* Bolland, Mont. & M. 315); or when a sufficient number of indictments growing out of the same transaction have been returned to satisfy public justice (*Ex p.* Jones, 2 Mont. & A. 193, 3 Deac. & C. 525; Dudley, etc., Banking Co. *v.* Spittle, 1 Johns. & H. 14), or the felon has fled the country before he could be apprehended (*In re* Herdson, 2 N. Zeal. Jur. N. S. 221 [*cited* in 28 Am. Rep. 49]; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237).

See also *infra*, I, J, 3, a, (III), (C), (2).

16. See 1 Cent. Dig. tit. "Actions," § 25 *et seq.*

17. See the statutes of the various states and the following cases:

Arkansas.— Brunson *v.* Martin, 17 Ark. 270.

Georgia.— Western, etc., R. Co. *v.* Meigs, 74 Ga. 857; Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

Iowa.— Barton *v.* Faherty, 3 Greene (Iowa) 327, 54 Am. Dec. 503.

Kentucky.— Eden *v.* Lexington, etc., R. Co., 14 B. Mon. (Ky.) 204; Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406.

Maine.— Nowlan *v.* Griffin, 68 Me. 235, 28 Am. Rep. 45; Belknap *v.* Milliken, 23 Me. 381; Crowell *v.* Merrick, 19 Me. 392.

New York.— Gordon *v.* Hostetter, 37 N. Y. 99; Van Duzer *v.* Howe, 21 N. Y. 531; Smith *v.* Lockwood, 13 Barb. (N. Y.) 209; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285.

Special statutory changes.— A statutory

(2) Rhode Island. In this state the common-law rule in a modified form is enacted by statute.[18]

(c) *Pleading and Practice* — (1) Under the Early Law. Under the common law, which held the criminal prosecution to be a strict condition precedent to the invoking of the civil remedy, its institution and termination must have been alleged and proved by plaintiff or complainant as a part of his cause of action,[19] and a failure to do so might be taken advantage of by defendant at any stage in the proceeding.[20]

(2) As Modified by Judicial Decision. While the principle that the remedy is suspended is still recognized as law in some jurisdictions, it has been so modified by judicial decision that there is no merger of the cause of action, nor is the criminal prosecution a strict condition precedent thereto;[21] but the prin-

provision that, when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within one year after death, abrogates the common-law principle that the civil remedy is suspended in cases of felony; since, if such representative should be required to prosecute the offender to conviction or acquittal before bringing suit, his cause of action would in most instances be barred before it accrued. Lankford *v.* Barrett, 29 Ala. 700. Where a statute which makes certain acts of malicious mischief a public offense, and at the same time provides that the wrongdoer shall be liable to the party injured in treble damages, the civil cause of action is not suspended. Thayer *v.* Boyle, 30 Me. 475.

18. R. I. Gen. Laws (1896), c. 233, § 16; Crowley *v.* Burke, 20 R. I. 793, 38 Atl. 895; Royce *v.* Oakes, 20 R. I. 252, 38 Atl. 371, 39 Atl. 758, 39 L. R. A. 845, 20 R. I. 418; Arnold *v.* Gaylord, 16 R. I. 573, note 1, 18 Atl. 177; Baker *v.* Slater Mill, etc., Co., 14 R. I. 531.

Pleading and practice.— For matters of pleading and practice under this statutory rule see *infra*, I, J, 3, a, (III), (C) (3).

19. Morton *v.* Bradley, 27 Ala. 640; Nelson *v.* Bondurant, 26 Ala. 341; Middleton *v.* Holmes, 3 Port. (Ala.) 424; Livingstone *v.* Massey, 23 U. C. Q. B. 156, which held that if plaintiff's evidence shows that the alleged loss of goods, the value of which he sues to recover, was caused by a felonious act committed by defendant, it is in truth a failure on plaintiff's part to prove the cause of action. It is not an answer set up by defendant to a cause of action *prima facie* proved.

20. Lack of proper averments.— Where it appears from plaintiff's pleadings that the cause of action is based upon a felonious act, and it is not alleged therein that a criminal prosecution has been instituted and terminated, a demurrer will lie (Cox *v.* Paxton, 17 Ves. Jr. 329) or, after verdict, a motion in arrest of judgment (Proctor *v.* Bury, Barnes Notes Cas. 450, where on such motion the judgment was directed to be stayed until further order). *Contra*, Nash *v.* Primm, 1 Mo. 178 [*approved* in Mann *v.* Trabue, 1 Mo. 709, overruling a motion for judgment *non obstante veredicto*].

Failure of proof.— Although the pleadings do not raise any question as to plaintiff's right being suspended because he has not done all in his power, or anything, to prosecute for the offense against public justice, the question may properly be raised at the trial. Macdonald *v.* Ketchum, 7 U. C. C. P. 484; Livingstone *v.* Massey, 23 U. C. Q. B. 156. Where plaintiff has failed to prove the institution and termination of a criminal prosecution, it has been held that he may be compelled to accept a nonsuit to prevent a verdict being directed for defendant (Talbot *v.* Fredrickson, Yelv. 99*a* note; Pease *v.* McAloon, 3 N. Brunsw. 111; Livingstone *v.* Massey, 23 U. C. Q. B. 156; Wellock *v.* Constantine, 2 H. & C. 146; Gimson *v.* Woodfull, 2 C. & P. 41; Gordon *v.* Fluskey, Arm. Mac. & O. 155; Quinlan *v.* Barber, Batty 47); or the jury may be instructed that if they find a felony has been committed they should return a verdict for defendant, otherwise for plaintiff (Prosser *v.* Rowe, 2 C. & P. 421; Hayes *v.* Smith, Smith & Bat. 378).

21. Suspension of cause of action.— Although the policy of the law requires that before the party injured by any felonious act can seek civil redress for it the matter should be heard and disposed of before a criminal tribunal, it becomes a different matter when we have to consider how the principle is to be enforced. Wells *v.* Abrahams, L. R. 7 Q. B. 554, per Cockburn, C. J. [*cited* in Taylor *v.* McCullough, 8 Ont. 309]; S. *v.* S., 16 Cox C. C. 566, *sub nom.* A. *v.* B., 24 L. R. Ir. 235. If the principle suspends the cause of action instead of merely staying the civil proceedings until the prosecution has been instituted and conducted to a termination, it must follow either (1) that the cause of action does not arise until the prosecution, or (2) that it arises on the happening of the injury, but is suspended until the prosecution. The first proposition would make the cause of action the act of the felon plus the prosecution, and no such theory has ever been suggested. The second is also attended with difficulties. The suspension of the cause of action is a thing nearly unknown to the law. To allow it to be raised by a plea would be contrary to the maxim *nemo allegans suam turpitudinem est audiendus;* and it would be absurd to suppose that the wrong-doer himself ever would so plead and face the consequences. *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237, per Bramwell, L. J. To same effect, Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561, per Williams, J. Since, therefore, the principle does not affect the

ciple can be enforced, if at all, only when public justice is likely to suffer if the party aggrieved is first allowed to obtain private redress. In such event the court probably has power, after the civil action or suit has been instituted, to summarily suspend or stay its further progress until a prosecution has been instituted and terminated.[22]

(3) In Rhode Island. In Rhode Island, where the principle that the remedy is suspended is declared in a modified form by statute,[23] compliance with the statutory conditions is a condition precedent to the right to sue, as under the early law, and therefore a part of plaintiff's case.[24]

cause of action, it cannot, contrary to the early decisions, be raised by demurrer to the declaration or bill, plea, or motion in arrest of judgment; nor can the court at the trial compel plaintiff to take a nonsuit under penalty of having verdict directed against him, or, in doubtful cases, leave it to the jury to affirm or negative the felony and render a verdict accordingly. Appleby *v.* Franklin, 17 Q. B. D. 93; Roope *v.* D'Avigdor, 10 Q. B. D. 412; Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561; *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237; S. *v.* S., 16 Cox C. C. 566, *sub nom.* A. *v.* B., 24 L. R. Ir. 235; Wells *v.* Abrahams, L. R. 7 Q. B. 554 [Quain, J., *contra*, that if it appears on the face of the declaration that a felony was laid as a ground of the action, that might be a case for demurrer or for a motion in arrest]; Stone *v.* Marsh, 6 B. & C. 551; Lutterell *v.* Reynell, 1 Mod. 282; Williams *v.* Robinson, 20 U. C. C. P. 255; Walsh *v.* Nattrass, 19 U. C. C. P. 453; Taylor *v.* McCullough, 8 Ont. 309.

Exception — Plea.— No objection exists to a plea that plaintiff has caused a prosecution for a felony to be commenced upon the same facts as were involved in the civil suit. Defendant does not thereby admit that he is a felon; he merely puts upon the record the fact that plaintiff has commenced a prosecution against him as such. Taylor *v.* McCullough, 8 Ont. 309.

Special statutory abrogation.— An act of the legislature which provides that an innkeeper, or persons in his employ, shall be liable to an action for damages for selling liquor to an intoxicated person, although his death was caused thereby under such circumstances as amount in law to a felony, abrogates the common-law principle. McCurdy *v.* Swift, 17 U. C. C. P. 126.

22. Roope *v.* D'Avigdor, 10 Q. B. D. 412; S. *v.* S., 16 Cox C. C. 566, *sub nom.* A. *v.* B., 24 L. R. Ir. 235; Wells *v.* Abrahams, L. R. 7 Q. B. 554 [*discussed* in *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237]; Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561; Taylor *v.* McCullough, 8 Ont. 309; Williams *v.* Robinson, 20 U. C. C. P. 255; Walsh *v.* Nattrass, 19 U. C. C. P. 453; Vincent *v.* Sprague, 3 U. C. Q. B. 283, per Macauley, J.; Hayle *v.* Hayle, 3 U. C. Q. B. O. S. 295; *In re* Herdson, 2 N. Zeal. Jur. N. S. 221 [*cited* in 28 Am. Rep. 49].

Origin and scope of this view.— This solution of the early principle was first suggested by Cockburn, C. J., and Blackburn, J., in Wells *v.* Abrahams, L. R. 7 Q. B. 554 [two justices *contra*]. *Ex p.* Ball, 10 Ch. D. 667, 14 Cox C. C. 237, per Bramwell, L. J. Where the criminal prosecution is not pending, and defendant makes no application for the stay of the civil proceedings, it has been held that there is no power in the court to enter such order on its own motion; that, apart from any right which the plaintiff may possess, defendant might be seriously prejudiced by the trial of the action being prevented. S. *v.* S., 16 Cox C. C. 566, 570, *sub nom.* A. *v.* B., 24 L. R. Ir. 235, O'Brien, J., dissenting and saying: "In my opinion it results from the very nature of the action of the court, and from the necessity of the case, because defendant may have very strong interest not to stir in the matter, and the crown, of course, does not appear, that the court will exercise that authority of their own motion and independently of any application from any party."

Amendment of declaration.— In a proceeding *in rem* against a ship, in which the statement of claim set up a cause of action with the word "fraudulently" therein contained, such word was ordered to be stricken out in answer to an objection by defendant that it made the act which gave rise to the cause of action a felony. The Princess Royal, L. R. 3 A. & E. 41.

Erroneous order of court.— Where an order of a judge staying the proceedings is erroneous, no doubt plaintiff has a right to have the order reviewed (Walsh *v.* Nattrass, 19 U. C. C. P. 453); but for error in refusing to stay, defendant has no right to have a verdict against him set aside or reviewed on appeal. It is only the public policy of the law which requires a judge to intervene in the interest of the state, and his failure to do so does not give defendant any right to move (Williams *v.* Robinson, 20 U. C. C. P. 255 [*approved* in Taylor *v.* McCullough, 8 Ont. 309]; Walsh *v.* Nattrass, 19 U. C. C. P. 453 [*explaining* Brown *v.* Dalby, 7 U. C. Q. B. 160]). See also Quinlan *v.* Barber, Batty 47.

Pennsylvania.— In this state it is provided by statute that the civil cause of action shall not be merged or in any way affected by the fact that it arose out of the commission of a felony (1 Brightly Purd. Dig. L. 388, § 4; 563, § 78); but it has been intimated in a case decided since this enactment that, where such a course is necessary for the sake of public justice, defendant may pray that the parol may demur, that is, that the civil action may be stayed or suspended until the criminal prosecution is terminated (Keyser *v.* Rodgers, 50 Pa. St. 275. See also Hutchinson *v.* Merchants', etc., Bank, 41 Pa. St. 42, 80 Am. Dec. 596).

23. See *supra*, I, J, 3, a, (III), (B), (2).

24. Arnold *v.* Gaylord, 16 R. I. 573, 18 Atl. 177, holding that a special plea is not neces-

b. Other Public Offenses. The common-law doctrine of the merger or suspension of the civil cause of action never had any application to misdemeanors, or other offenses differently qualified than felonies; and the civil remedy will lie exclusive of the criminal prosecution, or in conjunction with it.[25]

4. Perjury and Subornation of Perjury — a. General Rule. Perjury seems not to have been looked upon as a punishable offense under the early common law.[26] But, however this may be, false swearing by a party to litigation, or other witnesses, will not as a rule constitute a cause of action, either at law or in chancery, no matter how great the damage occasioned thereby to adverse parties. Otherwise there would be no end to litigation, or stability in the solemn adjudications of courts.[27]

sary in order to enable defendant to take advantage of plaintiff's omission to complain of the crime or offense before bringing suit for damages. A declaration for an injury occasioned by the commission of a crime or offense, under the Rhode Island statute, must allege the making of the complaint and the issuing of process thereon before the commencement of civil action, or it will be demurrable. Arnold *v.* Gaylord, 16 R. I. 573, 18 Atl. 177; Royce *v.* Oakes, 20 R. I. 252, 38 Atl. 371, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845. Where it appears on the trial that the statutory conditions have not been complied with, a verdict is properly directed for defendant. Crowley *v.* Burke, 20 R. I. 793, 38 Atl. 895.

25. *Alabama.*— Phillips *v.* Kelly, 29 Ala. 628; Kennedy *v.* McArthur, 5 Ala. 151.

Delaware.— Thoroughgood *v.* Anderson, 5 Harr. (Del.) 97.

Georgia.— Newton Mfg. Co. *v.* White, 63 Ga. 697; Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698; Adams *v.* Barrett, 5 Ga. 404.

Kentucky.— Blassingame *v.* Glaves, 6 B. Mon. (Ky.) 38.

New York.— Smith *v.* Lockwood, 13 Barb. (N. Y.) 209.

North Carolina.— White *v.* Fort, 10 N. C. 251.

South Carolina.— Cannon *v.* Burris, 1 Hill (S. C.) 372.

England.— The Hercules, 2 Dods. 353; Fissington *v.* Hutchinson, 15 L. T. Rep. N. S. 390.

Piracy.— At the common law piracy was not considered to be a felony, and the doctrine of the merger or the suspension of the cause of action has no application thereto. Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6. L. ed. 369; The Hercules, 2 Dods. 363.

Offenses punishable by penalty or forfeiture.— A statute imposing a penalty or forfeiture for the violation of a statutory duty is not a criminal law creating a felony; and if a civil cause of action is given thereby the civil remedy may be pursued without regard to the penal action. Reagh *v.* Spann, 3 Stew. (Ala.) 100.

26. Reason why.— Anciently jurors were merely a body of witnesses, whose verdict was based entirely on their own personal knowledge, and in no respect on the evidence of others testifying before them in court; and the only method whereby they could be punished was by writ of attaint. 3 Bl. Comm. 389, 404; 2 Pollock & M. Hist. Eng. L. 539, *et seq.;* Onslowe's Case, 2 Dyer 242 *b*; Damport *v.* Sympson, Cro. Eliz. 520. See also Eyres *v.* Sedgewicke, Cro. Jac. 601; Harding *v.* Bodman, Hutton 11; Juries; Perjury.

27. At law.— *California.*— Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491.

Connecticut.— Bostwick *v.* Lewis, 2 Day (Conn.) 447; Page *v.* Camp, Kirby (Conn.) 7, two judges dissenting.

Indiana.— Grove *v.* Brandenburg, 7 Blackf. (Ind.) 234.

Louisiana.— Gusman *v.* Hearsey, 28 La. Ann. 709, 26 Am. Rep. 104.

Maine.— Dunlap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625.

Massachusetts.— Phelps *v.* Stearns, 4 Gray (Mass.) 105, 64 Am. Dec. 61 [*cited* in Parker *v.* Huntington, 7 Gray (Mass.) 36, 66 Am. Dec. 455].

New York.— Verplanck *v.* Van Buren, 76 N. Y. 247 [*reversing* on other grounds 11 Hun (N. Y.) 328]; Smith *v.* Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; Young *v.* Leach, 27 N. Y. App. Div. 293, 50 N. Y. Suppl. 670.

Vermont.— Cunningham *v.* Brown, 18 Vt. 123, 46 Am. Dec. 140.

Wisconsin.— Abbott *v.* Bahr, 3 Pinn. (Wis.) 193, 3 Chand. (Wis.) 210.

England.— Dawling *v.* Wenman, 2 Show. 446; Eyres *v.* Sedgewicke, Cro. Jac. 601; Damport *v.* Sympson, Cro. Eliz. 520; Harding *v.* Bodman, Hutton 11. But see, *contra*, False Affidavits, 12 Coke 128, which is probably explainable as an action on the case for a false imprisonment, and not, therefore, based on the perjury which brought about the arrest, as the cause of action.

In equity.— *California.*— Pico *v.* Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336.

Illinois.— Galena, etc., R. Co. *v.* Ennor, 116 Ill. 55, 4 N. E. 762; Ames *v.* Snider, 55 Ill. 498.

Maryland.— Gott *v.* Carr, 6 Gill & J. (Md.) 309.

Michigan.— Cleveland Iron Min. Co. *v.* Husby, 72 Mich. 61, 40 N. W. 168; Gray *v.* Barton, 62 Mich. 186, 28 N. W. 813; Miller *v.* Morse, 23 Mich. 365.

New Jersey.— Burgess *v.* Lovengood, 55 N. C. 457.

New York.— Ross *v.* Wood, 8 Hun (N. Y.) 185.

Texas.— Metzger *v.* Wendler, 35 Tex. 378.

United States.— U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Walker *v.* Tribune Co., 29 Fed. 827.

b. Exceptions to Rule. A court of chancery, however, it has been said, may very appropriately grant relief against a judgment at law where the perjury is established by written documents or by the conviction of the guilty party;[28] and if valid legal or equitable grounds for relief exist, aside from the perjury, an action or suit would, of course, be entertained.[29]

K. Arising Out of Public Contracts. Where corporations or natural persons agree with the state to perform certain duties toward individual members of the public, an action lies by the latter against the promisors for damage resulting from a breach of the contract.[30] Otherwise where the contractual duties are for the benefit of the public generally.[31]

L. Death by Wrongful Act — 1. Actions for the Personal Injury. The authorities all agree that no action for damages for an injury to a freeman, which results in his death, will lie, except by force of statute, on the well-settled principle that a personal cause of action dies with the person.[32]

England.— Tovey *v.* Young, Prec. Ch. 193. See also Equity; Judgments.

"Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once it could be done again and again, *ad infinitum*." Pico *v.* Cohn, 91 Cal. 129, 134, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336.

New trial.— As perjury alone will not constitute a cause of action, neither will it, in the absence of statute, be a sufficient ground for the granting of a new trial in the law case. Duryee *v.* Dennison, 5 Johns. (N. Y.) 248 [*explaining* Fabrilius *v.* Cock, 3 Burr. 1771]. See also New Trial.

28. Cleveland Iron Min. Co. *v.* Husby, 72 Mich. 61, 40 N. W. 168; Burgess *v.* Lovengood, 55 N. C. 457; Peagram *v.* King, 9 N. C. 295; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Tovey *v.* Young, Prec. Ch. 193.

29. Thus, fraud, mistake, surprise, newly discovered evidence going to merits, and the like.

Delaware.— Kersey *v.* Rash, 3 Del. Ch. 321.

Illinois.— McGehee *v.* Gold, 68 Ill. 215.

New York.— Woodworth *v.* Van Buskerk, 1 Johns. Ch. (N. Y.) 432; Smith *v.* Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469.

North Carolina.— Burgess *v.* Lovengood, 55 N. C. 457 [*explaining* Peagram *v.* King, 9 N. C. 295].

Wisconsin.— Stowell *v.* Eldred, 26 Wis. 504 [*cited* in Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560].

See also Equity.

Defamation of character.— An action will lie against one who, by subornation of perjury, successfully consummated a scheme to defame plaintiff's character. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

30. Little *v.* Banks, 85 N. Y. 258 [*affirming* 20 Hun (N. Y.) 143]; Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 99 Am. Dec. 445. *Compare* Winterbottom *v.* Wright, 10 M. & W. 109, wherein it was said by Rolfe, B.: "This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is no doubt a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law." In this case it was held that no action would lie against an individual who contracted with the postmaster-general to provide and keep in repair a public mail-coach, by the driver thereof, hired by a third person who had contracted to carry the mail, for a personal injury caused by the breaking down of the coach through latent defects in its construction.

31. Thus a contract entered into by a corporation with a city, whereby the former agrees to provide adequate means for the extinguishing of conflagrations, does not give a cause of action to an individual member of the public whose property has been destroyed by fire owing to the failure of the contractors to perform as promised. It is not true that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason thereof. If the duty is purely a public duty, then the individual will have no cause of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon individual members of the public. The obligation or duty of the contractors was to the city, and not to the individual citizen, looking to the nature of the duty and the benefits to be accomplished by the performance of the contract. House *v.* Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179. To same effect, Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441 [*reversing* L. R. 6 Exch. 404]. *Contra*, Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77 [*followed* in Duncan *v.* Owensboro Water Co., (Ky. 1889) 12 S. W. 557].

32. Maxim.— *Actio personalis moritur cum persona.* Broom Leg. Max. 904; and the following cases:

Georgia.— Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698.

Kentucky.— Louisville, etc., R. Co. *v.* McElwain, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788; Eden *v.* Lexington, etc., R. Co., 14 B. Mon. (Ky.) 204.

Michigan.— Hyatt *v.* Adams, 16 Mich. 180.

2. Actions for Loss of Services — a. General Rule. By the weight of authority it is also established that no action will lie at common law for a cause of action lying outside the principle of the abatement of personal actions; such as an injury to a third person, due to the loss of services which the death occasions.[33] The effect of these decisions is that no cause of action arises for such a wrongful act; and not merely that there is a cause of action which is extinguished or abated by other recognized legal principles. It is generally admitted that this is not in accord with the fundamental rules of law which determine what constitutes a legal injury;[34] and in at least one case, holding that the doctrine is not sufficiently supported by precedent in the United States to be *stare decisis*, it has been denied *in toto*.[35]

New Hampshire.— Wyatt *v.* Williams, 43 N. H. 102.

New York.— Whitford *v.* Panama R. Co., 23 N. Y. 465; Green *v.* Hudson River R. Co., 2 Keyes (N. Y.) 294, 2 Abb. Dec. (N. Y.) 277.

United States.— Sullivan *v.* Union Pac. R. Co., 3 Dill. (U. S.) 334, 23 Fed. Cas. No. 13,599, 1 Centr. L. J. 595, 9 Am. L. Rev. 365.

But see, as to survival and revival of a common-law action for injury to the person, resulting in plaintiff's death after action brought, St. Louis, etc., R. Co. *v.* Dawson, (Ark. 1900) 56 S. W. 46; Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72; Thomas *v.* Maysville Gas Co., (Ky. 1900) 56 S. W. 153; Reed *v.* Northeastern R. Co., 37 S. C. 42, 16 S. E. 289, and, generally, Abatement and Revival.

And under statutes providing that actions for injury to the person shall not abate, in Pennsylvania, see McCafferty *v.* Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435; in Washington, see Dueber *v.* Northern Pac. R. Co., 100 Fed. 424; and in Wisconsin, see Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771. Similar statutes are found in Arkansas, Colorado, Illinois, Iowa, Kansas, Kentucky, Maryland, New Hampshire, South Carolina, Tennessee, Washington, and Wyoming.

33. *Kentucky.*— Eden *v.* Lexington, etc., R. Co., 14 B. Mon. (Ky.) 204.

Maine.— Nickerson *v.* Harriman, 38 Me. 277.

Massachusetts.— Carey *v.* Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616.

Michigan.— Hyatt *v.* Adams, 16 Mich. 180.

New Hampshire.— Wyatt *v.* Williams, 43 N. H. 102.

New York.— Quin *v.* Moore, 15 N. Y. 432; Green *v.* Hudson River R. Co., 2 Keyes (N. Y.) 294, 2 Abb. Dec. (N. Y.) 277; Safford *v.* Drew, 3 Duer (N. Y.) 627.

England.— Baker *v.* Bolton, 1 Campb. 493; Osborn *v.* Gillett, L. R. 8 Exch. 88, Bramwell, B., dissenting.

Civil law.— It has been stated in argument that the civil law and the laws of France and Scotland give a cause of action for the loss of services caused by an injury resulting in death. Carey *v.* Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; Safford *v.* Drew, 3 Duer (N. Y.) 627; Cutting *v.* Seabury, 1 Sprague (U. S.) 522, 6 Fed. Cas. No. 3,521; Sullivan *v.* Union Pac. R. Co., 3 Dill. (U. S.) 334, 23 Fed. Cas. No. 13,599, 1 Centr. L. J. 595, 9 Am. L. Rev. 365. *Compare* a case in Louisiana which held, discussing the civil law, that it was seemingly a principle of that law that the life of a free person was not subject to valuation; and that the provision contained therein that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," does not create such a cause of action; that at any rate no such cause of action is recognized in Louisiana or at the common law. Hubgh *v.* New Orleans, etc., R. Co., 6 La. Ann. 495. 54 Am. Dec. 565 [*cited* in Castille *v.* Caffery Cent. Refinery, etc., Co., 48 La. Ann. 392, 19 So. 332].

34. See, generally, cases cited *supra*, note 33.

Such a principle cannot be vindicated on considerations of reason, justice, or policy. There exists the damage and pecuniary injury which, on general principles, give a right to compensation. If such right does not exist it is upon the wrong-doer to show why. Per Dillon, Cir. J., in Sullivan *v.* Union Pac. R. Co., 3 Dill. (U. S.) 334, 23 Fed. Cas. No. 13,599, 1 Centr. L. J. 595, 9 Am. L. Rev. 365; Osborn *v.* Gillett, L. R. 8 Exch. 88, 97, opinion of Bramwell, B., who further said: "In my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case in the English books; it is not stated in any elementary treatise." In Baker *v.* Bolton, 1 Campb. 493, it was assumed to be the law by all parties and the court.

The reason for the common-law doctrine that an act causing the death of a human being was a felony, and the civil cause of action for the trespass was merged in the crime, no longer prevails; and it would seem that, under the legal principle that for every wrong there shall be a remedy, the unwritten law, expanding into new application on artificial restraint or obstruction imposed by public policy being removed, would allow the action. Cutting *v.* Seabury, 1 Sprague (U. S.) 522, 6 Fed. Cas. No. 3,521.

35. "The authentic evidence of what the common law is must be found in the judicial reports. It will be seen that all the cases, English and American, on this subject, rest upon the *nisi prius* decision, in 1808, of Lord Ellenborough in Baker *v.* Bolton, 1 Campb. 493. Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is that

b. Reason of Rule. Various reasons have been assigned in support of the rule,[36] but it is probably a survival of ancient English law which had no very well defined notion of a private injury apart from a public wrong.[37]

it ought not to be followed in a state where the subject is entirely open for settlement. It would be different if the rule had been settled in England by a long course of decisions made prior to the settlement of this country, as in that event the courts here would find it more difficult to reject it." Per Dillon, Cir. J., in Sullivan *v.* Union Pac. R. Co., 3 Dill. (U. S.) 334, 23 Fed. Cas. No. 13,599, 1 Centr. L. J. 595, 9 Am. L. Rev. 365.

Other decisions contra.— Some cases have held, without giving any particular reasons therefor, and as if it was an unquestioned legal principle, that a husband or father had at common law a right to recover of a wrongdoer, whose tortious act had resulted in the death of wife or child, the damage he had sustained thereby owing to loss of services. McDowell *v.* Georgia R. Co., 60 Ga. 320; Chick *v.* Southwestern R. Co., 57 Ga. 357; Allen *v.* Atlanta St. R. Co., 54 Ga. 503; Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698; Ford *v.* Monroe, 20 Wend. (N. Y.) 210; Lynch *v.* Davis, 12 How. Pr. (N. Y.) 323. See also Plummer *v.* Webb, 1 Ware (U. S.) 69, 19 Fed. Cas. No. 11,234.

36. Inestimable value of human life.— "The reason of the rule is to be found in that natural and almost universal, repugnance, among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined." Hyatt *v.* Adams, 16 Mich. 180, 190. See also, generally, cases cited in this subdivision.

Contra.— The reason for the rule just stated that a civil action for damages cannot be brought for the death of a human being because of the inappreciable value of human life will not bear a close examination, "inasmuch as the same may be said of reputation, sanctity of the marital relation, and the like, where the law, nevertheless, gives a remedy." Wyatt *v.* Williams, 43 N. H. 102. In Anglo-Saxon times also there was no such thing as the inappreciable value of human life. "The notion of compensation runs through the whole criminal law of the Anglo-Saxons, who allowed a sum of money as a recompense for every kind of crime. Every man's life had a value, called a ware, or *capitis estimatio*." Wise *v.* Teerpenning, 8 N. Y. Leg. Obs. 153, 156. To same effect, Wyatt *v.* Williams, 43 N. H. 102; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Pollock & M. Hist. Eng. L. 449, 457–58, wherein it is said: "The most marvelous revolution, however, is that which occurs in the law of homicide, for not only does wilful homicide become a capital crime — this we might have expected to happen sooner or later — but the kinsfolk of the slain lose their right to a *wer* and to compensation of any sort or kind. A modern statute was required to give the *parentes occisi* a claim for damages in an English court. (Lord Campbell's Act, 9 & 10 Vict. c. 93.) Yet in many parts of Western Europe at a comparatively recent time men have sued for a ware, nor only so, they have lawfully prosecuted the blood feud."

Precedent.— The law has been so understood up to the present time, and if it is to be changed it rests with the legislature, and not with the courts, to make the change. It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show what the general understanding was. Osborn *v.* Gillett, L. R. 8 Exch. 88, Bramwell, B., dissenting; Green *v.* Hudson River R. Co., 2 Keyes (N. Y.) 294, 2 Abb. Dec. (N. Y.) 277, per Leonard, J., who also said: "It is of no practical utility to search for the reason of the rule. It remains somewhat obscure. Whether it arose from the sentimental reason that the destruction of life by negligence was an injury that could not be compensated in damages, . . . or from the policy of the law to secure a greater safety to life and limbs by merging the right to damages by a civil action in the felony resulting from the killing of a human being by the negligent act of another, thus ensuring the coöperation of the next of kin, as may be supposed, in a vigorous prosecution of the criminal, and preventing the composition or settlement of such offenses, as I am inclined to believe,— it is now of little consequence to inquire."

Merger of cause of action.— Another reason frequently assigned is that an act which causes death was a felony at common law, and the civil cause of action was merged in the criminal offense. For the cases discussing this proposition see the next note.

37. Origin and history of rule.— "The most primitive laws that have reached us seem to point to a time when a man was responsible not only for all harm done by his own acts, but also for that done by the acts of his slaves, his beasts, or — for even this we must add — the inanimate things that belonged to him. . . . The man who commits homicide by misadventure or in self-defense deserves but needs a pardon. Bracton cannot conceal this from us, and it is plain from multitudinous records of Henry III's reign. If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him; they bid him hope for the king's mercy. . . . In cases of the latter sort we never hear of 'negligence' or of any similar standard of liability." 2 Pollock & M. Hist. Eng. L. 470, 477, 482. Such being the law, every homicide was a felony, and the civil cause of action was held to be merged or

3. Statutory Cause of Action. In most states the common law has been abrogated, to a greater or less extent, by statutes which create a cause of action; not, as a rule, for every injury, but only for the damage resulting to the family of the deceased.[38]

M. Statutory Enactments and Changes. In some jurisdictions certain of these fundamental principles of law have taken the form of statute law;[39] and

drowned in the criminal offense; and, unlike acts attended by less serious consequences, the doctrine of merger was never superseded by that of the mere suspension of the remedy until public justice had been satisfied; but the rule remained after the law came to distinguish between wilful, and accidental or negligent killing, and to a great extent exploded both the doctrine of merger and that of suspension.

Kentucky.— Louisville, etc., R. Co. *v.* McElwain, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 778; Eden *v.* Lexington, etc., R. Co., 14 B. Mon. (Ky.) 204.

Massachusetts.— Carey *v.* Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616.

Michigan.— Hyatt *v.* Adams, 16 Mich. 180.

New Hampshire.— Wyatt *v.* Williams, 43 N. H. 102; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

United States.— Cutting *v.* Seabury, 1 Sprague (U. S.) 522, 6 Fed. Cas. No. 3,521; Sullivan *v.* Union Pac. R. Co., 3 Dill. (U. S.) 334, 23 Fed. Cas. No. 13,599, 1 Centr. L. J. 595, 9 Am. L. Rev. 365.

England.— Higgins *v.* Butcher, Yelv. 89; Osborn *v.* Gillett, L. R. 8 Exch. 88. See also *supra*, I, J; I, J, 3.

38. Statutory cause of action.— Such an action was first given in England by a statute known as Lord Campbell's Act, 9 & 10 Vict. c. 93. This statute has been, with various modifications, incorporated into the legislation of nearly all the American states. Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503. See also Death; Negligence; Railroads.

Scope of statutes — Illustrations.— The language found in the preamble to Lord Campbell's Act, 9 & 10 Vict. c. 93, is not confined to cases to which the maxim *actio personalis moritur cum persona* applies, but is perfectly general: "Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him." Per Pigott, B., in Osborn *v.* Gillett, L. R. 8 Exch. 88. Construed as a whole, however, it was for the purpose of abrogating the common-law rule that the cause of action did not survive, and that therefore no right of recovery for the damages resulting from the death existed in favor of deceased's personal representatives or next of kin, that Lord Campbell's Act was passed. This is manifest both from its recital and from its provisions. It did not provide for the case of masters, and their rights were not touched by it. Sullivan *v.* Union Pac. R. Co., 3 Dill. (U. S.) 334, 23 Fed. Cas. No. 13,599, 1 Centr. L. J. 598, 9 Am. L. Rev. 365.

In Georgia, § 2971 of the code gives the right of action to the persons therein named to recover for the homicide of a husband or parent, and that is all that it does declare in relation to a recovery for the homicide of anybody. The homicide of a husband or parent is made by the statute a special cause of action in favor of the persons therein named, and is limited to them. Chick *v.* Southwestern R. Co., 57 Ga. 357 [*citing* Georgia R., etc., Co. *v.* Wynn, 42 Ga. 331].

In Louisiana the statute reads that "the right of this action shall survive in cases of death in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the father and mother, or either of them, for the space of one year from death." Castille *v.* Caffery Cent. Refinery, etc., Co., 48 La. Ann. 322, 329, 19 So. 332.

Statutes do not merely transfer a preëxisting cause of action.— In an English case Mr. Justice Coleridge, delivering the opinion of the court, after referring to the argument of plaintiff's counsel, that if deceased had recovered he would have been entitled to a *solatium*, and that therefore his representatives ought to be allowed it, said: "But it will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles. . . . The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family." Blake *v.* Midland R. Co., 18 Q. B. 93, 110, 10 Eng. L. & Eq. 443 [*approved* in Whitford *v.* Panama R. Co., 23 N. Y. 465, and Safford *v.* Drew, 3 Duer (N. Y.) 627]. To same effect see Quin *v.* Moore, 15 N. Y. 432.

39. Georgia.— In this state the rule of law, that every invasion of a positive legal right imports damage, and that an action may be sustained although no personal or actual damage is suffered, is recognized by the code, which provides that "general damages are such as the law presumes to flow from any tortious act, and may be recovered without proof of any amount." Ellington *v.* Bennett, 59 Ga. 286.

Louisiana.— The civil code of Louisiana, incorporating a provision of the Code Napoleon, provides that "every act whatever of man which causes damage to another obliges him by whose fault it happened, to repair it;" and that every person is responsible for the damage which he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill. Castille *v.* Caffrey Cent. Refinery, etc., Co. 48 La. Ann. 322, 328, 19 So. 332;

the legislature has ample power, not infrequently exercised, to create a remedy for many wrongs which, by virtue of them, do not give a right of action at common law.[40]

N. Conditions Precedent — 1. In General. Conditions precedent of various kinds are frequently imposed by express provision of contract, or are specifically required by law;[41] and they are also sometimes implied out of the relations between individuals.[42] They constitute a part of the cause of action, and strictly, therefore, must be performed before it will accrue and the remedial right arise.[43]

Donovan *v.* New Orleans, 11 La. Ann. 711; Cade *v.* Yocum, 8 La. Ann. 477; Hubgh *v.* New Orleans, etc., R. Co., 6 La. Ann. 495, 54 Am. Dec. 565; McGary *v.* Lafayette, 4 La. Ann. 440; St. Louis Church *v.* Blanc, 8 Rob. (La.) 51, 83; U. S. *v.* New Orleans, 17 Fed. 483. These provisions are not to be understood in a literal sense, as applicable indiscriminately to all cases whatever, but only to such acts as violate rights which the law undertakes to redress as being legal. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51. Under these provisions the reparation made must equal the injury inflicted, with the exception made by the Civil Code, art. 1928, in relation to damages resulting from offenses, quasi-offenses, and quasi-contracts. In those cases much discretion must be left to the judge and jury. McGary *v.* Lafayette, 4 La. Ann. 440. The wrong done by one human being to another, or to his estate, creates an obligation by virtue of these provisions of law; that is, brings at once into existence the relation of debtor and creditor between the wrong-doer and the injured party. U. S. *v.* New Orleans, 17 Fed. 483.

40. Illustrations, generally.— All rights of property are held subject to such reasonable control and regulation in the mode of keeping and use as the legislature, under the police power vested in them by the constitution, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare. Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94 [*approved* in Barker *v.* Barnard, 135 Mass. 116, 46 Am. Rep. 450]. Thus a statute imposing a penalty on an owner or tenant of any land containing coal who shall mine on such land within five feet of the land dividing it from that belonging to other persons, without the consent in writing of all persons interested in or having title to such adjoining lands, is a constitutional exercise of police power to preserve the natural boundary wall intact. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800. Although at common law no cause of action can arise out of illegal transactions as between the parties thereto, the common law may be changed by statute; and for the interest of the public one of the parties to such a transaction may be given a remedy against the other. Thus a party who has been bribed to cast his vote in a certain way may be empowered to recover a penal sum from the one who instigated him to commit the wrong. State *v.* Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767 [*followed* in State *v.* Schoonover, 135 Ind. 701, 35 N. E. 121]. See also the preceding pages of this article for various other illustrations discussed in connection with the principles of law changed by them.

"Spite fences."— An apt illustration of an exception to these fundamental principles is furnished by statutes enacted in many states, which make malicious motive in the erection of high fences on one's own land a cause of action to one who suffers an inconvenience therefrom. See Adjoining Landowners.

41. Contract conditions.— For express conditions precedent imposed by contracts see Contracts.

Statutory conditions.— For notice as a condition precedent in an action for personal injuries see Meisenheimer *v.* Kellogg, 106 Wis. 30, 81 N. W. 1033; Municipal Corporations. Demand or notice in actions on contracts are sometimes required by statute. Thus Tenn. Laws (1807), c. 95, § 1, provides that no action can be maintained on a contract to pay money in specific articles, where no time or place is mentioned, until notice has been given or demand made at the usual residence of the payor, if he shall reside within the county where the contract was made. Hopkins *v.* Rogers, 3 Yerg. (Tenn.) 456; Grimes *v.* Bartee, 1 Yerg. (Tenn.) 204. For statutes imposing upon persons suing the taking of an oath of allegiance and loyalty, or the filing of an affidavit that all taxes chargeable by law upon debts or contracts sued upon have been paid, owing their origin to conditions existing as the result of the civil war, and short-lived, see 1 Cent. Dig. tit. "Action," § 44 *et seq.*

Conditions required by unwritten law.—For the requirement of the early common law that before a civil cause of action arising out of a felony can be legally redressed a criminal prosecution must have been instituted and conducted to a termination see *supra*, I, J, 3; for the necessity for obtaining leave to sue from the court appointing a receiver in actions by or against such receiver see Receivers.

42. See *infra*, I, N, 2, 3; Whitton *v.* Whitton, 38 N. H. 127, 137, 75 Am. Dec. 163, wherein it was said: "In many cases . . . the law implies, from the nature of the contract itself, that certain things must be done by him before the condition is broken, because it would otherwise be out of the power of the other party to perform it; and in such cases the effect of a neglect to do anything thus implied is the same as if it was expressed."

43. Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. 185 [*approving* Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49]; Hatch *v.* Peet, 23

This is always so of conditions precedent contained in a statute creating a right or duty unknown to the common law.[44] But with other such conditions, whether express or implied by law, performance is often excused by the conduct of the adverse party, and the cause of action accrues without it.[45]

2. Notice. No one is entitled to notice before suit brought for a failure to perform that which he stipulates with another, unless he expressly contracts for it, or lacks and cannot obtain through sources other than the adverse party himself the information necessary to enable him to fulfil the duty he has undertaken.[46]

Barb. (N. Y.) 575; Midland Ins. Co. *v.* Smith, 6 Q. B. D. 561; Freeman *v.* Jeffries, L. R. 4 Exch. 189, 201, wherein it was said: "It is contended that no demand is necessary where there is already a cause of action. But this is begging the question; for the contention on the other side is that there can be no cause of action till demand, and the case of Wilkinson *v.* Godefroy, 9 A. & E. 536, is an authority in favor of that position." See, generally, Contracts. Thus, when notice is necessary, either by the terms or nature of the contract, it is of the gist of the action. Watson *v.* Walker, 23 N. H. 471.

In equity.— In the case of a condition precedent there must be a compliance therewith, or an excuse for non-compliance shown, as well in equity as at law. Barney *v.* Giles, 120 Ill. 154, 11 N. E. 206 [*citing* Downey *v.* O'Donnell, 86 Ill. 49]. *Compare, contra*, of implied demand before suit for specific performance, Bruce *v.* Tilson, 25 N. Y. 194, 202, wherein it was said per Smith, J.: "In equity the court has a discretion in respect to costs, and if an action is brought to enforce an equitable right unnecessarily and unreasonably, and without giving the defendant a fair opportunity, upon request or otherwise, to allow and to satisfy the plaintiff's claim without suit, the relief may be, and ordinarily will be, granted without costs, and the court, if it thinks proper, may make the plaintiff pay the defendant's costs. But the objection that a suit is brought without a technical demand is not available to bar an action in equity if the plaintiff has otherwise a good cause of action." See Equity; Specific Performance.

44. Pawlet *v.* Sandgate, 19 Vt. 621; Meisenheimer *v.* Kellogg, 106 Wis. 30, 81 N. W. 1033 [*overruling* Weed, etc., Mfg. Co. *v.* Whitcomb, 101 Wis. 226, 77 N. W. 175, and Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506, 77 N. W. 894]; Gatzow *v.* Buenning, 106 Wis. 1, 81 N. W. 1003; Relyea *v.* Tomahawk Paper, etc., Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878; Gowan *v.* Hanson, 55 Wis. 241, 13 N. W. 238 [*approved* in Bradley *v.* Kroft, 19 Fed. 295]. See also Attachment; Garnishment; Municipal Corporations.

45. New York *v.* Butler, 1 Barb. (N. Y.) 325, 337, wherein it is said: "No party can insist upon a condition precedent when its non-performance has been caused by himself. Such non-performance would not prevent the vesting of an estate, nor can it prevent the accruing of a right, or its enforcement by an action. It in effect amounts to a waiver." To same effect, Doll *v.* Noble, 116 N. Y. 230, 22 N. E. 406, 15 Am. St. Rep. 398; Clarke *v.* Crandall, 27 Barb. (N. Y.) 73; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528.

Notice and demand.— A condition in a contract requiring written notice before suit can be brought for a default in the performance of its conditions is waived by an absolute and total refusal to carry out the agreement in whole or in part. Robinson *v.* Frank, 107 N. Y. 655, 14 N. E. 413 [*citing* Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286]. To same effect, McQueen *v.* Smith, 118 N. C. 569, 24 S. E. 412. "There is another class of cases where the principle is well settled that wherever a right of action by one party depends upon his demanding performance of some act, or the execution of some instrument, by the other party, a demand or an offer or a tender of the thing to be done is unnecessary if the party has disabled himself from performance or gives notice that he will not perform." Clarke *v.* Crandall, 27 Barb. (N. Y.) 73, 77. See also Contracts, and for notice and demand by implication of law, *infra*, I, N, 2, 3.

Condition superadded to preexisting cause.— A statutory requirement that leave shall be obtained of the court before bringing an action on a judgment may be waived. It is no part of the cause of action which exists independently of the leave to sue. Lane *v.* Salter, 4 Rob. (N. Y.) 239; Dean *v.* Eldridge, 29 How. Pr. (N. Y.) 218. See also Judgments.

Inability to perform no excuse.— "Where a right of action depends upon the performance of a condition precedent, performance cannot be excused unless it is dispensed with or prevented by the opposite party, although it has become impossible without any default on the part of the plaintiff, or even by the act of God. . . . But the rule is different where the impossibility of performance is set up as matter of defense." Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589, 590; Moakley *v.* Riggs, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196 [*cited* in Taylor *v.* Bullen, 6 Cow. (N. Y.) 624]. See also Contracts.

46. See cases cited *infra*, note 47.

Guaranty.— Where a party absolutely and unconditionally guarantees payment of money or other performance by a third person, no notice is required to be given by the promisee to the promisor in the event of the failure of such person. Hess *v.* Powell, 29 Mo. App. 411; Whitney *v.* Groot, 24 Wend. (N. Y.) 82; Bush *v.* Critchfield, 4 Ohio 103. See also Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119. *Contra*, Jackson Bank *v.* Irons, 18 R. I. 718, 30 Atl. 420. See also Guaranty.

Labor and building contracts.— In a con-

On the other hand the law implies that notice shall be given, by the party entitled to the benefit of the performance, of every fact necessary for the other party to know to enable him to perform, and of every material circumstance connected with it which is within his peculiar and personal knowledge[47] or which depends upon his choice.[48]

3. Demand — a. Necessity[49] — (I) *In General* — (A) *Rule Stated.* When a demand is an integral part of a cause of action, as when the date to pay or to deliver property or to do some act does not arise until after demand, then, as a general rule, a demand must be made; but when the date has come for doing the act, and it is the duty of defendant to do it unconditionally, then no demand, other than the suit itself, is necessary.[50]

tract to pay money as soon as the promisee performed certain work and labor, it is not necessary to notify the promisor of the completion of the work before bringing suit to recover. The means of ascertaining whether or not the work is performed is open to him. Peck *v.* McMurtry, 2 A. K. Marsh. (Ky.) 358. *Contra,* Vannoy *v.* Duprez, 72 Ind. 26; Shepherd *v.* Hubbard, 1 Bibb (Ky.) 494. See also Contracts; Work and Labor. Where an act is to be done by a third person, as the making out of a certificate for the amount of work done under a contract, on which payment therefor is to be made, each party is bound to take notice of the performance of the act, and no notice need be given the party liable before suit to recover the amount due. Punderson *v.* Shepherd, 8 Pick. (Mass.) 379.

Other illustrations of this rule may be found in:

Arkansas.— Newton *v.* More, 14 Ark. 166.

Indiana.— Clifford *v.* Meyer, 6 Ind. App. 633, 34 N. E. 23.

Maryland.— Lawson *v.* Price, 45 Md. 123.

Massachusetts.—Hayden *v.* Bradley, 6 Gray (Mass.) 425, 66 Am. Dec. 421; Hobart *v.* Hilliard, 11 Pick. (Mass.) 143.

New Hampshire.— Wentworth *v.* Gove, 45 N. H. 160.

England.— Crane *v.* Crampton, Cro. Car. 34; Bradley *v.* Toder, Cro. Jac. 228.

47. *Connecticut.*— Marcy *v.* Crawford, 16 Conn. 549, 41 Am. Dec. 158; Hammond *v.* Gilmore, 14 Conn. 419; Ward *v.* Henry, 5 Conn. 595, 13 Am. Dec. 119; Spalding *v.* Spalding, 2 Root (Conn.) 271.

Illinois.— Wehrli *v.* Rehwoldt, 107 Ill. 60.

Kentucky.— M'Gee *v.* Beall, 3 Litt. (Ky.) 190; Peck *v.* McMurtry, 2 A. K. Marsh. (Ky.) 358.

Massachusetts.— Hayden *v.* Bradley, 6 Gray (Mass.) 425, 66 Am. Dec. 421; Hatch *v.* White, 22 Pick. (Mass.) 518; Farwell *v.* Smith, 12 Pick. (Mass.) 83; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

New Hampshire.— Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163; Watson *v.* Walker, 23 N. H. 471.

New York.— Wangler *v.* Swift, 90 N. Y. 38.

Ohio.— Bush *v.* Critchfield, 4 Ohio 103.

Vermont.— Lamphere *v.* Cowen, 42 Vt. 175.

Virginia.— Austin *v.* Richardson, 3 Call (Va.) 201, 2 Am. Dec. 543.

England.— Vyse *v.* Wakefield, 6 M. & W. 442; Smith *v.* Goffe, 2 Ld. Raym. 1126, 2 Salk. 457, 11 Mod. 48.

Illustrations of this rule may be found in:

Louisiana.— Jones *v.* Smalley, 5 La. 28.

Massachusetts.— Valentine *v.* Boston, 20 Pick. (Mass.) 201; Farwell *v.* Smith, 12 Pick. (Mass.) 83.

New Hampshire.— Watson *v.* Walker, 23 N. H. 471.

Tennessee.—Tiernan *v.* Napier, Peck (Tenn.) 212.

England.— Freeman *v.* Jeffries, L. R. 4 Exch. 189.

48. Whitton *v.* Whitton, 38 N. H. 127, 75 Am. Dec. 163; Grimes *v.* Bartee, 1 Yerg. (Tenn.) 204; Vyse *v.* Wakefield, 6 M. & W. 442.

49. As to the necessity of demand before suit brought see Absentees; Accounts and Accounting; Assignments for Benefit of Creditors; Assumpsit; Attorney and Client; Bailments; Bankruptcy; Banks and Banking; Bills and Notes; Bonds; Carriers; Chattel Mortgages; Contracts; Detinue; Factors and Brokers; Forcible Entry and Detainer; Landlord and Tenant; Mandamus; Money Lent; Money Paid; Money Received; Municipal Corporations; Officers; Principal and Agent; Replevin; Sales; Sheriffs and Constables; Specific Performance; Trover and Conversion; Work and Labor; and like special titles.

50. *California.*— Cox *v.* Delmas, 99 Cal. 104, 33 Pac. 836; O'Connor *v.* Dingley, 26 Cal. 11.

Indiana.— Barker *v.* Wallace, 62 Ind. 71; Sheets *v.* Andrews, 2 Blackf. (Ind.) 274.

Massachusetts.— Manning *v.* West, 6 Cush. (Mass.) 463.

New York.— Fuller *v.* Hubbard, 6 Cow. (N. Y.) 13, 16 Am. Dec. 423, 7 Cow. (N. Y.) 53, 17 Am. Dec. 498.

Vermont.— Jones *v.* Cooper, 2 Aik. (Vt.) 54, 16 Am. Dec. 678.

A distinction has always been taken between those cases where the promise is made, or the undertaking is implied, in consequence of a precedent debt or duty, and those cases where, by the expressed or implied promise of the contract, the obligation to pay or perform is to arise only by request. The former class of cases embraces all actions for goods sold and delivered, money lent, and work and labor performed; creates, *eo instanti,* the duty and liability to pay; and implies the undertaking to

(B) *Debts Due and Payable Immediately.* It may be stated as a general rule that where money is due and payable immediately, or where an action is for a precedent debt or duty, no demand is necessary.[51]

(C) *Required by Contract.* Where the contract itself provides that it is to be executed upon demand, or within a specified time after demand, a demand is usually essential to a right of action.[52]

(D) *Required by Statute.* Where a demand is required by statute, such demand made in the form provided is an essential prerequisite to an action.[53]

(II) *Against Wrong-Doers.* It is universally held, even in those jurisdictions where demand is required under other circumstances, that as against wrong-doers no demand is necessary as a prerequisite to action.[54] This rule does not apply,

do so sufficiently to maintain an action; and the writ is a demand. In the case of a bill or note payable on demand the same reason applies. The instrument imports a consideration, a precedent debt, as in Capp *v.* Lancaster, Cro. Eliz. 548, 549: "A duty maintenant, and therefore, there needs not any demand, as in the other cases, for there the plaintiff had not any cause of action until a precedent act done by him." But in the other class of cases it is otherwise. Where the action is for a collateral sum, to be paid on request, where, by the terms of the contract, the plaintiff is to request a performance or payment, the request becomes part of the agreement; it performs a condition precedent. West *v.* Murph, 3 Hill (S. C.) 284.

Public duties distinguished from private duties.— As to the necessity of a demand in any case, a distinction is to be made between duties of a public nature and those of a more private character which affect private individuals only. In the case of a public duty, which is strictly of a public nature, not affecting individual interest, where no one is especially empowered to demand its performance, there is no necessity for a demand or a refusal. Where the duty is required to be performed by law and is of a public nature, the law is a sufficient demand, and an omission to perform is a refusal. Chumasero *v.* Potts, 2 Mont. 242 [*citing* State *v.* Bailey, 7 Iowa 390; Com. *v.* Allegheny County, 37 Pa. St. 237].

Rule in Georgia.— "Under our law no demand is necessary, as a condition precedent to the bringing of an action, except in such cases as the law distinctly declares such demand shall be made." Georgia R., etc., Co. *v.* Macon, 86 Ga. 585, 589, 13 S. E. 21.

51. *Indiana.*— Olney *v.* Jackson, 106 Ind. 286, 4 N. E. 149; Princeton *v.* Gebhart, 61 Ind. 187; Bertha *v.* Sparks, 19 Ind. App. 431, 49 N. E. 831.

Massachusetts.— Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Carley *v.* Vance, 17 Mass. 389.

Mississippi.—Minor *v.* Michie, Walk. (Miss.) 24.

Missouri.— Weil *v.* Tyler, 38 Mo. 545, 90 Am. Dec. 441; Rector *v.* Hamtramck, 1 Mo. 565.

New Hampshire.— Hayes *v.* Morrison, 38 N. H. 90.

Nevada.— White Pine County Bank *v.* Sadler, 19 Nev. 98, 6 Pac. 941.

New York.— Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Clute *v.* McCrea, 1 N. Y. Suppl. 96; Maguire *v.* Durant, 1 Misc. (N. Y.) 509, 20 N. Y. Suppl. 617.

Texas.— Mitchell *v.* McLemore, 9 Tex. 151.

Washington.— Chappell *v.* Woods, 9 Wash. 134, 37 Pac. 286.

52. *Connecticut.*—Bacon *v.* Thorp, 27 Conn. 251.

Indiana.— Sebrell *v.* Couch, 55 Ind. 122.

New Hampshire.— Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171.

New York.— Locklin *v.* Moore, 57 N. Y. 360 [*cited* in Bunn *v.* Lett, 65 Hun (N. Y.) 43, 19 N. Y. Suppl. 728].

Vermont.— Carpenter *v.* Snell, 37 Vt. 255; Boody *v.* Rutland, etc., R. Co., 24 Vt. 660.

England.— Sicklemore *v.* Thistleton, 6 M. & S. 9; Birks *v.* Trippet, 1 Saund. 32.

53. Georgia R., etc., Co. *v.* Macon, 86 Ga. 585, 13 S. E. 21; Kelly *v.* Sandidge, 30 La. Ann. 1190; Broussard *v.* Phillips, 6 Mart. N. S. (La.) 309; Robichaud *v.* Worsham, 4 La. 125; Haynes *v.* Brown, 36 N. H. 545; Butchers' Co. *v.* Bullock, 3 B. & P. 434.

54. *Alabama.*— Nelson *v.* Shelby Mfg. Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.

California.— Stewart *v.* Levy, 36 Cal. 159.

Connecticut.— Thresher *v.* Stonington Sav. Bank, 68 Conn. 201, 36 Atl. 38; Cobb *v.* Charter, 32 Conn. 358, 87 Am. Dec. 178.

Delaware.—Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227.

Illinois.—Farwell *v.* Hanchett, 120 Ill. 573, 11 N. E. 875; Chapman *v.* Burt, 77 Ill. 337; Farson *v.* Hutchins, 62 Ill. App. 439; Sinamaker *v.* Rose, 62 Ill. App. 118.

Indiana.— Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854; Babb *v.* Babb, 89 Ind. 281; Thompson *v.* Doty, 72 Ind. 336; Baldwin *v.* Hutchinson, 8 Ind. App. 454.

Iowa.— Ruiter *v.* Plate, 77 Iowa 17, 41 N. W. 474; Jones *v.* Clark, 37 Iowa 586.

Kansas.— Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

Louisiana.—Rosenthral *v.* Baer, 18 La. Ann. 573.

Maine.— Calais *v.* Whidden, 64 Me. 249; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619; Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332.

Massachusetts.— Baring *v.* Clark, 19 Pick. (Mass.) 220.

Michigan.— Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795 [*followed* in Ballou *v.* O'Brien, 20 Mich. 304].

however, where the owner waives the tort and sues for money had and received on the strength of the contract implied by law between the parties.[55]

b. Sufficiency — (I) *In General.* Although a demand and a refusal be requisite to a right of action, yet the law does not require any particular form of words for either. Any words will suffice, provided they are understood by the parties to be a claim to money or property on the one side, and a refusal to pay or to deliver on the other.[56]

(II) *In Writing.* Unless specially provided for by contract or required by statute, a written demand is unnecessary, though it may be judicious, to prevent controversy, to make the demand in writing and to give defendant a copy.[57]

(III) *When to Be Made.* A demand, to be sufficient, should be made in a reasonable time, having proper regard to the circumstances of the case and the convenience and rights of others.[58]

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Glencoe *v.* McLeod County, 40 Minn. 44, 41 N. W. 239.

Missouri.— Malone *v.* Harris, 6 Mo. 451; Irwin *v.* Wells, 1 Mo. 9.

Montana.— Anderson *v.* Hulme, 5 Mont. 295.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Tritle, 4 Nev. 494; Perkins *v.* Barnes, 3 Nev. 557.

New York.—Stevens *v.* Hyde, 32 Barb. (N. Y.) 171; Roth *v.* Palmer, 27 Barb. (N. Y.) 652; Andrews *v.* Artisans' Bank, 26 N. Y. 298; Stacy *v.* Graham, 14 N. Y. 492 [*approved* in Howard *v.* France, 43 N. Y. 593]; Marshall *v.* De Cordova, 26 N. Y. App. Div. 615, 50 N. Y. Suppl. 294; Cooley *v.* Betts, 24 Wend. (N. Y.) 203; Utica Bank *v.* Van Gieson, 18 Johns. (N. Y.) 485; King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508; Purves *v.* Moltz, 2 Abb. Pr. N. S. (N. Y.) 409.

North Carolina.— Moore *v.* Garner, 101 N. C. 374, 7 S. E. 732.

Ohio.— Bancroft *v.* Blizzard, 13 Ohio 30.

South Dakota.— Consolidated Land, etc., Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904; Rosum *v.* Hodges, 1 S. D. 408, 47 N. W. 140, 9 L. R. A. 817.

Vermont.— Babcock *v.* Granville, 44 Vt. 325; Manwell *v.* Briggs, 17 Vt. 176.

Wisconsin.— Eldred *v.* Oconto County, 33 Wis. 133; Oleson *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428.

United States.— Leather Manufacturers' Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342.

55. Babb *v.* Babb, 89 Ind. 281.

56. *Delaware.*— Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227.

Illinois.— Newman *v.* Bennett, 23 Ill. 427.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619.

New Hampshire.—Clough *v.* Unity, 18 N. H. 75; Kimball *v.* Bellows, 13 N. H. 58.

New York.— La Place *v.* Aupoix, 1 Johns. Cas. (N. Y.) 406.

Vermont.— Gillett *v.* Brewster, 62 Vt. 312, 20 Atl. 105; Bishop *v.* Brown, 51 Vt. 330.

Wisconsin.— Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562; Smith *v.* Schulenberg, 34 Wis. 41; Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782.

United States.— Colby *v.* Reed, 99 U. S. 560, 25 L. ed. 484.

As to the sufficiency of a demand see, generally, the particular titles referred to *supra*, note 49.

A "legal demand" means a demand properly made as to form, time, and place, and by a person legally authorized. Foss *v.* Norris, 70 Me. 117.

Demand should be reasonable.— Boyden *v.* Burke, 14 How. (U. S.) 575, 14 L. ed. 548.

Questioned on appeal.— Sufficiency of demand cannot be questioned for the first time on appeal. Cook *v.* Hays, 9 Gratt. (Va.) 142. See also Appeal and Error.

57. Haynes *v.* Brown, 36 N. H. 545; Phelps *v.* Gilchrist, 28 N. H. 266; Colby *v.* Reed, 99 U. S. 560, 25 L. ed. 484; Logan *v.* Houlditch, 1 Esp. 23.

Demand in writing by letter sent through the mail is a sufficient demand, and where the receipt of the letter is admitted in evidence by defendant its contents are understood as making a demand. Lovejoy *v.* Jones, 30 N. H. 164.

Service of summons may in some cases constitute a sufficient demand in writing. Pendexter *v.* Carleton, 16 N. H. 482.

The statute contemplates a written demand in many cases, such as the demand of dower, and a demand of a mortgagee for the amount of his mortgage. But they are all cases where the acts to be done are such as might be done at a future time, and on this account stand on grounds peculiar to themselves. Phelps *v.* Gilchrist, 28 N. H. 266.

58. *Connecticut.*— Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231.

Indiana.— Pay *v.* Shanks, 56 Ind. 554.

Iowa.— Watson Coal, etc., Co. *v.* James, 72 Iowa 184, 33 N. W. 622.

Louisiana.— Hunter *v.* Spurlock, 3 La. Ann. 97, 22 Am. Dec. 165.

Massachusetts.— Codman *v.* Rogers, 10 Pick. (Mass.) 112.

New York.— Buck *v.* Burk, 18 N. Y. 337.

Vermont.— Bliss *v.* Stevens, 4 Vt. 88; Strong *v.* Hoyt, 2 Tyler (Vt.) 208.

See also particular titles referred to *supra*, in note 49.

What is considered to be a reasonable time for making a demand does not appear to be settled by any precise rule. It must depend on circumstances. Codman *v.* Rogers, 10 Pick. (Mass.) 112.

Before suit.— In all cases where a demand is necessary it should be made before an action

(IV) *Where to Be Made.* The place where a demand is to be made, when necessary, is largely dependent upon circumstances, and no fixed rule can be laid down on the subject beyond the general statement that the demand must be reasonable as to place as well as in other respects.[59]

(V) *Effect of Excessive Demand.* As a general rule the mere fact that a party embraces in his demand more than he has a right to will not justify defendant in refusing or neglecting to pay or deliver within a reasonable time so much as plaintiff is justly entitled to,[60] but it is otherwise where the failure to pay that which is due would occasion a forfeiture.[61]

(VI) *Effect of Repeated Demand.* Where a cause of action has accrued by reason of a proper demand made and refused, if plaintiff subsequently makes another demand he waives his right of action on that first made and is bound to accept a fulfilment if offered.[62]

c. Object of Demand. The object of demand is to afford defendant an opportunity to perform his contract, or to restore the property demanded to the rightful owner, without being put to the expense and inconvenience of litigation.[63]

has been commenced. Keller *v.* Robinson, 153 Ill. 458, 38 N. E. 1072; Underwood *v.* Tatham, 1 Ind. 276; Bowen *v.* Jackson, 8 Blackf. (Ind.) 203.

After writ, but before service.— It has been held that a demand is sufficiently made as to time, although made after a writ has been sued out or a bill in equity filed, where plaintiff has instructed the officer in charge of the writ or summons not to make service until after demand upon defendant, and refusal by him. Seaver *v.* Lincoln, 21 Pick. (Mass.) 267; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105; Leach *v.* Noyes, 45 N. H. 364; Graves *v.* Ticknor, 6 N. H. 537; Robinson *v.* Burleigh, 5 N. H. 225; Cross *v.* Barber, 16 R. I. 266, 15 Atl. 69.

Waiver.— Objection that the demand was premature may be waived. Benjamin *v.* Zell, 100 Pa. St. 33.

59. Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

Causes which determine the place of delivery have no relevancy to the place of demand; for the demand need not of necessity be made at the place where the goods and chattels must be received. Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41. See also Bragdon *v.* Poland, 51 Me. 323. *Compare* Hamilton *v.* Calhoun, 2 Watts (Pa.) 139.

Under contract to pay money the place of payment is not material; the money is supposed to be with the debtor wherever he may be, and therefore, when a demand of money is necessary, it may be made at any place. Hamilton *v.* Calhoun, 2 Watts (Pa.) 139. And see particular titles referred to *supra*, note 49.

Under contract to pay merchandise at the place of business of the promisor a personal demand elsewhere than at the place of business is good unless met by the offer to pay there. Widner *v.* Walsh, 3 Colo. 418. *Compare* Vance *v.* Bloomer, 20 Wend. (N. Y.) 196.

Written demand left at the house of an absent defendant is sometimes sufficient. Hunter *v.* Spurlock, 3 La. Ann. 97, 22 Am. Dec. 165; White *v.* Demary, 2 N. H. 546. But ordinarily such a notice is insufficient. Phelps *v.* Gilchrist, 28 N. H. 266.

Waiver.— Objection that demand was not made at the proper place may be waived. Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

60. Shirley *v.* Shattuck, 4 Cush. (Mass.) 470; Gragg *v.* Hull, 41 Vt. 217.

Refusal to accept proper amount.— A demand, where necessary, must be of a character to enable the promisor to perform according to the terms of his contract. Thus, where plaintiff demands more than is his due, and refuses what the facts in the case show was offered him by defendants, and rightfully offered under the contract, such facts are fatal to his cause of action. Russell *v.* Ormsbee, 10 Vt. 274. Where a party, in demanding property, informs defendant that he was instructed by plaintiff not to accept any of the property less than the whole that he has demanded, and that he should follow his instructions, defendant is relieved, under the circumstances, from the duty of presenting and tendering that portion of the property demanded which the plaintiff was entitled to, in the case where plaintiff was not entitled to the whole. The legal principle that a party is not bound to do a nugatory act is applicable. Gragg *v.* Hull, 41 Vt. 217.

61. Shirley *v.* Shattuck, 4 Cush. (Mass.) 470; Bradstreet *v.* Clark, 21 Pick. (Mass.) 389.

62. Widner *v.* Walsh, 3 Colo. 418; Buck *v.* Burk, 18 N. Y. 337; Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90. *Compare* Winterbottom *v.* Morehouse, 4 Gray (Mass.) 332.

63. *California.*— Cox *v.* Delmas, 99 Cal. 104, 33 Pac. 836.

Florida.— Webster *v.* Brunswick-Balke-Callender Co., 37 Fla. 433, 20 So. 536.

Louisiana.— The object of putting defendant in default is to secure to the creditor his right to demand either damages or a dissolution of the contract, so that the debtor can no longer deny this right by executing or offering to execute the agreement. Beck *v.* Fleitas, 37 La. Ann. 492; Pratt *v.* Craft, 20 La. Ann. 291; Moreau *v.* Chauvin, 8 Rob. (La.) 157.

Massachusetts.— Heard *v.* Lodge, 20 Pick.

d. Time for Compliance. A defendant must be allowed a reasonable time in which to comply with a demand, taking into consideration all the circumstances of the case, unless he has absolutely refused to so comply, in which case a suit may be brought immediately.[64]

e. What Will Excuse Failure to Make — (I) *In General.* Whenever a demand would be but a useless ceremony, as by reason of defendant's inability or refusal to perform his obligation or his denial of plaintiff's right, the law will relieve plaintiff of the necessity of a special demand before bringing his action.[65]

(II) *Refusal of Defendant.* Where a defendant absolutely and unconditionally refuses to pay over money due to, or deliver up property belonging to plaintiff, he not only waives any objection to the form in which a demand may have been made, but also releases plaintiff from all obligation to make any demand whatever.[66]

(Mass.) 53, 32 Am. Dec. 197; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Michigan.— Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16, 45 N. W. 654.

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

New York.— Clark *v.* Crandall, 3 Barb. (N. Y.) 612.

North Carolina.— Wiley *v.* Logan, 95 N. C. 358.

Washington.— Chappell *v.* Woods, 9 Wash. 134, 37 Pac. 286.

64. Richardson *v.* Learned, 10 Pick. (Mass.) 261; Gragg *v.* Hull, 41 Vt. 217; Brighty *v.* Norton, 3 B. & S. 305; Massey *v.* Sladen, L. R. 4 Exch. 13; Kinney *v.* Stubbs, 9 N. Brunsw. 126. "When, by the express terms of the instrument creating the debt, payment is to be made 'immediately upon demand in writing,' it must be construed to mean within a reasonable time. This agrees with what is said in Comyn Dig. tit. Condition (G. 5): 'Where a condition is to be performed immediately, he shall have a reasonable time to perform it, according to the nature of the thing to be done. So, if it be to be performed upon demand.'" Toms *v.* Wilson, 4 B. & S. 442, 454.

65. *Alabama.*—Hammett *v.* Brown, 60 Ala. 498; Stewart *v.* Frazier, 5 Ala. 114; Keath *v.* Patton, 2 Stew. (Ala.) 38.

Arkansas.— Tarwater *v.* Davis, 7 Ark. 153, 44 Am. Dec. 534.

California.— Cox *v.* Delmas, 99 Cal. 104, 33 Pac. 836; Parrott *v.* Byers, 40 Cal. 614.

Colorado.—Gottlieb *v.* Hartman, 3 Colo. 53.

Connecticut.—Smith *v.* Lawrence, 26 Conn. 468; Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

Georgia.— Foster *v.* Leeper, 29 Ga. 294.

Illinois.— Chapman *v.* Burt, 77 Ill. 337; Bedell *v.* Janney, 9 Ill. 193.

Indiana.— Ferguson *v.* Hull, 136 Ind. 339, 36 N. E. 254; Indiana Mfg. Co. *v.* Porter, 75 Ind. 428; Toney *v.* Toney, 73 Ind. 34.

Iowa.— Ruiter *v.* Plate, 77 Iowa, 17, 41 N. W. 474.

Kansas.— Ritchie *v.* Huntington, 7 Kan. 249.

Louisiana.— Dwyer *v.* Tulane Educational Fund, 47 La. Ann. 1232, 17 So. 796; Allen *v.* Steers, 39 La. Ann. 586, 2 So. 199; Beck *v.* Fleitas, 37 La. Ann. 492; Robinson *v.* Clark, 20 La. Ann. 384.

Maine.— Bicknell *v.* Hill, 33 Me. 297.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619.

Massachusetts.— Alden *v.* Pearson, 3 Gray (Mass.) 342; Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Holden *v.* Eaton, 7 Pick. (Mass.) 15; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Michigan.— Galvin *v.* Galvin Brass. etc., Works, 81 Mich. 16, 45 N. W. 654.

Minnesota.—Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Davenport *v.* Ladd, 38 Minn. 545, 38 N. W. 622; Parr *v.* Johnson, 37 Minn. 457, 35 N. W. 176.

Nevada.— Rose *v.* Treadway, 4 Nev. 455, 97 Am. Dec. 546.

New York.— Howard *v.* France, 43 N. Y. 593; Clark *v.* Crandall, 3 Barb. (N. Y.) 612; Walsh *v.* Ostrander, 22 Wend. (N. Y.) 178; Moore *v.* Craig, 4 N. Y. Suppl. 339.

North Carolina.— Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156.

Pennsylvania.— Benjamin *v.* Zell, 100 Pa. St. 33.

Rhode Island.— Chaffin *v.* Gurney, 17 R. I. 185, 20 Atl. 932.

Texas.— Blount *v.* Ralston, 20 Tex. 132.

Vermont.— Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766; Spencer *v.* Storrs, 38 Vt. 156.

Washington.— Burrows *v.* McCalley, 17 Wash. 269, 49 Pac. 508; Chappell *v.* Woods, 9 Wash. 134, 37 Pac. 286.

Wisconsin.— Merriam *v.* Lynch, 53 Wis. 82, 10 N. W. 1; Appleton *v.* Barrett, 29 Wis. 221.

United States.— The Ferreri, 9 Fed. 468.

England.— Short *v.* Stone, 8 Q. B. 358; Caines *v.* Smith, 15 M. & W. 189; Warrington *v.* Turbor, 8 East 242; Thompson *v.* Shirley, 1 Esp. 31; Amory *v.* Brodrick, 5 B. & Ald. 712.

Intentional absence of defendants.— Where a demand at a certain place is necessary, if the parties on whom the demand must be made absent themselves from the place and county wherein it is situated, a demand is idle and unnecessary to sustain a suit. Schnier *v.* Fay, 12 Kan. 184.

66. *Alabama.*— Keath *v.* Patton, 2 Stew. (Ala.) 38.

Arkansas.— Henry *v.* Harbison, 23 Ark. 25.

(III) *Denial of Plaintiff's Right.* Where a defendant contests plaintiff's right to recover upon the ground of a superior title in himself or in a third person, no demand is required of plaintiff previous to bringing his action. The ground of defense itself shows that a demand would have been unavailing, and it is therefore not required.[67]

(IV) *Lapse of Reasonable Time.* When a party agrees to pay a sum of

California.— Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072; Parrott *v.* Byers, 40 Cal. 614.

Connecticut.—Smith *v.* Lawrence, 26 Conn. 468; Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

Indiana.— Ferguson *v.* Hull, 136 Ind. 339, 36 N. E. 254; Indiana Mfg. Co. *v.* Porter, 75 Ind. 428; Bartlett *v.* Adams, 43 Ind. 447.

Kansas.— Ritchie *v.* Huntington, 7 Kan. 249.

Louisiana.— Allen *v.* Steers, 39 La. Ann. 586, 2 So. 199; Abels *v.* Glover, 15 La. Ann. 247; Figuras *v.* Benoist, 11 La. Ann. 683; New Orleans, etc., R. Co. *v.* Ganalh, 18 La. 510; Garcia *v.* Champomier, 8 La. 519.

Maine.—Weymouth *v.* Gorham, 22 Me. 385; York *v.* Penobscot, 2 Me. 1.

Maryland.— Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619.

Massachusetts.— Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197.

Michigan.— Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16, 45 N. W. 654.

Mississippi.— Robertson *v.* Crane, 27 Miss. 362, 61 Am. Dec. 520.

Missouri.— Kyle *v.* Hoyle, 6 Mo. 526.

New Hampshire.— Haynes *v.* Brown, 36 N. H. 545.

North Carolina.— Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156.

Pennsylvania.— Benjamin *v.* Zell, 100 Pa. St. 33.

Rhode Island.— Claflin *v.* Gurney, 17 R. I. 185, 20 Atl. 932.

Vermont.— Bishop *v.* Brown, 51 Vt. 330; Spencer *v.* Storrs, 38 Vt. 156; Bliss *v.* Stevens, 4 Vt. 88.

Washington.— Chappell *v.* Woods, 9 Wash. 134, 37 Pac. 286.

Wisconsin.—Merriam *v.* Lynch, 53 Wis. 82, 10 N. W. 1; Appleton *v.* Barrett, 29 Wis. 221.

England.— Abington *v.* Lipscomb, 1 Q. B. 776.

Refusal must be definite.— Kyle *v.* Hoyle, 6 Mo. 526. Defendant's probable refusal will not excuse demand. Southwick *v.* Memphis First Nat. Bank, 84 N. Y. 420.

67. *California.*— Becker *v.* Feigenbaum, (Cal. 1896) 45 Pac. 837; Cox *v.* Delmas, 99 Cal. 104, 33 Pac. 836.

Dakota.— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

Florida.—Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433, 20 So. 536.

Illinois.—Kingman *v.* Reinemer, 58 Ill. App. 173; Ward *v.* Montgomery, 67 Ill. App. 346.

Indiana.— Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206; Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541.

Iowa.— Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

Kansas.— Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084.

Maine.—O'Neil *v.* Baily, 68 Me. 429; Lewis *v.* Smart, 67 Me. 206.

Massachusetts.— Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Ayer *v.* Ayer, 16 Pick. (Mass.) 327.

Michigan.—Pierce *v.* Underwood, 112 Mich. 186, 70 N. W. 419; Breitenwischer *v.* Clough, 111 Mich. 6, 69 N. W. 88, 66 Am. St. Rep. 372.

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Parr *v.* Johnson, 37 Minn. 457, 35 N. W. 176.

Mississippi.— Newell *v.* Newell, 34 Miss. 385.

Nebraska.—Ogden *v.* Warren, 36 Nebr. 715, 55 N. W. 221; Homan *v.* Laboo, 1 Nebr. 204.

Nevada.— Perkins *v.* Barnes, 3 Nev. 557.

New York.—Marine Bank *v.* Fiske, 71 N. Y. 353; Howard *v.* France, 43 N. Y. 593; Carroll *v.* Cone, 40 Barb. (N. Y.) 220; Connah *v.* Hale, 23 Wend. (N. Y.) 462; Reading *v.* Lamphier, 9 N. Y. Suppl. 596; King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508.

North Carolina.—McGuire *v.* Williams, 123 N. C. 349, 31 S. E. 627; J. H. Hayes Woolen Co. *v.* McKinnon, 114 N. C. 661, 19 S. E. 761.

Oregon.— Rosenau *v.* Syring, 25 Oreg. 386, 35 Pac. 844.

Pennsylvania.— Springer *v.* Groom, (Pa. 1888) 12 Atl. 446.

South Dakota.— Consolidated Land, etc., Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904.

Vermont.— Tillotson *v.* McCrillis, 11 Vt. 477.

Washington.— Burrows *v.* McCalley, 17 Wash. 269, 49 Pac. 508; Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763.

Wisconsin.— Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170; Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413.

Wyoming.—Bunce *v.* McMahon, (Wyo. 1895) 42 Pac. 23.

Equity and law distinguished.—The rule in chancery seems to be that if defendant in his answer denies plaintiff's right, he cannot also insist in his defense that there is no legal demand. But at law it is otherwise to this extent, that if defendant does not, by his declarations and conduct, furnish any evidence from which the jury can infer a waiver, or if the circumstances of the case do not clearly show that a demand could not have been complied with, defendant may, on the trial, insist upon proof of a demand, although he also denies plaintiff's right. Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197.

money or do a collateral thing, and no time is specified therefor, the law implies that it shall be done in a reasonable time. Hence, when a reasonable time has elapsed, plaintiff has the right to maintain an action without previous demand.[68]

II. REMEDY.

A. Meaning of Term. The word "remedy," in a comprehensive sense, is the means employed to enforce a right or redress an injury, including not only applications to courts, but any other lawful mode of obtaining satisfaction.[69] As here used, however, and as generally defined in law, it refers to those means of redress only which are judicial.[70]

B. No Wrong Without a Remedy — 1. IN GENERAL. It has been an unquestioned principle of jurisprudence from very early times that there can be no wrong without a remedy;[71] that where the law recognizes a right it gives a remedy to enforce it or redress its violation.[72] Right and remedy are reciprocal,

68. Niemeyer *v.* Brooks, 44 Ill. 77; Hall *v.* Huckins, 41 Me. 574; Houston *v.* Russell, 52 Vt. 110.

69. Bouvier L. Dict.; State *v.* Young, 29 Minn. 474, 9 N. W. 737; Matter of Cooper, 22 N. Y. 67; Clark *v.* Eddy, 10 Ohio Dec. (Reprint) 539, 22 Cinc. L. Bul. 63.

The remedy is "the action or means given by the law for the recovery of a right." Andrews *v.* Herriot, 4 Cow. (N. Y.) 508 [*citing* Cunningham L. Dict.; Jacob L. Dict.].

Illustrations.— One of the remedies by act of the parties aggrieved, enumerated by Blackstone, bk. 2, c. 1, is that of distress for rent which existed at the common law and was regulated by statute, by which the landlord might seize and sell the tenant's property to enforce payment of the rent. Another non-judicial remedy is the right of a pledgee to sell the property pledged for payment of the debt for which it is pledged. Another is the power of sale contained in mortgages or trust deeds, where they are permitted by the law of the state. In general it may be said that any means in the hands of the party aggrieved, or any other person, though not a court, for enforcing performance of a contract,— any mode of enforcing it agreed on by the parties, if recognized and permitted by the law,— is a legal remedy; and where the power of administering a remedy is lodged by law with any person or body, especially if the duty to administer it is also imposed, that constitutes a legal remedy. This would include the legislative power and duty to provide means to pay state or municipal debts. State *v.* Young, 29 Minn. 474, 9 N. W. 737.

70. **Various definitions.**— A remedy is the judicial means of enforcing a right or redressing a wrong. Abbott L. Dict.; Stratton *v.* European, etc., R. Co., 74 Me. 422. The word "remedy" pertains more properly to those modes of procedure in pleading which lead up to and end in the judgment. Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388. The remedy for every species of wrong is, as Judge Blackstone says, the being put in possession of that right whereof the party injured is deprived. The instruments whereby this remedy is obtained are a diversity of suits and actions. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257. In its more comprehensive sense the law of remedy includes all lawful modes of redressing the violation of legal rights. But as more commonly used it covers only the forms of redress which may be had through the agency of courts of justice. Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539.

Under the codes.— The code has furnished no definition of remedy except so far as one can be drawn from its distribution of all remedies into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or order as a remedy. Belknap *v.* Waters, 11 N. Y. 477 [*approved* Matter of Cooper, 22 N. Y. 67]. The first section of the code shows what was intended by the word "remedy." It is limited to actions and special proceedings. Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668. An application to a court for admission to the bar is judicial in its nature, and clearly a remedy under the code. Matter of Cooper, 22 N. Y. 67.

71. **Legal maxim.**— *Ubi jus ibi remedium.* Broom Leg. Max. 192. See also cases cited *infra*, this subdivision.

72. *Alabama.*— Kelly *v.* McCaw, 29 Ala. 227.

California.— McNiel *v.* Borland, 23 Cal. 144.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657; Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739; Beardsley *v.* Smith, 16 Conn. 368, 41 Am. Dec. 148; Wolcott *v.* Coleman, 2 Conn. 324.

Florida.— Crawford *v.* Waterson, 5 Fla. 472.

Georgia.— Hendrick *v.* Cook, 4 Ga. 241.

Kentucky.— Williams *v.* Hedricks, 2 Ky. Dec. 175.

Indiana.— Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125.

Maine.— Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Missouri.— Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512.

New Hampshire.—Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398.

and to deny the remedy is in substance to deny the right; and it makes no difference whether the right exists at common law or by statute.[73]

2. Scope of Rule. This principle, that there is no wrong without a remedy, must be understood, however, with reference only to those rights or wrongs which the law recognizes as legal, having no application to those which do not, within legal principles, constitute causes of action.[74] Where cases are new in principle it is necessary to have recourse to legislative interposition in order to remedy the grievance;[75] but where they are only new in instance, and the sole question is upon the application of a principle recognized in the law, there must be a suitable remedy.[76]

New York.— Goulet *v.* Asseler, 22 N. Y. 225; Yates *v.* Joyce, 11 Johns. (N. Y.) 136; Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320.

Ohio.— Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605; Cincinnati *v.* Beuhausen, 22 Cinc. L. Bul. 421, 10 Ohio Dec. (Reprint) 652; Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539.

Pennsylvania.— McGunigal *v.* Mong, 5 Pa. St. 269.

West Virginia.— Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507.

England.— Coke Litt. 56*a*, 197*b*; Ashby *v.* White, 2 Ld. Raym. 938, 1 Salk. 19; Birkley *v.* Presgrave, 1 East 220.

Either at law or in equity.— It is not easy to imagine any new cases in which a right should be conferred by statute, for which the mode of enforcing it would not be found in the general framework of the courts of common law and equity. McNiel *v.* Borland, 23 Cal. 144.

73. Parker *v.* Griswold, 17 Conn. 288, 42 Am. Dec. 739; Sabatier *v.* Their Creditors, 6 Mart. N. S. (La.) 585 [*approved* in U. S. *v.* New Orleans, 17 Fed. 483]; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95; Edes *v.* Boardman, 58 N. H. 580, 590 (per Doe, C. J., who said, approving Cooley Torts 20: "That only is a legal right which is capable of being legally defended; and that is no legal right the enjoyment of which the law permits any one with impunity to hinder or prevent. It is a legal paradox to say that one has a legal right to something, and yet that to deprive him of it is not a legal wrong. When the law thus declines to interfere between the claimant and his disturber, and stands, as it were, neutral between them, it is manifest that, in respect to the matter involved, no claim to legal rights can be advanced"); Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629; Ashby *v.* White, 2 Ld. Raym. 938, 1 Salk. 19, per Holt, C. J.

Statutory right.— It makes no difference in this respect whether the right exists at common law or by statute. Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Effect of statute prescribing forms.— It is not to be supposed that the legislature, in prescribing the forms of writs in certain cases, intended to deny all remedy except such as may be under, or agreeable to, writs in such forms. Webster *v.* Edson, Smith (N. H.) 370.

Where statute takes away all remedy.— The law never deliberately takes away all remedy without intention to destroy the right. Remedies are frequently changed. Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629.

74. Wyatt *v.* Williams, 43 N. H. 102; Haldeman *v.* Chambers, 19 Tex. 1; Day *v.* Brownrigg, 10 Ch. D. 294, and other cases cited *infra*, this note. See, generally, *supra*, I.

Illustrations.— The maxim that there is no wrong without a remedy is a legal maxim and must be taken in a legal sense. It does not give a right of action merely for malicious motives in the doing of an act which a party has a legal right to do. "Courts administering civil law cannot punish sin or wickedness unless it be committed in violation of the civil law, which is the measure of their jurisdiction." Payne *v.* Western, etc., R. Co., 13 Lea. (Tenn.) 507, 527, 49 Am. Rep. 666. Every defendant against whom an action is unsuccessfully brought must inevitably experience some injury or inconvenience for which he receives no declared compensation. Yet in such cases the party injured is left without any remedy, and the maxim *ubi jus ibi remedium* has no application. Donovan *v.* New Orleans, 11 La. Ann. 711. The maxim does not apply where there is no one against whom the remedy can be enforced, as where a corporation liable for fires caused by engines operated on its railroad is no longer in existence and the road is operated, when the damage occurs, by trustees whom the law says shall not be liable. Stratton *v.* European, etc., R. Co., 74 Me. 422.

75. Pasley *v.* Freeman, 3 T. R. 51; Deane *v.* Clayton, 7 Taunt. 490; Fletcher *v.* Sondes, 3 Bing. 501.

76. To such new cases it would be just as competent to courts of justice to apply the principle to a case which may arise two centuries hence as it would two centuries ago. Pasley *v.* Freeman, 3 T. R. 51, per Ashhurst, J.; Deane *v.* Clayton, 7 Taunt. 490, per Park, J.

Multiplicity of suits no objection.— Where a plaintiff is obstructed of his right, he shall have his action. And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Per Holt, C. J., in Ashby *v.* White, 2 Ld. Raym. 938.

Doctrine essential to the growth of law.— "When you find a breach of the common law producing an injury to third persons, and

3. Framing New Remedies — a. In General. That there may not be a wrong without a remedy, new writs will be framed to redress or enforce new rights arising under established legal principles, if none appropriate to the case can be found;[77] but this power is one to be cautiously exercised, and never where justice can be reached by way of remedies already known to the law.[78] During the formative period of the common-law actions these new writs were issued out of chancery and directed to the law courts;[79] but this practice seems to have fallen into disuse after chancery had obtained recognition as a distinct judicial department of the state, and, whether the power thus to act had theretofore been possessed by the common-law courts or not,[80] it has since been upheld and exercised by them as a necessary and indisputable appurtenant to their jurisdiction;[81]

there is a principle, resting on reason and justice, in harmony with the principles of that law, and conflicting with none of its established rules, the application of which will furnish a remedy, you may take it that the common law adopts that principle and makes it a part of its own code. So it is, unquestionably, a fact that a great part of the common law has been gradually built up, and you can find no other foundation for it. In every instance of such accretions, if I may so call them, there must have been a first decision without any judicial precedent or statutory authority. On this principle, so guarded, it is really of the greatest practical importance to let no doubt or discredit be thrown. If you disparage it you not only sap the foundation of much that is now established on satisfactory grounds, but you deprive the common law of an expansive power to which it owes, more, perhaps, than to anything else, its high character and great utility; a power which may in some degree be its set-off against the more enlarged range and scientific divisions of the Roman law." Per Coleridge, J., in Gosling *v.* Veley, 4 H. L. Cas. 679, 768. "Where the principle is precisely the same, that all the mischiefs flowing from the one inevitably flow from the other, — where they vary in degree but not in kind,— I think the case no more requires legislative interference than one half of the cases every day occurring in Westminster Hall, where the old principle is applied to new combinations of circumstances, in order to circumvent the machinations of those who ingeniously are endeavoring by slight alterations to defeat or to evade the decisions of the courts." Per Park, J., in Fletcher *v.* Sondes, 3 Bing. 501, 550.

Absence of precedent.— That no precedent can be discovered in which a particular cause of action has been adjudged legal is not a decisive ground of objection if on reason and principle it is maintainable. Chamberlain *v.* Williamson, 2 M. & S. 408; Allen *v.* Flood, [1898] A. C. 1, per Lord Herschell.

77. See cases cited *infra*, note 78 *et seq.*

78. *Alabama.*— Garrott *v.* Fuller, 36 Ala. 179; Kelly *v.* McCaw, 29 Ala. 227.

Louisiana.— See Suwner *v.* Dunbar, 12 La. Ann. 182; Mielke's Succession, 8 La. Ann. 11; Baker *v.* Doane, 3 La. Ann. 434 [*citing* Thomas *v.* Bourgeat, 6 Rob. (La.) 435].

Massachusetts.— Lamb *v.* Stone, 11 Pick. (Mass.) 527.

Ohio.— See also Cincinnati *v.* Beuhausen, 10 Ohio Dec. (Reprint) 652, 22 Cinc. L. Bul. 421.

Vermont.— Hall *v.* Eton, 25 Vt. 458.

England.— Birkley *v.* Presgrave, 1 East 220.

79. Webb's Case, 8 Coke, 45*b*; Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547, per Doe, C. J. [*quoting* with approval from 3 Bl. Comm. 50].

80. See Webb's Case, 8 Coke 45*b*, 49*a*, wherein it is said: "Where such clerks (of the chancery), so knowing of the law failed, then the judges, in many cases, gave allowance to ancient forms of writs, and drove the party to make a special count when the writ doth warrant the count in substance although there be variance in circumstance."

81. *Alabama.*— Kelly *v.* McCaw, 29 Ala. 227.

Connecticut.— Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258.

New Hampshire.— Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794; Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547; Brooks *v.* Howison, 63 N. H. 382; Walker *v.* Walker, 63 N. H. 321; 56 Am. Rep. 514; Metcalf *v.* Gilmore, 59 N. H. 417, 47 Am. Rep. 217.

New York.— Searles *v.* Cronk, 38 How. Pr. (N. Y.) 320.

Ohio.— Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605.

Exercise by courts of this power entirely legal.— "As there was a time when there were no common-law precedents, everything that can be done with them could be done without them. And as nearly all our procedure, including initial, intermediate, and final process, pleading, trial, and judgment, at law and in equity, is of common-law judicial origin, and has been a subject of much common-law judicial alteration, the question arises whether this work is legally done by a court. It must be admitted that, in early times, the distinction between judicial and legislative power was very imperfectly developed, and that consequently there was much judicial legislation which is not evidence of the common law, and has no weight as common-law authority. But the great mass of the precedents of common-law procedure were made, or approved and allowed, from time to time, in the rightful exercise of judicial power. Each of them is presumed

and the duty of common-law courts to exercise this power on a proper case arising, is absolute.[82]

b. Action on the Case. A notable instance of a new writ framed under the early common law to reinforce the other more technical forms of common-law actions, and which more easily adapts itself to changing conditions, is that of the action of trespass on the case.[83]

to have been introduced because it was deemed reasonably necessary for the convenient ascertainment or vindication of some legal right. And the introduction of each was a precedent for introducing as many more as, at any subsequent time, should be found reasonably necessary for the same purpose. The non-production of a necessary one is an innovation — a departure from an immemorial usage that is founded on an elementary principle." Per Doe, C. J., in Metcalf *v.* Gilmore, 59 N. H. 417, 433, 47 Am. Rep. 217. To same effect, Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794, per Doe, C. J. The efficient operation of the maxim that every right, when withheld, must have a remedy, and every injury its proper redress, "does not depend upon such forms as happened to be invented for particular cases, by clerks 'too much attached to ancient precedents,' or by chancellors engaged in enlarging their own jurisdiction upon 'a strained interpretation' and 'false and fictitious suggestions.' If the common law had imposed the duty of framing its remedies upon nobody but a chancellor deriving equity power chiefly from the inadequacy of those remedies, the chancery writ of subpœna, indefinitely expanded, must have kept the work of juries and jury courts within narrow bounds. Employing common-law judges and practitioners, as well as chancellors and chancery clerks, in the service of devising measures of judicial administration, the remedial branch of immemorial custom has not been extinguished or exhausted by its own inventions; and it does not confine the duty of maintaining rights to ways and means that are defective. The permanent necessity of adequate remedy continues to sanction the best inventible procedure and to make the form and substance of relief at law more ample, specific, and equitable." Per Doe, C. J., in Owen *v.* Weston, 63 N. H. 599, 601, 4 Atl. 801, 56 Am. Rep. 547.

Effect on forms of actions.— "The distinction between substantive rights and their common-law remedies recovered its original importance when rights were liberated from the oppressive yoke of remedial form, which materially confounded the distinction and inculcated false ideas of law. The question of form of action is not considered when it is of no practical consequence, and time spent upon it would be wasted." Per Doe, C. J., in Boody *v.* Watson, 64 N. H. 162, 172, 9 Atl. 794. "Our forms of action are not mere rubrics nor dead categories; they are not the outcome of the classificatory process that has been applied to preëxisting materials. They are institutes of the law; they are — we say it without scruple — living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigor, usefulness, and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places. The struggle for life is keen among them, and only the fittest survive." Pollock & M. Hist. Eng. L. 559.

Statutes conferring power on courts.— Statutes authorizing the court to establish rules and orders of practice, and prescribe forms of proceedings, and a bill of rights which declares that every citizen shall be entitled to a remedy for all injuries he may receive in his person, property, or character, are mere confirmations and reënactments of the common law. Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794; Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547; Metcalf *v.* Gilmore, 59 N. H. 417, 434, 47 Am. Rep. 217, wherein it was said per Doe, C. J.: "The legislature can no more delegate to the court the power of legislation than the court can delegate the power of deciding the judicial questions of law raised in this case. The history of common-law procedure is a history of precedents, suggested, invented, or sanctioned by the court because the court regarded them as convenient in fact; altered and improved because the court regarded their improvement as convenient in fact; or laid aside and abandoned because experience, or changed conditions of property, business, and society, called for new ones more convenient in fact than the old." In Georgia it is provided by the code that for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other. Smith *v.* Floyd County, 85 Ga. 420, 11 S. E. 850; Austell *v.* Swann, 74 Ga. 278; Epping *v.* Aiken, 71 Ga. 682; Ellington *v.* Bennett, 59 Ga. 286; Griffin *v.* Marshall, 45 Ga. 549.

82. Metcalf *v.* Gilmore, 59 N. H. 417, 435, 47 Am. Rep. 217, per Doe, C. J., who said: "The judicial duty of allowing a convenient procedure as a necessary incident of the administration of the law of rights has not been and cannot be repealed by the court: and so far as it has not been changed by statute it is now what it was at first, and what in the nature of things it must be. We have no more authority to refuse to allow methods of pleading and practice, consistent with the statute, and necessary for expeditious and economical litigation, than the primitive courts had to defeat justice by allowing no methods whatever."

83. *Alabama.*— Hussey *v.* Peebles, 53 Ala. 432; Kelly *v.* McCaw, 29 Ala. 227.

Illinois.—Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688.

c. Equitable and Extraordinary Remedies. To this principle of the law may also be referred the origin and expansive growth of equitable remedies,[84] and the high prerogative and judicial writs, mandamus, prohibition, and quo warranto, the writ of habeas corpus, and perhaps other remedies of early origin.[85]

4. Form of Proceedings — a. Actions at Common Law. Where the right or duty is legal in its nature the action must be one of law,[86] adapted to the nature of the case and molded according to the forms of the common law.[87]

b. Suits in Equity. But the remedy for a new right created by statute is not necessarily at law; the question must depend upon the nature of the statutory right, and if it is equitable the remedy is by suit in equity.[88]

Maine.— Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Massachusetts.— Adams *v.* Paige, 7 Pick. (Mass.) 542.

New Hampshire.— Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547.

New York.— Van Pelt *v.* McGraw, 4 N. Y. 110.

Pennsylvania.— Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713 [*citing* Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352, 5 Atl. 742]; Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210; Cotteral *v.* Cummins, 6 Serg. & R. (Pa.) 343.

Rhode Island.— Royce *v.* Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845.

Vermont.— Griffin *v.* Farwell, 20 Vt. 151.

England.— Millar *v.* Taylor, 4 Burr. 2303; Winsmore *v.* Greenbank, Willes, 577; Orton *v.* Butler, 2 Chit. 343. See also Case, Action on.

84. Le Roy *v.* Marshall, 8 How. Pr. (N. Y.) 373, wherein it was said: "It was the impossibility of administering true justice in all cases in the common-law forms — the necessity of something more flexible and yielding in its requirements — which gave birth to equitable courts and equitable proceedings." See also other cases cited *infra*, this note.

Equity jurisdiction "never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they have been in later times. I have always thought that formerly there was too confined a way of thinking in the judges of the common-law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, but being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law." Per Lord Chief Justice Wilmot in Collins *v.* Blantern, 2 Wils. C. P. 341, 350.

Rise of equity jurisprudence.— "In early times the chief judicial employment of the chancellors must have been in devising new writs directed to the courts of the common law to give remedy in cases where none was before administered. But when uses of land, totally discountenanced by the courts of common law, were introduced, the chancellor, by a strained interpretation of the Statute of Westminster II, c. 24, which authorized a greater liberality in the framing of new writs, devised the writ of subpœna, returnable in a court of chancery only, to make the feoffee to use accountable to his *cestui que use;* which process was afterward extended to other matters wholly determinable at the common law, upon false and fictitious suggestions." Per Doe, C. J., in Owen *v.* Weston, 63 N. H. 599, 600, 4 Atl. 801, 56 Am. Rep. 547 [*quoting* with approval 3 Bl. Comm. 50, 51]. See also Gwathmey *v.* Stump, 2 Overt. (Tenn.) 308.

It is the peculiar office of equity to afford relief when the law gives a right, but the rigor of legal forms affords no remedy, or no adequate remedy. Keith *v.* Trapier, 1 Bailey Eq. (S. C.) 63 [*cited* in Austell *v.* Swann, 74 Ga. 278]. See also Equity.

85. 3 Bl. Comm. 109; Chumasero *v.* Potts, 2 Mont. 242; Mayo *v.* James, 12 Gratt. (Va.) 17; Rex *v.* Askew, 4 Burr. 2186; Rex *v.* Barker, 3 Burr. 1265. See, generally, Habeas Corpus; Mandamus; Prohibition; Quo Warranto.

86. McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453; Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

87. It may be an action of debt, assumpsit, detinue, or case, as the particular nature of the wrong or injury may require. Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121. To same effect, Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800.

88. Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84 [*cited* in Chandler *v.* Hanna, 73 Ala. 390]; Murray *v.* Rapley, 30 Ark. 568; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453; Duncan *v.* Greenwalt, 3 McCrary (U. S.) 378, 10 Fed. 800; Braithwaite *v.* Skinner, 5 M. & W. 313.

Federal courts.— Where a state statute confers a new right without prescribing the form of a remedy except that which shall be by action, which under the state code includes both actions at law and suits in equity, if the right is equitable it will be enforced by the federal courts in the same manner as they enforce other equitable rights. Central Pac. R. Co. *v.* Dyer, 1 Sawy. (U. S.) 641, 5 Fed. Cas. No. 2,552 [*citing* Clark *v.* Smith, 13 Pet. (U. S.) 195, 10 L. ed. 123].

Pennsylvania.— Under the early law prevailing in this state, where there was no other relief than that which a common-law court could give, damages only could be recovered; and the remedy, although the right was equitable, must have been by special ac-

c. Under Code Procedure. Every action or suit under the code is in the nature of a special action on the case[89] in which plaintiff, unhampered by technical forms, states the facts which constitute his cause of action; and there can be little difficulty as to the remedy.[90] Provision is generally made, however, for a resort to other known remedies in case it should become necessary to prevent a failure of justice.[91]

C. Change and Modification of Remedy. The rule is well settled that no one has a vested right in any particular remedy, and that remedies can be modified and changed by the legislature at its pleasure, subject, however, to the qualification — imposed by the organic law of the United States and most of the states of the country — that no law shall impair the obligation of contracts or encroach upon or violate other vested rights. In this respect there is an important distinction between statutes creating rights and those which afford remedies.[92]

tion upon the case. Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575.

89. See also, generally, *infra*, II, J.

Rogers *v.* Duhart, 97 Cal. 500, 32 Pac. 570; Jones *v.* Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142; Goulet *v.* Asseler, 22 N. Y. 225; Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207; Carter *v.* Wallace, 2 Tex. 206.

90. Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512.

Statute merely directing that suit be brought.— Where the legislature creates a right and makes no special provisions for its enforcement other than by directing that a civil action may be brought for that purpose, such action may be commenced and prosecuted pursuant to the provisions of the general law regulating proceedings in civil actions. Burson *v.* Cowles, 25 Cal. 535. *Compare* also Savings Assoc. *v.* O'Brien, 51 Hun (N. Y.) 45, 3 N. Y. Suppl. 764; Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446; Clafflin *v.* Robbins, 1 Flipp. (U. S.) 603, 5 Fed. Cas. No. 2,776.

91. Thus, "if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; Mawson *v.* Mawson, 50 Cal. 539, 542; Aiken *v.* Aiken, 12 Oreg. 203, 207, 6 Pac. 682, wherein it was said: "All the common-law remedies are preserved under our system of jurisprudence in some form or other. They are not in all cases specifically pointed out, nor do we have any mode for devising or framing writs, but we have a general provision in our law preserving a remedy for every wrong a court of justice has power to redress."

Framing remedies in equity.— The Georgia code provision that "for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other," applies to all courts; and the principle that equity will afford relief when the law gives a right, but legal forms afford no remedy, or no adequate remedy, is said to have been thereby enlarged. Austell *v.* Swann, 74 Ga. 278, 289.

92. *Illinois.*— Templeton *v.* Horne, 82 Ill. 491; Smith *v.* Bryan, 34 Ill. 364; Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755; Wood *v.* Child, 20 Ill. 209; Hughes *v.* Russell, 43 Ill. App. 430.

Kansas.— Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480.

Kentucky.—Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. (Ky.) 282.

Maine.— Frost *v.* Ilsley, 54 Me. 345; Bangor *v.* Godding, 35 Me. 73, 46 Am. Dec. 688.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

Mississippi.—Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388.

New Hampshire.— Rich *v.* Flanders, 39 N. H. 304; Willard *v.* Harvey, 24 N. H. 344.

Pennsylvania.— Krause *v.* Pennsylvania R. Co., 4 Pa. Co. Ct. 60.

United States.— White *v.* Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Van Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Campbell *v.* Iron-Silver Min. Co., 83 Fed. 643, 55 U. S. App. 150, 27 C. C. A. 646. See, generally, CONSTITUTIONAL LAW; CONTRACTS.

Abolition of forms of action.— Thus it is within the power of the legislature to abolish the distinction between certain forms of common-law actions, or to sweep away all distinctions as to form between actions at law and suits in equity, and provide in their stead a single action in which the facts constituting the demand shall be pleaded.

Illinois.— Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755.

Indiana.—Bowman *v.* Mallory, 14 Ind. 424.

Massachusetts.—Stowell *v.* Flagg, 11 Mass. 364.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

Nebraska.— Turner *v.* Althaus, 6 Nebr. 55.

New Hampshire.— Rich *v.* Flanders, 39 N. H. 304.

New York.— Anonymous, 2 Edm. Sel. Cas. (N. Y.) 18.

Pennsylvania.— Krause *v.* Pennsylvania R. Co., 4 Pa. Co. Ct. 60.

A constitutional provision which confers upon the superior courts general jurisdiction both at law and in equity does not have the effect of preventing the legislature from abolishing the distinction between them as to the forms of procedure. Holmes *v.* Campbell, 12

D. What Law Governs. The *lex fori*, or law of the forum, determines the form of the remedy, and all matters pertaining to it, whether the cause of action arose within or without the state in which the suit is brought.[93]

E. Statutory Rights and Remedies — 1. Right Created Without Remedy. Where a new right or duty is created by statute, but no remedy is pointed out, the principle of the law that there can be no wrong without a remedy has application, and one entitled to the benefit of the statutory provisions may resort to any existing remedy that will afford him adequate and proper redress.[94]

Minn. 221; Turner *v.* Althaus, 6 Nebr. 55, Gantt, J., dissenting; Phillips *v.* Gorham, 17 N. Y. 270 [*overruling* Reubens *v.* Joel, 13 N. Y. 488].

Substitution of summary proceeding for ordinary action.— It is within the discretion of the legislature, in a case in which a trial by jury is not required, to determine whether a controversy, judicial in its character, shall be pursued by a regular action or by a summary proceeding. U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, *sub nom.* Empire City Bank Case, 8 Abb. Pr. (N. Y.) 192.

No such power in courts.—If it be admitted that there is a natural and necessary impropriety in attempting to determine the legal and equitable rights of parties in the same action, the courts are without power to offer a remedy for the evil. Holmes *v.* Campbell, 12 Minn. 221.

Such law not retrospective.— A law changing the mode of enforcing rights will govern as to proceedings instituted after it goes into effect, no matter when the rights sought to be enforced accrued. Hughes *v.* Russell, 43 Ill. App. 430; Rich *v.* Flanders, 39 N. H. 304.

Pending actions.— The statute can make the remedy applicable to pending suits as well as to those subsequently brought, unless the legislature is prohibited from doing so by some provision of the organic law. Campbell *v.* Iron-Silver Min. Co., 83 Fed. 643, 55 U. S. App. 150, 27 C. C. A. 646. To same effect, Krause *v.* Pennsylvania R. Co., 4 Pa. Co. Ct. 60.

A judgment is not a remedy.— Otherwise no judgment would have any force beyond the territory where rendered. Statutes pertaining to the remedy are merely such as relate to the course and form of proceeding, but do not affect the substance of a judgment when pronounced. Morton *v.* Valentine, 15 La. Ann. 150 [*cited* in Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388].

Instance of unconstitutional law.— The means provided after judgment for making it effective are a part of the remedy and subject to modification; but the withdrawal of property from the operation of a judgment on a contract debt, as by an exemption law, strikes directly at the right and impairs the obligation of the contract. Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388. See Exemptions; Homesteads.

93. *Alabama.*— King *v.* Martin, 67 Ala. 177 [*citing* Story Confl. Laws, § 556].

California.— Majors *v.* Cowell, 51 Cal. 478.

Connecticut.—Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Illinois.— Mineral Point R. Co. *v.* Barron, 83 Ill. 365; Sherman *v.* Gassett, 9 Ill. 521; Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535; Johnson *v.* Huber, 34 Ill. App. 527.

Iowa.— Hamilton *v.* Schoenberger, 47 Iowa 385.

Massachusetts.— Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359.

New Hampshire.— Douglas *v.* Oldham, 6 N. H. 150.

New York.— Andrews *v.* Herriot, 4 Cow. (N. Y.) 508; Scoville *v.* Canfield, 14 Johns. (N. Y.) 338, 7 Am. Dec. 467; Smith *v.* Spinolla, 2 Johns. (N. Y.) 198.

United States.— Willard *v.* Wood, 164 U. S. 502, 17 S. Ct. 176, 41 L. ed. 531 [*affirming* 1 App. Cas. (D. C.) 44]; Bacon *v.* Howard, 20 How. (U. S.) 22, 15 L. ed. 811; Titus *v.* Hobart, 5 Mason (U. S.) 378, 23 Fed. Cas. No. 14,063.

Distinguished from lex loci contractus.— "The distinction between the obligation of contracts and the mode of applying remedies thereto is well established. The former is universally recognized according to the law of the place where the contract is made; the latter is bounded by the territorial limits and is not of efficiency elsewhere." Titus *v.* Hobart, 5 Mason (U. S.) 378, 23 Fed. Cas. No. 14,063. See also Contracts.

State and federal courts.— In the absence of clear expressions of the legislative law to that effect it is not to be inferred, waiving the question of power, that a state statute was intended to furnish remedies to suitors of the federal courts, the powers of which are derived wholly from the constitution and laws of the United States. Majors *v.* Cowell, 54 Cal. 478. There is no clause in the constitution which restrains the right of each state to legislate upon the remedy by which judgments of other states shall be put in suit, exclusive of all interference with their merits. Bacon *v.* Howard, 20 How. (U. S.) 22, 15 L. ed. 811.

94. *Alabama.*— Hightower *v.* Fitzpatrick, 42 Ala. 597.

California.—State *v.* Poulterer, 16 Cal. 514; Roberts *v.* Landecker, 9 Cal. 262; People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331.

Connecticut.— Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Gilbert *v.* Lynes, 2 Root (Conn.) 168.

Georgia.— Smith *v.* Floyd County, 85 Ga. 420, 11 S. E. 850.

Illinois.— Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896.

Indiana.— Ft. Wayne *v.* Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263.

Kentucky.— Russell *v.* Muldraugh's Hill, etc., Road Co., 13 Bush (Ky.) 307.

Maine.— Lee *v.* Pembroke Iron Co., 57 Me.

2. Right Created With Remedy. Where a statute creates an entirely new right and an entirely new duty, and prescribes a particular remedy whereby the party injured by a breach of the statutory duty may obtain redress, it has been frequently stated as a general rule that such remedy is exclusive and that none other will lie.[95]

481, 2 Am. Rep. 59; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Maryland.— Anne Arundel County *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557; Baltimore *v.* Howard, 6 Harr. & J. (Md.) 383.

Massachusetts.— Russell Mills *v.* Plymouth County, 16 Gray (Mass.) 347; Lowell *v.* Wyman, 12 Cush. (Mass.) 273; Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; Hill *v.* Sayles, 12 Metc. (Mass.) 142; Edder *v.* Bemis, 2 Metc. (Mass.) 599; Wiley *v.* Yale, 1 Metc. (Mass.) 553; Perry *v.* Wilson, 7 Mass. 393; Smith *v.* Drew, 5 Mass. 514.

Minnesota.—McCarthy *v.* St. Paul, 22 Minn. 527; Fairbault *v.* Misener, 20 Minn. 396.

Missouri.— Householder *v.* Kansas City, 83 Mo. 488; State Sav. Assoc. *v.* Kellogg, 63 Mo. 540.

New Hampshire.— Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794, per Doe, C. J.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398.

New York.— Dudley *v.* Mayhew, 3 N. Y. 9; Vinton *v.* Cattaraugus County, 2 N. Y. Suppl. 367; Smith *v.* Lockwood, 13 Barb. (N. Y.) 209; Renwick *v.* Morris, 7 Hill (N. Y.) 575; Durant *v.* Albany County, 26 Wend. (N. Y.) 66, per Bradish, President of Senate; Clark *v.* Brown, 18 Wend. (N. Y.) 213; Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304.

North Carolina.— McKay *v.* Woodle, 28 N. C. 352.

Ohio.—Akron *v.* McComb, 18 Ohio 229, 51 Am. Dec. 453 (same case on former appeal, 15 Ohio 474); Jones *v.* Leeds, 7 Ohio N. P. 480.

Pennsylvania.— Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713; Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352, 5 Atl. 742; Miller *v.* Lehigh County, 5 Pa. Dist. 588 [*affirmed* in 181 Pa. St. 622, 37 Atl. 824]. See also Eminent Domain.

Vermont.— Wheeler *v.* Wilson, 57 Vt. 157.

United States.— New York Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825; Pollard *v.* Bailey, 20 Wall. (U. S.) 520, 22 L. ed. 376; Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

England.— Wolverhampton New Waterworks Co. *v.* Hawkesford, 6 C. B. N. S. 336; Privilege of Priests, 12 Coke 100; Marshalsea Case, 10 Coke 68*b*; Ashby *v.* White, 14 How. St. Tr. 695; Ewer *v.* Jones, 2 Ld. Raym. 934, 2 Salk. 415; Braithwaite *v.* Skinner, 5 M. & W. 313; Anonymous, 6 Mod. 27; King *v.* Rochdale Canal Co., 14 Q. B. 136, 15 Jur. 896 [*affirming* 14 Q. B. 122. 14 Jur. 16]; Ross *v.* Rugge-Price, 1 Ex. D. 269, 273, wherein it was said: "Unless you find some remedy given in the statute where a benefit is given to an individual, or find in the statute clearly that it was not intended to give him any such remedy, the law there implies that he may have his common-law remedy."

Canada.— Frontenac County *v.* Kingston, 30 U. C. Q. B. 584.

General statutory remedy may be resorted to.— Where no remedy is given by the statute which creates a new right, the party injured may resort to the means of redress given by the common law or any general statute providing a remedy in similar cases. Smith *v.* Lockwood, 13 Barb. (N. Y.) 209.

Statutory right as absolute as common-law right.— In the absence of any authority to the contrary it is not perceived why a legal right to compensation for actual damages sustained, even though such right depend wholly upon a statute, is not as worthy of protection in a court of law as any common-law right. The common law is said to be, in fact, nothing but the expression of ancient statutes; but, whether this be so or not, the injury for a violation of a statute right is as real as are injuries which exist only by the common law. Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

95. *Alabama.*— Chandler *v.* Hanna, 73 Ala. 390; Janney *v.* Buell, 55 Ala. 408; Carter *v.* Wann, 45 Ala. 343.

California.— State *v.* Poulterer, 16 Cal. 514; Roberts *v.* Landecker, 9 Cal. 262; Ward *v.* Severance, 7 Cal. 126; People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331.

Illinois.— French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717; Burns *v.* Nash, 23 Ill. App. 552.

Indiana.— Ryan *v.* Ray, 105 Ind. 101, 4 N. E. 214; Martin *v.* West, 7 Ind. 657; Butler *v.* State, 6 Ind. 165.

Iowa.— Lease *v.* Vance, 28 Iowa 509; Cole *v.* Muscatine, 14 Iowa 296.

Kentucky.— Kentucky River Nav. Co. *v.* Com., 13 Bush (Ky.) 435; Russell *v.* Muldraugh's Hill, etc., Road Co., 13 Bush (Ky.) 307; Johnston *v.* Louisville, 11 Bush (Ky.) 527.

Maine.— Bassett *v.* Carleton, 32 Me. 553, 54 Am. Dec. 605.

Massachusetts.— Pollock *v.* Eastern R. Co., 124 Mass. 158; Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; Coffin *v.* Field, 7 Cush. (Mass.) 355; Edder *v.* Bemis, 2 Metc. (Mass.) 599; Wiley *v.* Yale, 1 Metc. (Mass.) 553; Osborn *v.* Danvers, 6 Pick. (Mass.) 98; Smith *v.* Drew, 5 Mass. 514.

Michigan.— Thurston *v.* Prentiss, 1 Mich. 193.

Missouri.— State *v.* Bittinger, 55 Mo. 596; Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469 [*cited* in Hill *v.* Missouri Pac. R. Co., 49 Mo. App. 520]; Young *v.* Kansas City, etc., R. Co., 33 Mo. App. 509.

New Hampshire.— State *v.* Manchester, etc., R. Co., 62 N. H. 29; Edes *v.* Boardman, 58 N. H. 580; Fletcher *v.* State Capital Bank, 37 N. H. 369; Green *v.* Bailey, 3 N. H. 33; Chesley *v.* Smith, 1 N. H. 20.

New York.— Jessup *v.* Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; Jordan, etc., Plank-road Co. *v.* Morley, 23 N. Y. 552; Dudley

But that this is an entirely correct statement of the law in such cases has been disputed.[96]

v. Mayhew, 3 N. Y. 9; Savings Assoc. *v.* O'Brien, 51 Hun (N. Y.) 45, 3 N. Y. Suppl. 764; Whitehall First Nat. Bank v. Lamb, 57 Barb. (N. Y.) 429; Smith *v.* Lockwood, 13 Barb. (N. Y. 209; Renwick *v.* Morris, 7 Hill (N. Y.) 575; Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Durant *v.* Albany County, 26 Wend. (N. Y.) 66, per Bradish, President of Senate, and Humphrey, Senator; Cornell *v.* Butternutts, etc., Turnpike Co., 25 Wend. (N. Y.) 365; Clark *v.* Brown, 18 Wend. (N. Y.) 213.

North Carolina.— McKay *v.* Woodle, 28 N. C. 352.

Pennsylvania.— O'Connor *v.* Pittsburgh, 18 Pa. St. 187; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, 53 Am. Dec. 517.

South Carolina.— Kennedy *v.* Reames, 15 S. C. 548.

Rhode Island.— Moies *v.* Sprague, 9 R. I. 541.

Vermont.— Hill *v.* National Bank, 56 Vt. 582.

United States.— Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196.

England.— Ross *v.* Rugge-Price, 1 Ex. D. 269; Marshall *v.* Nicholls, 18 Q. B. 882; Stevens *v.* Jeacocke, 11 Q. B. 731; Doe *v.* Bridges, 1 B. & Ad. 847; Wolverhampton New Waterworks Co. *v.* Hawkesford, 6 C. B. N. S. 336; St. Pancras *v.* Batterbury, 2 C. B. N. S. 477; Stevens *v.* Evans, 2 Burr. 1152.

"It is in the general true that if an affirmative statute which is introductive of a new law direct a thing to be done in a certain manner, that [a] thing shall not, even although [if] there are no negative words, be done in any other manner." Bac. Abr., "Statute," G, cited in Kennedy *v.* Reames, 15 S. C. 548.

It is only where a new right is given, which the party would not be entitled to but for the statute, that the remedy afforded by the statute is exclusive. Jordan, etc., Plankroad Co. *v.* Morley, 23 N. Y. 552. "There are instances, indeed, in which a court of equity gives remedy where the law gives none; but where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows." Heard *v.* Stanford, Cas. t. Talb. 173 [*approved* in 1 Story Eq. Jur. § 61, and Janney *v.* Buell, 55 Ala. 408].

Defective remedies.— The rule is applied although the remedy provided by the statute is so far defective that the right cannot be properly enforced; and neither a court of law nor one of equity can supplement it and go beyond the remedy afforded by the statute. The maxims that every right has a remedy, and that where a law does not give redress equity will afford relief, however just in theory, are subordinate to positive institutions and cannot be applied either to subvert established rules of law or to give a court a jurisdiction hitherto unknown. Chandler *v.* Hanna, 73 Ala. 390 [*distinguishing* Montandon *v.* Deas, 14 Ala. 33, 48 Am. Dec. 84]; Phillips *v.* Ash, 63 Ala. 414; Janney *v.* Buell, 55 Ala. 408; Dudley *v.* Mayhew, 3 N. Y. 9; Durant *v.* Albany County, 26 Wend. (N. Y.) 66, per Bradish, President of Senate; Donovan *v.* Finn, Hopk. (N. Y.) 59; Kennedy *v.* Reames, 15 S. C. 548. *Contra*, Johnston *v.* Louisville, 11 Bush (Ky.) 527.

If fraud intervenes or some other impediment or difficulty is interposed, obstructing the enforcement of the statutory remedy and rendering such remedy inadequate, perhaps a court of equity could take jurisdiction to enforce it as in other cases where legal remedies are not complete or appropriate. Chandler *v.* Hanna, 73 Ala. 390.

96. View in some respects contra.— The rules as to exclusive and cumulative remedies in civil cases seem to be applications of early common-law principles laid down in actions for penalties and prosecutions for crimes and other public offenses. Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Jordan, etc., Plank-road Co. *v.* Morley, 23 N. Y. 552; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, 66, 53 Am. Dec. 517, wherein the court said: "They were predicated of remedies for public wrongs; but there is nothing peculiar in the subject-matter of them to show that they are not equally predicable of remedies for private injuries;" O'Connor *v.* Pittsburgh, 18 Pa. St. 187; Brattleboro *v.* Wait, 44 Vt. 459. In Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499, discussing the application of these principles in civil cases, it was held that remedial statutes, unlike criminal and penal laws, should be liberally construed; that the rule that where a statute creates an offense known to the common law, and in the enacting or prohibiting clause points out the mode of proceeding under it, that mode alone can be pursued, should not be held applicable to beneficial statutes where there is a suitable remedy already in existence,— for example, assumpsit, to recover the amount of a stock subscription. It may be noted, however, that this was held of a statutory power and mode of execution given to a corporation, whereby it might forfeit and sell the shares of stock of delinquent subscribers,— a non-judicial remedy. See *infra*, II, E, 4, c. As in the case of penal statutes, so likewise of beneficial statutes: where a new right is created, if there exists an appropriate common-law remedy it may be pursued, although the statute creating the right also gives a remedy, where such remedy is contained in a distinct substantive clause. Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499. For these principles of the law of public wrongs see CRIMINAL LAW; PENALTIES. A statute giving a cause of action, unknown at the common law, for acts or omissions which occasion death, may be enforced in admiralty by its own processes, although a particular remedy is pre-

3. New Remedy for Preëxisting Right. Where the right or duty is not created by the statute, but the statute is remedial only, providing a new remedy for that which had been previously established by law to be a proper subject for legal redress, the statutory remedy is merely cumulative, unless preëxisting remedies are taken away either expressly or by necessary implication; and the party injured may resort to either at his election.[97]

4. Scope of Rules — a. In General. Statutes will not be construed in accordance with these general legal principles for determining whether a remedy is exclusive, or cumulative merely, if from the whole act it is apparent that it was otherwise intended.[98]

scribed by the act, where such remedy is given in a section distinct from that which establishes the general right. The Highland Light, Chase (U. S.) 150, 12 Fed. Cas. No. 6,477, 3 Am. L. Rev. 778.

97. *Alabama.*— Chandler *v.* Hanna, 73 Ala. 390; Carter *v.* Wann, 45 Ala. 343; Autauga County *v.* Davis, 32 Ala. 703.

Arkansas.— Wells *v.* Steele, 31 Ark. 219.

Connecticut.—Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

Georgia.— Doe *v.* Georgia R., etc., Co., 1 Ga. 524.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 141, 35 N. E. 881.

Kansas.— Board of Education *v.* Scoville, 13 Kan. 17.

Kentucky.— Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.) 576.

Maine.— Cumberland, etc., Canal Corp. *v.* Hitchings, 59 Me. 206; Gooch *v.* Stephenson, 13 Me. 371.

Massachusetts.— Pollock *v.* Eastern R. Co., 124 Mass. 158; Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Brown *v.* Castles, 11 Cush. (Mass.) 348; Coffin *v.* Field, 7 Cush. (Mass.) 355; Barden *v.* Crocker, 10 Pick. (Mass.) 383; Adams *v.* Paige, 7 Pick. (Mass.) 542.

Missouri.— State *v.* Bittinger, 55 Mo. 596.

New Hampshire.—State *v.* Manchester, etc., R. Co., 62 N. H. 29; Edes *v.* Boardman, 58 N. H. 580; Chesley *v.* Smith, 1 N. H. 20.

New York.— People *v.* New York Cent., etc., R. Co., 74 N. Y. 302; Smith *v.* Lockwood, 13 Barb. (N. Y.) 209; Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Clark *v.* Brown, 18 Wend. (N. Y.) 213; Cornell *v.* Butternutts, etc., Turnpike Co., 25 Wend. (N. Y.) 365; Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Almy *v.* Harris, 5 Johns. (N. Y.) 175; Jenkins *v.* Union Turnpike Road Co., 1 Cai. Cas. (N. Y.) 86 [*reversed* on other grounds in 1 Cai (N. Y.) 381]; Dean *v.* Eldridge, 29 How. Pr. (N. Y.) 218.

North Carolina.— McKay *v.* Woodle, 28 N. C. 352.

South Carolina.— Kennedy *v.* Reames, 15 S. C. 548.

Wisconsin.— Goodrich *v.* Milwaukee, 24 Wis. 422.

England.— Shepherd *v.* Hills, 11 Exch. 55; Sharp *v.* Warren, 6 Price 131; Wolverhampton New Waterworks Co. *v.* Hawkesford, 6 C. B. N. S. 336.

Cumulative statutory remedies.— In like manner a statutory remedy for a right established and legally enforceable under prior statutes is cumulative merely. Chapman *v.* Weaver, 19 Ala. 626; Lowell *v.* Wyman, 12 Cush. (Mass.) 273; Burnham *v.* Onderdonk, 41 N. Y. 425; Vinton *v.* Cattaraugus County, 50 Hun (N. Y.) 600, 2 N. Y. Suppl. 367; Crane *v.* Sawyer, 5 How. Pr. (N. Y.) 372. A statute which provides that "when any pecuniary forfeiture or fine, imposed by law, is made recoverable by bill, plaint, or information, it may nevertheless be sued for and recovered in an action of debt, or an action of trespass on the case," relates to penal and criminal laws only; and where a remedial statute gives a new right and prescribes a remedy this provision of law will not have the effect of increasing the remedies by which the right may be pursued. Wiley *v.* Yale, 1 Metc. (Mass.) 553, 554.

Early statement of law.—"If a statute gives a remedy in the affirmative (without a negative expressed or implied), for a matter which was actionable by the common law, the party may sue at the common law as well as upon the statute, for this does not take away the common law." Comyn Dig. tit. Action upon Statute, C; Doe *v.* Georgia R., etc., Co., 1 Ga. 524; Barden *v.* Crocker, 10 Pick. (Mass.) 383; Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Almy *v.* Harris, 5 Johns. (N. Y.) 175.

In admiralty law.— This rule of construction is as applicable to the remedies of the maritime law as it is to those of the common law. The Waverly, 7 Biss. (U. S.) 465, 29 Fed. Cas. No. 17,301; The M. W. Wright, Brown Adm. (U. S.) 290, 17 Fed. Cas. No. 9,983.

Equitable remedy.— As a rule, a remedy given by statute is considered as a legal remedy in contradistinction to an equitable remedy. But a remedy given by statute may sometimes be an equitable remedy, and when it is, it does not supersede some other previously existing equitable remedy unless it has been expressly so enacted, but the second remedy is merely cumulative and the two remedies are in effect concurrent. Board of Education *v.* Scoville, 13 Kan. 17.

Character of remedy not considered.— Although a new remedy provided by statute is much to be preferred to one already existing, yet parties are not restricted to it, if the statute contains no prohibition. Dean *v.* Eldridge, 29 How. Pr. (N. Y.) 218.

98. How statutes construed.— In all cases of statutes creating new rights, if no pro-

b. Remedy Coextensive With Right. The rule that a remedy for a newly created right is exclusive is not of universal application. It applies only when the remedy is coextensive with the right, and when, from the character and provisions of the act and the nature of the right and remedy, it is to be understood that the remedy is designed to be exclusive.[99]

c. Non-Judicial Remedies. To be exclusive the remedy must also be judicial.[1]

d. As Declared by Statute. In Pennsylvania, by a general law, a statutory

visions exist in such statutes to indicate that the remedy is intended as cumulative, it is held to be exclusive, because in all such cases the powers, rights, and remedies given are matters *stricti juris*; but if it is to be gathered from the provisions of the statutes that the means prescribed for executing it, or the remedy given as a redress for injury which its execution occasioned to the rights of others, are not intended to be exclusive, but cumulative, then the rule does not apply. Fletcher *v.* State Capital Bank, 37 N. H. 369. Statutes giving particular remedies for rights already established as legal are not to be construed as taking away the existing remedies unless the intention is manifest. Repeals by implication, especially of remedies, are not favored in the law. Cumberland, etc., Canal R. Corp. *v.* Hitchings, 59 Me. 206; Goodrich *v.* Milwaukee, 24 Wis. 422. "The court has no more authority to make a rule of construction that defeats a legislative purpose shown by the evidence than to defeat that purpose without a rule. The rule in favor of a cumulation of remedy is subject to qualifications and exceptions; and, taken with them, it signifies that, in the absence of satisfactory evidence of a legislative purpose to make a new remedy a substitute for an old one, the latter is not repealed. The statute is not held to mean what the evidence does not show the legislature meant. It is not a repeal when it does not appear that the legislature designed a repeal." Per Doe, C. J., in Edes *v.* Boardman, 58 N. H. 580, 592.

New right or remedy substituted.— When, from some public consideration, a new right or remedy is substituted for a preëxisting one, the statutory remedy is exclusive and not cumulative. Chesley *v.* Smith, 1 N. H. 20; Raymond *v.* Andrews, 6 Cush. (Mass.) 265; Williams *v.* Hingham, 4 Pick. (Mass.) 341. Where it is apparent that the whole matter of freight charges has been made the subject of statutory law, it must follow, under the general rules relating to statutory construction, that the statute was intended to be a revision of, or a substitute for, the common law, and a remedy for exacting excessive charges is exclusive. Young *v.* Kansas City, etc., R. Co., 33 Mo. App. 509.

99. *Alabama.*— Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

Connecticut.— Healey *v.* New Haven, 49 Conn. 394.

Maine.— Cushman *v.* Smith, 34 Me. 247; Fryeburg Canal *v.* Frye, 5 Me. 38.

Missouri.— Jamison *v.* Springfield, 53 Mo. 224; Soulard *v.* St. Louis, 36 Mo. 546.

New Hampshire.— Fletcher *v.* State Capital Bank, 37 N. H. 369; Dean *v.* Sullivan R. Co., 22 N. H. 316; Osgood *v.* Blake, 21 N. H. 550.

New Jersey.— Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335.

Vermont.— Babcock *v.* Granville, 44 Vt. 325.

Wisconsin.— Goodrich *v.* Milwaukee, 24 Wis. 422.

England.— Lichfield *v.* Simpson, 8 Q. B. 65. *Compare* Handley *v.* Moffat, 7 Ir. R. C. L. 104.

1. A mere security for a statutory obligation, or a mode by which the party aggrieved may enforce the right or redress its invasion out of court, is not such a remedy.

Alabama.— Autauga County *v.* Davis, 32 Ala. 703; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787, 39 Am. Dec. 344; Carlisle *v.* Cahawba, etc., R. Co., 4 Ala. 70; Beene *v.* Cawhaba, etc., R. Co., 3 Ala. 660.

California.— State *v.* Poulterer, 16 Cal. 514.

Connecticut.— Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

Delaware.— Randel *v.* Shoemaker, 1 Harr. (Del.) 565.

Kentucky.— Kentucky River Nav. Co. *v.* Com., 13 Bush (Ky.) 435; Russell *v.* Muldraugh's Hill, etc., Road Co., 13 Bush (Ky.) 307; Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.) 576.

Maine.— Bear Camp River Co. *v.* Woodman, 2 Me. 404.

New Hampshire.—Chesley *v.* Smith, 1 N. H. 20.

New York.— Swarthout *v.* New Jersey Steamboat Co., 48 N. Y. 209, 8 Am. Rep. 541; Jordan, etc., Plankroad Co. *v.* Morley, 23 N. Y. 552.

Pennsylvania.— Delaware, etc., Canal Nav. Co. *v.* Sansom, 1 Binn. (Pa.) 70.

United States.— U. S. *v.* Lyman, 1 Mason (U. S.) 482, 26 Fed. Cas. No. 15,647.

England.— Crisp *v.* Bunbury, 8 Bing. 394; Shepherd *v.* Hills, 11 Exch. 55; Great Northern R. Co. *v.* Kennedy, 7 Dowl. & L. 197.

Canada.— Municipal Council *v.* Wilmot Tp., 17 U. C. Q. B. 82. *Contra*, Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80.

Otherwise when required by rules of construction.— While the jurisdiction of the superior court is not to be ousted except by express words or by necessary implication, yet, where the object and intent of a statute manifestly requires it, words that appear to be permissive only must be considered as obligatory. Crisp *v.* Bunbury, 8 Bing. 394.

remedy is exclusive in every case; as well where the right was legal before the enactment of the statute as where it is created by it.[2]

5. Rules as to, Differently Stated — Illustrations. Where an act or omission is a legal wrong within the fundamental principles of jurisprudence relating to causes of action, and hereinbefore discussed,[3] a statutory mode of redress, unless expressly or by necessary implication excluding preëxisting remedies, is cumulative merely;[4] while on the other hand, if it does not fall within those principles, but becomes a legal right by force of the statute alone, a remedy provided therefor is exclusive.[5]

2. Pa. Act of March 21, 1806, 4 Sm. L. 332, § 13; North Beaver Tp. *v.* Big Beaver Tp., 8 Pa. Co. Ct. 82 [*citing* Directors of Poor *v.* Malany, 64 Pa. St. 144]; Dyer *v.* Sharp, 2 Pa. Co. Ct. 216; Weller *v.* Weyand, 2 Grant (Pa.) 103; Barrett *v.* Plymouth Tp., 13 Montg. Co. Rep. (Pa.) 46.

3. See *supra*, I.

4. *Alabama.*— Elliott *v.* Holbrook, 33 Ala. 659; Kingsland *v.* Forrest, 18 Ala. 519, 52 Am. Dec. 232; Garnett *v.* Roper, 10 Ala. 842; Sawyer *v.* Ballew, 4 Port. (Ala.) 116.

Arkansas.— Lee *v.* State, 22 Ark. 231.

Illinois.— Templeton *v.* Horne, 82 Ill. 491.

Kentucky.— Hamilton *v.* Com., 3 T. B. Mon. (Ky.) 212.

Massachusetts.— Coffin *v.* Field, 7 Cush. (Mass.) 355.

Michigan.— Bellant *v.* Brown, 78 Mich. 294, 44 N. W. 326.

Missouri.— Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469; Buchanan County *v.* Kirtley, 42 Mo. 534; Gathwright *v.* Callaway County, 10 Mo. 663; Hill *v.* Missouri Pac. R. Co., 49 Mo. App. 520.

New Hampshire.— Adams *v.* Richardson, 43 N. H. 212; Whittier *v.* Whittier, 31 N. H. 452.

New Jersey.— Coxe *v.* Robbins, 9 N. J. L. 477.

New York.—Lott *v.* Swezey, 29 Barb. (N. Y.) 87; Badger *v.* Appleton, 12 N. Y. Civ. Proc. 93; Colden *v.* Eldred, 15 Johns. (N. Y.) 220.

North Carolina.— McKay *v.* Woodle, 28 N. C. 352.

Ohio.— Coates *v.* Chillicothe Branch Bank, 23 Ohio St. 415; Taylor *v.* Fitch, 12 Ohio St. 169; Doane *v.* Fleming, Wright (Ohio) 168.

Vermont.— Edwards *v.* Osgood, 33 Vt. 224; Charleston *v.* Stacy, 10 Vt. 562; Tyler *v.* Lathrop, 5 Vt. 170; State Treasurer *v.* Kelsey, 4 Vt. 371.

Virginia.— Booker *v.* McRoberts, 1 Call (Va.) 243.

West Virginia.— Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999.

England.— Ross *v.* Rugge-Price, 1 Ex. D. 269.

This rule has been applied with respect to statutory remedies: against public officers (see Officers) and railroads (see Railroads); for breach of contract (see Contracts; Mechanics' Liens; Mortgages); for the collection of a judgment (see Judgments); for recovery on bond (see Bonds); for trespass (see Trespass); also to statutory remedy in lieu of audita querela (see Audita Querela), and in lieu of the common-law action for an escape (see Escape); statutory proceedings for partition (see Partition); statutory and summary proceedings to obtain restitution upon reversal of judgment (see Appeal and Error); and to statutory provisions as to vacation and modification of judgments (see Judgments). See also, generally, cases cited *supra*, this note.

5. *Connecticut.*— Gilbert *v.* Lynes, 2 Root (Conn.) 168; Waterbury *v.* Hurlburt, 1 Root (Conn.) 60.

Illinois.— French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717; Burns *v.* Nash, 23 Ill. App. 552.

Indiana.— Ft. Wayne *v.* Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263.

Iowa.— Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56; Cole *v.* Muscatine, 14 Iowa 296.

Maine.— White *v.* Wilkins, 24 Me. 299.

To same effect, Dale County *v.* Gunter, 46 Ala. 118.

Massachusetts.— Osborn *v.* Fall River, 140 Mass. 508, 5 N. E. 483; Hull *v.* Westfield, 133 Mass. 433; West Roxbury *v.* Minot, 114 Mass. 546; Roxbury *v.* Nickerson, 114 Mass. 544; Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; Crapo *v.* Stetson, 8 Metc. (Mass.) 393; Crosby *v.* Bennett, 7 Metc. (Mass.) 17; Kelton *v.* Phillips, 3 Metc. (Mass.) 61; Wiley *v.* Yale, 1 Metc. (Mass.) 553; Osborn *v.* Danvers, 6 Pick. (Mass.) 98.

Michigan.— Thurston *v.* Prentiss, 1 Mich. 193.

Minnesota.— Fairbault *v.* Misener, 20 Minn. 396; Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194.

Missouri.— Soulard *v.* St. Louis, 36 Mo. 546; Baker *v.* Hannibal, etc., R. Co., 36 Mo. 543; Leary *v.* Hannibal, etc., R. Co., 38 Mo. 485.

Nebraska — Churchill *v.* Beethe, 48 Nebr. 87, 66 N. W. 992, 35 L. R. A. 442.

New Hampshire.— State *v.* Manchester, etc., R. Co., 62 N. H. 29; Briggs' Petition, 29 N. H. 547. But see Edes *v.* Boardman, 58 N. H. 580, per Doe, C. J.; Henniker *v.* Contoocook Valley R. Co., 29 N. H. 146.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398; Den *v.* Morris Canal, etc., Co., 24 N. J. L. 587.

New York.— Savings Assoc *v.* O'Brien, 51 Hun (N. Y.) 45, 3 N. Y. Suppl. 764; Russell *v.* New York, 2 Den. (N. Y.) 461; *Ex p.* Van Riper, 20 Wend. (N. Y.) 614; New York *v.* Lord, 17 Wend. (N. Y.) 285 [*affirmed* in 18 Wend. (N. Y.) 126]; Calking

6. Criminal and Penal Statutes. Public remedies given by criminal and penal statutes which create new public offenses are sometimes discussed as exclusive of, or cumulative with, civil remedies for private injuries caused by a violation of the duty imposed; but this has to do rather with the cause of action than with the remedy, and will be found treated under that head herein.[6]

v. Baldwin, 4 Wend. (N. Y.) 667, 21 Am. Dec. 168 [*distinguishing* Crittenden *v.* Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462, and People *v.* Hillsdale, etc., Turnpike Co., 2 Johns. (N. Y.) 190]; McKeon *v.* Caherty, 3 Wend. (N. Y.) 494; Edwards *v.* Davis, 16 Johns. (N. Y.) 281.

Ohio.— Akron *v.* McComb, 18 Ohio 229, 51 Am. Dec. 453 [same case on former appeal, 15 Ohio 474]; Little Miami R. Co. *v.* Whitacre, 8 Ohio St. 590.

Pennsylvania.— Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Brown *v.* White Deer Tp., 27 Pa. St. 109; O'Connor *v.* Pittsburgh, 18 Pa. St. 187; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, 53 Am. Dec. 517.

Rhode Island.— Moies *v.* Sprague, 9 R. I. 541.

South Carolina.— McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583.

Texas.— Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

Vermont.— Hill *v.* Barre Nat. Bank, 56 Vt. 582; Shaw *v.* Pickett, 26 Vt. 482.

Wisconsin.— Wood *v.* Hustis, 17 Wis. 416.

United States.— Thompson *v.* Hubbard, 131 U. S. 123, 9 S. Ct. 710, 33 L. ed. 76; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; New York Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825 [*citing* Pollard *v.* Bailey, 20 Wall. (U. S.) 520, 22 L. ed. 376; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Garrett *v.* Sayles, 1 Fed. 371; James *v.* Atlantic Delaine Co., 13 Fed. Cas. No. 7,179, 11 Nat. Bankr. Reg. 390.

England.— Stevens *v.* Jeacocke, 11 Q. B. 731; St. Pancras *v.* Batterbury, 2 C. B. N. S. 477.

As illustrating this rule, generally, see Copyright; Corporations; Eminent Domain; Fish and Game; Forcible Entry and Detainer; Railroads; Taxation; and cases cited *supra*, this note.

Law of necessity.— At common law, property might be destroyed by a party acting under the overruling law of necessity, without any liability for resulting damage; and if a statute requires compensation for the injury and provides a remedy whereby the damage may be ascertained and recovered, such remedy is exclusive. Russell *v.* New York, 2 Den. (N. Y.) 461; New York *v.* Lord, 17 Wend. (N. Y.) 285 [*affirmed* in 18 Wend. (N. Y.) 126]; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

Liability to support parent.— The common law imposes no liability upon a child to support his parent; and where such duty is created by a statute which also provides a remedy, the statutory remedy is the only one which can be invoked. Gilbert *v.* Lynes, 2 Root (Conn.) 168; Waterbury *v.* Hurlburt, 1 Root (Conn.) 60; Edwards *v.* Davis, 16 Johns. (N. Y.) 281. See also Poor Persons.

Parties in pari delicto.— Where, by statute, a party is permitted to recover back usurious interest paid by him, and a particular remedy is prescribed for that purpose, such remedy is exclusive and no action at common law will lie. Crosby *v.* Bennett, 7 Metc. (Mass.) 17; Wiley *v.* Yale, 1 Metc. (Mass.) 553; Thurston *v.* Prentiss, 1 Mich. 193; Hill *v.* National Bank, 56 Vt. 582. So of a statutory remedy for the recovery back of money lost on a wager or in gaming. McKeon *v.* Caherty, 3 Wend. (N. Y.) 494. See also Contracts; Gaming.

Remedy against state.— Since no action or suit can be maintained against a state without its consent, when a statute giving consent prescribes a particular mode of proceeding the statutory remedy must be pursued. White *v.* Wilkins, 24 Me. 299. To same effect, Dale County *v.* Gunter, 46 Ala. 118; Brown *v.* White Deer Tp., 27 Pa. St. 109.

Right to enforce debt of decedent against real estate.— A court of chancery, in the absence of a statute, has no power to reach the real estate of a decedent unless the creditor has an equity in the form of a charge or encumbrance; and where a statute gives a right to have a simple-contract debt paid out of the proceeds of a sale of lands, with a mode of procedure clearly defined, that remedy only can be pursued. Hargrove *v.* Baskin, 50 Miss. 194.

6. See *supra*, I, J.

Remedies for public wrongs.— For the application of the rules of law governing exclusive and cumulative remedies to statutes creating new offenses punishable as crimes and misdemeanors or by penalties or forfeitures, or giving new remedies for acts already criminal, see Criminal Law; Penalties.

Criminal and penal statutes giving civil remedy.— An act making a party who obtains possession of money or property by false representations, or who wilfully withholds or misapplies money, liable on summary conviction to a penalty, and which further provides that he may be ordered to deliver up all such property or to repay the money improperly applied under penalty of being imprisoned for failure to obey such order, is merely cumulative of the appropriate common-law remedy to recover it back; or, more correctly speaking, an alternative remedy, because, if a party chooses to take the statutory remedy and gets judgment for repayment he cannot afterward, according to ordinary principles, bring an action for the same debt. Vernon *v.* Watson, [1891] 2 Q. B. 288, 64 L. T. Rep. N. S. 728, 39 Wkly. Rep. 519. Where a statute makes it a

F. Instruments of Remedy — 1. In General. The instruments whereby judicial remedy is obtained are a diversity of suits and actions.[7]

2. Definitions and Terminology— a. "Action." Many definitions of "action" have been given by law-writers and courts. Definitions drawn from the civil law by early common-law authorities, and approved by numerous decisions since, are: an action is nothing less than the right to pursue to judgment that which is one's due;[8] and, an action is the lawful demand of one's right.[9] With these definitions

crime for a person charged with the safe-keeping and disbursement of public moneys to convert the same or to invest or loan it, or for a person to advise, aid, or participate in such wrong-doing, and at the same time provides a fine in double the amount of money or property embezzled, which shall operate as a judgment for the use of the injured party, such statutory remedy is exclusive as to the person assisting or advising, as there was no preëxisting cause of action. As to the public officer, however, he would be liable for the embezzlement independent of the statute, and the remedy is cumulative. Hancock County *v.* Findley First Nat. Bank, 32 Ohio St. 194. *Contra*, that the remedy against the officer is also exclusive, Wayne County *v.* Bressler, 32 Nebr. 818, 49 N. W. 782. Where a penal statute imposes a new duty, as that certain stories of all buildings shall be provided with suitable fire-escapes, and that these shall not be encumbered in any way, and at the same time provides a civil remedy by injunction to restrain any violation of the act, such remedy is exclusive, and no other action or suit can be brought by a party aggrieved by breach of the statute. Grant *v.* Slater Mill, etc., Co., 14 R. I. 380. *Compare supra*, II, E, 4, b.

7. 3 Bl. Comm. 116 [*approved* by Marshall, C. J., in Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257]. To same effect, Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125; Webster *v.* County Com'rs, 63 Me. 27; Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539.

8. The *actio nihil aliud est quam jus prosequendi in judicio quod alicui* (*sibi*) *debetur* of Justinian and Bracton. Justinian Inst., 4, 6, *de Actionibus;* Bracton, lib. 3, c. 1; Altham's Case, 8 Coke 150*b et seq.;* Coke Litt. 285*a*; 3 Bl. Comm. 116; 1 Bouvier L. Dict. Also the following cases:

Indiana.— Brewington *v.* Lowe, 1 Ind. 21, 48 Am. Dec. 349.

Kentucky.—Johnston *v.* Com., 1 Bibb (Ky.) 598.

Maine.— Webster *v.* County Com'rs, 63 Me. 27; Bridgton *v.* Bennett, 23 Me. 420.

New York.— Durant *v.* Albany County, 26 Wend. (N. Y.) 66, per Verplanck, Senator; People *v.* Colborne, 20 How. Pr. (N. Y.) 378; People *v.* Sage, 3 How. Pr. (N. Y.) 56.

Pennsylvania.— Jacoby *v.* Shafer, 105 Pa. St. 610.

England.—Bradlaugh *v.* Clarke, 8 App. Cas. 354.

Canada.— Frontenac County *v.* Kingston, 30 U. C. Q. B. 584.

Norman-French equivalent.— Lord Coke (Coke Litt. 284*b*, 285*a*, and Reports pt. 8, 151*a*), adopts Bracton's definition of an "action:" "*Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur;*" also giving (in the former of those places) its equivalent in Norman-French: "*Action n'est auter chose que loyall demande de son droit.*" Bradlaugh *v.* Clarke, 8 App. Cas. 354.

Scope of definition.— Action is here defined rather as the right to sue than as the formal means whereby a party makes his demand in court (Bouvier L. Dict.; Webster *v.* County Com'rs, 63 Me. 27); but it is now generally held to refer to the suit or process itself. Thus it is said that the popular meaning of the word "action," as expressed in the language of Justinian, *jus prosequendi in judicio quod alicui debetur*, is precisely the same as defined by Webster; namely, that an action is "a suit or process by which a demand is made of a right in a court of justice; a claim made before a tribunal." Jacoby *v.* Shafer, 105 Pa. St. 610, 615. To same effect, Bouvier L. Dict.; Badger *v.* Gilmore, 37 N. H. 457.

9. Mirror C. 2, § 1; 3 Bl. Comm. 116; Coke Litt. 285*a*. Also the following cases:

Indiana.— Brewington *v.* Lowe, 1 Ind. 21, 48 Am. Dec. 345.

Maine.— Webster *v.* County Com'rs, 63 Me. 27; Bridgton *v.* Bennett, 23 Me. 420.

Massachusetts.— Valentine *v.* Boston, 20 Pick. (Mass.) 201.

Nevada.— Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

New Hampshire.— Badger *v.* Gilmore, 37 N. H. 457.

New York.— Hibernian Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Durant *v.* Albany County, 26 Wend. (N. Y.) 66; Farrington *v.* Freeman, 2 Edw. (N. Y.) 572; People *v.* Colborne, 20 How. Pr. (N. Y.) 378; People *v.* Sage, 3 How. Pr. (N. Y.) 56.

Tennessee.— Lightfoot *v.* Grove, 5 Heisk. (Tenn.) 473.

United States.— Foot *v.* Edwards, 3 Blatchf. (U. S.) 310, 9 Fed. Cas. No. 4,908; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23.

Code definition.— In Georgia an action is defined by the code as the judicial means of enforcing a right. Austell *v.* Swann, 74 Ga. 278; Mitchell *v.* Georgia R. Co., 68 Ga. 644; George *v.* Gardner, 49 Ga. 441. See also *infra*, II, F, 3, c, (II).

Origin.— Blackstone traces his definition back to the civil law, in which Cicero defines an action to be "the means by which men litigate with each other." People *v.* Colborne, 20 How. Pr. (N. Y.) 378 [*citing* 3 Bl. Comm. 117].

as a basis, others varying more or less in unimportant detail have been framed from time to time.[10]

b. "Suit." The common-law definitions of "action" just given[11] are applied indiscriminately to the term "suit,"[12] and the various other ways in which it is defined bring in no new elements.[13]

c. "Cause" and "Case." In any legal sense the words "cause" and "case," and like general expressions, are convertible terms with "action" and "suit," having the same use in law.[14]

10. Miscellaneous definitions.— The lawful demand of, or the formal means or method of pursuing and recovering, one's right in a court of justice. Anderson L. Dict.; Burrill L. Dict.; State *v.* Newell, 13 Mont. 302, 34 Pac. 28; Patterson *v.* Murray, 53 N. C. 278; Taylor *v.* Kelly, 80 Pa. St. 95; State *v.* One Bottle of Brandy, etc., 43 Vt. 297. The lawful demand of one's rights in a form given by law. Hall *v.* Decker, 48 Me. 255 [*cited* in Evans *v.* Evans, 105 Ind. 204, 5 N. E. 24, 768]. The form of a suit given by the law to recover a thing. Termes de la Ley, Action; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508; Badger *v.* Gilmore, 37 N. H. 457 [*cited* in Evans *v.* Evans, 105 Ind. 204, 5 N. E. 24, 768]; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23. Any judicial proceeding which, if conducted to a termination, will result in a judgment. People *v.* Rensselaer County Judge, 13 How. Pr. (N. Y.) 398 [*cited* in People *v.* Colborne, 20 How. Pr. (N. Y.) 378]. See also Evans *v.* Evans, 105 Ind. 204, 5 N. E. 24, 768; Willey *v.* Shaver, 1 Thomps. & C. (N. Y.) 324. A remedial instrument of justice whereby redress is obtained for any wrong committed or right withheld. Durant *v.* Albany County, 26 Wend. (N. Y.) 66 [*citing* 3 Bl. Comm. 3]. A judicial proceeding for the prevention or redress of a wrong. Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539.

11. See *supra*, II, F, 2, a.

12. *Connecticut.*— Magill *v.* Parsons, 4 Conn. 317.

Illinois.— McPike *v.* McPike, 10 Ill. App. 332.

New Hampshire.— Badger *v.* Gilmore, 37 N. H. 457 [*citing* 3 Bl. Comm. 116].

New York.— People *v.* Clarke, 10 Barb. (N. Y.) 120.

Pennsylvania.— McBride's Appeal, 72 Pa. St. 480.

United States.— Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257, per Marshall, C. J.

13. "Suit" defined.— A "suit" is the prosecution or presentation of some claim, demand, or request. In law language it is the prosecution of some demand in a court of justice. Story Comm. Const. §§ 17, 19; Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23. To similar effect see:

Connecticut.— Harris *v.* Phoenix Ins. Co., 35 Conn. 310.

Georgia.— Chisholm *v.* Lewis, 66 Ga. 729; Hendrix *v.* Kellogg, 32 Ga. 435.

Illinois.— McPike *v.* McPike, 10 Ill. App. 332.

Indiana.— Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125.

Iowa.— Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40.

Montana.— State *v.* Newell, 13 Mont. 302, 34 Pac. 28.

New Hampshire.— Badger *v.* Gilmore, 37 N. H. 457.

New York.—Hall *v.* Bartlett, 9 Barb. (N. Y.) 297.

Pennsylvania.— Ulshafer *v.* Stewart, 71 Pa. St. 170 [*citing* Webster Dict.].

Wisconsin.— Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443 [*citing* Burrill L. Dict.].

United States.— Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481, per Marshall, C. J.; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 408, 5 L. ed. 257, per Marshall, C. J., who said: "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptation of language, to continue that demand."

Origin of term.— The word "suit" was undoubtedly derived originally from *secta*, or suit of witnesses, which every plaintiff was required to produce, or offer to produce, when he preferred his claim in court. *Inde producit sectam* — thereupon he brings suit — a form of words still continued. Ulshafer *v.* Stewart, 71 Pa. St. 170 [*citing* 3 Bl. Comm. 295]. Bouvier gives the origin of the word "suit" thus: Latin *secta*; from Latin *sequi*, to follow. Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446; Clafflin *v.* Robbins, 1 Flipp. (U. S.) 603, 5 Fed. Cas. No. 2,776.

14. "Cause."—*Ex p.* Milligan, 4 Wall. (U. S.) 2, 112, 18 L. ed. 281, wherein it was said: "Webster defines the word 'cause' thus,— 'a suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right,'— and he says, 'this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive.'" Than "cause" a term more comprehensive could not readily be selected. Bridgton *v.* Bennett, 23 Me. 420.

"Case."— A suit or action; a cause. The Latin *casus* had formerly the same meaning. Bracton, fol. 301*b*; 1 Burrill L. Dict. Cases at law signify nothing more than actions at law. Chumasero *v.* Potts, 2 Mont. 242. A case in law or equity is a suit or proceeding in court,

d. Essential Elements — (I) *In General.* It results from the rules of law governing legal rights and remedies, hereinbefore discussed, that to every judicial action is necessary a cause of action, and a remedy whereby it can be enforced or redressed.[15]

(II) *Parties and Judge.* It is sometimes said to be also necessary that there be a plaintiff, a defendant, and a judge to every action or judgment.[16] But

invoking the exercise of judicial power, and consisting as well of the parties as of their rights. Piqua Branch Bank *v.* Knoup, 6 Ohio St. 342. To come within the description of a case in law or equity a question must assume a legal form for forensic litigation and judicial proceeding. Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181. To same effect, Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204 See also, generally, Constitutional Law; Courts; Removal of Causes.

Term "special cases," in a constitutional provision that "the county court shall have jurisdiction in cases arising in justices' courts and in special cases as the legislature may prescribe, but shall have no original civil jurisdiction except in such special cases," has been held in New York to mean all cases which the legislature shall specify, whether common-law actions, suits in equity, or special proceedings. Arnold *v.* Rees, 18 N. Y. 57, 7 Abb. Pr. (N. Y.) 328, 17 How. Pr. (N. Y.) 35 [*overruling* in effect Kundolf *v.* Thalheimer, 12 N. Y. 593 (*reversing* 17 Barb. (N. Y.) 506); Hall *v.* Nelson, 23 Barb. (N. Y.) 88; *disapproving dicta* in Doubleday *v.* Heath, 16 N. Y. 80].

Contra, in California, however, where "special cases" have been held to refer only to special proceedings, or those not known to the general framework of courts of common law and equity. Ryan *v.* Tomlinson, 31 Cal. 11; Dorsey *v.* Barry, 24 Cal. 449; McNiel *v.* Borland, 23 Cal. 144; Ricks *v.* Reed, 19 Cal. 551; Jacks *v.* Day, 15 Cal. 91; Saunders *v.* Haynes, 13 Cal. 145; Small *v.* Gwinn, 6 Cal. 447; Parsons *v.* Tuolumne County Water Co., 5 Cal. 43, 63 Am. Dec. 76; Brock *v.* Bruce, 5 Cal. 279. See, generally, Courts.

Although the code has narrowed the definition of "action" so as to exclude a special proceeding, the later is a "case" within a statutory provision governing allowances in special cases. Carpenter *v.* Jones, 121 Cal. 362, 53 Pac. 842.

Generic sense of these terms — Cause of action and not remedy.—The primary meaning of the word "case," according to lexicographers, is "cause." When applied to legal proceedings it imports a state of facts which furnish occasion for the exercise of the jurisdiction of a court of justice. In this, its generic sense, the word includes all cases, special or otherwise. Kundolf *v.* Thalheimer, 12 N. Y. 593 [*cited* in Benson *v.* Cromwell, 6 Abb. Pr. (N. Y.) 83]; Beecher *v.* Allen, 5 Barb. (N. Y.) 169.

Suits by statute process.—The term "cause" is sufficiently comprehensive to include suits by statute process. Bridgton *v.* Bennett, 23 Me. 420.

The term "civil matters," used in a statute, must be as broad in meaning as "civil cases," and if so it includes both actions and special proceedings. College of Physicians, etc. *v.* Guilbert, 100 Iowa 213, 61 N. W. 453.

15. Every judicial action has in it certain necessary elements: A primary right belonging to plaintiff, and a corresponding primary duty devolving upon defendant; a delict or wrong done by defendant, which consists in a breach of such primary right and duty; a remedial right in favor of plaintiff, and a remedial duty vesting on defendant springing out of this delict; and finally the remedy or relief itself. Every action, however simple, must contain these essential elements, and, however complicated, it has no more. Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1 [*citing* Pomeroy Rem. and Rem. Rights, § 453]. To same effect see Clark *v.* Eddy, 22 Cinc. L. Bul. 63, 10 Ohio Dec. (Reprint) 539; Hayes *v.* Clinkscales, 9 S. C. 441 [*approved* in Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406]. For cause of action see *supra,* I.

16. Parties and judge as elements.— The *actor, reus,* and *judex* of the early writers. Bouvier L. Dict.; Heath *v.* Bates, 70 Ga. 633; Hundley *v.* Lincoln Park Com'rs, 67 Ill. 559; Johnston *v.* Com., 1 Bibb (Ky.) 598 [*citing* Coke Litt. 39*a*]; Piat *v.* Allaway, 2 Bibb (Ky.) 554; Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401; Bruce *v.* Fox, 1 Dana (Ky.) 447; People *v.* Colborne, 20 How. Pr. (N. Y.) 378, 380, wherein it was said by Potter, J.: "Bracton, I think, embodies the whole idea of an action much better in the Latin expression *trinus actus trium personarum,* which seems to include not only the act of a plaintiff, who makes a lawful demand, and the act of a defendant, in opposition; but also the act of a court in passing judgment between the parties. This is full and comprehensive, and, I think, best expresses our notion of a legal action in the ordinary understanding of the term. This would include the less comprehensive and less perspicuous definition of an action given in the code (§ 2), to wit: 'An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense,' as well as the more apt conclusion of Justice Harris in People *v.* Rensselaer County Judge, 13 How. Pr. (N. Y.) 398, 400, in which he says: 'Any judicial proceeding which, if conducted to a termination, will result in a judgment, is an action.'"

The term "action" is sometimes defined on the basis that these elements are necessary.

while this is true enough when "action" is used in the sense of meaning only ordinary actions or suits, it does not accurately define it in its comprehensive and usual sense. As "the lawful demand of one's right" it also includes original judicial proceedings on *ex parte* applications and in other lawful modes different from the ordinary.[17]

3. What Proceedings Are Actions or Suits — a. In General. The words "action" and "suit," where there is nothing in the particular connection compelling a different construction, are sometimes distinguished. In a narrow sense "action" has been held to refer only to the ordinary common-law civil actions, "suit" only to bills in equity.[18] Again, "suit" is frequently held to have a more comprehensive use than "action," including all civil proceedings, "action" having reference only to the ordinary forms of proceedings at law,[19] and to them only until judgment.[20] As a general rule, however, the terms "suit" and "action"

Thus, it is "the legal and formal demand of one's right from another person or party, made and insisted on in a court of justice." Black L. Dict.; Bouvier L. Dict. To same effect:

Alabama.— Martin *v.* Tally, 72 Ala. 23.

Georgia.— Chisholm *v.* Lewis, 66 Ga. 729.

Montana.— State *v.* Newell, 13 Mont. 302, 34 Pac. 28.

Nevada.—Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098.

Ohio.— Rawson *v.* Boughton, 5 Ohio 328.

Washington.— State *v.* Schomber, (Wash. 1900) 63 Pac. 221.

Wisconsin.— State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

Instances of proceedings held not to be actions on this ground are: the removal of a guardian by a county court, which may act upon its own knowledge, or even suspicion, without the intervention of a actor or plaintiff, and according to its own discretion uncontrolled by any settled rules of law (Piat *v.* Allaway, 2 Bibb (Ky.) 554); a proceeding for contempt, there being no actor whose right or demand is to be affirmed or concluded by the decision thereon (Johnston *v.* Com., 1 Bibb (Ky.) 598); an order of a county court declaring the office of the clerk of said court vacant, and appointing another to fill the supposed vacancy (Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401).

17. Bruce *v.* Fox, 1 Dana (Ky.) 447, and cases cited *infra*, II, F, 3, a. Thus "action," in its legal sense, includes an *ex parte* application to a court by one claiming the office of district attorney by appointment, to be allowed to take the oath of office and proceed with the duties thereof; or by one to obtain a license to practise as an attorney. Bruce *v.* Fox, 1 Dana (Ky.) 447.

18. Mahar *v.* O'Hara, 9 Ill. 424; McPike *v.* McPike, 10 Ill. App. 332; Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125.

19. Burrill L. Dict.; also the following cases:

Illinois.— McPike *v.* McPike, 10 Ill. App. 332.

Iowa.— Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

New York.— Hall *v.* Bartlett, 9 Barb. (N. Y.) 297; Durant *v.* Albany County, 26 Wend. (N. Y.) 66; Didier *v.* Davison, 10 Paige (N. Y.) 515; People *v.* Colborne, 20 How. Pr. (N. Y.) 378.

North Carolina.— Patterson *v.* Murray, 53 N. C. 278.

Pennsylvania.— Ulshafer *v.* Stewart, 71 Pa. St. 170.

Wisconsin.— Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443; State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

Practically the term "action" is now exclusively appropriated to those forms of judicial remedy which are ranked under the threefold division of real, personal, and mixed actions. Patterson *v.* Murray, 53 N. C. 278.

Special proceedings.— The word "suit" being a more comprehensive term than "action," a statutory proceeding to condemn land for a street is included within a statute allowing arbitration of suits. Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40. In some of the codes and practice acts the classification of remedies and the definition given to the term "action" exclude special proceedings; but they are included within the comprehensive and usual meaning of the word "suit." Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443.

20. *Missouri.*— Bolton *v.* Lansdown, 21 Mo. 399.

New Jersey.— Tichenor *v.* Collins, 45 N. J. L. 123.

New York.— Hall *v.* Bartlett, 9 Barb. (N. Y.) 297; Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11.

Pennsylvania.— Ulshafer *v.* Stewart, 71 Pa. St. 170.

United States.— Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253.

England.— Altham's Case, 8 Coke 150b.

Thus a release of all actions is no bar to an execution, for by the judgment the action is determined, for the judgment is the end of the action,— *jus prosequendi in judicio.* Altham's Case, 8 Coke 150b. To same effect, Bolton *v.* Lansdown, 21 Mo. 399; Tichenor *v.* Collins, 45 N. J. L. 123.

Otherwise of the word "suit," the legal sense of which adheres to the case after the rendering of the judgment. Ulshafer *v.*

receive the same definition in law [21] and are synonymous terms, used interchangeably to include not only the ordinary forms of proceedings at law and in equity, but every proceeding in a court of justice, whatever its form or character,[22] including special proceedings and civil proceedings different from the usual remedies, having their origin in the statute law.[23] In their most extended sense

Stewart, 71 Pa. St. 170; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253, per Marshall, C. J. Thus an execution and levy is a pending suit within a statute which excepts such suits from a provision taking away the powers of county officers over suits begun in a territory cut off from that county and annexed to another. Ulshafer *v.* Stewart, 71 Pa. St. 170.

21. See *supra*, II, F, 2.

22. Bouvier L. Dict.

Connecticut.—White *v.* Washington School Dist., 45 Conn. 59; Harris *v.* Phoenix Ins. Co., 35 Conn. 310; Magill *v.* Parsons, 4 Conn. 317.

Illinois.— McPike *v.* McPike, 10 Ill. App. 332.

Indiana.— Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125.

Iowa.— Dullard *v.* Phelan, 83 Iowa 471, 50 N. W. 204 [*citing* Webster Dict.].

Maine.— Bridgton *v.* Bennett, 23 Me. 420.

New York.— People *v.* Clarke, 10 Barb. (N. Y.) 120; Hall *v.* Bartlett, 9 Barb. (N. Y.) 297; Durant *v.* Albany County, 26 Wend. (N. Y.) 66; People *v.* Colborne, 20 How. Pr. (N. Y.) 378.

North Carolina.— Patterson *v.* Murray, 53 N. C. 278.

Ohio.— Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446.

Pennsylvania.— Jacoby *v.* Shafer, 105 Pa. St. 610.

Wisconsin.— State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

United States.— Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481 [*approved* in *Ex p.* Milligan, 4 Wall. (U. S.) 2, 112, 18 L. ed. 281]; Clafflin *v.* Robbins, 1 Flipp. (U. S.) 603, 5 Fed. Cas. No. 2,776; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23.

Manner of commencement immaterial.— Whether the suit or action be commenced by scire facias, capias ad respondendum, or summons, a complaint cannot vary in its essential character. If it be a lawful demand of one's right, made in court, it must be an action. People *v.* Clarke, 10 Barb. (N. Y.) 120. A proceeding commenced by attachment is as much an action, in the full and legal sense of the word, as are ordinary proceedings commenced by summons. Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Jacoby *v.* Shafer, 105 Pa. St. 610. It cannot be objected that the issue of an execution, which is final process, cannot be the commencement of an action, whose initiatory step is the original process; and the broad signification of the term "action" includes a statutory summary proceeding whereby execution may be sued out against sureties upon a judgment against a principal. Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

Replevin is as much an action as any other whatsoever; proceeding in the same manner, and between a plaintiff and a defendant, or avowant, according to the nature of the defense, as other actions. Pearson *v.* Roberts, Willes 668.

To ordinary proceedings both at law and in equity.— The word "actions," contained in a constitutional provision that all pending actions shall continue as if no change had taken place in the government, is used in its largest sense, and includes all civil actions pending in court at the time, whether they are actions at law or in equity. Scott *v.* Smart, 1 Mich. 295. Use of the term "action," in a law which provides for allowing a deduction for usury in actions upon a usurious contract, is not confined to actions at law, but includes also suits in equity. Coatsworth *v.* Barr, 11 Mich. 199. Where a statute of limitations was enacted long before there was any remedy by suit in equity to open an account settled, and afterward an equitable remedy is sanctioned, the statute applies to such suits although it refers in terms only to actions. It cannot be supposed that the legislature intended virtually to repeal the limitations act, and thus to open the door of litigation on subjects which had slept quietly for years upon that statute. Farnam *v.* Brooks, 9 Pick. (Mass.) 212. See LIMITATIONS OF ACTIONS. The word "suit," used in an agreement of parties as to the facts stated in an agreed case, to which they agreed "for the purpose of this suit," means the same as "action." The two words are synonymous. Page *v.* Brewster, 58 N. H. 126. The word "action," as used in the act of congress establishing copyright, means an action either at law or in equity. Thompson *v.* Hubbard, 131 U. S. 123, 9 S. Ct. 710, 33 L. ed. 76.

23. The word "action" will not admit of an interpretation which will limit it to civil actions in which the proceedings were according to the course of the common law. An action is but the legal demand of a right without regard to the form of the proceedings by which that right may be enforced. Bridgton *v.* Bennett, 23 Me. 420. To same effect, Taylor *v.* Kelly, 80 Pa. St. 95. See, generally, cases cited *supra*, note 22; *infra*, this note.

Illustrations.— The term "action" includes a complaint under Me. Rev. Stat. c. 32, for the purpose of compelling a son to support his father, an alleged pauper. Bridgton *v.* Bennett, 23 Me. 420. A proceeding to establish a claim against the estate of a decedent, whether before commissioners ap-

these terms include criminal prosecutions, as indictments, informations, and convictions by a magistrate.[24]

b. As Affected by Rules of Construction. The words denoting the instruments of judicial remedy, when contained in statutes and agreements, should ordinarily be given their usual legal use and meaning.[25] But this is often precluded by the rules of construction, which require expressions used in laws and contracts to be interpreted to conform to the intention of the legislature or of the parties, respectively, where possible.[26]

pointed by the court or before the court itself, is a lawful demand of one's right in a court of justice, and an action or suit. Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412; Davidson *v.* Vorse, 52 Iowa 384, 3 N. W. 477; McBride's Appeal, 72 Pa. St. 480 [*approved* in Taylor *v.* Kelly, 80 Pa. St. 95]; Calderwood *v.* Calderwood, 38 Vt. 171. A statutory proceeding to assess damage caused by the flowage of land by a mill-dam is a lawful demand of one's right in a form given by law, and therefore an action. Hall *v.* Decker, 48 Me. 255. Statutory summary proceedings for the recovery of a debt are included within the definition of an action. For example: a proceeding by execution issued against sureties upon a judgment against the principal (Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Banks *v.* Brown, 4 Yerg. (Tenn.) 198); a proceeding before a justice of the peace, wherein he appoints commissioners to determine the rights of parties as to a partition fence, and if the amount found due from any party is not paid within ten days thereafter, enters up judgment, and issues execution for the same (Lightfoot *v.* Grove, 5 Heisk. (Tenn.) 473). A proceeding for the probate of a will is within the broad signification of the word "action." Jackman Will Case, 27 Wis. 409. *Contra*, Hunter's Will, 6 Ohio 499; and see also WILLS. A proceeding before the court of a justice of the peace in pursuance of the mechanic's lien law is an action. People *v.* Rensselaer County Judge, 13 How. Pr. (N. Y.) 398. A statutory proceeding by motion and notice in a circuit court, to collect from employees, lessees, assignees, or receivers of a railroad a judgment for injuries to animals, rendered by a justice of the peace against the railway corporation, is a civil action. Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733. A code proceeding for the foreclosure of a mortgage on real estate, providing a simple and cheap substitute for a bill in equity for that purpose, is a judicial means of enforcing a right and constitutes a suit or action. George *v.* Gardner, 49 Ga. 441. A proceeding for a divorce, which, although provided by statute, is based on the preëxisting remedies which the law afforded for that purpose, is for the redressing of a supposed wrong, or the establishment of an alleged right, and constitutes a suit or action. McPike *v.* McPike, 10 Ill. App. 332. For titles in which questions such as these frequently arise see APPEAL AND ERROR; COURTS; LIMITATIONS OF ACTIONS; REMOVAL OF CAUSES; VENUE.

24. Weeks *v.* Forman, 16 N. J. L. 237; Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446 [*citing* Bouvier L. Dict.]; State *v.* Carr, 6 Oreg. 133; State *v.* Schomber, (Wash. 1900) 63 Pac. 221 [*citing* Bouvier L. Dict.], wherein it was said that both "civil and criminal actions are included within the definition [by Bouvier] of the term 'action.' In one instance the demand is made to the court by an individual for the infringement of a private right. In the other the demand is made to the court by the sovereign for the redress of a public injury." *Contra*, that an action is the legal demand of a civil right, Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

The words "action at law," taken in their ordinary signification, do not mean "civil actions at law." A proceeding by indictment is an action at law, and is included within an act which provides that "all fines and forfeitures under the provisions of this act shall be recovered by an action at law to be brought in the name of the state of Oregon." State *v.* Carr, 6 Oreg. 133.

Classification of actions.— A common instance of this use of the terms "action" and "suit" appears in one of the classifications of actions which has obtained from very early times, and is incorporated into the codes and practice acts of several of the states,— that of civil and criminal. Comyn Dig., Action, D, 1 [*cited* in Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667]; Bacon Abr., Actions in General, (A); Jacob L. Dict.

For the code and practice act classification see *infra*, II, F, 3, c, (II).

In Iowa every proceeding is an action, and is civil, special, or criminal. Iowa Code (1897), § 3424; College of Physicians, etc. *v.* Guilbert, 100 Iowa 213, 61 N. W. 453.

25. Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23.

"Special proceeding."— Many of the codes and practice acts divide remedies into actions and special proceedings. Under these the term "special proceeding" has a fixed legal meaning, and when used in different statutes it is presumed that it is intended to convey that meaning, unless there is something in the statute itself which decrees otherwise. Matter of Jetter, 78 N. Y. 601.

26. *Connecticut.*—Stiles's Appeal, 41 Conn. 329.

Georgia.— Gilbert *v.* Thomas, 3 Ga. 575.

Idaho.— People *v.* Green, 1 Ida. 235.

Massachusetts.— Valentine *v.* Boston, 20 Pick. (Mass.) 201.

c. As Changed by Statute — (1) *In General.* The ordinary legal use of the words "action," "suit," and synonymous terms is also sometimes narrowed by statutes having a more direct bearing thereon than that which results from the rules of construction.[27]

Washington.— State *v.* Schomber, (Wash. 1900) 63 Pac. 221.

England.— Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667; Guthrie *v.* Fisk, 5 D. & R. 24.

Illustrations — "Action" or "suit."—Where it was the intention of a statute, in using the word "action," to include only the ordinary common-law actions, it will not include special statutory proceedings, such as bastardy cases, the assessment of damages under mill acts, or statutes providing for the laying out of highways. Valentine *v.* Boston, 20 Pick. (Mass.) 201. The words "actions and suits," contained in an act which empowers a society to commence and prosecute "all actions and suits" in the name of their secretary, are by no means to be extended so far as to include the suing out of a commission of bankruptcy against a debtor of the society. Guthrie *v.* Fisk, 5 D. & R. 24. While the word "action" is comprehensive enough to include both criminal and civil actions, it should not be given that construction, when contained in a statute, if a consideration of the scope of the civil and criminal law requires that it be confined in its use to one kind only. Thus a statute permitting certain persons to intervene in actions has no application to a quasi-criminal proceeding (People *v.* Green, 1 Ida. 235), and a statute that "all actions commenced before a justice of the peace shall be brought in the justice's court of the precinct in which one or more of the defendants reside" should be limited to include only civil actions (State *v.* Schomber, (Wash. 1900) 63 Pac. 221, wherein the court said: "Where the language of the statute is free from ambiguity, and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation. But where different statutes bear upon each other, and they would be rendered inconsistent, or absurd, or not constitutional by such literal interpretation, a departure from the obvious meaning of the words is justifiable"). Under an act of parliament establishing a penalty to be recovered by action, the word "action" is not to be construed as including indictments or criminal informations unless it is apparent that they were intended to be included. Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667. See also Penalties.

"Case."— Where the word "case," used in a law conferring appellate jurisdiction, refers more properly to actions at law and suits in chancery, it is not to be construed as including statutory proceedings, such as that for canvassing votes cast at an election. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; People *v.* Smith, 51 Ill. 177; Moore *v.* Mayfield, 47 Ill. 167; French *v.* Lighty, 9 Ind. 475. While the expression "civil cases" is broad enough to include equity cases, it will be held not to include them if excluded by the necessary construction of the constitutional or statutory provision in which the expression is found. Gilbert *v.* Thomas, 3 Ga. 575 [*explaining* Grimball *v.* Ross, T. U. P. Charlt. (Ga.) 175, which latter case is *approved* in Isaacs *v.* Tinley, 58 Ga. 457].

"Special proceedings."— A remedy which, under the code classification, is more properly a special proceeding than an action, must nevertheless be held to be a civil action under many of the statutes affecting proceedings in civil actions; as, for example, laws relating to the venue (Lester *v.* Lester, 70 Ind. 201; Whitney *v.* Atlantic Southern R. Co., 53 Iowa 651, 6 N. W. 32; State *v.* Clark, 46 Iowa 155), or a constitutional provision prohibiting imprisonment for debt in civil actions. (*Ex p.* Smith, 53 Cal. 204).

27. **Illustrations.**— Filing a statement and entering a judgment by confession do not constitute an action or suit under a code provision that "a judgment by confession is one entered without action." Therefore a clause contained in a note thus put in judgment, that there shall be paid, as part of the amount due, "a reasonable attorney's fee if sued," is not operative. Dullard *v.* Phelan, 83 Iowa 471, 50 N. W. 204. A statutory provision that "all civil actions except scire facias and other special writs shall be commenced by original writs" confines the term "action" to those brought in a court of law in the usual forms, and does not include statutory proceedings not thus commenced; as, for example, petitions before a board of county commissioners for the location of highways, or proceedings in insolvency. Belfast *v.* Fogler, 71 Me. 403; Webster *v.* County Com'rs, 63 Me. 27.

Use of qualifying words.— The terms "action" and "case," when qualified by the words "at law" or "at common law," in constitutional provisions preserving inviolable the right of trial by jury, refer to suits in which legal rights are ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies administered; or where, as in admiralty, a mixture of public law and maritime law and equity are often found in the same suit; or where the remedy is a special proceeding for the enforcement of a new right or one of the extraordinary remedies. Whallon *v.* Bancroft, 4 Minn. 70; Ford *v.* Wright, 13 Minn. 518; Chumasero *v.* Potts, 2 Mont. 242; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Klever *v.* Seawall, 65 Fed. 393, 22 U. S. App. 715, 12 C. C. A. 661; U. S. *v.* Block 121, 3 Biss. (U. S.) 208, 24 Fed. Cas. No. 14,610. See, generally, Con-

(II) *Codes and Practice Acts* — (A) *Actions.* Actions, as classified and defined in several of the codes and practice acts, include criminal prosecutions and ordinary civil proceedings, but not special proceedings. An action is defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of an offense.[23]

(B) *Special Proceedings* — (1) In General. After thus treating of actions these statutes declare every other remedy to be a special proceeding, without

stitutional Law. "Action" or "case" are frequently qualified by the use of the word "civil" when they include only proceedings, public or private, in which civil rights are enforced, or civil wrongs redressed, in contradistinction to prosecutions for public offenses. Mitchell *v.* Georgia R. Co., 68 Ga. 644; Grimball *v.* Ross, T. U. P. Charlt. (Ga.) 175; Fenstermacher *v.* State, 19 Oreg. 504, 25 Pac. 142; State *v.* One Bottle of Brandy, etc., 43 Vt. 297; State *v.* Schomber, (Wash. 1900) 63 Pac. 221; Rison *v.* Cribbs, 1 Dill. (U. S.) 181, 20 Fed. Cas. No. 11,860. The first section of the act of 1875 relating to the removal of causes uses the expressions, "suits of a civil nature," "civil action," and "civil suit," as synonymous. The second section of that act uses the expressions "suits of a civil nature" and "said suit" in the same sense. The third section of that act uses the expressions "suit," "such suit," "the case," and "action" in the same sense. The same is true of the same words, and also of the word "case," when used in the subsequent sections of the act. Clarkson *v.* Manson, 18 Blatchf. (U. S.) 443, 4 Fed. 257. See also Removal of Causes. When there is an intention to limit the comprehensive signification of the word "action," and apply it only to include common-law civil suits, it becomes necessary to use some other word with it for that purpose, such as personal, real, or mixed. Bridgton *v.* Bennett, 23 Me. 420. The phrase "civil cases at law," contained in a statute relating to appeals, distinguishes a class of remedies from suits in equity and the criminal and quasi-criminal modes of procedure, and comprehends all civil cases at law, whether the action be begun by statute or existed at common law. Mack *v.* Bonner, 3 Ohio St. 366 [*approving* Knoup *v.* Piqua Branch Bank, 1 Ohio St. 603, and *distinguishing* Hoy *v.* Hites, 11 Ohio 254]. See, generally, Appeal and Error. Where it was evidently the intention of the legislature, in statutes relating to the disqualification of persons as witnesses by reason of interest in the event of the proceedings, to give persons the right to testify in all proceedings at law, the words "suit," "action," and "proceeding at law" must be held to be used with reference to the same subject-matter, and substantially held to be synonymous terms, including all proceedings at law. Calderwood *v.* Calderwood, 38 Vt. 171.

The English Judicature Act of 1873, § 100, defines an action as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by the rules of court." Hamlyn *v.* Betteley, 6 Q. B. D. 63. See also *In re* Wallis' Trusts, 23 L. R. Ir. 7.

28. See the statutory provisions and cases cited *infra*, note 29.

Definition construed.— That part of this statutory definition of "action" which relates to civil actions has been construed in one case to mean an action wherein an issue is presented for trial, formed by the averments of the complaint and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegation of the pleadings, and a judgment in such an action is conclusive upon the rights of the parties, and could be pleaded in bar. Deer Lodge County *v.* Kohrs, 2 Mont. 66 [*cited* in Evans *v.* Evans, 105 Ind. 204, 5 N. E. 24, 768].

Includes both legal and equitable suits.— Under these codes and practice acts, and others by which the distinction between actions at law and suits in equity has been abolished and a single form of civil action prescribed (see *infra*, II, J), the term "action" includes all proceedings, as well equitable as legal, which under the preëxisting law were brought in the ordinary or regular forms, and not in some special or anomalous mode.

Montana.— Chumasero *v.* Potts, 2 Mont. 242.

New York.—Corson *v.* Ball, 47 Barb. (N. Y.) 452; Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83; Row *v.* Row, 4 How. Pr. (N. Y.) 133.

North Carolina.— Tate *v.* Powe, 64 N. C. 644; Woodley *v.* Gilliam, 64 N. C. 649.

Ohio.— Corry *v.* Lamb, 43 Ohio St. 390, 2 N. E. 851, and Larwell *v.* Burke, 19 Ohio Cir. Ct. 449; Chinn *v.* Fayette Trustees, 32 Ohio St. 236; Barger *v.* Cochran, 15 Ohio St. 460.

United States.— Central Pac. R. Co. *v.* Dyer, 1 Sawy. (U. S.) 641, 5 Fed. Cas. No. 2,552.

The word "action," used in the chapter of the code relating to attachment, must be deemed to include all civil actions; and, there being nothing in that chapter limiting the remedy of attachment to certain civil actions, the court cannot so limit it by reason of any previously recognized distinction between actions at law and suits in equity. Corson *v.* Ball, 47 Barb. (N. Y.) 452. See also Attachment.

For criminal actions, generally, see Criminal Law.

otherwise defining the term;[29] and it is often a difficult matter to determine whether a particular statutory remedy is an action or a special proceeding.[30]

(2) Distinguished from Actions. The criterion must be whether the proceeding is commenced as the code declares an action shall be commenced — for instance, by summons or warrant, issued in a form, if any, therein provided, or by voluntary appearance — and is between parties, with issues presented by the pleadings which the code requires in actions. If it is of such a character the

29. *Arkansas.*— Dig. Stat. (1894), § 5601 *et seq.*

California.— Code Civ. Proc. § 21 *et seq.*; Carpenter *v.* Jones, 121 Cal. 362, 53 Pac. 842; Matter of Joseph, 118 Cal. 660, 50 Pac. 768; Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206; Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Kansas.— 2 Gen. Stat. (1887), p. 82, §§ 2, 3.

Kentucky.— Bullitt Civ. Code (1899), § 1 *et seq.*

Montana.— Code Civ. Proc. § 3471 *et seq.*; Chumasero *v.* Potts, 2 Mont. 242.

New York.—Code Civ. Proc. § 3333 *et seq.*; Roe *v.* Boyle, 81 N. Y. 305; Matter of Jetter, 78 N. Y. 601; Hallahan *v.* Herbert, 57 N. Y. 409; Matter of Cooper, 22 N. Y. 67; Ketchum *v.* Buffalo, 14 N. Y. 356; Belnap *v.* Waters, 11 N. Y. 477; People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Matter of Rafferty, 14 N. Y. App. Div. 55, 43 N. Y. Suppl. 760.

North Carolina.— Clark's Code Civ. Proc. § 125 *et seq.*

North Dakota.— Rev. Codes, § 5155 *et seq.*

Oklahoma.— Stat. 1893, § 3875 *et seq.*

South Carolina.— Code Civ. Proc. § 1 *et seq.*; Allen *v.* Partlow, 3 S. C. 417.

South Dakota.—Annot. Stat. § 6010 *et seq.*

Wisconsin.— Stat. § 2594 *et seq.*; Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443.

See also, generally, other cases cited *infra*, this subdivision.

An "ordinary" or "regular" proceeding.— The word "ordinary," in the code definition of an action, or "regular," as the early New York code had it, was used by the legislature as opposed to "special," to distinguish actions from special proceedings. Hyatt *v.* Seeley, 11 N. Y. 52; Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83.

30. Tate *v.* Powe, 64 N. C. 644, 646, wherein it was said: "It might have been expected that . . . the code commissioners would have marked the dividing line between civil actions and special proceedings. But it is not so, for the reason, as may be presumed, it was a perplexing subject, fit to be left to judicial legislation. The questions occur every day. The mode of procedure is one of instant, pressing necessity, and this court must assume the task."

Comments on definitions — Law previous to the code.—This classification of judicial remedies into actions or special proceedings, and the code definitions of each, are held in one case not to be remarkable for their perspicuity or distinctness. People *v.* Rensselaer County Judge, 13 How. Pr. (N. Y.) 398. On the other hand they have been said to be "clear and apt," and it is undoubtedly true that they are entirely consistent with the understanding of the distinction between an ordinary or usual action and a special proceeding, under the law previous to the code, and not an entirely new departure. Matter of King, 42 Hun (N. Y.) 607; Holstein *v.* Rice, 15 Abb. Pr. (N. Y.) 307; Arnold *v.* Rees, 18 N. Y. 57, 7 Abb. Pr. (N. Y.) 328, 17 How. Pr. (N. Y.) 35, wherein it was held that there is and always has been a known distinction between "cases" at law or in equity, and "proceedings" of a special character which do not take on the form of an ordinary action; but are instituted and carried on in some peculiar and anomalous mode.

"Action" and "special proceeding" not synonymous terms.— Nearly all, if not all, special proceedings are civil in their nature, but it is manifestly the intention of the code to keep clear and definite the distinction between actions and special proceedings, as judicial remedies. To hold the terms interchangeable and synonymous would be inconsistent with the code classification of remedies into actions and special proceedings; and this division of remedies must not be confounded with the definition of "actions," which are all either civil or criminal, while special proceedings are not defined at all. Matter of Joseph, 118 Cal. 660, 50 Pac. 768.

Proceedings out of court.— It was held in early New York cases that to be a special proceeding in the sense of the code there must be a litigation in a court of justice, placing this construction upon the provision that "remedies in courts of justice are divided into actions and special proceedings." Matter of Dodd, 27 N. Y. 629, per Denio, J.; People *v.* Heath, 20 How. Pr. (N. Y.) 304, Davis, J., dissenting; Matter of Extension of Bowery, 12 How. Pr. (N. Y.) 97, 99, wherein it was said: "These remedies [special proceedings] . . . are such as are incident to the powers of a court of general jurisdiction, such as mandamus, prohibition, habeas corpus, and the like." This construction, however, is too narrow and would exclude proceedings instituted before a judicial officer out of court, or before persons appointed by a court and exercising judicial functions, such as commissioners to lay out a highway, and the like: and it has been virtually overruled. People *v.* Boardman, 4 Keyes (N. Y.) 59; Pinckney's Case, 18 Abb. Pr. (N. Y.) 356; Matter of Barnett, 52 How. Pr. (N. Y.) 73; People *v.* Highway Com'rs, 27 How. Pr. (N. Y.) 158; People *v.* Flake, 14 How. Pr. (N. Y.) 527.

proceeding is an action; if not, and yet a remedy and not a mere proceeding in an action, it is a special proceeding.[31]

(3) Of Various Remedies — Illustrations — (a) Statutory Remedies. The greater portion of the remedies which are special under the code provisions here discussed are statutory remedies. Wherever a statute gives a remedy which must be instituted or conducted in a manner different from that prescribed for actions. it is a special proceeding.[32]

(b) Remedies Antedating Code. But there are some anomalous remedies which antedated the code and have survived the changes made by it, and these are also special proceedings.[33]

31. Bowers *v.* Cherokee Bob, 45 Cal. 495; Van Winkle *v.* Stow, 23 Cal. 457; Roe *v.* Boyle, 81 N. Y. 305; Matter of Jetter, 78 N. Y. 601; Hallahan *v.* Herbert, 57 N. Y. 409; Matter of Cooper, 22 N. Y. 67; Hyatt *v.* Seeley, 11 N. Y. 52; Belnap *v.* Waters, 11 N. Y. 477; Matter of Rafferty, 14 N. Y. App. Div. 55, 43 N. Y. Suppl. 760; Bryan *v.* Wilkinson, 16 N. Y. Civ. Proc. 279; Coe *v.* Coe, 37 Barb. (N. Y.) 232; Lane *v.* Salter, 4 Rob. (N. Y.) 239; McLean *v.* Jephson, 26 Abb. N. Cas. (N. Y.) 40, 13 N. Y. Suppl. 834; Mills *v.* Thursby, 2 Abb. Pr. (N. Y.) 432; Crane *v.* Sawyer, 5 How. Pr. (N. Y.) 372; *In re* Ft. Plain, etc., Plank Road Co., 3 Code Rep. (N. Y.) 148; Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443; and other cases cited *infra*, this note.

An action is commenced by the service of a summons in some one of the modes prescribed by law, and it is plain that no proceeding can be an action unless it be such that it can be commenced by the service of summons on the opposite party; and pleadings — that is, the allegations of the cause of action on the one side, and, unless there be default, of the defense upon the other — are incidents of every action. Roe *v.* Boyle, 81 N. Y. 305; Matter of Rafferty, 14 N. Y. App. Div. 55, 43 N. Y. Suppl. 760.

If a remedy, and of so unusual a character as not to come within the code provisions which define and govern actions, it must be a special proceeding. Matter of Holden, 126 N. Y. 589, 27 N. E. 1063; Matter of Jetter, 78 N. Y. 601; Matter of Cooper, 22 N. Y. 67.

Statutory designation.— The fact that a remedy is designated as a special proceeding, or otherwise treated as if it were not an action, by the statute prescribing it, does not necessarily make it a special proceeding; and the question is whether it is such under the general principles which distinguish special proceedings from actions. Tate *v.* Powe, 64 N. C. 644; Woodley *v.* Gilliam, 64 N. C. 649; Corry *v.* Lamb, 43 Ohio St. 390, 2 N. E. 851 [*distinguishing* Chinn *v.* Fayette Trustees, 32 Ohio St. 236]; Klever *v.* Seawall, 65 Fed. 393, 22 U. S. App. 715, 12 C. C. A. 661. *Contra*, Chumasero *v.* Potts, 2 Mont. 242; Mills *v.* Thursby, 2 Abb. Pr. (N. Y.) 432.

Proceedings in actions.— For the distinction between proceedings in an action, and actions and special proceedings, see *infra*, II, F, 3, e.

32. "It is a statutory, and therefore it is a special, proceeding." Per Folger, J., in Matter of Ryers, 72 N. Y. 1, 4, 28 Am. Rep. 88, discussing a remedy given by a drainage act. This case was approved, of a proceeding to acquire land in the exercise of the right of eminent domain, in *In re* Appointment of Park Com'rs, 1 N. Y. Suppl. 763, 17 N. Y. St. 371.

Illustrations of remedies provided by statutes, which fall under the head of special proceedings, are many and various. See:

California.— Van Winkle *v.* Stow, 23 Cal. 457 [*citing* McNiel *v.* Borland, 23 Cal. 144].

Iowa.— Starr *v.* Ingham, 84 Iowa 580, 51 N. W. 175.

Kentucky.— Chandler *v.* Com., 4 Metc. (Ky.) 66.

New York.— Roe *v.* Boyle, 81 N. Y. 305; Matter of Jetter, 78 N. Y. 601; Rensselaer, etc., R. Co. *v.* Davis, 55 N. Y. 145 [*citing* New York Cent. R. Co. *v.* Marvin, 11 N. Y. 276]; Matter of Cooper, 22 N. Y. 67; Hyatt *v.* Seeley, 11 N. Y. 52; Matter of Rafferty, 14 N. Y. App. Div. 55, 43 N. Y. Suppl. 760; Coe *v.* Coe, 37 Barb. (N. Y.) 232; *In re* Ft. Plain, etc., Plank Road Co., 3 Code Rep. (N. Y.) 148; *In re* Long, 15 N. Y. Suppl. 657, 39 N. Y. St. 892; Boyd *v.* Bigelow, 14 How. Pr. (N. Y.) 511.

Wisconsin.— Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443.

Proceeding to obtain discretionary order.— A proceeding by a railroad corporation to procure an order of the court as a condition precedent to constructing its road along a village street is a remedy and a special proceeding notwithstanding the court has the power to refuse the order. Matter of Lima, etc., R. Co., 68 Hun (N. Y.) 252, 22 N. Y. Suppl. 967.

33. By petition in equity.— An important remedy to which the statement made in the text is applicable is that by petition in equity in certain matters of equitable cognizance, where a more summary proceeding than a bill is deemed necessary and proper; as, for example, matters connected with trusts, guardian and ward, insane persons, and the like. Matter of Livingston, 34 N. Y. 555 [*cited* in Riggs *v.* Pursell, 74 N. Y. 370]; Wilcox *v.* Wilcox, 14 N. Y. 575; Matter of King, 42 Hun (N. Y.) 607, 608, wherein it was said: "The practice in this class of cases has been to proceed in a summary manner by petition, and it does not appear to have been intended to be dependent upon or restricted to the ordinary proceedings in an action;" Williams *v.* Cameron, 26 Barb. (N. Y.) 172. A petition for the summary removal of a guardian

(4) How Instituted and Conducted. It was the object of the code to provide an entirely new system of practice only in civil actions. That left special proceedings as they had been provided for at the time when the code was enacted, and subject to the further regulations of them since prescribed by other statutes.[34]

d. Prerogative and Judicial Writs — (1) *As Actions or Suits.* The common-law remedies by prerogative and judicial writs, especially in the forms which they finally assumed by virtue of statutory or other changes, are actions or suits within the usual meaning of those terms in law.[35]

is not brought for the protection or enforcement of any right of the petitioner, or to redress any wrong sustained by him, but to inform the court of the existence of certain facts upon which the exercise of its parental authority has been invoked, and is a special proceeding. Matter of King, 42 Hun (N. Y.) 607.

Statutory changes in old remedies.— Long prior to the advent of the code, remedies more summary than the ordinary or usual ones were given for some rights; as, for example, a proceeding by petition to set apart dower or to obtain a partition of lands. It is most generally held, however, that the civil action of the code is applicable for these purposes in the absence of any express provision of statute by which the statutory remedies were retained. Watson *v.* Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Arnold *v.* Rees, 18 N. Y. 57, 7 Abb. Pr. (N. Y.) 328, 17 How. Pr. (N. Y.) 35; Beecher *v.* Allen, 5 Barb. (N. Y.) 169; Corry *v.* Lamb, 43 Ohio St. 390, 2 N. E. 851. *Contra,* Doubleday *v.* Heath, 16 N. Y. 80; Barger *v.* Cochran, 15 Ohio St. 460; Woodley *v.* Gilliam, 64 N. C. 649; Tate *v.* Powe, 64 N. C. 644, in which case the line between actions and special proceedings was drawn as follows: "Any proceeding that, under the old mode, was commenced by capias ad respondendum, including ejectment, or a bill in equity for a relief, is a 'civil action;' any proceeding that, under the old mode, may be commenced by petition, or motion upon notice, is a 'special proceeding.'" See, generally, Dower; Partition. In some of the early cases it is held that as, under the former system, proceedings for partition could be commenced either by bill or petition, and as the bill has been abolished and the civil action substituted, it follows that the remedies now remaining are the civil action of the code and the old petition. Row *v.* Row, 4 How. Pr. (N. Y.) 133; Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83. But see Backus *v.* Stilwell, 3 How. Pr. (N. Y.) 318; Watson *v.* Brigham, 3 How. Pr. (N. Y.) 290. Statutory changes before the code, affecting the old actions, but which did not make sweeping changes in the remedy, as modifications of the old remedy of *ejectione firmæ,* or of replevin, extensions of the remedies of ejectment or partition to other cases than those to which they formerly had application, do not prevent their being "ordinary proceedings" within the code definition of actions. Arnold *v.* Rees, 18 N. Y. 57, 7 Abb. Pr. (N. Y.) 328, 17 How. Pr. (N. Y.) 35; Beecher *v.* Allen, 5 Barb. (N. Y.) 169; Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83; Woodley *v.* Gilliam, 64 N. C. 649; Tate *v.* Powe, 64 N. C. 644. Divorce cases, having been suits of equitable cognizance under the old system of procedure, are clearly "civil actions" under the code in such a sense at least that the rules of pleading and practice therein provided will apply to them, except to the extent that a different procedure may be provided in a divorce act, and to the extent that it may be apparent that the legislature intended otherwise. Powell *v.* Powell, 104 Ind. 18, 3 N. E. 639 [*explaining* Ewing *v.* Ewing, 24 Ind. 468, and Musselman *v.* Musselman, 44 Ind. 106; *approved* in Evans *v.* Evans, 105 Ind. 204, 5 N. E. 24, 768].

34. Matter of Livingston, 34 N. Y. 555, 575, wherein it was said: "The code has not attempted to regulate the practice in special proceedings, except upon appeals." Somerville *v.* Crook, 9 Hun (N. Y.) 664.

Names of parties.— The names "plaintiff" and "defendant" are by the code given to the parties to a civil action; but there is nothing which prohibits the calling of the complaining party in a special proceeding by the name of "plaintiff," or the adverse party by that of "defendant." Davis *v.* Turner, 4 How. Pr. (N. Y.) 190.

Application of provisions relating to actions.— Some of the codes expressly provide that the provisions thereof which concern the prosecution of civil actions shall apply in special proceedings not otherwise regulated, so far as applicable. See, for instances, Whitney *v.* Atlantic Southern R. Co., 53 Iowa 651, 6 N. W. 32; State *v.* Clark, 46 Iowa 155; Forney *v.* Ralls, 30 Iowa 559. In Indiana, although no such express direction is given by statute, the mode of procedure and rules of practice prescribed for civil actions are held to be applicable to special statutory proceedings for the enforcement of private rights, except where the statute authorizing the special proceeding, expressly or by fair implication, prescribes a different course of procedure or a new practice. Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733; Bass *v.* Elliott, 105 Ind. 517, 5 N. E. 663; Burkett *v.* Holman, 104 Ind. 6, 3 N. E. 406.

35. **Proceeding by habeas corpus,** set in operation by a person for the purpose of testing the validity of his trial and sentence, is a "cause" or "suit" from the beginning, and does not become such only after the writ has been issued and a return made and the contest has become one between two adverse parties. When the petition is filed and the writ prayed for, it is a suit — a suit of the

(II) *As Actions or Special Proceedings.* In jurisdictions where remedies are defined and classified as actions and special proceedings, the prerogative and judicial writs, or remedies substituted in their stead, will be one or the other according as they are to be instituted or conducted as code actions or in some special and anomalous manner.[36]

party making the application. *Ex p.* Milligan, 4 Wall. (U. S.) 2, 12, 18 L. ed. 281. To same effect, Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579 [*cited* in State *v.* Newell, 13 Mont. 302, 34 Pac. 28]. See, generally, HABEAS CORPUS.

Remedy by writ of mandamus, especially in those jurisdictions where the early law that the only remedy for a false return is a separate action on the case is abrogated by statute, which allows the return to be pleaded to and the case proceeded with as an ordinary suit, is an action or a suit brought in a court of justice asserting a right, and prosecuted according to the forms of judicial proceeding. Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33 [*citing* People *v.* Glann, 70 Ill. 232]; Commercial Bank *v.* Canal Com'rs, 10 Wend. (N. Y.) 25; People *v.* Albright, 23 How. Pr. (N. Y.) 306; Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717; Kendall *v.* Stokes, 3 How. (U. S.) 87, 11 L. ed. 506; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 634, 9 L. ed. 1181, Taney, C. J., and two justices dissenting, the former saying: "The general court had authority to issue the writ of mandamus, not because the proceeding was a case or suit at law, but because no case or suit at law would afford a remedy to the party." *Contra,* People *v.* Sage, 3 How. Pr. (N. Y.) 56. See, generally, MANDAMUS.

Scire facias.— For the writ of scire facias see *infra,* II, F, 3, e; II, F, 3, e, (III).

Writ of prohibition is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin or in an action of trespass. Thus the constitutionality of an ordinance is contested; the party aggrieved by it applies to a court, and at his suggestion a writ of prohibition, the appropriate remedy, is issued. Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481. The writ of prohibition is not a part or continuation of the prohibited proceeding by removing it from one court to another for the purpose of adjudication in the latter. It is wholly collateral to that proceeding, and is intended to arrest it and prevent its being further prosecuted in a court having no jurisdiction of the subject. Mayo *v.* James, 12 Gratt. (Va.) 17. To same effect, Planters' Ins. Co. *v.* Cramer, 47 Miss. 200; State *v.* Evans, 88 Wis. 255, 60 N. W. 433. See also, generally, PROHIBITION.

Statutory construction.— Whether a writ of mandamus is technically an "action at law" or not, it is such within Conn. Gen. Stat. tit. 1, § 372, which provides that "whenever any action at law shall be tried by the superior court without a jury, said court shall find, upon the motion of either party, the facts upon which the judgment of said court is founded, and cause such finding to become a part of the record." State *v.* New Haven, etc., Co., 41 Conn. 134, 137. The words "civil cases," contained in an act which provides that "the supreme court shall have no original jurisdiction in civil cases," in their greatest possible extent might comprehend mandamus, for it is an original writ applied as a remedy in a civil case. As there used, however, they must be understood to include only the ordinary or usual civil actions; otherwise, there being no power in inferior courts to issue the writ, there would be a defect of justice on important occasions. Com. *v.* Lancaster County, 6 Binn. (Pa.) 5 [*cited* in State *v.* Jennings, 56 Wis. 113, 14 N. W. 28].

36. Mandamus.— Under many of the codes and practice acts a proceeding by mandamus, whether made a civil action by statute or brought and conducted in the manner described in the preceding note, has been treated as a civil action.

California.— Tyler *v.* Houghton, 25 Cal. 26.

Kansas.— State *v.* Jefferson County, 11 Kan. 66; State *v.* Marston, 6 Kan. 524.

New York.—People *v.* Richmond County, 28 N. Y. 112; People *v.* Ransom, 2 N. Y. 490; People *v.* Lewis, 28 How. Pr. (N. Y.) 159 [*affirmed* in 28 How. Pr. (N. Y.) 470]; People *v.* Albright, 23 How. Pr. (N. Y.) 306; People *v.* Colborne, 20 How. Pr. (N. Y.) 378.

North Carolina.— Haymore *v.* Yadkin County, 85 N. C. 268; Belmont *v.* Reilly, 71 N. C. 260; McLendon *v.* Anson County, 71 N. C. 38 [*cited* in Dawson Bank *v.* Harris, 84 N. C. 206]; Brown *v.* Turner, 70 N. C. 93. *Contra,* under early code, Howerton *v.* Tate, 66 N. C. 231; Lutterloh *v.* Cumberland County, 65 N. C. 403.

Texas.— Banton *v.* Wilson, 4 Tex. 400.

Wisconsin.— State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

Contra, as to the proceeding by mandamus in the old forms, and others not having the characteristics of code actions. Chumasero *v.* Potts, 2 Mont. 242; People *v.* Schoonmaker, 19 Barb. (N. Y.) 657; Chinn *v.* Fayette Trustees, 32 Ohio St. 236.

Although prosecuted in the name of the state, the state is only a nominal party, and mandamus is in substance a civil remedy for the citizen deprived of a clear legal right. State *v.* Jennings, 56 Wis. 113, 14 N. W. 28. To same effect, People *v.* Ransom, 2 N. Y. 490.

A proceeding by mandamus under the Iowa code, brought against a county to compel it to levy a tax for the payment of a judgment obtained in the circuit court of the United States, and brought in that court, is not an action or suit. When so employed it is neither a prerogative writ nor a new suit in a judicial sense. On the contrary it is a proceeding ancillary to a judgment which gives the jurisdic-

e. Applications and Motions — (I) *In General.* An application in an action, special proceeding, or other remedy connected with and dependent upon the principal remedy is not itself a remedy. It is merely for the purpose of obtaining incidental relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy.[37]

(II) *Distinguished from Special Proceedings.* Whether an application is merely one step in an action or other remedy, or is a special proceeding and therefore a remedy, is frequently a difficult matter to determine, and some difference of opinion exists as to the character of various summary proceedings.[38]

tion, and, when issued, becomes a substitute for the ordinary process of execution. Riggs *v.* Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768; Miller, J., Chase, C. J., and Grier, J., dissenting [*distinguished* in Chumasero *v.* Potts, 2 Mont. 242]; Weber *v.* Lee County, 6 Wall. (U. S.) 210, 18 L. ed. 781. See also, generally, MANDAMUS.

Habeas corpus.— A habeas corpus proceeding for the most part retains the distinctive features of the old writ, and is a special proceeding under the codes and practice acts. Matter of Bresee, 82 Iowa 573, 48 N. W. 991; State *v.* Newell, 13 Mont. 302, 34 Pac. 28; Matter of Barnett, 52 How. Pr. (N. Y.) 73. See also HABEAS CORPUS.

Quo warranto.—In many of the code states the civil action of the code has been substituted by statute for the old writ of quo warranto and information in the nature of a quo warranto.

Colorado.— Central, etc., R. Co. *v.* People, 5 Colo. 39.

Dakota.— Territory *v.* Hauxhurst, 3 Dak. 205, 14 N. W. 432.

Indiana.— Reynolds *v.* State, 61 Ind. 392.

Iowa.— State *v.* Independent School Dist., 44 Iowa 227.

Kentucky.— Com. *v.* Frankfort, 13 Bush (Ky.) 185.

New York.— People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

North Carolina.— Saunders *v.* Gatling, 81 N. C. 298.

South Carolina.— Alexander *v.* McKenzie, 2 S. C. 81.

United States.— Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

In California either quo warranto or a regular action may be brought. People *v.* Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736, holding that the special grant of jurisdiction to the superior courts to issue writs of quo warranto, made by the constitution of 1879, is not exclusive. The proceeding may be in the form of a quo warranto, but there is no reason why it may not be by regular action. In fact there is now so little difference that it is hardly worthy of discussion. See, generally, QUO WARRANTO.

For the test by which to determine whether a particular remedy is an action or special proceeding under codes and practice acts which make a distinction between these remedies see *supra*, II, F, 3, c; II, F, 3, c, (II).

37. Thus of ordinary motions.— Matter of Jetter, 78 N. Y. 601; Matter of Lima, etc., R. Co., 68 Hun (N. Y.) 252, 22 N. Y. Suppl. 967. See also PLEADING. Mere motions or summary proceedings based upon other matters before the court clearly do not belong to the class of remedies by original suit or action designed to be comprehended by the expression "civil cases at law" in a statute relating to appeals. Mack *v.* Bonner, 3 Ohio St. 366, 367.

Attachment.— Under the code an attachment is a form of process incident to an action against certain persons. As an incident of an action it is not to be regarded as a special proceeding; such proceedings being in their nature independent remedies that cannot be taken by an action. Allen *v.* Partlow, 3 S. C. 417 [*citing* Campbell *v.* Home Ins. Co., 1 S. C. 158]. See also ATTACHMENT.

Bill of revivor.— The death of either party pending a suit in equity does not, where the cause of action survives, amount to a determination of the suit; and a bill of revivor is not the commencement of a new suit, but the mere continuation of the old one. Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 9 L. ed. 1041. See also ABATEMENT AND REVIVAL.

Double damages against legal representative.— A cause of action against an administrator for double damages for waste, given by a statute, must be enforced by a civil action and cannot be disposed of summarily as a proceeding before a court of probate in the course of the administration of the estate. Deer Lodge County *v.* Kohrs, 2 Mont. 66.

Interpleader.— Under a code definition that an action is a "civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court," an interpleader is not an action, where it is not commenced in any manner thus designated, but a mere proceeding in an action. Hamlyn *v.* Betteley, 6 Q. B. D. 63. See INTERPLEADER.

A motion for a new trial, by unsuccessful defendants, is only a continuation of the action, and not the institution of a new proceeding. The defendants are merely pressing their defense originally interposed. Clarke *v.* Tunnicliff, 38 N. Y. 58 [*cited* in Willey *v.* Shaver, 1 Thomps. & C. (N. Y.) 324]. See also NEW TRIAL.

38. Applications in proceedings, and special proceedings, distinguished.— A motion is an application in a proceeding — by action or otherwise — already pending, or about to be commenced, upon which it depends for jurisdiction; whereas a special proceeding is an independent prosecution of a remedy in which jurisdiction is obtained by original process.

(III) *Scire Facias.* A writ of scire facias, although in most instances a judicial writ or writ of execution, can be pleaded to and otherwise proceeded in

The code definition of a special proceeding — namely, that it is every proceeding in a court of justice other than an action as therein defined — indicates that a special proceeding is the prosecution of a remedy by original process and independently of any other proceeding, and is opposed to the definition of a motion. Matter of Lima, etc., R. Co., 68 Hun (N. Y.) 252, 22 N. Y. Suppl. 967. If a proceeding is one in an action it is not a special proceeding as such are designated in the code. A special proceeding there referred to is a proceeding other than in actions. It is a remedy begun to enforce or protect a right without action, and not in aid of or a part of the proceedings in actions. Seeley *v.* Black, 35 How. Pr. (N. Y.) 369.

Set-off and counter-claim.— Though a set-off and counter-claim is in the nature of a cross-action, and in the place and stead of a cross-action, it is not an action. Indeed the statute of set-offs was enacted to prevent the necessity of cross-actions; and under the code it is a mere proceeding in an action, treated as a defense, under the head of answer. Warfield *v.* Gardner, 79 Ky. 583; Millet *v.* Watkins, 4 Bush (Ky.) 642; Taylor *v.* New York, 82 N. Y. 10 [*citing* Francis *v.* Dodsworth, 4 C. B. 202]. A statute requiring leave of court before an action can be brought upon a judgment does not apply where the judgment is set up, in an action against a judgment creditor by the judgment debtor, by way of set-off. Wells *v.* Henshaw, 3 Bosw. (N. Y.) 625. Set-off is not an action within Va. Rev. Code, c. 85, § 23, p. 320, which provides that "no action shall be had or maintained for clerk's or surveyor's fees unless the sheriff or sergeant shall return that the person owing or chargeable with such fees has not sufficient within his bailiwick;" and no such return is necessary before the claim can be made the subject of a set-off. Craigen *v.* Lobb, 12 Leigh (Va.) 627. A statute which provides that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees at law or in equity until the expiration of one month after he shall have delivered to the debtor a bill of such fees has no application where the claim of the attorney is pleaded as a set-off in an action brought against him. Martin *v.* Winder, 1 Dougl. 199 note [*cited* in Craigen *v.* Lobb, 12 Leigh (Va.) 627]; Bulman *v.* Birkett, 1 Esp. 449. See also Recoupment, Set-Off, and Counter-Claim. *Contra,* construing the acts of congress relating to the removal of causes, it has been held that a counter-claim or set-off is the affirmation of a cause of action against plaintiff, in the nature of a cross-action, upon which defendant may have affirmative judgment; and is an action or suit of a civil nature to which those acts apply. Clarkson *v.* Manson, 18 Blatchf. (U. S.) 443, 4 Fed. 257. See also Removal of Causes.

Proceeding for contempt.—A proceeding instituted against a party to punish him for a contempt in refusing to perform an order of the court is itself a special proceeding, original in its character, and fully independent of the action or other remedy in which the contempt arose. Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Gibbs *v.* Prindle, 11 N. Y. App. Div. 470, 42 N. Y. Suppl. 329; People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768; Sudlow *v.* Knox, 7 Abb. Pr. N. S. (N. Y.) 411. *Contra,* that it is a mere proceeding in an action. Pitt *v.* Davison, 37 N. Y. 235; People *v.* Bergen, 9 Hun (N. Y.) 202; Seeley *v.* Black, 35 How. Pr. (N. Y.) 369; Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19, 6 Duer (N. Y.) 687. See also, generally, Contempt; Creditors' Suits.

Proceedings supplementary to execution are civil actions, or, in those states where the term "action" is limited by the code definitions and classifications, special proceedings, and not mere proceedings in the original action. Hutchinson *v.* Trauerman, 112 Ind. 21, 13 N. E. 412; Burkett *v.* Holman, 104 Ind. 6, 3 N. E. 406; Burkett *v.* Bowen, 104 Ind. 184, 3 N. E. 768; Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453; Milliken *v.* Thomson, 12 N. Y. Civ. Proc. 168; Holstein *v.* Rice, 15 Abb. Pr. (N. Y.) 307; Davis *v.* Turner, 4 How. Pr. (N. Y.) 190; Meyer *v.* Van Collem, 7 Abb. Pr. (N. Y.) 222, 224, wherein it was said: "After judgment and execution the plaintiffs will have new rights, any obstruction of which may call for or authorize these or other additional remedies for the collection of the same debt; and although for the collection of the same debt they may be in a new or another action, because the same wrong is not to be redressed; but the plaintiffs, as judgment and execution creditors, are deprived of newly acquired rights." *Contra,* Wright *v.* Nostrand, 94 N. Y. 31; Wegman *v.* Childs, 41 N. Y. 159; Ross *v.* Clussman, 3 Sandf. (N. Y.) 676; Seeley *v.* Black, 35 How. Pr. (N. Y.) 369; Gould *v.* Torrance, 19 How. Pr. (N. Y.) 560; Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19. This difference of opinion as to the nature of supplementary proceedings has been settled in New York by an express statutory provision that such remedies shall be special proceedings. N. Y. Code Civ. Proc. § 2433. See, generally, Creditors' Suits.

Applications to vacate or modify judgments.— When all that is invoked in a proceeding under the code to break into an action after judgment and obtain further relief therein is the power given by the codes to courts to vacate or modify their own judgments, such proceeding cannot be regarded as a remedy, but as merely a proceeding in the action. Where, however, a proceeding seeks relief against a judgment, but only incidentally to equitable relief, which cannot be obtained in the original action, it is a remedy and not a mere proceeding in the action to vacate or modify the judgment. Coates *v.* Chillicothe Branch Bank, 23 Ohio St. 415; Taylor *v.* Fitch, 12 Ohio St. 169.

Parties to a proceeding other than original

as if an action, and for most purposes it is held to be one.[39] Under some circumstances, however, it is merely a proceeding in, and continuation of, the original suit.[40]

(IV) *Appeal and Error Proceedings*— (A) *General Rule.* Applications

parties.— Although a proceeding is a summary one in an action, it may nevertheless be a special proceeding if one of the parties to it is a third person and not a party to the original suit: for example, a motion for leave to issue execution, contested by a third party claiming to be the owner of the judgment by assignment (Ithaca Agricultural Works *v.* Eggleston, 107 N. Y. 272, 14 N. E. 312); a proceeding by the attorneys for plaintiff in the original suit, against the judgment defendant, to have vacated a satisfaction of the judgment and an order enforcing their lien for services against it (Peri *v.* New York Cent., etc., R. Co., 152 N. Y. 521, 46 N. E. 849 [*affirming* 12 N. Y. App. Div. 625, 43 N. Y. Suppl. 1162]); an application made by a creditor of the judgment defendant, not a party to the action, to set aside a judgment by confession entered therein (Belnap *v.* Waters, 1 N. Y. 477).

Opposition to probate of will.— Filing of grounds of opposition to the probate of a will, or the filing of a petition to contest the probate after the will has been proved, is not a new and distinct proceeding, either action or special proceeding, but merely a part of the proceeding to obtain probate. Matter of Joseph, 118 Cal. 660, 50 Pac. 768.

39. *Arkansas.*— Hubbard *v.* Bolls, 7 Ark. 442.

Georgia.— Heath *v.* Bates, 70 Ga. 633; Hill *v.* Neal, 52 Ga. 92.

Louisiana.— Morton *v.* Valentine, 15 La. Ann. 150.

Maine.— Potter *v.* Titcomb, 13 Me. 36.

Maryland.— Kirkland *v.* Krebs, 34 Md. 93.

Montana.— U. S. *v.* Ensign, 2 Mont. 396.

New Jersey.— Greenway *v.* Dare, 6 N. J. L. 372.

New York.— People *v.* Clarke, 10 Barb. (N. Y.) 120; Murphy *v.* Cochran, 1 Hill (N. Y.) 339; Cameron *v.* Young, 6 How. Pr. (N. Y.) 372.

England.— Guthrie *v.* Fisk, 5 D. & R. 24; Winter *v.* Kretchman, 2 T. R. 45; Fenner *v.* Evans, 1 T. R. 268; Pulteney *v.* Townson, 2 W. Bl. 1227; Coke Litt. 291*a*, wherein it is said by Lord Coke: "Here it is to be observed that every writ whereunto the defendant may plead, be it original or judicial, is in law an action."

See, generally, Scire Facias.

The reason for it is unanswerable; the defendant has the power to plead to it. Pulteney *v.* Townson, 2 W. Bl. 1227.

When an original action.— When the writ is brought upon a recognizance, or to repeal patents, it is an original action, unconnected with any other proceeding. Morton *v.* Valentine, 15 La. Ann. 150 [*citing* 4 Bouvier Inst. 84].

Illustrations.— Thus a release or discharge of all actions is a good plea in bar to a scire facias.

Arkansas.— Hubbard *v.* Bolls, 7 Ark. 442.

Connecticut.— White *v.* Washington School Dist., 45 Conn. 59; Smyth *v.* Ripley, 33 Conn. 306; Ensworth *v.* Davenport, 9 Conn. 390.

Georgia.— Reed *v.* Sullivan, 1 Ga. 292.

Maine.— Potter *v.* Titcomb, 13 Me. 36.

New York.— Alden *v.* Clark, 11 How. Pr. (N. Y.) 209.

A scire facias is included in a statute of limitations barring "all actions" not brought within a certain time. Gibbons *v.* Goodrich, 3 Ill. App. 590; People *v.* Clarke, 10 Barb. (N. Y.) 120. A statute authorizing special matter in bar to be given in evidence under a notice filed with the general issue is as applicable to the proceeding by scire facias as to one of the common-law actions. Smyth *v.* Ripley, 33 Conn. 306. Where the common-law rule that a married woman cannot sue her husband has not been changed by statute, a wife may not have a scire facias to enforce a decree for alimony. Chestnut *v.* Chestnut, 77 Ill. 346. A change of attorney on suing out a scire facias does not require a rule and notice. The scire facias is a new action and requires a new warrant of attorney. Gonnigal *v.* Smith, 6 Johns. (N. Y.) 106. A scire facias brought on a judgment obtained by a judge of probate on a probate bond, for a further sum for the benefit of a person not a party to the original suit, is a new suit. Although based upon the former judgment it is not brought for the benefit of the same party or for the same claim. Potter *v.* Titcomb, 13 Me. 36.

40. **Illustrations.**— A proceeding by scire facias to revive a judgment is but a continuation of the original suit, and not an action, within a statute providing for the removal of actions by certiorari. People *v.* Corey, 19 Wend. (N. Y.) 633. A scire facias to make parties, the only purpose of which is to continue the action in which it is sued out and prevent it from abating by the death of any or all of the parties, can be considered only as a continuation of the original action; and the pendency of another scire facias for the same purpose cannot be pleaded in abatement. Heath *v.* Bates, 70 Ga. 633 [*citing* Bouvier L. Dict.]. A scire facias is not the commencement of a suit within the meaning of the provision of the practice act which prohibits suits being brought outside of the county where defendants reside, but a judicial writ to have execution issued out of the court where the record is. Challenor *v.* Niles, 78 Ill. 78; Crisman *v.* People, 8 Ill. 351. Where a testator has agreed that no writ of error shall be brought on a judgment against him, no writ of error can be taken by his executor from a scire facias to revive the judgment, but the writ will be considered as merely a continuation of the old action. Wright *v.* Nutt, 1 T. R. 388.

for purposes of review, whether by informal statutory proceedings,[41] or by writ of error coram nobis at common law, or bill of review in chancery,[42] are rather continuations of the original proceedings — applications for new trials in causes once heard and determined — than actions or suits.[43]

(B) *Exceptions to Rule.* Appeal and error proceedings may, however, be actions or suits within the meaning of statutory provisions which use those words in such sense as expressly or impliedly to include them;[44] and a writ of error, when anything may be recovered or taken by way of restitution under or in consequence of it, has been declared to be a lawful demand of one's right, and therefore an action.[45]

41. Brockway *v.* Jewett, 16 Barb. (N. Y.) 590; Fenno *v.* Dickinson, 4 Den. (N. Y.) 84; Traver *v.* Nichols, 7 Wend. (N. Y.) 434; Johnson *v.* Yeomans, 8 How. Pr. (N. Y.) 140; Willey *v.* Shaver, 1 Thomps. & C. (N. Y.) 324, 329, wherein the court distinguished cases which hold writs of error and certiorari to be actions thus: "These cases came into the appellate court through writs or processes issuing out of the appellate court, under its mandate, with its seal, etc., and which were somewhat analogous to the processes by which actions were commenced. But those writs are abolished, and the action is continued from court to court by notice of appeal."

Illustration.— A statutory appeal from the probate of a will is not an action by or against legal representatives, and therefore not within a statute which provides that in such proceedings memoranda of the deceased relevant to the issue are admissible in evidence. Barber's Appeal, 63 Conn. 393, 27 Atl. 973 [*citing* Livingston's Appeal, 63 Conn. 68, 26 Atl. 470].

42. Moore *v.* Cooley, 2 Hill (N. Y.) 412; Longworth *v.* Sturges, 4 Ohio St. 690; The Schooner Marinda *v.* Dowlin, 4 Ohio St. 500; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23; Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628, where the court said: "According to the practice in this court it is rather a continuation of the original litigation than the commencement of a new action; and such, it is believed, is the general understanding of the legal profession in the United States."

Illustrations.— A statute giving a right to a poor person who shall have a cause of action against another person, to sue *in forma pauperis*, has no application to a writ of error, and such writ cannot be sued out in that way. Moore *v.* Cooley, 2 Hill (N. Y.) 412; McDonald *v.* Savings Bank, 2 How. Pr. (N. Y.) 35.

An error on which a writ of error lies does not constitute a cause of action making the proceeding an action, but the writ is merely for the purpose of reviewing and reversing an action already had and determined. Moore *v.* Cooley, 2 Hill (N. Y.) 412; The Schooner Marinda *v.* Dowlin, 4 Ohio St. 500; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23.

43. See, generally, APPEAL AND ERROR.

44. **Illustrations.**— An appeal from an award of commissioners appointed to ascertain the damages which will result from the taking of land by virtue of the right of eminent domain is an action, where the statute giving the remedy provides that "the appeal shall be considered as an action pending in court." Warren *v.* Wisconsin Valley R. Co., 6 Biss. (U. S.) 425, 29 Fed. Cas. No. 17,204. In Connecticut the statutory provision governing the return of process in civil actions is expressly declared to include all appeals. Barber's Appeal, 63 Conn. 393, 27 Atl. 973 [*citing* Gen. Stat. § 794]. A proceeding in error is not properly an action within the meaning of the code relating to the revivor of "actions"; but it is proper that these provisions should also be applied to proceedings in error. Black *v.* Hill, 29 Ohio St. 86. A supersedeas, while in one sense a continuation of the original suit, is yet regarded as a new suit by § 4 of the act of Feb. 28, 1865, which requires a suitor's oath by a person suing out an execution, writ of scire facias, or supersedeas. Nadenbousch *v.* Sharer, 2 W. Va. 285. An appeal by a defendant in an action, or by a respondent or party proceeded against in a special proceeding, although it may be regarded and treated as a new action or special proceeding for some purposes,— as entitling the party to appear by a new attorney and to charge a retaining fee, under the fee bill before the code,— is in fact but a step taken in continuation of the existing action or proceeding, as a defense thereto. Brockway *v.* Jewett, 16 Barb. (N. Y.) 590. Appeals from decrees of probate courts are actions within the meaning of a statute that, if either party to an action die, his executor or administrator may enter and prosecute or defend. Stiles' Appeal, 41 Conn. 329, where the court declared that whether a particular proceeding comes within the word "actions" contained in statutory regulations, in the absence of precedent and practical exposition, depends upon whether a technical construction is given to the word.

45. Moore *v.* Cooley, 2 Hill (N. Y.) 412; Ulshafer *v.* Stewart, 71 Pa. St. 170; Spurgin *v.* Spurgin, 3 Head (Tenn.) 23; Mowry *v.* Davenport, 6 Lea (Tenn.) 80; Altham's Case, 8 Coke 150*b*; Coke Litt. 288*b*, 289*a*; Bacon Abr. Error, (L.); Release (I), 2; and other cases cited *infra*, this note.

Authority for, and scope of, rule.— The authority upon which this rule proceeds is an early statement of the law that a release of all actions is a good bar to a writ of error. The rule applies, however, only when the writ, if successfully pursued, would restore the party who obtains it to the possession of something which is withheld from him, and not when its operation is entirely defensive.

(c) *Certiorari.* A proceeding by certiorari is not a mere application in an action or other remedy, but a remedy itself. Under the codes which limit the use of the term "action" by definition, it is a special proceeding;[46] elsewhere an action or suit.[47]

f. Proceedings by State or Sovereign. The word "action" is a generic term, inclusive, in its proper legal sense, of suits by the crown.[48]

Altham's Case, 8 Coke 150*b*, Coke Litt. 288*b*, 289*a*; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 410, 5 L. ed. 257, [*approved* in Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628], per Marshall, C. J., who said: "Where, then, a state obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far reëxamined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially it is an appeal on a single point, and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal because it is the more usual mode of removing suits at common law. . . . The mode of removal is form, and not substance." In strictness, "action" or "cause of action" is never identified with "writ of error." That a release of all actions includes a writ of error proceeds rather upon an equitable, and therefore extended, construction of the words in the release beyond their strict meaning; for they generally reach the original matter out of which the error arose, that being the direct subject of an action if the matter be thrown open by writ of error. The original matter being released, therefore, the words are very properly construed as reaching indirectly, and in liberal construction, to the writ of error itself, because that depends upon the original matter. Moore *v.* Cooley, 2 Hill (N. Y.) 412. By statute in some states, on a judgment being rendered, the aggrieved party may by new process review the case once as a matter of right. Such a provision was enacted by the New Hampshire assembly as early as 1701 (N. H. Prov. Laws, 27), and a similar provision formerly existed in Massachusetts (Charters, etc., 93; Plymouth Colony Laws, 254). Knox *v.* Knox, 12 N. H. 352, 358, where the effect of these provisions is discussed as follows: "The purpose and effect of the review are different where the writ of review is instituted by the plaintiff in the original action who has failed to sustain his suit, from its object and operation when it is brought by a defendant against whom the original plaintiff has obtained judgment. In the first instance it is in effect a continuation of the original suit, the plaintiff in review still seeking to recover the debt or damages for which he originally commenced his action. In the other, although the review rises out of and is dependent upon the original suit, . . . it is in effect a new action."

Illustrations.—A writ of error is a new suit, and hence falls within a statute of limitations limiting the time within which actions may be brought. Schroeder *v.* Merchants, etc., Ins. Co., 104 Ill. 71; International Bank *v.* Jenkins, 107 Ill. 291; Burnap *v.* Wight, 14 Ill. 303. A writ of error, like a scire facias, is considered as a new action, and is therefore within the act requiring security for costs in certain cases "in all cases in law or equity." Roberts *v.* Fahs, 32 Ill. 474; Smith *v.* Robinson, 11 Ill. 119; Hickman *v.* Haines, 10 Ill. 20; Ripley *v.* Morris, 7 Ill. 381.

Special proceeding.—Under the codes which define and classify remedies as actions and special proceedings, a writ of error is not a "suit" or "action," but a "special proceeding," and is not included within a statute which provides for the substitution, in actions or suits by or against public officers, of the names of their successors as parties. Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11 [*cited* in People *v.* Oswego County Ct. of Sess., 2 Thomps. & C. (N. Y.) 431].

46. College of Physicians, etc. *v.* Guilbert, 100 Iowa 213, 69 N. W. 453; Thompson *v.* Reed, 29 Iowa 117; Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394, 27 How. Pr. (N. Y.) 422 [*affirming* 1 Daly (N. Y.) 371]; People *v.* Stilwell, 19 N. Y. 531; People *v.* Oswego County Ct. of Sess., 2 Thomps. & C. (N. Y.) 431; People *v.* Fuller, 40 How. Pr. (N. Y.) 35.

Statutory construction.—It was held in People *v.* Oswego County Ct. of Sess., 2 Thomps. & C. (N. Y.) 431, 433, on the ground of precedent only [*following* Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11], that the words "suit" or "action," contained in a statute relating to abatement or discontinuance of suits commenced by or against public officers, do not include a writ of certiorari, since it is a special proceeding; the court saying that the proceeding of certiorari might be held to be embraced in the words "suit" or "action," as used in the section of the statute in question, without doing violence to the intention of the legislature.

47. Hendrix *v.* Kellogg, 32 Ga. 435; Fenno *v.* Dickinson, 4 Den. (N. Y.) 84. See also CERTIORARI.

48. Bradlaugh *v.* Clarke, 8 App. Cas. 354, wherein it was said: "In Chitty Prerogative, pp. 245, 362, [it is said that] 'the general rule is that the king may waive his prerogative remedies, and adopt such as are assigned to his subjects.'"

g. Non-Judicial Proceedings. The ministerial acts of judicial officers and courts,[49] and proceedings by parties to enforce non-judicial remedies,[50] are not actions or suits.

G. Actions In Rem and Actions In Personam — 1. Under the Civil Law. The distinction between actions *in rem* and *in personam*, as it came to us from the civil law, is now hardly known to our practice. The civil-law action *in rem* was purely impersonal, although not always an action against a thing.[51] On the other hand our action *in rem* always turns *in personam* for damages and costs, when the thing proves insufficient and the person comes within reach.[52]

2. Under the Common Law. This mode of classifying actions was unknown to the common law. The only English or American courts whose proceedings readily admit of this classification are those which administer their remedies according to the principles of the civil law, such as the ecclesiastical courts, the prize courts, the courts of admiralty, and the courts which have succeeded to the jurisdiction formerly exercised by them. In our modern practice the action against the thing is almost, if not quite, always connected with an obligation of a personal character, which seeks, but may not attain, enforcement in the same proceeding. Of this character are the summary proceedings for the enforcement of common-law or statutory liens,— such as those of an attorney, banker, carrier, innkeeper, warehouseman, landlord, mechanic, etc.,— as well as the actions at law or in equity provided for the enforcement of such liens,[53] and of rights to the thing[54] or to a lien upon it[55] arising out of contract, tort, or equities between the parties,[56] or out of torts connected with the thing *damage feasant*,[57] or by forfeiture under statutory penalties[58] or laws of war.[59] By an apparent oversight as to the radical distinction between the nature of the proceeding and the form or character of the

Code actions.— Besides classifying actions as civil and criminal, some of the codes further divide them into public and private. Ketchum *v.* Buffalo, 14 N. Y. 356.

49. Thus an order of a county court declaring vacant the office of the clerk of said court, and appointing another to fill the supposed vacancy, is not an action, being an executive and not a judicial act. Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401. The power to incorporate governments is not a special case contemplated by the constitution in conferring jurisdiction upon the county court. The words "special cases" refer to suits or controversies at law, and not to proceedings of this character. People *v.* Nevada, 6 Cal. 143.

50. Illustrations.— A proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely the act of the mortgagee executing the power of sale given him by the contract. All the definitions of the word "suit" require it to be a proceeding in some court. Hall *v.* Bartlett, 9 Barb. (N. Y.) 297. It has been held that a statutory proceeding to contest an election is clearly not an action or suit; that the duties therein performed by the court are not strictly judicial, but rather of the nature of executive or legislative duties, pertaining to one of these latter departments in governmental affairs. Patterson *v.* Murray, 53 N. C. 278. But see Elections. See also, in connection with the statement made in the text, *supra*, II, A. *Compare* one of the several definitions of the word "suit" given by Bouvier, L. Dict., *ad verbum:* "A petition to a king, or a great person, or a court" [*cited* in State *v.* Jennings, 56 Wis. 113, 120, 14 N. W. 28].

51. For a full discussion of this subject and of the relation of these terms to the common-law terms "real" and "personal" actions see 4 Law Quart. Rev. 394.

52. For example, in an action by a carrier or warehouseman for the collection of charges, begun against the goods and continued *in personam* against the owner, who made the contract upon his voluntary appearance in the action. See Carriers; Warehousemen; and like special titles.

53. See, generally, Attorney and Client; Banks and Banking; Carriers; Innkeepers; Landlord and Tenant; Mechanics' Liens; Warehousemen; and other special titles relating to liens.

An action to foreclose a mechanic's lien is a limited proceeding *in rem*. Carson *v.* White, 6 Gill (Md.) 17.

54. As by replevin against chattels, or ejectment against land. See *infra*, II, H; also Ejectment; Replevin; and like special titles.

55. The foreclosure of a mortgage is an action *in rem* so far as it seeks the sale of the mortgaged premises. Peters *v.* Dunnells, 5 Nebr. 460.

56. For example, by way of mortgage, contract for sale, decree, or trust. See Mortgages; Vendor and Purchaser; and like special titles.

57. As in the case of animals *damage feasant*, see Animals; or in collisions or personal torts on things afloat, see Admiralty; Collision; and like special titles.

58. See Forfeitures; Penalties; and like special titles.

59. See War.

process or procedure used, it has sometimes been suggested that the form of the latter made the action itself *in rem*.[60] While it is true that, in the absence of a defendant, the thing seized may limit the relief obtainable by present execution, it is still a personal action. So even the limit of jurisdiction itself to the thing attached leaves the action a personal action, which may result in a general judgment against defendant when afterward brought more fully within the jurisdiction of the court by voluntary appearance or otherwise.[61]

H. Real, Personal, and Mixed Actions. The remedies administered by the English courts of common law were formerly either actions real, actions personal,[62] or mixed actions, depending upon the things to be recovered and upon the nature of the relief afforded by the actions.[63]

"Real actions" were those brought for the specific recovery of lands, tenements, and hereditaments. The essential and distinguishing feature of a real action was that it sought to recover specifically the land and its possession.[64]

"Personal actions" were those brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract and other injuries of every description, excepting only the specific recovery of title or possession of lands, tenements, and hereditaments.[65]

"Mixed actions" were such as appertained in some degree to both the former classes, being brought both for the specific recovery of lands, tenements, and hereditaments and for damages for injury sustained in respect to such property.[66]

All real and mixed actions were abolished in England by statute 3 & 4 Wm. IV, cc. 27, 36, except actions for dower, quare impedit, and ejectment, and a new proceeding in ejectment was substituted for that form of action by the common-law procedure act of 1852. The few real actions have been abolished or ceased to exist in most of the states. One or two of the mixed actions, such as ejectment and waste, survive in modified form.[67]

60. As in the case of an execution sale of chattels (Woodruff *v.* Taylor, 20 Vt. 65), or a statutory attachment suit (McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384; Green *v.* Hill, 4 Tex. 465; Houston *v.* McCluney, 8 W. Va. 135 [the judges disagreed as to this point in Bray *v.* McClury, 55 Mo. 128]). See also Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

61. **Attachment suit when defendant appears.**— An original attachment, no citation being issued to defendant, is a proceeding against property, but if defendant appears and takes issue on the petition the action becomes a personal one. Brenner *v.* Moyer, 98 Pa. St. 274; Green *v.* Hill, 4 Tex. 465. See also ATTACHMENT.

62. Johnston *v.* Com., 1 Bibb (Ky.) 598; Eaton *v.* Southby, Willes 131; Coke Litt. 289*a*.

63. Hall *v.* Decker, 48 Me. 255.

64. Hall *v.* Decker, 48 Me. 255; Stephen Pl. 3.

Generally there are no damages in real actions, but so favorable was the law to the action for the recovery of dower that the Statute of Merton provided a special relief for the widow by giving her damages. Curtis *v.* Curtis, 2 Bro. Ch. 620.

65. Osborn *v.* Fall River, 140 Mass. 508, 5 N. E. 483; Stephen Pl. 3.

The term "personal action" in its largest sense includes all actions except those for the recovery of real estate, and would embrace actions for debt and assumpsit for the money counts. Hayden *v.* Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723. An action for wrongfully taking and converting a horse, where a judgment is demanded besides costs, is an action for damages, and not to recover specific property. Seymour *v.* Van Curen, 18 How. Pr. (N. Y.) 94. A proceeding to obtain a judgment on a bond and warrant of attorney is a "personal action." The whole proceedings assume the shape and form of a suit. "There is a plaintiff and defendant — a record of proceedings to judgment. Costs are taxed, consisting of the attorney's fees in a suit at law — a judgment is rendered for debt and costs, as in any other suit in action, execution shown in the usual form." Farrington *v.* Freeman, 2 Edw. (N. Y.) 572.

Damage for flooding land can be recovered only in the mode prescribed by statute. Such damage is not the subject of a personal action at law or of a suit in equity, but of a particular statutory mode of redress which must be pursued. Henderson *v.* Adams, 5 Cush. (Mass.) 610.

An action on a foreign judgment is a personal action. Shackleford *v.* Robinson, 10 La. Ann. 583.

66. Hall *v.* Decker, 48 Me. 255; Stephen Pl. 3.

67. See EJECTMENT; WASTE.

"'Mixed' is a blessed word.— The too impatient student who looks down upon mediæval law from the sublime heights of 'general jurisprudence' will say that most of our English actions are mixed and many of them very mixed." 2 Pollock & M. Hist. Eng. L. 472.

I. Criminal and Civil Actions — 1. Definitions. Actions, in respect to the nature of the wrongs which they are brought to punish or redress, are either criminal or civil.

A "criminal action" is one instituted by the sovereign power of the state against one or more individuals for the purpose of punishing or preventing a criminal offense.[68]

A "civil action" is one which has for its object the recovery of private or civil rights, or of compensation for their infraction.[69] Under the code such an action comprehends suits in equity under the old practice.[70]

2. Penal Actions — a. In General. A "penal action" is one brought either by the state or by an individual under permission of a statute to enforce a penalty imposed by law for the commission of a prohibited act.[71] Where a penal statute provides that on conviction the party guilty of violating the statute shall be fined or imprisoned, or both, at the discretion of the court, it contemplates a criminal action only;[72] but where the statute merely subjects the guilty party to liability in a penal sum, such sum may be recovered in a civil action,[73] and in such case

68. Black L. Dict.; Bouvier L. Dict.

Contempt of court is a specific criminal offense, punished sometimes by indictment and sometimes by summary proceedings. Whittem *v.* State, 36 Ind. 196; State *v.* Dent, 29 Kan. 416; State *v.* Matthews, 37 N. H. 450; Williamson's Case, 26 Pa. St. 9.

A proceeding to disbar an attorney, like the proceeding for contempt, has been held to be a criminal proceeding, or at least a quasi-criminal proceeding. *In re* Peyton, 12 Kan. 398; Turner *v.* Com., 2 Metc. (Ky.) 619; Rice *v.* Com., 18 B. Mon. (Ky.) 472. But see, *contra,* Bradley *v.* Fisher, 7 D. C. 32 [*affirmed* in 13 Wall. (U. S.) 335, 20 L. ed. 646].

A peace warrant is a criminal action under the code. State *v.* Locust, 63 N. C. 574.

69. Black L. Dict.; Bouvier L. Dict.

Actions upon bail-bonds and recognizances. —A scire facias brought before a recognizance, or an action brought upon a bail-bond, is a civil action or proceeding. State *v.* Kinne, 39 N. H. 129. The fact that an undertaking, the breach of which has given rise to a cause of action, was given to secure the appearance of a party to answer a criminal charge, does not make the proper form of action a criminal one or in the nature of such an one. It is an action on a contract with liquidated damages. U. S. *v.* Ensign, 2 Mont. 396. A court of criminal jurisdiction only has, in the absence of statutory authority, no power to issue any process for the collection of the sums forfeited. Com. *v.* Stebbins, 4 Gray (Mass.) 25.

70. Kramer *v.* Rebman, 9 Iowa 114; Fenstermacher *v.* State, 19 Oreg. 504, 25 Pac. 142. So, too, a statutory injunction against a criminal nuisance. Rancour's Petition, 66 N. H. 172, 20 Atl. 930.

71. Black L. Dict.

72. Pardee *v.* Smith, 27 Mich. 33; New York *v.* Walker, 4 E. D. Smith (N. Y.) 258; U. S. *v.* Claflin, 97 U. S. 546, 24 L. ed. 1082.

73. Reagh *v.* Spann, 3 Stew. (Ala.) 100; Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848; Ott *v.* Jordan, 116 Pa. St. 218, 9 Atl. 321.

Recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, then that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment would fall to the ground, for every penal statute would involve a crime and would be a criminal enactment. Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667, 687.

The phrase "civil actions," used in the statute removing the common-law disabilities of parties as witnesses to testify, includes actions at law, suits in chancery, and proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the government. It is used in counter-distinction to prosecution for crime. U. S. *v.* Ten Thousand Cigars, Woolw. (U. S.) 123, 28 Fed. Cas. No. 16,451 [*citing* The Poland, 19 Fed. Cas. No. 11,242, 2 Mich. Lawy. 16].

Failure of railroads to erect signboards.— An action to recover a penalty for failure of a railroad company to erect signboards, as required by statute, is a civil suit. Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

Penalty for mining coal near dividing lines. — The penalty prescribed by statute for mining coal within five feet of the line dividing the land containing the coal from that of another, without the latter's consent, may be recovered by the person injured, in an action of trespass on the case. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800.

Penalty under contract labor act.— A suit by the United States under the contract labor act of Feb. 26, 1885 (23 Stat. at L. 332, c. 164), although brought to recover a penalty, is a civil suit, and a deposition is admissible in evidence therein against defendant. Moller *v.* U. S., 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459.

Recovery of money lost at gaming.— A statute giving the loser of money at gaming a cause of action against the winner for twice the amount lost confers a strictly civil action. O'Keefe *v.* Weber, 14 Oreg. 55, 12 Pac. 74.

Recovery of money paid for liquor sold in violation of law.— An action brought under a statute to recover money or property paid for

the appropriate remedy at common law to recover the penalty is an action of debt.[74]

b. Remedial and Penal Statutes Distinguished. Whether a statute is to be considered remedial or penal depends upon the inquiry whether or not the party seeking to recover under it is required to prove that he has been actually injured by defendant. If the party recovering is not obliged to prove this, the action is a penal one, whether brought by a common informer or by a party who has been injured by the breach of the statute.[75] But if the plaintiff, to recover, must prove an injury to himself, the statute allowing the action is a remedial one, although it may give cumulative damages.[76]

intoxicating liquors sold in violation of law is a civil and not a quasi-criminal action, and therefore admits of a motion for a new trial on the ground that the verdict is contrary to the evidence. Woodward *v.* Squires, 39 Iowa 435.

Selling liquor to minor.— An action to recover the penalty for selling liquor to a minor is properly a civil action and may therefore be commenced by summons. Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848.

Taking excessive tolls.— The forfeit prescribed by a statute to be paid by the proprietor of a grist-mill to his customer for taking excessive toll may be recovered in a civil action before a justice of the peace. West *v.* Rawson, 40 W. Va. 480, 21 S. E. 1019.

Municipal ordinances.— An action to recover a penalty imposed by a municipal ordinance is a civil action.

Colorado.— Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1; Walton *v.* Cañon City, 13 Colo. App. 77, 56 Pac. 671.

Illinois.— Hoyer *v.* Mascoutah, 59 Ill. 137; Jacksonville *v.* Block, 36 Ill. 507; Knowles *v.* Wayne City, 31 Ill. App. 471.

Missouri.— Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750; *Ex p.* Hollwedell, 74 Mo. 395; St. Louis *v.* Knox, 74 Mo. 79; Cassville *v.* Jimerson, 75 Mo. App. 426.

Pennsylvania.—Com. *v.* Davenger, 10 Phila. (Pa.) 478, 30 Leg. Int. (Pa.) 321; Philadelphia *v.* Duncan, 4 Phila. (Pa.) 145, 17 Leg. Int. (Pa.) 373.

Wyoming.— Jenkins *v.* Cheyenne, 1 Wyo. 287.

74. *Georgia.*— Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 11 S. E. 396.

Illinois.— Webster *v.* People, 14 Ill. 365.

Mississippi.— Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

New Hampshire.— Robertson *v.* Kettell, 64 N. H. 430, 14 Atl. 78; Morrison *v.* Bedell, 22 N. H. 234; Woart *v.* Winnick, 3 N. H. 473, 14 Am. Dec. 384.

New York.— Warren *v.* Doolittle, 5 Cow. (N. Y.) 678.

Pennsylvania.—Osborn *v.* Athens First Nat. Bank, 154 Pa. St. 134, 26 Atl. 289.

Virginia.—Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

West Virginia.— Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800; West *v.* Rawson, 40 W. Va. 480, 21 S. E. 1019.

United States.— Chaffee *v.* U. S., 18 Wall. (U. S.) 516, 21 L. ed. 908; U. S. *v.* Lyman, 1 Mason (U. S.) 482, 26 Fed. Cas. No. 15,647; Bullard *v.* Bell, 1 Mason (U. S.) 243, 4 Fed. Cas. No. 2,121.

75. A statute providing that every one of the parties to a fraudulent and deceitful conveyance shall forfeit the full value of the property conveyed gives an action that is highly penal, as it inflicts upon each of the parties offending a forfeiture of the full value of the property conveyed, besides making the conveyance void. Although the forfeiture is recovered by the person to be injured, yet it does not appear as an extinguishment of either right or debt. Brooks *v.* Clayes, 10 Vt. 37. A statute which provided that any person summoned as trustee, who shall be adjudged guilty of perjury on examination, shall be liable to pay to plaintiff, or his legal representative, the full amount of the judgment obtained against defendant, or such part of it as may remain due, with interest and double costs, is a penal statute, and an action founded thereon is a penal action. Mansfield *v.* Ward, 16 Me. 433.

Where a sum is given to a stranger, as where it is given to him who shall prosecute, the action is penal. O'Keefe *v.* Weber, 14 Oreg. 55, 12 Pac. 74.

A statute which authorizes a third person to recover treble the value of money lost by gaming is a penal statute. Cole *v.* Groves, 134 Mass. 471

76. *Maine.*— Quimby *v.* Carter, 20 Me. 218.

Massachusetts.— Goodridge *v.* Rogers, 22 Pick. (Mass.) 495; Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662.

New York.— Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304.

Vermont.— Burnett *v.* Ward, 42 Vt. 80.

England.— Woodgate *v.* Knatchbull, 2 T. R. 148; Wynne *v.* Middleton, 1 Wils. C. P. 125; Wilkinson *v.* Colley, 5 Burr. 2694.

A remedy for a breach of the remedial statute is by an action for damages sustained from such a breach, at the suit of the party injured. A penal statute imposes a penalty upon the commission of a prohibited offense, which is recovered by an action of debt, in the name of the informer, for his own use or *qui tam*. The statute fixes the amount of the penalty, and hence an action of debt is appropriate, while in actions under remedial statutes the party injured recovers the amount of injury he has sustained by the breach of the statute, and case is the appropriate remedy where a statute merely prohibits the act and does not require any other form of action to be brought. Mount *v.* Hunter, 58 Ill. 246; Baylies *v.* Curry, 30 Ill. App. 105.

3. Civil Actions Criminal in Form — a. In General. There are a few actions of an anomalous character which, though civil in object, have for certain purposes been made criminal in form.[77]

b. Quo Warranto. The original common-law writ of quo warranto was a civil writ at the suit of the crown, being in the nature of a writ of right against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them.[78] This writ, however, fell into disuse and was superseded by an information in the nature of a quo warranto, which in its origin was "a criminal method of prosecution as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or seize it for the crown."[79] It subsequently lost its character as a criminal proceeding in everything except form, the fine imposed being nominal only,[80] and such was its nature when it was introduced as a common-law action into the United States.[81] The incidents of a criminal action clung to it so far as jurisdiction and pleading were concerned,[82] but, in many of the states, statutes were subsequently passed investing it with all the incidents of a civil action,[83] and such is its character under the code.

J. Forms of Actions — 1. At Common Law. At common law the distinction between the different forms of actions is strictly guarded and enforced.[84]

An action under the Illinois statute of 1865 for injury to animals from a contagious disease, being remedial and not penal, should be in case and not in debt, and the declaration need not conclude "against the form of the statute." Mount *v.* Hunter, 58 Ill. 246.

A statute may be partly remedial and partly penal: remedial as to the party suing to recover back the money, and penal as to the right given to any other person to sue for it on his neglect. Where a statute gives an action to a stranger to recover a forfeiture, he is a common informer, and the action is a penal action; though it is otherwise where a statute gives damages, either single or cumulative, as compensation to the party aggrieved. Moore *v.* Jones, 23 Vt. 739; White *v.* Comstock, 6 Vt. 405; Hubbell *v.* Gale, 3 Vt. 226 [*approved* in Burnett *v.* Ward, 42 Vt. 80].

77. **Death by wrongful act.**— Of such a nature is a proceeding by indictment to recover for negligence in causing the death of a person. Though criminal in form, it is, in some respects and for some material purposes, a civil suit. The object of the law authorizing the proceeding is not the punishment of a crime, but the compensation of the widow and children or heirs of the person whose life is lost through the negligence of the defendants. Yet in its method of institution, the form of complaint, and perhaps in other respects, it is a criminal action. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258; State *v.* Grand Trunk R. Co., 58 N. H. 198; State *v.* Manchester, etc., R. Co., 52 N. H. 528. See also Death.

Bastardy proceeding.—A remedy of a somewhat similar nature is a bastardy proceeding. In some of the states it is classed as a criminal action; in others it is a civil one; but it is perhaps strictly neither, but in form and object partakes of many of the incidents of both. Most of the forms of the proceeding are borrowed from the criminal law, but these are simply with the view of giving a more summary and stringent character to the process. The object of the law is to redress a civil injury by compelling the putative father to aid the mother in the support of the child, and to indemnify the town chargeable with its support against expenses which may be incurred thereby, and the proceeding is substantially a civil suit. See, generally, Bastards.

78. Rex *v.* Marsden, 3 Burr. 1812.

79. 3 Bl. Comm. 263 [*cited* in Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482].

80. Rex *v.* Francis, 2 T. R. 484; 2 Kent Comm. 313.

81. *Indiana.*— Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267.

Missouri.— State *v.* Lingo, 26 Mo. 496.

New York.— People *v.* Richardson, 4 Cow. (N. Y.) 97.

North Carolina.— State *v.* Hardie, 23 N. C. 42.

Pennsylvania.—Com. *v.* Philadelphia County, 1 Serg. & R. (Pa.) 382.

82. *Arkansas.*— State *v.* Ashley, 1 Ark. 279.

Idaho.— People *v.* Green, 1 Ida. 235.

New Jersey.—State *v.* Roe, 26 N. J. L. 215.

New York.— People *v.* Jones, 18 Wend. (N. Y.) 601; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

Wisconsin.— State *v.* West Wisconsin R. Co., 34 Wis. 197.

83. Central, etc., Road Co. *v.* People, 5 Colo. 39; Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439; State *v.* McDaniel, 22 Ohio St. 354; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

84. *Alabama.*— Booker *v.* Jones, 55 Ala. 266.

California.— Kimball *v.* Lohmas, 31 Cal. 154; O'Connor *v.* Dingley, 26 Cal. 11.

Illinois.— Creel *v.* Kirkham, 47 Ill. 344.

Massachusetts.— Clark *v.* Swift, 3 Metc. (Mass.) 390.

Michigan.— Post *v.* Campau, 42 Mich. 90, 3 N. W. 272.

New Mexico.—Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699.

New York.— Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

2. As Modified by Statute. By statute in many states all distinctions between actions at law and suits in equity, and the forms of such actions and suits, are abolished.[85]

3. Effect of Statutory Modification — a. In General. Such statutes, however, make no change in the law which determines what facts constitute a cause of action. They merely provide the mode in which redress may be had when a right has been invaded.[86]

Pennsylvania.— Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210; Legeaux *v.* Feasor, 1 Yeates (Pa.) 586.

Rhode Island.— Royce *v.* Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845.

Texas.— Kellers *v.* Reppien, 9 Tex. 443.

Vermont.— Henry *v.* Edson, 2 Vt. 499.

England.—Savignac *v.* Roome, 6 T. R. 125; Abbott *v.* Butler, 2 Chit. 243; Reynolds *v.* Clerk, 8 Mod. 272; Israel *v.* Douglas, 1 H. Bl. 239; Woods *v.* Finnis, 7 Exch. 363.

Actions ex contractu.— If the cause of action is the breach of a contract obligation, the remedy is an action *ex contractu*. Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; City, etc., R. Co. *v.* Brauss, 70 Ga. 368; Freeman *v.* Jeffries, L. R. 4 Exch. 189.

For consideration of special forms of common-law actions *ex contractu* see Assumpsit, Action of; Covenant, Action of; Case, Action on; Debt, Action of; and like special titles.

Actions ex delicto.— If the cause of action is a wrong with a resulting injury, the cause is *ex delicto*. City, etc., R. Co. *v.* Brauss, 70 Ga. 368; Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381; Shippen *v.* Tankersley, 4 McCrary (U. S.) 259, 13 Fed. 537.

For consideration of special forms of common-law actions *ex delicto* see Trespass; Trover and Conversion; and like special titles.

85. See the statutes of the several states and the following cases:

Arkansas.— Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96; Crawford *v.* Fuller, 28 Ark. 370.

California.— Rogers *v.* Duhart, 97 Cal. 500, 32 Pac. 570; Kimball *v.* Lohmas, 31 Cal. 154.

Colorado.— Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37; Blatchley *v.* Coles, 6 Colo. 82.

Georgia.— Austell *v.* Swann, 74 Ga. 278; McNabb *v.* Lockhart, 18 Ga. 495.

Idaho.— Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770; Wa Ching *v.* Constantine, 1 Ida. 266.

Indiana.— Evans *v.* Evans, 105 Ind. 204, 5 N. E. 24, 768; Powell *v.* Powell, 104 Ind. 18, 3 N. E. 639.

Iowa.— Mentzer *v.* Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 28 L. R. A. 72; Taylor *v.* Adair, 22 Iowa 279.

Kansas.— Atchison, etc., R. Co. *v.* Rice, 36 Kan. 593, 14 Pac. 229; McGonigle *v.* Atchison, 33 Kan. 726, 7 Pac. 550.

Kentucky.— Harper *v.* Harper, 10 Bush (Ky.) 447.

Minnesota.— First Div. St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 278; Berkey *v.* Judd, 14 Minn. 394.

Mississippi.—Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313; New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

Missouri.—Johnson-Brinkman Commission Co. *v.* Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512.

Montana.— U. S. *v.* Ensign, 2 Mont. 396.

Nebraska.—Hopkins *v.* Washington County, 56 Nebr. 596, 77 N. W. 53; Cropsey *v.* Wiggenhorn, 3 Nebr. 108.

New York.—Davis *v.* Morris, 36 N. Y. 569; Laub *v.* Buckmiller, 17 N. Y. 620; Corson *v.* Ball, 47 Barb. (N. Y.) 452; Millikin *v.* Cary, 5 How. Pr. (N. Y.) 272.

North Carolina.— Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156; John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22.

Ohio.— Culver *v.* Rodgers, 33 Ohio St. 537; Jones *v.* Timmons, 21 Ohio St. 596.

Oregon.— The distinction between forms of action has been abolished, while that between actions and suits has been retained. Burrage *v.* Bonanza Gold, etc., Min. Co., 12 Oreg. 169, 6 Pac. 766; Beacannon *v.* Liebe, 11 Oreg. 443, 5 Pac. 273.

South Carolina.— Southern Porcelain Mfg. Co. *v.* Thew, 5 S. C. 5.

South Dakota.—Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

Texas.— Kellers *v.* Reppien, 9 Tex. 443; Banton *v.* Wilson, 4 Tex. 400.

Utah.— Houtz *v.* Gisborn, 1 Utah 173; Folsom *v.* McLaughlin, 1 Utah 178.

Wisconsin.— Peterson *v.* Stoughton State Bank, 78 Wis. 113, 47 N. W. 368.

Canada.— Joyce *v.* Hart, 1 Can. Supreme Ct. 321.

In many states a few of the commoner forms have been retained; in others, only the distinction between *ex contractu* and *ex delicto*, or between law and equity. See, generally, statutes of the several states; also *infra*, II, J, 3, b, c.

86. *Arkansas.*— Chrisman *v.* Carney, 33 Ark. 316; Ball *v.* Fulton County, 31 Ark. 379.

California.— Hastings *v.* Cunningham, 39 Cal. 137; Miller *v.* Van Tassel, 24 Cal. 458; Sampson *v.* Schaeffer, 3 Cal. 196; De Witt *v.* Hays, 2 Cal. 463, 66 Am. Dec. 352.

Colorado.— Schroers *v.* Fisk, 10 Colo. 599, 16 Pac. 285.

Connecticut.—Metropolis Mfg. Co. *v.* Lynch, 68 Conn. 459, 36 Atl. 832.

Indiana.— Emmons *v.* Kiger, 23 Ind. 483.

Kansas.— Fitzpatrick *v.* Gebhardt, 7 Kan. 35.

Kentucky.—Richmond, etc., Turnpike Road Co. *v.* Rogers, 7 Bush (Ky.) 532; Murphy *v.* Estes, 6 Bush (Ky.) 532; Hill *v.* Barrett, 14 B. Mon. (Ky.) 83.

b. On Actions Ex Contractu and Ex Delicto. It is further to be observed that the enactment of such statutes does not abrogate the distinctions between actions *ex contractu* and those *ex delicto*.[87]

c. On Legal and Equitable Relief. It has also been held that the essential principles of equitable actions and equitable relief, as distinguished from legal actions and remedies, are as clearly marked and defined as before the enactment of such statutes.[88]

4. Equitable Relief in Action at Law — a. Rule at Common Law. At common law an equitable right is incapable of assertion in a court of law.[89]

Massachusetts.— Worthington *v.* Waring, 157 Mass. 421, 32 N. E. 744, 34 Am. St. Rep. 294, 20 L. R. A. 342.

Minnesota.— Berkey *v.* Judd, 14 Minn. 394.

Missouri.— Magwire *v.* Tyler, 47 Mo. 115.

Nebraska.— Wilcox *v.* Saunders, 4 Nebr. 569.

New York.— Austin *v.* Rawdon, 44 N. Y. 63; Goulet *v.* Asseler, 22 N. Y. 225; Eldridge *v.* Adams, 54 Barb. (N. Y.) 417; Cropsey *v.* Sweeney, 27 Barb. (N. Y.) 310, 7 Abb. Pr. (N. Y.) 129; Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207; Howe *v.* Peckham, 6 How. Pr. (N. Y.) 229; Rochester City Bank *v.* Suydam, 5 How. Pr. (N. Y.) 216.

North Carolina.— John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22.

South Carolina.— Southern Porcelain Mfg. Co. *v.* Thew, 5 S. C. 5.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Wisconsin.— Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237; Oleson *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428.

87. *California.*— Lubert *v.* Chauviteau, 3 Cal. 458, 5 Am. Rep. 415.

Indiana.— Cincinnati, etc., R. Co. *v.* Harris, 61 Ind. 290.

New York.— Austin *v.* Rawdon, 44 N. Y. 63; Andrews *v.* Bond, 16 Barb. (N. Y.) 633.

North Carolina.— Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156; Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

Pennsylvania.— Corry *v.* Pennsylvania R. Co., 194 Pa. St. 516, 45 Atl. 341; Osborn *v.* Athens First Nat. Bank, 154 Pa. St. 134, 26 Atl. 289.

Wisconsin.— Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237; Pierce *v.* Carey, 37 Wis. 232.

88. *California.*— Smith *v.* Rowe, 4 Cal. 6; De Witt *v.* Hays, 2 Cal. 463, 66 Am. Dec. 352.

Colorado.— Danielson *v.* Gude, 11 Colo. 87, 17 Pac. 283; Exchange Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449.

Indiana.— Bonnell *v.* Allen, 53 Ind. 130; Vail *v.* Jones, 31 Ind. 467.

Iowa.— Conyngham *v.* Smith, 16 Iowa 471; Shepard *v.* Ford, 10 Iowa 502.

Kentucky.—Grigsby *v.* Barr, 14 Bush (Ky.) 330.

Minnesota.— Russell *v.* Minnesota Outfit, 1 Minn. 162.

Missouri.— Lackland *v.* Garesche, 56 Mo. 267; Magwire *v.* Tyler, 47 Mo. 115.

Nebraska.—Hopkins *v.* Washington County, 56 Nebr. 596, 77 N. W. 53; Wilcox *v.* Saunders, 4 Nebr. 569.

New York.— Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; Stevens *v.* New York, 84 N. Y. 296; Chipman *v.* Montgomery, 63 N. Y. 221; Hubbell *v.* Sibley, 50 N. Y. 468; Lattin *v.* McCarty, 41 N. Y. 107; Voornis *v.* Childs, 17 N. Y. 354; Dalton *v.* Vanderveer, 8 Misc. (N. Y.) 484, 31 Abb. N. Cas. (N. Y.) 430, 23 N. Y. Civ. Proc. 443, 29 N. Y. Suppl. 342; Ireland *v.* Nichols, 1 Sweeny (N. Y.) 208; Arndt *v.* Williams, 16 How. Pr. (N. Y.) 244; Wooden *v.* Waffle, 6 How. Pr. (N. Y.) 145; Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668.

North Carolina.— John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22; Matthews *v.* McPherson, 65 N. C. 189.

Ohio.— Dixon *v.* Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487; Klonne *v.* Bradstreet, 7 Ohio St. 322; Lamson *v.* Pfaff, 1 Handy (Ohio) 449.

Oregon.—Knowles *v.* Herbert, 11 Oreg. 240, 4 Pac. 126.

South Carolina.— Chapman *v.* Lipscomb, 18 S. C. 222.

South Dakota.— Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

Utah.— Zeile *v.* Moritz, 1 Utah 283.

Wisconsin.— Deery *v.* McClintock, 31 Wis. 195; Bonesteel *v.* Bonesteel, 28 Wis. 245.

England.— Gibbs *v.* Guild, 9 Q. B. D. 59.

89. *Arkansas.*— Carleton *v.* Neal, 19 Ark. 292.

California.— Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Illinois.— Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Greenup *v.* Sewell, 18 Ill. 53.

Indiana.— Lindley *v.* Cravens, 2 Blackf. (Ind.) 426.

Michigan.— Hayes *v.* Livingston, 34 Mich. 384, 22 Am. Rep. 533; Ryder *v.* Flanders, 30 Mich. 336.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

Nebraska.— Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

New Hampshire.—Winnipiseogee Paper Co. *v.* Eaton, 64 N. H. 234, 9 Atl. 221.

New Jersey.— Den *v.* Dimon, 10 N. J. L. 156.

England.— O'Kelly *v.* Sparkes, 10 East 369.

As to jurisdiction of equity to grant full relief where there is a remedy at law for part of relief praved see Equity.

In the federal courts a blending of equitable and legal causes of action in one suit is not permissible. Lindsay *v.* Shreveport First Nat.

b. Rule as Modified by Statute. But in states in which the formal distinctions between actions at law and suits in equity are abolished the court may administer relief according to the nature of the cause set out, whether it is such as would be granted in equity or such as would be given at law.[90]

5. Equitable Defenses in Action at Law — a. Right to Interpose — (i) *Rule at Common Law.* In a legal proceeding at common law the court can deal only with the legal rights of the parties. A cause of action which might have been enforced in equity cannot be set up as a defense.[91]

(ii) *Rule as Modified by Statute.* But by statute in many jurisdictions defendant may set up as many defenses as he may have. The question in such

Bank, 156 U. S. 485, 15 S. Ct. 472, 39 L. ed. 505; Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052; Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358; Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453; Gibson *v.* Chouteau, 13 Wall (U. S.) 92, 20 L. ed. 534; Payne *v.* Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Thompson *v.* Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Bennett *v.* Butterworth, 11 How. (U. S.) 669, 13 L. ed. 859; Robinson *v.* Campbell, 3 Wheat. (U. S.) 212, 4 L. ed. 372; Gravenberg *v.* Laws, 100 Fed. 1, 40 C. C. A. 240; Davis *v.* Davis, 72 Fed. 81, 30 U. S. App. 723, 18 C. C. A. 438; Doe *v.* Roe, 31 Fed. 97; Snyder *v.* Pharo, 25 Fed. 398.

For consideration of particular forms of equitable relief and procedure see Equity; Injunctions; Receivers; Specific Performance; and like special titles.

90. *California.*— Hurlbutt *v.* N. W. Spaulding Saw Co., 93 Cal. 55, 28 Pac. 795; Watson *v.* Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; White *v.* Lyons, 42 Cal. 279; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Idaho.— Wa Ching *v.* Constantine, 1 Ida. 266.

Indiana.— Powell *v.* Powell, 104 Ind. 18, 3 N. E. 639; Anderson *v.* Caldwell, 91 Ind. 451, 46 Am. Rep. 613.

Iowa.— Shepard *v.* Ford, 10 Iowa 502.

Kansas.— Deering *v.* Boyle, 8 Kan. 525, 12 Am. Rep. 480; Going *v.* Orns, 8 Kan. 85.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

Missouri.— Clark *v.* Clark, 86 Mo. 114; Meyers *v.* Fields, 37 Mo. 434.

Nebraska.—Hopkins *v.* Washington County, 56 Nebr. 596, 77 N. W. 53; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

New York.—Stevens *v.* New York, 84 N. Y. 296; Emery *v.* Pease, 20 N. Y. 62; Cole *v.* Reynolds, 18 N. Y. 74; Crary *v.* Goodman, 12 N. Y. 266; Corson *v.* Ball, 47 Barb. (N. Y.) 452; Peck *v.* Newton, 46 Barb. (N. Y.) 173; Wood *v.* Wood, 26 Barb. (N. Y.) 356; Caswell *v.* West, 3 Thomps. & C. (N. Y.) 383; Devlin *v.* New York, 4 Misc. (N. Y.) 106, 23 N. Y. Suppl. 888; Ireland *v.* Nichols, 1 Sweeny (N. Y.) 208; Burget *v.* Bissell, 5 How. Pr. (N. Y.) 192.

North Carolina.— Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600; John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22; Tate *v.* Powe, 64 N. C. 644.

Ohio.— Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110; Goble *v.* Howard, 12 Ohio St. 165; Hager *v.* Reed, 11 Ohio St. 626; Clayton *v.* Freet, 10 Ohio St. 544.

Utah.— Houtz *v.* Gisborn, 1 Utah 173; Folsom *v.* McLaughlin, 1 Utah 178.

91. *Idaho.*— Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770.

Illinois.— Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; McGinnis *v.* Fernandes, 126 Ill. 228, 19 N. E. 44; Roy *v.* Goings, 6 Ill. App. 162.

Iowa.— Page *v.* Cole, 6 Iowa 153.

Maine.— Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527.

Michigan.— Harrett *v.* Kinney, 44 Mich. 457, 7 N. W. 63; Ryder *v.* Flanders, 30 Mich. 336.

Missouri.— Martin *v.* Turnbaugh, 153 Mo. 172, 54 S. W. 515.

New Jersey.— Stryker *v.* Vanderbilt, 25 N. J. L. 482; Rogers *v.* Colt, 21 N. J. L. 18.

North Carolina.— Dempsey *v.* Rhodes, 93 N. C. 120.

England.— Scholey *v.* Mearns, 7 East 148.

Equitable estoppel.— At common law an estoppel which is simply an equitable right cannot be asserted in a court of law. St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 102 Ill. 514; Blake *v.* Fash, 44 Ill. 302; Hayes *v.* Livingston, 34 Mich. 384, 22 Am. Rep. 533; Ryder *v.* Flanders, 30 Mich. 336. *Contra,* Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618; Kirk *v.* Hamilton, 102 U. S. 68, 26 L. ed. 79; De Guire *v.* St. Joseph Lead Co., 38 Fed. 65.

In a federal court defendant cannot set up a defense that is an equitable one in answer to an action at law, but he must file his bill in chancery for the relief to which he may be entitled. Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052; Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; Northern Pac. R. Co. *v.* Paine, 119 U. S. 561, 7 S. Ct. 323, 30 L. ed. 513; Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; Foster *v.* Mora, 98 U. S. 425, 25 L. ed. 191; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661; Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805; Robinson *v.* Campbell, 3 Wheat. (U. S.) 212, 4 L. ed. 372; Gravenberg *v.* Laws, 100 Fed. 1, 40 C. C. A. 240; Davis *v.* Davis, 72 Fed.

jurisdictions is, Ought plaintiff to recover? — and anything which shows that he ought not is available as a defense, whether it is of legal or equitable cognizance.[92]

b. Defenses Which May Be Interposed. In some jurisdictions it is held that to constitute matter an equitable defense in an action at law the facts must be such as would justify a court of equity in decreeing affirmative relief to the defendant, if its jurisdiction were invoked by suit,[93] or would entitle the

81, 30 U. S. App. 723, 18 C. C. A. 438; Wilcox, etc., Guano Co. *v.* Phoenix Ins. Co., 61 Fed. 199.

92. *Arizona.*—Houghtaling *v.* Ellis, 1 Ariz. 383, 25 Pac. 534.

Arkansas.— Little Rock Granite Co. *v.* Shall, 59 Ark. 405, 27 S. W. 562; Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100.

California.— Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624; Ayres *v.* Bensley, 32 Cal. 620.

Colorado.— Salsbury *v.* Ellison, 7 Colo. 167, 2 Pac. 906, 49 Am. Rep. 347, 7 Colo. 303, 3 Pac. 485.

Connecticut.— Hewitt's Appeal, 53 Conn. 24, 1 Atl. 815.

Florida.— Walls *v.* Endel, 20 Fla. 86; Florida Cent. R. Co. *v.* Bisbee, 18 Fla. 60.

Georgia.— Turner *v.* Rives, 75 Ga. 606; Radcliffe *v.* Varner, 56 Ga. 222.

Idaho.— Wa Ching *v.* Constantine, 1 Ida. 266; Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770.

Indiana.— East *v.* Peden, 108 Ind. 92, 8 N. E. 722; Bonnell *v.* Allen, 53 Ind. 130; Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370.

Iowa.— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146; Taylor *v.* Adair, 22 Iowa 279.

Kansas.— Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957.

Kentucky.— Thomasson *v.* Townsend, 10 Bush (Ky.) 114; Petty *v.* Malier, 15 B. Mon. (Ky.) 591.

Maine.— Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527.

Maryland.— Urner *v.* Sollenberger, 89 Md. 316, 43 Atl. 810; Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852.

Massachusetts.— Page *v.* Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; Barton *v.* Radclyffe, 149 Mass. 275, 21 N. E. 374; George Woods Co. *v.* Storer, 144 Mass. 399, 11 N. E. 662.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221; McClane *v.* White, 5 Minn. 178.

Missouri.— Swope *v.* Weller, 119 Mo. 556, 25 S. W. 204; Sachleben *v.* Heintze, 117 Mo. 520, 24 S. W. 54; Clyburn *v.* McLaughlin, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 369; St. Louis *v.* Schulenburg, etc., Lumber Co., 98 Mo. 613, 12 S. W. 248; Barlow *v.* Elliott, 56 Mo. App. 374.

Nebraska.— Wanser *v.* Lucas, 44 Nebr. 759, 62 N. W. 1108; Blazier *v.* Johnson, 11 Nebr. 404, 9 N. W. 543.

Nevada.— South End Min. Co. *v.* Timey, 22 Nev. 19, 35 Pac. 89; Rose *v.* Treadway, 4 Nev. 455.

New York.— Wing *v.* De La Rionda, 131 N. Y. 422, 30 N. E. 243; Chapman *v.* Forbs, 123 N. Y. 532, 26 N. E. 3; McCreery *v.* Day, 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 503; Andrews *v.* Gillespie, 47 N. Y. 487; Cope *v.* Wheeler, 41 N. Y. 303; Murray *v.* Walker, 31 N. Y. 399; Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131; Phillips *v.* Gorham, 17 N. Y. 270; Despard *v.* Walbridge, 15 N. Y. 374; Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Haire *v.* Baker, 5 N. Y. 357.

North Carolina.— Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600; Dempsey *v.* Rhodes, 93 N. C. 120; Tuttle *v.* Harrill, 85 N. C. 456; Farmer *v.* Daniel, 82 N. C. 152.

Ohio.— Raymond *v.* Toledo, etc., R. Co., 57 Ohio St. 271, 48 N. E. 1093; Judy *v.* Louderman, 48 Ohio St. 562, 29 N. E. 181; Wittle *v.* Lockwood, 39 Ohio St. 141; Coates *v.* Chillicothe Branch Bank, 23 Ohio St. 415.

Oregon.— Spaur *v.* McBee, 19 Oreg. 76, 23 Pac. 818; Hill *v.* Cooper, 6 Oreg. 181.

Pennsylvania.— Murphy *v.* Hubert, 16 Pa. St. 50; Light *v.* Stoever, 12 Serg. & R. (Pa.) 431.

Rhode Island.— American Bldg. Loan, etc., Co. *v.* Booth, 17 R. I. 736, 24 Atl. 779; McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11; Newport Hospital *v.* Carter, 15 R. I. 285, 3 Atl. 412.

South Carolina.— Chapman *v.* Lipscomb, 18 S. C. 222; Adickes *v.* Lowry, 12 S. C. 97.

Texas.— Peevy *v.* Hurt, 32 Tex. 146; Herrington *v.* Williams, 31 Tex. 448; Neil *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746.

Utah.— Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

Virginia.— Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Brown *v.* Rice, 76 Va. 629; Watkins *v.* Hopkins, 13 Gratt. (Va.) 743.

West Virginia.— Knott *v.* Seamands, 25 W. Va. 99; Fisher *v.* Burdett, 21 W. Va. 626.

Wisconsin.— Jordan *v.* Warner, (Wis. 1900) 83 N. W. 946; Quinn *v.* Quinn, 27 Wis. 168; Prentiss *v.* Brewer, 17 Wis. 635, 86 Am. Dec. 730.

England.— Scott *v.* Littledale, 8 E. & B. 815; Evans *v.* Bremridge, 8 De G. M. & G. 100; Vorley *v.* Barrett, 1 C. B. N. S. 225; Steele *v.* Haddock, 10 Exch. 643; Murphy *v.* Glass, L. R. 2 P. C. 408; Kingsford *v.* Swinford, 5 Jur. N. S. 261; Allen *v.* Walker, L. R. 5 Exch. 187.

Canada.— Griggs *v.* Firley, 6 U. C. L. J. 61; Boulton *v.* Hugel, 35 U. C. Q. B. 402; Brown *v.* Blackwell, 35 U. C. Q. B. 239; Belyea *v.* Muir, 5 Ont. Pr. 273.

93. *California.*— Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624; Carpentier *v.* Oakland, 30 Cal. 439.

Indiana.— East *v.* Peden, 108 Ind. 92, 8 N. E. 722.

Iowa.— Cottle *v.* Cole, 20 Iowa 481.

defendant, in the event of a judgment recovered against him in the action, to unqualified and unconditional relief against it.[94]

c. Necessity of Interposing. The question of the necessity of interposing an equitable defense in an action at law would seem to depend on the statute of the particular state. Thus in some states it has been held that the defendant who has an equitable defense which can be set up must do so, or he will be concluded by the judgment.[95] In other states it has been held that defendant is not obliged to set up such a defense; but he may let judgment go at law and then file his bill in equity for relief.[96]

d. Mode of Establishing. It has been held that an equitable defense set up in an action at law is triable upon the same principles that would apply upon an original bill in equity brought for the same purpose.[97]

e. Burden of Proof. The burden of proving an equitable defense is upon the defendant by whom it is set up.[98]

III. COMMENCEMENT, PROSECUTION, AND TERMINATION.

A. Commencement — 1. Accrual of Cause of Action[99] — a. In General. It is a well-established principle that an action cannot be maintained, except as per-

Minnesota.— McClane *v.* White, 5 Minn. 178; Gates *v.* Smith, 2 Minn. 30.

New York.— Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Cramer *v.* Benton, 4 Lans. (N. Y.) 291; Hicks *v.* Sheppard, 4 Lans. (N. Y.) 335.

Pennsylvania.— Waln *v.* Smith, 1 Phila. (Pa.) 362, 9 Leg. Int. (Pa.) 87.

Rhode Island.— Newport Hospital *v.* Carter, 15 R. I. 285, 3 Atl. 412; Hawkins *v.* Baker, 14 R. I. 139.

94. *Florida.*— Marshall *v.* Bumby, 25 Fla. 619, 6 So. 480; Johnston *v.* Allen, 22 Fla. 224, 1 Am. St. Rep. 180.

Maryland.— Urner *v.* Sollenberger, 89 Md. 316, 43 Atl. 810; Williams *v.* Peters, 72 Md. 584, 20 Atl. 175.

Massachusetts.— Chemical Electric Light, etc., Co. *v.* Howard, 150 Mass. 495, 23 N. E. 317; Page *v.* Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; Barton *v.* Radclyffe, 149 Mass. 275, 21 N. E. 374; Roberts *v.* White, 146 Mass. 256, 15 N. E. 568.

England.— Scott *v.* Littledale, 8 E. & B. 815; Wodehouse *v.* Farebrother, 5 E. & B. 277; Perez *v.* Oleaga, 11 Exch. 506; Steele *v.* Haddock, 10 Exch. 643; Wood *v.* Dwarris, 11 Exch. 493; Mines Royal Soc. *v.* Magnay, 10 Exch. 489; Wake *v.* Harrop, 6 H. & N. 768; Solvency Mut. Guarantee Co. *v.* Freeman, 7 H. & N. 17; Gorely *v.* Gorely, 1 H. & N. 144; Allen *v.* Walker, L. R. 5 Exch. 187; Lently *v.* Hillas, 4 Jur. N. S. 1166; Farebrother *v.* Welchman, 3 Drew. 122; Kingsford *v.* Swinford, 5 Jur. N. S. 261; Gompertz *v.* Pooley, 4 Drew. 448, 5 Jur. N. S. 261; Prothero *v.* Phelps, 2 Jur. N. S. 173; Wakley *v.* Froggatt, 2 H. & C. 669; Gibbs *v.* Guild, 9 Q. B. D. 59; Waterlow *v.* Bacon, L. R. 2 Eq. 514; Wood *v.* Copper Miners' Co., 17 C. B. 561.

Canada.— Griggs *v.* Firley, 6 U. C. L. J. 61; Belyea *v.* Muir, 5 Ont. Pr. 273; Marmand *v.* McCraddy, 3 Russ. & C. N. S. 66.

An equitable defense, when set up in an action at law, must be such a one as may be proved by witnesses competent to testify in such actions. Thus, where a party to a suit at law is disqualified from giving the evidence necessary to support the plea, for the reason that he is a party to the suit, the issues raised by the plea cannot be tried. Perley *v.* Loney, 18 U. C. Q. B. 429.

95. Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; Radcliffe *v.* Varner, 56 Ga. 222; Field *v.* Price, 52 Ga. 469; Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770; Winfield *v.* Bacon, 24 Barb. (N. Y.) 154; Foot *v.* Sprague, 12 How. Pr. (N. Y.) 355. But see Auburn City Bank *v.* Leonard, 20 How. Pr. (N. Y.) 193, where it was held that if affirmative relief cannot be had upon an equitable defense set up by defendant in an action at law, because other necessary parties thereto are not before the court, a defendant is not compelled to obtain such relief, but may rely on the matter set up as a defense only, and may bring a separate action in equity for the affirmative relief required. *Compare* Elder *v.* Allison, 45 Ga. 13.

96. Ayres *v.* Bensley, 32 Cal. 620; Hough *v.* Waters, 30 Cal. 309; Lorraine *v.* Long, 6 Cal. 452; Emmerson *v.* Herriford, 8 Bush (Ky.) 229; Ross *v.* Ross, 3 Metc. (Ky.) 274; Chinn *v.* Mitchell, 2 Metc. (Ky.) 92; Moss *v.* Rowland, 1 Duv. (Ky.) 321; Spaur *v.* McBee, 19 Oreg. 76, 23 Pac. 818; Hill *v.* Cooper, 6 Oreg. 181; Warwick *v.* Norvell, 1 Rob. (Va.) 308.

97. *Florida.*— Walls *v.* Endel, 20 Fla. 86.

Iowa.— Penny *v.* Cook, 19 Iowa 538.

Nevada.— South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89.

New York.— Dyke *v.* Spargur, 143 N. Y. 651, 38 N. E. 269; Thurman *v.* Anderson, 30 Barb. (N. Y.) 621.

Pennsylvania.— Murphy *v.* Hubert, 16 Pa. St. 50.

Utah.— Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

98. Willis *v.* Wozencraft, 22 Cal. 607.

99. As to accrual of cause of action for running of statute of limitations see LIMITATIONS OF ACTIONS.

mitted by statute,[1] on a debt or demand that is not due at the time of the commencement of the action. Plaintiff, in order to recover, must have a right of action before beginning suit.[2]

b. Debt Payable in Instalments. Where a debt is payable in instalments, recovery cannot be had on the whole debt on default in the payment of an instalment, in the absence of a stipulation that on default of any instalment the whole shall become due.[3] It has been held, however, that if a person is bound by

1. As to attachment before maturity of debt or demand see ATTACHMENT.

2. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.—Blount *v.* McNeill, 29 Ala. 473; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Griffin *v.* State Bank, 6 Ala. 908; Woodward *v.* Harbin, 4 Ala. 534, 37 Am. Dec. 753.

Arkansas.— Pyburne *v.* Moses, 54 Ark. 121, 15 S. W. 84; Moore *v.* Horsley, 42 Ark. 163; Phebe *v.* Quillin, 21 Ark. 490; Zachery *v.* Brown, 17 Ark. 442.

California.— Lewis *v.* Fox, 122 Cal. 244, 54 Pac. 823; Landis *v.* Morrissey, 69 Cal. 83, 10 Pac. 258; Hentsch *v.* Porter, 10 Cal. 555.

Colorado.— Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88.

Connecticut.— Dickerman *v.* New York, etc., R. Co., 72 Conn. 271, 44 Atl. 228; Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657; Southey *v.* Dowling, 70 Conn. 153, 39 Atl. 113.

District of Columbia.— Arrick *v.* Fry, 8 App. Cas. (D. C.) 125.

Georgia.— Wadley *v.* Jones, 55 Ga. 329; Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235.

Illinois.— Pitts Sons Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Harvey *v.* Parsons, 36 Ill. 147; Nickerson *v.* Babcock, 29 Ill. 497; Ford *v.* Parr, 57 Ill. App. 139.

Indiana.— Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865.

Iowa.— Seaton *v.* Hinneman, 50 Iowa 395; Whitney *v.* Bird, 11 Iowa 407.

Kansas.— Smith *v.* Smith, 22 Kan. 699.

Kentucky.— Harper *v.* Montgomery, 5 Litt. (Ky.) 347. *Compare* Kelly *v.* Kelly, 2 Duv. (Ky.) 363.

Louisiana.— Catlett *v.* Heffner, 23 La. Ann. 577; Taylor *v.* Pearce, 15 La. Ann. 564; Dugas *v.* Truxillo, 15 La. Ann. 116; Groning *v.* Krumbhaar, 13 La. 402.

Maine.— Wingate *v.* Smith, 20 Me. 287.

Massachusetts.— Emery *v.* Seavey, 148 Mass. 566, 20 N. E. 177; Cram *v.* Holt, 135 Mass. 46; Franklin Sav. Inst. *v.* Reed, 125 Mass. 365; Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439.

Michigan.— Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122.

Minnesota.— Napa Valley Wine Co. *v.* Daubner, 63 Minn. 112, 65 N. W. 143; Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143.

Mississippi.— Wiggle *v.* Thomason, 11 Sm. & M. (Miss.) 452.

Missouri.— Heard *v.* Ritchey, 112 Mo. 516, 20 S. W. 799; Turk *v.* Stahl, 53 Mo. 437; Mason *v.* Barnard, 36 Mo. 384; Weinwick *v.* Bender, 33 Mo. 80; McDowell *v.* Morgan, 33 Mo. 555.

Nebraska.— Green *v.* Raymond, 9 Nebr. 295, 2 N. W. 881.

New Hampshire.— Hilliard *v.* Bothell, 64 N. H. 313, 8 Atl. 826; Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25.

New York.— Smadbeck *v.* Sisson, 31 Hun (N. Y.) 582; Mack *v.* Burt, 5 Hun (N. Y.) 28; Smith *v.* Aylesworth, 40 Barb. (N. Y.) 104; Hare *v.* Van Deusen, 32 Barb. (N. Y.) 92; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170; Waring *v.* Yates, 10 Johns. (N. Y.) 119; Storm *v.* Livingston, 6 Johns. (N. Y.) 44; Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42; Lowry *v.* Lawrence, 1 Cai. (N. Y.) 69; Garrigue *v.* Loescher, 3 Bosw. (N. Y.) 578; Wattson *v.* Thibou, 17 Abb. Pr. (N. Y.) 184.

Ohio.— Redick *v.* Orr, Tappan (Ohio) 158; Chapline *v.* Tope, Tappan (Ohio) 282.

Oregon.— Fiore *v.* Ladd, 29 Oreg. 528, 46 Pac. 144; Elder *v.* Rourke, 27 Oreg. 363, 41 Pac. 6.

Pennsylvania.— Langer *v.* Parish, 8 Serg. & R. (Pa.) 134; McLaughlin *v.* Parker, 3 Serg. & R. (Pa.) 144; Miller *v.* Ralston, 1 Serg. & R. (Pa.) 309; Stewart *v.* McBride, 1 Serg. & R. (Pa.) 202; Owen *v.* Shelhamer, 3 Binn. (Pa.) 45; Gordon *v.* Kennedy, 2 Binn. (Pa.) 287; Moore *v.* Wait, 1 Binn. (Pa.) 219.

Rhode Island.— Clapp *v.* Smith, 16 R. I. 717, 19 Atl. 330.

South Carolina.— Moon *v.* Johnson, 14 S. C. 434; Josey *v.* Dixon, 12 Rich. (S. C.) 378; State Bank *v.* S. C. Mfg. Co., 3 Strobh. (S. C.) 190; Wilson *v.* Williman, 1 Nott & M. (S. C.) 440.

Tennessee.— Simmons *v.* Harris, 7 Baxt. (Tenn.) 325; Blevins *v.* Alexander, 4 Sneed (Tenn.) 583.

Texas.— Kerr *v.* Riddle, (Tex. Civ. App. 1895) 31 S. W. 328.

Vermont.— Wetherell *v.* Evarts, 17 Vt. 219.

Washington.— Rockford Shoe Co. *v.* Jacob, 6 Wash. 421, 33 Pac. 1057.

Wisconsin.— Streissguth *v.* Reigelman, 75 Wis. 212, 43 N. W. 1116; Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753; Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238; Turner *v.* Pierce, 31 Wis. 342.

England.— Pugh *v.* Robinson, 1 T. R. 116; Granger *v.* Dacre, 12 M. & W. 431; Owen *v.* Waters, 2 M. & W. 91; Gurney *v.* Hill, 2 Dowl. N. S. 936; Wood *v.* Newton, 1 Wils. C. P. 141; Ward *v.* Honeywood, 1 Dougl. 61.

3. Napa Valley Wine Co. *v.* Daubner, 63 Minn. 112, 65 N. W. 143; Foxell *v.* Fletcher, 87 N. Y. 476.

Election to declare debt due before matur-

a bond with a penalty conditioned to be discharged by the payment of several sums at different times, a suit will lie immediately after the time fixed for the payment of any one instalment has elapsed, although the other sums may not be due.[4]

c. Exhaustion of Collateral. It has been held that in the absence of a statute or agreement requiring a creditor to exhaust collateral security given before suing for the debt,[5] the mere taking of collateral security does not suspend the right to sue for the debt.[6]

d. Expiration of Period of Credit. An action on a debt or demand on definite credit is premature when brought before the expiration of the credit.[7] It has been held, however, that where goods are sold on credit, the vendee to give his note, and after the goods are delivered he refuses so to do, an action may be maintained for a breach of the contract before the expiration of the credit.[8] It

ity.— A creditor having the right, for default of the debtor, to declare a debt due before maturity, may make his election by bringing suit thereon; and such election will, in the absence of anything to the contrary, be deemed to have been made upon all the grounds specified. Northwestern Mut. L. Ins. Co. *v.* Allis, 23 Minn. 337.

Recovery on instalment.— Where a debt is payable in instalments, recovery may be had on an instalment on default in the payment thereof. Tucker *v.* Randall, 2 Mass. 283.

Subsequent extension of credit.—A creditor who by a subsequent agreement extends the time of payment of a debt so that it shall be payable in instalments cannot, on default in part of the instalments, sue on the debt. Napa Valley Wine Co. *v.* Daubner, 63 Minn. 112, 65 N. W. 143; Foxell *v.* Fletcher, 87 N. Y. 476.

4. Cocke *v.* Stuart, 2 Overt. (Tenn.) 231.

5. In California and Minnesota, by statute, an action on a note secured by mortgage is not maintainable until the mortgage security is first exhausted. Bartlett *v.* Cottle, 63 Cal. 366; Johnson *v.* Lewis, 13 Minn. 364; Swift *v.* Fletcher, 6 Minn. 550. But such a statute does not apply where the security is worthless. Schalck *v.* Harmon, 6 Minn. 265.

Agreement that execution shall not issue. — In Kennion *v.* Kelsey, 10 Iowa 443, it appeared that a note and a mortgage to secure its payment were executed at the same time, the mortgage containing a stipulation that "general execution shall not issue herein." It was held that the mortgagee could not recover a general judgment on the note, his remedy being limited to the mortgaged property alone.

6. *Illinois.*— Vansant *v.* Allmon, 23 Ill. 30.

Indiana.— Mills *v.* Gould, 14 Ind. 278; Dugan *v.* Sprague, 2 Ind. 600.

Kansas.—Lichty *v.* McMartin, 11 Kan. 565.

Louisiana.— Canonge *v.* Fuselier, 10 La. Ann. 697.

Massachusetts.— Burtis *v.* Bradford, 122 Mass. 129; Ball *v.* Wyeth, 99 Mass. 338; Ely *v.* Ely, 6 Gray (Mass.) 439.

Missouri.— Kansas City Sav. Assoc. *v.* Mastin, 61 Mo. 435.

New York.— Cary *v.* White, 52 N. Y. 138 [*disapproving* Pratt *v.* Coman, 37 N. Y. 440]; Mechanics', etc., Bank *v.* Wixon, 42 N. Y. 438; Taggard *v.* Curtenius, 15 Wend. (N. Y.) 155; Dunkley *v.* Van Buren, 3 Johns. Ch. (N. Y.) 330.

Washington.— Frank *v.* Pickle, 2 Wash. Terr. 55, 3 Pac. 584.

United States.— Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829; U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437; Connecticut Mut. L. Ins. Co. *v.* Jones, 1 McCrary (U. S.) 388, 8 Fed. 303.

As to effect of taking collateral security, generally, see CHATTEL MORTGAGES; MORTGAGES; PLEDGES.

As to right to sue on the debt and collateral security at the same time see ABATEMENT AND REVIVAL, II, O.

7. Daniels *v.* Osborn, 71 Ill. 169; Barron *v.* Mullin, 21 Minn. 374; Russell *v.* Englehardt, 24 Mo. App. 36; Dodge *v.* Waterman, 36 N. H. 186.

Burden of proof.— In assumpsit for the price of goods it appeared that suit was brought six days after the goods were sold, and that at the time of the sale nothing was said about the terms; but there was evidence that previous bills had been sold on thirty days' time. It was held that the burden of proof rested on plaintiff to show that the demand had matured at the institution of the suit. Kahn *v.* Cook, 22 Ill. App. 559.

Insolvency.— In Kleinwort *v.* Klingender, 14 La. Ann. 96, it was held that mere insolvency is not sufficient to render a debt due which by its terms is payable at a future day.

8. Russell *v.* Englehardt, 24 Mo. App. 36; Benjamin *v.* Zell, 100 Pa. St. 33; Rinehart *v.* Olwine, 5 Watts & S. (Pa.) 157; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; Hale *v.* Jones, 48 Vt. 227. See also Stoddard *v.* Mix, 14 Conn. 12, where defendant promised plaintiff to give him a note for $100 payable in sixty days, and then refused to give such note. It was held that this was a promise to give such note immediately or within a reasonable time, and that a right of action accrued immediately upon defendant's refusal to give it. And see Kronenberger *v.* Binz, 56 Mo. 121, wherein it was held that the amount ascertained by a settlement becomes due from the date thereof, and where, by the terms of the settlement, the debtor stipulates to give his note payable at a day certain for the amount found to be

has also been held that where a buyer has obtained goods upon a credit by means of fraudulent representations the contract may be repudiated and a new one implied to pay at once for the goods.[9]

e. Expiration of Time of Performance. It is a general rule that an action commenced upon a contract before the expiration of the time fixed for performance is premature and cannot be maintained.[10] But if a party disables himself from performing his contract he may be sued as for a breach thereof before the day for performance arrives.[11] And if, before the time for performing the contract arrives, the promisor expressly renounces his contract, the promisee may treat this as a breach of the contract and may at once bring his action for it.[12]

due, but fails to do so, the debt accrues immediately.

Mere failure to give note.— But where goods are agreed to be sold on credit, and the buyer is to give his note for the price, if the goods are delivered without the note or any request for it, the stipulation for the note is waived, and no action can be maintained for the price of the goods until the agreed term of credit has expired. Dodge *v.* Waterman, 36 N. H. 186. To same effect, Russell *v.* Englehardt, 24 Mo. App. 36. *Compare* Hartman *v.* Proudfit, 6 Bosw. (N. Y.) 191.

9. Manufacturers, etc., Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83; Willson *v.* Foree, 6 Johns. (N. Y.) 110; White *v.* Harrison, 1 N. Y. City Ct. 482. See also Arnold *v.* Shapiro, 29 Hun (N. Y.) 478, which held that where one who has obtained goods upon credit fraudulently disposes of his property for the purpose of cheating his creditors, the credit is avoided, and suit may be brought for the price of the goods, although the term for which credit was given has not expired. *Compare* Zenner *v.* Dessar, 22 N. Y. Wkly. Dig. 403.

10. *Alabama.*— Thompson *v.* Gordon, 72 Ala. 455, wherein it was held that where an agreement for the sale of lands provides for a conveyance on payment of the price, and gives the vendee three years to pay, a bill filed by the vendee within three years, for the specific performance of the contract, is premature.

Georgia.— Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235, wherein it was held that where an agent was to have ninety days within which to account for the sale of the articles consigned to him the principal has no right of action until the expiration of the ninety days.

Illinois.— Snydacker *v.* Magill, 24 Ill. 138.

Iowa.— Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208.

Massachusetts.— Gaffney *v.* Hicks, 124 Mass. 301.

New York.— Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Campbell *v.* Campbell, 65 Barb. (N. Y.) 639. See also Smadbeck *v.* Sisson, 31 Hun (N. Y.) 582, wherein it was held that where, in an action to recover for work, it appeared from the affidavit for an attachment that the suit was brought on the very day on which the work was completed, and it did not appear that defendant was notified of its completion, the suit was prematurely begun.

North Carolina.—Kelly *v.* Oliver, 113 N. C. 442, 18 S. E. 698.

Pennsylvania.—Gordon *v.* Kennedy, 2 Binn. (Pa.) 287.

Day of performance.—In Harris *v.* Blen, 16 Me. 175, it was held that where, by the terms of a contract, money is payable on a particular day, an action cannot, except in the case of negotiable paper, be brought on that day, although a demand has been made on the same day.

11. *Illinois.*—Lee *v.* Pennington, 7 Ill. App. 247, which was an action on a trustee's bond obligating him to hold a certain fund for A until the death of B, to whom the interest was payable. It was held that upon the trustee's embezzlement of the fund, insolvency, and death, action lay before B's death.

Iowa.— Crabtree *v.* Messersmith, 19 Iowa 179.

Massachusetts.— Jewett *v.* Brooks, 134 Mass. 505; Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384; Heard *v.* Bowers, 23 Pick. (Mass.) 455.

New York.— Taylor *v.* Bradley, 39 N. Y. 129; Campbell *v.* Campbell, 65 Barb. (N. Y.) 639.

Texas.— See Gulf, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1900) 55 S. W. 986.

England.— Lovelock *v.* Franklyn, 8 Q. B. 371; Short *v.* Stone, 8 Q. B. 358; Ford *v.* Tiley, 6 B. & C. 325; Bowdell *v.* Parsons, 10 East 359; Wilkinson *v.* Verity, L. R. 6 C. P. 206; Planche *v.* Colburn, 8 Bing. 14; Avery *v.* Bowden, 5 E. & B. 714, 6 E. & B. 953; 5 Vin. Abr. 224.

Marriage to another person.— One who promises to marry a woman on a future day, and before that day arrives marries another woman, is instantly liable to an action for breach of promise of marriage. Short *v.* Stone, 8 Q. B. 358.

12. *Iowa.*— Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208, holding that where one of the parties to a contract to marry renounces the contract before that time has arrived, the other party may treat such renunciation as a breach and may at once maintain an action therefor; Crabtree *v.* Messersmith, 19 Iowa 179.

Kansas.—Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Maryland.— Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

New Hampshire.— Lamoreaux *v.* Rolfe, 36 N. H. 33.

New York.— Howard *v.* Daly, 61 N. Y.

f. Happening of Event. Where money is to be paid on the happening of an event, suit cannot be brought until the event has happened.[13]

g. Maturity of Note Taken for Previous Debt. The rule is a very general one that, in the absence of an agreement to the contrary, the taking of a note for a preëxisting simple-contract debt extends the time of payment and suspends the creditor's remedy until the maturity of the note.[14]

362, 19 Am. Rep. 285. See also Lee *v.* Decker, 3 Abb. Dec. (N. Y.) 53.

West Virginia.— James *v.* Adams, 16 W. Va. 245.

England.— Hochster *v.* De Lataur, 20 Eng. L. & Eq. 157, wherein it was held that a party who had contracted with another to enter his services as a carrier on the 1st of June thereafter became liable to an action before that day by giving notice of his refusal to employ him according to the contract; Danube, etc., R., etc., Co. *v.* Xenos, 11 C. B. N. S. 152, 13 C. B. N. S. 825; Frost *v.* Knight, L. R. 7 Exch. 111, 5 Alb. L. J. 235; Avery *v.* Bowden, 5 E. & B. 714; Chitty Contr. (10th Am. from 6th Eng. ed.) 799. *Contra*, Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384, wherein it was held that an action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purpose, cannot be maintained, even though there is an absolute refusal on defendant's part ever to purchase.

13. *Illinois.*— Crandall *v.* Payne, 54 Ill. App. 644.

Maine.—Hamlin *v.* Otis, 36 Me. 381, wherein it was held that where commissioners are appointed by the court to partition lands, and an agreement is made by all concerned that the commissioners shall apportion among all the parties all expenses under the commission, the commissioners cannot recover for their services until the apportionment is made.

New York.— Childs *v.* Smith, 38 How. Pr. (N. Y.) 328, wherein it was held that where an agreement is made that one person shall pay another a certain sum on the organization of a certain company, and all the formalities of the organization are completed except the filing of the certificate required by the act, an action brought to recover such sum is premature.

Tennessee.— Arnold *v.* Elliott, 7 Humphr. (Tenn.) 354, wherein it was held that where a debtor promised to pay a debt discharged in bankruptcy after a certain time no suit could be maintained on such debt until such time had elapsed.

Wisconsin.— Smith *v.* Malbon, 4 Wis. 300, wherein it appeared that the claimant of an interest in a steamboat entered into an agreement with one S, who had taken the boat in the character of an agent or trustee to sell her, that when the boat should be sold, and the debts subsisting against her paid, the claimant should "receive his share of any equitable claim which he may have against said boat, either as stock or otherwise." It was held that no cause of action against S accrued to the claimant till the boat was sold and the debts paid.

Ability to pay.— In Denney *v.* Wheelwright, 60 Miss. 733, it was held that the liability created by a promise to pay a certain debt when or if the promisor becomes able becomes absolute immediately upon his becoming able to pay it, and the right of action thereby accruing is not lost by his subsequent insolvency or inability to pay the debt.

Delivery of deposit.— In Ripley *v.* Wardell, 1 Cai. (N. Y.) 175, it was held that if a security be deposited, on the return of which the depositary will be entitled to something in lieu, on tendering the deposit an action may at once be brought for the substitute.

Lease of building when completed.— In Friedman *v.* McAdory, 85 Ala. 61, 4 So. 835, it was held that a bill to enforce a contract to lease a building when completed cannot be maintained while the building is in course of construction.

Satisfaction of judgment.— In Tobin *v.* McCann, 17 Mo. App. 481, it was held that there can be no recovery where the right of action is dependent on the satisfaction of a judgment which is not satisfied until after the action is brought.

"When balance of purchase-money is paid." — In Green *v.* Robertson, 64 Cal. 75, 28 Pac. 446, it was held that where a person contracts to pay his agent a certain commission when the balance of purchase-money is paid on the principal's ranch, the right of action for such commission accrues at the instant the balance of the purchase-money is paid.

14. *Alabama.*— McCrary *v.* Carrington, 35 Ala. 698; Mobile L. Ins. Co. *v.* Randall, 71 Ala. 220.

California.— Comptoir D'Escompte *v.* Dresbach, 78 Cal. 15, 20 Pac. 28; Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151; Welch *v.* Allington, 23 Cal. 322; Smith *v.* Owens, 21 Cal. 11.

Florida.— Pitt *v.* Acosta, 18 Fla. 270.

Illinois.— Cox *v.* Keiser, 15 Ill. App. 432.

Maryland.— Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Mudd *v.* Harper, 1 Md. 110, 54 Am. Dec. 644; Hunter *v.* Van Bomhorst, 1 Md. 504; Glenn *v.* Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452.

Massachusetts.— Appleton *v.* Parker, 15 Gray (Mass.) 173.

Michigan.— Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529; Phoenix Ins. Co. *v.* Allen, 11 Mich. 501, 83 Am. Dec. 756.

Minnesota.— Barnum *v.* Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

Missouri.— McMurray *v.* Taylor, 30 Mo. 263, 77 Am. Dec. 611.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100; Westervelt *v.* Frech, 33 N. J. Eq. 451.

2. Accrual of Cause Subsequent to Commencement. A plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action.[15] Nor can plaintiff recover in a pending action on a cause of action which accrued after the institution of such action, even though such cause of action relate to the subject-matter of the pending action.[16]

New York.— Jagger Iron Co. *v.* Walker, 76 N. Y. 521; Greene *v.* Bates, 74 N. Y. 333; Happy *v.* Moslier, 48 N. Y. 313; Reed *v.* Ashe, 18 N. Y. App. Div. 501, 46 N. Y. Suppl. 126; Martens-Turner Co. *v.* Mackintosh, 17 N. Y. App. Div. 419, 45 N. Y. Suppl. 275; Parrott *v.* Colby, 6 Hun (N. Y.) 55; Dodge *v.* Johnson, 9 N. Y. Civ. Proc. 339; Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290, 13 Am. Dec. 533; Putnam *v.* Lewis, 8 Johns. (N. Y.) 389; Tobey *v.* Barber, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326.

Rhode Island.— Wilbur *v.* Jernegan, 11 R. I. 113.

South Carolina.— Judge *v.* Fiske, 2 Speers (S. C.) 436, 42 Am. Dec. 380.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874.

Vermont.— Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

Virginia.— Blair *v.* Wilson, 28 Gratt. (Va.) 165.

West Virginia.— Hornbrooks *v.* Lucas, 24 W. Va. 493, 49 Am. Rep. 277; Merchants Nat. Bank *v.* Good, 21 W. Va. 455.

Wisconsin.— Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

United States.— Black *v.* Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690.

England.— Stedman *v.* Gooch, 1 Esp. 3; Palmer *v.* Bramley, [1895] 2 Q. B. 405.

But see Whitney *v.* Goin, 20 N. H. 354, wherein it was held that the receiving, by a creditor from his debtor, of the note of a third person, indorsed by the debtor, as collateral security for the debt, is not conclusive evidence of an agreement to wait for its maturity before collecting the principal debt.

As to acceptance of note as payment see Payment.

15. *Alabama.*— Collier *v.* Crawford, Minor (Ala.) 100.

Arkansas.— Scott *v.* Fowler, 14 Ark. 427.

California.— Lewis *v.* Fox, 122 Cal. 244, 54 Pac. 823.

Georgia.— Wadley *v.* Jones, 55 Ga. 329.

Kansas.— Smith *v.* Smith, 22 Kan. 699.

Louisiana.— Dugas *v.* Truxillo, 15 La. Ann. 116.

Massachusetts.— Wheatland *v.* Lovering, 10 Gray (Mass.) 16.

Michigan.— Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122.

Missouri.— Werth *v.* Springfield, 22 Mo. App. 12.

New Hampshire.— Tappan *v.* Tappan, 30 N. H. 50; Robinson *v.* Burleigh, 5 N. H. 225.

New York.— Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 23 N. E. 1054; Banigan *v.* Nyack, 25 N. Y. App. Div. 150, 49 N. Y. Suppl. 199; Hare *v.* Van Deusen, 32 Barb. (N. Y.) 92; Storm *v.* Livingston, 6 Johns. (N. Y.) 44; Garrigue *v.* Loescher, 3 Bosw. (N. Y.) 578; Wattson *v.* Thibou, 17 Abb. Pr. (N. Y.) 184.

Ohio.— Dewit *v.* Greenfield, 5 Ohio 225.

Pennsylvania.— Roud *v.* Griffith, 11 Serg. & R. (Pa.) 130; McLaughlin *v.* Parker, 3 Serg. & R. (Pa.) 144; Stewart *v.* McBride, 1 Serg. & R. (Pa.) 202; Miller *v.* Ralston, 1 Serg. & R. (Pa.) 309; Campbell *v.* Scaife, 1 Phila. (Pa.) 187, 8 Leg. Int. (Pa.) 74.

Tennessee.— Blevins *v.* Alexander, 4 Sneed (Tenn.) 583; Nashville Bank *v.* Ragsdale, Peck (Tenn.) 296; Reed *v.* Brewer, Peck (Tenn.) 275.

Texas.— Moreland *v.* Atchison, 24 Tex. 164; Bradford *v.* Hamilton, 7 Tex. 55; Linn *v.* Scott, 3 Tex. 67. *Compare* Crescent Ins. Co. *v.* Camp, 64 Tex. 521; Cox *v.* Reinhardt, 41 Tex. 591.

Vermont.— Wetherell *v.* Evarts, 17 Vt. 219.

Wisconsin.— Turner *v.* Pierce, 31 Wis. 342.

Illustrations.— There can be no recovery where the right of action is dependent upon the satisfaction of a judgment which is not satisfied until after the suit is begun. Tobin *v.* McCann, 17 Mo. App. 481.

An action for payments made by a surety for his principal cannot be maintained where it appears that the payments sued for were made after the institution of the suit. Jennings *v.* Zerr, 48 Mo. App. 528.

16. *Alabama.*— Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

Illinois.— Hamlin *v.* Race, 78 Ill. 422; Toledo, etc., R. Co. *v.* Arnold, 49 Ill. 178; Nickerson *v.* Babcock, 29 Ill. 497.

Missouri.— Hudson *v.* Burk, 48 Mo. App. 314.

North Carolina.— Metcalf *v.* Guthrie, 94 N. C. 447.

Vermont.— Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321.

See also Claflin *v.* Mather Electric Co., 98 Fed. 699, 39 C. C. A. 241, wherein it was held that plaintiff, not having a right to sue on a portion of its claim at the time it commenced its first suit, cannot be required to introduce its cause of action thereon into such suit by amendment after the same accrued. But see Burns *v.* True, 5 Tex. Civ. App. 74, 24 S. W. 338, wherein it was held that the fact that a cause of action had not accrued when the original petition was filed is immaterial, where it had accrued when the amended petition was filed. And see Warfield *v.* Oliver, 23 La. Ann. 612, wherein it was held that if a suit is commenced before the entire obligations sued on are due, but some obligations become due before judgment, the court may, in its discretion, allow an amendment of the pleadings so as to cover the whole demand.

3. Premature Commencement[17]— **a. Parts of Causes Premature.** A suit prematurely brought as to parts of the causes of action stated therein will be dismissed only as to such causes.[18]

b. Objections to Premature Commencement — (i) *Necessity.* It has been held that an objection that an action was brought before the cause thereof accrued must be pleaded or in some way urged at the trial. Advantage cannot be taken of it for the first time on appeal or error.[19]

(ii) *Manner of Raising.* If a suit is brought before the cause of action accrues, the objection may be pleaded in abatement;[20] or it may be raised by demurrer where it appears on the face of the declaration or complaint;[21] or it

17. As to effect of premature commencement see *supra*, III, A, 1.

Ancillary proceedings.— As garnishee proceedings are ancillary to the main action, a decision in the main action that plaintiff's claim is due and that he is entitled to a judgment is, until set aside, conclusive on a motion made to dismiss the garnishee proceedings on the ground that the action was prematurely brought. Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143.

18. Osburn *v.* McCartney, 121 Ill. 408, 12 N. E. 72; Knapp *v.* Joy, 9 Mo. App. 575. But see Stewart *v.* McBride, 1 Serg. & R. (Pa.) 202, wherein it was held that if there are two counts in a declaration and one of them states a cause of action which had not accrued when the suit was commenced, and a general verdict is found for plaintiff, the judgment will be reversed.

Action on notes.— If the action is based on notes, some of which are due and others not, the cause may proceed as to the notes which have matured. Knapp *v.* Joy, 9 Mo. App. 575.

19. Mahoney *v.* O'Leary, 34 Ala. 97; Johnson *v.* Meyer, 54 Ark. 442, 16 S. W. 123 (holding that upon appeal an objection cannot be made for the first time that a suit to foreclose a mortgage was brought before its conditions were broken); Hickey *v.* Thompson, 52 Ark. 234, 12 S. W. 475; Clason *v.* Kehoe, 87 Hun (N. Y.) 368, 34 N. Y. Suppl. 431 (holding that an objection that an action upon an undertaking was commenced sooner than was permitted by the statute cannot be taken for the first time on appeal); Elder *v.* Rourke, 27 Oreg. 363, 41 Pac. 6. See also Blount *v.* McNeill, 29 Ala. 473 [*distinguishing* Randolph *v.* Cook, 2 Port. (Ala.) 286], holding that where the judgment is by *nil dicit* and the complaint shows a good cause of action, the objection cannot be raised on error for the first time that one of the notes on which the suit is founded was not due when the action was commenced.

20. *Alabama.*— Herndon *v.* Garrison, 5 Ala. 380; McKenzie *v.* McColl, 3 Ala. 516; Jones *v.* Yarborough, 2 Ala. 524; Randolph *v.* Cook, 2 Port. (Ala.) 286.

Arkansas.— Hicks *v.* Branton, 21 Ark. 186.

Colorado.— Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88.

Illinois.—Pitts Sons Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Culver *v.* Johnson, 90 Ill. 91; Palmer *v.* Gardiner, 77 Ill. 143; Archibald *v.* Argall, 53 Ill. 307.

Maine.— Wingate *v.* Smith, 20 Me. 287.

Massachusetts.— Benthall *v.* Hildreth, 2 Gray (Mass.) 288; Prescott *v.* Tufts, 7 Mass. 209.

Minnesota.— Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143.

Mississippi.— Winston *v.* Miller, 12 Sm. & M. (Miss.) 550.

Missouri.— Giboney *v.* German Ins. Co., 48 Mo. App. 185.

New York.— Osborn *v.* Moncure, 3 Wend. (N. Y.) 170.

Oregon.— Elder *v.* Rourke, 27 Oreg. 363, 41 Pac. 6.

Tennessee.— Robinson *v.* Grubb, 8 Baxt. (Tenn.) 19; Simmons *v.* Harris, 7 Baxt. (Tenn.) 325; Carter *v.* Turner, 2 Head (Tenn.) 51; Bell *v.* Bullion, 2 Yerg. (Tenn.) 478.

Vermont.— Wetherell *v.* Evarts, 17 Vt. 219.

Wisconsin.— Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753; Millett *v.* Hayford, 1 Wis. 401.

England.— Rush *v.* Tory, 4 Mod. 367; Venables *v.* Daffe, Carth. 113; Ward *v.* Honeywood, 1 Dougl. 61; 1 Comyn's Dig. Abatement, G, 6, p. 98; 1 Chitty Pl. 553.

Necessity of pleading in abatement.— In some states it is held that facts merely showing that an action has been prematurely brought must be pleaded in abatement and cannot be pleaded in bar. Herndon *v.* Garrison, 5 Ala. 380; McKenzie *v.* McColl, 3 Ala. 516; Jones *v.* Yarborough, 2 Ala. 524; Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865; Midland R. Co. *v.* Stevenson, 6 Ind. App. 207, 33 N. E. 254.

21. *Arkansas.*— Hicks *v.* Branton, 21 Ark. 186; Zachery *v.* Brown, 17 Ark. 442.

California.— Hentsch *v.* Porter, 10 Cal. 555.

Connecticut.— Dickerman *v.* New York, etc., R. Co., 72 Conn. 271, 44 Atl. 228; Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657; Southey *v.* Dowling, 70 Conn. 153, 39 Atl. 113.

Illinois.— Collins *v.* Montemy, 3 Ill. App. 182.

Indiana.— Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865; Midland R. Co. *v.* Stevenson, 6 Ind. App. 207, 33 N. E. 254.

Massachusetts.— Bemis *v.* Faxon, 4 Mass. 263.

Minnesota.— Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143.

Mississippi.— Winston *v.* Miller, 12 Sm. & M. (Miss.) 550.

New York.— Maynard *v.* Talcott, 11 Barb. (N. Y.) 569; Lowry *v.* Lawrence, 1 Cai. (N. Y.)

may be taken on the trial under the general issue or general denial;[22] or it may be made the basis of a motion for a nonsuit.[23]

(III) *Waiver*—(A) *In General.* It has been held that where defendant is sued on a demand before it is due, and pleads in chief, it is too late afterward to make objection that the action is premature.[24]

(B) *Confession of Judgment.* Error in bringing an action before the cause of action accrues is cured by a confession of judgment;[25] but not by a judgment by default.[26]

69; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170; Waring *v.* Yates, 10 Johns. (N. Y.) 119; Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42.

Tennessee.—Carter *v.* Turner, 2 Head (Tenn.) 51.

Wisconsin.— Millett *v.* Hayford, 1 Wis. 401.

England.— 1 Chitty Pl. 553; Granger *v.* Dacre, 12 M. & W. 431; Owen *v.* Waters, 2 M. & W. 91; Gurney *v.* Hill, 2 Dowl. N. S. 936; Pugh *v.* Robinson, 1 T. R. 116.

Exception in limine litis.— In Louisiana, if the demand of the plaintiff is premature, a defense for that cause should be by exception *in limine litis.* Mortee *v.* Edwards, 20 La. Ann. 236; Penniston *v.* Jefferson, 18 La. Ann. 158; Wiltz *v.* De St. Romes, 18 La. Ann. 187; Ross *v.* Chambliss, 5 La. Ann. 158.

22. *Alabama.*— Rainey *v.* Long, 9 Ala. 754, holding that defendant may prove, under the general issue in assumpsit, that the action was commenced before the debt was due.

Arkansas.— Hicks *v.* Branton, 21 Ark. 186.

California.— Landis *v.* Morrissey, 69 Cal. 83, 10 Pac. 258.

Illinois.— Hamlin *v.* Race, 78 Ill. 422; Daniels *v.* Osborn, 71 Ill. 169; Nickerson *v.* Babcock, 29 Ill. 497; Harlow *v.* Boswell, 15 Ill. 56.

Maine.— Wingate *v.* Smith, 20 Me. 287.

Massachusetts.— Wilder *v.* Colby, 134 Mass. 377; Franklin Sav. Inst. *v.* Reed, 125 Mass. 365; Reed *v.* Scituate, 7 Allen (Mass.) 141; Benthall *v.* Hildreth, 2 Gray (Mass.) 288.

Mississippi.— Winston *v.* Miller, 12 Sm & M. (Miss.) 550.

New York.—Smith *v.* Holmes, 19 N. Y. 271; Mack *v.* Burt, 5 Hun (N. Y.) 28; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170.

Tennessee.— Robinson *v.* Grubb, 8 Baxt. (Tenn.) 19; Carter *v.* Turner, 2 Head (Tenn.) 51; Bell *v.* Bullion, 2 Yerg. (Tenn.) 478.

Vermont.— Wetherell *v.* Evarts, 17 Vt. 219.

England.— 1 Chitty Pl. 553; Venables *v.* Daffe, Carth. 113; Ward *v.* Honeywood, Dougl. 61; Rush *v.* Tory, 4 Mod. 367; Facquire *v.* Kynaston, 2 Ld. Raym. 1249.

23. *Illinois.*— Collins *v.* Montemy, 3 Ill. App. 182.

Minnesota.— Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143.

Mississippi.— Winston *v.* Miller, 12 Sm. & M. (Miss.) 550.

New York.— Smith *v.* Aylesworth, 40 Barb. (N. Y.) 104; Osborn *v.* Moncure, 3 Wend. (N. Y.) 170.

Tennessee.— Robinson *v.* Grubb, 8 Baxt. (Tenn.) 19 [*disapproving* Carter *v.* Turner, 2 Head (Tenn.) 51, so far as the latter holds that the objection that an action is prematurely brought can be taken advantage of only by plea in abatement].

Wisconsin.— Millett *v.* Hayford, 1 Wis. 401.

Error, how reviewed.— A judgment rendered by a justice of the peace upon a note not due at the time of rendering the judgment, cannot be quashed by the circuit court, as a void judgment, upon a proceeding by writs of certiorari and supersedeas instituted by defendant for that purpose. The proper mode of bringing the question before the court is by appeal. Simmons *v.* Harris, 7 Baxt. (Tenn.) 325.

24. Crygier *v.* Long, 1 Johns. Cas. (N. Y.) 393. See also Lawrence *v.* Bowne, 2 Johns. Cas. (N. Y.) 225, which held that where an action is commenced before the debt is due, and an inquest is taken by default, the court will not set aside the verdict if defendant admits the debt to be due at the time of making application to set aside the verdict.

As to waiver by failure to urge objection see *supra*, III, A, b, (I).

Agreement that libel should be commenced. — Where a libel was filed against a cargo to recover a balance due under a charter-party, a previous agreement by claimant that such a libel should be commenced, and his assisting the officer in arresting the goods and afterward obtaining them by giving stipulation, without objection, is a waiver of any right which he had to object to the time of instituting the suit as premature. The Salem's Cargo, 1 Sprague (U. S.) 389, 21 Fed. Cas. No. 12,248.

Agreement to waive errors.— Where suit is brought before the sum is due, and afterward an agreement of record is entered into, by which the defendant agrees to try the case upon its merits and "waives all errors," it was held that the commencement of the suit before the sum was due was an error, but that it was released or waived by the agreement and could not be insisted on by defendant. Ward *v.* Crenshaw, 4 Yerg. (Tenn.) 197.

Tender of part of demand.— A tender in court of a part of the demand in suit admits that the amount tendered was due at the date of the suit and is therefore inconsistent with a claim that the suit was prematurely brought. Giboney *v.* German Ins. Co., 48 Mo. App. 185.

Trial of exception with merits.— In Louisiana an exception that the action is prematurely brought is not waived or merged in the answer by a consent to have the same referred to be tried with the merits. Murray *v.* Spencer, 46 La. Ann. 452, 15 So. 25.

25. Bush *v.* Hanson, 70 Ill. 480. See also Lanier *v.* Blount, (Tex. Civ. App. 1898) 45 S. W. 202, which held that errror in rendering judgment on an unmatured vendor's lien note is waived where defendant consents thereto.

26. Winston *v.* Miller, 12 Sm. & M. (Miss.) 550, the reason being that the defect goes to the right of action.

4. Delay in Commencing. An action for money which defendant agreed, but failed, to loan plaintiff, will not lie after the expiration of the time within which plaintiff was to repay it.[27]

5. Proceedings Constituting Commencement[28] **— a. Actions at Law —** (I) *Issue of Writ or Summons* — (A) *In General.* It is a general rule, except where it has been otherwise provided by statute, that an action is deemed commenced, so far as the parties to it are concerned, from the time that the writ or summons is sued out.[29]

27. Stanley *v.* Nye, 51 Mich. 232, 16 N. W. 387, the reason being that an action would immediately lie by defendant to recover it back.

As to limitation of action see Limitations of Actions.

Waiver of delay.— Defendant may waive his right to take advantage of plaintiff's unreasonable delay in asserting his rights, by basing his defense upon the ground of the insufficiency of plaintiff's proofs. Moore *v.* Greene County, 87 N. C. 209.

28. As to proceedings which will permit of revival on death of party see Abatement and Revival, III, B, 2.

As to proceedings which will stop running of statute of limitations see Limitations of Actions.

As to proceedings which will support plea of another action pending see Abatement and Revival, II, C, 2.

29. *Alabama.*—West *v.* Engel, 101 Ala. 509, 14 So. 333; Ware *v.* Swann, 79 Ala. 330; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150; Huss *v.* Central R., etc., Co., 66 Ala. 472; *Ex p.* Locke, 46 Ala. 77; Alabama, etc., R. Co. *v.* Harris, 25 Ala. 232; Cox *v.* Cooper, 3 Ala. 256; Randolph *v.* Cook, 2 Port. (Ala.) 286.

Arkansas.— State Bank *v.* Brown, 12 Ark. 94; State Bank *v.* Cason, 10 Ark. 479; State Bank *v.* Bates, 10 Ark. 120; McLarren *v.* Thurman, 8 Ark. 313. [The rule has been changed by statute. See *infra*, III, A, 5, a, (II).]

Connecticut.— Service and not issuance of the writ is the commencement of the action. Studwell *v.* Cooke, 38 Conn. 549; Sanford *v.* Dick, 17 Conn. 213; Gates *v.* Bushnell, 9 Conn. 530; Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120.

Illinois.— U. S. Ins. Co. *v.* Ludwig, 108 Ill. 514; Schroeder *v.* Merchants, etc., Ins. Co., 104 Ill. 71; Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588; Feazle *v.* Simpson, 2 Ill. 30.

Indiana.— Charlestown School Tp. *v.* Hay, 74 Ind. 127; Fordice *v.* Hardesty, 36 Ind. 23; Temple *v.* Irvin, 34 Ind. 412; Evans *v.* Galloway, 20 Ind. 479; Hust *v.* Conn, 12 Ind. 257.

Iowa.— The delivery of original notice to the sheriff with intent that it shall be served immediately is the commencement of the action. Bracken *v.* McAlvey, 83 Iowa 421, 49 N. W. 1022; Hampe *v.* Schaffer, 76 Iowa 563, 41 N. W. 315; Fernekes *v.* Case, 75 Iowa 152, 39 N. W. 238; Phinney *v.* Donahue, 67 Iowa 192, 25 N. W. 126. But delivery of original notice to the sheriff is not the commencement of the action, where the sheriff is unable to make the service. Richardson *v.* Turner, (Iowa 1900) 81 N. W. 593; Wolfenden *v.* Barry, 65 Iowa 653, 22 N. W. 915.

Kentucky.— Butts *v.* Turner, 5 Bush (Ky.) 435; Pindell *v.* Maydwell, 7 B. Mon. (Ky.) 314; Chiles *v.* Jones, 7 Dana (Ky.) 545; Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Thompson *v.* Bell, 6 T. B. Mon. (Ky.) 559. [The rule has been changed by statute. See *infra*, III, A, 5, a, (II).]

Maine.— Biddeford Sav. Bank *v.* Mosher, 79 Me. 242, 9 Atl. 614; Haskell *v.* Brewer, 11 Me. 258; Jewett *v.* Greene, 8 Me. 447; Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203.

Maryland.— The docketing of an action, with directions to the clerk to issue process, is the commencement of the action. U. S. Bank *v.* Lyles, 10 Gill & J. (Md.) 326.

Massachusetts.— Grimes *v.* Briggs, 110 Mass. 446; Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439; Wheatland *v.* Lovering, 10 Gray (Mass.) 16; Field *v.* Jacobs, 12 Metc. (Mass.) 118.

Michigan.— Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661; Galloway *v.* Holmes, 1 Dougl. (Mich.) 330. But a suit commenced by declaration cannot be considered as pending until a copy of the declaration, with notice of the rule to plead, is served upon defendant. Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149; Wetherbee *v.* Kusterer, 41 Mich. 359, 2 N. W. 45; Ellis *v.* Fletcher, 40 Mich. 321.

Mississippi.— Lamkin *v.* Nye, 43 Miss. 241; Allen *v.* Mandaville, 26 Miss. 397.

Missouri.— If the suit be instituted by process, it is deemed commenced upon delivery of the writ to the constable to be served. Turner *v.* Burns, 42 Mo. App. 94.

New Hampshire.— Brewster *v.* Brewster, 52 N. H. 52; Mason *v.* Cheney, 47 N. H. 24; Hardy *v.* Corlis, 21 N. H. 356; Davis *v.* Dunklee, 9 N. H. 545.

New Jersey.— Updike *v.* Ten Broeck, 32 N. J. L. 105; Whitaker *v.* Turnbull, 18 N. J. L. 172.

New York.— Boughton *v.* Bruce, 20 Wend. (N. Y.) 234; Ontario Bank *v.* Rathbun, 19 Wend. (N. Y.) 291; Jackson *v.* Brooks, 14 Wend. (N. Y.) 649; Van Hoesen *v.* Holley, 9 Wend. (N. Y.) 209; Koon *v.* Greenman, 7 Wend. (N. Y.) 124; Hogan *v.* Cuyler, 8 Cow. (N. Y.) 203; Ross *v.* Luther, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341; Burdick *v.* Green, 18 Johns. (N. Y.) 14; Bronson *v.* Earl, 17 Johns. (N. Y.) 63; Fowler *v.* Sharp, 15 Johns. (N. Y.) 323; Brown *v.* Van Duzen, 11 Johns. (N. Y.) 472; Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42; Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433; Boyce *v.* Morgan, 3 Cai. (N. Y.) 133; Lowry *v.* Lawrence, 1 Cai. (N. Y.) 69; Carpenter *v.* Butterfield, 3 Johns. Cas. (N. Y.) 145.

(B) *Provisional Issue.* But when it is said that the suing out of the writ or summons is the commencement of the suit it is not intended that the mere filling up of the process, or the mere sending of it to an officer, or the placing of it in his hands, is such commencement. These acts, to constitute the commencement of the suit, must be accompanied with a *bona fide*, absolute, and unequivocal intention to have the writ or summons served. Accordingly, where a writ or summons is made provisionally and delivered to an officer with instructions that it is not to be used until after a certain time or the happening of a certain event, the action cannot be considered as commenced until the arrival of the time or the happening of the event.[30]

(C) *Alteration of Writ.* It has been held that where there is a substantial alteration of a writ after it is made, and before service, the suit will be deemed to be commenced at the time the alterations are made.[31]

(D) *Alias Writ or Summons.* But an alias writ or summons regularly issued is the continuation of an original valid process, and not the inception of a new suit.[32]

[The rule has been changed by the code. See *infra*, III, A, 5, a, (III).]

North Carolina.— Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396; McArthur *v.* McEachin, 64 N. C. 72; Patrick *v.* Joyner, 63 N. C. 573; Haughton *v.* Leary, 20 N. C. 12. But an original summons must be followed by appropriate successive processes in order to constitute a continuing single action referable to the date of its issue. Etheridge *v.* Woodley, 83 N. C. 11; Hanna *v.* Ingram, 53 N. C. 55.

Pennsylvania.— Fuller *v.* Dempster, (Pa. 1887) 11 Atl. 670; Caldwell *v.* Heitshu, 9 Watts & S. (Pa.) 51; Flanegan *v.* Negley, 3 Serg. & R. (Pa.) 498; Moulson *v.* Rees, 6 Binn. (Pa.) 32; Hertzog *v.* Ellis, 3 Binn. (Pa.) 209; American Cent. Ins. Co. *v.* Haws, 20 Wkly. Notes Cas. (Pa.) 370, 11 Atl. 107; Clemson *v.* Beaumont, 2 Browne (Pa.) 215.

Rhode Island.— Cross *v.* Barber, 16 R. I. 266, 15 Atl. 69; Hail *v.* Spencer, 1 R. I. 17.

South Carolina.— Montague *v.* Stelts, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736.

Tennessee.— Reed *v.* Brewer, Peck (Tenn.) 275.

Texas.— Keeble *v.* Bailey, 3 Tex. 492. [The rule has been changed by statute. See *infra*, III, A, 5, a, (II).]

Vermont.— Service and not issuance of the writ is the commencement of the action. Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321; Randall *v.* Bacon, 49 Vt. 20, 24 Am. Rep. 100; *In re* Foster, 44 Vt. 570; Kirby *v.* Jackson, 42 Vt. 552. But to save the demand from the bar of the statute of limitations the action will be deemed commenced from the suing out of the writ. Chapman *v.* Goodrich, 55 Vt. 354; Day *v.* Lamb, 7 Vt. 426; Allen *v.* Mann, 1 D. Chipm. (Vt.) 94.

Virginia.— Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

United States.— Ewell *v.* Chicago, etc., R. Co., 29 Fed. 57; Fowler *v.* Byrd, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4,999*a*; *In re* Iowa, etc., Constr. Co., 2 McCrary (U. S.) 178, 6 Fed. 799.

30. *Alabama.*— West *v.* Engel, 101 Ala. 509, 14 So. 333; *Ex p.* Locke, 46 Ala. 77; Alabama, etc., R. Co. *v.* Harris, 25 Ala. 232.

Illinois.— Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472.

Indiana.— Hancock *v.* Ritchie, 11 Ind. 48.

Maine.— Biddeford Sav. Bank *v.* Mosher, 79 Me. 242, 9 Atl. 614.

Massachusetts.—Grimes *v.* Briggs, 110 Mass. 446; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105; Federhen *v.* Smith, 3 Allen (Mass.) 119; Seaver *v.* Lincoln, 21 Pick. (Mass.) 267.

Michigan.— Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

New Hampshire.— Buswell *v.* Babbitt, 65 N. H. 168, 18 Atl. 748; Clark *v.* Slayton, 63 N. H. 402, 1 Atl. 113; Brewster *v.* Brewster, 52 N. H. 52; Mason *v.* Cheney, 47 N. H. 24; Leach *v.* Noyes, 45 N. H. 364.

New Jersey.— Lynch *v.* New York, etc., R. Co., 57 N. J. L. 4, 30 Atl. 187; Updike *v.* Ten Broeck, 32 N. J. L. 105; Whitaker *v.* Turnbull, 18 N. J. L. 172.

New York.— Jackson *v.* Brooks, 14 Wend. (N.Y.) 649; Koon *v.* Greenman, 7 Wend. (N.Y.) 124; Ross *v.* Luther, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341; Burdick *v.* Green, 18 Johns. (N. Y.) 14; Visscher *v.* Gansevoort, 18 Johns. (N. Y.) 496.

Rhode Island.— Cross *v.* Barber, 16 R. I. 266, 15 Atl. 69.

South Carolina.— Montague *v.* Stelts, 37 S. C. 200, 15 S. E. 968.

United States.— Fowler *v.* Byrd, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4,999*a*.

Accrual of cause of action after issue of writ.— But where the cause of action accrued after the date of the writ, but before service, it was held that the latter should be considered the time of the commencement of the action. Federhen *v.* Smith, 3 Allen (Mass.) 119; Butler *v.* Kimball, 5 Metc. (Mass.) 94.

31. Mason *v.* Cheney, 47 N. H. 24.

32. *Alabama.*—Goodlett *v.* Hansell, 56 Ala. 346.

Arkansas.— St. Louis, etc., R. Co. *v.* Shelton, 57 Ark. 459, 21 S. W. 876.

Indiana.— Finley *v.* Richards, 1 Blackf. (Ind.) 487.

Nebraska.— *Compare* Davis *v.* Ballard, 38 Nebr. 830, 57 N. W. 527.

Pennsylvania.— McClurg *v.* Fryer, 15 Pa.

(II) *Filing of Complaint and Issue of Summons.* In some states, by statute, an action is not deemed commenced until the filing of the complaint or petition and the issue of summons thereon.[33]

(III) *Service of Summons*— (A) *In General.* In other states the statutes provide that the service of summons is the commencement of the action.[34]

St. 293; Pennock *v.* Hart, 8 Serg. & R. (Pa.) 369; Lynn *v.* McMillen, 3 Penr. & W. (Pa.) 170; American Cent. Ins. Co. *v.* Haws, 20 Wkly. Notes Cas. (Pa.) 370, 11 Atl. 107.

Virginia.— Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

Wisconsin.— *Compare* Blair *v.* Cary, 9 Wis. 543.

See, generally, PROCESS.

Failure to issue alias at return term.— Where a writ is issued, returnable at a certain term of court, and no alias issues from such return term, but a writ is issued from the next term, the latter writ is the commencement of the action. Hanna *v.* Ingram, 53 N. C. 55; Fulbright *v.* Tritt, 19 N. C. 491.

Original process void.— Where a summons is made returnable on the fourth day of a term instead of the first day as required by statute, it is void, but an alias summons awarded thereon, though erroneously granted, may be considered as the commencement of a new suit. Rattan *v.* Stone, 4 Ill. 540.

Supplementary complaint.— Where an order is made for the service of summons by publication, and a summons is issued, and a supplementary complaint is afterward filed and a summons issued thereon, the original action becomes merged in the action as supplemented, and the court will not acquire jurisdiction of the persons of absent defendants by publication of the original summons, but the summons issued on the supplementary complaint must be served by publication. McMinn *v.* Whelan, 27 Cal. 300.

33. *Arkansas.*— St. Louis, etc., R. Co. *v.* Shelton, 57 Ark. 459, 21 S. W. 876; Burleson *v.* McDermott, 57 Ark. 229, 21 S. W. 222; Hallum *v.* Dickinson, 47 Ark. 120, 14 S. W. 477; People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126, construing Arkansas statute.

California.—Easton *v.* O'Reilly, 63 Cal. 305; Jeffers *v.* Cook, 58 Cal. 147; Adams *v.* Paterson, 35 Cal. 122; Reynolds *v.* Page, 35 Cal. 296.

Georgia.— Where a petition setting out a cause of action has been filed, and is followed up by the issue of process and service, the time of the commencement of the suit is the date of the filing. But the filing of the petition without more does not operate to commence a suit. Nicholas *v.* British-American Assur. Co., 109 Ga. 621, 34 S. E. 1004; McClendon *v.* Hernando Phosphate Co., 100 Ga. 219, 28 S. E. 152; Cherry *v.* North, etc., R. Co., 65 Ga. 633; Barrett *v.* Devine, 60 Ga. 632; Coleman *v.* Worrill, 57 Ga. 124.

Kansas.— Smith *v.* Payton, 13 Kan. 362. But where a party hands a petition to the clerk of the court, in order that he may place his file-marks thereon, and not for the purpose of allowing it to remain in official custody, and does not ask for or obtain the issue of a summons, but holds the petition in his own possession, the action is not pending. Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158.

Kentucky.— Louisville, etc., R. Co. *v.* Smith, 87 Ky. 501, 9 S. W. 493; Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477.

Missouri.— Suit is commenced at the time petition is filed. South Missouri Lumber Co. *v.* Wright, 114 Mo. 326, 21 S. W. 811; Spurlock *v.* Sproule, 72 Mo. 503; Gosline *v.* Thompson, 61 Mo. 471; Fenwick *v.* Gill, 38 Mo. 510; Chapman *v.* Currie, 51 Mo. App. 40.

Montana.— Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

Ohio.— Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250; Bowen *v.* Bowen, 36 Ohio St. 312; Seibert *v.* Switzer, 35 Ohio St. 661; Buckingham *v.* Commercial Bank, 21 Ohio St. 131; Divelle *v.* Hinde, 18 Ohio Cir. Ct. 618; Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disn. (Ohio) 336.

Oregon.— An action is commenced by the filing of a complaint. Coggan *v.* Reeves, 3 Oreg. 275.

Texas.— Bates *v.* Smith, 80 Tex. 242, 16 S. W. 47, holding that where plaintiff filed a petition with the clerk, directing him not to issue citation on it until plaintiff should so direct, the action was not commenced until the citation was issued in accordance with the order. Maddox *v.* Humphries, 30 Tex. 494; Davidson *v.* Southern Pac. Co., 44 Fed. 476, construing Texas statute.

Utah.— Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

Non-resident notice.—In Texas the filing of the petition and service of non-resident notice constitute the commencement of the action. Standard L., etc., Ins. Co. *v.* Askew, 11 Tex. Civ. App. 59, 32 S. W. 31.

34. *Minnesota.*— An action is commenced and is pending only from the time of the service of summons on defendant, or of his appearance without service. Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661; Auerbach *v.* Maynard, 26 Minn. 421, 4 N. W. 816.

Nebraska.— Davis *v.* Ballard, 38 Nebr. 830, 57 N. W. 527; Burlingim *v.* Cooper, 36 Nebr. 73, 53 N. W. 1025.

New York.— Foxell *v.* Fletcher, 87 N. Y. 476; Wallace *v.* Castle, 68 N. Y. 370; Kerr *v.* Mount, 28 N. Y. 659; Riley *v.* Riley, 64 Hun (N. Y.) 496, 19 N. Y. Suppl. 522; Merritt *v.* Scott, 3 Hun (N. Y.) 657; Haynes *v.* Onderdonk, 5 Thomps. & C. (N. Y.) 176; Matter of Griswold, 13 Barb. (N. Y.) 412; Carruth *v.* Church, 6 Barb. (N. Y.) 504; Wiggin *v.* Orser, 5 Duer (N. Y.) 118; Lee *v.* Averell, 1 Sandf. (N. Y.) 731; Broadway Bank *v.* Luff, 51 How.

(B) *Service by Publication.* The authorities are not in accord as to when an action is commenced in case of service by publication. In some states the action is considered as pending from the time of the first publication.[35] In other states the action is not commenced until the expiration of the time for publication.[36]

b. Suits in Equity. Filing a bill and taking out a subpœna and making a *bona fide* attempt to serve it have been deemed to be the commencement of a suit in equity as between the parties to it.[37] There are cases, however, which hold that a suit in equity is commenced at the date of filing the bill.[38]

c. Amendment of Pleadings — (I) *In General.* It is well settled that an amended declaration or complaint which does not introduce a new cause of action relates back to the commencement of the suit.[39] It has been held, however, that if the declaration or complaint is amended so as to state a new cause of action, the action is not commenced as to the new cause until the amended declaration or complaint is filed.[40]

(II) *As to Parties.* Where a person is made a party after the institution of the suit, the suit is pending as to such party only from the time he became such.[41]

Pr. (N. Y.) 479; Gibson *v.* Van Derzee, 47 How. Pr. (N. Y.) 231; Treadwell *v.* Lawlor, 15 How. Pr. (N. Y.) 8; Hill *v.* Thacter, 3 How. Pr. (N. Y.) 407; Diefendorf *v.* Elwood, 3 How. Pr. (N. Y.) 285.

Washington.—Seattle *v.* O'Connell, 16 Wash. 625, 48 Pac. 412.

Wisconsin.— Mariner *v.* Waterloo, 75 Wis. 438, 44 N. W. 512; Woodville *v.* Harrison, 73 Wis. 360, 41 N. W. 526; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252; Knowlton *v.* Watertown, 130 U. S. 327, 9 S. Ct. 539, 32 L. ed. 956, construing Wisconsin statute.

Service of declaration in ejectment.— An action of ejectment is commenced by serving the declaration and notice. Ware *v.* Swann, 79 Ala. 330; Farnsworth *v.* Agnew, 27 Ill. 42; Thompson *v.* Red, 47 N. C. 412.

Void citation.— Service of a citation afterward held to be void because issued to defendant as sole when she was in fact married is not the commencement of an action. Bertrand *v.* Knox, 39 La. Ann. 431, 2 So. 63.

35. Wood *v.* Bissell, 108 Ind. 229, 9 N. E. 425; Burlingim *v.* Cooper, 36 Nebr. 73, 53 N. W. 1025.

36. More *v.* Thayer, 10 Barb. (N. Y.) 258; Abrahams *v.* Mitchell, 8 Abb. Pr. (N. Y.) 123; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329; Tomlinson *v.* Van Vechten, Code Rep. N. S. (N. Y.) 317. But see Dykers *v.* Woodard, 7 How. Pr. (N. Y.) 313.

Issue of attachment.— Where summons is served by publication and an attachment issues, the court acquires jurisdiction, although the publication has not been completed. Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329.

37. Fairbanks *v.* Farwell, 141 Ill. 354, 30 N. E. 1056; Fitch *v.* Smith, 10 Paige (N. Y.) 9; Hayden *v.* Bucklin, 9 Paige (N. Y.) 512; Webb *v.* Pell, 1 Paige (N. Y.) 564; Weed *v.* Smull, 3 Sandf. Ch. (N. Y.) 273; Angelo *v.* Van Burgh, 1 Code Rep. (N. Y.) 84.

Service of subpœna.— A suit in equity has been held not to be pending, so as to constitute notice to strangers, until the subpœna is actually served. Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Hayden *v.* Bucklin, 9 Paige (N. Y.) 512; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566; Miller *v.* Kershaw, Bailey Eq. (S. C.) 479, 23 Am. Dec. 183; Dunn *v.* Games, 1 McLean (U. S.) 321, 8 Fed. Cas. No. 4,176.

38. *Alabama.*— Greenwood *v.* Warren, 120 Ala. 71, 23 So. 686; Crowder *v.* Moone, 52 Ala. 220.

Illinois.— Hodgen *v.* Guttery, 58 Ill. 431.

Michigan.— Sheridan *v.* Cameron, 65 Mich. 680, 32 N. W. 894.

Mississippi.— Bacon *v.* Gardner, 23 Miss. 60.

New Hampshire.— Clark *v.* Slayton, 63 N. H. 402, 1 Atl. 113.

Tennessee.— Collins *v.* North British, etc., Ins. Co., 91 Tenn. 432, 19 S. W. 525.

39. Winston *v.* Mitchell, 93 Ala. 554, 9 So. 551; South, etc., Alabama R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752; Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337; Moses *v.* Taylor, 6 Mackey (D. C.) 255; Lewis *v.* Washington, etc., R. Co., 6 Mackey (D. C.) 556; Verdery *v.* Barrett, 89 Ga. 349, 15 S. E. 476; Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

As to effect of amendment on statute of limitations see Limitations of Actions.

Sustaining of demurrer.— The filing of a new complaint after a demurrer has been sustained is not the commencement of a new action. Jones *v.* Frost, 28 Cal. 245.

40. *Alabama.*—Alabama, etc., Co. *v.* Smith, 81 Ala. 229, 1 So. 723; Mohr *v.* Lemle, 69 Ala. 180.

California.— Valensin *v.* Valensin, 73 Cal. 106, 14 Pac. 397; Anderson *v.* Mayers, 50 Cal. 525.

District of Columbia.— Johnston *v.* District of Columbia, 1 Mackey (D. C.) 427.

Georgia.— Jones *v.* Johnson, 81 Ga. 293, 6 S. E. 181.

New York.—See Sands *v.* Burt, (N. Y. 1851) 1 Alb. L. J. 124, wherein it was held that where leave is obtained to amend the summons and complaint, and a new summons and complaint without any allusion to the former is served, the service of the new papers is the commencement of the action.

41. *Illinois.*— Haines *v.* Chandler, 26 Ill. App. 400.

Mississippi.— Brown *v.* Goolsby, 34 Miss. 437.

d. Suit by Defendant against Co-Defendant. If defendants seek to enforce their demands against a co-defendant by answer or cross-bill, as to such demands the suit will be deemed commenced as of the time when their answers, setting up such demands, are filed.[42]

e. Special Proceedings — (I) *In General.* In New York the presentation of a petition is deemed the commencement of a special proceeding.[43]

(II) *Summary Proceedings.* In Tennessee, in summary proceedings against an officer, the motion, and not the notice, is the commencement of the suit.[44]

6. Evidence of Commencement. In jurisdictions in which the issue of the writ is the commencement of the action, the date of the writ is *prima facie* evidence of the time of the commencement of the action.[45]

B. Stay of Proceedings[46] — **1. Definition.** A stay of proceedings imports an order of court made in a cause, and, as a part of its course, suspending further action in it.[47]

Nebraska.— Greene *v.* Sanford, 34 Nebr. 363, 51 N. W. 967 [*overruling* Manly *v.* Downing, 15 Nebr. 637, 19 N. W. 601].

New York.— Shaw *v.* Cock, 78 N. Y. 194.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

But see Willingham *v.* Long, 47 Ga. 540, which held that where, in ejectment, a third person goes into possession after suit is brought, and is made defendant, the date of the commencement of the original suit is the date of the commencement of the suit against such new party.

Defendant sued by fictitious name.— A defendant sued by a fictitious name is a party to the action from its commencement, and an amendment to the complaint by inserting his true name does not change the cause of action. Farris *v.* Merritt, 63 Cal. 118.

Substitution of party.—Where a mortgagee is the administrator of the estate of the mortgagor, and a suit is begun for his benefit by one to whom he assigns the mortgage while he is such administrator, and after he ceases to be administrator he is substituted as plaintiff therein, the suit will not be considered as begun until such substitution. Brown *v.* Mann, 71 Cal. 192, 12 Pac. 51.

Suits in equity.— The date of the commencement of a suit in chancery as to a defendant made a party by amendment to the original bill is the time of the filing of the amendment. Brown *v.* Goolsby, 34 Miss. 437.

42. German F. Ins. Co. *v.* Bullene, 51 Kan. 764, 33 Pac. 467.

43. Matter of Bradley, 70 Hun (N. Y.) 104, 23 N. Y. Suppl. 1127.

44. Bellanfont *v.* Coleman, 7 Heisk. (Tenn.) 559.

Proceedings by notice.— In Alabama, in summary proceedings by notice, the service of notice constitutes the commencement of the action. Stanley *v.* Mobile Bank, 23 Ala. 652.

45. *Alabama.*— Griffin *v.* State Bank, 6 Ala. 908; Randolph *v.* Cook, 2 Port. (Ala.) 286.

Kentucky.— Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111.

Maine.— Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203.

Massachusetts.— Farrell *v.* German American Ins. Co., 175 Mass. 340, 56 N. E. 572; Veginan *v.* Morse, 160 Mass. 143, 35 N. E. 451; Federhen *v.* Smith, 3 Allen (Mass.) 119; Bunker *v.* Shed, 8 Metc. (Mass.) 150.

Michigan.— Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

New Hampshire.— Robinson *v.* Burleigh, 5 N. H. 225.

Vermont.— Day *v.* Lamb, 7 Vt. 426.

Judicial notice.— If there is a question whether the cause of action had accrued when suit was begun, the court must take judicial notice of the date shown by the file-mark on the petition, and charge the jury that suit was begun on that date. Chapman *v.* Currie, 51 Mo. App. 40.

The original indorsement on a writ, and not the entry in the sheriff's books, is the best evidence to prove when an action was commenced. Reid *v.* Colcock, 1 Nott & M. (S. C.) 592, 9 Am. Dec. 729.

Presumption of time of commencement.— Where the complaint alleges that an act was done on a certain day it will be presumed that the action was commenced after that day. Prentice *v.* Ashland County, 56 Wis. 345, 14 N. W. 297; Clarke *v.* Lincoln County, 54 Wis. 578, 12 N. W. 20.

46. As to injunction against other action see Injunctions.

47. Abbott L. Dict.

Other definitions.— "The suspension of an action." Bouvier L. Dict.; Cochrane L. Lex.; Rapalje and L. L. Dict. "A stopping of the regular proceedings in a cause." English L. Dict. "The act of stopping or arresting a judicial proceeding by the order of a court or judge." Burrill L. Dict.

Distinguished from injunction and prohibition.— A stay of proceedings is distinguishable from injunction to restrain proceedings at law, which is in the nature of an equitable decree in another court that the party stayed shall proceed no farther because his action is deemed contrary to equity; and from prohibition, which is a mandate of a superior court to an inferior one commanding it to refrain from proceedings because they are deemed in excess of its jurisdiction. Abbott L. Dict.

2. Nature of Right to Stay. A motion for a stay of proceedings is not grantable as of course, but is addressed to the discretion of the court.[48]

3. Grounds of Stay — a. Action in Name of Dead Person. Where plaintiff was dead when his bill was filed, on notice thereof, all subsequent proceedings by defendant, except to ask for costs, will be stayed.[50]

b. Action Instituted Without Authority. If a person institutes a suit in the name of another without his consent and without any legal or equitable right to do so, the person in whose name the suit is thus instituted is entitled to have the proceedings stayed upon application to the appropriate tribunal.[51]

c. Another Action Pending — (1) *In General.* Where two actions are pending between the same parties, involving the same state of facts, and aiming to accomplish substantially the same result, the court may stay proceedings in the later action until the other shall have been heard and decided.[53]

48. *Indiana.*— Horman *v.* Hartmetz, 131 Ind. 558, 31 N. E. 81.

Minnesota.— Graves *v.* Backus, 69 Minn. 532, 72 N. W. 811.

New York.— Avery *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 404; Schmidt *v.* Levy, 61 Barb. (N. Y.) 496.

Wisconsin.— Parmalee *v.* Wheeler, 32 Wis. 429.

United States.— Andrews *v.* Spear, 4 Dill. (U. S.) 470, 1 Fed. Cas. No. 379.

49. As to stay of proceedings by bankruptcy of party see Bankruptcy. For non-payment of costs see Costs.

50. Balbi *v.* Duvet, 3 Edw. (N. Y.) 418.

51. Matter of Merritt, 5 Paige (N. Y.) 125. See also Whitney *v.* Merchants Nat. Bank, 40 N. J. L. 481, wherein it was held that if plaintiff's attorney, on demand by defendant, refuses to declare plaintiff's abode, or whether a writ was issued by his authority, or omits so to do so long that his failure amounts to a refusal, plaintiff can proceed no farther in the action without leave of court. But see Delhi *v.* Graham, 6 Thomps. & C. (N. Y.) 49, which was a motion by defendant to stay proceedings on the ground that the action was brought without plaintiff's authority. It was held that such relief should be limited to cases of actual fraud on the court and cases in which an attorney was using plaintiff's name without his knowledge or consent, and that it should seldom be granted on application of defendant, and probably never if plaintiff were a natural person and not a corporation.

52. As to another action pending as ground for abatement see Abatement and Revival, II.

53. *California.*— Smith *v.* Jones, 128 Cal. 14, 60 Pac. 466.

Delaware.— See Wilcox *v.* Wilmington City R. Co., 1 Pennew. (Del.) 245, 40 Atl. 191.

Indiana.— Horman *v.* Hartmetz, 131 Ind. 558, 31 N. E. 81; Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95; Fehrle *v.* Turner, 77 Ind. 530; Walker *v.* Heller, 73 Ind. 46.

Missouri.— Sharkey *v.* Kiernan, 97 Mo. 102, 10 S. W. 886.

New York.— Dolbeer *v.* Stout, 139 N. Y. 486, 34 N. E. 1102; Cushman *v.* Leland, 93 N. Y. 652; Schnehle *v.* Reiman, 86 N. Y. 270; Travis *v.* Myers, 67 N. Y. 542; Allentown Foundry, etc., Works *v.* Loretz, 16 N. Y. App. Div. 72, 44 N. Y. Suppl. 689; Burlingame *v.* Parce, 12 Hun (N. Y.) 149; Lowenstein *v.* Schiffer, 29 Misc. (N. Y.) 477, 61 N. Y. Suppl. 1011; Jackson *v.* Stiles, 5 Cow. (N. Y.) 282; Jackson *v.* Schauber, 4 Cow. (N. Y.) 78; Kittle *v.* Kittle, 8 Daly (N. Y.) 72; Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Suppl. 533; Franklin *v.* Catlin, 43 N. Y. Super. Ct. 138; McFarlan *v.* Clark, 2 Sandf. (N. Y.) 699; Atkinson *v.* Merritt, 1 Sandf. (N. Y.) 667; Brown *v.* May, 17 Abb. N. Cas. (N. Y.) 205; McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 164; Dederick *v.* Fisk, 59 How. Pr. (N. Y.) 73; Fuller *v.* Read, 15 How. Pr. (N. Y.) 236; Dederick *v.* Hoysradt, 4 How. Pr. (N. Y.) 350; New York, etc., R. Co. *v.* Robinson, 15 N. Y. St. 237; Farnsworth *v.* Western Union Tel. Co., 1 N. Y. St. 80; Kimball *v.* Mapes, 19 N. Y. Wkly. Dig. 481; Jung *v.* May, 19 N. Y. Wkly. Dig. 140.

Oregon.— Crane *v.* Larsen, 15 Oreg. 345, 15 Pac. 326.

Wisconsin.— Wilson *v.* Jarvis, 19 Wis. 597.

United States.— Hurd *v.* Moiles, 28 Fed. 897; Andrews *v.* Spear, 4 Dill. (U. S.) 470, 1 Fed. Cas. No. 379.

England.— Jones *v.* Pritchard, 6 Dowl. & L. 529; Pott *v.* Gallini, 1 Sim. & St. 206; Shepherd *v.* Towgood, Turn. & R. 379; McHenry *v.* Lewis, 22 Ch. D. 397.

Action on judgment pending proceedings to vacate.— In an action upon a judgment the court may grant a stay of proceedings until the determination of a suit, brought by the judgment defendants in the court where such judgment was rendered, to have the same set aside. Parmalee *v.* Wheeler, 32 Wis. 429; Christie *v.* Richardson, 3 T. R. 78.

Second action pending appeal in prior action.— An action may be stayed pending the determination of an appeal in a prior action between the same parties.

Indiana.— Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95; Walker *v.* Heller, 73 Ind. 46.

Kansas.— Standard Implement Co. *v.* Stevens, 51 Kan. 530, 33 Pac. 366.

Missouri.— Sharkey *v.* Kiernan, 97 Mo. 102, 10 S. W. 886.

New York.— Dederick *v.* Fisk, 59 How. Pr. (N. Y.) 73.

United States.— Friedman *v.* Harrington, 56 Fed. 860. So an action against an indorser should be stayed on motion of defendant until the termination of a pending appeal in an action against the maker, where it appears that

(II) *Identity of Subject-Matter and Relief.* But to authorize a stay of proceedings on account of the pendency of a prior suit, the two suits must involve the same subject-matter and be for the same relief.[54]

(III) *Actions in Different States.* An action brought in one state pending an action in another state between the same parties for the same cause will be stayed where the stay will not endanger any opportunity of plaintiff to obtain satisfaction of his claim.[55] The rule is otherwise, however, where it appears that the action was begun in the other state to forestall the action within the state.[56]

(IV) *Actions in Federal and State Courts.* An action in a state court may be stayed where a prior action between the same parties, seeking the same relief, is pending in a federal court.[57] And the same rule obtains in the case

the maker had obtained judgment on account of want of consideration for the note, and that notice of that action had been given to the indorser. Scott *v.* Herald, 8 Blackf. (Ind.) 129. Proceedings against bail may be stayed pending error by the principal. Myer *v.* Arthur, 1 Str. 419. So the trial of an action may be stayed in order to obtain the benefit of a decision at general term of a similar case pending there. Brady *v.* New York, 57 N. Y. Super. Ct. 571, 5 N. Y. Suppl. 181. But a stay for an indefinite time to await the result of an appeal in another action, because of a hope that the judgment may be reversed in whole or in part, is not within the power of the court. Waring *v.* Yale, 1 Hun (N. Y.) 492. And a continuance will not be granted because an appeal is pending in another state between one of the parties and third persons, which it is alleged will determine the questions arising in the suit in which the continuance is asked. Cates *v.* Mayes, (Tex. 1889) 12 S. W. 51.

Stay of first action.— The action first brought will be stayed where the suit subsequently commenced was delayed by the act of defendant in evading service and the issue in that suit had been framed so as to be tried in advance of the first suit. Flanagan *v.* Flanagan, 13 N. Y. St. 432.

54. *California.*— Dunphy *v.* Belden, 57 Cal. 427.

Michigan.— People *v.* Wayne Circuit Judge, 27 Mich. 406.

New Jersey.— Carlisle *v.* Cooper, 18 N. J. Eq. 241.

New York.— People *v.* Northern R. Co., 53 Barb. (N. Y.) 98; Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Suppl. 533; Liftchild *v.* Smith, 7 Rob. (N. Y.) 306; Sorley *v.* Brewer, 18 How. Pr. (N. Y.) 509; New York, etc., R. Co. *v.* Robinson, 15 N. Y. St. 237.

England.— Adamson *v.* Tuff, 44 L. T. Rep. N. S. 420; Newton *v.* Belcher, 9 Q. B. 612; Giles *v.* Tooth, 3 C. B. 665; Wade *v.* Simeon, 1 C. B. 610.

Thus a suit in equity cannot be delayed until the determination of a suit in law brought for a different object. Carlisle *v.* Cooper, 18 N. J. Eq. 241.

Joint and several actions.— An action against a defendant sued jointly with others as drawers is no ground for staying an action against him as acceptor. Wise *v.* Prowse, 9 Price 393. So a suit against one defendant will not be stayed because another suit for the same cause of action against him and another jointly is pending. Sowter *v.* Dunston, 1 M. & R. 508.

55. Crown Coal, etc., Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042; Allentown Foundry, etc., Works *v.* Loretz, 16 N. Y. App. Div. 72, 44 N. Y. Suppl. 689; Nichols *v.* Nichols, 12 Hun (N. Y.) 428; Bell *v.* Donohue, 47 N. Y. Super. Ct. 458; Hammond *v.* Baker, 3 Sandf. (N. Y.) 704. See also Chatzel *v.* Bolton, 3 McCord (S. C.) 33, wherein it was held that the pendency of a suit in another state is no reason, of itself, for the delay of a cause in the state. But when it is clear to the court that its decision will affect rights to be ascertained by the determination of such suit, and where such rights are involved in the case within the state, it will grant a reasonable time to obtain such determination. *Compare* Howard *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 471. See, further, Wood *v.* Lake, 13 Wis. 84, wherein it was held that where an action has been brought by a creditor against his debtor, and a garnishee proceeding against the debtor for the same cause of action is subsequently commenced in a court of a different state, the action will not be stayed in the court whose jurisdiction first attached.

Action on judgment pending proceedings to vacate.— Pending an action in another state to set aside a judgment obtained there, the court should stay proceedings in an action on the judgment brought in the state. Parmalee *v.* Wheeler, 32 Wis. 429.

Actions for separation and divorce.— A wife commenced an action in New York for separation, and procured an order for the payment of alimony. Afterward she commenced an action in Connecticut for an absolute divorce. She then procured an order in the action in New York requiring defendant to pay the alimony awarded by the prior order, she having received only a small portion thereof. It was held that the order by the New York court granting alimony should be vacated, and all proceedings therein be stayed until the action in Connecticut was disposed of. Nichols *v.* Nichols, 12 Hun (N. Y.) 428.

56. Jaffray *v.* Hunter, 8 N. Y. App. Div. 315, 40 N. Y. Suppl. 932.

57. Bell *v.* Donohue, 47 N. Y. Super. Ct. 458. But see Rogers *v.* Paterson, 4 Paige (N. Y.) 409, wherein it appeared that after a decision in a state court in a suit against executors for a legacy, by which the legacy was pronounced valid, the residuary legatees com-

of an action brought in a federal court while a prior one is pending in a state court.[58]

(v) *Action In Personam and In Rem.* The pendency of proceedings *in personam* is not a ground for a stay of proceedings *in rem* in admiralty.[59]

(vi) *Creditors' Suits.* Where a bill is brought by one creditor on behalf of himself and of other creditors for the satisfaction of their debts, and a similar one is brought by another creditor before a decree is rendered in the first suit, either suit will be stayed as soon as a decree for the benefit of all creditors is obtained in the other suit.[60]

(vii) *Suits at Law and in Equity.* It has been held that where defendant in a pending action at law commences a suit for equitable relief against plaintiff, the court may order the prosecution of the suit at law to be stayed until the determination of the equitable suit.[61]

d. Determination of Rights of Third Persons. It is within the discretion of the court to stay an action pending the determination of the right of third persons to the property in controversy.[62]

e. Irregularities in Proceedings. But proceedings in a civil action will not be stayed for irregularity unless the defect be so substantial as to make the proceedings null and void.[63]

f. Malicious or Vexatious Action. The prosecution of an action will not be perpetually stayed on defendant's motion, on the ground that it is vexatious or malicious, unless it plainly appears that plaintiff has no meritorious cause of action or is estopped from prosecuting it.[64]

menced a suit in a court of the United States to avoid the legacy. It was held that this was no ground for refusing or delaying to carry into effect the decree in the state court. And see Avery *v.* Contra Costa County, 57 Cal. 247, wherein it was held that the pendency of a suit in a federal court, brought by the United States to cancel a patent under which plaintiff claimed title, is no ground for a stay of proceedings in an action to recover the mesne profits of the land after plaintiff had recovered judgment in ejectment against defendant. *Compare* Pomeroy *v.* Chandler, (N. J. 1895) 30 Atl. 1092.

Pendency of appeal to United States supreme court.— An action in a state court will be stayed pending an appeal of another cause to the supreme court of the United States which will be decisive of the defense to the action in the state court. Dederick *v.* Fisk, 59 How. Pr. (N. Y.) 73.

58. Foley *v.* Hartley, 72 Fed. 570; Avery *v.* Boston Safe-Deposit, etc., Co., 72 Fed. 700. But see Detroit *v.* Detroit City R. Co., 55 Fed. 569, wherein it was held that where a suit in equity in a federal court, involving the construction of a statute and constitution of a state, has been set for hearing, the court will not, on motion of a party, postpone the trial to await the decision by the supreme court of the state of a suit pending before it, involving the same question, if it is not clear that the point involved will be determined in the latter suit and it is uncertain when it will come on for determination. See also Sharon *v.* Hill, 26 Fed. 337, wherein it was held that a suit in a circuit court of the United States will not be stayed until another suit subsequently brought between the parties in a state court, involving some of the questions, shall have been determined. *Compare* Mercantile Trust Co. *v.* Lamoille Valley R. Co., 16 Blatchf. (U. S.) 324, 17 Fed. Cas. No. 9,432.

59. People *v.* Wayne Circuit Judge, 27 Mich. 406; The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; A Raft of Spars, Abb. Adm. 291, 20 Fed. Cas. No. 11,528; Harner *v.* Bell, 22 Eng. L. & Eq. 62.

Replevin and salvage suit.— A court of admiralty will not allow a salvage suit to be stayed because there is pending in a court of law an action of replevin for the salved property brought by the owner against the salvor. A Raft of Spars, Abb. Adm. 291, 20 Fed. Cas. No. 11,528.

60. Innes *v.* Lansing, 7 Paige (N. Y.) 583.

61. Auburn City Bank *v.* Leonard, 20 How. Pr. (N. Y.) 193. See also Purington *v.* Frank, 2 Iowa 565, wherein it was held that where both an action at law and a proceeding in chancery between the same parties and about the same subject-matter is pending in the same court, it is a proper exercise of discretion to postpone the trial of that suit which depends upon strict legal right until those equities which defendant has been compelled to set up in the separate action can be heard and determined. But see Murphy *v.* Cadell, 2 B. & P. 137, wherein it was held that the court will not stay proceedings in an action on the ground of a bill pending in chancery for the same cause.

62. Graves *v.* Backus, 69 Minn. 532, 72 N. W. 811.

63. Hammarskold *v.* Bull, 9 Rich. (S. C.) 474.

64. Ramsey *v.* Erie R. Co., 8 Abb. Pr. N. S. (N. Y.) 174.

Action brought against good faith.— The courts will not perpetually stay proceedings as against good faith except where the suits are brought in violation of some arrangement or

4. Application — a. Necessity. A court will not stay proceedings because of the pendency of a prior action in the absence of an application therefor.[65]

b. Manner of Making. An application for a stay of proceedings may be made by motion.[66]

c. Requisites and Sufficiency. An application to stay proceedings because of the pendency on appeal of a cross-action between the same parties involving the same subject-matter should state facts affirmatively showing a defense, that such defense is properly pleaded and presented in the other action, and that the other action is prosecuted in good faith and with reasonable prospect of success.[67]

d. To What Court Made. Application for a stay should be made in the suit in which the proceedings are to be stayed.[68] One court has no authority, by an order made in an action pending therein, to stay proceedings in another court.[69]

e. Notice. The plaintiff is entitled to notice of a motion to stay proceedings.[70]

f. Time of Making. It has been held that an application for a stay of proceedings because of the pendency of a prior action should be made before answering or going to trial. It is too late after verdict.[71]

5. Imposition of Conditions. Conditions may be imposed on the granting of a motion to stay proceedings.[72]

understanding between the parties. Keeler *v.* King, 1 Barb. (N. Y.) 390; Ramsay *v.* Erie R. Co., 8 Abb. Pr. N. S. (N. Y.) 174; Gibbs *v.* Ralph, 14 M. & W. 804; Cocker *v.* Tempest, 7 M. & W. 502; Moscati *v.* Lawson, 4 A. & E. 331.

65. Crown Coal, etc., Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042. See also Sanford *v.* Cloud, 17 Fla. 532, wherein it was held that on a motion for a discontinuance on the ground of a prior suit pending in chancery the judge of the circuit court cannot, in his capacity as chancellor, act on his own knowledge that the chancery suit was first brought and stay proceedings in the action at law. Such fact must be properly pleaded.

66. *Indiana.*— Scott *v.* Herald, 8 Blackf. (Ind.) 129.

New Jersey.— Den *v.* Fen, 17 N. J. L. 354.

New York.— Dederick *v.* Hoysradt, 4 How. Pr. (N. Y.) 350.

Wisconsin.— Parmalee *v.* Wheeler, 32 Wis. 429; Prentiss *v.* Danaher, 20 Wis. 311.

England.—Pott *v.* Gallini, 1 Sim. & St. 206; Shepherd *v.* Towgood, Turn. & R. 379.

67. Horman *v.* Hartmetz, 131 Ind. 558, 31 N. E. 81.

Prima facie right to relief.— The application for a stay should make out a case showing at least a *prima facie* right to some relief, which can be effectually obtained only by arresting the proceedings of the opposite party in the meantime. Keeler *v.* King, 1 Barb. (N. Y.) 390.

68. Dederick *v.* Hoysradt, 4 How. Pr. (N. Y.) 350.

District where action is triable.— The application must be made within the district where the action is triable (Bangs *v.* Selden, 13 How. Pr. (N. Y.) 374) and to a court having jurisdiction of the matter (Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246).

69. Liftchild *v.* Smith, 7 Rob. (N. Y.) 306; Chubbuck *v.* Morrison, 6 How. Pr. (N. Y.) 367; Roshell *v.* Maxwell, Hempst. (U. S.) 25, 20 Fed. Cas. No. 12,066*a*. See also Devo *v.* Morss, 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 841, wherein it was held that the supreme court cannot, by order, stay proceedings in the surrogate's court.

70. Den *v.* Fen, 17 N. J. L. 354; Rosevelt *v.* Fulton, 5 Cow. (N. Y.) 438; Marvin *v.* Lewis, 12 Abb. Pr. (N. Y.) 482; Bangs *v.* Selden, 13 How. Pr. (N. Y.) 374; Sales *v.* Woodin, 8 How. Pr. (N. Y.) 349; Chubbuck *v.* Morrison, 6 How. Pr. (N. Y.) 367; Dederick *v.* Hoysradt, 4 How. Pr. (N. Y.) 350; Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246.

Waiver of notice.— Defendant obtained an *ex parte* order staying proceedings, which plaintiff did not treat as void, but moved to set aside. The court denied the motion and directed that the order should stand. It was held that this rendered the stay valid. Clumpha *v.* Whiting, 10 Abb. Pr. (N. Y.) 448.

71. Fehrle *v.* Turner, 77 Ind. 530; Walker *v.* Heller, 73 Ind. 46.

Before answer.— Where a second suit is merely for the same objects as the first, and the decree in the first suit would be a bar to it, the court, on motion before answer, will order all proceedings in the second suit to be stayed. Pott *v.* Gallini, 1 Sim. & St. 206; Shepherd *v.* Towgood, Turn. & R. 379.

Before final decree.— In Crown Coal, etc., Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042, it was held that an application to stay proceedings because of the pendency of a prior suit could be made at any time before final decree.

72. McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 164; Parmalee *v.* Wheeler, 32 Wis. 429.

Expenses of receivership.— A receiver appointed in an action commenced when a former action between the same parties and on the same subject-matter was pending in another court expended moneys in the matter of the receivership. It was held, on granting a motion to stay proceedings, that it should be done on condition that his expenses and compensation be paid by the moving party. McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 164.

Security for costs.— In a proper case the court may require security for costs to be

6. Vacation or Modification of Order. The court may vacate or modify its order staying proceedings whenever, in the exercise of a sound discretion, it deems it proper.[73]

7. Appeal. An order granting or refusing a motion to stay proceedings is not appealable.[74]

8. Effect of Stay. The effect of a stay granted to await the determination of another action is simply to restrain further proceedings until the other action is determined.[75]

C. Abandonment — 1. In General. Acts inconsistent with the further prosecution of a pending suit may be deemed an abandonment of the suit.[76]

2. Presumption. Where a plaintiff takes no step to bring his suit to trial for a long period of years, the presumption is that it has been abandoned.[77]

given by defendant before staying proceedings on his motion. Parmalee *v.* Wheeler, 32 Wis. 429. But where plaintiff brings two separate actions concerning the same matter, one as administrator and the other individually, he should not be required to pay costs as a condition of being allowed to continue the one case on the ground that it would be determined by the other case. Wilcox *v.* Wilmington City R. Co., 1 Pennew. (Del.) 245, 40 Atl. 191.

73. Parmalee *v.* Wheeler, 32 Wis. 429.

Who may move to vacate.— A motion to vacate a stay of proceedings cannot be made by a person not a party to the action. People *v.* Croton Aqueduct Board, 5 Abb. Pr. (N. Y.) 372.

74. Rhodes *v.* Craig, 21 Cal. 419; Schmidt *v.* Levy, 61 Barb. (N. Y.) 496; Rossiter *v.* Ætna L. Ins. Co., 96 Wis. 466, 71 N. W. 898; Parmalee *v.* Wheeler, 32 Wis. 429; Johnston *v.* Reiley, 24 Wis. 494.

Remedy of party prejudiced by stay.— And it seems that in California the remedy of a party prejudiced by an order staying proceedings is by application for a mandamus to compel the court to proceed. Rhodes *v.* Craig, 21 Cal. 419.

75. Waring *v.* Yale, 1 Hun (N. Y.) 492. See also Hummin *v.* Jones, 2 Mart. N. S. (La.) 163, wherein it was held that the district court cannot proceed in a suit in which defendant has, by an application for a respite, obtained a stay of proceedings from the parish court.

Death of party pending stay.— The death of a party pending a stay of his proceedings does not affect his representatives so as to prevent a motion by them for revival. Matter of Bainbridge, 67 Barb. (N. Y.) 293.

The effect of a stipulation that judgment should be entered in two actions, but that they should abide the determination of an appeal in another action between the same parties, and that the evidence and exceptions in the action appealed should apply to the others, is to stay proceedings, including executions in the two other actions. Murphy *v.* Keyes, 2 Hun (N. Y.) 375.

Violation of stay.— It is a contempt for an attorney to move a case for trial, after an order staying proceedings in the action had been served on him, without first applying *ex parte* to the judge who granted the stay, or to the court, on notice, to vacate it. Oakley *v.* Cokalete, 20 Misc. (N. Y.) 206, 45 N. Y. Suppl. 782.

76. Seeley *v.* Mitchell, 85 Ky. 508, 4 S. W. 190, where a mortgagee, having instituted a foreclosure suit and obtained judgment for the sale of the mortgaged land, assigned the judgment to another, and the assignee set up his claim to the property by cross-petition in a separate action between other parties to which he was a defendant, and undertook to litigate it with them, they claiming liens on it adverse to him. It was held that he could not, while the latter suit was pending, proceed in the foreclosure suit, have the order of sale executed, buy in the property, take the commissioner's deed, and thereby perfect his title, as his act in voluntarily introducing his claim into the other suit, and litigating it with the lienholders, who were not parties to the foreclosure suit, was an abandonment of his right to pursue further the foreclosure suit. See also Bowman *v.* Purtell, 47 N. Y. Super. Ct. 403, wherein plaintiff's complaint stated inconsistent claims in contract and in tort. The case was tried as an action of tort, and was dismissed because the evidence did not sustain the allegations of tort. It was held that the claim in contract must be deemed to have been abandoned, and that the case was properly dismissed.

Of action before justice.— Where a justice of the peace has improperly dismissed an action under an erroneous view of what constitutes a plea of title, and plaintiff submits to the decision and files his complaint in the supreme court, he must be regarded as voluntarily abandoning the suit before the justice, and the action is to be treated as originally commenced in the supreme court. La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796.

Waiver of defense of abandonment.— A defense of abandonment based on laches in prosecution of suit can be made only by motion to dismiss or appropriate plea, and is waived by answer to the merits. Collins *v.* North British, etc., Ins. Co., 91 Tenn. 432, 19 S. W. 525. To same effect, McKenzie *v.* Cook, 113 Mich. 452, 71 N. W. 868.

77. *Louisiana.*— Johns *v.* Race, 48 La. Ann. 1170, 20 So. 660.

New York.— *Compare* Marshall *v.* De Cordova, 26 N. Y. App. Div. 615, 50 N. Y. Suppl. 294.

Pennsylvania.—Wilson *v.* Altemus, 2 Watts

3. **Effect.** It has been held that a personal action, once suspended by the voluntary act of the party entitled to it, is forever gone and discharged.[78]

D. Termination. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or the time for an appeal has passed, unless the judgment is sooner satisfied.[79] Accordingly an action is not terminated until satisfaction of the judgment.[80]

ACTIONUM GENERA MAXIME SUNT SERVANDA. A maxim meaning "the varieties of actions are especially to be preserved."[1]

ACTIO PERSONALIS MORITUR CUM PERSONA. A maxim meaning "a personal right of action dies with the person."[2] (See Abatement and Revival.)

ACTIO PŒNALIS IN HÆREDEM NON DATUR, NISI FORTE EX DAMNO LOCUPLETIOR HÆRES FACTUS SIT. A maxim meaning "a penal action is not given against an heir, unless, indeed, such heir is benefited by the wrong."[3]

ACTIVE TRUST. See Trusts.

ACT OF ATTAINDER. See Bill of Attainder.

ACT OF BANKRUPTCY. An act the commission of which by a debtor renders him liable to be adjudged a bankrupt.[4] (See Bankruptcy.)

ACT OF CONGRESS, OF THE LEGISLATURE, or OF PARLIAMENT. A term

& S. (Pa.) 255; Schmidt *v.* Heimberger, 21 Pa. Co. Ct. 564; Bryan *v.* Zimmerly, 16 Pa. Co. Ct. 564; Huffman *v.* Stiger, 1 Pittsb. (Pa.) 185.

Tennessee.— Maynard *v.* May, 2 Coldw. (Tenn.) 44.

West Virginia.— Exchange Bank *v.* Hall, 6 W. Va. 447.

As to dismissal for failure to prosecute see Dismissal and Nonsuit.

Illustrations.— Where the parties to a partition proceeding have acquiesced in it for nearly thirty years, their heirs cannot continue it. Johns *v.* Race, 48 La. Ann. 1170, 20 So. 660.

A lapse of twenty years after suit brought, without an effort on the part of plaintiff to obtain a trial, will raise the presumption that he has abandoned the suit. Wilson *v.* Altemus, 2 Watts & S. (Pa.) 255.

Where a warrant was sued out before a justice of the peace Nov. 22, 1858, and not placed in the hands of a constable for service until Nov. 10, 1859, the suit may properly be considered as abandoned. Maynard *v.* May, 2 Coldw. (Tenn.) 44.

The failure of plaintiff to take any steps toward maturing a cause against defendant, beyond the entrance of a common order, for eleven years, there not being, during that period, even an order of continuance, and no appearance, for some years, of the case upon the docket of the court, is a discontinuance of said cause. Exchange Bank *v.* Hall, 6 W. Va. 447.

On the other hand it is held that a suit to foreclose a mortgage is not abated by the failure of complainant to take any steps in the proceeding for ten years after the answer was filed. Hagood *v.* Riley, 21 S. C. 143.

78. Thomas *v.* Thompson, 2 Johns. (N. Y.) 471; Cheetham *v.* Ward, 1 B. & P. 630; Fryer *v.* Gildridge, Hob. 10; Rex Dominus *v.* Raynes, 1 Salk. 299. But see Com. *v.* York, 9 B. Mon. (Ky.) 40, wherein it appeared that during the pendency of an action against a constable and the sureties on his bond, the former died, and on motion of defendants, and against the opposition of plaintiff, the writ was revived against the administrator of the constable, whereupon plaintiff abandoned the suit. It was held that he did not thereby lose his right to resort to the supreme court to have the pleadings and parties settled according to law.

As against subsequent creditor.— A delay of eight years by a creditor in the prosecution of his suit is an abandonment of his prior right as against a subsequent creditor prosecuting the same debtor. Myrick *v.* Selden, 36 Barb. (N. Y.) 15.

79. Vermont Marble Co. *v.* Black, 123 Cal. 21, 55 Pac. 599; Lough *v.* Pitman, 25 Minn. 120.

Redemption "pending" action.— Under N. J. Revision, p. 710, allowing a mortgagor to redeem at any time "pending" the action, where, in ejectment against the mortgagor, the cause has proceeded to judgment and a writ of possession has issued, there is no action "pending" within the statute. Tichenor *v.* Collins, 45 N. J. L. 123.

80. Scherrer *v.* Caneza, 33 La. Ann. 314; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253; Campbell *v.* Hadley, 1 Sprague (U. S.) 470, 4 Fed. Cas. No. 2,358.

As to termination of action: For purposes of appeal, see Appeal and Error. For purposes of action for malicious prosecution, see Malicious Prosecution.

Compromising an action and filing a stipulation that it is settled and thereby discontinued as between the parties takes it out of court, so that no ground remains upon which either can take proceedings therein against the other. Eastman *v.* St. Anthony Falls Water-Power Co., 17 Minn. 48.

1. Burrill L. Dict.
2. Broom Leg. Max.
3. Wharton L. Lex.
4. Wharton L. Lex.

usually employed as meaning a law passed by either legislative body; or as equivalent to statute.[5] (See STATUTES.)

ACT OF CURATORY. In Scotch law, the order by which a curator or guardian is appointed by the court.[6]

ACT OF GOD. What is meant precisely by the expression "act of God" has undergone much discussion[7] and the term has received a variety of definitions, differing rather in their mode of expression than in the substance of their signification.[8] It may be defined to be any accident, due directly and exclusively to

5. Abbott L. Dict.

6. Wharton L. Lex.

7. Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Ewart *v.* Street, 2 Bailey (S. C.) 157, 161, 23 Am. Dec. 131, where it is said that "it is, perhaps, not practicable to define accurately the sort of accident that comes under the denomination of the act of God."

"The earliest use of the term 'act of God,' that we can find in our law books is by Sir Edward Coke, 1 Coke 97*b*, in 1581, in Shelley's Case, speaking of the death of a man, and he seems to have been fond of it, for he uses it often afterwards; Blumfield's Case, 5 Coke 86*b*, 87*a*, 22*a*, 1 Inst. 206*a*, also meaning death, and Keighley's Case, 10 Coke 139*a*, 139*b*, where it is applied to a sudden tempest breaking down sea-walls, and refers to the statute where the term is 'inevitable dangers or necessity, without any fault of him who is bound to repair.' Moreover, Coke used the phrase, 'the act of God excuses,' as equivalent to *impotentia excusat legem*, and also as equivalent to an accident which is 'so inevitable that, by no providence or industry of him who is bound, it can be prevented,' or, as in Shelley's Case, 1 Coke 97*b*, 'which no industry could avoid nor policy prevent.' Again, he uses the phrase in 1601, as applicable to a sudden storm: 1 Bulst. 280; Le Case de Gravesend Barge, 1 Rolle 79; and certainly that is one of the many kinds of inevitable accidents that may be so described. The phrase 'act of God,' is used by other judges in 1629, Williams *v.* Lloyd, W. Jones 179, Williams *v.* Hide, Palmer 548, as applicable to the death of a horse, in deciding that the death of a borrowed horse excuses the return of him; and again, in 1718, it means a tempest: Amies *v.* Stevens, 1 Str. 128. It is used also by the judges in Coggs *v.* Bernard, 2 Ld. Raym. 909, in 1704; but they do not define their meaning in using it, and the case did not require it, and they give no indication that they attached to it any other than what had been its usual meaning." Lourie, C. J., in Hays *v.* Kennedy, 41 Pa. St. 378, 380, 80 Am. Dec. 627.

8. Haines, J., in New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

"Damages by the elements."—The elements are the means by which God acts, and we are unable to perceive why "damages by the elements" and "damages by the acts of God" are not convertible expressions. Packard *v.* Taylor, 35 Ark. 402, 37 Am. Rep. 37; Polack *v.* Pioche, 35 Cal. 416, 95 Am. Dec. 115.

"Fortuitous event."— In its legal sense "fortuitous event" is synonymous with "act of God" in the common law. Eugster *v.* West, 35 La. Ann. 119, 48 Am. Rep. 232.

"Inevitable" or "unavoidable" accident.— In numerous cases the court has expressed the opinion that the words "inevitable accident" and "unavoidable accident" are exactly equivalent to the expression "act of God."

Alabama.— Sprowl *v.* Kellar, 4 Stew. & P. (Ala.) 382.

Connecticut.— Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Georgia.— Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Illinois.— Gillett *v.* Ellis, 11 Ill. 579.

Indiana.— Walpole *v.* Bridges, 5 Blackf. (Ind.) 222.

Mississippi.— Neal *v.* Saunderson, 2 Sm. & M. (Miss.) 572, 41 Am. Dec. 609 [*citing* Story Bailm. 318].

New York.— Elliott *v.* Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306.

Pennsylvania.— Hays *v.* Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627; Sullivan *v.* Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698.

United States.— New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 381, 12 L. ed. 465.

This is not strictly true, however, for while every act of God is an inevitable accident every inevitable accident is not an act of God. Central Line of Boats *v.* Lowe, 50 Ga. 509; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292; McArthur *v.* Sears, 21 Wend. (N. Y.) 190, 198; Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127. And in Plaisted *v.* Boston, etc., Steam Nav. Co., 27 Me. 132, 46 Am. Dec. 587, it is pointed out that Story (Bailm. §§ 511, 512) does not undertake to decide whether the terms "perils of the sea," "inevitable accidents," and "acts of God" are synonymous.

"Irresistible, superhuman cause."—"The words 'irresistible, superhuman cause' are equivalent in meaning to the phrase 'the act of God,' and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ." Ryan *v.* Rogers, 96 Cal. 349, 353, 31 Pac. 244.

"Perils of the sea."—"Act of God" and "perils of the sea" are not convertible terms. Plaisted *v.* Boston, etc., Steam Nav. Co., 27 Me. 132, 46 Am. Dec. 587; Fergusson *v.*

natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented.[9] The general characteristics of such perils are very intelligible.[10] (Act of God:

Brent, 12 Md. 9, 71 Am. Dec. 582; Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364. But see Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745, where "act of God" and "dangers of the sea" are said to be expressions of very similar import.

9. *Alabama.*— Smith *v.* Western R. Co., 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

California.—Chidester *v.* Consolidated Ditch Co., 59 Cal. 197; Polack *v.* Pioche, 35 Cal. 416, 95 Am. Dec. 115.

Connecticut.— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Delaware.— McHenry *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 448.

District of Columbia.— Gleeson *v.* Virginia Midland R. Co., 5 Mackey (D. C.) 356.

Georgia.— Central Line of Boats *v.* Lowe, 50 Ga. 509; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Illinois.—Merchants' Despatch Co. *v.* Smith, 76 Ill. 542; Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285, 18 Am. Rep. 613.

Kentucky.— Louisville, etc., R. Co. *v.* Hedger, 9 Bush (Ky.) 645.

Maryland.— Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582.

Missouri.— Wolf *v.* American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449.

New Jersey.— New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Mershon *v.* Hobensack, 22 N. J. L. 371, 372.

New York.— Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292 [*affirming* 31 Barb. (N. Y.) 38]; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

North Carolina.— Backhouse *v.* Sneed, 5 N. C. 173.

Pennsylvania.— Hays *v.* Kennedy, 3 Grant (Pa.) 351; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632.

South Carolina.— Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364.

Texas.— Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639 [*approved* in Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654].

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

Wisconsin.— Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452.

England.— Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127; Forward *v.* Pittard, 1 T. R. 27.

10. Act of God is commonly illustrated by such natural convulsions as droughts (Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458); earthquakes (Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Central Line of Boats *v.* Lowe, 50 Ga. 509, 511; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936 (the Charleston earthquake); Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458); floods (Smith *v.* Western R. Co., 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; McHenry *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 448; Wallace *v.* Clayton, 42 Ga. 443; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327, 25 Am. L. Reg. 650; Long *v.* Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741 (the Johnstown flood); Baltimore, etc., R. Co. *v.* Sulphur Spring Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; Nitro-Phosphate, etc., Co. *v.* London, etc., Docks Co., 9 Ch. D. 503; Nichols *v.* Marsland, 2 Ex. D. 1. *Contra*, if an ordinary freshet, Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153); freezing (Vail *v.* Pacific R. Co., 63 Mo. 230; Worth *v.* Edmonds, 52 Barb. (N. Y.) 40; Wing *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458. *Contra*, McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696); lightning (Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Polack *v.* Pioche, 35 Cal. 416, 95 Am. Dec. 115; McHenry *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 448; Central Line of Boats *v.* Lowe, 50 Ga. 509; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; Gilmore *v.* Carman, 1 Sm. & M. (Miss.) 279, 40 Am. Dec. 96; New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364; Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; Nugent *v.* Smith, 1 C. P. D. 423, 428, 34 L. T. Rep. N. S. 827, 18 Am. Rep. 618 note, 14 Alb. L. J. 164; Forward *v.* Pittard, 1 T. R. 27); shifting of shoals (Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364. *Contra*, Friend *v.* Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119); snow-storms (Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315;

As Affecting Liability—For Flowage, see WATERS; For Negligence, see NEGLIGENCE; Of Carriers of Goods, see CARRIERS; SHIPPING. As Affecting Performance—Of Conditions, see BONDS; DEEDS; Of Contracts, see CONTRACTS.)

ACT OF GRACE. A term sometimes applied to a general pardon, or the granting or extension of some privilege, at the beginning of a new reign, the coming of age or the marriage of a sovereign, etc.[11]

ACT OF HONOR. An instrument drawn up by a notary public, after protest of a bill of exchange, when a third party is desirous of paying or accepting the bill for the honor of any or all of the parties to it.[12] (See BILLS AND NOTES.)

ACT OF INDEMNITY. A statute by which persons subject to penalties by reason of having committed illegal acts are protected from the consequences thereof.[13]

ACT OF INSOLVENCY. The phrase "act of insolvency," within the 52d section of the currency act, denotes any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.[14] (See BANKS AND BANKING; INSOLVENCY.)

Black *v.* Chicago, etc., R. Co., 30 Nebr. 197, 46 N. W. 428; Briddon *v.* Great Northern R. Co., 28 L. J. Exch. 51); storms (Polack *v.* Pioche, 35 Cal. 416, 95 Am. Dec. 115; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; Nugent *v.* Smith, 1 C. P. D. 423, 428, 34 L. T. Rep. N. S. 827, 18 Am. Rep. 618 note, 14 Alb. L. J. 164; Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127; Nichols *v.* Marsland, 2 Ex. D. 1, L. R. 10 Exch. 255; Forward *v.* Pittard, 1 T. R. 27); striking a sunken rock (Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235. *Contra,* if the rock be marked by a buoy, Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582); striking hidden snag (Smyrl *v.* Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146; Charleston, etc., Steam Boat Co. *v.* Bason, Harp. (S. C.) 262. *Contra,* Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516); sudden failure of wind (Colt *v.* McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200); sudden illness (Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Dickey *v.* Linscott, 20 Me. 453, 37 Am. Dec. 66; Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; Boast *v.* Firth, L. R. 4 C. P. 1; Robinson *v.* Davison, L. R. 6 Exch. 269); sudden death (Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458); tempests (Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Polack *v.* Pioche, 35 Cal. 416, 95 Am. Dec. 115; McHenry *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 448; Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; Nugent *v.* Smith, 1 C. P. D. 423, 428, 34 L. T. Rep. N. S. 827, 18 Am. Rep. 618 note, 14 Alb. L. J. 164; Amies *v.* Stevens, 1 Str. 128; Forward *v.* Pittard, 1 T. R. 27); tornadoes (Central Line of Boats *v.* Lowe, 50 Ga. 509; New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452); violence of the seas (Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696); waterspouts (Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153); wind (Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292; Pennsylvania R. Co. *v.* Fries, 87 Pa. St. 234; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452; Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127; Forward *v.* Pittard, 1 T. R. 27).

11. Century Dict.

In Scotch law it designates a statute passed in 1696, under which a creditor, enforcing his right to imprison a debtor, was compellable to provide for his subsistence. Abbott L. Dict.

12. Bouvier L. Dict.

13. Rapalje & L. L. Dict.

14. *In re* Manufacturer's Nat. Bank, 5 Biss. (U. S.) 499, 505, 16 Fed. Cas. No. 9,051, 1 Centr. L. J. 19.

Such acts are "non-payment of its circulating notes, bills of exchange, or certificates of deposit; failure to make good the impair-

ACT OF LAW. The operation of legal rules upon given facts.[15]

ACT OF PARLIAMENT. See ACT OF CONGRESS.

ACT OF SETTLEMENT. The statute 12 & 13 Wm. III, c. 2, limiting the crown to the Princess Sophia of Hanover and to the heirs of her body being Protestants.[16]

ACT OF STATE. An act done by the sovereign power of a country, or by its delegate, within the limits of the power vested in him.[17]

ACT OF SUPREMACY. The statute 1 Eliz. c. 1, by which was established the supremacy of the crown in matters ecclesiastical.[18]

ACT OF THE LEGISLATURE. See ACT OF CONGRESS.

ACT OF UNIFORMITY. The statute 13 & 14 Car. II, c. 4, enacting that the book of common prayer, as then recently revised, should be used in every parish church, and other place of public worship, and otherwise ordaining a uniformity in religious services.[19]

ACTON BURNEL. The statute 11 Edw. I, ordaining the statute merchant.[20]

ACT ON PETITION. A summary mode of proceeding, in which the parties state their respective cases briefly and support their statements by affidavit.[21]

ACTOR. A PLAINTIFF,[22] *q. v.*; and in old English law, a proctor or advocate in civil courts or causes.[23]

ACTORE NON PROBANTE ABSOLVITUR REUS. A maxim meaning "the plaintiff not proving [his demand] the defendant is acquitted."[24]

ACTORI INCUMBIT ONUS PROBANDI. A maxim meaning "the burden of proof rests on the plaintiff."[25]

ACTOR QUI CONTRA REGULAM QUID ADUXIT, NON EST AUDIENDUS. A maxim meaning "a plaintiff who advances anything against authority is not to be heard."[26]

ACTOR SEQUITUR FORUM REI. A maxim meaning "the plaintiff follows the forum of the thing."[27]

ACTS OF COURT. Legal memoranda in the nature of pleas, especially in admiralty courts.[28]

ACTS OF SEDERUNT. In Scotch law, ordinances made by the court of session for regulating the forms of proceeding to be observed in all actions or matters which may be brought before them.[29]

ACTS OF UNION. The statutes by which the articles of union between England and Wales,[30] Scotland,[31] and Ireland,[32] respectively, were ratified and confirmed.[33]

ACTUAL. Real; existing in act.[34]

ment of capital, or to keep good its surplus or reserve" (*In re* Manufacturer's Nat. Bank, 5 Biss. (U. S.) 499, 504, 16 Fed. Cas. No. 9,051, 1 Centr. L. J. 19), or "the closing of the doors, refusal to pay depositors on demand, refusal to go on in due course of business to transact its business as a bank, and discharge its liabilities to its creditors" (Irons *v.* Manufacturer's Nat. Bank, 6 Biss. (U. S.) 301, 306, 13 Fed. Cas. No. 7,068).

The same construction has been placed on the words in a Michigan statute. Stone *v.* Dodge, 96 Mich. 514, 525, 56 N. W. 75.

15. Abbott L. Dict.

16. Wharton L. Lex.

17. Black L. Dict.

18. Stimson L. Gloss.

19. Burrill L. Dict.

20. Jacob L. Dict.

It was so termed from a place named Acton-Burnel, where it was made, being a castle formerly belonging to the families of Burnel, and afterward of Lovel, in Shropshire. Jacob L. Dict.

21. Ville de Varsovie, 2 Dods. 174, 184 [*quoted* in 1 Hagg. Adm. 1, note 1].

22. Burrill L. Dict.

23. Jacob L. Dict.

24. Burrill L. Dict. [*citing* Hob. 103].

25. Morgan Leg. Max.

Sometimes written "*actori incumbit probatio.*" Abbott L. Dict.; Stimson L. Gloss.

26. Rapalje & L. L. Dict.

27. Burrill L. Dict.

28. Wharton L. Lex.

29. Burrill L. Dict. [*citing* Erskine Inst. b. 1, tit. 1, § 40].

So called from the word *sederunt*,— they sat,— with which anciently they used to begin. Burrill L. Dict.

30. 27 Hen. VIII, c. 26, confirmed by 34 & 35 Hen. VIII, c. 26.

31. 5 Anne, c. 8.

32. 39 & 40 Geo. III, c. 67.

33. Wharton L. Lex.

34. State *v.* Wells, 31 Conn. 210, 213; Astor *v.* Merritt, 111 U. S. 202, 213, 4 S. Ct. 413, 28 L. ed. 401.

ACTUALLY. Really; truly; in fact.[35]

ACTUARY. The manager of a joint-stock company, under a board of directors, particularly of an insurance company; combining with the duties of a secretary those of a scientific adviser to the board which gives him his office, in all matters involving calculation; a person skilled in the doctrine of life annuities and insurances, and who is in the habit of giving opinions upon cases of annuities, reversions, etc.[36]

ACTUM or ACTUS. A thing done; an act or action.[37]

ACTUS CURIÆ NEMINEM GRAVABIT. A maxim meaning "an act of the court shall prejudice no man."[38]

ACTUS DEI NEMINI EST DAMNOSUS. A maxim meaning "the act of God is hurtful to no one."[39]

ACTUS DEI NEMINI FACIT INJURIAM. A maxim meaning "the act of God does injury to no one."[40]

ACTUS DEI VEL LEGIS NEMINI FACIT INJURIAM. A maxim meaning "the act of God or of the law does injury to no one."[41]

ACTUS INCEPTUS, CUJUS PERFECTIO PENDET EX VOLUNTATE PARTIUM, REVOCARI POTEST; SI AUTEM PENDET EX VOLUNTATE TERTIÆ PERSONÆ, VEL EX CONTINGENTI, REVOCARI NON POTEST. A maxim meaning "an act already begun, the completion of which depends on the will of the parties, may be revoked; but if it depend on the will of a third person, or on a contingency, it cannot be revoked."[42]

ACTUS JUDICARIUS CORAM NON JUDICE IRRITUS HABETUR; DE MINISTERIALI AUTEM A QUOCUNQUE PROVENIT RATIUM ESTO. A maxim meaning "a judicial act done without authority is void; not so a ministerial act."[43]

ACTUS LEGIS NEMINI EST DAMNOSUS. A maxim meaning "the act of the law is hurtful to no one."[44]

ACTUS LEGIS NEMINI FACIT INJURIAM. A maxim meaning "the act of the law does injury to no one."[45]

ACTUS LEGITIMI NON RECIPIUNT MODUM. A maxim meaning "legal actions do not admit a limitation."[46]

ACTUS ME INVITO FACTUS NON EST MEUS ACTUS. A maxim meaning "an act done by me against my will is not my act."[47]

ACTUS NON FACIT REUM NISI MENS SIT REA. A maxim meaning "the act itself does not make a man guilty unless his intention were so."[48]

ACTUS SERVI IN IIS QUIBUS OPERA EJUS CUM MUNITUR ADHIBITA EST, ACTUS DOMINI HABETUR. A maxim meaning "the act of a servant in those things in which he is commonly employed is considered the act of his master."[49]

A. D. An abbreviation of the words *anno Domini*,—in the year of our Lord.[50]

Opposite of "constructive" or "virtual."—In legal phraseology "actual" is used as the opposite of "constructive" or "virtual."

Alabama.— State, *ex rel.* Dawson, 39 Ala. 367, 383.

California.—McIntyre *v.* Sherwood, 82 Cal. 139, 141, 22 Pac. 937.

Connecticut.—State *v.* Wells, 31 Conn. 210, 213.

New York.— Cleveland *v.* Crawford, 7 Hun (N. Y.) 616, 620.

England.— Gladstone *v.* Padwick, 40 L. J. Exch. 154, 159, L. R. 6 Exch. 203.

35. State, *ex rel.* Dawson, 39 Ala. 367, 383.

It is the opposite or antithesis of "seemingly," "pretendedly," or "feignedly." State, *ex rel.* Dawson, 39 Ala. 367, 383.

36. Burrill L. Dict.

37. Anderson L. Dict.

38. Burrill L. Dict.

39. Burrill L. Dict.

40. Abbott L. Dict.

41. Stimson L. Gloss.

42. Burrill L. Dict. [*citing* Bacon Max. 79, reg. 20].

43. Morgan Leg. Max.

44. Burrill L. Dict.

45. Abbott L. Dict.

46. Morgan Leg. Max. [*citing* Hob. 153].

47. Burrill L. Dict.

48. Broom Leg. Max.

49. Morgan Leg. Max. [*citing* Lofft 227].

50. State *v.* Reed, 35 Me. 489, 58 Am. Dec. 727; Com. *v.* Clark, 4 Cush. (Mass.) 596; Com. *v.* Hagarman, 10 Allen (Mass.) 401; Brown *v.* State, 11 Tex. App. 451.

AD. In Law Latin the word "*ad*" is a preposition meaning "at,"[51] "concerning,"[52] "for,"[53] "on account of,"[54] "to,"[55] and "until."[56]

ADAYER. To provoke.[57]

ADD. To join or unite, as one thing, or some, to another, so as to increase the number, or augment the quantity, enlarge the magnitude, or so as to form one aggregate.[58]

AD DAMNUM. Literally, "to the damage." That part of the plaintiff's pleading in which he alleges the amount for which he claims recovery.[59] A clause of like name is used in a libel in admiralty.[60]

ADDITIO. An Addition,[61] *q. v.*

ADDITION. The result of adding; anything added.[62] (Addition: In Fire Insurance, see Fire Insurance. In Mechanics' Lien Law, see Mechanics' Liens. Of New Parties, see Parties. To Land by Accretion, see Navigable Waters; Waters. To Name of Party, see Indictments and Informations; Parties. To Property by Accession, see Accession.)

ADDITIONAL. Joined to or united with.[63] (Additional: Allowance of Costs, see Costs.)

51. *Ad alium diem,*— at another day. Y. B. 7 Hen. VI, 13. *Ad certum diem,*— At a certain day. Rex *v.* Ward, 2 Str. 747. *Ad communem legem,*— at the common law. Drury *v.* Drury, 2 Eden 39, 54. *Ad curiam,*— at a court. Rex *v.* Everard, 1 Ld. Raym. 638, 1 Salk. 195. *Ad instantiam,*— at the instance. Milward *v.* Ingram, 2 Mod. 43, 44. *Ad libitum,*— at pleasure. 3 Bl. Comm. 292. *Ad ostium ecclesiæ,*— at the door of the church. 4 Kent Comm. 36. *Ad punctum temporis,*— at the point of time. Story Bailm. § 263. *Ad tunc et ibidem,*— at the time and in the same place. Buckler's Case, 1 Dyer 69*a*.

52. *Ad omissa vel male appretiata,*— concerning omissions or wrong estimations. Erskine Inst. III, tit. 9, § 36 [*cited* in Adams Gloss.].

53. *Ad abundatiorem cautelam,*— for more abundant caution. Abbot's Case, 2 How. St. Tr. 1159, 1182. *Ad admittendum clericum,*— for admitting a clerk. Abbott L. Dict. *Ad campi partem,*— for a share of the land. Fleta, lib. II, c. 36, § 4 [*cited* in Adams Gloss.]. *Ad cautelam ex superabundanti,*— for more abundant caution. Abbot's Case, 2 How. St. Tr. 1159, 1163. *Ad colligendum,*— for collecting. 2 Kent Comm. 414. *Ad hospitandos homines,*— for the purpose of entertaining persons. Calye's Case, 8 Coke 32*a*. *Ad litem,*— for the suit. 3 Bl. Comm. 427. *Ad majorem cautelam,*— for greater caution. Abbot's Case, 2 How. St. Tr. 1159, 1182.

54. *Ad modum,*— on account of the manner. Adams Gloss.

55. *Ad aliud examen,*—to another tribunal. Tobey *v.* Bristol County, 3 Story (U. S.) 800, 827, 23 Fed. Cas. No. 14,065; The Steamboat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 182, 9 L. ed. 677. *Ad assisam capiendum,*— to take an assize. Bracton, fol. 110*b* [*cited* in Adams Gloss.]. *Ad audiendum considerationem curiæ,*— to hear the judgment of the court. Bracton, fol. 383*b* [*cited* in Adams Gloss.]. *Ad audiendum et determinandum,*— to hear and determine. 4 Bl. Comm. 278. *Ad barram evocatus,*—called to the bar. Levinz *v.* Randolph, 1 Ld. Raym. 594, 595. *Ad capiendus assisas,*— to try writs of assize. 3 Bl. Comm. 352. *Ad commune nocumentum,* — to the common nuisance. Broom & H. Comm. bk. IV, 196. *Ad comparendem,*— to appear. Worlich *v.* Massy, Cro. Jac. 67. *Ad effectum sequentem,*— to the effect following. Rex *v.* Bear, 2 Salk. 417. *Ad eversionem juris nostri,*— to the overthrow of our right. 2 Kent Comm. 91. *Ad exhæredationem,*— to the disinheriting. 3 Bl. Comm. 225. *Ad faciendum,*— to do. Coke Litt. 204*a*. *Ad filum medium aquæ,*— to the middle thread of the water. Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268, 272, 16 Am. Dec. 342. *Ad gaolas deliberandas,*— to deliver the gaols. Bracton, fol. 109*b* [*cited* in Adams Gloss.]. *Ad idem,* — to the same point. Allen *v.* McKeen, 1 Sumn. (U. S.) 276, 310, 1 Fed. Cas. No. 229; Alsop *v.* Commercial Ins. Co., 1 Sumn. (U. S.) 451, 463, 1 Fed. Cas. No. 262; —— *v.* Chillender, Hardres 97; Russel *v.* Oldish, 1 Show. 353. *Ad mordendum assuetus,*— accustomed to bite. Boulton *v.* Banks, Cro. Car. 254. *Ad prosequendum,*— to prosecute. Spiller *v.* Andrews, 11 Mod. 362. *Ad respondendum,* — to answer. Fleta, lib. II, c. 65, § 12 [*cited* in Adams Gloss.]. *Ad satisfaciendum,*— to satisfy. Broom & H. Comm. bk. III, 139. *Ad ultimam vim terminorum,*— to the most extended import of the terms. Drury *v.* Drury, 2 Eden 39, 55.

56. *Ad culpam,*—until misbehavior. Adams Gloss.

57. Kelham Dict.

58. Hancock County *v.* State, 119 Ind. 473, 476, 22 N. E. 10 [*citing* Webster Dict.].

59. Abbott L. Dict.

60. Story, J., in Jenks *v.* Lewis, 3 Mason (U. S.) 503, 13 Fed. Cas. No. 7,279.

61. Burrill L. Dict.

62. Century Dict.

"In addition."— "The words 'in addition' do not ordinarily mean 'exclusive of,' but are diametrically opposed to the idea of diminution or abatement, but signify an increase of or accession to." Matter of Daggett, 2 Connoly Surr. (N. Y.) 230, 235, 9 N. Y. Suppl. 652, 29 N. Y. St. 864.

63. State *v.* Hull, 53 Miss. 626, 645, where it is said: "The term 'additional' embraces the idea of joining or uniting one

ADDITIONALES. Additional terms or propositions to be added to a former agreement.[64]

ADDITIO PROBAT MINORITATEM. A maxim meaning "an addition proves inferiority." [65]

ADDONE or **ADDONNE.** Given to.[66]

ADDRESS. See ABATEMENT AND REVIVAL; APPEARANCES; BILLS AND NOTES; EQUITY; MOTIONS; NOTICES; PARTIES; PROCESS.

ADDRESSER. To hold up; to erect.[67]

AD EA QUAE FREQUENTIUS ACCIDUNT JURA ADAPTANTUR. A maxim meaning "the laws are adapted to those cases which most frequently occur." [68]

ADEEM. To take away, take back, or revoke, as a legacy.[69]

ADEMPTION. A taking away or revocation.[70] (Ademption: Of Legacies, see WILLS.)

ADEO. So; as.[71]

ADEPRIMES. First.[72]

ADEQUACY. Sufficiency; sufficiency for a particular purpose.[73]

ADERERE. In arrear; behind.[74]

ADESOUTH. Under; beneath.[75]

ADEVANT. Before.[76]

ADGISANT. ADJACENT,[77] *q. v.*

ADHERING. See TREASON.

ADIEU. Without day.[78]

A DIGNIORI FIERI DEBET DENOMINATIO ET RESOLUTIO. A maxim meaning "the title and exposition of a thing ought to be derived from, or given, or made with reference to the more worthy degree, quality, or species of it." [79]

AD INQUIRENDUM. A judicial writ commanding inquiry to be made of any thing relating to a cause depending in the king's courts.[80]

ADIRATUS. Strayed; lost.[81]

ADIT. An entrance or passage; a term in mining used to denote the opening by which a mine is entered, or by which water and ores are carried away; called also the "drift." [82]

ADITUS. A public way, including a footway, horseway, and cartway.[83]

ADJACENT. Lying close or near to; neighboring.[84]

thing to another, so as thereby to form one aggregate."

64. Black L. Dict.

65. Adams Gloss.

66. Kelham Dict.

67. Burrill L. Dict.

68. Broom Leg. Max.

69. Burrill L. Dict.

70. Burrill L. Dict.

71. Burrill L. Dict., giving as an example from 10 Coke 65 the expression *adeo plene et integre*,— as fully and entirely.

72. Kelham Dict.; Burrill L. Dict., the latter giving as an example from Y. B. 8 Edw. III, 9, the expression *pledes adeprimes v're plea, et puis desputes*,— plead your plea first, and then argue.

73. Pennsylvania, etc., Canal, etc., Co. *v.* Mason, 109 Pa. St. 296, 58 Am. Rep. 722 [*citing* Webster Dict.].

74. Burrill L. Dict. [*citing* Litt. § 151].

75. Kelham Dict.

76. Kelham Dict.

77. Kelham Dict.

78. Burrill L. Dict.

In the Year Books this term is frequently used, implying final dismissal from the courts. It is sometimes written "*adeu*," as in the expression *alez adeu*,— go without day. Y. B. 5 Edw. II, 173.

79. Burrill L. Dict.

80. Jacob L. Dict.

81. Stimson L. Gloss.

82. Gray *v.* Truby, 6 Colo. 278, 280 [*citing* Webster Dict.].

83. Coke Litt. 56*a*.

84. *Kansas.*— State *v.* Kansas City, 50 Kan. 508, 522, 31 Pac. 1100 [*citing* Webster Dict.].

Kentucky.— Miller *v.* Cabell, 81 Ky. 178, 184.

New York.— Matter of Ward, 52 N. Y. 395, 397 [*citing* Crabb's English Synonyms]; Brooklyn Heights R. Co. *v.* Brooklyn, 18 N. Y. Suppl. 876; People *v.* Schermerhorn, 19 Barb. (N. Y.) 540, 556; Carrier *v.* Schoharie Turnpike Road Co., 18 Johns. (N. Y.) 56, 57; 6 Cow. (N. Y.) 544, note.

Washington.— U. S. *v.* Northern Pac. R. Co., (Wash. Terr. 1884) 29 Alb. L. J. 24.

United States.— U. S. *v.* Lynde, 47 Fed. 297, 300; Henderson *v.* Long, Cooke (Tenn.) 128, Brunn. Col. Cas. 188, 11 Fed. Cas. No. 6,354.

Need not touch.— The word "adjacent" is not inconsistent with the idea of something intervening. Johnson *v.* District of Columbia, 6 Mackey (D. C.) 21, 27; State *v.* Kansas City, 50 Kan. 508, 522, 31 Pac. 1100; Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 312, 24 Atl.

ADJECTION. In old English law, ADDITION,[85] *q. v.*

ADJOINING. Lying next to or in contact with; contiguous.[86]

729; U. S. *v.* Lynde, 47 Fed. 297, 300. Where the adjacent ends and non-adjacent begins may be difficult to determine. U. S. *v.* Chaplin, 31 Fed. 890, 896. But the owner of property half a mile distant from a railway is not an adjacent occupant or proprietor. Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

Use as synonym of "adjoining."—While the word strictly speaking does not mean "adjoining" (Henderson *v.* Long, Cooke (Tenn.) 128, Brunn. Col. Cas. 188, 11 Fed. Cas. No. 6,354) it is sometimes used as a synonym for "adjoining" or "contiguous."

Kentucky.— Miller *v.* Cabell, 81 Ky. 178, 184.

Louisiana.— Municipality No. Two, etc., 7 La. Ann. 76, 79.

Pennsylvania.— Camp Hill Borough Annexation, 142 Pa. St. 511, 517, 21 Atl. 978.

Washington.— U. S. *v.* Northern Pac. R. Co., (Wash. Terr. 1884) 29 Alb. L. J. 24.

United States.— U. S. *v.* Denver, etc., R. Co., 31 Fed. 886, 889.

See also People *v.* Schermerhorn, 19 Barb. (N. Y.) 540, 556, and 6 Cow. (N. Y.) 544 note, to the effect that "adjacent" means "bordering upon."

85. Burrill L. Dict.

86. *District of Columbia.*—Johnson *v.* District of Columbia, 6 Mackey (D. C.) 21, 27.

Iowa.— Truax *v.* Pool, 46 Iowa 256.

Missouri.— Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56.

New Hampshire.—State *v.* Downs, 59 N. H. 320.

New Jersey.— Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 312, 24 Atl. 729; McCullough *v.* Absecom Beach, etc., Imp. Co., 48 N. J. Eq. 170, 187, 21 Atl. 481; Akers *v.* United New Jersey R., etc., Co., 43 N. J. L. 110, 112.

New York.—Matter of Ward, 52 N. Y. 395, 397; Holmes *v.* Carley, 31 N. Y. 289 [*affirming* 32 Barb. (N. Y.) 440]; Peverelly *v.* People, 3 Park. Crim. (N. Y.) 59, 69.

North Carolina.— Massey *v.* Belisle, 24 N. C. 170, 182.

England.— Josh *v.* Josh, 5 C. B. N. S. 454, 466, 94 E. C. L. 454; Rex *v.* Hodges, M. & M. 341; Lightbound *v.* Higher Bebington Local Board, 14 Q. B. D. 849 [*distinguishing* Wakefield Local Board of Health *v.* Lee, 1 Ex. D. 336].

Synonym of "along."— The word "adjoining" is sometimes used as synonymous with "along." Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56.

Synonym of "fronting."— In a statute relating to the assessment of lands for the construction of sidewalks, the word "adjoining" was held equivalent to "fronting" in Scott County *v.* Hinds, 50 Minn. 204, 52 N. W. 523.

Use as synonym of "adjacent."— While the word "adjoining" implies a closer relation than "adjacent" (Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 312, 24 Atl. 729), it is sometimes used as a synonym therefor. State *v.* Downs, 59 N. H. 320; Doe *v.* Pitt, 6 N. Brunsw. 385, 389, where the court, per Chipman, C. J., said: "We do not see any ground for the distinction urged by the defendant's counsel between the meaning of the terms 'adjacent' and 'adjoining' used in the deed."

Distinguished from "appertaining."—"The words 'adjoining' and 'appertaining' are not synonymous. As descriptive words in a deed, 'adjoining' usually imports contiguity; 'appertaining,' use, occupancy. One thing may appertain to another without adjoining or touching it. Proof that pieces of land adjoin would not be proof that one appertained to the other. Neither in literal meaning, nor as used in deeds, are they equivalent." Miller *v.* Mann, 55 Vt. 475, 479. But see Com. *v.* Curley, 101 Mass. 24, where it was held that an inclosed yard of a house of correction, though divided by a public street against which it is suitably fenced and protected, must be regarded as adjoining or appurtenant.

ADJOINING LANDOWNERS

By Charles C. Cole
Associate Justice of Supreme Court of District of Columbia

CROSS-REFERENCES

For Adjoining Mines, Quarries, or Wells, see MINES AND MINERALS.
Boundaries, see BOUNDARIES.
Easements, see EASEMENTS.
Excavations by Municipal Corporations Removing Lateral Support, see MUNICIPAL CORPORATIONS.
Fences, see FENCES.

For Nuisances, see NUISANCES.
Party-Walls, see PARTY-WALLS.
Springs, Subterranean and Surface Waters, see WATERS.

I. IN GENERAL.

A. Reasonable Use of Property. The mutual rights, duties, and liabilities of adjoining landowners are dependent on the principle expressed by the maxim *sic utere tuo ut alienum non lædas*, which requires one to enjoy his property in such a manner as not to injure that of another, but the application of this principle is to be limited so as not to restrain an owner of property from reasonable and prudent use and enjoyment of it. It is therefore a general rule of law that every owner of land has absolute dominion over it and may make any legitimate use of it he sees fit, and if injuries result to adjoining land by such use it is *damnum absque injuria*.[1]

B. Unskilful or Negligent Use of Property — 1. Action for Damages — a. Right of Action — (I) *In General.* The general rule of law just stated is subject, however, to the qualification that if a landowner himself, or another by his procurement or permission, in doing a lawful act on his own land, which involves danger to the adjoining property, does it so unskilfully or negligently as to occasion damage thereto, he will be answerable to the owner of such property,[2] or

1. Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Rylands *v.* Fletcher, L. R. 3 H. L. 330 [*affirming* L. R. 1 Exch. 265]; Hurdman *v.* North Eastern R. Co., 3 C. P. D. 168; Baird *v.* Williamson, 15 C. B. N. S. 376; Smith *v.* Kenrick, 7 C. B. 515; Acton *v.* Blundell, 12 M. & W. 324. See also Graves *v.* Mattison, 67 Vt. 630, 32 Atl. 498, holding that injunction will not lie to restrain a landowner from erecting a wall on his ground because the foundation thereof is higher than plaintiff's adjoining building and there is danger that, if plaintiff removes his wall to rebuild, defendant's wall may fall.

The test as to permissible use of, or action upon, one's own land is not whether the use causes injury to a neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but is as to whether the act or use is a reasonable exercise of the dominion which the owner, by virtue of his ownership, has over his property, having regard to all the interests affected, his own and his neighbor's, and also having in view public policy. Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105.

This rule has been applied to injuries resulting from blasting (Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Newell *v.* Woolfolk, 91 Hun (N. Y.) 211, 36 N. Y. Suppl. 327); building negro tenements adjoining residential property (Falloon *v.* Schilling, 29 Kan. 292, 44 Am. Rep. 642); building operations (Leavenworth Lodge No. 2 *v.* Byers, 54 Kan. 323, 38 Pac. 261; Appleton *v.* Fullerton, 1 Gray (Mass.) 186); cutting an embankment (Koch *v.* Delaware, etc., R. Co., 53 N. J. L. 256, 21 Atl. 284); excavating in a highway (Williams *v.* Kenney, 14 Barb. (N. Y.) 629); explosion of steam boiler (Marshall *v.* Welwood, 38 N. J. L. 399, 20 Am. Rep. 394; Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Losee *v.* Saratoga Paper Co., 42 How. Pr. (N. Y.) 385); landslide caused by excavating a hill (Gardner *v.* Heartt, 2 Barb. (N. Y.) 165); lawful acts of third persons (McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583); maintaining a fence which causes snow to accumulate on adjoining land (Carson *v.* Western R. Co., 8 Gray (Mass.) 423); maintaining shade-trees (Bliss *v.* Ball, 99 Mass. 597); maintaining wharf which induced vessels to pass over or lie upon adjacent flats (Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568); obstructing flow of surface water (Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693); operating a mine (Baird *v.* Williamson, 15 C. B. N. S. 376; Smith *v.* Kenrick, 7 C. B. 515; Acton *v.* Blundell, 12 M. & W. 324; Partridge *v.* Scott, 3 M. & W. 220); protecting against inundation (Mailhot *v.* Pugh, 30 La. Ann. 1359); pulling down a house or wall (Peyton *v.* London, 9 B. & C. 725; Chadwick *v.* Trower, 6 Bing. N. Cas. 1 [*reversing* Trower *v.* Chadwick, 3 Bing. N. Cas. 334]); setting fire (Clark *v.* Foot, 8 Johns. (N. Y.) 421); using machinery for public improvement (Lester *v.* New York, 79 Hun (N. Y.) 479, 29 N. Y. Suppl. 1000); vibrations from passing trains (Lewis *v.* Mt. Adams, etc., Inclined Plane R. Co., 3 Cinc. L. Bul. 1007, 7 Ohio Dec. (Reprint) 566).

2. Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Lambert *v.* Bessey, T. Raym. 421.

Liability resulting from unskilful or negligent use of adjoining property has been held to attach in cases of alteration of building (Leavenworth Lodge No. 2 *v.* Byers, 54 Kan. 323, 38 Pac. 261); blasting (Louisville, etc., R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. 526; Scott *v.* Bay, 3 Md. 431; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Tremain

to the occupant thereof, for all damage occasioned by such unskilful or negligent use of his property.[3]

(II) *Work Done by Third Persons.* An owner who has employed others to excavate by blasting is not responsible for injuries resulting from the negligence of the contractor where he has no control over the work and has not interfered therewith, and where the work is lawful and necessary for the enjoyment of his property, is not a public nuisance, and there is no statute binding him to perform it efficiently.[4] If, however, when contracting for the work, he is aware of a custom of the contractors to perform their work in a dangerous manner and in violation of law, he will be charged with all damage caused by their wrongdoing, though he retains no control over the work;[5] or he may be liable if the work is necessarily injurious.[6]

b. Defenses — (I) *Condemnation of Injured Building.* The fact that the

v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hays *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Hill *v.* Schneider, 13 N. Y. App. Div. 299, 4 N. Y. Annot. Cas. 70, 43 N. Y. Suppl. 1; Newell *v.* Woolfolk, 91 Hun (N. Y.) 211, 36 N. Y. Suppl. 327; Morgan *v.* Bowes, 62 Hun (N. Y.) 623, 17 N. Y. Suppl. 22; Denken *v.* Canavan, 17 Misc. (N. Y.) 392, 39 N. Y. Suppl. 1078; Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399); building against wall (Bonquois *v.* Monteleone, 47 La. Ann. 814, 17 So. 305); connecting drain with tidewater (Sturges *v.* Society, etc., 130 Mass. 414; Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137); construction of wall (Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 224; Newman *v.* Greenleaf Real Estate Co., 73 Mo. App. 326; Jarvis *v.* Baxter, 52 N. Y. Super. Ct. 109); defective construction of railway embankment (Brine *v.* Great Western R. Co., 2 B. & S. 402); digging pit on boundary (Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793); failure to guard against street water after removal of sidewalk, curb, and gutter, to facilitate building operations (Mairs *v.* Manhattan Real Estate Assoc., 47 N. Y. Super. Ct. 31); landslide caused by insufficient retaining wall (Hummell *v.* Seventh St. Terrace Co., 20 Oreg. 401, 26 Pac. 277) or by undermining a hill (Gardner *v.* Heartt, 2 Barb. (N. Y.) 165); setting fires (Tubervil *v.* Stamp, 1 Salk. 13); taking down walls (Walters *v.* Pfeil, M. & M. 362).

Negligence from bare performance of acts. — From the opinions in the decisions just cited it seems that some acts done by the owner or by his authority on his own premises, which result in damage to the adjoining owner, are actionable, although they may be performed with the utmost care. In this class of cases the negligence consists in the mere doing of the act. The test is, whether the act done is a reasonable exercise of the right of property at the time, in the place, and under the circumstances surrounding the property. If so, the doing of it is neither a nuisance nor negligence; otherwise, it is actionable. Much depends upon the circumstances of the particular case. An act resulting in damage to an adjoining proprietor might be actionable under one set of circumstances, when the same or a like act with a similar result under a different state of facts would not be. There is a seeming conflict in some of the decided cases upon the point arising out of the varying circumstances of the cases. All the well-considered ones, however, may be reconciled by applying to them the test above stated. Whether what is done in a given case is a reasonable exercise of the right of property under all the circumstances is always a question of fact; but if all reasonable minds would draw the same conclusion the fact may properly be declared by the court, otherwise it must be submitted to the jury. Again, an act which might be considered a reasonable use of property, and therefore lawful, might be negligently performed and thereby rendered unlawful and actionable, if damage is caused by the negligence. There is often a choice in the modes of performing the same act, one of which might be harmful and the other harmless to the adjoining property. If the former mode should be adopted, and damage should result, it would be actionable unless it would be unreasonable to require the act to be done in the other mode.

3. Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523; Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200.

4. Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; French *v.* Vix, 143 N. Y. 90, 37 N. E. 612 [*affirming* 30 Abb. N. Cas. (N. Y.) 158, 21 N. Y. Suppl. 1016], where the same principle was applied to the liability of a contractor who had sublet the work; Roemer *v.* Striker, 142 N. Y. 134, 36 N. E. 808; Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 254; Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404.

Evidence that a party gave orders concerning and superintended blasting operations is sufficient *prima facie* to charge him with liability for damage therefrom, without proof respecting the capacity in which he acted. Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523.

5. Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451, wherein it appeared that the owner was aware of a custom of the contractors to disregard a city ordinance requiring certain precautions to be taken.

6. Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 254.

building injured has been condemned by municipal authority will not preclude the owner from recovering for injury thereto by an adjoining owner.[7]

(II) *Due Care.* It is no defense to an action for injuries caused by blasting that proper precautions were taken to prevent the resultant injuries if the stone or other material blasted falls upon the premises of the adjoining owner.[8]

2. Action to Enjoin. A landowner may enjoin his neighbor from blasting rock for purposes of improvement, unless he proceeds with the usual safeguards which prudent men adopt to prevent injury to adjacent owners,[9] but not if the neighbor has contracted to have the work done and has no control over the mode of its performance, but he would be entitled to an injunction against the contractor under such circumstances.[10]

C. Wrongful Use of Property — 1. Action at Law — a. Right of Action — (I) *In General.* The rule is subject to the further exception that one adjoining landowner cannot do any wrongful act to the injury of the other, or inflict on him any injury which can reasonably be avoided, or unnecessarily sacrifice his rights, and for such acts the wrongdoer will be held liable,[11] provided the injury is real and not fancied or possible.[12] An act which in many cases is in itself lawful becomes unlawful when damage has accrued thereby to the property of another.[13]

(II) *Where Public Act Is Violated.* The proprietor of a building has a

7. Bonquois *v.* Monteleone, 47 La. Ann. 814, 17 So. 305.

8. Scott *v.* Bay, 3 Md. 431.

9. Rafter *v.* Tagliabue, 29 Abb. N. Cas. (N. Y.) 1, 21 N. Y. Suppl. 107.

Where injury has previously resulted from blasts of a similar character and force made at a greater distance, and the excavation can be made more safely though at a greater cost, the blasting may be enjoined. Hill *v.* Schneider, 13 N. Y. App. Div. 299, 4 N. Y. Annot. Cas. 70, 43 N. Y. Suppl. 1.

10. Hill *v.* Schneider, 13 N. Y. App. Div. 299, 4 N. Y. Annot. Cas. 70, 43 N. Y. Suppl. 1.

11. The wrongdoer has been held liable for injuries resulting from construction of an embankment so as to force earth upon adjoining land (Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810, holding that the railroad could not justify on the ground that its charter authorized it to construct its railroad, and that the embankment was constructed with reasonable care and prudence, since the injury is not of the class of incidental injuries, unavoidable in the operation of a railroad, which are deemed *damnum absque injuria*, but is a direct invasion of private property); displaying wares so as to interfere with light, air, and access (Lavery *v.* Hannigan, 52 N. Y. Super. Ct. 463); establishment of a brothel (Givens *v.* Van Studdiford, 4 Mo. App. 498); grading so as to injure improvements on lands of adjoining owner or render enjoyment thereof less convenient (Price *v.* Knott, 8 Oreg. 438); obstructing ingress and egress to and from adjoining property by construction of stoop or porch (Rutter *v.* Fidler, 11 Pa. St. 181); piling material against adjoining wall (Barnes *v.* Masterson, 38 N. Y. App. Div. 612, 56 N. Y. Suppl. 939; Davis *v.* Evans, 59 Hun (N. Y.) 618, 13 N. Y. Suppl. 437); throwing earth against a building while grading (Hutchinson *v.* Schimmelfeder, 40 Pa. St. 396, 80 Am. Dec. 582); and turning waste water from tank on adjoining land in freezing weather (Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339).

Injury partly due to natural cause.—In an action for allowing waste water from a tank to flow on plaintiff's land it appeared that some of the water which caused the injury was surface water which flowed down from a hillside, and it was held that a requested instruction that if the jury could not determine what part of the damages was caused by the water from the tank they could in no event find for the plaintiff more than nominal damages was properly refused because liable to mislead the jury to believe that unless they could determine to a certainty the extent of damage from each source there could be no recovery. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

12. Sikes *v.* Miller, 54 Ark. 533, 16 S. W. 570, wherein it was held that an action would not lie by lot-owners against other owners of lots on the same block, for the failure, in constructing buildings, to follow the lot plan shown on a map or plat, and in laying out an alley which it was alleged would become a nuisance, but which had not become so in fact.

Nominal damages may be recovered, however, where defendant, in filling his lot up to grade, throws earth on plaintiff's adjoining lot, for covering up plaintiff's land between his line and the wall of his house, though no injury was done to the wall. Hutchinson *v.* Schimmelfeder, 40 Pa. St. 396, 80 Am. Dec. 582.

13. Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, holding that the use by one owner of a violent and dangerous explosive, gunpowder, to blast out rocks upon his own lot, contiguous to the lot of another person, situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property which no care or skill in so doing can excuse him from being responsible for the damages actually done to the adjoining premises as the natural and proximate result of his blasting.

right of action against one who has erected an adjoining building in violation of a statute regulating building within certain limits, if he shows special damage sustained by him in consequence of such erection.[14]

b. Form of Action. Where a recovery is sought for injury to a wall by the piling of material against it by an adjoining owner, it is immaterial that the form of the action is case for negligence, and not trespass, or case for nuisance.[15]

c. Amount Recoverable. Where the wrongful act will continue to cause injury, damages resulting before and after the action may be estimated and recovered.[16] The amount recoverable may be affected by evidence as to the extent of plaintiff's ownership.[17]

2. Action to Enjoin. One adjoining owner may enjoin another who, by a wrongful display of goods on the sidewalk, deprives plaintiff to some extent of light, air, and access to his building.[18]

II. Encroachments.

A. What Constitutes. An encroachment is an unlawful gaining upon the rights or possessions of another.[19]

B. Right of Adjoining Owner — 1. In General. Before an encroachment has ripened into a right by adverse possession or user the owner of the land encroached upon may use his land in the same manner that he might have used it if the encroachment did not exist,[20] and it has been held that the owner of the land encroached upon by a wall may use it, and that it will not thereby necessarily become a party-wall.[21]

2. To Abate Encroachment. An encroachment is deemed a private nuisance which an adjoining owner, who is thereby deprived of the complete enjoyment of

14. Aldrich *v.* Howard, 7 R. I. 199.

15. Barnes *v.* Masterson, 38 N. Y. App. Div. 612, 56 N. Y. Suppl. 939.

16. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

17. Rau *v.* Minnesota Valley R. Co., 13 Minn. 442, where it was held that in an action by one in possession for damages to land caused by the wrongful act of the occupant of adjoining land it is not necessary to show an ownership in fee; the extent of his ownership going only to the *quantum* of damages.

18. Lavery *v.* Hannigan, 52 N. Y. Super. Ct. 463.

19. Burrill L. Dict.

An encroachment may consist of the projection or intrusion of beams inserted in adjoining wall (Rankin *v.* Charless, 19 Mo. 490, 61 Am. Dec. 574); cornice and sills (Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298); eaves or gutters (Keats *v.* Hugo, 115 Mass. 204, 15 Am. Rep. 80; Aiken *v.* Benedict, 39 Barb. (N. Y.) 400; Bellows *v.* Sackett, 15 Barb. (N. Y.) 96; Lawrence *v.* Hough, 35 N. J. Eq. 371; Rasch *v.* Noth, 99 Wis. 285, 74 N. W. 820, 67 Am. St. Rep. 858, 40 L. R. A. 577); foundation walls (Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Pile *v.* Pedrick, 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677; Zander *v.* Valentine Blatz Brewing Co., 95 Wis. 162, 70 N. W. 164; McCourt *v.* Eckstein, 22 Wis. 153); overhanging walls (Meyer *v.* Metzler, 51 Cal. 142; Langfeldt *v.* McGrath, 33 Ill. App. 158; Hofferberth *v.* Myers, 42 N. Y. App. Div. 183, 59 N. Y. Suppl. 88; Lyle *v.* Little, 83 Hun (N. Y.) 532, 33 N. Y. Suppl. 8; Sherry *v.* Frecking, 4 Duer (N. Y.) 452); a roof (Pierce *v.* Lemon, 2 Houst. (Del.) 519; Murphy *v.* Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309); walls or structures built on the land (Escondido Bank *v.* Thomas, (Cal. 1895) 41 Pac. 462; Guttenberger *v.* Woods, 51 Cal. 523; Lapp *v.* Guttenkunst, (Ky. 1898) 44 S. W. 964; Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399; Mulrein *v.* Weisbecker, 37 N. Y. App. Div. 545, 56 N. Y. Suppl. 240; Crocker *v.* Manhattan L. Ins. Co., 31 Misc. (N. Y.) 687, 66 N. Y. Suppl. 84; Vansyckel *v.* Tryon, 6 Phila. (Pa.) 401, 24 Leg. Int. (Pa.) 140; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508); or windows (Jenks *v.* Williams, 115 Mass. 217; Codman *v.* Evans, 1 Allen (Mass.) 443, 5 Allen (Mass.) 308, 81 Am. Dec. 748).

20. Roberts *v.* White, 2 Rob. (N. Y.) 425 (holding that one who without the consent of the adjoining owner inserts beams in a wall standing on the land of the latter cannot restrain him from taking down his wall); Harvey *v.* Philadelphia, 2 Phila. (Pa.) 165, 13 Leg. Int. (Pa.) 316 (holding that one who encroaches on adjoining land has no remedy against the owner thereof for injuries sustained by the action of the latter in making a proper use of his own premises, the injury in this case consisting of the heaping of dirt against an encroaching ice-house and injuring its contents).

21. Escondido Bank *v.* Thomas, (Cal. 1895) 41 Pac. 462.

The court will not enjoin the use of a projecting wall as a party-wall. Guttenberger *v.* Woods, 51 Cal. 523.

his land, may abate; but in removing the encroachment care must be taken to remove no more than actually encroaches, and to refrain from causing unnecessary damage.[22]

3. To Maintain Action — a. For Equitable Relief. An adjoining owner may invoke the aid of a court of equity and enjoin the maintenance of the encroachment, or compel its removal or the restoration of plaintiff's premises to their original condition as near as may be,[23] even though no actual damage is sustained.[24] But if the encroachment is slight, and the cost of removal will be great, and the corresponding benefit to the adjoining owner small, or compensation in damages can be had, the court will decline to compel the removal and will leave the party complaining to his remedy at law.[25] The relief will not be denied, however, because of laches or because the complainant declines to sell the land on which the encroachment exists;[26] nor is complainant estopped to compel removal by permitting the construction to proceed, if not aware that it encroached.[27]

b. In Ejectment and Trespass. Whether or not ejectment is an appropriate remedy has been the subject of some discussion, and while on the one hand it has been held to be maintainable[28] there are decisions which affirm that case for a nuisance or trespass, and not ejectment, is the proper form of relief, especially where there is no actual physical occupation of the soil.[29]

c. To Recover Damages — (1) *Right of Action.* The owner encroached upon may, in addition to other relief or by a separate action, recover such damages from the wrongdoer as he may show himself entitled to.[30]

22. Lawrence *v.* Hough, 35 N. J. Eq. 371 (cutting projecting eaves); Lyle *v.* Little, 83 Hun (N. Y.) 532, 33 N. Y. Suppl. 8 (removal of an overhanging wall); Roberts *v.* White, 2 Rob. (N. Y.) 425 (taking down encroaching wall); 2 Rolle Abr. 144 1; Rex *v.* Pappineau, 2 Str. 686; Cooper *v.* Marshall, 1 Burr. 259; Welch *v.* Nash, 8 East 394; Dyson *v.* Collick, 5 B. & Ald. 600; Com. Dig. tit. Action upon the Case for a Nuisance, D. 4.

An excavating owner will be liable for injury, under contract to remove part of an encroaching wall, sustained by his failure to protect the wall with due care, skill, and prudence. Lapp *v.* Guttenkunst, (Ky. 1898) 44 S. W. 964.

23. Meyer *v.* Metzler, 51 Cal. 142; Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Tucker *v.* Howard, 128 Mass. 361; Mulrein *v.* Weisbecker, 37 N. Y. App. Div. 545, 56 N. Y. Suppl. 240; Pile *v.* Pedrick, 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677; Vansyckel *v.* Tryon, 6 Phila. (Pa.) 401, 24 Leg. Int. (Pa.) 140.

Ordinance denouncing encroachment no ground for equitable relief.— An ordinance imposing penalties for encroachments on public streets will furnish an adjoining owner no ground for equitable relief unless the encroachment amounts to a public nuisance. Jenks *v.* Williams, 115 Mass. 217.

Fixing time for removal.— In Pile *v.* Pedrick, 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677, one year was considered a reasonable time within which defendants should be required to remove an encroaching wall.

24. Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298.

25. Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399; Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Methodist Episcopal Soc. *v.* Akers, 167 Mass. 560, 46 N. E. 381; Crocker *v.* Manhattan L. Ins. Co., 31 Misc. (N. Y.) 687, 66 N. Y. Suppl. 84.

Dividing encroaching wall between tenants in common.— Where a tenant in common of a wall, in rebuilding the same, encroached on the land of the other tenant, who was a reversioner, the court ordered the wall to be divided longitudinally between the two tenants and refused a mandatory injunction to compel the removal of the encroachment, but granted damages for the trespass. Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508.

26. Hodgkins *v.* Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; Tucker *v.* Howard, 128 Mass. 361.

27. Mulrein *v.* Weisbecker, 37 N. Y. App. Div. 545, 56 N. Y. Suppl. 240.

28. Sherry *v.* Frecking, 4 Duer (N. Y.) 452; Murphy *v.* Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; McCourt *v.* Eckstein, 22 Wis. 153, wherein some stones of defendant's foundation wall projected over plaintiff's land, and it was held that this might be treated as a disseizin rather than a trespass.

Unintentional encroachment — Ejectment enjoined.— Where adjoining owners agreed on a division line which by mutual mistake was different from the true line, and one erected a building on his lot to the agreed line, and the other brought actions of trespass and ejectment, the actions were enjoined so long as the building remained standing. Kernan *v.* Moore, 33 Ill. App. 229.

29. Vrooman *v.* Jackson, 6 Hun (N. Y.) 326; Aiken *v.* Benedict, 59 Barb. (N. Y.) 400; Rasch *v.* Noth, 99 Wis. 285, 74 N. W. 820, 67 Am. St. Rep. 858, 40 L. R. A. 577; Zander *v.* Valentine Blatz Brewing Co., 95 Wis. 162, 70 N. W. 164.

30. *California.*— Meyer *v.* Metzler, 51 Cal. 142.

(II) *Defenses.* The fact that a building the wall of which settled and injured the adjoining building was in possession of a tenant when the injury was done will not relieve the owner, where it does not appear that the wall has become dangerous or out of repair during the tenancy or that the encroachment was caused by the tenant or his omission to make repairs.[31]

(III) *Evidence* — (A) *Burden of Proof.* Where injury to a building by an encroachment of an adjoining wall by settling is shown, it devolves on the encroaching owner to show that the injury was not the result of any cause which he was bound to remedy or over which he had control.[32]

(B) *Admissibility of Evidence of Custom.* In an action for an encroachment by erecting a bay-window extending over plaintiff's line, evidence of a custom to erect bay-windows in that manner is not admissible.[33]

(IV) *Measure of Damages.* The measure of damages for an overhanging wall is the difference between the value of the use of plaintiff's lot with and without the encroachment prior to the bringing of the action.[34]

III. Failure to Repair.

A landowner is liable for injuries caused by his failure to keep his own premises in proper condition and repair, if by reason of his neglect the adjoining premises are damaged;[35] but there is no implied obligation between owners of distinct parts of a building, which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby the plaintiff's part is injured.[36]

IV. Keeping Dangerous Thing on Premises.

A. In General. It is the duty of an owner upon whose land something exists which is dangerous in itself, or which has become dangerous from any cause, to take precaution that no injury shall befall the adjoining property because of his failure to take proper measures to prevent threatened injury; and if he neglects this duty and injury results, he is liable.[37]

Delaware.— Pierce *v.* Lemon, 2 Houst. (Del.) 519.

Illinois.— Kernan *v.* Moore, 33 Ill. App. 229.

Massachusetts.— Harrington *v.* McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Tucker *v.* Howard, 128 Mass. 361; Codman *v.* Evans, 5 Allen (Mass.) 308, 81 Am. Dec. 748; Codman *v.* Evans, 1 Allen (Mass.) 443.

Missouri.—Rankin *v.* Charless, 19 Mo. 490, 61 Am. Dec. 574.

New York.—Hofferberth *v.* Myers, 42 N. Y. App. Div. 183, 59 N. Y. Suppl. 88; Aiken *v.* Benedict, 39 Barb. (N. Y.) 400; Bellows *v.* Sackett, 15 Barb. (N. Y.) 96.

England.— Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508.

31. Hofferberth *v.* Myers, 42 N. Y. App. Div. 183, 59 N. Y. Suppl. 88.

32. Hofferberth *v.* Myers, 42 N. Y. App. Div. 183, 59 N. Y. Suppl. 88.

33. Codman *v.* Evans, 5 Allen (Mass.) 308, 81 Am. Dec. 748.

34. Langfeldt *v.* McGrath, 33 Ill. App. 158.

35. Savannah, etc., R. Co. *v.* Lawton, 75 Ga. 192; Kappes *v.* Appel, 14 Ill. App. 170; Benson *v.* Suarez, 19 Abb. Pr. (N. Y.) 61, 43 Barb. (N. Y.) 408; Bellows *v.* Sackett, 15 Barb. (N. Y.) 96; Tenant *v.* Goldwin, 1 Salk. 360.

A tenant may be liable where it was his duty to repair. Bellows *v.* Sackett, 15 Barb. (N. Y.) 96.

36. Pierce *v.* Dyer, 109 Mass. 374, 12 Am. Rep. 716. See also Ottumwa Lodge *v.* Lewis, 34 Iowa 67, 11 Am. Rep. 135, wherein it was held that where the ownership of a building is divided, one person owning the lower story and the other the upper story with right of way to it, the latter cannot recover of the former for expenses of repairing the roof.

Who liable.— Primarily an action for injuries caused by the failure to keep the adjoining premises in repair should be brought against the owner. To make available an objection that the action should have been instituted against the tenant, it should be shown that it was the tenant's duty to repair. Bellows *v.* Sackett, 15 Barb. (N. Y.) 96.

37. **This rule has been applied** to decayed trees (Gibson *v.* Denton, 4 N. Y. App. Div. 198, 38 N. Y. Suppl. 554); walls rendered insecure by fire (Anderson *v.* East, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35; Sessengut *v.* Posey, 67 Ind. 408, 33 Am. Rep. 98; Glover *v.* Mersman, 4 Mo. App. 90); and see Vaughan *v.* Menlove, 3 Bing. N. Cas. 468, wherein a landowner was held to be liable for the negligent construction of a hayrick on the extremity of his land, whereby spontane-

B. Water. In England the earlier cases held that an adjoining owner who brought on his land or collected and kept there water which was likely to do mischief if not properly controlled kept it there at his peril and was *prima facie* answerable for all damages which were the natural consequences of its escape,[38] but subsequently this rule was qualified by absolving the adjoining owner from liability where the injury was caused by some agency beyond his control, as *vis major* or an act of God, in the sense that the injury resulted from something which it was practically, though not physically, impossible to resist.[39] The English rule has been followed to some extent in this country,[40] but in general the American courts base the liability on negligence, either in the original construction of the reservoir or other receptacle, in subsequently allowing it to become defective, or in failing properly to provide against all such contingent damages as might reasonably be anticipated.[41]

V. LATERAL SUPPORT.

A. Right to Support — 1. In General — a. Land in Natural Condition — (I) *Nature of Right.* At common law an owner of land is entitled to have it supported and protected in its natural condition by the land of the adjoining proprietor;[42] but the right does not extend to support by subterranean

ous ignition occurred which destroyed an adjoining cottage.

Instruction as to liability.— In an action to recover for injuries sustained by the falling of a wall which had been rendered unsafe by a fire, evidence that after a fire the city marshal told the owner of the building that he would take charge of the walls and have them taken down if necessary will not justify an instruction that the owner would not be liable if the city marshal took charge of the premises, preventing any persons from going near the ruins until after the walls fell. Anderson *v.* East, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35.

38. Rylands *v.* Fletcher, L. R. 3 H. L. 330 [*affirming* L. R. 1 Exch. 265]. See also Crowhurst *v.* Burial Board, 4 Ex. D. 5, where this doctrine was approved and applied in determining the liability for injury caused by allowing the branches of a poisonous tree to extend over adjoining land and become accessible to live stock.

39. Nichols *v.* Marsland, L. R. 10 Exch. 255 [*distinguishing* Fletcher *v.* Rylands, L. R. 1 Exch. 265, 3 H. & C. 774, 34 L. J. Exch. 177].

40. Kankakee Water Co. *v.* Reeves, 45 Ill. App. 285 (a case of the escape of water from a tank); Rau *v.* Minnesota Valley R. Co., 13 Minn. 442 (where defendant made an excavation which filled by the rise of a river and discharged the water on the adjoining land).

41. Murphy *v.* Gillum, 73 Mo. App. 487 [*citing* Hughes *v.* Anderson, 68 Ala. 280, 44 Am. Rep. 147; Everett *v.* Hydraulic Flume Tunnel Co., 23 Cal. 225; Garland *v.* Towne, 55 N. H. 55, 20 Am. Rep. 164; Marshall *v.* Welwood, 38 N. J. L. 339, 20 Am. Rep. 394; Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Livingston *v.* Adams, 8 Cow. (N. Y.) 175]; Cooley Torts, 676, 677.

42. *Alabama.*—Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719; Moody *v.* McClelland, 39 Ala. 45, 84 Am. Dec. 770.

California.—Sullivan *v.* Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730.

Delaware.— Stimmel *v.* Brown, 7 Houst. (Del.) 219, 30 Atl. 996.

Indiana.— Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296.

Kansas.— Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138.

Maryland.—Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Shafer *v.* Wilson, 44 Md. 268.

Massachusetts.— Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

Michigan.— Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

Minnesota.— Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; Dyer *v.* St. Paul, 27 Minn. 457, 8 N. W. 272.

Missouri.— Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Busby *v.* Holthaus, 46 Mo. 161; Charless *v.* Rankin, 22 Mo. 566, 66 Am. Dec. 642; Walters *v.* Hamilton, 75 Mo. App. 237; Eads *v.* Gains, 58 Mo. App. 586.

New Jersey.—McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

New York.—Dorrity *v.* Rapp, 72 N. Y. 307; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231; Farrand *v.* Marshall, 19 Barb. (N. Y.) 380, 21 Barb. (N. Y.) 409; Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

Ohio.— Taylor *v.* Day, 6 Ohio N. P. 447; Hall *v.* Kleeman, 6 Ohio Dec. 323, 4 Ohio N. P. 201.

Rhode Island.—Gobeille *v.* Meunier, 21 R. I. 103, 41 Atl. 1001; McMaugh *v.* Burke, 12 R. I. 499.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354.

Vermont.— Graves *v.* Mattison, 67 Vt. 630, 32 Atl. 498; Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693; Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465.

Virginia.— Tunstall *v.* Christian, 80 Va. 1,

waters,[43] to made land,[44] or to land worked by hydraulic mining.[45] The right is a natural one and is not in the nature of an easement.[46]

(II) *How Lost.* This right, or the right to restrain interference therewith or to recover damages for the deprivation thereof, may be lost by a grant or reservation affecting the adjoining land which is inconsistent with its continuance.[47]

b. Land with Buildings Added — (I) *In General.* The right to lateral support does not extend to land burdened with buildings or structures which increase the lateral pressure, unless the right has been gained by grant or prescription[48] or is conferred by statute, for one adjoining owner cannot deprive the other of the right to use and enjoy his land to the same extent as he might have enjoyed it if such burdens had not been added;[49] and even where a prescriptive right to the support of an existing structure has been acquired, if the weight of such structure is increased by substantial additions thereto the rights of the parties are the same as if such prescriptive right had not existed.[50]

(II) *When Buildings Do Not Contribute to Injury.* The right to lateral support for the soil in its natural state will not be lost, however, by the mere placing of structures upon the land,[51] where the structure is of such a character

56 Am. Rep. 581; Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

Wisconsin.— Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

United States.— Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336.

England.—Jordeson *v.* Sutton, etc., Gas Co., [1899] 2 Ch. 217; Trinidad Asphalt Co. *v.* Ambard, [1899] A. C. 594; Hunt *v.* Peake, Johns. Ch. (Eng.) 705, 29 L. J. Ch. 785.

43. Popplewell *v.* Hodkinson, L. R. 4 Exch. 248.

44. Fisher *v.* Green, 1 Phila. (Pa.) 382, 9 Leg. Int. (Pa.) 130, holding that one owner cannot compel the other to contribute to the expense of maintaining land artificially made on his lot to conform to the grade.

45. Hendricks *v.* Spring Valley Min., etc., Co., 58 Cal. 190, 41 Am. Rep. 257.

46. Solomon *v.* Mystery of Vintners, 4 H. & N. 585.

47. Ryckman *v.* Gillis, 57 N. Y. 68, 15 Am. Rep. 464; Ludlow *v.* Hudson River R. Co., 4 Hun (N. Y.) 239, 6 Thomps. & C. (N. Y.) 420.

48. For contractual or prescriptive right to lateral support of land upon which buildings are added see EASEMENTS.

49. *Alabama.*—Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719.

California.—Sullivan *v.* Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730.

Illinois.— Mamer *v.* Lussem, 65 Ill. 484.

Indiana.— Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296.

Kansas.— Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138.

Kentucky.— Krish *v.* Ford, (Ky. 1897) 43 S. W. 237; Oneil *v.* Harkins, 8 Bush (Ky.) 650; Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Massachusetts.— Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Callender *v.* Marsh, 1 Pick. (Mass.) 418; Thurston *v.* Hancock, 12 Mass. 220, 7 Am. Dec. 57.

Michigan.— Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

Missouri.— Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Larson *v.* Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330; Charless *v.* Rankin, 22 Mo. 566, 66 Am. Dec. 642; Walters *v.* Hamilton, 75 Mo. App. 237; Eads *v.* Gains, 58 Mo. App. 586.

New Jersey.—McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

New York.—Dorrity *v.* Rapp, 72 N. Y. 307; White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231; Finegan *v.* Eckerson, 32 N. Y. App. Div. 233, 52 N. Y. Suppl. 993; Farrand *v.* Marshall, 19 Barb. (N. Y.) 380, 21 Barb. (N. Y.) 409; Denken *v.* Canavan, 17 Misc. (N. Y.) 392, 39 N. Y. Suppl. 1078; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

Ohio.— Taylor *v.* Day, 6 Ohio N. P. 447; Cincinnati, etc., Inclined Plane R. Co. *v.* Pfau, 9 Cinc. L. Bul. 200, 8 Ohio Dec. (Reprint) 691.

Pennsylvania.— Richart *v.* Scott, 7 Watts (Pa.) 460.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354.

Vermont.— Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693.

Virginia.— Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

Wisconsin.— Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

United States.— Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336.

England.— Wyatt *v.* Harrison, 3 B. & Ad. 871; Smith *v.* Thackerah, L. R. 1 C. P. 564; Humphries *v.* Brogden, 12 Q. B. 739; Popplewell *v.* Hodkinson, L. R. 4 Exch. 248; 2 Rolle Abr. 564, tit. Trespass (I) Pl. 1; Com. Dig. tit. Action upon the Case for a Nuisance (A).

Rule not applicable to support from land in highway.— The rule which has been stated in the text that the right to lateral support does not include burdens on the land is not applicable to a highway. Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605.

50. Murchie *v.* Black, 19 C. B. N. S. 190.

51. Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

as not materially to increase the weight and pressure,[52] or where the building, even though of a substantial character, did not in fact contribute to the injury.[53]

2. From Non-Adjoining Land. The right to lateral support is confined to adjoining premises, and no recovery can be had for injury caused by operations on other land[54] except where the adjoining and non-adjoining lands were owned by the same person.[55]

B. Right to Excavate — 1. Land in Natural Condition — a. In General. A landowner has the undoubted right to excavate on his own land and close to the line of the adjoining owner, but he must take reasonable precaution to prevent his neighbor's soil from falling, and if, by depriving the adjoining land of its natural support, he causes it to crumble, sink, or fall away, he will be liable for all damages sustained.[56]

52. White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231.

An ordinary fence will not be deemed such an additional weight as will deprive the landowner of the right to recover for an injury to his land caused by the negligence or unskilfulness of one excavating an adjoining lot. Oneil *v.* Harkins, 8 Bush (Ky.) 650.

53. Thurston *v.* Hancock, 12 Mass. 220, 7 Am. Dec. 57; Busby *v.* Holthaus, 46 Mo. 161; White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231; People *v.* Canal Board, 2 Thomps. & C. (N. Y.) 275; Brown *v.* Robins, 4 H. & N. 186; Hunt *v.* Peake, Johns. Ch. (Eng.) 705, 29 L. J. Ch. 785.

54. Solomon *v.* Mystery of Vintners, 4 H. & N. 585, where it appeared that three houses had stood out of the perpendicular on a side-hill for more than thirty years, but it was not shown when they were built or that there was any connection between them in title, possession, or occupation. The lower house was torn down, which caused the middle house to sag, with the result that the upper house, being deprived of support, fell, and it was held that there was no cause of action for injury sustained because of the deprivation of support. But see White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231, wherein the owner of a wharf was permitted to recover for injury thereto by excavation to an unusual depth on non-adjoining land under water, but in which the fact that the land did not join does not appear to have been considered.

55. Witherow *v.* Tannehill, 194 Pa. St. 21, 44 Atl. 1088, holding that the fact that an injurious excavation was not made on a lot immediately adjoining plaintiff's lot will not relieve the excavator from liability where the adjoining lot and the one on which the excavation was made were owned by the same person at the time of the injury and since had become one.

56. *Alabama.*— Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719; Moody *v.* McClelland, 39 Ala. 45, 84 Am. Dec. 770.

California.— Green *v.* Berge, 105 Cal. 52, 38 Pac. 539, 45 Am. St. Rep. 25.

Delaware.— Stimmel *v.* Brown, 7 Houst. (Del.) 219, 30 Atl. 996.

Indiana.— Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296.

Kentucky.— Oneil *v.* Harkins, 8 Bush (Ky.) 650.

Maryland.— Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Shafer *v.* Wilson, 44 Md. 268.

Massachusetts.— White *v.* Dresser, 135 Mass. 150, 46 Am. Rep. 454; Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Foley *v.* Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771; Thurston *v.* Hancock, 12 Mass. 220, 7 Am. Dec. 57.

Michigan.— Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; Buskirk *v.* Strickland, 47 Mich. 389, 11 N. W. 210.

Missouri.— Charless *v.* Rankin, 22 Mo. 566, 66 Am. Dec. 642; Walters *v.* Hamilton, 75 Mo. App. 237.

New Jersey.— McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

New York.— Farrant *v.* Marshall, 19 Barb. (N. Y.) 380, 21 Barb. (N. Y.) 409.

Ohio.— Taylor *v.* Day, 6 Ohio N. P. 447; Hall *v.* Kleeman, 6 Ohio Dec. 323, 4 Ohio N. P. 201.

Pennsylvania.— Wier's Appeal, 81* Pa. St. 203.

Rhode Island.— Gobeille *v.* Meunier, 21 R. I. 103, 41 Atl. 1001; McMaugh *v.* Burke, 12 R. I. 499.

Vermont.— Graves *v.* Mattison, 67 Vt. 630, 32 Atl. 498; Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693; Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283.

United States.— Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336.

England.— Caledonian R. Co. *v.* Sprot, 2 Macq. 449; Hunt *v.* Peake, Johns. Ch. (Eng.) 705, 29 L. J. Ch. 785.

Character of soil.— This doctrine has been applied to the loss of support by draining an excavation and thereby withdrawing wet sand or running silt from beneath the adjoining land (Jordeson *v.* Sutton, etc., Gas Co., [1899] 2 Ch. 217), and to the withdrawal of asphalt which formed the main ingredient of the adjoining land (Trinidad Asphalt Co. *v.* Ambard, [1899] A. C. 594), but not to the withdrawal of subterranean water which furnished support (Popplewell *v.* Hodkinson, L. R. 4 Exch. 248).

In Walters *v.* Hamilton, 75 Mo. App. 237, it is said that if the character of the adjoining soil is such that it will and does sustain its own weight and the natural pressure thereon by its own coherence, without the support of the surrounding soil, the adjoin-

b. Effect of Negligence. As the removal of lateral support is a violation of a right incident to the ownership of the adjoining property, it is actionable whether or not precaution against injury was taken or the excavation was conducted negligently,[57] unless by agreement the excavation is to be conducted in a particular manner.[58]

c. Statutory Provisions. The common-law doctrine of lateral support has been considerably qualified by statutes, the evident object of which is to relieve owners of adjoining lots in cities and villages of the inconvenience of a strict adherence to the rule of the common law. This legislation regulates and limits the extent of grading or excavation which may be done without liability, and usually requires notice of and an opportunity to protect against the intended changes.[59]

2. Land with Buildings Added — a. In General. An owner of land adjoining land upon which there are buildings or other structures may lawfully excavate on his own land and to the line, although he endanger such structures and erections, and, in the absence of statutory provisions on the subject or of a contractual or prescriptive right of lateral support, will not be liable for the injury sustained by the adjoining owner, provided that no injury would have been caused to the soil had no building been thereon,[60] and provided the excavation was not made with an improper motive.[61]

ing owner may remove his soil without liability to damage.

Taking down retaining wall.— A retaining wall two or three feet from the line of a higher lot may be demolished by the owner of the lot on which it stands, and the earth removed to the line, in the absence of any right, prescriptive or otherwise, to have the wall remain. Kilgour *v.* Wolf, 6 Ohio Dec. 343, 4 Ohio N. P. 183.

57. *Indiana.*— Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296.

Massachusetts.— Foley *v.* Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771. See also Mears *v.* Dole, 135 Mass. 508, which held that one who excavates on his land in such a manner as to let in the sea, which undermines and injures adjoining land, is liable for the injuries so caused.

Michigan.— Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

Minnesota.— Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630.

Missouri.— Walters *v.* Hamilton, 75 Mo. App. 237.

New York.— Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605.

South Dakota.— Ulrick *v.* Dakota L. & T. Co., 2 S. D. 285, 49 N. W. 1054.

58. Casselberry *v.* Ames, 13 Mo. App. 575, where it was held that where plaintiff had agreed that excavation on an adjoining lot might be made by blasting he could not recover for injury to his soil caused by such blasting, unless negligently done.

59. Thus Cal. Civ. Code, § 832, is merely declaratory of the common law, except as to the requirement of notice of an intention to excavate. Sullivan *v.* Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730; Aston *v.* Nolan, 63 Cal. 269. And the Ohio statute of 1873 (66 Ohio L. 232, § 494) prescribed a liability for damages caused by excavating more than nine feet below the surface of adjoining lots. Burkhardt *v.* Hanley, 23 Ohio St. 558, in which case it was held that where the grade had been changed the statute referred to the existing and not to the original surface.

So far as concerns cities and villages in Ohio the common-law doctrine has been abrogated by statute (91 Ohio L. 210), so that landowners therein may, upon notice, conform the grade of their lots to that of the street without liability except for negligence. Hall *v.* Kleeman, 6 Ohio Dec. 323, 4 Ohio N. P. 201.

Lots on one street.— In Taylor *v.* Day, 6 Ohio N. P. 447, it is said that the statutory restriction as to the depth to which an adjoining owner may dig evidently applies to lots abutting on the same street.

Where lots extend from higher to lower street the depth to which excavation is permissible is to be calculated from a line drawn from the curb of one street to that of the other. Elshoff *v.* Deremo, 3 Ohio N. P. 273.

60. *Alabama.*— Moody *v.* McClelland, 39 Ala. 45, 84 Am. Dec. 770.

Illinois.— Kramer *v.* Northern Hotel Co., 185 Ill. 612, 57 N. E. 847 [*affirming* 85 Ill. App. 264]; Stevens *v.* Brown, 14 Ill. App. 173.

Indiana.— Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Kentucky.— Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741.

Massachusetts.— Thurston *v.* Hancock, 12 Mass. 220, 7 Am. Dec. 57.

Michigan.— Hemsworth *v.* Cushing, 115 Mich. 92, 72 N. W. 1108.

Missouri.— Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

New York.— Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Panton *v.* Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

Vermont.— Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693.

England.— Smith *v.* Thackerah, L. R. 1 C. P. 564; Wyatt *v.* Harrison, 3 B. & Ad. 871.

61. Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138; McGuire *v.* Grant, 25

b. Duties of Respective Parties — (I) *Of Excavating Owner* — (A) *In General.* The general right to excavate, however, does not relieve an owner from taking reasonable precaution against injuring adjoining land upon which there are buildings, and it is his duty to proceed with excavations in an ordinarily skilful and careful way, though if he does so and injury result it is *damnum absque injuria.*[62] The obligation to use ordinary care is not affected by the fact that the adjoining building was illy constructed,[63] that it encroached on the excavator's land,[64] or that the statute prescribed a liability when an excavation exceeded a certain depth and the excavation was within the limit.[65]

(B) *To Notify Adjoining Owner* — (1) In General. The duty of a landowner who intends to excavate on his own land, to proceed with due care, ordinarily requires that he should notify the adjoining landowner of his intention and thus afford the latter an opportunity of protecting his buildings and structures from apprehended injury. The obligation is not imperative, but seems, like that of exercising due care, to rest upon the proposition expressed by the maxim *sic utere tuo ut alienum non lædas,*[66] and, where notice is not required by statute,

N. J. L. 356, 67 Am. Dec. 49. But see Panton *v.* Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369, to the effect that an allegation that the excavation was made with malicious intent to injure is supported by proof of negligence without showing malice.

62. *Alabama.*— Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719.

District of Columbia.— Dixon *v.* Wilkinson, 2 MacArthur (D. C.) 425.

Georgia.— Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

Illinois.— Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243; Kramer *v.* Northern Hotel Co., 85 Ill. App. 264 [*affirmed* in 185 Ill. 612, 57 N. E. 847].

Indiana.— Moellering *v.* Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Kansas.— Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138.

Kentucky.— Louisville, etc., R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. 526; Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741.

Maryland.— Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Shafer *v.* Wilson, 44 Md. 268.

Massachusetts.— Foley *v.* Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

Michigan.— Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

Minnesota.— Rau *v.* Minnesota Valley R. Co., 13 Minn. 442.

Missouri.— Charless *v.* Rankin, 22 Mo. 566, 66 Am. Dec. 642.

New Jersey.— McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

New York.— Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Panton *v.* Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

Pennsylvania.— Richart *v.* Scott, 7 Watts (Pa.) 460.

Virginia.— Tunstall *v.* Christian, 80 Va. 1, 56 Am. Rep. 581; Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

United States.— U. S. *v.* Peachy, 36 Fed. 160.

England.— Massey *v.* Goyder, 4 C. & P. 161; Wyatt *v.* Harrison, 3 B. & Ad. 871.

Duty to excavate or build in sections.— Due care does not require that a contractor or owner shall excavate or build piecemeal or in sections. Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

The employment of skilled persons to conduct the work is evidence of the exercise of due care. Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719; U. S. *v.* Peachy, 36 Fed. 160.

Diverting water into excavation.— In Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296, the excavation was made with due care, but, owing to the obstruction of the street gutter by building-material, water found its way into the excavation and caused the collapse of a wall on adjoining land, and it was held that although the owner of the land on which the excavation was made did not obstruct the gutter, yet, as he subsequently acquired and had at the time of the injury the ownership, possession, and control of the obstructing material, he was liable for the damage.

63. O'Daniel *v.* Baker's Union, 4 Houst. (Del.) 488.

64. Walters *v.* Hamilton, 75 Mo. App. 237.

65. Cincinnati, etc., Inclined Plane R. Co. *v.* Pfau, 9 Cinc. L. Bul. 200, 8 Ohio Dec. (Reprint) 691.

66. *Indiana.*— Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Kentucky.— Krish *v.* Ford, (Ky. 1897) 43 S. W. 237; Oneil *v.* Harkins, 8 Bush (Ky.) 650; Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Maryland.— Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Shafer *v.* Wilson, 44 Md. 268.

New Jersey.— Schultz *v.* Byers, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569.

New York.— People *v.* Canal Board, 2 Thomps. & C. (N. Y.) 275.

England.— Brown *v.* Windsor, 1 Cr. & J. 20.

See also Peyton *v.* London, 9 B. & C. 736, wherein it was held that there could be no

failure to give notice will not of itself render an excavator liable for the injury caused by his acts, if otherwise he did everything which ordinary care and prudence required of him, and it is a question of fact under all the circumstances whether the failure to give notice is negligence in any given case.[67]

(2) Under Statute. If the requirement of notice is statutory,[68] prudence requires that it should be given, yet the object of statutory notice is attained when the adjoining owner has knowledge in fact,[69] although ordinarily the knowledge which will absolve an excavating owner must be of a character which will fully inform the adjoining owner of the nature and extent of the proposed work.[70]

(3) Effect of Non-Action by Owner Notified — (a) In General. If, after notice, the owner of the adjoining land neglects to take adequate precaution for the protection of his building, the owner who has given notice is still bound to prosecute the excavation and attendant work in a reasonably careful and prudent manner, and, if he is negligent, will become liable.[71]

(b) Right of Excavator to Protect Building at Owner's Expense. It has been held that the neglect or refusal of the owner receiving notice will authorize the owner intending to excavate to enter upon the land of the former and take needed precautions for the safety of the building or buildings thereon, and charge such owner with the expense thereby incurred.[72]

(c) *To Protect Adjoining Buildings* — (1) At Common Law. At common law there is no obligation on the part of an excavating owner to protect the walls and buildings of an adjoining owner, by shoring, underpinning, or the like,[73]

recovery on the ground that defendant had failed to give notice where that omission was not alleged to have been a cause of the injury.

Imperfect duty.— The duty of giving notice of an intention to excavate or pull down seems to be one of those duties of imperfect obligation which are not enforced by the law. Parke, B., in Chadwick *v.* Trower, 6 Bing. N. Cas. 1, wherein it was held that the mere circumstance of juxtaposition does not require notice of an intention to take down a wall, where there is no knowledge of the existence of an underground adjoining wall; nor is extraordinary caution required in such a case.

67. Mamer *v.* Lussem, 65 Ill. 484; Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Spohn *v.* Dives, 174 Pa. St. 474, 34 Atl. 192.

68. Cal. Civ. Code, § 832, requires notice. Sullivan *v.* Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730; Conboy *v.* Dickinson, 92 Cal. 600, 28 Pac. 809; Aston *v.* Nolan, 63 Cal. 269.

69. Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749.

70. As where the preliminary work, when stopped, failed to indicate the full extent of the excavation which it was proposed to make on resumption (Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918), or the adjoining owner, though aware of the danger, failed to take measures to protect his building, but was assured by the excavator that he would do so (Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46, in which case the excavator was guilty of negligence otherwise).

Notice construed.— A notice given in conformity to statute, which states the depth of the proposed excavation and requires precautions to be taken, will not be construed as referring only to an excavation immediately adjoining the land of the person notified. Nippert *v.* Warneke, 128 Cal. 501, 61 Pac. 96.

71. *Georgia.*— Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

Indiana.— Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Missouri.— Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

South Dakota.— Ulrick *v.* Dakota L. & T. Co., 2 S. D. 285, 49 N. W. 1054 [*affirmed* in 3 S. D. 44, 51 N. W. 1023].

England.— Massey *v.* Goyder, 4 C. & P. 161.

72. Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Walters *v.* Hamilton, 75 Mo. App. 237; Eads *v.* Gains, 58 Mo. App. 586. *Contra*, San Francisco First Nat. Bank *v.* Villegra, 92 Cal. 96, 28 Pac. 97.

Ordinance as evidence.— In an action to recover the cost of shoring the building of an adjoining owner who had failed to protect his building after notice, a city ordinance declaratory of the common-law rule as to the duty of adjoining landowners under such circumstances is admissible in evidence. Eads *v.* Gains, 58 Mo. App. 586.

73. *Indiana.*— Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Missouri.— Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

New York.— White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231.

Ohio.— Taylor *v.* Day, 6 Ohio N. P. 447; Cincinnati, etc., Inclined Plane R. Co. *v.* Pfau, 9 Cinc. L. Bul. 200, 8 Ohio Dec. (Reprint) 691.

England.— Peyton *v.* London, 9 B. & C. 725; Massey *v.* Goyder, 4 C. & P. 161.

though conditions may exist which will necessitate protection of some kind because of the duty of exercising reasonable care.[74]

(2) Under Statute — (a) In General. In some states statutes regulate the depth to which excavations may be made in designated localities[75] and require persons making excavations on their land beyond the prescribed depth to protect walls and buildings of adjoining owners from injury.[76] This duty does not end with the completion of the excavation.[77] But as to one excavating within the prescribed limits the rule of the common law applies, and there is no duty to furnish protection.[78]

(b) License to Enter Adjoining Lands. It is also provided in one state[79] that no obligation to furnish such protection exists unless the person excavating is afforded the necessary license to enter on the adjoining land, which license must be explicit and sufficient to enable the excavator to furnish the protection.[80] It is unnecessary that the owner of the land which contains the buildings entitled to protection should tender a license[81] or that he should grant it until a request is made therefor.[82] The necessary license will be deemed to be afforded when such acts are authorized as may be necessary to enable the licensee to perform the duty which the statute creates in such a contingency.[83]

(II) *Of Adjoining Owner*—(A) *In General.* It is the duty of the owner of land burdened with buildings to protect himself from injury which may be anticipated as the result of excavations made on adjoining land by the owner thereof, and to that end to take all precautions which from the circumstances appear to be necessary. If he neglects this duty and the adjoining owner has exercised due care, the latter is not liable for resultant injury.[84] Circumstances may arise, however, under which a failure of the owner of buildings to take measures for the protection thereof will not preclude a recovery, as where the

74. **As where the soil is of a character** such that it is apparent that injury must result unless some precaution is taken which will involve but a slight expense. Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

75. Thus N. Y. Laws (1855), c. 6, prescribed such a limit. Dorrity *v.* Rapp, 72 N. Y. 307, wherein it was held that an owner who has contracted for excavation beyond the prescribed limit is the person "causing the excavation to be made." And N. Y. Laws (1882), c. 410, requires persons excavating to a greater depth than ten feet to protect adjoining walls. Cohen *v.* Simmons, 21 N. Y. Suppl. 385, holding that the owner of a leasehold may recover for a violation of this law. An Ohio statute (66 Ohio Laws 232), authorizes an excavation to the full depth of the foundation on adjoining land, and, if there be an established grade of the street, to the depth of nine feet. Burkhardt *v.* Hanley, 23 Ohio St. 558, holding that this means nine feet below the existing or artificial and not the original or natural surface of the land.

76. **Stoop wholly on adjoining land.**— A statutory requirement as to protection of walls standing upon or near the boundary line does not oblige an excavating owner to protect a stoop standing wholly on the adjoining land. Berry *v.* Todd, 14 Daly (N. Y.) 450.

Street excavations.— N. Y. Act (1855), c. 6, reënacted in N. Y. Laws (1882), c. 410, § 474, and amended by N. Y. Laws (1885), c. 456, and N. Y. Laws (1887), c. 566, applies to adjoining owners only, and not to street excavations under municipal authority. Jencks *v.* Kenny, 28 Abb. N. Cas. (N. Y.) 154, 19 N. Y. Suppl. 243.

77. Bernheimer *v.* Kilpatrick, 53 Hun (N. Y.) 316, 6 N. Y. Suppl. 858.

78. McMillen *v.* Watt, 27 Ohio St. 306; Taylor *v.* Day, 6 Ohio N. P. 447, holding that one who excavates within the prescribed limits is not liable to the adjoining owner for the cost of underpinning and shoring made necessary by the excavation.

79. N. Y. Laws (1885), c. 6; The New York City Consolidation Act, Laws (1882), c. 410, § 474, as amended by Laws (1887), c. 566.

80. Sherwood *v.* Seaman, 2 Bosw. (N. Y.) 127.

81. Dorrity *v.* Rapp, 72 N. Y. 307 [*reversing* 11 Hun (N. Y.) 374].

82. Cohen *v.* Simmons, 66 Hun (N. Y.) 634, 21 N. Y. Suppl. 385.

83. Sun Printing, etc., Assoc. *v.* Tribune Assoc., 44 N. Y. Super. Ct. 136.

Revocation of license.— Where a license has been granted, and the licensor's building has been supported, the licensees have a right of entry to the premises of the licensor, after revocation of the license, for the purpose of rebuilding a party-wall in which supports are inserted, to the extent which may be necessary to ensure safety, before they can be required to remove the supports. Ketchum *v.* Newman, 116 N. Y. 422, 22 N. E. 1052.

84. Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296; Peyton *v.* London, 9 B. & C. 725, 4 M. & R. 625; Walters *v.* Pfeil, M. & M. 362.

person excavating has promised to furnish protection,[85] or, commencing to excavate in a manner which is not dangerous, he changes the mode of excavating to a dangerous one without affording the adjoining owner an opportunity to protect his building,[86] or where injury is the inevitable result of the wilful removal of the soil.[87]

(B) *After Notice of Intended Excavation.* Where the landowner intending to make excavations gives proper notice of his intention to the owner of adjoining land, it becomes the duty of the latter to take all necessary measures to protect his land and buildings from the probable consequences of the excavation.[88]

3. LIABILITY OF EXCAVATOR — a. Land in Natural Condition. Not only the owner of the land[89] upon which the excavation is made, but also one with whom he has contracted for the work,[90] or who excavates under a license from the owner,[91] may be held for the resultant damage.

b. Land with Buildings Added — (I) *IN GENERAL.* If, in excavating, a landowner, or others under his direction and control, fail to prosecute the work skilfully or to take proper care to avoid injury to the structures on adjoining land, and damage is sustained by the adjoining landowner, the excavator will be liable for all damages resulting from his negligent or wrongful conduct.[92]

(II) *UNDER AGREEMENT TO PROTECT.* If the excavating owner agrees with

85. Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

86. Larson *v.* Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330.

87. Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

88. Lapp *v.* Guttenkunst, (Ky. 1898) 44 S. W. 964; Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741; Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Walters *v.* Hamilton, 75 Mo. App. 237; Eads *v.* Gains, 58 Mo. App. 586; Dunlap *v.* Wallingford, 1 Pittsb. (Pa.) 127.

One who is entitled to support for a building is not bound to protect it by furnishing other supports to replace those removed, notwithstanding notice of such removal. Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

89. See *supra*, V, B, 1, a.

90. Green *v.* Berge, 105 Cal. 52, 38 Pac. 539, 45 Am. St. Rep. 25, wherein it appeared that no precaution was taken for lateral support as required by statute.

91. Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

92. *Alabama.*— Moody *v.* McClelland, 39 Ala. 45, 84 Am. Dec. 770.

California.— Conboy *v.* Dickinson, 92 Cal. 600, 28 Pac. 809.

Connecticut.— Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

Illinois.— Kramer *v.* Northern Hotel Co., 85 Ill. App. 264 [*affirmed* in 185 Ill. 612, 57 N. E. 847]; Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243.

Indiana.— Moellering *v.* Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Kentucky.— Krish *v.* Ford, (Ky. 1897) 43 S. W. 237; Louisville, etc., R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. 526; Oneil *v.* Harkins, 8 Bush (Ky.) 650.

Maryland.—Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918; Shafer *v.* Wilson, 44 Md. 268; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117.

Massachusetts.— Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

Minnesota.— Rau *v.* Minnesota Valley R. Co., 13 Minn. 442.

New York.— White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231; Denken *v.* Canavan, 17 Misc. (N. Y.) 392, 39 N. Y. Suppl. 1078; People *v.* Canal Board, 2 Thomps. & C. (N. Y.) 275.

Ohio.— Taylor *v.* Day, 6 Ohio N. P. 447; Cincinnati, etc., Inclined Plane R. Co. *v.* Pfau, 9 Cinc. L. Bul. 200, 8 Ohio Dec. (Reprint) 691.

Pennsylvania.—Witherow *v.* Tannehill, 194 Pa. St. 21, 44 Atl. 1088; Spohn *v.* Dives, 174 Pa. St. 474, 34 Atl. 192; Dunlap *v.* Wallingford, 1 Pittsb. (Pa.) 127.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354.

South Dakota.— Ulrick *v.* Dakota L. & T. Co., 3 S. D. 44, 51 N. W. 1023 [*affirming* 2 S. D. 285, 49 N. W. 1054].

Virginia.— Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

England.— Dodd *v.* Holme, 1 A. & E. 493; Walters *v.* Pfeil, M. & M. 362.

Instances of liability are disregard of the advice of skilled workmen employed (Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753); excavating for railroad purposes so deep and so near a building as to weaken the foundation (Bradley *v.* New York, etc., R. Co., 21 Conn. 294); excavating to a great depth, beginning but a few feet from the boundary line (Conboy *v.* Dickinson, 92 Cal. 600, 28 Pac. 809); failure to remove earth in sections (Larson *v.* Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330).

the owner of the adjoining land to protect the building thereon against the effects of the excavation, he is liable for injuries caused by his negligence.[93]

(III) *For Acts or Omissions of Contractor.* Where the owner of the land upon which an excavation is negligently and carelessly done by a contractor controls and directs it he will be liable,[94] even though the contractor undertook to protect adjoining buildings under a contract requiring such undertaking.[95] The contractor is liable only for injuries due to his negligent or wanton acts not necessarily incident to the plan or contract of work.[96]

4. Action for Damages — a. Accrual of Right of Action. The right of action accrues when injury actually results, and not when the support is removed.[97]

b. Who May Sue. The remedy for injury and damage resulting from the negligence or wrongful act of an adjoining owner in removing lateral support is not confined to the owner of the injured land and buildings, but his tenant or lessee has such an interest as will entitle him to recover for damage sustained,[98] even against his landlord who has excavated on adjoining land.[99]

c. Defenses — (I) *Acts of Non-Adjoining Owners.* The fact that injury would not have occurred but for the acts of persons other than plaintiff in erecting buildings upon their own land is no defense.[1]

(II) *Consent.* Consent to the injury complained of will bar a recovery.[2]

(III) *Contributory Negligence.* There can be no recovery for the injury if the damage would not have resulted but for the act of the adjoining owner.[3]

(IV) *Defect in Building.* The fact that a building was in such a condition that its fall could not have been avoided by timely precaution will not of itself bar a right of recovery,[4] nor will the fact that the building was so infirm that it could have stood but for a few months in any event,[5] but these facts may be considered upon the question of whether there was negligence or not, and in mitigation of damages if the verdict be against the defendant.

d. Requisites of Complaint or Declaration — (I) *Alleging Right to Support.* The plaintiff's right to lateral support should be alleged.[6]

93. Kramer *v.* Northern Hotel Co., 185 Ill. 612, 57 N. E. 847 [*affirming* 85 Ill. App. 264]; Walters *v.* Hamilton, 75 Mo. App. 237; Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658.

Right to enter adjoining land. — An arrangement or understanding that the excavating owner shall underpin the building of the adjoining owner will be construed as a license to go upon the land of the latter, but not to remove soil from beneath the foundation of the building. Walters *v.* Hamilton, 75 Mo. App. 237.

Attempt to protect without notice. — If one who has failed to give notice attempts to protect an adjoining wall, he will be liable for his negligence in that endeavor. Dunlap *v.* Wallingford, 1 Pittsb. (Pa.) 127.

94. Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320; Watson Lodge, No. 32 *v.* Drake, (Ky. 1895) 29 S. W. 632.

95. Bower *v.* Peate, 1 Q. B. D. 321.

96. Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327, holding also that the contractor's liability is to the injured party only, and that as between the excavating owner and the person with whom he contracted to do the work the former cannot assert, against the latter, claims of adjoining owners for injuries sustained by the removal of lateral support, which have not been paid, nor attempted to be collected.

97. Smith *v.* Seattle, 18 Wash. 484, 51 Pac. 1057; Backhouse *v.* Bonomi, 9 H. L. Cas. 503. And see Crumbie *v.* Wallsend Local Board, [1891] 1 Q. B. 503, where the subsidence was continuous.

98. Bass *v.* West, 110 Ga. 698, 36 S. E. 244; Austin *v.* Hudson River R. Co., 25 N. Y. 334.

99. Stevens *v.* Brown, 14 Ill. App. 173.

1. Foley *v.* Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

2. Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741.

3. Kramer *v.* Northern Hotel Co., 185 Ill. 612, 57 N. E. 847.

4. Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

5. Dodd *v.* Holme, 1 A. & E. 493.

6. Wyatt *v.* Harrison, 3 B. & Ad. 871. But see Bibby *v.* Carter, 4 H. & N. 153, 28 L. J. Exch. 182, where it was held that allegations that defendant wrongfully excavated on adjoining land without protecting plaintiff's buildings, whereby, being deprived of support, they sank, etc., states a cause of action, although there is no allegation of a right to support or that defendant was the owner of the adjoining premises, for he will be taken to have been a stranger and a wrongdoer.

An allegation that plaintiff was possessed of a messuage belonging to and supporting which there were certain foundations which it had enjoyed and ought to enjoy, etc., is supported by evidence that plaintiff was entitled to an easement in an adjoining foundation wall. Brown *v.* Windsor, 1 Cr. & J. 20.

(II) *Alleging Want of Notice.* A complaint good in other respects is not rendered defective by a failure to allege that plaintiff had no notice of the intention to excavate.[7]

(III) *Alleging Removal.* The complaint or declaration should allege that the defendant removed the lateral support.[8]

(IV) *Alleging Special Damages.* To authorize a recovery therefor in addition to a recovery for injury to the land, the special damages sustained must be specifically alleged.[9]

e. Trial — (I) *Evidence* — (A) *Burden of Proof.* It is incumbent on a landowner who seeks to recover for injury to his land in its natural condition to show that the erections thereon did not contribute to the injury.[10]

(B) *Judicial Notice of Effect of Excavation.* The court will take judicial notice of the probable consequences of an excavation.[11]

(C) *Admissibility* — (1) In General. The evidence must be material to the issues.[12]

(2) Cost of Preservation. Evidence of the cost of preservation is admissible.[13]

(3) Custom in Making Excavations. For the purpose of determining the question of negligence the usual custom of making excavations by skilled persons under like circumstances may be shown;[14] but not where no omission of duty in that respect is charged.[15]

(4) Subsequent Market Value of Land. Evidence of the value of the land, subsequent to the injury, is not prejudicial where it appears that there has been no change in the market value.[16]

(D) *Sufficiency.* Evidence that the excavation was without notice to or knowledge by the adjoining owner is sufficient to show a want of care,[17] but there is no presumption of negligence from the fact that defendant excavated and that plaintiff's building on adjoining land sustained injury.[18]

(II) *Instructions.* Upon request the court may refuse to charge erroneous propositions of law,[19] but the failure to point out, in a proper case, the degree of care required of a person excavating on his own land,[20] or a direction to find in favor of a party who according to the evidence may be liable,[21] is prejudicial error.

7. Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

8. Secongost *v.* Missouri Pac. R. Co., 53 Mo. App. 369, wherein an allegation in substance that defendant, a railroad corporation, conducted its business in a cut adjoining plaintiff's land without erecting a retaining wall, was held insufficient.

Variance.—A complaint charging injury to a building by an excavation made by defendant on the adjoining land will not authorize a recovery on the theory that the building fell because of negligence in excavating beneath its foundation under an agreement with plaintiff. Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749.

9. Stimmel *v.* Brown, 7 Houst. (Del.) 219, 30 Atl. 996.

10. Busby *v.* Holthaus, 46 Mo. 161.

11. As that the earth under a foundation wall will crack and crumble in consequence of an excavation immediately adjoining and extending down five feet lower than the foundation. Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

12. Conboy *v.* Dickinson, 92 Cal. 600, 28 Pac. 809, wherein, to disprove a charge of malice, defendant denied that the excavation was made maliciously and further testified that it was made for a useful purpose, and it was held that evidence of the use to which the land could have been put to in its original condition was immaterial.

13. Kopp *v.* Northern Pac. R. Co., 41 Minn. 310, 43 N. W. 73, holding that the cost of retaining walls may be shown whether or not there could not have been repair or preservation.

14. Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937; Nolte *v.* Hill, 2 Cinc. L. Bul. 86, 7 Ohio Dec. (Reprint) 297.

15. Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

16. Kopp *v.* Northern Pac. R. Co., 41 Minn. 310, 43 N. W. 73.

17. Schultz *v.* Byers, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569.

18. Ward *v.* Andrews, 3 Mo. App. 275.

19. As that defendant "contributed" to the injury (Smith *v.* Hardesty, 31 Mo. 411) or was not guilty of negligence, when negligence is not a factor (Cohen *v.* Simmons, 66 Hun (N. Y.) 634, 21 N. Y. Suppl. 385).

20. Moellering *v.* Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449.

21. Watson Lodge, No. 32 *v.* Drake, (Ky. 1895) 29 S. W. 632, wherein there was evidence that the party in question controlled

(III) *Province of Jury.* In determining the responsibility for the injury the jury may take into consideration all the evidence bearing on the degree of care required under the facts of the particular case and that exercised by defendant for the purpose of ascertaining whether he was or was not negligent;[22] also the connection between his acts and the injury charged,[23] whether or not there was increased pressure which contributed to the injury;[24] and on the question of damages they may consider the faulty construction of the damaged building and its condition immediately prior to the injury, resulting from age, decay, or other cause.[25]

(IV) *Verdict.* A verdict for an amount less than the difference between the damage to the building and the diminution in value of the premises as proved is warranted by proof of damage in excess of the damage to the building plus the amount of the verdict, and is not contrary to an instruction that damages for injury to the building could not be awarded.[26]

f. Measure of Damages. While there are decisions holding that the measure of damages for injury by the removal of lateral support is the actual damage to the soil[27] or the cost of restoring the property to its former condition with as good means of lateral support,[28] the weight of authority is to the effect that the true measure of damages is the diminution of the value of the land as the natural result of its loss of lateral support.[29] Whether there can be a recovery for injuries to structures which do not increase the lateral pressure on the adjacent land, the authorities are not agreed.[30] The rule in England is that if the buildings or improvements have not increased the lateral pressure there may be a recovery, not only for the injury to the soil, but also for injury to the structures thereon;[31] but this rule, though it has been recognized in this country,[32] has not been followed generally.[33]

5. Action to Enjoin. The right of a landowner to the natural support of the adjoining land may be protected by restraining the owner thereof from excavat-

and directed the making of the excavation which caused the injury.

22. Hart *v.* Ryan, 53 Hun (N. Y.) 638, 6 N. Y. Suppl. 921; Stevenson *v.* Wallace, 27 Gratt. (Va.) 77; Dodd *v.* Holme, 1 A. & E. 493.

The character of the soil may be considered, in connection with the distance of the excavation from the injured premises. Witherow *v.* Tannehill, 194 Pa. St. 21, 44 Atl. 1088.

23. Bernheimer *v.* Kilpatrick, 53 Hun (N. Y.) 316, 6 N. Y. Suppl. 858.

24. Oneil *v.* Harkins, 8 Bush (Ky.) 650.

25. Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

26. Conboy *v.* Dickinson, 92 Cal. 600, 28 Pac. 809.

27. Bohrer *v.* Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296; McGettigan *v.* Potts, 149 Pa. St. 155, 30 Wkly. Notes Cas. (Pa.) 137, 24 Atl. 198.

28. Stimmel *v.* Brown, 7 Houst. (Del.) 219, 30 Atl. 996; Brown *v.* Werner, 40 Md. 15, holding, in addition, that the injured party is entitled to compensation for the loss consequent on the interruption of his business; Hide *v.* Thornborough, 2 C. & K. 250.

Injury to tenant.— The damages to which a tenant who has been compelled to abandon leased premises is entitled is their rental value during the remainder of the term. The value of the good-will of the business, and the loss of profits, if ascertainable with a reasonable degree of certainty, may be considered in determining the value of the premises for rent. Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

29. *Indiana.*—Moellering *v.* Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449.

Minnesota.— Schultz *v.* Bower, 64 Minn. 123, 66 N. W. 139 [*following* Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630].

Missouri.— Williams *v.* Missouri Furnace Co., 13 Mo. App. 70.

New Jersey.—McGuire *v.* Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

South Dakota.— Ulrick *v.* Dakota L. & T. Co., 2 S. D. 285, 49 N. W. 1054 [*affirmed* in 3 S. D. 44, 51 N. W. 1023].

Injury to feelings.— Natural injury to feelings caused by the removal of the lateral support of land intended as a burial-place is not an element of damage. White *v.* Dresser, 135 Mass. 150, 46 Am. Rep. 454.

30. White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231.

31. Brown *v.* Robins, 4 H. & N. 186; Hunt *v.* Peake, Johns. Ch. (Eng.) 705.

32. White *v.* Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Suppl. 231, wherein damages were allowed for the collapse of a wharf caused by submarine excavations, not immediately adjoining the land on which the wharf stood, to an unusual depth.

33. In Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312, the recovery was confined to the actual injury to the soil, and compensation for fences and shrubs was disallowed.

ing so as to deprive the land in question of its natural support;[34] but this relief will be denied where no serious injury is apprehended, and there is nothing peculiar which requires equitable interference,[35] or where land is held subject to the reservation of such use of the adjoining land as will necessarily remove the lateral support.[36] In England, moreover, if there is a right either implied or prescriptive to have a building supported, threatened action on the part of the adjoining owner by which the building may sustain injury may be restrained,[37] although there is no actual damage[38] or the anticipated damage will be small.[39]

VI. LIGHT AND AIR.[40]

A. Right to Access of — 1. ENGLISH DOCTRINE. The early English cases established the doctrine that where the owner of a parcel of land conveyed a portion thereof with a building having windows or openings thereon overlooking the land reserved, an implied grant of a free passage of light and air over the land was reserved, unless the privilege was excluded by the express terms of the conveyance. These cases do not clearly indicate the principle upon which they were decided, but by subsequent decisions the doctrine has been firmly established and appears to be based on the idea that the grantee is entitled to the same beneficial rights as were possessed by the grantor, who can do nothing in derogation of his grant.[41] For the same reason there is no implication of a reservation of the right to light and air where the unimproved portion of the parcel is conveyed and the portion built upon retained.[42]

2. AMERICAN DOCTRINE — a. In General. While there is some confusion in this country due to early decisions and *dicta* which expressly or impliedly recognized

34. *Connecticut.*— Trowbridge *v.* True, 52 Conn. 190, 52 Am. Rep. 579.

Kentucky.—Oneil *v.* Harkins, 8 Bush (Ky.) 650.

New York.—Farrand *v.* Marshall, 19 Barb. (N. Y.) 380, 21 Barb. (N. Y.) 409; Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605.

Pennsylvania.— Wier's Appeal, 81* Pa. St. 203.

England.— Trinidad Asphalt Co. *v.* Ambard, [1899] A. C. 594.

See also Gobeille *v.* Meunier, 21 R. I. 103, 41 Atl. 1001, which held that an injunction will issue to restrain an excavation by an adjoining owner which is partially on complainant's land, and also the erection of a supporting wall thereon.

Condition of denying relief.— The erection of a retaining wall may be made a condition of denying injunctive relief. Wier's Appeal, 81* Pa. St. 203.

35. Gobeille *v.* Meunier, 21 R. I. 103, 41 Atl. 1001; McMaugh *v.* Burke, 12 R. I. 499, as where it does not appear that complainant's soil will be displaced or otherwise materially damaged; Morrison *v.* Latimer, 51 Ga. 519. *Contra,* Trowbridge *v.* True, 52 Conn. 190, 52 Am. Rep. 579.

36. Ryckman *v.* Gillis, 57 N. Y. 68, 15 Am. Rep. 464.

37. Rigby *v.* Bennett, 21 Ch. D. 559.

38. Siddons *v.* Short, 2 C. P. D. 572.

39. Dent *v.* Auction Mart Co., 35 L. J. Ch. 555.

40. The treatment, in this section, of the right of adjoining landowners to the access of light and air over each other's land will be confined to questions concerning the acquisition thereof by implication through a grant of that portion of a larger parcel which has thereon a building containing windows overlooking the land reserved, and also of the general right of adjoining owners to obstruct windows or openings on the adjoining land, together with matters incident thereto. The doctrine of ancient lights and of rights to light and air which rest in prescription involve a different principle and will be treated under EASEMENTS.

41. Palmer *v.* Fletcher, 1 Lev. 122; Rosewell *v.* Pryor, 6 Mod. 116; Cox *v.* Matthews, 1 Vent. 239; Canham *v.* Fisk, 2 Cr. & J. 126; Swansborough *v.* Coventry, 9 Bing. 305; Robins *v.* Barnes, Hob. 131; Compton *v.* Richards, 1 Price 27; Glave *v.* Harding, 27 L. J. Exch. 286; Coutts *v.* Gorham, M. & M. 396; Myers *v.* Catterson, 43 Ch. D. 470; Wheeldon *v.* Burrows, 12 Ch. D. 31, 58; Allen *v.* Taylor, 16 Ch. D. 355; Leech *v.* Schweder, L. R. 9 Ch. 463, 472; Riviere *v.* Bower, R. & M. 24. And see Robinson *v.* Grave, 27 L. T. Rep. N. S. 648 [*affirmed* in 29 L. T. Rep. N. S. 7], applying the principle to a grant for building purposes.

Interference with light by land reserved.— Where the owner of two contiguous buildings sold one by a conveyance which designated correctly the ground site of the house conveyed, and one of the rooms of the first floor of the house retained projected over the site and was supported by the other house, it was held that the vertical column of air over so much of the room as overhung the site conveyed belonged to the grantee. Corbett *v.* Hill, L. R. 9 Eq. 671.

42. Russell *v.* Watts, L. R. 10 A. C. 590.

or adopted the English doctrine,[43] these cases have been generally overruled by subsequent decisions and are no longer recognized as of any force or effect. It may be considered, therefore, as established in the United States by the great weight of authority that a grant of the right to light and air over the land reserved will not be presumed from a conveyance under the circumstances stated, but that such a right can be conferred only by express grant of an interest in, or a covenant relating to, the land over which it is claimed, and that in the absence of such a grant or covenant neither the grantor nor one claiming under him is precluded from improving the land reserved, although the consequence of such improvement is to darken the windows of the building on the land first conveyed and to exclude light and air therefrom.[44]

b. Necessary Light and Air. The American courts have adopted, however, a modification of the general doctrine, to the effect that if particular windows permitting the access of light and air across adjoining land are necessary for the reasonable enjoyment of the premises of the party claiming the right, a grant of necessary light and air will be presumed; but this doctrine will not be carried to the extent of conceding such a right as a mere convenience,[45] and if the existing

43. *Illinois.*— Gerber *v.* Grabel, 16 Ill. 217.

Maine.— White *v.* Bradley, 66 Me. 254, wherein the absolute right is questioned.

Maryland.— Janes *v.* Jenkins, 34 Md. 1, 6 Am. Rep. 300; Cherry *v.* Stein, 11 Md. 1.

Massachusetts.— Grant *v.* Chase, 17 Mass. 443, 9 Am. Dec. 161; Thurston *v.* Hancock, 12 Mass. 220, 7 Am. Dec. 57; Story *v.* Odin, 12 Mass. 157, 7 Am. Dec. 46.

New Jersey.— Greer *v.* Van Meter, 54 N. J. Eq. 270, 33 Atl. 794; Sutphen *v.* Therkelson, 38 N. J. Eq. 318; Robeson *v.* Pittenger, 2 N. J. Eq. 57.

New York.— Lampman *v.* Milks, 21 N. Y. 505; Havens *v.* Klein, 51 How. Pr. (N. Y.) 82.

Pennsylvania.— Maynard *v.* Esher, 17 Pa. St. 222; Kay *v.* Stallman, 2 Wkly. Notes Cas. (Pa.) 643.

South Carolina.— McCready *v.* Thomson, Dudley (S. C.) 131.

United States.— U. S. *v.* Appleton, 1 Sumn. (U. S.) 492, 24 Fed. Cas. No. 14,463.

44. *Connecticut.*— Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

Georgia.— Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497.

Illinois.— Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544.

Indiana.— Keiper *v.* Klein, 51 Ind. 316.

Iowa.— Morrison *v.* Marquardt, 24 Iowa 35, 92 Am. Dec. 444.

Kentucky.—Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388.

Maine.— Pierre *v.* Fernald, 26 Me. 436, 46 Am. Dec. 573.

Maryland.— Cherry *v.* Stein, 11 Md. 1.

Massachusetts.— Christ Church *v.* Lavezzolo, 156 Mass. 89, 30 N. E. 471; Keats *v.* Hugo, 115 Mass. 204, 15 Am. Rep. 80; Randall *v.* Sanderson, 111 Mass. 114; Brooks *v.* Reynolds, 106 Mass. 31; Royce *v.* Guggenheim, 106 Mass. 201; Paine *v.* Boston, 4 Allen (Mass.) 168; Carrig *v.* Dee, 14 Gray (Mass.) 583; Rogers *v.* Sawin, 10 Gray (Mass.) 376; Collier *v.* Pierce, 7 Gray (Mass.) 18, 66 Am. Dec. 453.

New York.— Doyle *v.* Lord, 64 N. Y. 432, 21 Am. Rep. 629; Knabe *v.* Levelle, 23 N. Y. Suppl. 818; Myers *v.* Gemmel, 10 Barb. (N. Y.) 537; Parker *v.* Foote, 19 Wend. (N. Y.) 309; Palmer *v.* Wetmore, 2 Sandf. (N. Y.) 316; Shipman *v.* Beers, 2 Abb. N. Cas. (N. Y.) 435.

Ohio.— Mullen *v.* Stricker, 19 Ohio St. 135, 2 Am. Rep. 379.

Pennsylvania.— Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777; Haverstick *v.* Sipe, 33 Pa. St. 368.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354; Napier *v.* Bulwinkle, 5 Rich. (S. C.) 311.

Vermont.— Hubbard *v.* Town, 33 Vt. 295.

Virginia.— Tunstall *v.* Christian, 80 Va. 1, 56 Am. Rep. 581.

West Virginia.— Powell *v.* Sims, 5 W. Va. 1, 13 Am. Rep. 629.

Populous districts.— The soundness of this view is especially apparent when considered with relation to adjoining property in cities, towns, and villages, and the rapid physical development of the country. Parker *v.* Foote, 19 Wend. (N. Y.) 309; Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777; Tunstall *v.* Christian, 80 Va. 1, 56 Am. Rep. 581. And it has been said that no case can be found in this country where the doctrine has been applied to property so situated. Cofer, J., in Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388.

45. *Connecticut.*— Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

Georgia.— Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497.

Maine.— White *v.* Bradley, 66 Me. 254.

New Jersey.— Greer *v.* Van Meter, 54 N. J. Eq. 270, 33 Atl. 794; Sutphen *v.* Therkelson, 38 N. J. Eq. 318.

Pennsylvania.— Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777; Kay *v.* Stallman, 2 Wkly. Notes Cas. (Pa.) 643.

West Virginia.— Powell *v.* Sims, 5 W. Va. 1, 13 Am. Rep. 629.

Forfeiture of right.— A temporary abuse of the use of windows by throwing filth and refuse therefrom on the adjoining land, or by annoying the owner thereof by speech and conduct, will not forfeit the right to such use. Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497.

windows or openings are not a real necessity, or others can be constructed at a reasonable cost, so that there may be a reasonably useful enjoyment of light and air, the implication of a grant will be denied and rejected.[46]

B. Obstruction of — 1. In General. The making of openings or windows in a house or wall abutting on or overlooking adjoining land confers no right to the access of light and air over the adjoining land which the owner thereof is bound to respect. The doctrine of the common law is that an adjoining owner may deprive his neighbor of the light coming laterally over his land by the erection of a wall or other structure thereon, within the period of prescription, though he does so for the purpose of darkening the windows and obstructing the passage of light and air; and except where this rule has been changed by statute there is no legal injury by such an obstruction.[47]

46. Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497; Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777; Powell *v.* Sims, 5 W. Va. 1, 13 Am. Rep. 629.

This doctrine has been well stated in a recent case (Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298) which holds that a grantee of a part of a tract of land has no implied grant or easement of light or air as against a subsequent *bona fide* purchaser of the remaining portion unless the alleged easement is so evidently necessary to the reasonable enjoyment of his premises, so continuous in its nature, so plain, visible, and open, and so manifest from the situation of the two parts, as fairly and clearly to indicate to the prospective purchaser of the remaining portion that it was the intention of the parties to the sale of the first portion to create and continue such an easement, and to charge him with knowledge that law and equity forbid him, in case of this purchase, so to occupy his part as to interfere with such easement.

47. *Alabama.*— Ray *v.* Lynes, 10 Ala. 63.

California.— Ingwersen *v.* Barry, 118 Cal. 342, 50 Pac. 536; Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192.

Delaware.— Pierce *v.* Lemon, 2 Houst. (Del.) 519.

Georgia.— Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497.

Illinois.— Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506; Honsel *v.* Conant, 12 Ill. App. 259.

Iowa.— Morrison *v.* Marquardt, 24 Iowa 35, 92 Am. Dec. 444.

Kansas.— Lapere *v.* Luckey, 23 Kan. 534, 33 Am. Rep. 196; Triplett *v.* Jackson, 5 Kan. App. 777, 48 Pac. 931.

Louisiana.— Oldstein *v.* Firemen's Bldg. Assoc., 44 La. Ann. 492, 10 So. 928.

Maine.— Lord *v.* Langdon, 91 Me. 221, 39 Atl. 552; Pierre *v.* Fernald, 26 Me. 436, 46 Am. Dec. 573.

Massachusetts.— Rogers *v.* Sawin, 10 Gray (Mass.) 376; Fifty Associates *v.* Tudor, 6 Gray (Mass.) 255. See also Carrig *v.* Dee, 14 Gray (Mass.) 583 (where the same principle was applied though the window was on hinges so as to swing over the adjoining land); Richardson *v.* Pond, 15 Gray (Mass.) 387 (holding that swing shutters would give no easement of light or air); Keats *v.* Hugo, 115 Mass. 204, 15 Am. Rep. 80 (stating that the tendency of the decisions is to deny the doctrine of the right to light and air by presumption or prescription, and that since the decision in Story *v.* Odin, 12 Mass. 157, 7 Am. Dec. 46, no right to light and air has been upheld in Massachusetts).

Mississippi.—See Gwin *v.* Melmoth, Freem. (Miss.) 505, stating that one cannot build so as immediately to obstruct light or air, but that the mere tendency to obstruct will not warrant equitable interference.

New Jersey.— Harwood *v.* Tompkins, 24 N. J. L. 425; King *v.* Miller, 8 N. J. Eq. 559, 55 Am. Dec. 246.

New York.— Levy *v.* Samuel, 4 Misc. (N. Y.) 48, 23 N. Y. Suppl. 825; Knabe *v.* Levelle, 23 N. Y. Suppl. 818; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Parker *v.* Foote, 19 Wend. (N. Y.) 309; Mahan *v.* Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; Shipman *v.* Beers, 2 Abb. N. Cas. (N. Y.) 435.

Ohio.— Letts *v.* Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

Pennsylvania.— Haverstick *v.* Sipe, 33 Pa. St. 368; Shell *v.* Kemmerer, 13 Phila. (Pa.) 502, 34 Leg. Int. (Pa.) 410.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354; Napier *v.* Bulwinkle, 5 Rich. (S. C.) 311.

Texas.— Klein *v.* Gehrung, 25 Tex. Suppl. 232, 78 Am. Dec. 565.

Vermont.— Hubbard *v.* Town, 33 Vt. 295.

West Virginia.— Cunningham *v.* Dorsey, 3 W. Va. 293.

England.— Moore *v.* Rawson, 3 B. & C. 332; Chandler *v.* Thompson, 3 Campb. 80; Butt *v.* Imperial Gas Co., L. R. 2 Ch. 158. See Wilson *v.* Cohen, Rice Eq. (S. C.) 80, where the court declined to interfere with the closing of a window through which, by opening iron shutters, a stairway was lighted, it appearing that the shutters were but seldom opened.

Light and air from square.— Unless by express grant the owner of a lot opposite a square and separated from it by a street has no right to light and air which will give him any redress for its appropriation to new uses. Greene *v.* New York Cent., etc., R. Co., 12 Abb. N. Cas. (N. Y.) 124, 65 How. Pr. (N. Y.) 154.

2. Motive of Obstruction — a. In General. If an erection which deprives the adjoining owner of light and air is lawful, it is not *per se* a nuisance, and the law will not inquire into the motive with which the erection was made.[48] It has been held, however, that obstruction by one owner with intent to injure his neighbor and without any advantage to himself is unlawful.[49]

b. Under Statute. By statute in some states, fences or like structures are declared a private nuisance if they exceed a prescribed height and are unnecessarily or maliciously erected or maintained to spite or annoy the owners or occupants of the adjoining land. In cases arising under these statutes, to compel removal or for damages, it is held that the purpose to annoy must be the controlling motive and must amount to actual malevolence as distinguished from technical malice.[50] But it has been held that a fence which is wholly on the land of one owner is not within an act regulating the height of division fences, and that its maintenance cannot be enjoined merely because it obstructs the passage of light and air.[51]

3. Action — a. Parties. An adjoining owner not in occupation may maintain an action for obstruction of access of light and air,[52] and proof that one defendant resided on the premises upon which an objectionable fence was maintained, and that the other, who owned an undivided interest in the property, had manifested his approval of the obstruction, is sufficient to render both liable.[53]

b. Pleading and Proof. On the theory of an implied grant, an action to recover for the obstruction of or interference with light and air may be maintained at any time after the right is interfered with, and hence, in such a case, it is unnecessary to allege or prove a right by prescription.[54] An allegation of a right to light and air is sustained by proof of a right by prescription or by grant,[55] and a mere allegation that the windows obstructed were "ancient" will not restrict the plaintiff to proof of prescription, but he may show that the right was acquired by grant.[56]

48. *Illinois.*— Guest *v.* Reynolds, 68 Ill. 478, 18 Am. Rep. 570.

Kansas.— Lapere *v.* Luckey, 23 Kan. 534, 33 Am. Rep. 196; Triplett *v.* Jackson, 5 Kan. App. 777, 48 Pac. 931 [*following* Falloon *v.* Schilling, 29 Kan. 292, 44 Am. Rep. 642, wherein an adjoining owner erected cottages for rental to negroes].

Louisiana.— Taylor *v.* Boulware, 35 La. Ann. 469, holding that the erection of screens obstructing the view, but not interfering with the opening of window-shutters in an adjoining house, is not an obstruction of a right to light and air which can be successfully complained of.

Maine.— Lord *v.* Langdon, 91 Me. 221, 39 Atl. 552.

New York.— Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Mahan *v.* Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461.

Ohio.— Letts *v.* Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

49. Burke *v.* Smith, 69 Mich. 380, 37 N. W. 838, which, by a divided court, affirmed a decision that a fence erected maliciously and for the express purpose of depriving the adjoining owner of light and air is a nuisance. The doctrine thus affirmed was followed in Flaherty *v.* Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183; Kirkwood *v.* Finegan, 95 Mich. 543, 55 N. W. 457; Peek *v.* Roe, 110 Mich. 52, 67 N. W. 1080. See also Havens *v.* Klein, 49 How. Pr. (N. Y.) 95, wherein an adjoining owner was prohibited from maintaining a structure or scaffold so constructed as practically to close the windows of an adjoining flat-house. However, there is no opinion, and nothing to support the holding but the reporter's statement.

50. Harbison *v.* White, 46 Conn. 106; Lord *v.* Langdon, 91 Me. 221, 39 Atl. 552; Rice *v.* Moorehouse, 150 Mass. 482, 23 N. E. 229; Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81; Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393 (these last two cases holding that the statute is applicable to fences existing at the time of its passage and subsequently maintained); Karasek *v.* Peier, (Wash. 1900) 61 Pac. 33.

Requiring abatement of nuisance as condition of removing fence.— Where defendant maliciously erected an unnecessary fence the court directed its removal upon the alteration by plaintiff of his projecting roof so as to prevent it from discharging water on defendant's land. Karasek *v.* Peier, (Wash. 1900) 61 Pac. 33.

51. Ingwersen *v.* Barry, 118 Cal. 342, 50 Pac. 536; Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192.

52. Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393, the statute giving a right of action to any owner or occupant injured in his comfort or in the enjoyment of his estate.

53. Peek *v.* Roe, 110 Mich. 52, 67 N. W. 1080.

54. Story *v.* Odin, 12 Mass. 157, 7 Am. Dec. 46.

55. Gerber *v.* Grabel, 16 Ill. 217.

56. Ward *v.* Neal, 35 Ala. 602.

VII. Permitting Offensive Matter or Water to Pass upon Adjoining Land.

One owner may be liable for allowing things in themselves offensive to go upon a neighbor's property, or for causing, by artificial means, things in themselves inoffensive to pass upon his land, so as substantially to interfere with the enjoyment to which he is entitled or to cause him injury,[57] and the motive is immaterial.[58] He is not liable, however, where the act is caused by a stranger.[59]

VIII. Subjacent Support.

Where parts of a building are owned by different persons, each owner is entitled to have the others so use their portions that he shall not be prejudiced, and if he is the owner of an upper story he has a right to the support of the walls below, which right he may enforce in such manner as the circumstances justify.[60]

IX. Trees.

A. On Land of One Adjoining Owner — 1. Ownership — a. In General. In spite of some confusion among the older authorities as to the ownership of a tree standing wholly on the land of one owner, when its roots extended into the land of another,[61] it is now the generally adopted view, both in this country and

57. Ball *v.* Nye, 99 Mass. 582, 97 Am. Dec. 56; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Brine *v.* Great Western R. Co., 2 B. & S. 402; Hurdman *v.* North Eastern R. Co., 3 C. P. D. 168; Wilson *v.* Newberry, L. R. 7 Q. B. 31; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Tenant *v.* Goldwin, 1 Salk. 360; Baird *v.* Williamson, 15 C. B. N. S. 376; Smith *v.* Kenrick, 7 C. B. 515; Acton *v.* Blundell, 12 M. & W. 324.

Increased injury by freezing.— One who turns waste water from a tank upon the premises of another in freezing weather cannot claim exemption from liability on the ground that the freezing was an act of nature. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

Where a complaint averred damages because of the wrongful construction of an embankment whereby large quantities of water flowed on plaintiff's land and caused injury, and the plea averred the construction and maintenance of the embankment by act of parliament, it was held that a replication which admitted the facts stated by the plea and averred that the damage resulted from wrongful, negligent, and improper construction of the embankment and its wrongful continuance was not a departure from the declaration. Brine *v.* Great Western R. Co., 2 B. & S. 402.

58. Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357.

59. Brown *v.* McAllister, 39 Cal. 573, holding that where the owner of a lot on a declivity had no control over property lying above his on the same declivity, or over the persons occupying it, and foul and offensive water was, without any fault of his, thrown upon the upper lot, which flowed naturally across his premises onto the lot below, he was not responsible to the owner of the lower lot for the damage resulting therefrom.

60. McConnel *v.* Kibbe, 33 Ill. 175; Humphries *v.* Brogden, 12 Q. B. 739 [*citing* Erskine Inst. bk. II, tit. 9, § 11]; Caledonian R. Co. *v.* Sprot, 2 Macq. 449; Bush *v.* Field, Cary 90. See also Doe *v.* Morrell, Smith (N. H.) 255, wherein it was held that where each of two persons owns one half of a dwelling-house, and the part owned by one is not worth repairing, the latter will be liable in trespass if he takes down his part, thereby impairing the other's enjoyment of his half, though the work was done so as to do as slight injury as possible to the habitable portion. In Keilw. 98, it was held that the owner of the lower rooms in a house is bound to repair the foundation, but this was doubted in Tenant *v.* Goldwin, 6 Mod. 311, although the court said: "There is indeed a writ in Fitzherbert Nat. Brev. 127 to a mayor to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof."

Special damage unnecessary.— The removal of the lower division walls is an infringement of the right of the owner of the upper stories for which he can sustain an action without showing any special damage. McConnel *v.* Kibbe, 33 Ill. 175.

61. Branches follow root.— In Waterman *v.* Soper, 1 Ld. Raym. 737, it was said: "If A plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B next adjoining, A and B are tenants in common of this tree. But if all the root grows into the land of A, though the boughs overshadow the land of B, yet the branches follow the root, and the property of the whole is in A." See, however, Lyman *v.* Hale, 11 Conn. 177, 27 Am. Dec. 728, which points out that the tree in this case, though planted on the extremest limits of A's land, when grown must have stood in the dividing line, and that therefore the case

in England, that the ownership of a tree under such circumstances is in him in whose land the tree stands.[62]

b. Of Fruit on Overhanging Branches. Where the trunk of the tree stands wholly on the land of one owner, the growing fruit thereon is his property, including that upon branches overhanging the adjoining land;[63] and the adjoining owner is liable in an action for conversion if he takes fruit from the branches,[64] and for assault if he attempts by violence to prevent the owner of the tree, while on his own land, from gathering such fruit.[65]

2. Remedy for Injuries Resulting from — a. In General — (I) *Abatement and Damages.* It seems that if trees on the land of another are injurious to the adjoining owner, even though they are not noxious, the latter may have an action to abate them as a nuisance and for damages under a provision of the code of California defining a nuisance.[66]

(II) *Right to Destroy.* One adjoining owner has no right to cut or destroy the trunk of a tree which is entirely on the land of another, even though it cause him personal inconvenience, discomfort, or injury.[67]

b. Intrusion of Roots or Branches — (I) *Of Harmless Trees.* One adjoining owner cannot maintain an action against another for the intrusion of roots or branches of a tree which is not poisonous or noxious in its nature;[68] his remedy in such case is to clip or lop off the branches or cut the roots.[69]

is not authority for the proposition that adjoining owners become tenants in common merely because the roots extend into their lands.

Branches follow trunk.— In Masters *v.* Pollie, 2 Rolle 141, it was held that if a tree grows in the close of A it is his property even though its roots extend into the close of B, because its body is in A's soil.

62. Lyman *v.* Hale, 11 Conn. 177, 27 Am. Dec. 728; Hoffman *v.* Armstrong, 48 N. Y. 201, 8 Am. Rep. 537 [*affirming* 46 Barb. (N. Y.) 337]; Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326 [*affirming* Relyea *v.* Beaver, 34 Barb. (N. Y.) 547]; Skinner *v.* Wilder, 38 Vt. 115, 88 Am. Dec. 645; Holder *v.* Coates, M. & M. 112; 1 Washburn Real Prop. § 7; 20 Vin. Abr. 417; 1 Chitty Gen. Prac. 652.

Belong to land where first planted.— In Holder *v.* Coates, M. & M. 112, it is said: "If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted."

Removal of trees on own side of line.— One who, with the coöperation of the adjoining owner, his grantor, sets a division fence and plants trees on his own side thereof, may remove them against the consent of successors to the title to the adjoining land, whether or not the action of himself and his grantor respecting the location of the fence and planting of the trees would have amounted to an estoppel. Reed *v.* Drake, 29 Mich. 222.

63. Lyman *v.* Hale, 11 Conn. 177, 27 Am. Dec. 728; Hoffman *v.* Armstrong, 48 N. Y. 201, 8 Am. Rep. 537 [*affirming* 46 Barb. (N. Y.) 337]; Skinner *v.* Wilder, 38 Vt. 115, 88 Am. Dec. 645.

The maxim cujus est solum ejus est usque ad cœlum et ad inferos has no application to overhanging branches of trees. Hoffman *v.* Armstrong, 46 Barb. (N. Y.) 337 [*affirmed* in 48 N. Y. 201, 8 Am. Rep. 537].

64. Skinner *v.* Wilder, 38 Vt. 115, 88 Am. Dec. 645.

65. Hoffman *v.* Armstrong, 46 Barb. (N. Y.) 337 [*affirmed* in 48 N. Y. 201, 8 Am. Rep. 537].

66. Grandona *v.* Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623.

Boundary trees are not a nuisance per se, nor merely because the adjoining land is rendered unfit for a purpose for which the owner never wished or attempted to use it, for in such a case it cannot be said that the land is injuriously affected or the owner's personal enjoyment lessened. Grandona *v.* Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121.

An allegation in a complaint to compel the removal of trees on or near a boundary, and for damages, which states that the trunks have so grown as to break the division fence and let in animals which have destroyed plaintiff's crops, does not constitute a separate cause of action and may be rejected as surplusage, where there is no averment that any part of the trunks of the trees are on plaintiff's land. Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623.

67. Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623; Bliss *v.* Ball, 99 Mass. 597, 598, wherein it was held that defendant could not justify on the ground that shade-trees destroyed by him were a public nuisance and rendered his house damp and unhealthy. The court said: "As against adjoining proprietors, the owner of a lot may plant shade-trees upon it, or cover it with a thick forest, and the injury done to them by the mere shade of the trees is *damnum absque injuria*."

68. Countryman *v.* Lighthill, 24 Hun (N. Y.) 405; Crowhurst *v.* Burial Board, 4 Ex. D. 5, wherein it is said that no action for damages has ever been maintained under such circumstances. See also Bliss *v.* Ball, 99 Mass. 597, cited *supra*, note 67.

69. *California.*— Grandona *v.* Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623.

(II) *Of Noxious Trees.* Where intruding branches cause actual injury to an adjoining owner because of the noxious or poisonous nature of the tree, he may recover from the owner of the tree for the injury sustained.[70]

c. Threatened Planting. It has been held that one owner may enjoin the adjoining owner from planting trees near the boundary line, where such a planting would be injurious to the former's land.[71]

d. Trimmings. If one owner so trims his trees as to allow the trimmings or clippings to fall upon a neighbor's land to his damage, he is liable to the latter;[72] but it is said that if a tree grow in a hedge, and the fruit fall onto another man's land, the owner may fetch it therefrom.[73]

B. On Boundary Line — 1. Ownership. If the trunk of a tree is wholly or in part upon the line dividing the land of adjoining owners, it is the common property of both, whether marked as a boundary or not,[74] and it has been held in a very recent case that the property interest of each owner is identical as to extent with that portion of the tree which is upon his land.[75]

2. Injury to or Destruction of — a. In General. Where a tree is thus owned in common, each owner may require that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole, and neither may cut or otherwise injure it without the consent of the other,[76] and the fact

Connecticut.— Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Lyman *v.* Hale, 11 Conn. 177, 27 Am. Dec. 728.

Mississippi.— Buckingham *v.* Elliott, 62 Miss. 296, 52 Am. Rep. 188.

New York.— Countryman *v.* Lighthill, 24 Hun (N. Y.) 405.

England.— Crowhurst *v.* Burial Board, 4 Ex. D. 5; Lonsdale *v.* Nelson, 2 B. & C. 302; Lemmon *v.* Webb, [1895] A. C. 1.

70. Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623, Buckingham *v.* Elliott, 62 Miss. 296, 52 Am. Rep. 188; Hoffman *v.* Armstrong, 46 Barb. (N. Y.) 337; Crowhurst *v.* Burial Board, 4 Ex. D. 5.

71. Brock *v.* Connecticut, etc., Rivers R. Co., 35 Vt. 373, holding that a railroad company may be enjoined from planting willow-trees near the boundary line of its land, to be used as posts for a fence, when such trees would, by their roots and shade, injure the adjoining land; no necessity being shown for that method of fencing the road.

72. Mitten *v.* Faudrye, Popham 161; Lambert *v.* Bessey, T. Raym. 421, 467, wherein thorns were allowed to fall on the adjoining land.

Must allege trimming by plaintiff.— In Wilson *v.* Newberry, L. R. 7 Q. B. 31, the declaration charged that defendant, being possessed of certain yew-trees on his land, the clippings of which are poisonous, it became and was his duty "to take due and proper care to prevent the said clippings off the said yew-trees from being put or placed in and upon land other than land of defendant, or in his occupation, where the horses and cattle of his neighbors and others might be enabled to eat them," and this was held bad because of failure to allege that defendant clipped the yew-trees, or that he knew that they were clipped, or that he had anything to do with the escape of the clippings on his neighbor's land. The court said that it would be quite consistent with the averment that the cutting had been done by a stranger without defendant's knowledge.

73. Mitten *v.* Faudrye, Popham 161.

74. *Connecticut.*— Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298.

Delaware.— Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595.

Iowa.— Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484.

New Hampshire.— Griffin *v.* Bixby, 12 N. H. 454, 37 Am. Dec. 225.

New York.— Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326 [*affirming* Relyea *v.* Beaver, 34 Barb. (N. Y.) 547]; Hoffman *v.* Armstrong, 46 Barb. (N. Y.) 337 [*affirmed* in 48 N. Y. 201, 8 Am. Rep. 537].

75. Robinson *v.* Clapp, 65 Conn. 365, 379, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298 [*quoting* 10 Alb. L. J. 226], wherein it is said that "where a tree stands partly on the lands of each of two adjoining proprietors, the possession of each must be always confined to that portion of the tree which is on his side of the boundary line, in view of the greater dignity and permanence of real-estate tenure as compared with the temporary and changing nature of growing timber."

76. Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484; Griffin *v.* Bixby, 12 N. H. 454, 37 Am. Dec. 225; Relyea *v.* Beaver, 34 Barb. (N. Y.) 547 [*affirmed* in Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326]. See also Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623, and the same case on another appeal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121, where the trunks of boundary trees extended a few inches into adjoining land, and it was said, among other things, that the owner of such land had no right to cut the trees.

that one owner has cut a few trees will not authorize the other owner to cut the remainder.[77]

b. Action for Damages. For injury to or the destruction of a tree standing on the boundary line of adjoining landowners either may maintain an action of trespass against the one who has caused its injury or destruction without the consent of the other,[78] whether his interest is several or in common with the wrongdoer.[79]

c. Enjoining Threatened Destruction. Where one adjoining owner threatens to remove or destroy a tree standing on the boundary line, and no sufficient reason therefor appears, an injunction may be granted at the instance of the other owner to restrain the commission of such act.[80] Whether such destruction is reasonable or otherwise is a matter of discretion with the trial court.[81]

ADJORNARE. To ADJOURN,[1] *q. v.*

ADJORNATUR or **ADJOURNATUR.** It is adjourned.[2]

ADJOURN. To put off; to delay; to defer to a day specified.[3]

ADJOURNAMENTUM. An ADJOURNMENT,[4] *q. v.*

ADJOURNATUR. See ADJORNATUR.

ADJOURNED SUMMONS. A summons taken out in the chambers of a judge and afterward taken into court to be argued by counsel.[5]

ADJOURNER. To ADJOURN,[6] *q. v.*

ADJOURNMENT. A putting off until another time and place.[7] It is no more

77. Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484.

78. Griffin *v.* Bixby, 12 N. H. 454, 37 Am. Dec. 225; Relyea *v.* Beaver, 34 Barb. (N. Y.) 547 [*affirmed* in Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326]. See also Waterman *v.* Soper, 1 Ld. Raym. 737, wherein it is said: "Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting."

Treble damages.— In New York one owner in common of a line tree may recover treble damages against the other for its destruction. Relyea *v.* Beaver, 34 Barb. (N. Y.) 547 [*affirmed* in Dubois *v.* Barber, 25 N. Y. 123, 82 Am. Dec. 326].

79. Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326 [*affirming* Relyea *v.* Beaver, 34 Barb. (N. Y.) 547].

80. Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484; Relyea *v.* Beaver, 34 Barb. (N. Y.) 547 [*affirmed* in Dubois *v.* Beaver, 25 N. Y. 123, 82 Am. Dec. 326]; Comfort *v.* Everhardt, 35 Wkly. Notes Cas. (Pa.) 364.

Sheltering trees.— An injunction will issue to prevent the destruction of trees which shelter and protect the buildings and stock of the plaintiff, though their presence is injurious to defendant's land. Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484.

Extent of relief.— Where a portion of a trunk of a tree is on the land of one owner who threatens to cut or remove it, the injunction should extend no further than to restrain him from cutting any portion of the trunk, or any portion of the branches or roots than he might have cut had the tree stood wholly on the other owner's land, but reaching to the boundary line. If the tree divides itself, as it extends upward, into two or more parts of similar size with more of a perpendicular than horizontal extension, each of those parts should be regarded as a portion of the trunk. Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298.

81. Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298, holding that the exercise of that discretion will not be revised in a doubtful case.

1. Adams Gloss.

2. Burrill L. Dict.

A common term in the old reports which was used in such expressions as "*adjornatur*, to be argued again" (Rex *v.* London, 2 Show. 263, 271) and "but because Holt, Chief Justice, *hæsitavit, adjornatur*" (Howard *v.* Tremaine, 1 Show. 363, 364).

3. Bisham *v.* Tucker, 2 N. J. L. 237; La Farge *v.* Van Wagenen, 14 How. Pr. (N. Y.) 54, 58.

Synonym of "postpone."— In Bisham *v.* Tucker, 2 N. J. L. 237, 238, the court said: "If there could be any doubt upon the import of the term 'adjourn,' it is explained in a subsequent clause of the section. There the word 'postpone' is used to signify precisely the same thing."

4. Burrill L. Dict.

5. Abbott L. Dict.

6. Stimson L. Gloss.

7. Wilson *v.* Lott, 5 Fla. 302, 303 [*citing* Jacob L. Dict.; Johnson Dict.]; People *v.* Martin, 5 N. Y. 22, 26 [*citing* Bouvier L. Dict.; Webster Dict.; Wharton L. Lex.]:

than a continuance of a session from one day to another.[8] (Adjournment: By Arbitrators, see Arbitration and Award. By Justices of the Peace, see Justices of the Peace. By Referees, see References. In Bastardy Proceedings, see Bastards. Of Canvass of Returns of Elections, see Elections. Of Hearing on Appeal or Error, see Appeal and Error. Of Municipal Meeting, see Municipal Corporations. Of Proceedings to Take Deposition, see Depositions. Of Sale under Judicial Process, see Executions; Mortgages. Of Term of Court, see Courts. Of Trial, see Criminal Law; Trial. See also Continuances.)

ADJOURNMENT-DAY. A further day appointed by the judges at the *nisi prius* sittings to try issues in fact which were not then ready for trial.[9]

ADJOURNMENT DAY IN ERROR. A day appointed some days before the end of the term at which matters left undone on the affirmance day are finished.[10]

ADJOURNMENT IN EYRE. The appointment of a day when the justices in eyre mean to sit again.[11]

ADJUDGE. To decide or determine[12] judicially;[13] used also in the past tense in the sense of "deemed."[14]

ADJUDICARE. To adjudge; to determine; and, in old English law, to forjudge.[15]

ADJUDICATAIRE. A term used in Canadian law to denote a purchaser at a sheriff's sale.[16]

"**Adjournment is the act of separation** and departure; until this has fairly taken place the act is incomplete. Giving the order to adjourn, and rising preparatory to separation, is not actual adjournment, if the judges are yet on the bench, and those who are concerned in the business before them remain." Person *v.* Neigh, 52 Pa. St. 199.

Distinguished from "prorogation." — "The diversity between a prorogation and an adjournment or continuance of the parliament is, that by the prorogation in open court there is a session, and then such bills as passed in either house, or by both houses, and had no royal assent to them, must, at the next assembly, begin again; . . . but if it be only adjourned or continued, all things continue in the same state they were in before the adjournment or continuance." Wetmore *v.* Story, 22 Barb. (N. Y.) 414, 494 [*citing* Bacon Abr. tit. Court of Parliament, F.].

8. 1 Bl. Comm. 186; Cheyney *v.* Smith, (Ariz. 1890) 23 Pac. 680, 685; Trammell *v.* Bradley, 37 Ark. 374, 379; People *v.* Draper, 28 Hun (N. Y.) 1, 3; Division of Lansford Borough, 141 Pa. St. 134, 137, 21 Atl. 503.

An adjourned term, therefore, is but a continuance of the regular term. Van Dyke *v.* State, 22 Ala. 57, 60; Harris *v.* Gest, 4 Ohio St. 469, 473; Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106, 109, 5 L. ed. 217. But see Belton *v.* Halsey, 1 Root (Conn.) 221, where the court said that an adjourned court is a distinct term, for many purposes, as much as a stated court; the one is constituted immediately by the law, the other mediately by the judges.

It is distinguishable from an "additional term," which is a distinct term and not a prolongation of a regular **term.** Harris *v.* Gest, 4 Ohio St. 469, 473.

9. Wharton L. Lex.

10. Bouvier L. Dict.

11. Black L. Dict.

12. Edwards *v.* Hellings, 99 Cal. 214, 215, 33 Pac. 799; U. S. *v.* Hing Quong Chow, 53 Fed. 233.

13. The word can be predicated only of an act of the court. Searight *v.* Com., 13 Serg. & R. (Pa.) 301, 303.

14. State *v.* Price, 11 N. J. L. 241, 258, wherein it is said: "The word 'adjudged' is here used by the legislature, perhaps not very aptly, as synonymous with 'deemed;' which latter word is frequently found in correspondent places. They have so employed the word 'adjudged' in the act respecting lotteries. . . . 'All lotteries shall be and are hereby adjudged to be common and public nuisances.'" See also Blaufus *v.* People, 69 N. Y. 107, 111, 25 Am. Rep. 148, where the court said: "The learned counsel for the plaintiff in error contends that there is no difference in meaning between the words 'deemed' and 'adjudged,' used in the penal enactments of the Revised Statutes, and urges that the word 'adjudged,' in the section under consideration, should be read as if written 'deemed.' It is, perhaps, enough to say that it, in fact, reads 'adjudged,' and that whatever difference there is between the two terms, is in favor of our interpretation of the statute. Moreover, the phrase 'deemed,' is not in its meaning, when used in legislative expression, so much more favorable to the plaintiff in error, as to turn us from our view of the question. To 'damn' or 'condemn,' is 'to deem, think or judge any one, to be guilty, to be criminal — to give judgment, or sentence, or doom of guilt; to adjudge, or declare the penalty or punishment' (Rich. Dict., in *voce, damn*); and 'judge not, that ye be not judged,' of our New Testament, is 'Nyle ye deme, that ghe be not demed,' of Wicliffe."

15. Burrill L. Dict.

16. Desjardins *v.* La Banque du Peuple, 10 L. C. Rep. 325; Meath *v.* Fitzgerald, 1 L. C. Rep. 241.

ADJUDICATION. A solemn or deliberate determination by the judicial power; the act of giving judgment.[17] (Adjudication: Decisions of Courts Generally, see COURTS; JUDGMENTS. Effect of Former, see CRIMINAL LAW; JUDGMENTS. Of Bankruptcy, see BANKRUPTCY. Of Insolvency, see INSOLVENCY.)

ADJUNCTION. One of the modes of accession borrowed from the Roman law.[18] (See generally ACCESSION.)

ADJUNCTS. Additional judges;[19] also words used to modify or describe other words in a sentence.[20]

AD JURA REGIS. A writ brought by the king's clerk, presented to a living, against those that endeavor to eject him, to the prejudice of the king's title.[21]

ADJURATION. A swearing or binding upon oath.[22]

ADJUST. To settle or bring to a satisfactory state; to determine an amount due;[23] to fit or make accurate.[24]

ADJUSTER. One who determines the amount of a claim.[25]

ADJUSTMENT. A settlement or determination of the relative rights of parties, or of the sum due upon a demand.[26] (Adjustment: Of Controversy by Parties, see ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT. Of Loss Within Policy of Insurance, see INSURANCE.)

ADLEGIARE. To purge one's self of a crime by oath.[27]

ADMEASUREMENT. A measuring out; an assignment by measure; an adjustment, or allotment, according to certain fixed limits, or in certain proportions. Also the name of the writ for making such assignment or adjustment, and which lay at common law against persons who usurped more than their share of any right or privilege.[28]

ADMEASUREMENT OF DOWER. A writ to which an heir is entitled where a man's widow, after his decease, holds from the heir more land as dower than of right belongs to her; or where the heir being within age, or his guardian, has assigned to her more than she ought to have.[29] (See DOWER.)

ADMEASUREMENT OF PASTURE. A writ which lay at common law between those who had common of pasture appendant or by vicinage, in cases where any one or more of them surcharged the common with more cattle than they ought.[30]

AD MELIUS INQUIRENDUM. Literally, to inquire better. A writ directed to a coroner commanding him to hold a second inquest.[31]

ADMENSURARE. In old English law, to admeasure.[32]

ADMENSURATIO. In old English law, ADMEASUREMENT,[33] *q. v.*

ADMINICLE. Aid; help; support.[34]

17. Street *v.* Benner, 20 Fla. 700, 713 [*citing* Abbott L. Dict.]; Irwin *v.* U. S. 23 Ct. Cl. 149, 154.

To adjudicate is to determine in the exercise of judicial power. Street *v.* Benner, 20 Fla. 700, 713; Irwin *v.* U. S., 23 Ct. Cl. 149, 154.

18. Abbott L. Dict.

19. Wharton L. Lex.; Tyrrell *v.* Marsh, 3 Hagg. Ecc. 471.

20. Sanderson, C. J., in dissenting opinion in Bourland *v.* Hildreth, 26 Cal. 161, 232, where he further said: "If they modify the subject or object, they consist of adjective words, phrases or sentences. If they modify the predicate, they consist of adverbial words, phrases or sentences. They are primary and secondary; the former attend upon the principal parts of a sentence, and the latter upon other adjuncts."

21. Jacob L. Dict.

22. Wharton L. Lex.

23. *Connecticut.*—State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924 [*citing* Anderson L. Dict.].

Iowa.— Lynch *v.* Nugent, 80 Iowa 422, 429, 46 N. W. 61.

Nebraska.— State *v.* Moore, 40 Nebr. 854, 861, 59 N. W. 755 [*citing* Webster Dict.].

New York.— New York *v.* Hamilton F. Ins. Co., 39 N. Y. 45, 47 [*citing* Webster Dict.].

Virginia.— Townes *v.* Birchett, 12 Leigh (Va.) 173, 201.

24. Washington County *v.* St. Louis, etc., R. Co., 58 Mo. 372, 376.

25. Anderson L. Dict.

26. Abbott L. Dict.

27. Jacob L. Dict.

28. Burrill L. Dict.

29. Burrill L. Dict.

30. Burrill L. Dict.

The remedy is abolished in both England and the United States. Bouvier L. Dict.

31. Wharton L. Lex. [*citing* Reg. *v.* Carter, 45 L. J. Q. B. 711].

32. Burrill L. Dict.

33. Black L. Dict.

34. Jacob L. Dict.

In Scotch law the term is applied to any deed tending to establish the existence or

ADMINICULAR. Auxiliary to.[35]

ADMINICULUM. An aid or support to something else, but principally used to designate evidence adduced in aid or support of other evidence which without it is imperfect.[36]

ADMINISTER. To furnish; to give; to dispense;[37] to direct or cause to be taken;[38] to fulfill the functions of or perform the duties of an administrator.[39]

ADMINISTRATION. A term applied broadly to denote the management of an estate by a person appointed by authority of law to take charge thereof in place of the legal owner.[40] (Administration: Of Estate — Assigned for Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Of Bankrupt, see BANKRUPTCY; Of Decedent, see EXECUTORS AND ADMINISTRATORS; Of Infant, see GUARDIAN AND WARD; Of Insolvent, see INSOLVENCY. Of Property in Hands of Receiver, see RECEIVERS.)

ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATION SUIT. A suit brought in chancery, in English practice, by any one interested, for administration of a decedent's estate, when there is doubt as to its solvency.[41]

ADMIRAL. A high officer or magistrate having the government of the king's navy, and, in his court of admiralty, the determining of all cases belonging to the sea and offenses committed thereon.[42]

ADMIRALITAS. Admiralty; the admiralty, or court of admiralty.[43]

ADMIRALITAS JURISDICTIONEM NON HABET SUPER IIS QUÆ COMMUNI LEGE DIRIMUNTUR. A maxim meaning "a court of admiralty has no jurisdiction over those things which are determined by common law.[44]

terms of a deed which is lost. Wharton L. Lex.

35. As in the expression "the murder would be adminicular to the robbery," used by Story, J., in The Marianna Flora, 3 Mason (U. S.) 116, 121, 16 Fed. Cas. No. 9,080.

Adminicular evidence, in ecclesiastical law, is evidence brought in to explain and complete other evidence. Bouvier L. Dict. [*citing* Moore *v.* Paine, 2 Lee Ecc. 595].

36. Brown L. Dict.

37. Brinson *v.* State, 89 Ala. 105, 110, 8 So. 527; La Beau *v.* People, 34 N. Y. 223, 233 [*affirming* 6 Park. Crim. (N. Y.) 371, 33 How. Pr. (N. Y.) 66]; People *v.* Quin, 50 Barb. (N. Y.) 128.

"The word 'minister' is said to be derived from the same root as the Latin word *manus*, the hand. Etymologically, therefore, the word 'administer' would seem applicable to anything that could be done by the hand, to or for another." Blackburn *v.* State, 23 Ohio St. 146, 162.

38. Brinson *v.* State, 89 Ala. 105, 110, 8 So. 527; La Beau *v.* People, 34 N. Y. 223, 233 [*affirming* 6 Park. Crim. (N. Y.) 371, 33 How. Pr. (N. Y.) 66].

39. Lanier *v.* Irvine, 21 Minn. 447, 448.

Imports alteration, change, or conversion.— "In the case of Coleman *v.* McMurdo, 5 Rand. (Va.) 51, the word *administer* is defined by two of the Judges, in their opinions, to be equivalent to 'alter, change, or convert,' and we think these words, properly understood, may, for all necessary purposes, be regarded as a correct definition of the term." Gregory *v.* Harrison, 4 Fla. 56, 66.

40. Bouvier L. Dict.

41. Stimson L. Gloss.

42. Jacob L. Dict., wherein it is said that the office is now executed by commissioners, who, by statute, are declared to have the same authorities, jurisdictions, and powers as the Lord High Admiral, who is usually understood by this term in law, not adverting to the naval distinction.

43. Burrill L. Dict.

44. Morgan Leg. Max. [*citing* Lofft 479].

ADMIRALTY

By Isaac N. Huntsberger

CROSS-REFERENCES

For Matters Relating to:

Applicability of Local Ordinances, see COLLISION.
Authority of Master to Bind Ship or Represent Cargo, see SHIPPING.
Collisions, see COLLISION.
Criminal Jurisdiction, see CRIMINAL LAW.
Custody of Property Seized for Violation of Customs Regulations, see CUSTOMS DUTIES.
Deposit of Ship's Papers with Consular Representative, see SHIPPING.
Enforcement of State Statutory Liens, see MARITIME LIENS; SHIPPING.
Indictments for Offenses Committed on High Seas, see INDICTMENTS AND INFORMATIONS.
Liability of Marshal for Destruction of Vessel in His Possession, see UNITED STATES MARSHALS.
Liability of Sheriff for Releasing Attachment of Vessel, see SHERIFFS AND CONSTABLES.
Liability of Ship-Owners, see SHIPPING.

For Matters Relating to — (*continued*)
Liability of Vessel Carrying Excessive Number of Passengers, see SHIPPING.
Maritime Contracts, see MARINE INSURANCE; MARITIME LIENS; SALVAGE; SEAMEN; SHIPPING; TOWAGE; WHARVES.
Maritime Liens, see MARITIME LIENS.
Maritime Offenses, see CRIMINAL LAW; NEUTRALITY LAWS; PIRACY.
Maritime Torts, see COLLISION; SHIPPING.
Minority Owners Objecting to Voyage, see SHIPPING.
Pilots, see PILOTS.
Power of Proctor to Settle Claims, see ATTORNEY AND CLIENT.
Prize Cases, see WAR.
Proceedings for Limitation of Ship-Owner's Liability, see SHIPPING.
Prohibition to District Courts in Admiralty, see PROHIBITION.
Regulations of Commerce, see COMMERCE; NAVIGABLE WATERS.
Remedies of Employee for Injuries, see MASTER AND SERVANT; SHIPPING.
Salvage, see SALVAGE.
Seamen, see SEAMEN.
Shipping, see SHIPPING.
Towage, see TOWAGE.
Violation of Customs Regulations, see CUSTOMS DUTIES.
Violation of Neutrality Laws, see NEUTRALITY LAWS.
Wharfage, see WHARVES.
Wreck, see SHIPPING.

I. DEFINITION.

Admiralty is that branch or department of jurisprudence which relates to and regulates maritime property, affairs, and transactions, whether civil or criminal.[1] In a more limited sense it is the tribunal exercising jurisdiction over maritime causes and administering the maritime law by a procedure peculiar to itself and distinct from that followed by either courts of equity or of common law.[2]

II. ORIGIN AND GROWTH.

A. Early History under the Civil Law. Admiralty courts owe their origin and procedure largely to the civil law,[3] which prevailed in Italy and along the north coast of the Mediterranean, where naval commerce was originally most active, and where, after the fall of the Western Empire, the merchants and traders by sea brought about the establishment of a court of consuls in each of the principal maritime cities to hear causes arising out of maritime commerce and property.[4] The judges of these consular courts were chosen on Christmas of each year by the chief merchants,[5] and they enforced and applied to controversies the customs of the sea, whose origin is long anterior to the civil law itself.[6] These courts gradually developed and extended their jurisdiction, as maritime commerce became more profitable and important, until ultimately, in most states, they were merged into, and became known as, courts of admiralty.[7]

1. Benedict Adm. (3d ed.) §§ 3, 4, 10, 33, 38–40; 2 Browne Civ. & Adm. L. c. 1.

2. Bouvier L. Dict.; Benedict Adm. (3d ed.) §§ 189–191, 347, 358; 2 Parsons Mar. L. 508.

3. New England Mut. Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Coke Litt. 11*b*; Zouch Adm. Jur. 88; Benedict Adm. (3d ed.) § 5.

4. De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Bouvier L. Dict. [*citing* 1 Pardessus Lois Maritimes 201; Ordonnance de Valentia (1283), c. 1, §§ 22, 23]; 2 Browne Civ. & Adm. L. 30; Zouch Adm. Jur. 87.

5. Ordonnance de Valentia (1283), c. 1, §§ 22, 23 [*cited* in Bouvier L. Dict.].

6. New England Mut. Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 400, 7 Fed. Cas. No. 3,776; 1 Valin Comm. 1.

7. De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Benedict Adm. (3d ed.) § 4; Zouch Adm. Jur. 87.

Ancient maritime codes and writers.— The most celebrated and important codes or collections of the usages, laws, and customs of

B. In England. In England admiralty courts were established about the same time, and originally had about the same jurisdiction, as in the other states of Europe;[8] but owing to the hostility which, from historic causes, gradually developed in England against the civil law, the jurisdiction of admiralty was there greatly restricted and limited, both by statute[9] and by decisions of the common-law courts interpreting the same.[10] A reaction in favor of the admiralty courts has now taken place, however, and by acts of parliament they have regained much of their lost jurisdiction,[11] and have acquired jurisdiction over all claims for damages done by any ship, whether on land or water.[12]

C. In the United States. In the United States it has been finally determined that the admiralty jurisdiction is not to be limited by either the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and object, and with reference to analogous jurisdiction in other countries constituting the maritime commercial world, as well as that of England.[13]

III. Courts.

A. Constitutional Authority. The United States constitution provides that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."[14]

B. Distribution of Power — 1. District Courts. Under this provision congress, by the judiciary act of 1789, vested in the district courts exclusive jurisdiction of all admiralty and maritime causes of a civil nature, excepting particular cases over which the circuit court was given jurisdiction, but including all seizures under the laws of impost, navigation, or trade of the United States, made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; but saving to suitors in all cases the right of a common-law remedy where the common law was competent to give it.[15]

the sea are the following: Consolato del Mare, contained in the collection of maritime laws of Pardessus; Le Guidon, edited by Cleirac; Laws of Oleron, Laws of Wisbuy, and Ordonnance de la Marine, of Louis XIV, published in 1681, all three of which are contained in the appendixes to Peters' Admiralty Reports, from which they are reprinted in 30 Fed. Cas. p. 1171 *et seq.* Valin's Commentary upon the last named is an admirable work, and Cleirac's volume Us et Coustumes de la Mer, published in France in 1647, is also an excellent compilation and commentary upon nearly all of the foregoing codes, and, in addition, contains various ordinances of France, Spain, and the Netherlands concerning admiralty jurisdiction. A more original treatise is that of Roccus, a Neapolitan jurisconsult, published in 1655, a condensation of which was issued in Amsterdam in 1708, under the title De Navibus et Naulo, which sets forth in systematic arrangement the whole law merchant of that day as it was then practised. The Discursus Legale of Casaregis, an Italian lawyer of the eighteenth century, covers the commercial and maritime law, and includes an edition of the Consolato del Mare, with a complete commentary thereon. The works of Pothier also treat of maritime and commercial law with great ability.

8. De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; The Jerusalem, 2 Gall. (U. S.) 345, 13 Fed. Cas. No. 7,294; Benedict Adm. (3d ed.) c. 5.

9. 13 Rich. II, c. 5; 15 Rich. II, c. 3.

10. New England Mut. Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; The Jerusalem, 2 Gall. (U. S.) 345, 13 Fed. Cas. No. 7,294; Benedict Adm. (3d ed.) c. 6; Zouch Adm. Jur. 36.

11. 3 & 4 Vict. c. 65; 9 & 10 Vict. c. 99, § 40.

Functions of court transferred.— The admiralty court was abolished in 1873 by the Judicature Act, and its functions were transferred to the probate, divorce, and admiralty divisions of the high court of justice.

12. Admiralty Court Act (1861), §§ 7, 35; The Bernina, 12 P. D. 58, 11 P. D. 31, 13 App. Cas. 1.

13. New England Mut. Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Benedict Adm. (3d ed.) §§ 7, 19, 29–31.

Its boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction were granted to the federal government. The Steamer St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058.

14. U. S. Const. art. 3, § 2.

15. U. S. Rev. Stat. (1878), §§ 563, cl. 8; 711, cl. 3.

2. Circuit Courts. Certain prize and seizure cases were also placed within the concurrent jurisdiction of the circuit courts,[16] and in case of the disability of the district judge all admiralty cases pending in the district court may, on application to the circuit justice by the district attorney or marshal, be certified into the circuit court for trial and disposition.[17] The circuit court has original jurisdiction also in certain cases described in the next paragraph,[18] but has no longer any appellate jurisdiction over the district court.[19]

3. Court of Claims. The court of claims, in 1887, was given jurisdiction of maritime and other suits against the government, in cases not sounding in tort, concurrent with the district court, for amounts not exceeding $1,000, and with the circuit court for amounts above that sum;[20] but this does not extend to proceedings *in rem* against government vessels, it being against public policy to permit the possession of government property to be disturbed.[21]

4. Circuit Courts of Appeals. By the act establishing circuit courts of appeals,[22] jurisdiction of appeals in admiralty cases, irrespective of the amount involved, was vested in the circuit court of appeals, and its decisions were made final except that at any time it may certify to the supreme court any question or proposition of law concerning which it desires the instructions of that court for its proper decision; and the supreme court may also require, by certiorari or otherwise, any case to be certified to it by the circuit court of appeals, for review and determination, in the same manner as if it had been carried by error or appeal to the supreme court.[23]

5. Supreme Court. In addition to the appellate jurisdiction by certiorari and over questions certified to it by the circuit court of appeals,[24] the supreme court was given, by the act of March 3, 1891,[25] exclusive jurisdiction by appeal or writ of error direct from the district courts or from the existing circuit courts in certain cases, regardless of the amount involved,[26] and in all cases not made final in

There is no limitation as to the size of vessels or as to the water's being navigable from the sea, as the former section now stands.

16. U. S. Rev. Stat. (1878), §§ 629, cl. 6, 7; 5309, relating respectively to the slave-trade and to condemnation of property employed in aid of insurrection against the government of the United States within U. S. Rev. Stat. (1878), § 5308.

17. U. S. Rev. Stat. (1878), §§ 587, 588.

18. See *infra*, III, B, 3.

19. U. S. Rev. Stat. (Suppl. 1891), p. 903, § 4. See also *infra*, III, B, 4.

20. U. S. Rev. Stat. (Suppl. 1891), p. 559, c. 359; U. S. *v.* Morgan, 99 Fed. 570, 39 C. C. A. 653; The Viola, 55 Fed. 829, 3 U. S. App. 637, 5 C. C. A. 283 [*affirming* 52 Fed. 172].

21. The Davis, 10 Wall. (U. S.) 15, 19 L. ed. 875; U. S. *v.* Morgan, 99 Fed. 570, 39 C. C. A. 653; Briggs *v.* Light-Boat Upper Cedar Point, 11 Allen (Mass.) 157.

22. Act of March 3, 1891 (U. S. Rev. Stat. (Suppl. 1891), p. 901, c. 517).

23. U. S. Rev. Stat. (Suppl. 1891), p. 903, § 6; The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

24. See *supra*, III, B, 4.

25. U. S. Rev. Stat. (Suppl. 1891), p. 903, § 5.

Former practice.— Under the act of Feb. 16, 1875, the circuit courts, in deciding admiralty causes on the instance side of the court, were required to find and state the facts and their conclusions of law separately; and upon appeal the supreme court was limited to a determination of the questions of law arising upon the record and to such rulings of the circuit court, excepted to at the time, as might be presented by bill of exceptions; and the findings of facts of the latter court were conclusive on the supreme court. U. S. Rev. Stat. (Suppl. 1891), p. 62, c. 77; Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742; The City of New York, 147 U. S. 72, 13 S. Ct. 211, 37 L. ed. 84; The Gazelle, 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496; Sun Mut. Ins. Co. *v.* Ocean Ins Co., 107 U. S. 485, 1 S. Ct. 582, 27 L. ed. 337; The Annie Lindsley, 104 U. S. 185, 26 L. ed. 716; The Abbotsford, 98 U. S. 440, 25 L. ed. 168.

26. **The cases included were** appeals "from the final sentences and decrees in prize causes; in cases of conviction of a capital or otherwise infamous crime; in any case that involves the construction or application of the constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; or in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States; and cases in which the jurisdiction of the court is in issue;" but in this last class of cases only the question of jurisdiction can be certified to the supreme court for decision. U. S. Rev. Stat. (Suppl. 1891), p. 903, § 5.

As to crimes, however, the appellate jurisdiction of the supreme court direct from the district court was transferred to the circuit

the circuit court of appeals where the amount in controversy exceeds $1,000 exclusive of costs, provided the appeal be taken or the writ be sued out within one year after the entry of the order, judgment, or decree sought to be reviewed.[27]

6. Territorial Courts. It is competent for congress to vest admiralty jurisdiction in the courts of the territories, and such jurisdiction has generally been conferred upon them.[28]

IV. Jurisdiction.

A. In General — 1. Nature and Scope. The jurisdiction of admiralty courts in the United States includes only maritime causes, or such as arise out of commerce and navigation upon the high seas or the navigable waters of the United States.[29] The test of such jurisdiction is the nature of the claim on which the suit is founded,[30] and not the form of remedy resorted to.[31] The jurisdiction is complete in its nature, extending to the person as well as to the *res*.[32]

2. By What Law Governed — a. In General. While the admiralty courts of the United States are governed in general by the same principles of maritime law as the courts of the maritime nations of continental Europe,[33] their jurisdiction does

court of appeals by the act of Jan. 20, 1897 (U. S. Rev. Stat. (Suppl. 1897), p. 541, c. 68) except on conviction for a capital offense.

27. U. S. Rev. Stat. (Suppl. 1891), p. 904, § 6; The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

28. *In re* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; The City of Panama, 101 U. S. 453, 25 L. ed. 1061; American Ins. Co. *v.* Three Hundred and Fifty-Six Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242; American Ins. Co. *v.* Fisk, 1 Paige (N. Y.) 90; Phelps *v.* The Steamship City of Panama, 1 Wash. Terr. 518.

29. People *v.* The Steamer America, 34 Cal. 676.

Admiralty jurisdiction owes its existence chiefly to the fact that common-law tribunals, by reason of their modes of procedure and their doctrine that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and navigable waters of the earth. The Arkansas, 5 McCrary (U. S.) 364, 17 Fed. 383.

30. American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303; Steamer Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397.

31. Steamer Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397. But see Home Ins. Co. *v.* Northwestern Packet Co., 32 Iowa 223, 7 Am. Rep. 183, holding that U. S. Const. art. 3, § 2, does not apply to an action for loss of goods against a carrier operating upon the Mississippi river if the proceeding be by an action at law or in chancery according to the forms of the common law.

Diverse citizenship of parties.— Admiralty jurisdiction is not dependent upon diversity of citizenship, but extends to suits between citizens of the same state. Zollinger *v.* The Emma, 30 Fed. Cas. No. 18,218, 3 Centr. L. J. 285, 22 Int. Rev. Rec. 154; Peyroux *v.* Howard, 7 Pet. (U. S.) 324, 8 L. ed. 700, 19 Fed. Cas. No. 11,207.

32. Stevens *v.* The Sandwich, 1 Pet. Adm. 233, 23 Fed. Cas. No. 13,409.

33. The Steamboat New York *v.* Rea, 18 How. (U. S.) 223, 15 L. ed. 359; Kynoch *v.* The Propeller S. C. Ives, Newb. Adm. 205, 14 Fed. Cas. No. 7,958; Mutual Safety Ins. Co. *v.* The Ship George, Olc. Adm. 89, 17 Fed. Cas. No. 9,981; The Seneca, 3 Wall. Jr. C. C. (U. S.) 395, 21 Fed. Cas. No. 12,670; Davis *v.* The Brig Seneca, Gilp. (U. S.) 10, 7 Fed. Cas. No. 3,650; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

Usages of foreign countries not obligatory. — The maritime usages of foreign countries are not obligatory upon the courts of the United States and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. The Elfrida, 172 U. S. 186, 19 S. Ct. 146, 43 L. ed. 413 [*reversing* 77 Fed. 754, 41 U. S. App. 585, 23 C. C. A. 527].

Effect of municipal regulations.— The admiralty courts will enforce municipal regulations which affect the equipment, position, or management of vessels within particular jurisdictions (Culbertson *v.* The Steamboat Southern Belle, Newb. Adm. 461, 6 Fed. Cas. No. 3,462; Vandewater *v.* Westervelt, 28 Fed. Cas. No. 16,846*a*), but such ordinances are binding only as police regulations (The Palmetto, 1 Biss. (U. S.) 140, 18 Fed. Cas. No. 10,699).

Concerning the original admiralty jurisdiction, Story, J., in De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 400, 7 Fed. Cas. No. 3,776, said: "What was originally the nature and extent of the jurisdiction of the Admiralty cannot now with absolute certainty be known. It is involved in the same obscurity, which rests on the original jurisdiction of the Courts of common law. It seems, however, that, at a very early period, the Admiralty had cognizance of all questions of prize; of torts and offenses, as well in ports within the ebb and flow of the tide, as upon the high seas; of maritime contracts and navigation; and also the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas. The forms of its proceedings were borrowed from the civil law; and the

not extend to all cases which would fall within the jurisdiction of such courts, and the exact nature and extent thereof must be determined by the laws of congress and the decisions of the United States supreme court[34] and by the usages prevailing in the courts of the states at the time the federal constitution was adopted.[35]

b. English Common-Law Decisions. The jurisdiction of the federal courts is not limited to the particular subjects over which the admiralty courts of England exercised jurisdiction when the federal constitution was adopted,[36] and the decisions of the English common-law courts upon the jurisdiction of the admiralty are not binding on the courts of this country.[37]

c. Federal Statutes. The jurisdiction of the federal courts in admiralty rests solely upon the constitution of the United States, and such jurisdiction is not dependent upon and cannot be enlarged or abridged by congress under its power to regulate commerce between the states and foreign nations.[38]

d. State Statutes. The states of the union have no power to enlarge the admiralty jurisdiction of the federal courts by statute.[39]

rules by which it was governed, were, as is every where avowed, the ancient laws, customs and usages of the seas. In fact, there can scarcely be the slightest doubt, that the Admiralty of England, and the maritime Courts of all the other powers of Europe, were formed upon one and the same common model; and that their jurisdiction included the same subjects, as the consular courts of the Mediterranean. These courts are described in the Consolato del Mare, as having jurisdiction of 'all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas or on the shore; of the armament or equipment of ships, galleys or other vessels; and generally of all other contracts declared in the customs of the sea.'"

34. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373.

35. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373; Cope *v.* Vallette Dry-Dock, 10 Fed. 142 [*affirmed* in 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501]; The Huntsville, 12 Fed. Cas. No. 6,916; Cunningham *v.* Hall, 1 Cliff. (U. S.) 43, 6 Fed. Cas. No. 3,481; Scott *v.* The Propeller Young America, Newb. Adm. 101, 21 Fed. Cas. No. 12,549; Bains *v.* The Schooner James and Catherine, Baldw. (U. S.) 544, 2 Fed. Cas. No. 756; Thompson *v.* The Ship Catharina, 1 Pet. Adm. 104, 23 Fed. Cas. No. 13,949.

Depends on laws and usages of particular country.—Maritime law is only so far operative in any country as it is adopted by the laws and usages of that country. The Scotland, 105 U. S. 24, 26 L. ed. 1001.

36. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373; Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226; Steele *v.* Thacher, 1 Ware (U. S.) 85, 22 Fed. Cas. No. 13,348.

37. The Stephen Allen, Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 13,361; The Seneca, 3 Wall. Jr. C. C. (U. S.) 395, 21 Fed. Cas. No. 12,670; Davis *v.* The Brig Seneca, Gilp. (U. S.) 10, 7 Fed. Cas. No. 3,650; Steele *v.* Thacher, 1 Ware (U. S.) 85, 22 Fed. Cas. No. 13,348; Stevens *v.* The Sandwich, 1 Pet. Adm. 233, 23 Fed. Cas. No. 13,409. But see U. S. *v.* Seven Hundred and Three Casks of Rice, 27 Fed. Cas. No. 16,253*b*, holding that the practice of the federal courts in admiralty is governed by the rules of admiralty law found in the English reports.

The principles of equity rather than the strict rules of common law are the controlling principles upon which courts of admiralty act. O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469 [*citing* The Ship Virgin *v.* Vyfhius, 8 Pet. (U. S.) 538, 8 L. ed. 1036; Pope *v.* Nickerson, 3 Story (U. S.) 465, 19 Fed. Cas. No. 12,274].

38. The Belfast, 7 Wall. (U. S.) 624, 19 L. ed. 266 [*overruling* Maguire *v.* Card, 21 How. (U. S.) 248, 16 L. ed. 118]; The Propeller Commerce, 1 Black (U. S.) 574, 17 L. ed. 107; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058; U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443, 4 West. L. Month. 281; Scott *v.* The Propeller Young America, Newb. Adm. 101, 21 Fed. Cas. No. 12,549; Franconet *v.* The Propeller F. W. Backus, Newb. Adm. 1, 9 Fed. Cas. No. 5,048. See also *infra*, IV, B, 1, b, (I).

39. The Steam-boat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; The Manhasset, 18 Fed. 918; Gill *v.* The Continental, 10 Fed. Cas. No. 5,425, 8 West. Jur. 232; Harrison *v.* The Anna Kimball, Hoffm. Op. 464, 11 Fed. Cas. No. 6,132; The Coernine, 5 Fed. Cas. No. 2,944, 7 Am. L. Reg. 5, 21 Law Rep. 343. See also *infra*, IV, E, 3, b.

Effect of adoption of state laws by congress.—The jurisdiction of the district courts in admiralty and maritime cases is not ousted by the adoption of state laws by act of congress. Such acts only give concurrent jurisdiction to the state courts, and limit the recovery in the United States courts to the sum to which the party is entitled by the state law so adopted. Hobart *v.* Drogan, 10 Pet. (U. S.) 108, 9 L. ed. 363.

3. Effect of Concurrent Remedy at Common Law. The fact that courts of common law have concurrent jurisdiction in a case with the admiralty does not take away the admiralty jurisdiction.[40]

4. Effect of Removal of Res. Jurisdiction once acquired by possession of the *res* is not lost by its subsequent removal beyond the territorial jurisdiction of the court.[41]

5. Saving of Common-Law Remedy — a. In General. Whenever the federal courts have original cognizance of admiralty causes, that cognizance is exclusive, and no other court, state or national, can exercise it;[42] but the grant of admiralty jurisdiction was not intended to deprive suitors of any remedies afforded by the common law, either in state or federal courts, and, to make this clear, congress inserted in the judiciary act of 1789 a clause "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."[43]

b. Meaning of "Common-Law Remedy" — (I) *In General.* The clause saving to suitors a common-law remedy where the common law is competent to give it is intended to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings,[44] and the words "common-law remedy" do not necessarily imply an action or remedy obtainable in a common-law court, but are equivalent to "the means employed to enforce a right or redress an injury,"[45] nor are they limited to such causes of action as were known to the common law at the time of the passage of the judiciary act.[46]

(II) *Personal Actions* — (A) *Generally.* Where no process is served upon, nor any remedy is sought against, the vessel, but only a personal judgment against the owners is prayed, the case is not within the exclusive jurisdiction of the federal courts, but, whether the action be one of contract[47]

40. Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226; Dike *v.* Propeller St. Joseph, 6 McLean (U. S.) 573, 7 Fed. Cas. No. 3,908. See also *infra*, IV, A, 5.

41. *In re* Morrison, 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60; The Rio Grande, 23 Wall. (U. S.) 458, 23 L. ed. 158; U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 347, 26 Fed. Cas. No. 15,612; Otis *v.* The Rio Grande, 1 Woods (U. S.) 279, 18 Fed. Cas. No. 10,613.

42. The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; The Ferry Steamers Norfolk and Union, 2 Hughes (U. S.) 123, 18 Fed. Cas. No. 10,297; Steamer Rio Grande *v.* Rawson, 42 Ala. 133; Fisher *v.* Luling, 33 N. Y. Super. Ct. 337; The Steamboat General Buell *v.* Long, 18 Ohio St. 521; Campbell *v.* Sherman, 35 Wis. 103.

43. U. S. Rev. Stat. (1878), § 563, cl. 8; The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028; Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226; Steamer Rio Grande *v.* Rawson, 42 Ala. 133; The Steamboat General Buell *v.* Long, 18 Ohio St. 521.

Constitutionality of statute.— In Home Ins. Co. *v.* Northwestern Packet Co., 32 Iowa 223, 7 Am. Rep. 183, it was held that this provision of congress was not in conflict with U. S. Const. art. 3, § 2.

The act of 1845 by which admiralty jurisdiction was extended to the lakes did not take away the concurrent remedy that existed at common law. The Globe, 2 Blatchf. (U. S.) 427, 10 Fed. Cas. No. 5,483; Tug Boat E. P. Dorr *v.* Waldron, 62 Ill. 221, 14 Am. Rep. 86; Thompson *v.* Steamboat Julius D. Morton, 2 Ohio St. 26.

44. Chase *v.* American Steamboat Co., 9 R. I. 419, 11 Am. Rep. 274.

45. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921 [*affirming* 178 Ill. 107, 52 N. E. 898]; Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981; The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. ed. 397.

46. Walter *v.* Kierstead, 74 Ga. 18; Dougan *v.* Champlain Transp. Co., 6 Lans. (N. Y.) 430.

47. Conrad *v.* De Montcourt, 138 Mo. 311, 39 S. W. 805; Brown *v.* Gilmore, 92 Pa. St. 40.

See 1 Cent. Dig. tit. "Admiralty," § 18 *et seq.*

Contracts of affreightment.—The existence of a remedy in admiralty against a vessel for breach of a contract of affreightment does not prevent a state court entertaining a common-law action against the owners. Parisot *v.* Helm, 52 Miss. 617; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248.

Goods sold and delivered.— State courts have jurisdiction of actions to recover from the owners the value of goods sold and delivered at the request of the master, although for use of a vessel engaged in navigating the high seas. Crawford *v.* Roberts, 50 Cal. 235.

Marine insurance.— Courts of common law have a jurisdiction concurrent with the admiralty over contracts of marine insurance. De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248.

or whether it be one sounding in tort, the state courts will be held to have jurisdiction thereof.[48]

(B) *Ancillary Attachment.* If a suit be *in personam* against an individual defendant, with an ancillary attachment against a particular thing or against defendant's property in general, it is essentially a proceeding according to the course of the common law and within the saving clause of the statute, even though the claim sued on be maritime and the property attached be a vessel on navigable waters.[49]

(C) *Suits in Equity.* A suit in equity is within the saving clause where it is brought against individuals.[50]

(III) *Replevin.* There is nothing in the laws of the United States impairing

Pilotage.—Jurisdiction of admiralty courts of cases of pilotage services is not exclusive of the state courts in the absence of any legislative provision on the subject. The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131, 29 Fed. Cas. No. 17,300.

Salvage.— The courts of common law of the several states have jurisdiction to enforce claims for salvage where, in other respects, the case comes within their jurisdiction, and to this extent the jurisdiction of the admiralty courts is concurrent and not exclusive. Hunter *v.* St. Louis, etc., Transp. Co., 25 Mo. App. 660; Cashmere *v.* De Wolf, 2 Sandf. (N. Y.) 379; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248. But see Frith *v.* Crowell, 5 Barb. (N. Y.) 209, wherein the supreme court of New York declined to entertain a complaint alleging that plaintiffs were the owners of certain property on which defendants claimed a lien for salvage, and praying the court to determine if such lien existed, its extent (if any), and that a receiver be appointed pending the suit.

48. Trevor *v.* The Ad. Hine, 17 Iowa 349; Brown *v.* Gilmore, 92 Pa. St. 40.

Collision on navigable waters.— The federal courts have not exclusive jurisdiction of suits *in personam* growing out of collisions between vessels while on navigable waters. Schoonmaker *v.* Gilmore, 102 U. S. 118, 26 L. ed. 95; U. S. Mail Line Co. *v.* McCracken, (Ky. 1895) 33 S. W. 82; Digby *v.* Kenton Iron Co., 8 Bush (Ky.) 166; Stewart *v.* Harry, 3 Bush (Ky.) 438.

Damage by burning boat.— The state courts have jurisdiction in a suit for damages by fire from a burning scow. Chappell *v.* Bradshaw, 128 U. S. 132, 9 S. Ct. 40, 32 L. ed. 369.

Death by wrongful act.— An action for negligently causing the death of a citizen on navigable waters may be maintained in a state court. American Steamboat Co. *v.* Chase, 16 Wall. (U. S.) 522, 21 L. ed. 369 [*affirming* Chase *v.* American Steamboat Co., 9 R. I. 419, 11 Am. Rep. 274]; McDonald *v.* Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Dougan *v.* Champlain Transp. Co., 6 Lans. (N. Y.) 430.

Loss or damage of goods.— State courts have concurrent jurisdiction with the admiralty in actions for loss of or injury to goods *in transitu.* Bohannan *v.* Hammond, 42 Cal. 227; Home Ins. Co. *v.* Northwestern Packet Co., 32 Iowa 223, 7 Am. Rep. 183; Rake *v.* The Steamboat Potomac, 6 Bush (Ky.) 25.

Neglect of sick seaman.— An action for neglect of a seaman by the vessel's officers, while sick during a voyage, is within the concurrent jurisdiction of state and admiralty courts. Moseley *v.* Scott, (Ohio 1865) 5 Am. L. Reg. N. S. 599.

49. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447; Leon *v.* Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74; The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; Gindele *v.* Corrigan, 129 Ill. 582, 22 N. E. 516, 16 Am. St. Rep. 292 [*affirming* 28 Ill. App. 476]; Switzer *v.* Heinn, 27 La. Ann. 25; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248; Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503.

50. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921 (holding that a bill brought in the state court against individuals, as defendants, seeking to foreclose a possessory lien for towage on a raft in plaintiff's possession, and to sell the same to satisfy a personal decree against defendants, in default of their payment thereof, was within the saving clause, and that the coexistence of a maritime lien therefor did not deprive the state court of jurisdiction. But see Terrell *v.* The B. F. Woolsey, 18 Blatchf. (U. S.) 344, 4 Fed. 552; Pelham *v.* The Schooner B. F. Woolsey, 3 Fed. 457; Brown *v.* Gray, 70 Hun (N. Y.) 261, 24 N. Y. Suppl. 61, holding that a statutory proceeding of an equitable nature for the enforcement and foreclosure of a possessory lien founded upon a maritime contract is not a common-law remedy); Soper *v.* Manning, 147 Mass. 126, 16 N. E. 752 (where, plaintiffs having obtained a judgment of the court of claims establishing their claim, as owners of a vessel captured during the war, for the loss of cargo, and directing them to distribute the amount of the judgment, according to law, among the owners, officers, and crew, the state court, and not exclusively a court of admiralty, was held to have jurisdiction of a bill, alleging plaintiffs to be owners of the claim, to compel defendants, who were plaintiffs' attorneys, to deliver up to plaintiffs a United States treasury draft given in payment of the judgment).

the concurrent jurisdiction of state courts in replevin, and federal courts by libel in admiralty, in suits for the possession of ships[51] or goods.[52]

(IV) *Proceedings In Rem*—(A) *Not Included.* Proceedings *in rem* are not included in the term "common-law remedy," and a state law conferring jurisdiction of such proceedings upon state courts is void.[53]

(B) *What Is Proceeding In Rem.* A suit against a vessel without naming the captain or owners, accompanied by a provisional seizure of the vessel, is an action *in rem*.[54]

(V) *Suit In Rem and In Personam.* Where, under a state statute, both the owners or master and the vessel by name are proceeded against in the same action, it has been held competent for the state court to entertain the action and render judgment in the personal action.[55]

c. Effect of Act to Limit Liability of Ship-Owners. The jurisdiction of actions to enforce common-law remedies for breaches of maritime contract or for mari-

51. Daily *v.* Doe, 3 Fed. 903.

52. Warehouse, etc., Supply Co. *v.* Galvin, 96 Wis. 523, 71 N. W. 804, 65 Am. St. Rep. 57.

53. The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. ed. 296 [*reversing* Atlantic Works *v.* Tug Glide, 159 Mass. 60, 34 N. E. 258 (*affirming* 157 Mass. 525, 33 N. E. 163)]; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; The Belfast, 7 Wall. (U. S.) 624, 19 L. ed. 266 [*reversing* 41 Ala. 50]; The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. ed. 397; Stewart *v.* Potomac Ferry Co., 5 Hughes (U. S.) 372, 12 Fed. 296; Terrell *v.* The B. F. Woolsey, 18 Blatchf. (U. S.) 344, 4 Fed. 552; Pelham *v.* The Schooner B. F. Woolsey, 3 Fed. 457; The Ferry Steamers Norfolk and Union, 2 Hughes (U. S.) 123, 18 Fed. Cas. No. 10,297; *In re* The Ship Edith, 11 Blatchf. (U. S.) 451, 8 Fed. Cas. No. 4,283, 5 Ben. (U. S.) 432, 8 Fed. Cas. No. 4,282; Moir *v.* The Dubuque, 17 Fed. Cas. No. 9,696, 4 Am. L. T. Rep. 84, 3 Chic. Leg. N. 145; Jackson *v.* The Kinnie, 13 Fed. Cas. No. 7,137, 8 Am. L. Reg. N. S. 470; The Isabella, Brown Adm. 96, 13 Fed. Cas. No. 7,100; Ashbrook *v.* The Steamer Golden Gate, Newb. Adm. 296, 2 Fed. Cas. No. 574; Crawford *v.* The Bark Caroline Reed, 42 Cal. 469; Ford *v.* Fuget, 29 Ind. 52; Claycomb *v.* Cohn, 28 Ind. 483; Vaughan *v.* McCullough, 28 Ind. 359; Ballard *v.* Wiltshire, 28 Ind. 341; Walters *v.* The Steamboat Mollie Dozier, 24 Iowa 192, 95 Am. Dec. 722; Marshall *v.* Curtis, 5 Bush (Ky.) 607; Haeberle *v.* Barringer, 29 La. Ann. 410; Young *v.* Ship Princess Royal, 22 La. Ann. 388, 2 Am. Rep. 731; Berwin *v.* Steamship Matanzas, 19 La. Ann. 384; Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49; Hayford *v.* Cunningham, 72 Me. 128; Griswold *v.* Steamboat Otter, 12 Minn. 465, 93 Am. Dec. 239; Dever *v.* Steamboat Hope, 42 Miss. 715, 2 Am. Rep. 643; Connelly *v.* The Steamboat Bee, 40 Mo. 263; Phegley *v.* Steamboat David Tatum, 33 Mo. 461, 84 Am. Dec. 57; Poole *v.* Kermit, 59 N. Y. 554 [*affirming* 37 N. Y. Super. Ct. 114]; Vose *v.* Cockcroft, 44 N. Y. 415; Brookman *v.* Hamill, 43 N. Y. 554, 3 Am. Rep. 731; Bird *v.* The Steamboat Josephine, 39 N. Y. 19 [*reversing* 50 Barb. (N. Y.) 501]; Baird *v.* Daly, 4 Lans. (N. Y.) 426; Ferran *v.* Hosford, 54 Barb. (N. Y. 200; Steamer Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397 [*reversing* 1 Cinc. Super. Ct. (Ohio) 27]; Dowell *v.* Goode, 25 Ohio St. 390; The Steamboat General Buell *v.* Long, 18 Ohio St. 521; Boyd *v.* Steamboat Falcon, 1 Handy (Ohio) 362; The Willapa, 25 Oreg. 71, 34 Pac. 689; Rutherford *v.* Barque Ornen, 10 Phila. (Pa.) 369, 32 Leg. Int. (Pa.) 420; Weston *v.* Morse, 40 Wis. 455.

See 1 Cent. Dig. tit. "Admiralty," § 23.

54. The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; Haeberle *v.* Barringer, 29 La. Ann. 410; Southern Dry Dock Co. *v.* The Steamboat J. D. Perry, 23 La. Ann. 39, 8 Am. Rep. 585.

True test or rule.— In Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921, the court said: "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute [U. S. Rev. Stat. (1878), § 563] of a common-law remedy."

55. Southern Dry Dock Co. *v.* The Steamboat J. D. Perry, 23 La. Ann. 39, 8 Am. Rep. 585; Parisot *v.* Green, 46 Miss. 747. See also Merritt *v.* Peabody, 40 Ga. 177, holding that a suit by the officers, etc., of a steamboat, against the owners and the boat, to recover for wages due and supplies furnished, is not, when judgment is recovered *in personam* against the owners, such a proceeding to enforce a maritime lien as falls within the exclusive jurisdiction of the courts of the United States, although judgment is also recovered *in rem* against the boat.

time torts, saved to the state courts, is not limited, restricted, or qualified by the act "to limit the liability of ship-owners," unless appropriate proceedings are taken under said statute by a party interested to avail himself of the benefit thereof.[56]

6. Conflict of Jurisdiction as to Res[57] — a. In General. It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court,[58] but to render this rule applicable there must be actual [59] and lawful [60] possession.

56. Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488.

57. See, generally, Courts; International Law.

58. Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981; Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028; Clark *v.* Five Hundred and Five Thousand Feet of Lumber, 65 Fed. 236, 24 U. S. App. 509, 12 C. C. A. 628.

Property in custody of state officer.— It follows from the rule stated in the text that where, at the time a libel is filed against a vessel in admiralty, the vessel is in the custody of a state court, the libellant cannot deprive the state officers of their custody (The Red Wing, 5 McCrary (U. S.) 122, 14 Fed. 869), whether the *res* be in the custody of a sheriff (Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028 [*affirming* 24 Pa. St. 259]; The Oliver Jordan, 2 Curt. (U. S.) 414, 18 Fed. Cas. No. 10,503; The Ship Robert Fulton, 1 Paine (U. S.) 620, 20 Fed. Cas. No. 11,890; Bowler *v.* Eldridge, 18 Conn. 1; Keating *v.* Spink, 3 Ohio St. 105, 62 Am. Dec. 214. *Contra*, The Julia Ann, 1 Sprague (U. S.) 382, 14 Fed. Cas. No. 7,577; The Gazelle, 1 Sprague (U. S.) 378, 10 Fed. Cas. No. 5,289; Riggs *v.* The Schooner John Richards, Newb. Adm. 73, 20 Fed. Cas. No. 11,827; Wall *v.* The Royal Saxon, 29 Fed. Cas. No. 17,093, 2 Am. L. Reg. 324, 5 Pa. L. J. Rep. 290; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559) or receiver (The E. L. Cain, 45 Fed. 367).

Forcible dispossession of marshal.— Where a vessel is in the possession of the marshal under attachment, and, in the absence of the ship-keeper, persons having knowledge of the attachment forcibly seize and take the vessel into another state and there cause her to be attached in the state court, the marshal has the right to follow and retake her. The Joseph Gorham, 13 Fed. Cas. No. 7,537, 7 Law Rep. 135, 2 N. Y. Leg. Obs. 388.

Vessel in employ of receiver.— Where a vessel owned by an insolvent corporation is employed by a receiver under authority of the court in transporting merchandise and passengers in connection with the usual business of the corporation, the vessel is not exempt by comity nor by the fact that it is *in custodia legis* from maritime liens for liabilities incurred in the course of such employment, nor from seizure for enforcement of such lien upon libels in a federal district court in another state, without leave of the court appointing the receiver. The Willamette Valley, 62 Fed. 293. See also Van Valkenburg *v.* Kingsbury, 14 Ohio St. 353, holding that the seizure of a water-craft under a state law, and her subsequent delivery to the owner upon bond and security, do not impair the capacity of the craft to incur liabilities described in the statute, or those arising under the admiralty of the United States in the course of her employment by the owner after such discharge.

In proceedings to limit liability of ship-owner, the vessel will be sold where it appears that, if she is compelled to remain in custody until the termination of the litigation, her value will be greatly impaired, if not substantially destroyed, though attachment proceedings are pending against her in the state court. The Mendota, 14 Fed. 358.

59. **Subsequent possession will not relate back.**— In proceedings in a state court to wind up a corporation, such court has no power to restrain proceedings in a federal court on libels to enforce maritime liens against vessels of the corporation, where the receiver of the corporation never took possession of such vessels, and they were seized by the marshal under the libels before the receiver qualified, though he was appointed before the libels were filed, for the doctrine of relation has no application in such a case. Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981.

Garnishment proceedings.— It is no defense to a petition that freight be brought into the admiralty courts to answer the exigencies of suits for mariners' wages, which are a charge thereon, that the consignee, before the libels were filed, was summoned as a trustee or garnishee of the ship-owner in a common-law court. The Caroline, 1 Lowell (U. S.) 173, 5 Fed. Cas. No. 2,419.

Service of monition by the marshal for seamen's wages upon parties owing freight moneys does not place the fund beyond the reach of an attachment subsequently issued from the state court to the sheriff of the county in an action brought by another against the ship-owner. The Olivia A. Carrigan, 7 Fed. 507.

60. The Ferryboats Roslyn and Midland, 9 Ben. (U. S.) 119, 20 Fed. Cas. No. 12,068, holding that the tortious presence of a sheriff on board of a vessel is not of itself sufficient to oust the jurisdiction of the admiralty to seize the vessel in a proceeding *in rem* taken to enforce a maritime lien. See also The J. W. French, 13 Fed. 916, holding that where the sheriff has taken possession of a vessel under an order of condemnation and sale from a state court, made without jurisdic-

b. Effect of Sale under Process of State Court. A state court, having no jurisdiction to adjudicate maritime liens, cannot order a sale of a vessel divested thereof, and a vessel which has been sold under process of a state court may be subsequently seized and sold by order of the admiralty.[61]

c. State Officer How Protected. Where a conflict arises between a sheriff acting under process of a state court, and a marshal who has made a subsequent levy on the same property, the sheriff must either apply to the state court to be protected or petition the federal court to order its officer to withdraw.[62]

B. Waters and Voyages within Jurisdiction — 1. Waters — a. Tidal Waters. By the early decisions admiralty jurisdiction was confined to waters within the ebb and flow of the tide, and in England[63] and some of the early American decisions[64] tide-waters within the body of a county were not included. By the later decisions of this country, however, such waters are included, whether the cause of action be one of contract[65] or tort.[66]

tion, the federal court can treat him as a mere trespasser and enforce its process against the vessel.

61. The J. G. Chapman, 62 Fed. 939; The James Roy, 59 Fed. 784; The Elexena, 53 Fed. 359; The E. L. Cain, 45 Fed. 367; The Red Wing, 5 McCrary (U. S.) 122, 14 Fed. 869; The Steamer Circassian, 1 Ben. (U. S.) 128, 5 Fed. Cas. No. 2,721; The Julia Ann, 1 Sprague (U. S.) 382, 14 Fed. Cas. No. 7,577; The Gazelle, 1 Sprague (U. S.) 378, 10 Fed. Cas. No. 5,289; Ashbrook *v.* The Steamer Golden Gate, Newb. Adm. 296, 2 Fed. Cas. No. 574; Riggs *v.* The Schooner John Richards, Newb. Adm. 73, 20 Fed. Cas. No. 11,827; Taylor *v.* The Royal Saxon, 1 Wall. Jr. C. C. (U. S.) 311, 23 Fed. Cas. No. 13,803.

See 1 Cent. Dig. tit. "Admiralty," § 33.

Distribution of proceeds of vessel.— Where a vessel has been sold in admiralty, a mortgagee is entitled to file a petition against the proceeds and have the same paid to him, as against a receiver, appointed after default was made on the mortgage, who is seeking to transfer litigation concerning the mortgage to the state court. The Advance, 63 Fed. 704.

Where a vessel has been sold under a libel, and the claims of the libellants have been satisfied, a state court will appoint a receiver for the purpose of obtaining from the federal court, with its consent, any surplus proceeds remaining in its custody, in order to distribute the same in the state court where litigation is pending between various mortgagees of the vessel and other creditors claiming liens thereon by judgment, execution, or attachment. Thompson *v.* Van Vechten, 5 Duer (N. Y.) 618.

62. The Steamer Circassian, 1 Ben. (U. S.) 128, 5 Fed. Cas. No. 2,721.

63. The Egyptian Monarch, 36 Fed. 773.

64. The Steam-Boat Thomas Jefferson, 10 Wheat. (U. S.) 428, 6 L. ed. 358; The Sloop Abby, 1 Mason (U. S.) 360, 1 Fed. Cas. No. 14; Johnson *v.* Twenty-One Bales, etc., 2 Paine (U. S.) 601, 13 Fed. Cas. No. 7,417; Montgomery *v.* Henry, 1 Dall. (Pa.) 49, 1 Am. Dec. 223.

Merely touching in tide-water at one terminus of the voyage, where the vessel was engaged substantially in non-tidal waters, was insufficient to give admiralty jurisdiction. The Steam-boat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677. But where the service was substantially performed upon the sea or tide-waters, although the voyage commenced and terminated beyond the reach of the tide, it was held that admiralty had jurisdiction. New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

65. Peyroux *v.* Howard, 7 Pet. (U. S.) 324, 8 L. ed. 700, 19 Fed. Cas. No. 11,207; The Brig John Gilpin, Olc. Adm. 77, 13 Fed. Cas. No. 7,345; Pierce *v.* The Victory, 19 Fed. Cas. No. 11,149*a*; Thackarey *v.* The Farmer of Salem, Gilp. (U. S.) 524, 23 Fed. Cas. No. 13,852; Wilson *v.* The Steamboat Ohio, Gilp. (U. S.) 505, 30 Fed. Cas. No. 17,825; Martin *v.* Acker, Blatchf. & H. Adm. 279, 16 Fed. Cas. No. 9,155; The Wave, Blatchf. & H. Adm. 235, 29 Fed. Cas. No. 17,297.

66. The Propeller Commerce, 1 Black (U. S.) 574, 17 L. ed. 107; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. (U. S.) 209, 16 L. ed. 433; The Steamboat New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019; Newton *v.* Stebbins, 10 How. (U. S.) 586, 13 L. ed. 551; Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226; The Volunteer, Brown Adm. 159, 28 Fed. Cas. No. 16,990; Roberts *v.* Skolfield, 3 Ware (U. S.) 184, 20 Fed. Cas. No. 11,917; Camden, etc., Transp. Co. *v.* The Lotty, 4 Fed. Cas. No. 2,337*a*; The Bark Lotty, Olc. Adm. 329, 15 Fed. Cas. No. 8,524; Taylor *v.* Harwood, Taney (U. S.) 437, 23 Fed. Cas. No. 13,794; Washington Imp. Co. *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 489, 29 Fed. Cas. No. 17,242; Bulloch *v.* The Lamar, 4 Fed. Cas. No. 2,129, 8 Law Rep. 275, 1 West. L. J. 444; Thomas *v.* Gray, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898; Thomas *v.* Lane, 2 Sumn. (U. S.) 1, 23 Fed. Cas. No. 13,902; Simpson *v.* The Tug Ceres, 14 Phila. (Pa.) 523, 36 Leg. Int. (Pa.) 339.

See 1 Cent. Dig. tit. "Admiralty," § 41 *et seq.*

Long Island Sound is not only, in common-law acceptation, an arm of the sea, but is a strait and parcel of the high sea not within the territorial limits of any particular state. St. John *v.* Paine, 10 How. (U. S.) 557, 13

b. Non-Tidal but Navigable Waters — (1) *In General* — (A) *Lakes and Rivers.* The ebb and flow of the tide continued to be the test of admiralty jurisdiction down to the year 1851,[67] since which date the admiralty jurisdiction has been held to cover the entire navigable waters of the United States.[68]

(B) *Canals.* The term "navigable waters" is not to be understood in the same sense as "natural streams," and includes artificial communication, such as canals.[69]

L. ed. 537; The Sloop Martha Anne, Olc. Adm. 18, 16 Fed. Cas. No. 9,146.

67. In 1851, in Fretz *v.* Bull, 12 How. (U. S.) 466, 13 L. ed. 1068, and The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058, it was held that the act of Feb. 26, 1845, extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same, was authorized by the constitution in the clause granting maritime and admiralty jurisdiction to the federal courts, and not by the clause in the constitution giving congress power to regulate commerce between the states.

Subsequently the act of 1845 was held to be inoperative and of no effect, and the admiralty jurisdiction of cases on the great lakes and rivers was held not to be limited thereby, but to be governed by the judiciary act of 1789. The Eagle, 8 Wall. (U. S.) 15, 19 L. ed. 365; The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; Jackson *v.* The Steamboat Magnolia, 20 How. (U. S.) 296, 15 L. ed. 909; Revenue Cutter No. 1, Brown Adm. 76, 20 Fed. Cas. No. 11,713; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443, 4 West. L. Month. 281; Parmlee *v.* The Propeller Charles Mears, Newb. Adm. 197, 18 Fed. Cas. No. 10,766; Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932, 18 Law Rep. 672; The Flora, 1 Biss. (U. S.) 29, 9 Fed. Cas. No. 4,878; Franconet *v.* The Propeller F. W. Backus, Newb. Adm. 1, 9 Fed. Cas. No. 5,048.

The restriction in the judiciary act of 1789, confining jurisdiction to waters navigable from the sea by vessels of ten tons burden or more, applies exclusively to seizures under the laws of impost, navigation, or trade, in matters of revenue only. Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443, 4 West. L. Month. 281.

68. *In re* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631; The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; Nelson *v.* Leland, 22 How. (U. S.) 48, 16 L. ed. 269; Jackson *v.* The Steamboat Magnolia, 20 How. (U. S.) 296, 15 L. ed. 909; Cope *v.* Vallette Dry-Dock, 10 Fed. 142; The General Cass, Brown Adm. 334, 10 Fed. Cas. No. 5,307; The Steamboat Cheeseman *v.* Two Ferry-boats, 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633; The Lewellen, 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443, 4 West. L. Month. 281; Williams *v.* The Barge Jenny Lind, Newb. Adm. 443, 29 Fed. Cas. No. 17,723; Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232; McGinnis *v.* Steamboat Pontiac, 5 McLean (U. S.) 359, 16 Fed. Cas. No. 8,801; Franconet *v.* The Propeller F. W. Backus, Newb. Adm. 1, 9 Fed. Cas. No. 5,048; Raymond *v.* The Schooner Ellen Stewart, 5 McLean (U. S.) 269, 20 Fed. Cas. No. 11,594; Chisholm *v.* Northern Transp. Co., 61 Barb. (N. Y.) 363; Steamer Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397.

See 1 Cent. Dig. tit. "Admiralty," § 46.

Waters in foreign territory.— As the admiralty jurisdiction of the federal courts extends to collisions occurring on the great lakes, the circumstance that a portion of those waters lies within the limits of Canada constitutes no objection to the exercise of such jurisdiction, though the collision occurred within the limits of Canada, the laws of which give no lien or any action or any right *in rem* against the wrong-doing vessel. The Eagle, 8 Wall. (U. S.) 15, 19 L. ed. 365; The Pilot, 1 Biss. (U. S.) 159, 19 Fed. Cas. No. 11,168.

The Fox and Wolf rivers in Wisconsin, between Oshkosh and Winneconne, were held not to be public navigable waters of the United States in Morse *v.* Home Ins. Co., 30 Wis. 496, 11 Am. Rep. 580; but in The Montello, 20 Wall. (U. S.) 430, 22 L. ed. 391, the Fox river was held to be navigable.

The Savannah river is a navigable river subject to the maritime law. *In re* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631.

The Tennessee river is within the admiralty jurisdiction of the United States. Akling *v.* St. Louis, etc., Packet Co., (Tenn. 1898) 46 S. W. 24.

69. The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771; *Ex p.* Boyer, 109 U. S. 629, 3 S. Ct. 434, 27 L. ed. 1056; The B. & C., 18 Fed. 543; Malony *v.* The City of Milwaukee, 1 Fed. 611; The Steam Barge Monitor, 9 Ben. (U. S.) 78, 17 Fed. Cas. No. 9,708; The Steamer Oler, 2 Hughes (U. S.) 12, 18 Fed. Cas. No. 10,485; The Avon, Brown Adm. 170, 2 Fed. Cas. No. 680; Scott *v.* The Propeller Young America, Newb. Adm. 101, 21 Fed. Cas. No. 12,549; Monteith *v.* Kirkpatrick, 3 Blatchf. (U. S.) 279, 17 Fed. Cas. No. 9,721; Lowry *v.* The E. Benjamin, 15 Fed. Cas. No. 8,582, 6 Pa. L. J. 277, 4 Pa. L. J. Rep. 25.

See 1 Cent. Dig. tit. "Admiralty," § 50 *et seq.*

Contract performed on canal and tide-waters.— In The Canal Boat E. M. McChesney, 8 Ben. (U. S.) 150, 49 How. Pr. (N. Y.) 178, 8 Fed. Cas. No. 4,463, it was doubted if admiralty had jurisdiction of a contract for the carriage of goods exclusively upon a canal, but held that it did have jurisdiction of a contract for carriage into navigable waters beyond the canal. This had been denied, however, in the earlier cases of Wallis *v.* Chesney, 29 Fed. Cas. No. 17,110, 4 Am. L. Reg. 307;

(II) *Test of Navigability.* Waters are navigable waters of the United States, in contradistinction from navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water.[70]

2. Voyages — a. Wholly within State. If a voyage is made upon public navigable waters, the fact that it is made for the purpose of carrying on merely local or internal commerce between ports of the same state does not prevent admiralty from taking jurisdiction,[71] although at one time a contrary rule prevailed,[72] even where the ultimate destination of the vessel was a port in another state.[73]

b. Length of No Effect. The length of a voyage is no criterion by which to determine the question of admiralty jurisdiction.[74]

3. Extent — a. In General. The process of admiralty courts cannot be executed by the seizure of vessels outside their districts,[75] nor can a vessel be consid-

McCormick *v.* Ives, Abb. Adm. 418, 15 Fed. Cas. No. 8,720; Davis *v.* The Enterprise, 7 Fed. Cas. No. 3,632.

70. The Montello, 20 Wall. (U. S.) 430, 22 L. ed. 391; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. ed. 999; U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; Malony *v.* The City of Milwaukee, 1 Fed. 611; Williams *v.* The Barge Jenny Lind, Newb. Adm. 443, 29 Fed. Cas. No. 17,723; Akling *v.* St. Louis, etc., Packet Co., (Tenn. 1898) 46 S. W. 24.

Waters completely within state limits, without any navigable outlet to any other state or country, are navigable waters of the state not within the jurisdiction of the federal government. U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; Stapp *v.* Steamboat Clyde, 43 Minn. 192, 45 N. W. 430.

71. *Ex p.* Boyer, 109 U. S. 629, 3 S. Ct. 434, 27 L. ed. 1056; The Belfast, 7 Wall. (U. S.) 624, 19 L. ed. 266; The Propeller Commerce, 1 Black (U. S.) 574, 17 L. ed. 107; The Tolchester, 42 Fed. 180; U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; Murray *v.* The Ferry-Boat F. B. Nimick, 2 Fed. 86; Leonard *v.* The Volunteer, 15 Fed. Cas. No. 8,260, 4 Chic. Leg. N. 156; The Elmira Shepherd, 8 Blatchf. (U. S.) 341, 8 Fed. Cas. No. 4,418; The Barge Leonard, 3 Ben. (U. S.) 263, 15 Fed. Cas. No. 8,256; The Steamboat Brooklyn, 2 Ben. (U. S.) 547, 4 Fed. Cas. No. 1,938; The Sarah Jane, 1 Lowell (U. S.) 203, 21 Fed. Cas. No. 12,349; The Mary Washington, 1 Abb. (U. S.) 1, Chase (U. S.) 125, 16 Fed. Cas. No. 9,229; Van Santwood *v.* The John B. Cole, 28 Fed. Cas. No. 16,875, 4 N. Y. Leg. Obs. 373. See also Carpenter *v.* The Schooner Emma Johnson, 1 Cliff. (U. S.) 633, 5 Fed. Cas. No. 2,430, holding that admiralty has jurisdiction over a contract of affreightment between two ports of the same state where a part of the navigation is upon the high seas and out of the jurisdiction of any particular state.

72. Abbey *v.* The Steamboat Robert L. Stevens, 22 How. Pr. (N. Y.) 78, 1 Fed. Cas. No. 8, 21 Law Rep. 41; Poag *v.* The McDonald, 19 Fed. Cas. No. 11,239, 17 Leg. Int. (Pa.) 318, 19 Fed. Cas. No. 11,238; The Troy, 4 Blatchf. (U. S.) 355, 24 Fed. Cas. No. 14,192; Harrison *v.* The Anna Kimball, Hoffm. Op. 464, 11 Fed. Cas. No. 6,132; Brooks *v.* The Peytona, 4 Fed. Cas. No. 1,959, 2 West. L. Month. 518. See also The Scow Bolivar, Olc. Adm. 474, 3 Fed. Cas. No. 1,609, to the effect that, unless it be shown that the remedy in the local court is doubtful, admiralty may refuse to take jurisdiction of a libel for wages filed by a seaman hired to serve on a small vessel navigating the Hudson river, it appearing that he knew the residence and responsibility of the owner.

73. Maguire *v.* Card, 21 How. (U. S.) 248, 16 L. ed. 118; Allen *v.* Newberry, 21 How. (U. S.) 244, 16 L. ed. 110; Whitaker *v.* The Fred Lorents, 29 Fed. Cas. No. 17,527, 2 West. L. Month. 520.

74. The Gate City, 5 Biss. (U. S.) 200, 10 Fed. Cas. No. 5,267.

Coasting voyage.— Admiralty has jurisdiction of suits *in personam* against owners of a boat for the value of goods carried, and lost by fire in Long Island Sound on a voyage between New York and Providence. New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465. And a contract for wages on a voyage between adjoining states and on the tide-waters of a river or bay is within the jurisdiction of the district court and may be enforced by a suit *in rem* in admiralty. Smith *v.* The Sloop Pekin, Gilp. (U. S.) 203, 22 Fed. Cas. No. 13,090.

Voyage of less than mile.— A libel *in rem* may be maintained for the master's failure to deliver that portion of goods on board, and for refusing to take on the residue, even though the cargo was to be transported only from New York across the East river to Brooklyn, a voyage of less than a mile in length. The Flash, Abb. Adm. 67, 9 Fed. Cas. No. 4,857.

75. The L. B. X., 88 Fed. 290; The Kodiak, 53 Fed. 126; Pinckney *v.* The Hungaria, 42 Fed. 510 [*affirming* The Hungaria, 41 Fed. 109]; Euberweg *v.* La Compagnie Générale Transatlantique, 35 Fed. 428; The Sarah E. Kennedy, 25 Fed. 569. See also Tyler *v.* People, 8 Mich. 320, to the effect that, in the absence of a treaty with Great Britain authorizing it, the process of district courts of

ered as constructively within the district for the purpose of a libel *in rem* because she did not clear on leaving port, nor because her master consents or stipulates that she shall be so considered,[76] but process may be executed or served anywhere within the district, upon property or persons there present, regardless of their nationality or residence.[77]

b. Confined to Boundary Lines of State. The territorial limits of the district and of the court's jurisdiction are confined to the boundary lines of a state, and its process does not run to the three-mile limit or frontier of water recognized by the law of nations as under the control of the United States for the purposes of revenue and defense,[78] although the colonial courts of common law had jurisdiction over the bays and arms of the sea, and over the coasts to the extent of a marine league.[79]

c. Under State Legislation Conferring Jurisdiction. Where, however, by legislative action, concurrent jurisdiction is given over waters forming the boundary between several states, the federal courts held in such state have jurisdiction over such waters,[80] and their process may be executed thereon outside of any harbor or bay.[81]

C. Suits Involving Foreign Parties — 1. Between Foreigners — a. Power to Assume Jurisdiction — (1) *In General.* While admiralty is under no obligation to entertain jurisdiction where all the parties are foreigners,[82] and may

the United States sitting in admiralty cannot be executed in Canadian waters.

Where a vessel is outside the district, admiralty acquires jurisdiction by the filing of a libel, provided the vessel is subsequently seized within the district on alias monition. Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135.

76. The Hungaria, 41 Fed. 109.

Effect of stipulation — Vessel within district. — Where a vessel is within the district, but, before monition is issued or the vessel is seized, claimants voluntarily give a stipulation for value conditioned to perform and pay any decree rendered, the court has jurisdiction to proceed with the case precisely as if the vessel had first been seized and the stipulation then given. The Frank Vanderkerchen, 87 Fed. 763.

77. *Ex p.* St. Paul F. & M. Ins. Co., 134 U. S. 493 note, 10 S. Ct. 589, 33 L. ed. 994 note; *In re* Louisville Underwriters, 134 U. S. 488, 10 S. Ct. 587, 33 L. ed. 991; Atkins *v.* Fibre Disintegrating Co., 18 Wall. (U. S.) 272, 21 L. ed. 841; The Willamette, 70 Fed. 874, 44 U. S. App. 26, 18 C. C. A. 366, 31 L. R. A. 715.

78. The Hungaria, 41 Fed. 109.

Three-mile limit fixed by state constitution. — Where, however, the state constitution extends its boundary and jurisdiction three miles from the shore line, its laws and process from courts, state or federal, within such state, will extend to such three-mile limit. Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

79. Chase *v.* American Steamboat Co., 9 R. I. 419, 11 Am. Rep. 274.

80. Middleton *v.* La Compagnie Générale Transatlantique, 100 Fed. 866, 41 C. C. A. 98; The Lindrup, 62 Fed. 851; Aitcheson *v.* The Endless Chain Dredge, 40 Fed. 253; The Norma, 32 Fed. 411; U. S. *v.* The Julia Lawrence, 26 Fed. Cas. No. 15,502, 6 Am. L. Rev. 383.

Vessel moored or anchored. — A vessel tied to a pier on either side of such water (Devoe Mfg. Co., Petitioner, 108 U. S. 401, 2 S. Ct. 894, 27 L. ed. 764; Euberweg *v.* La Compagnie Générale Transatlantique, 35 Fed. 428; The Norma, 32 Fed. 411; The Mary McCabe, 22 Fed. 750; Hall *v.* Devoe Mfg. Co., 14 Fed. 183) or anchored within the territorial limits of one state (The Sarah E. Kennedy, 25 Fed. 569) is within the exclusive jurisdiction of the court within whose district such pier is located or such ship is anchored.

81. The Lindrup, 62 Fed. 851.

82. Neptune Steam Nav. Co. *v.* Sullivan Timber Co., 37 Fed. 159; The Noddleburn, 30 Fed. 142; Muir *v.* The Brig Brisk, 4 Ben. (U. S.) 252, 17 Fed. Cas. No. 9,901; One Hundred and Ninety-Four Shawls, Abb. Adm. 317, 18 Fed. Cas. No. 10,521; The Bee, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1,219. See also Fairgrieve *v.* Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190, to the same effect, but holding that a suit by a foreign marine insurance company against a vessel within the jurisdiction of the court, based on a right claimed under a policy of insurance issued in the United States, is one of which the court is not justified in declining jurisdiction.

Assignment of claim to citizen after jurisdiction refused. — Where a court of admiralty, in the exercise of its discretion, has refused to entertain jurisdiction of a suit between foreigners for the breach of a contract of carriage made in Canada, and no part of which was to be performed within the United States, it appearing that the controversy could more properly be determined by the courts of Canada, by the laws of which the contract was governed, it is not required to entertain a second suit on the same cause of action by an assignee of the former libellant, who is a citizen and resident of the district

remit the parties to their home forum if substantial justice can be afforded there,[83] it may take jurisdiction,[84] except when treaty provisions prevent,[85] although it has been said that such jurisdiction will not be taken except when necessary to prevent a failure of justice.[86]

(II) *Claim for Salvage.* Admiralty will take jurisdiction of a claim for salvage when the salvors and claimants are all foreigners.[87]

(III) *Claim for Wages*—(A) *In General.* The admiralty court, in the absence of treaty stipulation[88] or stipulation in the contract against its enforcement in a foreign jurisdiction,[89] may, in its discretion, assume jurisdiction of a

where the suit is brought, when the assignment was merely colorable and made for the purpose of enabling the suit to be brought in such court. Goldman *v.* Furness, 101 Fed. 467.

Where foreigners have a domicile in this country the admiralty court ought to take jurisdiction where justice requires it. The Sailor's Bride, Brown Adm. 68, 21 Fed. Cas. No. 12,220.

83. Bernhard *v.* Creene, 3 Sawy. (U. S.) 230, 3 Fed. Cas. No. 1,349; One Hundred and Ninety-Four Shawls, Abb. Adm. 317, 18 Fed. Cas. No. 10,521.

Where no common home forum exists, as in case of a suit between foreigners who are subjects of different governments, the court will take jurisdiction. Thomassen *v.* Whitwell, 9 Ben. (U. S.) 113, 23 Fed. Cas. No. 13,928; Bernhard *v.* Creene, 3 Sawy. (U. S.) 230, 3 Fed. Cas. No. 1,349.

84. *Ex p.* Newman, 14 Wall. (U. S.) 152, 20 L. ed. 877; The Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. ed. 772; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; Boult *v.* Ship Naval Reserve, 5 Hughes (U. S.) 233, 5 Fed. 209; Thomassen *v.* Whitwell, 9 Ben. (U. S.) 113, 23 Fed. Cas. No. 13,928; Bucker *v.* Klorkgeter, Abb. Adm. 402, 4 Fed. Cas. No. 2,083; Davis *v.* Leslie, Abb. Adm. 123, 7 Fed. Cas. No. 3,639; The Brig Napoleon, Olc. Adm. 208, 17 Fed. Cas. No. 10,015; The Jerusalem, 2 Gall. (U. S.) 191, 13 Fed. Cas. No. 7,293.

85. The Burchard, 42 Fed. 608; The Elwine Kreplin, 9 Blatchf. (U. S.) 438, 8 Fed. Cas. No. 4,426; The Kendept *v.* The Theodore Korner, 14 Fed. Cas. No. 7,693, 3 Am. L. Reg. 47.

Failure to appoint consular officers.—Where a foreign country has failed to appoint the necessary consular officers under a treaty, the admiralty court is not debarred from exercising its authority in a case within the terms of such treaty. The Amalia, 3 Fed. 652.

Barbarous and malicious assault upon seaman.—Where the master of an Italian vessel in one of the ports of the United States is guilty of barbarous and malicious assault upon a seaman on such vessel, the federal court of such port may take jurisdiction, though a treaty between the United States and Italy provides that "consul general, consuls, vice consuls and consular agents shall have exclusive charge and shall alone take cognizance of questions of whatever kind that may arise both at sea and in port between the captain, officers and seamen." The Salomoni, 29 Fed. 534.

86. Bernhard *v.* Creene, 3 Sawy. (U. S.) 230, 3 Fed. Cas. No. 1,349; Bucker *v.* Klorkgeter, Abb. Adm. 402, 4 Fed. Cas. No. 2,083; Davis *v.* Leslie, Abb. Adm. 123, 7 Fed. Cas. No. 3,639; The Brig Napoleon, Olc. Adm. 208, 17 Fed. Cas. No. 10,015.

87. One Hundred and Ninety-Four Shawls, Abb. Adm. 317, 18 Fed. Cas. No. 10,521; The Bee, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1,219.

The case should be remitted to the home forum where the answer charges the libellants with wanton misconduct in obtaining the possession of the property, and prays privilege to contest the claim before the courts of their common country. One Hundred and Ninety-Four Shawls, Abb. Adm. 317, 18 Fed. Cas. No. 10,521.

88. The Amalia, 3 Fed. 652, in which case it was held that on a libel for wages by a crew consisting of Swedes, Prussians, and Danes against a Swedish vessel, the nationality of the vessel, and not that of the crew, should regulate the action of a court of admiralty in assuming jurisdiction.

89. The Pawashick, 2 Lowell (U. S.) 142, 19 Fed. Cas. No. 10,851; Armstrong *v.* The Rydesdale, 1 Fed. Cas. No. 547; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; Aertsen *v.* Ship Aurora, Bee Adm. 161, 1 Fed. Cas. No. 95.

Such stipulation may be disregarded where the interests of justice require it; as, where a voyage is broken up by some other cause than the wreck of the vessel, or where the seaman is discharged, or becomes entitled to discharge by reason of improper treatment (The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030); or where the crew are released from obligation to sail with the vessel by reason of her unseaworthiness (Bucker *v.* Klorkgeter, Abb. Adm. 402, 4 Fed. Cas. No. 2,083; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030); or because of improper treatment of seamen (Bucker *v.* Klorkgeter, Abb. Adm. 402, 4 Fed. Cas. No. 2,083); but it seems that a deviation from the voyage for which the seaman shipped is not ground for entertaining jurisdiction of a claim for wages where the parties have stipulated to sue in their own country only (Bucker *v.* Klorkgeter, Abb. Adm. 402, 4 Fed. Cas. No. 2,083; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030).

The British merchant's act of 1854 (§ 190), providing that no seaman who is engaged for

claim for wages against a foreign master or foreign vessel.[90] Such jurisdiction will be assumed only in special cases,[91] as where the voyage is ended or broken up,[92] or a seaman has been wrongfully discharged in a port of the United States,[93] or when the vessel is in custody of the marshal on a claim made by some other creditor.[94]

(B) *Obtaining Consent of Consul.* While the approval of a consul is not absolutely necessary to the maintaining of a suit by a foreign seaman,[95] which under some circumstances may be done against the protest of a consul,[96] yet ordinarily admiralty will not proceed without the consent of the consul of the country to which the ship belongs.[97]

(IV) *Collisions.* The admiralty courts of the United States have jurisdiction

a voyage which is to terminate in the United Kingdom shall be entitled to sue in any court abroad, does not preclude the courts of this country from taking jurisdiction of a libel to recover wages, where it appeared that the seaman did not belong in Nova Scotia, where the vessel was owned, and it was uncertain, when the libel was filed, for what port the vessel would sail, and when the cause was heard the vessel had finished her voyage, and it was uncertain where she was. The Bark Lilian M. Vigus, 10 Ben. (U. S.) 385, 15 Fed. Cas. No. 8,346.

90. The Lady Furness, 84 Fed. 679; The Adolph, 7 Fed. 501; The Amalia, 3 Fed. 652; The Pawashick, 2 Lowell (U. S.) 142, 19 Fed. Cas. No. 10,851; Armstrong *v.* The Rydesdale, 1 Fed. Cas. No. 547; The Gazelle, 1 Sprague (U. S.) 378, 10 Fed. Cas. No. 5,289.

Jurisdiction exercised as matter of comity. — Admiralty jurisdiction in suits by foreign seamen for wages is exercised as matter of comity. Gonzales *v.* Minor, 2 Wall. Jr. C. C. (U. S.) 348, 10 Fed. Cas. No. 5,530.

91. Thomson *v.* Ship Nanny, Bee Adm. 217, 23 Fed. Cas. No. 13,984; Willendson *v.* Försöket, 1 Pet. Adm. 197, 29 Fed. Cas. No. 17,682.

In the absence of cruelty or great hardship, the admiralty courts of the United States cannot be required or allow themselves to entertain jurisdiction of a case where subjects of a foreign government invoke their assistance against a merchant vessel of a foreign government. The Montapedia, 14 Fed. 427; The Carolina, 14 Fed. 424. See also Graham *v.* Hoskins, Olc. Adm. 224, 10 Fed. Cas. No. 5,669, to the effect that courts of a foreign power will take cognizance of the claims of seamen for their wages only in cases of flagrant wrong or suffering on their part, but not upon an alleged breach of contract, much less to decide upon a *quantum meruit.*

Where a vessel, under bottomry and liable to be sold, is about to depart on a voyage which makes her ultimate return to her home port uncertain, admiralty will take jurisdiction of a claim for wages at the suit of seamen who have left the vessel on advice of their consul for breach of their shipping-articles. The Sirius, 47 Fed. 825.

92. The Hermine, 3 Sawy. (U. S.) 80, 12 Fed. Cas. No. 6,409; The Pawashick, 2 Lowell (U. S.) 142, 19 Fed. Cas. No. 10,851; Armstrong *v.* The Rydesdale, 1 Fed. Cas. No. 547; Gonzales *v.* Minor, 2 Wall. Jr. C. C. (U. S.) 348, 10 Fed. Cas. No. 5,530; Lynch *v.* Crowder, 15 Fed. Cas. No. 8,637, 12 Law Rep. 355; Orr *v.* The Achsah, 18 Fed. Cas. No. 10,586; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; Graham *v.* Hoskins, Olc. Adm. 224, 10 Fed. Cas. No. 5,669; The Brig Napoleon, Olc. Adm. 208, 17 Fed. Cas. No. 10,015; Burckle *v.* The Tapperheten, 4 Fed. Cas. No. 2,141, 31 Niles Reg. (Pa.) 73.

See 1 Cent. Dig. tit. "Admiralty," § 74.

93. The Hermine, 3 Sawy. (U. S.) 80, 12 Fed. Cas. No. 6,409; Lynch *v.* Crowder, 15 Fed. Cas. No. 8,637, 12 Law Rep. 355; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; The Brig Napoleon, Olc. Adm. 208, 17 Fed. Cas. No. 10.015; Cochran *v.* McLean, 5 Fed. Cas. No. 2,927*a*.

An offer of passage home will prevent a foreign seaman who has shipped to this country from suing for wages here, where the master has given security for his return. The Pacific, Blatchf. & H. Adm. 187, 18 Fed. Cas. No. 10,644. See also Willendson *v.* Försöket, 1 Pet. Adm. 197, 29 Fed. Cas. No. 17,682, where a master, having denied a discharge and charged a desertion, offered to return the seaman to his own country and to give him a certificate of forgiveness of past offenses, and admiralty refused to take jurisdiction and dismissed the suit.

94. The Champion, 5 Fed. Cas. No. 2,584, 10 Chic. Leg. N. 10, 2 Cinc. L. Bul. 226, 23 Int. Rev. Rec. 355; The Barque Havana, 1 Sprague (U. S.) 402, 11 Fed. Cas. No. 6,226.

95. Bucker *v.* Klorkgeter, Abb. Adm. 402, 4 Fed. Cas. No. 2,083.

96. The Lady Furness, 84 Fed. 679; The Topsy, 44 Fed. 631 (where, pending a suit, the vessel left port without any certain destination); The Bark Lilian M. Vigus, 10 Ben. (U. S.) 385, 15 Fed. Cas. No. 8,346 (where seamen were not citizens of consul's country); Orr *v.* The Achsah, 18 Fed. Cas. No. 10,586 (where the voyage was broken up and the seamen discharged).

97. The Walter D. Wallet, 66 Fed. 1011; The Becherdass Ambaidass, 1 Lowell (U. S.) 569, 3 Fed. Cas. No. 1,203; Hayes *v.* The Barque J. J. Wickwire, 7 Phila. (Pa.) 594, 27 Leg. Int. (Pa.) 67, 11 Fed. Cas. No. 6,262; Reynolds *v.* The Simoon, 20 Fed. Cas. No. 11,733; Hay *v.* The Bloomer, 11 Fed. Cas. No. 6,255; Saunders *v.* The Victoria, 21 Fed. Cas.

of collisions occurring on the high seas between foreign vessels,[98] and there are cases in which special grounds should appear, to induce the court to deny its aid.[99]

(v) *Torts.* Admiralty courts have jurisdiction of torts committed on the high seas without reference to the nationality of the vessel on which they are committed, or that of the parties to them, where the parties are within reach of their process,[1] but will refuse to take jurisdiction where the relations of libellant and respondent have been settled by their respective consuls.[2]

b. By What Law Governed. In cases of contract or tort between foreigners or foreign ships of the same nation, or of different nations using the same law, the admiralty courts of the United States will, through comity, administer the law of the country with reference to which the contract was made, or of the country whose flag the ship carries, and to which the seamen and owners have submitted themselves, if such law be proved in the case; otherwise the maritime law of the United States will be applied.[3] In cases of tort between citizens or ships of different nations, using different laws, however, they will administer the maritime law even though the tort is committed upon or by a foreign vessel upon the high seas.[4]

No. 12,377, 11 Leg. Int. (Pa.) 70; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; Jelly *v.* Tiddeman, 13 Fed. Cas. No. 7,256*a*.

See 1 Cent. Dig. tit. "Admiralty," § 82.

Failure of consul to interfere.— Where a British vessel was libeled for seamen's wages at a port where there was no British consul and the nearest British consul had declined to interfere, two of the libellants being American citizens and all but three of the crew not being lawfully bound by any contract of shipment, the court had jurisdiction of the case. The Karoo, 49 Fed. 651.

If, after submitting claim to consul, a seaman on a British vessel disregards the consul's award and files a libel, the court will not take jurisdiction unless the award was clearly wrong. Townshend *v.* Brig Mina, 6 Phila. (Pa.) 482, 25 Leg. Int. (Pa.) 380, 24 Fed. Cas. No. 14,121.

98. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152 [*affirming* 9 Fed. 576]; Jensen *v.* The Steam-Ship Belgenland, 5 Fed. 86; The Propeller East, 9 Ben. (U. S.) 76, 8 Fed. Cas. No. 4,251; The Steamship Russia, 3 Ben. (U. S.) 471, 21 Fed. Cas. No. 12,168; The Bark Jupiter, 1 Ben. (U. S.) 536, 14 Fed. Cas. No. 7,585.

99. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152 [*affirming* 9 Fed. 576].

No grounds for denying jurisdiction.— Libellant, an American citizen, sued as assignee of the owners of the British ship A for damages caused by a collision in the English Channel between the A and the German steamer B. The B had never been in the United States, none of her witnesses were there, and her owner asked the court to decline to entertain jurisdiction of the action. The owner of the German steamer had been requested, and refused, to appear in an action instituted against him in a British court. It was held, assuming, but not deciding, that it is competent for a court of admiralty, in its discretion, to decline to entertain jurisdiction of a cause of collision on the high seas where all the parties are foreigners, that this case presented no grounds on which the court should so decline jurisdiction. Chubb *v.* Hamburg-American Packet Co., 39 Fed. 431.

In an action *in personam* between foreigners to recover for injuries sustained in a collision, jurisdiction will not be declined where the request is delayed until after the parties have gone to the expense of taking testimony of many witnesses. Thomassen *v.* Whitwell, 9 Ben. (U. S.) 113, 23 Fed. Cas. No. 13,928.

1. The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52; The Noddleburn, 28 Fed. 855. But see The Montapedia, 14 Fed. 427; The Carolina, 14 Fed. 424, to the effect that an action in admiralty by a foreign seaman against a foreign vessel for an assault and battery committed upon the high seas, resulting in the detention of the ship and crew, cannot be maintained, particularly where the representative of the foreign country requests the federal court not to interfere and there are no circumstances showing cruelty or great hardship to the seaman.

Tort committed in foreign port.— The court will investigate the conduct of the master of a British vessel in procuring the intervention of a British consul in a foreign port, by which a seaman was imprisoned. Patch *v.* Marshall, 1 Curt. (U. S.) 452, 18 Fed. Cas. No. 10,793.

2. Camille *v.* Couch, 40 Fed. 176.

3. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152; The Scotland, 105 U. S. 24, 26 L. ed. 1001; The Belvidere, 90 Fed. 106; Moran *v.* Baudin, 2 Pet. Adm. 415, 17 Fed. Cas. No. 9,785.

There being no lien by the local law for repairs furnished in Canada to a Canadian vessel, no proceeding *in rem* can be maintained here to enforce the payment of such repairs. The Mermaid, Brown Adm. 51, 17 Fed. Cas. No. 9,459.

4. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152; The Scotland, 105 U. S. 24, 26 L. ed. 1001; Rundell *v.* La Campagnie Générale Transatlantique, 100 Fed. 655, 40 C. C. A. 625 [*affirming* 94 Fed. 366]; The

2. Between Citizens and Foreigners. Actions for seamen's wages[5] or for salvage[6] will be entertained of right in behalf of American seamen against foreign vessels, owners, or masters, and, except where prevented by treaty,[7] admiralty will take jurisdiction of libels for personal injuries received by American seamen on foreign vessels.[8]

D. Property within Jurisdiction — 1. Bridges. A bridge is not the subject of a maritime lien and is not within the jurisdiction of admiralty.[9]

2. Flotsam, Jetsam, and Ligan. If goods of the description of flotsam, jetsam, and ligan are taken up at sea and brought on shore, the court of admiralty has jurisdiction, but not if they are cast on the land by the sea.[10]

3. Vessels — a. Private Vessels — (I) *In General.* With the exception of government vessels,[11] the jurisdiction of admiralty extends to all vessels in navigable waters.[12]

(II) *Term "Vessel" Defined.* The word "vessel" includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water;[13] and if the business or employment of a vessel appertain to travel or trade and commerce on the water[14] it is subject to the admiralty jurisdiction whatever may be its size,[15] form, capacity, or means of propulsion.[16]

City of Carlisle, 39 Fed. 807, 5 L. R. A. 52; The Brantford City, 29 Fed. 373; Churchill *v.* The Ship British America, 9 Ben. (U. S.) 516, 5 Fed. Cas. No. 2,715; Thomassen *v.* Whitwell, 9 Ben. (U. S.) 403, 23 Fed. Cas. No. 13,929; Johnson *v.* Twenty-One Bales, etc., 2 Paine (U. S.) 601, 13 Fed. Cas. No. 7,417, 3 Wheel. Crim. (N. Y.) 433.

5. The Brig Napoleon, Olc. Adm. 208, 17 Fed. Cas. No. 10,015.

6. The Sailor's Bride, Brown Adm. 68, 21 Fed. Cas. No. 12,220.

7. The Welhaven, 55 Fed. 80.

8. Bolden *v.* Jensen, 70 Fed. 505; Patch *v.* Marshall, 1 Curt. (U. S.) 452, 18 Fed. Cas. No. 10,793.

By what law governed.— A proceeding *in rem* by a seaman for personal injuries received on board an English vessel while within English territorial waters is governed by the law of England, though libellant is a naturalized American citizen (The Egyptian Monarch, 36 Fed. 773) and where the British owner of a British ship is proceeded against in an American court by both British and American cargo-owners, in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those of Great Britain (The State of Virginia, 60 Fed. 1018).

9. The Rock Island Bridge, 6 Wall (U. S.) 213, 18 L. ed. 753.

10. Lacaze *v.* State, Add. (Pa.) 59.

11. See *infra*, IV, D, 3, b.

12. Chisholm *v.* Northern Transp. Co., 61 Barb. (N. Y.) 363.

13. U. S. Rev. Stat. (1878), § 3.

14. The General Cass, Brown Adm. 334, 10 Fed. Cas. No. 5,307; The Steamboat Hendrick Hudson, 3 Ben. (U. S.) 419, 11 Fed. Cas. No. 6,355.

See 1 Cent. Dig. tit. "Admiralty," § 88 *et seq.*

Dry-dock.— A claim for salvage of a dry-dock is not within the admiralty jurisdiction of the courts of the United States. Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501 [*affirming* 10 Fed. 142]; Salvor Wrecking Co. *v.* Sectional Dock Co., 21 Fed. Cas. No. 12,273, 3 Centr. L. J. 640, 12 Pac. L. Rep. 74. And see Snyder *v.* A Floating Dry-Dock, 22 Fed. 685, wherein it was held that a suit to recover the possession and delivery of a floating dry-dock with a floating pump, which is not a vessel, or constructed or used in navigation or commerce, cannot be maintained in admiralty.

A marine pump, to rest on piles, but capable of floating, and which is used for sucking mud from beneath the water or from scows, and forcing it onto the adjacent land, is not a subject of admiralty jurisdiction. The Big Jim, 61 Fed. 503.

A pile-driver furnished with a wheel by which it is propelled about the harbor, but not fitted for transportation, is not a subject of admiralty jurisdiction. Pile Driver E. O. A., 69 Fed. 1005.

Steamboat used as hotel.— A steamboat dismantled and stripped of her motive power, and fitted and used as a hotel, is not liable *in rem* for services to her in the nature of salvage, where she went ashore while being towed to another place. The Steamboat Hendrick Hudson, 3 Ben. (U. S.) 419, 11 Fed. Cas. No. 6,355.

15. The Pioneer, 21 Fed. 426; The General Cass, Brown Adm. 334, 10 Fed. Cas. No. 5,307.

16. The General Cass, Brown Adm. 334, 10 Fed. Cas. No. 5,307.

Barges.— The jurisdiction of admiralty is not affected by the fact that the vessel is a mere barge, not fitted with any means of propulsion, but dependent on towing. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373; Wood *v.* Canal Boat Wilmington, 5 Hughes (U. S.) 205, 48 Fed. 566; The City of Pittsburgh, 45 Fed. 699; Disbrow *v.* The Walsh Brothers, 36 Fed. 607; Haslett *v.* The Enterprise, 11 Fed. Cas. No. 6,197, 19 Int. Rev. Rec. 108; The

b. Government Vessels. A public vessel of war of a foreign nation at peace with the United States, coming into her ports and demeaning herself in a friendly

Coal Boat D. C. Salisbury, Olc. Adm. 71, 7 Fed. Cas. No. 3,694. But see Jones *v.* The Coal Barges, 3 Wall. Jr. C. C. (U. S.) 53, 13 Fed. Cas. No. 7,458 (holding that flatboats and coal-barges used to transport merchandise down stream, and broken up and sold for lumber at the end of their voyage, are not subject to admiralty jurisdiction) and Leddo *v.* Hughes, 15 Ill. 41 (to the effect that flatboats and their pilots or navigators do not come under maritime law). See also Wood *v.* Two Barges, 46 Fed. 204, wherein it was held that coal-barges, which are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, and have no motive or propelling power, no master or crew, no tackle, apparel, or furniture, and no name, being generally designated by number, and which are not permitted to be enrolled or licensed under any law of the United States, and have no license, are not "ships," within the language of Admiralty Rule 20, and cannot be made the subject of a possessory suit therein provided for.

Bath-houses.—A bath-house built on boats, and designed for transportation, is within admiralty jurisdiction. The Public Bath No. 13, 61 Fed. 692; The Steam-Tug M. R. Brazos, 10 Ben. (U. S.) 435, 17 Fed. Cas. No. 9,898.

Canal-boats.— A suit in admiralty may be maintained for the non-performance of a contract for the transportation of merchandise from the city of Albany to the city of New York, on the Hudson river, in a canal-boat designed for the navigation of the Erie canal, and without motive power of its own (Van Santwood *v.* The John B. Cole, 28 Fed. Cas. No. 16,875, 4 N. Y. Leg. Obs. 373. *Contra*, The Ann Arbor, 1 Fed. Cas. No. 407), or to enforce a claim for towage (Ryan *v.* Hook, 34 Hun (N. Y.) 185) or for repairs (The Robert Morris, 1 Wall. Jr. C. C. (U. S.) 33, 16 Fed. Cas. No. 8,896). But see Boon *v.* The Hornet, Crabbe (U. S.) 426, 3 Fed. Cas. No. 1,640, to the effect that a canal-boat built and used for service in the interior canals of the state is not liable in admiralty for a claim for repairs made upon it upon a navigable river.

"Chuncker."— A "chuncker" is a vessel within the admiralty jurisdiction, and a claim for furnishing an air-pump to such a vessel will be enforced in the district court in admiralty. Winslow *v.* A Floating Steam Pump, 30 Fed. Cas. No. 17,880, 2 N. J. L. J. 124.

Dredges.— A dredge and her scows are one concern, and are subject to libel in admiralty for wages. The Starbuck, 61 Fed. 502; The Atlantic, 53 Fed. 607; Aitcheson *v.* The Endless Chain Dredge, 40 Fed. 253; The Pioneer, 30 Fed. 206; The Alabama, 22 Fed. 449 [*following* The Floating Elevator Hezekiah Baldwin, 8 Ben. (U. S.) 556, 12 Fed. Cas. No. 6,449].

Ferry-boats.— A steam ferry-boat is a vessel within the jurisdiction of admiralty, though she merely crosses and recrosses a river (U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; Murray *v.* The Ferry-Boat F. B. Nimick, 2 Fed. 86; The Steamboat Cheeseman *v.* Two Ferry-boats, 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633) and is owned by a company owning a ferry franchise (The Gate City, 5 Biss. (U. S.) 200, 10 Fed. Cas. No. 5,267) or operated in connection with a railroad (The St. Louis, 48 Fed. 312).

A floating elevator, used in the harbor of New York, though without motive power or capacity for cargo, is a vessel subject to a maritime lien. The Floating Elevator Hezekiah Baldwin, 8 Ben. (U. S.) 556, 12 Fed. Cas. No. 6,449.

Lighters.— Admiralty jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water, and the fact that such lighters are not enrolled or licensed does not affect the question of jurisdiction. The General Cass, Brown Adm. 334, 10 Fed. Cas. No. 5,307.

Rafts.— Admiralty has jurisdiction of a libel for injuries by (Seabrook *v.* Raft of Railroad Cross-Ties, 40 Fed. 596) or to (The F. & P. M. No. 2, 33 Fed. 511) a raft and in matters of salvage (A Raft of Timber, 4 Woods (U. S.) 197, 15 Fed. 555; Fifty Thousand Feet of Timber, 2 Lowell (U. S.) 64, 9 Fed. Cas. No. 4,783; A Raft of Spars, Abb. Adm. 485, 20 Fed. Cas. No. 11,529. *Contra*, A Raft of Cypress Logs, 1 Flipp. (U. S.) 543, 20 Fed. Cas. No. 11,527; Tome *v.* Four Cribs of Lumber, Taney (U. S.) 533, 24 Fed. Cas. No. 14,083), but has not jurisdiction to try the question of title to logs which have been incorporated into a raft and floated down a public navigable river (Gastrel *v.* A Cypress Raft, 2 Woods (U. S.) 213, 10 Fed. Cas. No. 5,266).

Scows.— A contract for the repair of a scow used in carrying ballast to or from vessels, and propelled by steam-tugs, and having neither steam power, nor sails, nor rudder, is maritime. Endner *v.* Greco, 3 Fed. 411. See also Woodruff *v.* One Covered Scow, 30 Fed. 269, to the effect that a structure consisting of a float made of timbers, 11 feet wide and 23 feet long, constructed to float in the water, and to support above the surface of the water a floor and a house nearly the size of the float, one use of which is to store within the house the oars and sails of small boats landing at the float, and to afford persons a means of egress from small boats coming to the slip to an adjoining wharf, to which it is attached by lines, and thence to the shore, is subject to a lien, enforceable in admiralty, arising out of an implied contract of wharfage, although never used in the transportation of passengers or freight from place to place.

Tugboats.— A tug of less than five tons burden, whose chief occupation is the towing of canal-boats and other small craft about the harbor of Buffalo and adjacent waters, occasionally running out upon Lake Erie and the Niagara river, is engaged in aiding commerce upon navigable waters of the United

manner, is not amenable to process of our courts,[17] and government vessels owned or employed by the United States[18] or by a state or municipality[19] are exempt from seizure on grounds of public policy.

E. Subject-Matter of Jurisdiction — 1. In General. While admiralty courts act as courts of equity so far as their powers go,[20] they have no general jurisdiction to administer relief as courts of equity,[21] their powers being limited

States, and within the admiralty jurisdiction. The Ella B., 24 Fed. 508.

Vessel dismantled for repairs.— Services rendered a dismantled steamboat moored on a navigable river, and undergoing alteration and repairs for the purpose of being fitted for use as a wharf-boat, are maritime in their nature. The Old Natchez, 9 Fed. 476.

17. L' Invincible, 1 Wheat. (U. S.) 238, 4 L. ed. 80; The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287 [*affirming* 16 Fed. Cas. No. 8,786]; Long *v.* The Tampico, 16 Fed. 491; The Pizarro *v.* Matthias, 19 Fed. Cas. No. 11,199, 10 N. Y. Leg. Obs. 97; Moitez *v.* The South Carolina, Bee Adm. 422, 17 Fed. Cas. No. 9,697.

To same effect in England see The Constitution, 4 P. D. 39.

Letters of marque.— Seamen on board letters of marque may sue for their wages in the admiralty courts of neutral nations. Ellison *v.* Ship Bellona, Bee Adm. 112, 8 Fed. Cas. No. 4,407.

Action against foreign privateer for unlawful capture.— A French admiralty court having declared that the capture of an American vessel by a French privateer was unlawful, an admiralty court of the United States will entertain jurisdiction of a libel *in rem* against the French vessel to recover damages for an unlawful seizure. McGrath *v.* Sloop Candalero, Bee Adm. 60, 16 Fed. Cas. No. 8,809.

Enforcing seizures by foreign public vessels.— In the case of a libel *qui tam* against a vessel seized by an English cruiser as having been engaged in the slave-trade, process *in rem* will not be denied libellant because he is a foreigner, but will be granted on condition that he enter into a stipulation with sureties to abide by all decrees of the court, interlocutory or otherwise. The Tigris, 23 Fed. Cas. No. 14,038, 3 Law Rep. 428.

18. The Siren, 7 Wall. (U. S.) 152, 19 L. ed. 129; U. S. *v.* Morgan, 99 Fed. 570, 39 C. C. A. 653; The Thomas A. Scott, 10 L. T. Rep. N. S. 726; Briggs *v.* Light-Boat Upper Cedar Point, 11 Allen (Mass.) 157.

To same effect in England see The Athol, 1 W. Rob. 374.

19. The F. C. Latrobe, 28 Fed. 377; The Protector, 20 Fed. 207; The Fidelity, 16 Blatchf. (U. S.) 569, 8 Fed. Cas. No. 4,758, 9 Ben. (U. S.) 333, 8 Fed. Cas. No. 4,757.

See also *infra*, V, I, 4.

20. The Sappho, 89 Fed. 366; Brown *v.* Lull, 2 Sumn. (U. S.) 443, 4 Fed. Cas. No. 2,018; Brown *v.* Burrows, 4 Fed. Cas. No. 1,995.

21. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. ed. 269 [*affirming* Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159]; Grant *v.* Poillon, 20 How. (U. S.) 162, 15 L. ed. 871; The Sappho, 89 Fed. 366; Kynoch *v.* The Propeller S. C. Ives, Newb. Adm. 205, 14 Fed. Cas. No. 7,958.

Accounting.— Admiralty cannot exercise jurisdiction in matters of account (Minturn *v.* Maynard, 17 How. (U. S.) 477, 15 L. ed. 235; The Steam-boat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; The H. E. Willard, 52 Fed. 387; The H. E. Willard, 53 Fed. 599; The John E. Mulford, 18 Fed. 455; Daily *v.* Doe, 3 Fed. 903; Pettit *v.* The Steamer Charles Hemje, 5 Hughes (U. S.) 359, 19 Fed. Cas. No. 11,047*a*; The Brig Susan E. Voorhis, 10 Ben. (U. S.) 380, 23 Fed. Cas. No. 13,633; The Schooner Ocean Belle, 6 Ben. (U. S.) 253, 18 Fed. Cas. No. 10,402; U. S. *v.* Steamboat Isaac Hammett, 2 Pittsb. (Pa.) 358, 26 Fed. Cas. No. 15,446, 10 Pittsb. Leg. J. (Pa.) 97, 4 West. L. Month. 486; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236, 5 Am. L. Reg. 406; Grant *v.* Poillion, 10 Fed. Cas. No. 5,700; The Larch, 2 Curt. (U. S.) 427, 14 Fed. Cas. No. 8,085 [*reversing* 3 Ware (U. S.) 28, 14 Fed. Cas. No. 8,086]; Kellum *v.* Emerson, 2 Curt. (U. S.) 79, 14 Fed. Cas. No. 7,669; Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170; Duryee *v.* Elkins, Abb. Adm. 529, 8 Fed. Cas. No. 4,197; Davis *v.* Child, 2 Ware (U. S.) 78, 7 Fed. Cas. No. 3,628; Bains *v.* The Schooner James and Catharine, Baldw. (U. S.) 544, 2 Fed. Cas. No. 756; The Fairplay, Blatchf. & H. Adm. 136, 8 Fed. Cas. No. 4,615) except upon the basis of an adjusted and recognized liability (Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791) or when incident to other matter of which it has admitted cognizance (The John E. Mulford, 18 Fed. 455; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236, 5 Am. L. Reg. 406; Matter of The L. B. Goldsmith, Newb. Adm. 123, 15 Fed. Cas. No. 8,152; The J. B. Lunt, 13 Fed. Cas. No. 7,246, 11 N. Y. Leg. Obs. 137; Davis *v.* Child, 2 Ware (U. S.) 78, 7 Fed. Cas. No. 3,628).

Mortgages.—Admiralty has no jurisdiction of a petition to foreclose (Bogart *v.* The Steamboat John Jay, 17 How. (U. S.) 399, 15 L. ed. 95 [*affirming* The John Jay, 3 Blatchf. (U. S.) 67, 13 Fed. Cas. No. 7,352]; Britton *v.* The Venture, 21 Fed. 928; The C. C. Trowbridge, 14 Fed. 874; Morgan *v.* Tapscott, 5 Ben. (U. S.) 252, 17 Fed. Cas. No. 9,808; Deely *v.* The Brigantine Ernest and Alice, 2 Hughes (U. S.) 70, 7 Fed. Cas. No. 3,735; The Ship Sailor Prince, 1 Ben. (U. S.) 461, 21 Fed. Cas. No. 12,219; The Martha Washington, 3 Ware (U. S.) 245, 16 Fed. Cas. No. 9,148), or redeem from a mortgage of a vessel (The J. B. Lunt *v.* Merritt, 13 Fed. Cas. No. 7,247) or to enforce the surrender or cancellation of a mortgage (Dean *v.* Bates, 2 Woodb. & M. (U. S.) 87, 7 Fed. Cas. No.

to maritime employment or transactions and matters concerning or relating to navigation and commerce upon navigable waters.[22]

2. Contracts — a. In General. Admiralty has jurisdiction over all maritime contracts,[23] wheresoever the same may be executed [24] and whatever may be the form of the stipulations.[25]

b. Test of Jurisdiction — (1) *Rule Stated.* With respect to admiralty jurisdiction over contracts, the true criterion is the nature and subject-matter

3,704), but it has been held that admiralty has jurisdiction of a suit by the mortgagee of a vessel, after condition broken, to reclaim possession from a purchaser at a sheriff's sale under a judgment against a mortgagor (The J. B. Lunt, 13 Fed. Cas. No. 7,246, 11 N. Y. Leg. Obs. 137).

Where a bill of sale of a vessel is given as collateral security for the repayment of a loan or as indemnity against loss on a contingent payment of obligations assumed for the vendor, the contract will be treated as a mortgage, and admiralty will not assume jurisdiction. The Ella J. Slaymaker, 28 Fed. 767.

Injunction.— A court of admiralty has no power to grant an injunction preventing defendants from enforcing a claim against a cargo. Paterson *v.* Dakin, 31 Fed. 682.

Partition suit.—An equitable action by one part-owner of a boat against another part-owner, for a partition of the boat by a sale and for an accounting, is not a civil cause of admiralty and maritime jurisdiction within U. S. Rev. Stat. (1878), § 563, giving the district court of the United States exclusive jurisdiction thereof. Swain *v.* Knapp, 32 Minn. 429, 21 N. W. 414; Andrews *v.* Betts, 8 Hun (N. Y.) 322.

Reformation of instrument.—An admiralty court has no jurisdiction of an action to reform a contract. Meyer *v.* Pacific Mail Steamship Co., 58 Fed. 923; Williams *v.* Providence Washington Ins. Co., 56 Fed. 159; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6, 1 Fed. Cas. No. 374.

Specific performance.— Admiralty has no jurisdiction to enforce the specific performance of a contract. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. ed. 269 [*affirming* Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159]; The City of Clarksville, 94 Fed. 201; Paterson *v.* Dakin, 31 Fed. 682; Deely *v.* The Brigantine Ernest and Alice, 2 Hughes (U. S.) 70, 7 Fed. Cas. No. 3,735; Kynoch *v.* The Propeller S. C. Ives, Newb. Adm. 205, 14 Fed. Cas. No. 7,958; Davis *v.* Child, 2 Ware (U. S.) 78, 7 Fed. Cas. No. 3,628; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6, 1 Fed. Cas. No. 374; Montgomery *v.* Henry, 1 Dall. (Pa.) 49, 1 Am. Dec. 223.

Trusts.— Admiralty has no direct jurisdiction over trusts, although they may relate to maritime affairs. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. ed. 269 [*affirming* Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159]; Davis *v.* Child, 2 Ware (U. S.) 78, 7 Fed. Cas. No. 3,628.

22. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. ed. 269 [*affirming* Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159].

Enforcing award or common-law judgment. — An award of arbitrators for damages cannot be enforced in admiralty though the libellant alleges that he was induced by misrepresentation to sign the agreement for arbitration and had no notice of the hearing (The Union, 20 Fed. 539), nor can a judgment against the master of a vessel, recovered in an action for wages in a common-law court, be enforced against either the vessel or its owner in admiralty (Assign *v.* The G. B. Lamar, 2 Fed. Cas. No. 593*a*).

Taxes.— Admiralty has no jurisdiction of a claim for state and county taxes assessed against a steamboat. The Bradich Johnson, 3 Fed. Cas. No. 1,770, 10 Chic. Leg. N. 353.

23. Bark San Fernando *v.* Jackson, 12 Fed. 341; Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 478; Davis *v.* A New Brig, Gilp. (U. S.) 473, 7 Fed. Cas. No. 3,643; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

See 1 Cent. Dig. tit. "Admiralty," § 131 *et seq.*

24. Bark San Fernando *v.* Jackson, 12 Fed. 341; Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 478; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

Contract made on land.— If the subject-matter of a contract relates to navigation of the sea, though it be made on land, admiralty has jurisdiction. Zane *v.* The Brig President, 4 Wash. (U. S.) 453, 30 Fed. Cas. No. 18,201. But see Pritchard *v.* Schooner Lady Horatia, Bee Adm. 167, 19 Fed. Cas. No. 11,438, to the effect that admiralty has no jurisdiction of a contract for repairs to a vessel made on land, where the owners were represented on the spot by a consignee who had funds.

25. Bark San Fernando *v.* Jackson, 12 Fed. 341; Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 378; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776. But see Bains *v.* The Schooner James and Catharine, Baldw. (U. S.) 544, 2 Fed. Cas. No. 756, to the effect that article 7 of the amendments to the constitution, providing that the right of trial by jury shall be preserved, and that no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law, excludes the jurisdiction of admiralty over contracts regulated by the common law. Suits upon such contracts are appropriately suits at common law within the terms of the amendment, and are cognizable only in courts of common law.

thereof.[26] To come within the jurisdiction, the contract must concern transportation by sea, relate to navigation or maritime employment, or be one of navigation and commerce on navigable waters,[27] but it is not essential that it be attended by a lien.[28] A mere preliminary contract, however, though of a character

26. Boutin *v.* Rudd, 82 Fed. 685, 53 U. S. App. 525, 27 C. C. A. 526; Wortman *v.* Griffith, 3 Blatchf. (U. S.) 528, 30 Fed. Cas. No. 18,057; Cox *v.* Murray, Abb. Adm. 340, 6 Fed. Cas. No. 3,304; Thackarey *v.* The Farmer of Salem, Gilp. (U. S.) 524, 23 Fed. Cas. No. 13,852; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; The Jerusalem, 2 Gall. (U. S.) 191, 13 Fed. Cas. No. 7,293.

27. New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Cox *v.* Murray, Abb. Adm. 340, 6 Fed. Cas. No. 3,304; The Perseverance, Blatchf. & H. Adm. 385, 19 Fed. Cas. No. 11,017.

A lease of a wharf is not a maritime contract, but is a contract relating to realty, and is not therefore cognizable in a court of admiralty. Upper Steamboat Co. *v.* Blake, 2 App. Cas. (D. C.) 51. But see Clifford *v.* U. S., 34 Ct. Cl. 223, to the effect that a wharf, though standing on the land, comes within admiralty jurisdiction.

Collection of freights.— A contract by which respondent, as a ship-broker, agreed to collect certain freights earned by a vessel, and to divide the same with libellant, in consideration that the latter would not contest a claim filed by respondent against the vessel in pending proceedings in which she was libeled, is not maritime, and a suit for its enforcement cannot be maintained in a court of admiralty. Skinner *v.* Harris, 98 Fed. 442.

Constituting person general agent.—A contract constituting a person general passenger and freight agent of a steamship, and giving him entire control of her passenger and freight business, is not a maritime contract, and a suit *in rem* in admiralty will not lie for a breach of such contract. The Humboldt, 86 Fed. 351.

Contract between passenger and master.— A contract between a passenger and the master of a vessel is a personal contract not cognizable in admiralty. Brackett *v.* The Hercules, Gilp. (U. S.) 184, 3 Fed. Cas. No. 1,762.

Contract to care for minor son.—Admiralty has no jurisdiction of a libel *in personam* for breach of a contract whereby defendant agreed that libellant's minor son should go on a sea voyage, and render services without receiving compensation therefor, but have careful and tender usage, the libel alleging that by reason of defendant's misconduct and ill treatment libellant's son died, and that libellant thereby lost the services, comfort, and society of his son. Plummer *v.* Webb, 4 Mason (U. S.) 380, 19 Fed. Cas. No. 11,233.

Money advanced for railroad charges.—An agreement to reimburse libellant for money advanced to pay railroad charges is not a maritime contract and cannot be enforced in admiralty. Pacific Coast Steamship Co. *v.* Ferguson, 76 Fed. 993, 44 U. S. App. 708, 22 C. C. A. 671; Pacific Coast Steamship Co. *v.* Moore, 70 Fed. 870.

Money advanced to pay crew.— A contract made with the owners of a vessel used in navigating the waters of the state, whereby money was advanced to them and used in paying the wages of the boat's crew, is not such a maritime contract as will give the United States district court exclusive jurisdiction thereof and oust the jurisdiction of the state courts. Cavender *v.* Steamboat Fanny Barker, 40 Mo. 235. But where seamen for a yacht are procured by shipping-agents at the master's request, sign articles, and at the master's request are supplied with board until the master may call for them, but are afterward discharged, the shipping-agent's services and supplies are maritime and within the jurisdiction of a court of admiralty. Haveron *v.* Goelet, 88 Fed. 301.

Personal contract of agent of ship.—Where a libel was filed *in personam* against the agents of a foreign ship in New York, who had personally promised the libellants to pay for a previous loss through the breach of a charter-party, the agents not being owners or personally liable for the damage aside from the new promise, it was held, upon exceptions to the libel, that the agent's personal contract was not a maritime contract of which the admiralty had jurisdiction. Fox *v.* Patton, 22 Fed. 746.

Purchasing vessel and traveling with her. — A claim against the owner of a vessel for services in purchasing her and in traveling on her, looking after the owner's interests, but having no control over or concern in the navigation of the vessel, and for advances to the master and vessel as the owner's agent, is not within the jurisdiction of admiralty. Doolittle *v.* Knobeloch, 39 Fed. 40.

Sale of cargo on shore.— Where a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there and proceeded to dispose of it on shore, this was not a maritime contract cognizable in an admiralty court. Waterbury *v.* Myrick, Blatchf. & H. Adm. 34, 29 Fed. Cas. No. 17,253.

Storage.— The storage of sails when stripped from the vessel is not a service pertaining to her navigation, and a claim for such storage is not a subject of admiralty jurisdiction, either by proceedings *in rem* or *in personam* (Hubbard *v.* Roach, 9 Biss. (U. S.) 375, 2 Fed. 393) nor is a contract for the storage of cargo at the end of the voyage (The Richard Winslow, 71 Fed. 426, 34 U. S. App. 542, 18 C. C. A. 344 [*affirming* 67 Fed. 259]; The Pulaski, 33 Fed. 383).

28. The Resolute, 168 U. S. 437, 18 S. Ct. 112, 42 L. ed. 533; Boutin *v.* Rudd, 82 Fed. 685, 53 U. S. App. 525, 27 C. C. A. 526; Maury *v.* Culliford, 4 Woods (U. S.) 118, 10 Fed. 388; Schultz *v.* Bosman, 5 Hughes (U. S.)

eventually leading to a maritime contract, is not within the jurisdiction of the admiralty.[29]

(II) *Contract Partly Non-Maritime.* Where a maritime contract is so inseparably connected with a contract over which the court has no jurisdiction that one cannot be decided without disposing of the other, admiralty has no jurisdiction,[30] but the jurisdiction is not defeated by the fact that some incidental matters are to be performed on land.[31]

c. Executory Agreements. While maritime contracts remain executory no liens arise thereunder against the vessel or cargo for breach thereof,[32] but admiralty will entertain jurisdiction of actions *in personam* for such breach.[33] Where, however, the contract has been partly executed, a lien arises and will be enforced by proceedings *in rem* for failure to perform the remainder of the contract.[34]

d. Particular Contracts — (I) *Bottomry and Hypothecation.* Bottomry bonds, or bonds executed as a hypothecation of a vessel and her cargo, are cognizable in admiralty, whether given by the master in a foreign port under circumstances of necessity and when he is unable to communicate with the owners and raise money on their credit,[35] or by the owners themselves in the home or a for-

97, 21 Fed. Cas. No. 12,488; The Richard Busteed, 1 Sprague (U. S.) 441, 20 Fed. Cas. No. 11,764.

29. The Harvey and Henry, 86 Fed. 656, 57 U. S. App. 41, 30 C. C. A. 330; Wenberg *v.* A Cargo of Mineral Phosphate, 15 Fed. 285; The Schooner Tribune, 3 Sumn. (U. S.) 144, 24 Fed. Cas. No. 14,171; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6, 1 Fed. Cas. No. 374.

A contract to procure insurance is not a maritime contract enforceable in admiralty. The City of Clarksville, 94 Fed. 201; Marquardt *v.* French, 53 Fed. 603; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6, 1 Fed. Cas. No. 374.

Contract to purchase cargo.— Admiralty will not take cognizance of a libel for a breach of a contract to purchase a cargo for a vessel with her funds, although such contract is contained in a charter-party stipulating for the carriage of the cargo. Peck *v.* Laughlin, 14 Phila. (Pa.) 531, 37 Leg. Int. (Pa.) 18, 19 Fed. Cas. No. 10,890, 21 Alb. L. J. 94, 8 Wkly. Notes Cas. (Pa.) 188.

Costs of advertising a vessel for sea and commissions for procuring freight are not suable *in rem.* Richard *v.* Hogarth, 94 Fed. 684; The Bark Joseph Cunard, Olc. Adm. 120, 13 Fed. Cas. No. 7,535.

Procuring cargo.— The services of one who procures a cargo for a vessel and assists in loading it are not maritime in their character. The Ole Oleson, 20 Fed. 384.

30. Turner *v.* Beacham, Taney (U. S.) 583, 24 Fed. Cas. No. 14,252.

31. Rosenthal *v.* The Louisiana, 37 Fed. 264; Wortman *v.* Griffith, 3 Blatchf. (U. S.) 528, 30 Fed. Cas. No. 18,057; The Brookline, 1 Sprague (U. S.) 104, 4 Fed. Cas. No. 1,937. See also Keyser *v.* Blue Star Steamship Co., 91 Fed. 267, 63 U. S. App. 402, 33 C. C. A. 496 [*reversing* 81 Fed. 507], to the effect that where a provision of a charter-party for a foreign vessel, though not in itself maritime in character, is so connected with the other stipulations therein as to render it an essential part of the contract, and it appears probable that without it the contract would not have been entered into by the owners, a court of admiralty has jurisdiction of an action for an alleged breach of such provision.

32. Vandewater *v.* Mills, 19 How. (U. S.) 82, 15 L. ed. 554; The J. F. Warner, 22 Fed. 342; The City of Baton Rouge, 19 Fed. 461; The Monte A, 12 Fed. 331; The Steamboat William Fletcher, 8 Ben. (U. S.) 537, 29 Fed. Cas. No. 17,692; The Schooner General Sheridan, 2 Ben. (U. S.) 294, 10 Fed. Cas. No. 5,319; The Pauline, 1 Biss. (U. S.) 390, 19 Fed. Cas. No. 10,848; Torices *v.* The Winged Racer, 24 Fed. Cas. No. 14,102; The Cabarga, 3 Blatchf. (U. S.) 75, 4 Fed. Cas. No. 2,276 [*reversing* 13 Fed. Cas. No. 7,038]. But see The Williams, Brown Adm. 208, 29 Fed. Cas. No. 17,710; The Pacific, 1 Blatchf. (U. S.) 569, 18 Fed. Cas. No. 10,643; The Flash, Abb. Adm. 67, 9 Fed. Cas. No. 4,857, in which cases it was held that a libel *in rem* would lie for a breach of executory contract.

33. Boutin *v.* Rudd, 82 Fed. 685, 53 U. S. App. 525, 27 C. C. A. 526; The J. F. Warner, 22 Fed. 342; The Monte A., 12 Fed. 331; Maury *v.* Culliford, 4 Woods (U. S.) 118, 10 Fed. 388; Marshall *v.* Pierrez, 9 Ben. (U. S.) 39, 16 Fed. Cas. No. 9,130; Oakes *v.* Richardson, 2 Lowell (U. S.) 173, 18 Fed. Cas. No. 10,390; The Schooner General Sheridan, 2 Ben. (U. S.) 294, 10 Fed. Cas. No. 5,319. But see Cox *v.* Murray, Abb. Adm. 340, 6 Fed. Cas. No. 3,304; Coyne *v.* The Alexander McNeil, 6 Fed. Cas. No. 3,312*a*, 20 Int. Rev. Rec. 176, in which cases it was held that admiralty had no jurisdiction, either *in rem* or *in personam*, of a libel for breach of an executory contract for personal services to be rendered to a vessel in port in lading or unlading her cargo.

34. The Oscoda, 66 Fed. 347; The Director, 26 Fed. 708; The Hermitage, 4 Blatchf. (U. S.) 474, 12 Fed. Cas. No. 6,410.

35. The Hilarity, Blatchf. & H. Adm. 90, 12 Fed. Cas. No. 6,480.

Implied hypothecation.— Admiralty has jurisdiction of a claim by the owner of goods

eign port, where there is an express pledge as security and the money is used and intended to be used for the safety of the ship or the purposes of a voyage.[36]

(II) *Building Contracts*—(A) *In General.* Admiralty jurisdiction does not extend to contracts for building a ship or supplying materials for her construction,[37] even when the work is performed or the materials are supplied after she is launched.[38] Where, however, a vessel is altered and fitted up for a different trade from that for which she was originally designed, work done and materials furnished therefor will be taken as having been furnished for repairs and not for construction, even where the expenditure is large as compared with the value of the vessel, and admiralty will take jurisdiction of a claim therefor.[39]

(B) *State Statutory Lien.* In respect to such contracts it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations, prescribing the mode of their enforcement, not inconsistent with the exclusive jurisdiction of the admiralty courts;[40] but such a lien created

sold by the master in a foreign port to obtain means of repairing damages to the vessel suffered on the high seas. Bulgin *v.* Sloop Rainbow, Bee Adm. 116, 4 Fed. Cas. No. 2,116.

If not given upon principles governing such securities, a hypothecation cannot be enforced in admiralty. Squire *v.* One Hundred Tons of Iron, 2 Ben. (U. S.) 21, 22 Fed. Cas. No. 13,270; Maitland *v.* The Brig Atlantic, Newb. Adm. 514, 16 Fed. Cas. No. 8,980; Hurry *v.* The Ship John and Alice, 1 Wash. (U. S.) 293, 12 Fed. Cas. No. 6,923.

36. The Brig Draco, 2 Sumn. (U. S.) 157, 7 Fed. Cas. No. 4,057; The Sloop Mary, 1 Paine (U. S.) 671, 16 Fed. Cas. No. 9,187.

Necessity for loan.—Admiralty jurisdiction in cases of bottomry is not affected by the fact that the bond was given by the owner for an object not indispensable. It is not the absolute necessity of the loan that gives jurisdiction. The Sloop Mary, 1 Paine (U. S.) 671, 16 Fed. Cas. No. 9,187. But admiralty has no jurisdiction to enforce a bottomry bond given in the home port for money not used, and not intended to be used, for the purposes of the voyage. Knight *v.* The Brig Attila, Crabbe (U. S.) 326, 14 Fed. Cas. No. 7,881.

37. Edwards *v.* Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487 [*affirming* 34 N. J. L. 96]; Roach *v.* Chapman, 22 How. (U. S.) 129, 16 L. ed. 294; Peoples' Ferry Co. *v.* Beers, 20 How. (U. S.) 393, 15 L. ed. 961; The John B. Ketcham 2d, 97 Fed. 872, 38 C. C. A. 518 [*affirming* Globe Iron Works Co. *v.* The Steamer John B. Ketcham 2d, 100 Mich. 583, 59 N. W. 247, 43 Am. St. Rep. 464]; The Paradox, 61 Fed. 860; Foster *v.* Ellis, 5 Ben. (U. S.) 83, 9 Fed. Cas. No. 4,968; The Ship Norway, 3 Ben. (U. S.) 163, 18 Fed. Cas. No. 10,359; Allair *v.* The Francis A. Palmer, 1 Fed. Cas. No. 203; The Coernine, 5 Fed. Cas. No. 2,944, 7 Am. L. Reg. 5, 21 Law Rep. 343; Young *v.* The Ship Orpheus, 2 Cliff. (U. S.) 29, 30 Fed. Cas. No. 18,169; Ludington *v.* The Nucleus, 15 Fed. Cas. No. 8,598, 2 Am. L. J. N. S. 563; Clinton *v.* The Brig Hannah, Bee Adm. 419, 5 Fed. Cas. No. 2,898; Sinton *v.* The Steamboat R. R. Roberts, 46 Ind. 476; Sheppard *v.* Steele, 43 N. Y. 52, 3 Am. Rep. 660; The Scow M. Tuttle *v.* Buck, 23 Ohio St. 565, 13 Am. Rep. 270; Waddell *v.* The Steamboat Daisy, 2 Wash. Terr. 76, 3 Pac. 616; Thorsen *v.* The Schooner J. B. Martin, 26 Wis. 488, 7 Am. Rep. 91. *Contra*, The Richard Busteed, 1 Sprague (U. S.) 441, 20 Fed. Cas. No. 11,764; Read *v.* The Hull of a New Brig, 1 Story (U. S.) 244, 20 Fed. Cas. No. 11,609.

See 1 Cent. Dig. tit. "Admiralty," § 150 *et seq.*

Under the civil law and anciently in England admiralty exercised jurisdiction over ship-building contracts. De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Benedict Adm. (3d ed.) § 264.

Defects discovered after employment on voyage.—The district court in admiralty has no jurisdiction of a libel *in personam* against the builder to recover damages for the non-completion of a ship according to a written contract under which the ship was built and sold, for defects discovered in the construction after the ship was delivered and employed on a voyage. Cunningham *v.* Hall, 1 Cliff. (U. S.) 43, 6 Fed. Cas. No. 3,481.

38. The William Windom, 73 Fed. 496; *In re* Glenmont, 32 Fed. 703; The Count De Lesseps, 17 Fed. 460; The Iosco, Brown Adm. 495, 13 Fed. Cas. No. 7,060; Wilson *v.* Lawrence, 82 N. Y. 409. *Contra*, The Manhattan, 46 Fed. 797; The Revenue Cutter No. 2, 4 Sawy. (U. S.) 143, 20 Fed. Cas. No. 11,714.

39. The Iris, 100 Fed. 104, 40 C. C. A. 301; The L. B. X., 93 Fed. 233; The Eliza Ladd, 3 Sawy. (U. S.) 519, 8 Fed. Cas. No. 4,364. See also *infra*, IV, E, 2, d, (XIII). But see McMaster *v.* One Dredge, 95 Fed. 832, to the effect that a contract for converting a scow into a dredge is one for the building of the dredge, and is therefore not maritime.

40. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; Edwards *v.* Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487; Calkin's Case, 3 Ct. Cl. 297; Davis *v.* Mason, 44 Ark. 553; Wyatt *v.* Stuckley, 29 Ind. 279; Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125; King *v.* Greenway, 71 N. Y. 413;

by state statute in favor of one building a vessel will not be enforced in admiralty.[41]

(III) *Carriage*—(A) *Of Goods*—(1) In General. Admiralty jurisdiction extends to charter-parties,[42] and to contracts for the transportation of goods.[43]

The Victorian, 24 Oreg. 121, 32 Pac. 1040, 41 Am. St. Rep. 838; Lake Nav. Co. *v.* Austin Electrical Supply Co., (Tex. Civ. App. 1895) 30 S. W. 832.

41. The Ship Norway, 3 Ben. (U. S.) 163, 18 Fed. Cas. No. 10,359. *Contra*, The Hull of a New Ship, 2 Ware (U. S.) 203, 12 Fed. Cas. No. 6,859. See, generally, *infra*, IV, E, 3, b.

42. Morewood *v.* Enequist, 23 How. (U. S.) 491, 16 L. ed. 516; The Ripon City, 102 Fed. 176, 42 C. C. A. 247; Dunbar *v.* Weston, 93 Fed. 472; The Oregon, 55 Fed. 666, 6 U. S. App. 581, 5 C. C. A. 229; The Alberto, 24 Fed. 379; The Monte A., 12 Fed. 331; The Fifeshire, 11 Fed. 743; Maury *v.* Culliford, 4 Woods (U. S.) 118, 10 Fed. 388; Marshall *v.* Pierrez, 9 Ben. (U. S.) 39, 16 Fed. Cas. No. 9,130; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559; The Schooner Volunteer, 1 Sumn. (U. S.) 551, 28 Fed. Cas. No. 16,991; Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 145, 7 Fed. Cas. No. 4,085.

Bond to secure performance.— Where a steamboat was hired by written contract for a year for the purpose of carrying passengers and freight, the charterer to navigate, man, and control her, bear all expenses of navigation, supplies, insurance, and repairs, keep her free from liens, and pay the owner a fixed sum monthly for her use, and, in case of loss, the gross sum of $8,000, and the charterer secured performance of his engagement by giving a bond with sureties for $8,000, it was held that admiralty would entertain jurisdiction of a suit on the bond although the contract differed in phraseology and form from agreements usual in shipping transactions, it being, nevertheless, a maritime contract. Haller *v.* Fox, 51 Fed. 298.

Charter of vessel not in existence.— The letting by charter of a vessel not in existence, but "to be built," is a maritime contract as respects the voyages to be made under it and the guaranties it contains as to speed and draft; and a court of admiralty has jurisdiction of a libel for the breach of such warranties after the vessel is built and delivered. The Baracoa, 44 Fed. 102.

Stipulation not embraced in charter-party.— A libel *in rem* cannot be maintained by charterers against a vessel for a cause of action founded upon a stipulation or condition of the hiring not embraced in the charter-party, or for misrepresentations or concealment of facts in respect to the tonnage or capacity of the vessel by the master or owners, leading to the charter-party. Balchen *v.* The Eli Whitney, 2 Fed. Cas. No. 792*a*.

43. Morewood *v.* Enequist, 23 How. (U. S.) 491, 16 L. ed. 516; Rich *v.* Lambert, 12 How. (U. S.) 347, 13 L. ed. 1017; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; The New York, 93 Fed. 495; The Queen of the Pacific, 61 Fed. 213; Rosenthal *v.* The Louisiana, 37 Fed. 264; The Monte A., 12 Fed. 331; Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 478; The A. M. Bliss, 2 Lowell (U. S.) 103, 1 Fed. Cas. No. 274; Wallis *v.* Chesney, 29 Fed. Cas. No. 17,110, 4 Am. L. Reg. 307; Church *v.* Shelton, 2 Curt. (U. S.) 271, 5 Fed. Cas. No. 2,714; Vose *v.* Allen, 3 Blatchf. (U. S.) 289, 28 Fed. Cas. No. 17,006; Higgins *v.* U. S. Mail Steamship Co., 3 Blatchf. (U. S.) 282, 12 Fed. Cas. No. 6,469; Quirk *v.* Clinton, 20 Fed. Cas. No. 11,518; Lowry *v.* The E. Benjamin, 15 Fed. Cas. No. 8,582, 6 Pa. L. J. 277, 4 Pa. L. J. Rep. 25; Van Santwood *v.* The John B. Cole, 28 Fed. Cas. No. 16,875, 4 N. Y. Leg. Obs. 373; The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914; The Gold Hunter, Blatchf. & H. Adm. 300, 10 Fed. Cas. No. 5,513.

See 1 Cent. Dig. tit. "Admiralty," § 156 *et seq.*

Damages occurring on wharf.— On a libel for the value of goods which were to be shipped on claimant's vessel, but were destroyed on the pier before lading, the contract of affreightment, the basis of the ship's liability, being a maritime contract, an additional stipulation for insurance while the goods were on the wharf cannot oust the jurisdiction of the admiralty. Rosenthal *v.* The Louisiana, 37 Fed. 264. See also Vose *v.* Allen, 3 Blatchf. (U. S.) 289, 28 Fed. Cas. No. 17,006, where the consignee of a cargo of iron shipped on freight refused to have anything to do with its delivery at the wharf where the master was delivering it, and the master overloaded the wharf so that it broke down, and a portion of the iron was lost, and the ship-owner was held responsible for the loss to the consignee, who had made advances on the consignment.

Deviation.— A libel *in rem* may be maintained for damages to a cargo of grain caused by deviation in violation of a condition that no other cargo should be taken and that the vessel should proceed directly to its destination. Knox *v.* The Schooner Ninetta, Crabbe (U. S.) 534, 14 Fed. Cas. No. 7,912.

Unseaworthiness of vessel.— A shipper, after discovering that the vessel upon which the cargo was laden is unseaworthy, may maintain a libel *in rem* for the non-performance of the contract, and to recover the cargo where it is wrongfully withheld (The Director, 26 Fed. 708) or for damages to the cargo (The New York, 93 Fed. 495).

Libel for freight.— An action for the recovery of freight lies in admiralty in favor of the master of a ship, against the consignee of cargo, equally *in personam* and *in rem*.

(2) In Part on Land. Admiralty has jurisdiction in case of loss, in the course of water transit, of goods shipped to inland points under a contract for through transportation,[44] but not unless the transportation on land is expressly contracted for in the shipping contract.[45]

(3) Supplemental Contracts. Where, in a contract for the transportation of goods, the vessel agrees to collect the price, advances, and freight charges on the goods from the consignee and repay them to the shipper, admiralty has jurisdiction of such supplemental contract;[46] but where the owner and master of a vessel contracts to carry the cargo to its destination, and there sell it and return the proceeds to the consignor less the freight, the vessel cannot be libeled for the proceeds of such sale, and a court of admiralty has no jurisdiction to enforce the contract.[47]

(B) *Of Passengers.* Contracts for the transportation by water of passengers and their baggage, and all injuries thereto, are within the admiralty jurisdiction.[48]

(IV) *Demurrage.* Admiralty jurisdiction extends to claims for demurrage or compensation for the wrongful detention of a vessel.[49]

(V) *Dockage.* Contracts for dockage are of a maritime character, and are within the jurisdiction of admiralty.[50]

(VI) *Lockage and Tolls.* A claim for lockage in a public navigable river,[51] or for tolls imposed by a state statute in favor of corporations organized for the improvement of rivers and harbors,[52] is cognizable in admiralty.

(VII) *Marine Insurance and General Average.* Contracts of marine

Gaughran *v.* One Hundred and Fifty-One Tons of Coal, 10 Fed. Cas. No. 5,273; Thatcher *v.* McCulloh, Olc. Adm. 365, 23 Fed. Cas. No. 13,862; Warehouse, etc., Supply Co. *v.* Galvin, 96 Wis. 523, 71 N. W. 804, 65 Am. St. Rep. 57.

Courts of admiralty have full jurisdiction also, as incidental to proceedings *in rem*, to decree freight to the ship-owner in proper cases. The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542, 17 Fed. Cas. No. 10,032.

Implied contract to receipt for goods.— Where a dispute arose between the captain of a schooner and the libellant's agent respecting the quantity of wire delivered to such schooner, in consequence of which a clean receipt therefor was refused and the schooner sailed away with the wire on board, it was held that the implied obligation of the schooner to give such receipt is a maritime obligation within the jurisdiction of the admiralty. The W. A. Morrell, 27 Fed. 570.

44. Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 10 Biss. (U. S.) 18, 19 Fed. Cas. No. 11,112.

45. One Hundred and Fifty-One Tons of Coal, 4 Blatchf. (U. S.) 368, 18 Fed. Cas. No. 10,520; Gaughran *v.* One Hundred and Fifty-One Tons of Coal, 10 Fed. Cas. No. 5,273.

46. The St. Joseph, 21 Fed. Cas. No. 12,230, 10 Chic. Leg. N. 269, 7 N. Y. Wkly. Dig. 35; The Hardy, 1 Dill. (U. S.) 460, 11 Fed. Cas. No. 6,056.

47. Krohn *v.* The Julia, 37 Fed. 369; Alberti *v.* The Brig Virginia, 2 Paine (U. S.) 115, 1 Fed. Cas. 141; Waterbury *v.* Myrick, Blatchf. & H. Adm. 34, 29 Fed. Cas. No. 17,253.

48. The Steamship Hammonia, 10 Ben. (U. S.) 512, 11 Fed. Cas. No. 6,006; Woolston *v.* The John A. Warner, 30 Fed. Cas. No. 18,033; Walsh *v.* The Steamboat H. M. Wright, Newb. Adm. 494, 29 Fed. Cas. No. 17,115; McAfee *v.* The Barque Creole, 1 Phila. (Pa.) 190, 8 Leg. Int. (Pa.) 82, 15 Fed. Cas. No. 8,655; The Pacific, 1 Blatchf. (U. S.) 569, 18 Fed. Cas. No. 10,643; Stone *v.* The Relampago, 23 Fed. Cas. No. 13,486; Marshall *v.* Bazin, 16 Fed. Cas. No. 9,125, 7 N. Y. Leg. Obs. 342; The Steamboat General Buell *v.* Long, 18 Ohio St. 521. *Contra*, Brackett *v.* The Hercules, Gilp. (U. S.) 184, 3 Fed. Cas. No. 1,762.

See 1 Cent. Dig. tit. "Admiralty," § 159.

49. Brown *v.* Certain Tons of Coal, 34 Fed. 913; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565.

50. The Vidal Sala, 12 Fed. 207; Wortman *v.* Griffith, 3 Blatchf. (U. S.) 528, 30 Fed. Cas. No. 18,057. But see Ransom *v.* Mayo, 3 Blatchf. (U. S.) 70, 20 Fed. Cas. No. 11,571, to the effect that an action *in personam* will not lie to recover damages for injury to a vessel through the negligence of a ship-builder in hauling her up on the ways, when the contract for repairs is made on land, to be performed in a ship-yard.

Work done in dry-dock preliminary to repairs.— Work done upon a vessel in the dry-dock, in scraping her bottom preparatory to coppering her, is not of a maritime character, and compensation for such labor cannot be recovered in admiralty. Bradley *v.* Bolles, Abb. Adm. 569, 3 Fed. Cas. No. 1,773.

51. Monongahela Nav. Co. *v.* The Steam Tug Bob Connell, 1 Fed. 218.

52. The St. Joseph, 21 Fed. Cas. No. 12,230, 10 Chic. Leg. N. 269, 7 N. Y. Wkly. Dig. 35.

insurance[53] and claims for general average[54] are within the jurisdiction of admiralty.

(VIII) *Novation.* A new contract or promise made by novation as a substitute for and in consideration of a former contract or liability which was maritime in character is not on that account sufficient to give a court of admiralty jurisdiction thereof;[55] but the mere acceptance of notes in liquidation of a maritime claim or as collateral security therefor, when not taken as payment thereof, does not so change the debt as to take it out of the admiralty jurisdiction, and the original cause of action may therefore be enforced in the admiralty court.[56]

(IX) *Partnership.* Admiralty has no jurisdiction of a contract of partnership to engage in maritime commerce.[57]

(X) *Pilotage and Consortship.* Admiralty has jurisdiction of suits for pilotage fees, including claims for half pilotage,[58] and over an action for breach of

53. New England Mut. Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; The Guiding Star, 9 Fed. 521; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

Suit based on fraudulent negotiations.— A suit brought upon a policy of marine insurance, where the loss occurred outside of the express limits of the policy and the complaint is based upon alleged false and fraudulent negotiations leading up to the making of the policy, is not within the jurisdiction of a court of admiralty. Williams *v.* Providence Washington Ins. Co., 56 Fed. 159.

54. Cutler *v.* Rae, 7 How. (U. S.) 729, 12 L. ed. 890; National Board of Mar. Underwriters *v.* Melchers, 45 Fed. 643; Coast Wrecking Co. *v.* Phenix Ins. Co., 20 Blatchf. (U. S.) 557, 13 Fed. 127, 7 Fed. 236; Bark San Fernando *v.* Jackson, 12 Fed. 341; Mutual Safety Ins. Co. *v.* The Ship George, Olc. Adm. 89, 17 Fed. Cas. No. 9,981.

55. Fox *v.* Patton, 22 Fed. 746; The Centurion, 1 Ware (U. S.) 490, 5 Fed. Cas. No. 2,554.

56. Sheafe *v.* Kimball, 21 Fed. Cas. No. 12,729*a*.

Note amounting to payment.— Whether a note taken for a maritime claim is a bar to the admiralty jurisdiction depends upon the effect which the note has upon the original contract by the laws of the place where it is made. If it discharges it, it puts an end to the admiralty jurisdiction, and the surrender of the note cannot renew the original debt for the purpose of restoring the admiralty jurisdiction over it. Reppert *v.* Robinson, Taney (U. S.) 492, 20 Fed. Cas. No. 11,703. And see Ramsay *v.* Allegre, 12 Wheat. (U. S.) 611, 6 L. ed. 746 (to the effect that where the owner of a ship has given a negotiable note for supplies furnished in her home port, a suit *in personam* in the admiralty cannot be maintained against him by the materialman if the local law gives no specific lien on the ship, especially if such note be not given up or offered to be given up) and Marshall *v.* Bazin, 16 Fed. Cas. No. 9,125, 7 N. Y. Leg. Obs. 342 (to the effect that taking personal security for a demand against a passenger by promissory note or bill of exchange will be regarded as a waiver of the remedy in admiralty and bar proceedings while such security remains outstanding).

But see The Harriet, 1 Sprague (U. S.) 33, 11 Fed. Cas. No. 6,098 (wherein it was held that a seaman taking the note of the master, not negotiable, and giving a receipt for his wages, and putting the note in suit, is not thereby precluded from proceeding by libel against the vessel for his wages), and The Gate City, 5 Biss. (U. S.) 200, 10 Fed. Cas. No. 5,267 (holding that a seaman's lien is not waived by receiving notes on settling attachment proceedings under state law, where they afterward become worthless).

57. Ward *v.* Thompson, 22 How. (U. S.) 330, 16 L. ed. 249 [*reversing* Newb. Adm. 95, 29 Fed. Cas. No. 17,162]; Turner *v.* Beacham, Taney (U. S.) 583, 24 Fed. Cas. No. 14,252; Milne *v.* Huber, 3 McLean (U. S.) 212, 17 Fed. Cas. No. 9,617; The Crusader, 1 Ware (U. S.) 448, 6 Fed. Cas. No. 3,456; Francis *v.* Lavine, 26 La. Ann. 311. But where the libellant was master and also a co-owner of a whaling-vessel, it was held that after the voyage had been made up and the amount due for his lay ascertained, and the proceeds of the voyage were in the hands of the other owners, the libellant was entitled to recover, in admiralty, the amount due him as master, notwithstanding his co-ownership. Dexter *v.* Munroe, 2 Sprague (U. S.) 39, 7 Fed. Cas. No. 3,863.

58. *Ex p.* Hagar, 104 U. S. 520, 26 L. ed. 816; Hobart *v.* Drogan, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Bark Alaska, 3 Ben. (U. S.) 391, 1 Fed. Cas. No. 129; The Brig America, I Lowell (U. S.) 176, 1 Fed. Cas. No. 289; The Wave, Blatchf. & H. Adm. 235, 29 Fed. Cas. No. 17,297; The Schooner Anne, 1 Mason (U. S.) 508, 1 Fed. Cas. No. 412; Rutherford *v.* Barque Ornen, 10 Phila. (Pa.) 369, 32 Leg. Int. (Pa.) 420.

Claim for half pilotage.— Where the pilot law provides that an offer of pilot service, if refused, shall entitle the pilot to half pilotage, such offer and refusal, in law, create an obligation or contract to pay such half pilotage, which may be enforced in the admiralty against the owner or vessel. The Glenearne, 7 Sawy. (U. S.) 200, 7 Fed. 604; The Schooner Kalmar, 10 Ben. (U. S.) 242, 14 Fed. Cas. No. 7,601; Banta *v.* McNeil, 5 Ben. (U. S.) 74, 2 Fed. Cas. No. 966; The California, 1 Sawy. (U. S.) 463, 4 Fed. Cas. No. 2,312; The George S. Wright, Deady (U. S.) 591, 10 Fed. Cas. No. 5,340; The Brig

an agreement of consortship between the masters of two vessels engaged in the business of wrecking.[59]

(XI) *Proctor's Costs and Fees.* A proctor may maintain a suit in admiralty for his costs or fees.[60]

(XII) *Services On or About Vessel or Cargo*—(A) *By Seamen.* Admiralty has jurisdiction over contracts for the services of seamen,[61] but to justify a person employed on a vessel in suing in admiralty the services rendered must be essentially maritime.[62]

America, 1 Lowell (U. S.) 176, 1 Fed. Cas. No. 289. *Contra,* Harrison *v.* The Anna Kimball, Hoffm. Op. 464, 11 Fed. Cas. No. 6,132; Leitch *v.* The George Law, 15 Fed. Cas. No. 8,223, 6 Am. L. Reg. 368.

Statute making consignee liable.— A state statute which provides that in a certain contingency the consignee shall also be liable for pilotage does not affect the jurisdiction in admiralty, but only gives an additional remedy against a third person. The George S. Wright, Deady (U. S.) 591, 10 Fed. Cas. No. 5,340.

59. Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729.

60. McDonald *v.* The Ship Cabot, Newb. Adm. 348, 16 Fed. Cas. No. 8,759.

61. Sheppard *v.* Taylor, 5 Pet. (U. S.) 675, 8 L. ed. 269; The Kentigern, 99 Fed. 443; The George T. Kemp, 2 Lowell (U. S.) 477, 10 Fed. Cas. No. 5,341; The Coal Boat D. C. Salisbury, Olc. Adm. 71, 7 Fed. Cas. No. 3,694; Wilson *v.* The Steamboat Ohio, Gilp. (U. S.) 505, 30 Fed. Cas. No. 17,825; Hammond *v.* Essex F. & M. Ins. Co., 4 Mason (U. S.) 196, 11 Fed. Cas. No. 6,001; Abbott *v.* The Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542.

A father may sue in admiralty for the wages of his minor son earned on a maritime voyage. Plummer *v.* Webb, 4 Mason (U. S.) 380, 19 Fed. Cas. No. 11,233.

Claim by seaman for expenses during sickness.— Admiralty has jurisdiction to enforce the payment of expenses for curing a sick seaman in the course of a voyage. Harden *v.* Gordon, 2 Mason (U. S.) 541, 11 Fed. Cas. No. 6,047.

Contract for particular purpose.— A contract by the master employing another as nominal master for a particular purpose may be sued on in admiralty as to the wages stipulated, but not as to a further stipulation for an additional sum in case the voyage should be altered or discontinued. L'Arina *v.* Manwaring, Bee Adm. 199, 14 Fed. Cas. No. 8,089.

Services rendered on wrecked vessel for the purpose of fitting her up and making her ready for further use in navigation are maritime. Gilchrist *v.* Godman, 79 Fed. 970; The Progresso, 46 Fed. 292; The Old Natchez, 9 Fed. 476. But see The Steamer Propeller M. M. Caleb, 9 Ben. (U. S.) 152, 17 Fed. Cas. No. 9,682 (to the effect that admiralty has no jurisdiction of a claim for wages of a seaman for the time he was engaged in repairing a vessel which had been sunk in port and raised again), and Sturgis *v.* The Oregon, 23 Fed. Cas. Nos. 13,577, 13,576*b* (holding that admiralty has no jurisdiction of a claim for services rendered in the port of New York to a vessel on the rocks, and materials furnished in aid thereof under employment by the owners in charge to assist them, where the vessel was owned in New York, and regularly employed as a passenger boat between that state and Connecticut, the libellants having no possession thereof as salvors and not undertaking the work on the footing of salvage services).

Share of earnings of fishing voyage.— Suits may be maintained either at law or in admiralty for shares or proportions of earnings in fishing-voyages, such shares being the measure of the amount of wages. Duryee *v.* Elkins, Abb. Adm. 529, 8 Fed. Cas. No. 4,197; Macomber *v.* Thompson, 1 Sumn. (U. S.) 384, 16 Fed. Cas. No. 8,919.

Admiralty also has jurisdiction to decree the bounty allowed to persons employed in the cod-fishery, and a claim therefor may be united with a claim for an account of the fish taken. The Lucy Anne, 3 Ware (U. S.) 253, 15 Fed. Cas. No. 8,596.

62. The Steam-Boat Thomas Jefferson, 10 Wheat. (U. S.) 428, 6 L. ed. 358; Thackarey *v.* The Farmer of Salem, Gilp. (U. S.) 524, 23 Fed. Cas. No. 13,852.

What services are maritime.— To be a maritime contract, it is not enough that the service is to be done on the sea; it must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation directly by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea. Gurney *v.* Crockett, Abb. Adm. 490, 11 Fed. Cas. No. 5,874; The Ship Harriet, Olc. Adm. 229, 11 Fed. Cas. No. 6,097; The Coal Boat D. C. Salisbury, Olc. Adm. 71, 7 Fed. Cas. No. 3,694; Thackarey *v.* The Farmer of Salem, Gilp. (U. S.) 524, 23 Fed. Cas. No. 13,852; Trainer *v.* The Boat Superior, Gilp. (U. S.) 514, 24 Fed. Cas. No. 14,136. Neither the extent of the voyage, nor the nature of the business or trade carried on by the vessel, provided it be of a maritime character, will prevent seamen from resorting to admiralty to recover their wages where their services are of the character above indicated. The Atlantic, 53 Fed. 607; The W. F. Brown, 46 Fed. 290; Disbrow *v.* The Walsh Brothers, 36 Fed. 607; Hart *v.* The Enterprise, 11 Fed. Cas. No. 6,151. 3 Wkly. Notes Cas. (Pa.) 172; Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190, 5 Big. Ins. Cas. 18, 2 Centr. L. J. 495, 5 Ins. L. J. 26; The Steamer May Queen, 1 Sprague

(B) *By Ship-Keeper or Watchman.* Admiralty will not entertain jurisdiction of claims for services by a ship-keeper, or watchman, while the vessel is in her home port, where his sole duty is to remain aboard, or to visit the vessel at anchorage from time to time and see to her safety;[63] but where it is a part of his duty to get the vessel under way and navigate her from place to place as circumstances from time to time demand, his services are maritime and are within the jurisdiction of admiralty.[64]

(C) *By Stevedore.* The services of stevedores in loading or unloading a vessel are maritime in character, and claims therefor are within the admiralty jurisdiction,[65] although the contrary has been held in many cases.[66]

(XIII) *Supplies and Repairs*—(A) *In General.* Contracts for furnishing supplies to or making repairs on vessels engaged in commerce or navigation, or loans of money for such purposes, are within the jurisdiction of admiralty, whether furnished in a foreign port[67] or in the vessel's home port.[68]

(U. S.) 588, 16 Fed. Cas. No. 9,360; The Sloop Canton, 1 Sprague (U. S.) 437, 5 Fed. Cas. No. 2,388.

Master's services as factor.—No suit for services performed by the master as a factor, or in any other character except that of master, is cognizable in the admiralty. Willard *v.* Dorr, 3 Mason (U. S.) 161, 29 Fed. Cas. No. 17,680.

Musicians on board of a vessel, who are hired and employed as such, cannot enforce the payment of their wages by a suit *in rem* in admiralty. Trainer *v.* The Boat Superior, Gilp. (U. S.) 514, 24 Fed. Cas. No. 14,136.

Performers in a show given on a float at points on the Mississippi river cannot recover for their services in an admiralty court. The W. F. Brown, 46 Fed. 290.

Services in procuring crew.—Admiralty has no jurisdiction of a suit by shipping-masters to recover for services in procuring a crew to navigate a vessel from one port to another in the same state. Scott *v.* The Morning Glory, Hoffm. Op. 448, 21 Fed. Cas. No. 12,542.

Services rendered in port.—A contract to work at a certain rate per day in port, in putting in machinery in a vessel, is not a maritime contract and will not support an action *in rem* in admiralty (Walter *v.* The Kamchatker, 29 Fed. Cas. No. 17,119), and services rendered by a fireman on board a British ship while at the dock at Liverpool do not give to the demand for wages a maritime character of which admiralty can take cognizance (Graham *v.* Hoskins, Olc. Adm. 224, 10 Fed. Cas. No. 5,669).

63. Gurney *v.* Crockett, Abb. Adm. 490, 11 Fed. Cas. No. 5,874; Russell *v.* Barkman, 21 Fed. Cas. No. 12,151; The Ship Harriet, Olc. Adm. 229, 11 Fed. Cas. No. 6,097; Phillips *v.* The Ship Thomas Scattergood, Gilp. (U. S.) 1, 19 Fed. Cas. No. 11,106; Levering *v.* Columbia Bank, 1 Cranch C. C. (U. S.) 207, 15 Fed. Cas. No. 8,287.

64. Wishart *v.* The Jos. Nixon, 43 Fed. 926; The Maggie P., 32 Fed. 300; Robert *v.* The Bark Windermere, 2 Fed. 722; Gurney *v.* Crockett, Abb. Adm. 490, 11 Fed. Cas. No. 5,874.

65. The Allerton, 93 Fed. 219; The Main, 51 Fed. 954, 2 U. S. App. 349, 2 C. C. A. 569; The Mattie May, 45 Fed. 899; The Gilbert Knapp, 37 Fed. 209; Florez *v.* The Scotia, 35 Fed. 916; The Hattie M. Bain, 20 Fed. 389; The Canada, 7 Sawy. (U. S.) 173, 7 Fed. 119; The Senator, 21 Fed. 191; The George T. Kemp, 2 Lowell (U. S.) 477, 10 Fed. Cas. No. 5,341.

Preparations for loading or delivering.—The services of a cooper in preparing a cargo for delivery (The Bark Onore, 6 Ben. (U. S.) 564, 18 Fed. Cas. No. 10,538) or of a compress company in compressing cotton and putting it on board (The Wivanhoe, 26 Fed. 927. *Contra*, United Hydraulic Cotton-Press Co. *v.* The Alexander McNeil, 24 Fed. Cas. No. 14,404, 20 Int. Rev. Rec. 175; The Bark Joseph Cunard, Olc. Adm. 120, 13 Fed. Cas. No. 7,535), the weighing, inspecting, and measuring of a cargo (Constantine *v.* The Schooner River Queen, 2 Fed. 731), and the removal of ballast for the purpose of putting a vessel in condition to receive a cargo (Roberts *v.* The Bark Windermere, 2 Fed. 722), are all maritime services and are within the admiralty jurisdiction.

66. Danace *v.* The Magnolia, 37 Fed. 367; Paul *v.* The Bark Ilex, 2 Woods (U. S.) 229, 18 Fed. Cas. No. 10,842; Coyne *v.* The Alexander McNeil, 6 Fed. Cas. No. 3,312*a*, 20 Int. Rev. Rec. 176; The A. R. Dunlap, 1 Lowell (U. S.) 350, 1 Fed. Cas. No. 513; The Circassian, 1 Ben. (U. S.) 209, 5 Fed. Cas. No. 2,722; Kegan *v.* The Amaranth, 14 Fed. Cas. No. 7,646; Regan *v.* The Amaranth, 20 Fed. Cas. No. 11,664; Cox *v.* Murray, Abb. Adm. 340, 6 Fed. Cas. No. 3,304; The Coal Boat D. C. Salisbury, Olc. Adm. 71, 7 Fed. Cas. No. 3,694; The Amstel, Blatchf. & H. Adm. 215, 1 Fed. Cas. No. 339; Fisher *v.* Luling, 33 N. Y. Super. Ct. 337.

67. The Advance, 72 Fed. 793, 38 U. S. App. 344, 19 C. C. A. 194; Tree *v.* The Brig Indiana, Crabbe (U. S.) 479, 24 Fed. Cas. No. 14,165; The Brig Nestor, 1 Sumn. (U. S.) 73, 18 Fed. Cas. No. 10,126; The Jerusalem, 2 Gall. (U. S.) 345, 13 Fed. Cas. No. 7,294.

Distinction between ports.—So far as the remedy in admiralty for repairs and supplies is concerned, there is no distinction between a port in this country other than the home port and the port of a foreign country. Whitlock *v.* The Barque Thales, 20 How. Pr. (N. Y.) 447, 29 Fed. Cas. No. 17,578.

68. The Iris, 100 Fed. 104, 40 C. C. A. 301; Jutte *v.* Davis, 47 Fed. 592; Endner *v.* Greco, 3 Fed. 411; Whittaker *v.* The J. A.

(B) *General Contract for Supplies.* A contract with the owners to supply their vessels for the period of a year with all the provisions they might require while in the port where the supplies are to be furnished is not a maritime contract, and a court of admiralty has no jurisdiction of a suit for damages for its breach by the ship-owners.[69]

(XIV) *TOWAGE.* A contract for towage is a maritime contract which may be sued in admiralty.[70]

(XV) *VESSEL-HIRE.* Admiralty has jurisdiction of contracts for the employment of vessels upon navigable waters.[71]

(XVI) *WHARFAGE.* A claim for wharfage of a sea-going vessel is of maritime cognizance.[72]

3. LIENS — a. In General. Admiralty has a general jurisdiction to enforce maritime liens.[73]

b. Lien Created by State Statute. Although a state statute cannot confer jurisdiction on a federal court, it may give a right to which, other things permitting, such a court may give effect,[74] and in many cases, therefore, admiralty will

Travis, 29 Fed. Cas. No. 17,599, 7 Chic. Leg. N. 275; The Selt, 3 Biss. (U. S.) 344, 21 Fed. Cas. No. 12,649; Turner *v.* Beacham, Taney (U. S.) 583, 24 Fed. Cas. No. 14,252; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*b*; Tree *v.* The Brig Indiana, Crabbe (U. S.) 479, 24 Fed. Cas. No. 14,165; Murphey *v.* Mobile Trade Co., 49 Ala. 436; Steamboat Mist *v.* Martin, 41 Ala. 712; Steamer Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397. *Contra*, Merritt *v.* Sackett, 17 Fed. Cas. No. 9,484, 2 Am. L. J. N. S. 341, 12 Law Rep. 511; Gardner *v.* The Ship New Jersey, 1 Pet. Adm. 223, 9 Fed. Cas. No. 5,233; The Tug Montauk *v.* Walker, 47 Ill. 335; Williamson *v.* Hogan, 46 Ill. 504; Southern Dry Dock Co. *v.* Gibson, 22 La. Ann. 623; Avrill *v.* The Steamer Alabama Bell, 20 La. Ann. 432.

Breach as to quality of supplies.— A contract for supplies to a vessel being a maritime contract, a court of admiralty has jurisdiction to give damages for a breach of the contract as to the quality of the supplies furnished, or for misrepresentations, or for other breaches in the performance of it. The Electron, 48 Fed. 689.

Manner of vessel's employment immaterial. — The jurisdiction in admiralty over a contract for repairs or supplies to a vessel depends upon her character, and not upon the manner in which she is actually employed. Reppert *v.* Robinson, Taney (U. S.) 492, 20 Fed. Cas. No. 11,703.

69. Diefenthal *v.* Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, 46 Fed. 397.

70. The Oscoda, 66 Fed. 347; The Williams, Brown Adm. 208, 29 Fed. Cas. No. 17,710; The Canal-Boat W. J. Walsh, 5 Ben. (U. S.) 72, 30 Fed. Cas. No. 17,922; The Acadia, Brown Adm. 73, 1 Fed. Cas. No. 24.

71. Wood *v.* Canal Boat Wilmington, 5 Hughes (U. S.) 205, 48 Fed. 566; The Dick Keys, 1 Biss. (U. S.) 408, 7 Fed. Cas. No. 3,898; Scott *v.* The Steamboat Dick Keyes, 1 Bond (U. S.) 164, 21 Fed. Cas. No. 12,528.

72. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373; Upper Steamboat Co. *v.* Blake, 2 App. Cas. (D. C.) 51; Atlantic Dock Co. *v.* Wenberg, 9 Ben. (U. S.) 464, 2 Fed. Cas. No. 622; The Canal Boat Ann Ryan, 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428; The Canal-Boat Kate Tremaine, 5 Ben. (U. S.) 60, 14 Fed. Cas. No. 7,622; Brookman *v.* Hamill, 43 N. Y. 554, 3 Am. Rep. 731. *Contra*, Delaware River Storage Co. *v.* The Thomas, 9 Phila. (Pa.) 364, 29 Leg. Int. (Pa.) 116, 7 Fed. Cas. No. 3,769, 6 Alb. L. J. 292, 6 Am. L. Rev. 765, 7 Am. L. Rev. 381, 4 Chic. Leg. N. 218, 15 Int. Rev. Rec. 147, 20 Int. Rev. Rec. 175, 4 Leg. Gaz. (Pa.) 114, 20 Pittsb. Leg. J. (Pa.) 19.

Wharfage accruing at home port.— The federal courts have no jurisdiction of a libel *in rem* to enforce a claim for wharfage accruing while the vessel was lying in a home port and within the jurisdiction of a state. Squires *v.* The Charlotte Vanderbilt, 22 Fed. Cas. No. 13,271, 3 Wkly. L. Gaz. 343; Jeffersonville *v.* The Steam Ferryboat John Shallcross, 35 Ind. 19.

73. The General Smith, 4 Wheat. (U. S.) 438, 4 L. ed. 609; Paxson *v.* Cunningham, 63 Fed. 132, 21 U. S. App. 466, 11 C. C. A. 111; *In re* Kirkland, 14 Fed. Cas. No. 7,842, 12 Am. L. Reg. N. S. 300, 6 Am. L. T. Rep. 324; The Circassian, 5 Fed. Cas. No. 2,720*a*, 6 Alb. L. J. 401, 12 Am. L. Reg. N. S. 291, 7 Am. L. Rev. 575, 5 Am. L. T. Rep. 482, 5 Chic. Leg. N. 146; The Selt, 3 Biss. (U. S.) 344, 21 Fed. Cas. No. 12,649; Ashbrook *v.* The Steamer Golden Gate, Newb. Adm. 296, 2 Fed. Cas. No. 574; Read *v.* The Hull of a New Brig, 1 Story (U. S.) 244, 20 Fed. Cas. No. 11,609; Davis *v.* Child, 2 Ware (U. S.) 78, 7 Fed. Cas. No. 3,628; Davis *v.* A New Brig, Gilp. (U. S.) 473, 7 Fed. Cas. No. 3,643; The Gold Hunter, Blatchf. & H. Adm. 300, 10 Fed. Cas. No. 5,513; The Rebecca, 1 Ware (U. S.) 187, 20 Fed. Cas. No. 11,619; Drinkwater *v.* The Brig Spartan, 1 Ware (U. S.) 145, 7 Fed. Cas. No. 4,085.

See 1 Cent. Dig. tit. "Admiralty," § 191 *et seq.*

Failure of maritime lien.— A party who sets up an admiralty lien which fails cannot set up and rely upon a common-law or statutory lien. Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787, 14 Am. L. Reg. N. S. 86 [*reversing* 23 Fed. Cas. No. 13,788, 13 Am. L. Reg. N. S. 502, 6 Chic. Leg. N. 334, 20 Int. Rev. Rec. 64].

74. *Ex p.* McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624.

Lien dependent on recording.— As the constitution and laws of Louisiana declare that no privilege shall affect third persons unless

enforce a lien against a vessel given by a state statute,[75] but will never do so in aid of a claim which is not maritime in its nature.[76]

recorded in the parish where the property to be affected is situated, the failure to record a privilege claimed under a state statute for repairs and supplies furnished at the home port will prevent the enforcement of the lien, even if the federal court otherwise had jurisdiction. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654.

Lien dependent upon seizure.— Where the local law provides for proceedings *in rem* against domestic vessels, but gives no lien before seizure, admiralty has no jurisdiction, under Admiralty Rule 12, which provides that proceedings *in rem* may be had in the admiralty courts against domestic ships " when by the local law a lien is given." Wick *v.* The Schooner Samuel Strong, 6 McLean (U. S.) 587, Newb. Adm. 187, 29 Fed. Cas. No. 17,607. And see Price *v.* Frankel, 1 Wash. Terr. 33, to the effect that admiralty had no jurisdiction under the California statute in force in 1857, relating to enforcing liabilities against vessels for supplies and materials furnished in the state, which gave no lien until the institution of the proceeding authorized created the lien.

Lien divested by state law.— A materialman whose only lien is given by a state law, and has by that law been divested, is not entitled to sue in the United States courts. The Whistler, 30 Fed. 199; Ashbrook *v.* The Steamer Golden Gate, Newb. Adm. 296, 2 Fed. Cas. No. 574. But see The Barque Chusan, 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717, holding that in a proceeding against a foreign vessel for materials furnished, that clause in the New York statute (relative to liens on any vessel within the state) providing that the lien thereby given shall cease when the ship has left the state cannot be invoked, as the federal courts, in the exercise of admiralty jurisdiction, are governed solely by the legislation of congress.

An unconstitutional power to state courts to proceed *in rem* to enforce the lien will not affect the right of the admiralty court to enforce it. The Illinois, 2 Flipp. (U. S.) 383, 12 Fed. Cas. No. 7,005; The John Farron, 14 Blatchf. (U. S.) 24, 13 Fed. Cas. No. 7,341.

Not bound by priority.— A lien given by the local law for supplies furnished by materialmen in the home port will be enforced in admiralty, but the admiralty court is not bound by the priority given it. Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*b*.

Power to order sale of vessel.—Though the New York act of May 8, 1869, providing for the enforcement of the liens of mechanics, workmen, etc., by the sale of the chattel, does not authorize a state court to order the sale of a vessel to enforce a shipwright's lien, admiralty may give effect to the statute by causing the vessel to be sold. The B. F. Woolsey, 7 Fed. 108.

Prior to May 1, 1859, Admiralty Rule 12 authorized a procedure *in rem* to enforce a lien given by the local law upon a vessel for supplies or repairs in a domestic port (The Steamer St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180), but on that date the rule was changed so as to provide for proceedings *in rem* or *in personam* to enforce liens for supplies and repairs to foreign ships, and " proceedings *in personam*, but not *in rem*," for supplies, etc., to domestic ships. In 1872, however, the rule was changed again, so as to provide that in all suits for supplies the libellant may proceed against the ship *in rem*, or against the master, etc., *in personam*. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654. Between the first and last mentioned dates a proceeding *in rem* could not be maintained to enforce a local lien for supplies and repairs to a ship in a domestic port. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; Jackson *v.* The Kinnie, 13 Fed. Cas. No. 7,137, 8 Am. L. Reg. N. S. 470; The Ship Adele, 1 Ben. (U. S.) 309, 1 Fed. Cas. No. 78; New York Mail Steamship Co. *v.* The Baltic, 18 Fed. Cas. No. 10,213, 5 Int. Rev. Rec. 3; Tupper *v.* The St. Lawrence, 24 Fed. Cas. No. 14,240, 16 Leg. Int. (Pa.) 317.

75. The William M. Hoag, 168 U. S. 443, 18 S. Ct. 114, 42 L. ed. 537; The Resolute, 168 U. S. 437, 18 S. Ct. 112, 42 L. ed. 533; The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. ed. 296; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; *Ex p.* McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624; The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451; The Steamer St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; Peyroux *v.* Howard, 7 Pet. (U. S.) 324, 8 L. ed. 700, 19 Fed. Cas. No. 11,207; The Glendale *v.* Erich, 81 Fed. 633, 42 U. S. App. 546, 26 C. C. A. 500 [*affirming* 77 Fed. 906]; The Louis Olsen, 52 Fed. 652; The Manhattan, 46 Fed. 797; The J. F. Warner, 22 Fed. 342; Winslow *v.* A Floating Steam Pump, 30 Fed. Cas. No. 17,880, 2 N. J. L. J. 124; The Floating Elevator Hezekiah Baldwin, 8 Ben. (U. S.) 556, 12 Fed. Cas. No. 6,449; The Barque Unadilla, 8 Ben. (U. S.) 478, 24 Fed. Cas. No. 14,332; The John Farron, 14 Blatchf. (U. S.) 24, 13 Fed. Cas. No. 7,341; The Steamer Raleigh, 2 Hughes (U. S.) 44, 20 Fed. Cas. No. 11,539; *In re* The Ship Edith, 11 Blatchf. (U. S.) 451, 8 Fed. Cas. No. 4,283; Whitney *v.* The Scow-Schooner Mary Gratwick, 2 Sawy. (U. S.) 342, 29 Fed. Cas. No. 17,591; The Brig America, 1 Lowell (U. S.) 176, 1 Fed. Cas. No. 289; The Richard Busteed, 1 Sprague (U. S.) 441, 20 Fed. Cas. No. 11,764; Russel *v.* The Asa R. Swift, Newb. Adm. 553, 21 Fed. Cas. No. 12,144; Dudley *v.* The Steamboat Superior, Newb. Adm. 176, 7 Fed. Cas. No. 4,115; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*b*; Weaver *v.* The S. G. Owens, 1 Wall. Jr. C. C. (U. S.) 359, 29 Fed. Cas. No. 17,310; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; The Ship Harriet, Olc. Adm. 229, 11 Fed. Cas. No. 6,097; The Hull of a New Ship, 2 Ware (U. S.) 203, 12 Fed. Cas. No. 6,859; The Schooner Marion, 1 Story (U. S.) 68, 16 Fed. Cas. No. 9,087; Phillips *v.* The Ship Thomas Scattergood, Gilp. (U. S.) 1, 19 Fed. Cas. No. 11,106.

76. Roach *v.* Chapman, 22 How. (U. S.) 129, 16 L. ed. 294; The Steam-boat Orleans *v.*

c. Lien Given by Law of Foreign Nation. The courts of admiralty may enforce a lien given by the maritime law of a foreign jurisdiction, notwithstanding the parties are foreigners.[77]

4. Penalties and Forfeitures — a. In General. Under various acts of congress for the regulation of shipping and navigation and the protection of the revenue, imposing penalties and forfeitures for their violation, the courts of admiralty have been given exclusive jurisdiction to enforce such penalties and forfeitures by seizure of the offending vessels and cargoes.[78] They have no jurisdiction, however, of libels *in personam* against the owner or master of a vessel for the recovery of penalties incurred by a violation of shipping regulations as to passengers[79] or inspection of vessels,[80] although a libel *in rem* may be maintained therefor.[81]

b. Necessity for Seizure — (1) *In General.* Under the judiciary act of 1789 the admiralty jurisdiction in cases of seizures for forfeitures does not attach until after the seizure is made, and the seizure must subsist when the libel is filed.[82]

Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; The H. E. Willard, 52 Fed. 387, 53 Fed. 599; The Kingston, 23 Fed. 200; Griffenberg *v.* The John Laughlin, 11 Fed. Cas. No. 5,811, 2 Wkly. Notes Cas. (Pa.) 612; The Ship Norway, 3 Ben. (U. S.) 163, 18 Fed. Cas. No. 10,359; Allair *v.* The Francis A. Palmer, 1 Fed. Cas. No. 203; The Gem, Brown Adm. 37, 10 Fed. Cas. No. 5,303; Russel *v.* The Asa R. Swift, Newb. Adm. 553, 21 Fed. Cas. No. 12,144; Kegan *v.* The Amaranth, 14 Fed. Cas. No. 7,646; Regan *v.* The Amaranth, 20 Fed. Cas. No. 11,664; Russell *v.* Barkman, 21 Fed. Cas. No. 12,151.

No lien created by statute.— The Wisconsin statute providing that every vessel used in navigating the waters of the state shall be liable for all debts contracted by the master, etc., and authorizing suit against the vessel by name, and the sale of the vessel therefor, as on execution, but not so as to vest in the purchaser an unencumbered title, creates no lien which can be enforced in admiralty against a domestic vessel by a proceeding *in rem* brought by a domestic creditor. The Celestine, 1 Biss. (U. S.) 1, 5 Fed. Cas. No. 2,541.

77. The Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. ed. 772; The Champion, 5 Fed. Cas. No. 2,584, 10 Chic. Leg. N. 10, 2 Cinc. L. Bul. 226, 23 Int. Rev. Rec. 355; The Barque Havana, 1 Sprague (U. S.) 402, 11 Fed. Cas. No. 6,226.

78. *In re* Fassett, 142 U. S. 479, 12 S. Ct. 295, 35 L. ed. 1087; Cleveland Ins. Co. *v.* Globe Ins. Co., 98 U. S. 366, 25 L. ed. 201; The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644; The Samuel, 1 Wheat. (U. S.) 9, 4 L. ed. 23; Whelan *v.* U. S., 7 Cranch (U. S.) 112, 3 L. ed. 286; U. S. *v.* The Schooner Betsey and Charlotte, 4 Cranch (U. S.) 443, 2 L. ed. 673; U. S. *v.* Schooner Sally, 2 Cranch (U. S.) 406, 2 L. ed. 320; U. S. *v.* La Vengeance, 3 Dall. (U. S.) 297, 1 L. ed. 610; The Meteor, 17 Fed. Cas. No. 9,493; Robinson *v.* Hook, 4 Mason (U. S.) 139, 20 Fed. Cas. No. 11,956; Clark *v.* U. S., 2 Wash. (U. S.) 519, 5 Fed. Cas. No. 2,837; Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404. See also Hastings *v.* Plater, 1 Bland (Md.) 613, note *g*; First Case of the Judges, 4 Call (Va.) 1, to the effect that the commissions of the crown gave the courts which were established a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas; and acts of parliament enlarged, or rather recognized, this jurisdiction, by giving or confirming cognizance of all seizures for contraventions of the revenue laws.

Proceedings under the confiscation act of 1862, § 7, entitled "An act to suppress insurrection," etc., and to "confiscate the property of rebels," etc., and providing that the proceedings against the property seized shall be *in rem*, and "shall conform as nearly as may be to the proceedings in admiralty," are not proceedings in admiralty within the meaning of the judiciary act of 1789, authorizing the supreme court "to issue writs of prohibition to the District Courts when proceeding as courts of admiralty." *Ex p.* Graham, 10 Wall. (U. S.) 541, 542, 19 L. ed. 981.

79. The Scotia, 39 Fed. 429; McAfee *v.* The Barque Creole, 1 Phila. (Pa.) 190, 8 Leg. Int. (Pa.) 82, 15 Fed. Cas. No. 8,655. *Contra*, U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331.

80. Virginia, etc., Steam Nav. Co. *v.* U. S., Taney (U. S.) 418, 28 Fed. Cas. No. 16,973.

81. The Arctic, 11 Fed. 177 note; Pollock *v.* The Steam-Boat Sea Bird, 3 Fed. 573; The Lewellen, 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307.

82. The Brig Ann, 9 Cranch (U. S.) 289, 3 L. ed. 734; U. S. *v.* The Frank Silvia, 45 Fed. 641 [*reversing* 13 Sawy. (U. S.) 595, 37 Fed. 155]; The Tug May, 6 Biss. (U. S.) 243, 16 Fed. Cas. No. 9,330; The Fideliter, 1 Abb. (U. S.) 577, 1 Sawy. (U. S.) 153, 8 Fed. Cas. 4,755. But see The Paolina S., 18 Blatchf. (U. S.) 315, 11 Fed. 171, to the effect that the jurisdiction of a court of admiralty to enforce a lien for the penalty, on failure of the master to notify of its arrival or enter the manifest required by law, does not depend upon seizure of the vessel before libel brought.

Waiver of seizure by executing delivery bond.— The execution of a delivery bond by the owner of a vessel, in a proceeding *in rem* for a penalty or forfeiture, is a waiver of objection to the want of a prior seizure.

(II) *Revenue Cases.* In revenue cases the admiralty has jurisdiction[83] although the property seized may never have come into the possession of its officers.[84]

c. Place of Seizure — (I) *In General.* Admiralty has jurisdiction of cases of seizure and forfeiture without the limits of any district,[85] but the jurisdiction does not extend to seizures on land,[86] although, where part of the cargo seized has been landed, jurisdiction will be taken thereof as well as of the vessel and the remainder of the cargo.[87]

(II) *Of Foreign Vessel.* Foreign vessels cannot be seized by the officers of another country for the breach of a municipal regulation thereof beyond the limits of its territorial jurisdiction, except upon the high seas, and a seizure made within the territory of another nation cannot give jurisdiction to courts of admiralty.[88]

(III) *Jurisdiction Depends On.* The admiralty court sitting in the district where the seizure is made,[89] or into which the vessel is brought after seizure,[90] and not that in which the offense was committed, has jurisdiction of proceedings *in rem* for the alleged forfeiture.

d. Legality of Seizure. The question as to whether a seizure for a forfeiture under the laws of the United States is rightful or not must be decided exclusively by the admiralty courts, and their decrees thereon are final.[91]

e. Reseizure. A vessel which is seized under a libel of forfeiture for violation of the revenue laws, and is released on bond, is subject to reseizure in a different district under a libel alleging other violations committed during the same period and before the previous seizure.[92]

The Lewellen, 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307, 4 Biss. (U. S.) 167, 15 Fed. Cas. No. 8,308.

Loss of possession after seizure.— After a vessel has been seized and libeled, and a forfeiture claimed, admiralty does not lose its jurisdiction to condemn the vessel by losing possession of it. U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 347, 26 Fed. Cas. No. 15,612.

83. U. S. *v.* The Steamship Missouri, 9 Blatchf. (U. S.) 433, 26 Fed. Cas. No. 15,785; The Steamer Missouri, 3 Ben. (U. S.) 508, 17 Fed. Cas. No. 9,652.

No jurisdiction to enforce payment of duties.— A lien for duties cannot be enforced by a libel in admiralty, as the revenue jurisdiction of district courts proceeding *in rem* is confined to seizures for forfeitures under the laws of impost. U. S. *v.* Three Hundred and Fifty Chests of Tea, 12 Wheat. (U. S.) 486, 6 L. ed. 702; U. S. *v.* Five Hundred Boxes of Pipes, 2 Abb. (U. S.) 500, 25 Fed. Cas. No. 15,116; The Waterloo, Blatchf. & H. Adm. 114, 29 Fed. Cas. No. 17,257.

Suits for property seized by customs officers.— The owner of a vessel or property wrongfully seized by a collector of customs may maintain a suit for possession thereof and for damages against him notwithstanding that U. S. Rev. Stat. (1878), § 934, provides that all property seized under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. *In re* Fassett, 142 U. S. 479, 12 S. Ct. 295, 35 L. ed. 1087; Burke *v.* Trevitt, 1 Mason (U. S.) 96, 4 Fed. Cas. No. 2,163.

84. The Brig Ann, 9 Cranch (U. S.) 289, 3 L. ed. 734; Schooner Bolina, 1 Gall. (U. S.) 75, 3 Fed. Cas. No. 1,608.

85. The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249; U. S. *v.* Arms and Ammunitions, 24 Fed. Cas. No. 14,466*a*.

86. U. S. *v.* Winchester, 99 U. S. 372, 25 L. ed. 479; The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644; The Ariel, 1 Hask. (U. S.) 65, 1 Fed. Cas. No. 527.

87. Two Hundred and Fifty Barrels of Molasses *v.* U. S., Chase (U. S.) 502, 24 Fed. Cas. No. 14,293; Clark *v.* U. S., 2 Wash. (U. S.) 519, 5 Fed. Cas. No. 2,837.

88. Hudson *v.* Guestier, 6 Cranch (U. S.) 281, 3 L. ed. 224; 4 Cranch (U. S.) 293, 2 L. ed. 625; Rose *v.* Himely, 4 Cranch (U. S.) 241, 2 L. ed. 608.

89. The Merino, 9 Wheat. (U. S.) 391, 6 L. ed. 118; The Brig Ann, 9 Cranch (U. S.) 289, 3 L. ed. 734; Keene *v.* U. S., 5 Cranch (U. S.) 304, 3 L. ed. 108; U. S. *v.* The Schooner Betsey and Charlotte, 4 Cranch (U. S.) 443, 2 L. ed. 673; The Idaho, 29 Fed. 187; U. S. *v.* The Julia Lawrence, 26 Fed. Cas. No. 15,502, 6 Am. L. Rev. 383; The Ship Octavia, 1 Gall. (U. S.) 488, 18 Fed. Cas. No. 10,422.

90. The Merino, 9 Wheat. (U. S.) 391, 6 L. ed. 118; The Ship Richmond *v.* U. S., 9 Cranch (U. S.) 102, 3 L. ed. 670.

91. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Slocum *v.* Mayberry, 2 Wheat. (U. S.) 1, 4 L. ed. 169; The North Cape, 6 Biss. (U. S.) 505, 18 Fed. Cas. No. 10,316; Buchannan *v.* Biggs, 2 Yeates (Pa.) 232.

92. The Haytian Republic, 154 U. S. 118, 14 S. Ct. 99, 38 L. ed. 930 [*reversing* 59 Fed. 476, 15 U. S. App. 288, 8 C. C. A. 182].

5. Prize Cases — a. In General. In England the admiralty court has no jurisdiction in prize cases except by special commission, which is always issued at the outbreak of a war and continues in force until the close thereof,[93] but in the United States the jurisdiction of the admiralty courts in such cases is permanent and exclusive, being conferred by the judiciary act of 1789 under the constitutional grant of admiralty jurisdiction.[94]

b. Damages for Unlawful Capture. Where the court of the captor nation has declared the capture to be unlawful, the admiralty court of the nation to which the captured vessel belonged will entertain jurisdiction of a libel *in rem* against the capturing vessel to recover damages for the unlawful seizure.[95]

c. Distribution of Prize-Money. Admiralty has jurisdiction in cases of claims made by seamen to shares of prizes.[96]

d. Ransom Bills. Admiralty has exclusive jurisdiction to entertain suits on ransom bills.[97]

e. Locality of Capture — (I) *What Court Has Jurisdiction.* According to the law of nations the capture of a hostile vessel can lawfully be made only upon navigable waters and within the territorial jurisdiction of the belligerents, or upon the high seas, and admiralty courts of the capturing power have exclusive jurisdiction over vessels thus captured, and of all questions incident thereto.[98] Neither of the belligerents can establish prize courts in a neutral country, nor can their home courts exercise jurisdiction therein except in pursuance of treaties,[99] though they may hold their courts in the country of an ally,[1] nor will the courts of a neutral nation assume jurisdiction of prize matters of foreign nations occurring upon high seas.[2]

93. Lindo *v.* Rodney, 2 Dougl. 613 note; *Ex p.* Lynch, 1 Madd. 15.

94. The Amiable Nancy, 3 Wheat. (U. S.) 546, 4 L. ed. 456; Jennings *v.* Carson, 4 Cranch (U. S.) 2, 2 L. ed. 531 [*affirming* 1 Pet. Adm. 1, 13 Fed. Cas. No. 7,281]; The Amy Warwick, 2 Sprague (U. S.) 123, 1 Fed. Cas. No. 341; Maisonnaire *v.* Keating, 2 Gall. (U. S.) 325, 16 Fed. Cas. No. 8,978; The Dash, 1 Mason (U. S.) 4, 7 Fed. Cas. No. 3,584; Johnson *v.* Twenty-One Bales, etc., 2 Paine (U. S.) 601, Van Ness Prize Cas. 5, 13 Fed. Cas. No. 7,417; The Ship Emulous, 1 Gall. (U. S.) 563, 8 Fed. Cas. No. 4,479; U. S. *v.* Bright, 24 Fed. Cas. No. 14,647, Brightly (Pa.) 19 note; Hallett *v.* Lamothe, 7 N. C. 279; Cheriot *v.* Foussat, 3 Binn. (Pa.) 220; Ross *v.* Rittenhouse, 1 Yeates (Pa.) 443; W. B. *v.* Latimer, 4 Dall. (Pa.) Appendix i; Sasportas *v.* Jennings, 1 Bay (S. C.) 470; Jenkins *v.* Putnam, 1 Bay (S. C.) 8, 1 Am. Dec. 594.

See 1 Cent. Dig. tit. "Admiralty," § 250 *et seq.*

Captures in inland waters.—Captures made on waters within the Confederate lines during the civil war were held to be within the jurisdiction of the admiralty courts of the United States, being governed by the rules of war. U. S. *v.* The Hundred and Sixty-Nine and One-Half Bales of Cotton, Woolw. (U. S.) 236, 28 Fed. Cas. No. 16,583. But by the act of July 2, 1864, no property seized upon any of the inland waters of the United States could be regarded as maritime prize. The Cotton Plant, 10 Wall. (U. S.) 577, 19 L. ed. 983.

Captures on land by the conjoint action of the army and navy can be brought within prize jurisdiction only by statute. U. S. *v.* Two Hundred and Sixty-Nine and One-Half Bales of Cotton, Woolw. (U. S.) 236, 28 Fed. Cas. No. 16,583; Slocum *v.* Wheeler, 1 Conn. 429.

95. McGrath *v.* Sloop Candalero, Bee Adm. 60, 16 Fed. Cas. No. 8,809.

96. Keane *v.* The Brig Gloucester, 2 Dall. (U. S.) 36, 1 L. ed. 278; Mahoon *v.* The Brig Glocester, Bee Adm. 395, 16 Fed. Cas. No. 8,970.

97. Maisonnaire *v.* Keating, 2 Gall. (U. S.) 325, 16 Fed. Cas. No. 8,978.

98. The Estrella, 4 Wheat. (U. S.) 298, 4 L. ed. 574; L'Invincible, 1 Wheat. (U. S.) 238, 4 L. ed. 80 [*affirming* 2 Gall. (U. S.) 29, 13 Fed. Cas. No. 7,054]; Talbot *v.* Janson, 3 Dall. (U. S.) 133, 1 L. ed. 540; U. S. *v.* Peters, 3 Dall. (U. S.) 121, 1 L. ed. 535; Hernandez *v.* Aury, 12 Fed. Cas. No. 6,413, 1 Jour. Jur. 131; Findlay *v.* The Ship William, 1 Pet. Adm. 12, 9 Fed. Cas. No. 4,790.

99. Jecker *v.* Montgomery, 13 How. (U. S.) 498, 14 L. ed. 240; Glass *v.* The Sloop Betsey, 3 Dall. (U. S.) 6, 1 L. ed. 485; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345.

1. The Flad Oyen, 1 C. Rob. 135.

2. The Estrella, 4 Wheat. (U. S.) 298, 4 L. ed. 574; L'Invincible, 1 Wheat. (U. S.) 238, 4 L. ed. 80 [*affirming* 2 Gall. (U. S.) 29, 13 Fed. Cas. No. 7,054]; Hernandez *v.* Aury, 12 Fed. Cas. No. 6,413, 1 Jour. Jur. 131; Castello *v.* Bouteille, Bee Adm. 29, 5 Fed. Cas. No. 2,504; Findlay *v.* The Ship William, 1 Pet. Adm. 12, 9 Fed. Cas. No. 4,790.

Sale on land in the ports of the United States cannot be prevented by courts of admiralty, in cases of lawful capture on the high seas, by French privateers duly commissioned. Moodie *v.* Ship Amity, Bee Adm. 89, 17 Fed. Cas. No. 9,741.

(II) *Within Jurisdiction of Neutral Nation.* Where a vessel is captured in violation of the laws of neutrality and is brought within the territory of a neutral nation, its courts will restore the prize to the original owner and without assessing damages against the captors, aside from the costs and expenses of the trial.[3]

f. Control of Property Not Essential. It is not necessary to the jurisdiction of a prize court that the property captured should be within its actual control.[4]

6. Proceedings to Limit Liability — a. In General. Admiralty has exclusive jurisdiction of a proceeding by ship-owners to limit their liability.[5]

b. Possession of Vessel Unnecessary. The possession of the vessel by the marshal or trustee is unnecessary for the purposes of limited-liability proceedings.[6]

7. Rights of Ownership and Possession — a. Petitory and Possessory Suits — (I) *In General.* In the United States the admiralty courts have jurisdiction over petitory actions to try the title to property[7] and over possessory actions to reinstate owners who have been displaced from their possession,[8] and while for

3. La Amistad de Rues, 5 Wheat. (U. S.) 385, 5 L. ed. 115; Soult *v.* L'Africaine, Bee Adm. 204, 22 Fed. Cas. No. 13,179; Moxon *v.* The Brigantine Fanny, 2 Pet. Adm. 309, 17 Fed. Cas. No. 9,895.

4. Jecker *v.* Montgomery, 13 How. (U. S.) 498, 14 L. ed. 240; The Schooner Zavalla, Blatchf. Prize Cas. 173, 30 Fed. Cas. No. 18,203. *Contra,* Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345.

5. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017; Norwich Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; The S. A. McCaulley, 99 Fed. 302; *In re* Leonard, 14 Fed. 53; Matter of Providence, etc., Steamship Co., 6 Ben. (U. S.) 124, 20 Fed. Cas. No. 11,451. But where the court had no jurisdiction of the cause of action originally involved it cannot take jurisdiction of a petition for limitation of liability. *Ex p.* Phenix Ins. Co., 118 U. S. 610, 7 S. Ct. 25, 30 L. ed. 274.

See 1 Cent. Dig. tit. "Admiralty," § 120.

Circuit courts have no jurisdiction to enforce proceedings for limiting the liability of ship-owners, such jurisdiction being in the district courts. Elwell *v.* Geibei, 33 Fed. 71; The Mary Lord, 31 Fed. 416.

Jurisdiction not dependent on power to regulate commerce.— The act of congress limiting the liability of ship-owners in certain cases is not referable to that clause in the constitution giving power to regulate interstate commerce, but is a rule of admiralty procedure enacted under the clause granting admiralty jurisdiction, and therefore the district court has jurisdiction of a proceeding to limit the liability, for a maritime tort, of the owners of a ship customarily employed within the navigable waters of a state. The Tolchester, 42 Fed. 180; The Garden City, 26 Fed. 766 [*following In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599]

Extent of jurisdiction.— The powers of an admiralty court in proceedings instituted by ship-owners to limit their liability are as extensive, and its remedies are as effective, as are those of a court of chancery, where its jurisdiction is invoked in an equitable proceeding. Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

6. The Mendota, 14 Fed. 358; Matter of The Steamboat City of Norwich, 6 Ben. (U. S.) 330, 5 Fed. Cas. No. 2,762.

Departure of vessel after stipulation given. — The court, in proceedings to limit liability, does not lose jurisdiction by allowing the steamship, after giving a stipulation for her value, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight. *In re* Morrison, 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

7. Ward *v.* Peck, 18 How. (U. S.) 267, 15 L. ed. 383; Grigg *v.* The Sloop Clarissa Ann, 2 Hughes (U. S.) 89, 11 Fed. Cas. No. 5,826; Blanchard *v.* The Brig Martha Washington, 1 Cliff. (U. S.) 463, 3 Fed. Cas. No. 1,513; The Schooner Friendship, 2 Curt. (U. S.) 426, 9 Fed. Cas. No. 5,123; Taylor *v.* The Royal Saxon, 1 Wall. Jr. C. C. (U. S.) 311, 23 Fed. Cas. No. 13,803; The Watchman, 1 Ware (U. S.) 232, 29 Fed. Cas. No. 17,251; The Schooner Tilton, 5 Mason (U. S.) 465, 23 Fed. Cas. No. 14,054.

Property seized on attachment or execution.— Admiralty has power to decide between conflicting claims to property seized by attachment or on execution. Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202.

8. Glass *v.* The Sloop Betsey, 3 Dall. (U. S.) 6, 1 L. ed. 485; The Daisy, 29 Fed. 300; Thurber *v.* The Sloop Fannie, 8 Ben. (U. S.) 429, 23 Fed. Cas. No. 14,014; Five Hundred and Twenty-Eight Pieces of Mahogany, 2 Lowell (U. S.) 323, 9 Fed. Cas. No. 4,845.

See 1 Cent. Dig. tit. "Admiralty," § 121 *et seq.*

Possessory action by sheriff.— Where a sheriff has attached a vessel, which is afterward taken out of his custody and removed into another state, he can sue in admiralty to recover possession in the district court of the district into which the vessel has been removed. The Bonnie Doon, 36 Fed. 770.

Recovery on land of goods taken at sea.— Goods taken by pirates and sold upon land may be recovered from the purchaser by suit in admiralty. Davison *v.* Seal-skins, 2 Paine (U. S.) 324, 7 Fed. Cas. No. 3,661.

a time jurisdiction of petitory suits was abandoned, the same is now true of the English admiralty.[9]

(II) *Equitable Rights Not Enforceable.* The admiralty courts will enforce only the legal title or possession, however, and will not undertake to determine equitable rights or titles in such actions.[10]

b. Proceeds of Vessel or Cargo. Admiralty courts will entertain suits or petitions by the owners for the recovery of the proceeds of a vessel or her cargo sold under legal proceedings, when the same have been paid over without lawful authority[11] or are still in the custody of the court or its officers.[12]

c. Disagreement as to Employment of Vessel. Where equal part-owners of a vessel cannot agree concerning her employment, admiralty has jurisdiction, upon the application of either party, to compel a sale of the same and divide the proceeds between them,[13] but has not such jurisdiction at the instance of a minority interest,[14] although in the latter case it may require of the majority owners a stipulation for the safe return of the vessel.[15]

Offense against United States by foreign power.— Though the capture of an English vessel by a French vessel within the coast-line jurisdiction of the United States during the existence of hostilities between France and England is an offense against the United States as a neutral power, yet, as it is not necessary to bring the captured vessel within the territory of the captors in order to vest the right of property in the captors, admiralty will not entertain jurisdiction of a libel filed by the British owners of the captured vessel for the restoration thereof, as redress of the offense against the United States should be left in the first instance to the executive department of the government. Moxon *v.* The Brigantine Fanny, 2 Pet. Adm. 309, 17 Fed. Cas. No. 9,895.

Possessory action will not lie merely for the refusal of a collector of customs to issue papers to a vessel, though such vessel may have been temporarily prevented from navigating as the result of the collector's nonaction. Brent *v.* Thornton, 91 Fed. 546, 33 C. C. A. 666.

9. Ward *v.* Peck, 18 How. (U. S.) 267, 15 L. ed. 383; Snyder *v.* A Floating Dry-Dock, 22 Fed. 685; The Aurora, 3 C. Rob. 133; The Warrior, 2 Dods. 288.

Jurisdiction had been abandoned as to petitory actions by the English admiralty courts, because of the jealous interference of the common-law courts, until 3 & 4 Vict. c. 65, § 4, restored plenary jurisdiction of such cases to them. Ward *v.* Peck, 18 How. (U. S.) 267, 15 L. ed. 383; Snyder *v.* A Floating Dry-Dock, 22 Fed. 685; The Aurora, 3 C. Rob. 133; Radley *v.* Egglesfield, 2 Saund. 259*e*; Edmonson *v.* Walker, 1 Show. 177.

Suits between foreigners.—The English admiralty courts are averse to entertaining jurisdiction in suits between foreigners involving the title or possession of vessels, because to do so might result in depriving the parties of rights to which they are entitled by the laws of their own country as modified by statute or administered by their own courts (The Johann and Siegmund, Edw. Adm. 242; The Martin of Norfolk, 4 C. Rob. 293; The See Reuter, 1 Dods. 22), but where the courts are authorities of the home country and have passed upon the rights of parties under similar circumstances, the English courts will take jurisdiction (The See Reuter, 1 Dods. 22; The Martin of Norfolk, 4 C. Rob. 293; The Evangelistria, 2 P. D. 241).

10. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. ed. 269 [*affirming* Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159]; The Robert R. Kirkland, 92 Fed. 407; The Ella J. Slaymaker, 28 Fed. 767; The Amelia, 23 Fed. 406 note, 1 Fed. Cas. No. 275; The G. Reusens, 23 Fed. 403; Wenberg *v.* A Cargo of Mineral Phosphate, 15 Fed. 285; Hill *v.* The Yacht Amelia, 6 Ben. (U. S.) 475, 12 Fed. Cas. No. 6,487; Cole *v.* The Brandt, 6 Fed. Cas. No. 2,978; The Martha Washington, 3 Ware (U. S.) 245, 16 Fed. Cas. No. 9,148; The William D. Rice, 3 Ware (U. S.) 134, 29 Fed. Cas. No. 17,691; Kynoch *v.* The Propeller S. C. Ives, Newb. Adm. 205, 14 Fed. Cas. No. 7,958; Kellum *v.* Emerson, 2 Curt. (U. S.) 79, 14 Fed. Cas. No. 7,669; Bogart *v.* The John Jay, 3 Fed. Cas. No. 1,597.

11. American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303.

12. The St. Johns, 101 Fed. 469; The Dauntless, 7 Fed. 366; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713, 4 Adm. Rec. 647; The Esperanza, Bee Adm. 97, 6 Fed. Cas. No. 3,277.

13. Coyne *v.* Caples, 7 Sawy. (U. S.) 360, 8 Fed. 638; The Ship Annie H. Smith, 10 Ben. (U. S.) 110, 1 Fed. Cas. No. 420; The Schooner Ocean Belle, 6 Ben. (U. S.) 253, 18 Fed. Cas. No. 10,402; Burr *v.* The St. Thomas, 4 Fed. Cas. No. 2,194*a*; The Seneca, 3 Wall. Jr. C. C. (U. S.) 395, 21 Fed. Cas. No. 12,670 [*reversing* Gilp. (U. S.) 10, 7 Fed. Cas. No. 3,650].

Supplies furnished by moiety-owners.—Admiralty has no jurisdiction of a suit by equitable co-owners of a vessel against the other co-owners for supplies furnished. Hall *v.* Hudson, 2 Sprague (U. S.) 65, 11 Fed. Cas. No. 5,935.

14. The Steam-boat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; Coyne *v.* Caples, 7 Sawy. (U. S.) 360, 8 Fed. 638; Lewis *v.* Kinney, 5 Dill. (U. S.) 159, 15 Fed. Cas. No. 8,325; The Schooner Ocean Belle, 6 Ben. (U. S.) 253, 18 Fed. Cas. No. 10,402.

15. The Steam-boat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; Lewis *v.* Kin-

8. Salvage. Admiralty courts exercise jurisdiction over salvage causes and causes in the nature of salvage, whether based on contract,[16] or arising independently thereof,[17] and whether the services were rendered in American waters or not.[18]

9. Torts — a. In General. The court of admiralty has jurisdiction in cases of maritime torts *in personam* as well as *in rem*,[19] without reference to the nationality of the vessel on board of which the tort may have been committed, or that of the parties to it,[20] and whether the wrong was committed by direct force or suffered in consequence of negligence or malfeasance where the remedy at common law is by an action on the case.[21]

ney, 5 Dill. (U. S.) 159, 15 Fed. Cas. No. 8,325; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236, 5 Am. L. Reg. 406. But see The Schooner Ocean Belle, 6 Ben. (U. S.) 253, 18 Fed. Cas. No. 10,402, to the effect that admiralty cannot require majority owners to give a bond to minority owners to cover indebtedness of the vessel to them, or to indemnify them against loss in her future employment.

Claim for use or destruction during voyage. — Admiralty jurisdiction does not extend to a claim by a part-owner dissenting from a voyage, for the use or destruction, during the voyage, of his share of the outfit. The remedy is in equity. The Marengo, 1 Lowell (U. S.) 52, 16 Fed. Cas. No. 9,065.

16. De Leon *v.* Leitch, 65 Fed. 1002; The Roanoke, 50 Fed. 574; The Louisa Jane, 2 Lowell (U. S.) 295, 15 Fed. Cas. No. 8,532; The Steamship Circassian, 2 Ben. (U. S.) 171, 5 Fed. Cas. No. 2,723; The A. D. Patchin, 1 Blatchf. (U. S.) 414, 1 Fed. Cas. No. 87.

Services in nature of salvage.— Admiralty has jurisdiction of a suit to recover for services of a tug in hauling off a vessel aground, though the same do not amount to a salvage service (The Clarion, Brown Adm. 74, 5 Fed. Cas. No. 2,795), and a contract for launching a vessel which has been carried a quarter of a mile up the beach by a storm is a maritime contract for which the vessel is liable *in rem* (The Ella, 48 Fed. 569).

17. Houseman *v.* The Schooner North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; The Steamboat Cheeseman *v.* Two Ferry-boats, 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633; Gates *v.* Johnson, Brunn. Col. Cas. (U. S.) 633, 10 Fed. Cas. No. 5,268; Williams *v.* The Barge Jenny Lind, Newb. Adm. 443, 29 Fed. Cas. No. 17,723; The Brig John Gilpin, Olc. Adm. 77, 13 Fed. Cas. No. 7,345; Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87, 4 Fed. Cas. No. 1,847.

Services rendered from land.— Admiralty jurisdiction extends to a salvage suit by a city fire department for services rendered from the land to a burning vessel brought to the city's wharves. The Huntsville, 12 Fed. Cas. No. 6,916.

Action by salvor against co-salvor.—Courts of admiralty have jurisdiction of an action to compel distribution by one co-salvor, who has obtained the entire salvage compensation, among the other co-salvors entitled. McMullin *v.* Blackburn, 59 Fed. 177; McConnochie *v.* Kerr, 9 Fed. 50.

18. Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443, 4 West. L. Month. 281.

19. Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369; The Clatsop Chief, 7 Sawy. (U. S.) 274, 8 Fed. 163 [*following* Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262, 5 Fed. 75]; West *v.* Steamer Uncle Sam, McAll. (U. S.) 505, 29 Fed. Cas. No. 17,427; The Sloop Martha Anne, Olc. Adm. 18, 16 Fed. Cas. No. 9,146; De Lovio *v.* Boit, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; Akling *v.* St. Louis, etc., Packet Co., (Tenn. 1898) 46 S. W. 24.

See 1 Cent. Dig. tit. "Admiralty," § 206 *et seq.*

20. Bernhard *v.* Creene, 3 Sawy. (U. S.) 230, 3 Fed. Cas. No. 1,349.

21. Leathers *v.* Blessing, 105 U. S. 626, 26 L. ed. 1192; Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262, 5 Fed. 75; Smith *v.* Wilson, 31 How. Pr. (N. Y.) 272, 22 Fed. Cas. No. 13,128, 13 Pittsb. Leg. J. (Pa.) 538; Philadelphia, etc., Steam Tow-boat Co. *v.* Philadelphia, etc., R. Co., 19 Fed. Cas. No. 11,085, 5 Am. L. Reg. 280; Chamberlain *v.* Chandler, 3 Mason (U. S.) 242, 5 Fed. Cas. No. 2,575; The Amiable Nancy, 1 Paine (U. S.) 111, 1 Fed. Cas. No. 331; Martins *v.* Ballard, Bee Adm. 51, 16 Fed. Cas. No. 9,175.

Collisions on navigable waters are maritime torts of which admiralty will take jurisdiction. The Grand Republic, 10 Fed. 398; Simpson *v.* The Tug Ceres, 14 Phila. (Pa.) 523, 36 Leg. Int. (Pa.) 339, 22 Fed. Cas. No. 12,881, 10 Centr. L. J. 113, 7 Wkly. Notes Cas. (Pa.) 576; The Steam-Tug M. R. Brazos, 10 Ben. (U. S.) 435, 17 Fed. Cas. No. 9,898; The Volunteer, Brown Adm. 159, 28 Fed. Cas. No. 16,990; Camden, etc., R. Co. *v.* The Thomas Wallace, 4 Fed. Cas. No. 2,337; Camden, etc., Transp. Co. *v.* The Lotty, 4 Fed. Cas. No. 2,337*a*; The Bark Lotty, Olc. Adm. 329, 15 Fed. Cas. No. 8,524.

Collusive spoliation.— An admiralty court has jurisdiction to entertain a libel for "collusive spoliation" by the owners of a vessel wrecked in pursuance of an agreement between the master and a salvor, as against the salvor, and all persons responsible for his acts, *in personam*, for all the damage occasioned by the wreck. Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713, 4 Adm. Rec. 647.

Failure to carry required number of life-preservers.— Where a steam ferry-boat, contrary to the provision of U. S. Rev. Stat. (1878), § 4466, carries passengers on an excursion largely in excess of the number

b. Test of Jurisdiction — (I) *Rule Stated.* In all cases of maritime torts the locality of the act is the test of admiralty cognizance; and whether the court has jurisdiction in any case depends upon whether the wrong and injury complained of was committed on the high seas or navigable waters.[22]

(II) *Tort Originating on Land Consummated on Water.* Where the active cause of the injury originates upon land, or is a structure or agency thereon, and the tort is consummated upon navigable water or upon a vessel thereon, admiralty has jurisdiction thereof.[23]

allowed by her permit, and fails to carry the required number of life-preservers, she is guilty of a marine tort, and a United States district court has jurisdiction of a libel *in personam* against her owners and master to recover the penalty prescribed by § 4500. U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331.

Negligent towage or pilotage.—Damage resulting from negligent towage (The Steamboat Brooklyn, 2 Ben. (U. S.) 547, 4 Fed. Cas. No. 1,938) or pilotage (Sideracudi *v.* Mapes, 3 Fed. 873) is within the jurisdiction of admiralty.

Refusal to furnish accommodations to passenger.— The refusal of the officers of a vessel on the high seas to furnish a passenger with the accommodations to which he was entitled is a marine tort, for which such passenger may proceed in admiralty against the vessel without regard to any question of the jurisdiction of admiralty over a contract for land and water transportation, under which he has been taken on board. The Willamette Valley, 71 Fed. 712.

Refusal to give bill of lading.—The refusal of a master of a vessel in navigable waters to issue a bill of lading to vendors in whose name the goods were shipped, even though he had previously issued a bill of lading to the vendee, who absconded, is a maritime tort for which an action may be brought in the district court. The Markee, 14 Fed. 112 [*affirming* The Ferreri, 9 Fed. 468].

Seizure of vessel.— The seizure and detention of a vessel by force without legal authority is a maritime tort. Jervey *v.* The Carolina, 66 Fed. 1013; The Sloop Martha Anne, Olc. Adm. 18, 16 Fed. Cas. No. 9,146; American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303. And so where the master of a vessel, without authority, took a lighter and neglected to return it, it was held that admiralty had jurisdiction *in rem* for the tort. The Florence, 2 Flipp. (U. S.) 56, 9 Fed. Cas. No. 4,880. But where the claimant had negotiated with the libellant for the purchase of certain coal-barges, and, being informed of the location and price and that he could have them if suitable, took possession at once, without advising the libellant, and the latter subsequently sold them to a third party and seeks by action to recover possession so as to carry out that contract, there is no such fraudulent taking by the claimant as will enable the libellant to maintain an action for a marine tort, and the action must be regarded as a possessory action only. Wood *v.* Two Barges, 46 Fed. 204.

Shaving the head of a stowaway for the mere purpose of putting a mark upon him is a maritime tort. Turbett *v.* Dunlevy, 24 Fed. Cas. No. 14,241.

22. The Professor Morse, 23 Fed. 803; The Arkansas, 5 McCrary (U. S.) 364, 17 Fed. 383; The Mary Stewart, 5 Hughes (U. S.) 312, 10 Fed. 137; Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262, 5 Fed. 75; Simpson *v.* The Tug Ceres, 14 Phila. (Pa.) 523, 36 Leg. Int. (Pa.) 339, 22 Fed. Cas. No. 12,881, 10 Centr. L. J. 113, 7 Wkly. Notes Cas. (Pa.) 576; The Highland Light, Chase (U. S.) 150, 12 Fed. Cas. No. 6,477; Thomas *v.* Lane, 2 Sumn. (U. S.) 1, 23 Fed. Cas. No. 13,902. But see The Propeller Commerce, 1 Black (U. S.) 574, 17 L. ed. 107, to the effect that the admiralty jurisdiction in cases of marine torts depends on the place where service can be made *in personam* or *in rem*, and not upon the place where the tort was committed.

Arresting seamen on shore.— The wrongful arrest on shore of deserting seamen, by the procurement of the master, does not constitute a maritime tort. Bain *v.* Sandusky Transp. Co., 60 Fed. 912.

Obstruction of stream by bridge.— Admiralty has no jurisdiction of the offense of obstructing a navigable stream by a bridge. U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

23. Hermann *v.* Port Blakely Mill Co., 69 Fed. 646; The Normannia, 62 Fed. 469; Greenwood *v.* Westport, 60 Fed. 560; Oregon City Transp. Co. *v.* Columbia St. Bridge Co., 53 Fed. 549; Hill *v.* Board of Chosen Freeholders, 45 Fed. 260; Assante *v.* Charleston Bridge Co., 40 Fed. 765; Boston *v.* Crowley, 38 Fed. 202; Leonard *v.* Decker, 22 Fed. 741; Northwestern Union Packet Co. *v.* Atlee, 2 Dill. (U. S.) 479, 18 Fed. Cas. No. 10,341; Barque Yankee *v.* Gallagher, McAll. (U. S.) 467, 30 Fed. Cas. No. 18,124; Steele *v.* Thacher, 1 Ware (U. S.) 85, 22 Fed. Cas. No. 13,348.

Bridges.—Damage done to a vessel on navigable water by a bridge improperly constructed may be recovered by libel in admiralty. Oregon City Transp. Co. *v.* Columbia St. Bridge Co., 53 Fed. 549; Boston *v.* Crowley, 38 Fed. 202.

Careless loading of vessel.—Admiralty has jurisdiction of a libel to recover damages for personal injuries to a laborer working in the hold of a vessel, who was struck by lumber sent without warning through a chute by one working on the pier. Hermann *v.* Port Blakely Mill Co., 69 Fed. 646.

Defective wharf.— A claim against a

(III) *Tort Originating on Water Consummated on Land.* Where, however, the active cause of the injury originates upon navigable waters, and the tort is consummated upon land, admiralty has no jurisdiction.[24]

wharf-owner for injury sustained by a vessel or cargo by reason of an alleged defect in the wharf is within the jurisdiction of admiralty. Ball *v.* Trenholm, 45 Fed. 588; The City of Lincoln, 25 Fed. 835; Leonard *v.* Decker, 22 Fed. 741. So, where a steamship is given the quay-berth in a wharf previously occupied by another, and the latter is moored outside, with no means of communication with the wharf other than across the deck of the inner vessel, negligence in permitting the deck of the inner vessel to be in a condition unsafe for passing over it to the outside vessel is a marine tort within the jurisdiction of the admiralty courts. Anderson *v.* The E. B. Ward, Jr., 38 Fed. 44.

Drawbridge.— An injury to a vessel from negligence in operating a drawbridge is a maritime tort, and a court of admiralty will entertain an action therefor. Greenwood *v.* Westport, 60 Fed. 560, 53 Fed. 824; Hill *v.* Board of Chosen Freeholders, 45 Fed. 260; Assante *v.* Charleston Bridge Co., 40 Fed. 765; Etheridge *v.* City of Philadelphia, 26 Fed. 43.

False representations.— An action based on false representations in regard to a voyage is within the jurisdiction of the admiralty, though such representations were made on land after the contract of carriage was entered into, when they were made with reference to the contract of carriage and the damages alleged to have arisen from them occurred on the sea. The Normannia, 62 Fed. 469.

The forcible deportation of a citizen to a foreign country in an American ship commanded by an American master, in pursuance or execution of a sentence of banishment of an illegal and self-constituted body of men, is a marine tort. Gallagher *v.* The Yankee, Hoffm. Op. 456, 9 Fed. Cas. No. 5,196; Barque Yankee *v.* Gallagher, McAll. (U. S.) 467, 30 Fed. Cas. No. 18,124.

Kidnapping.— A parent may maintain a libel in admiralty for the kidnapping of his child and carrying him beyond the sea. Tillmore *v.* Moore, 5 Hughes (U. S.) 217, 4 Fed. 231; Steele *v.* Thacher, 1 Ware (U. S.) 85, 22 Fed. Cas. No. 13,348; Plummer *v.* Webb, 4 Mason (U. S.) 380, 19 Fed. Cas. No. 11,233.

Leaving piles in the bed of a tidal river so that a ship is thereby injured is a tort cognizable in admiralty. Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. (U. S.) 209, 16 L. ed. 433. And so the United States admiralty courts have jurisdiction of a libel *in personam* against an American corporation for injuries received by a foreign vessel in a foreign port, by a concealed obstruction at a dock owned by such corporation. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 17 S. Ct. 572, 41 L. ed. 1004.

Piers.— Admiralty has jurisdiction of an action for injuries to a vessel by collision with a pier erected, without legal authority, within the navigable channel of a river. Northwestern Union Packet Co. *v.* Atlee, 2 Dill. (U. S.) 479, 18 Fed. Cas. No. 10,341.

24. The Plymouth, 3 Wall. (U. S.) 20, 18 L. ed. 125; Price *v.* The Belle of the Coast, 66 Fed. 62; The John C. Sweeney, 55 Fed. 540.

There is a clear distinction between torts arising from the collision of boats with structures placed in the navigable bed of a river, and torts resulting from collisions of boats and vessels with structures on land, whether immediately along the shore or not. Torts of the former class are within the admiralty jurisdiction, and torts of the latter class are of common-law cognizance; and whether the structures are solid or floating, realty or personalty, firmly fixed to the bed of the river or otherwise, does not affect such jurisdiction. The Arkansas, 5 McCrary (U. S.) 364, 17 Fed. 383.

Bridges.— Admiralty has no jurisdiction of an action for an injury to a bridge by collision with a vessel. The John C. Sweeney, 55 Fed. 540; Milwaukee *v.* The Curtis, 37 Fed. 705; The Neil Cochran, Brown Adm. 162, 14 Fed. Cas. No. 7,996; The Savannah, 21 Fed. Cas. No. 12,384; Chicago *v.* Schooner Queen City, 17 Ill. App. 203.

Buildings.— The cause of action for injuries to a building on land by a vessel is not a maritime tort of which the federal courts have jurisdiction. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447 [*affirming* 105 Ill. 462]; The Plymouth, 3 Wall. (U. S.) 20, 18 L. ed. 125; The Arkansas, 5 McCrary (U. S.) 364, 17 Fed. 383.

Derrick.— Admiralty cannot take jurisdiction of a libel against a vessel for damages to a derrick sustained by a collision, where the derrick, engaged in the construction of a lighthouse, was supported by the land at a place surrounded and covered by waters. The Schooner Maud Webster, 8 Ben. (U. S.) 547, 16 Fed. Cas. No. 9,302.

Log-boom.— A boom constructed to detain logs passing down a navigable river is a structure pertaining to the adjacent land as much as a wharf or building erected thereon; and assuming that it extends no farther out than the landowner, with due regard to navigation, might properly extend it, a wrongful injury to it is not a marine injury, and cannot be redressed in a court of admiralty. The Brig City of Erie *v.* Canfield, 27 Mich. 479.

Marine railway.— An action for injuries to a marine railway, the upper end of which is securely fastened to the land, does not lie in the admiralty courts, although the ways run down below the ebb and flow of the tide, to facilitate the transfer of vessels from the water to the shore. The Professor Morse, 23 Fed. 803.

Personal injuries received on shore, although caused by negligence originating on a

c. Particular Torts — (I) *Personal Injuries.* The admiralty courts have jurisdiction of actions for personal injuries to seamen, passengers, and others lawfully on board vessels upon navigable waters, whether the result of direct force or consequential injury,[25] but such actions will not be entertained for merely nominal damages in cases not involving any subject-matter beyond the claim for damages.[26]

(II) *Death by Wrongful Act.* It is well settled that, independent of statute, no action arises either at common law or under the general maritime law for wrongfully causing the death of another,[27] but a right of action has been created therefor by statute in nearly all of the states of the Union, and within the territory covered by such statutes the admiralty courts take jurisdiction of such causes,[28]

ship, are not within the jurisdiction of admiralty. Price *v.* The Belle of the Coast, 66 Fed. 62; The Mary Garrett, 63 Fed. 1009; The H. S. Pickands, 42 Fed. 239; The Mary Stewart, 5 Hughes (U. S.) 312, 10 Fed. 137; Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722; Elwell *v.* Bender, 79 Hun (N. Y.) 243, 29 N. Y. Suppl. 357. But see The Strabo, 90 Fed. 110 [*affirmed* in 98 Fed. 998, 39 C. C. A. 375] holding that where the libellant, a workman on a vessel lying at a dock, attempted to leave the ship by means of a ladder, which by reason of the master's negligence was not secured properly to the ship's rail, and therefore fell, the libellant being thrown to the dock and injured, it was inferable that the master's breach of duty took effect upon the libellant while he was upon the ship; and, although his physical injury was completed by his fall upon the dock, a court of admiralty had jurisdiction.

Wharves.— Admiralty has no jurisdiction of a suit against either the vessel or her owner for damage to a wharf or pier by a vessel. The Hoxby, 95 Fed. 170, 94 Fed. 1016; Homer Ramsdell Transp. Co. *v.* Compagnie Générale Transatlantique, 63 Fed. 845; The C. Accame, 20 Fed. 642; The Ottawa, Brown Adm. 356, 18 Fed. Cas. No. 10,616. But see New York City *v.* Hichland, 6 Ben. (U. S.) 289, 18 Fed. Cas. No. 10,196, wherein it was held that a libel for damage to a pier, averring that the pier was within navigable waters, and not showing that it was a part of the land, stated a case of admiralty jurisdiction.

25. Grimsley *v.* Hankins, 46 Fed. 400; The Calista Hawes, 14 Fed. 493; Dunstan *v.* The Steamship R. R. Kirkland, 3 Hughes (U. S.) 641, 8 Fed. Cas. No. 4,181; Roberts *v.* Skolfield, 3 Ware (U. S.) 184, 20 Fed. Cas. No. 11,917; Mendell *v.* The Martin White, Hoffm. Op. 450, 17 Fed. Cas. No. 9,419; Chamberlain *v.* Chandler, 3 Mason (U. S.) 242. 5 Fed. Cas. No. 2,575. But see Murray *v.* Donnelly, 17 Fed. Cas. No. 9,958, 3 Leg. Int. (Pa.) 41, to the effect that admiralty will not take jurisdiction of a libel *in personam* for assault committed against a mariner by the officers of the vessel, if the case is of doubtful merits, and must be established by unquestionable proofs, but will remit libellant to his remedy at common law.

Injuries to minor son.— A libel may be maintained by the father in the admiralty for the consequential damages resulting from an assault and battery of his minor child on the high seas. But, to support the action, he must show either actual damage or that which is held to be such by intendment of law. Plummer *v.* Webb, 1 Ware (U. S.) 69, 19 Fed. Cas. No. 11,234.

26. Barnett *v.* Luther, 1 Curt. (U. S.) 434, 2 Fed. Cas. No. 1,025.

27. The Alaska, 130 U. S. 201, 9 S. Ct. 461, 32 L. ed. 923 [*affirming* 33 Fed. 107]; The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358 [*reversing* 15 Fed. 610]; Welsh *v.* The North Cambria, 39 Fed. 615.

In some of the earlier cases, however, it was held that admiralty would entertain actions for causing death under the civil law and independent of statute. Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262, 5 Fed. 75; Hollyday *v.* The Steamer David Reeves, 5 Hughes (U. S.) 89, 12 Fed. Cas. No. 6,625; The Steamboat Charles Morgan, 2 Flipp. (U. S.) 274, 5 Fed. Cas. No. 2,618; The Steamship Tonawanda, 13 Phila. (Pa.) 464, 34 Leg. Int. (Pa.) 394, 24 Fed. Cas. No. 14,109, 12 Am. L. Rev. 401, 5 Centr. L. J. 418, 23 Int. Rev. Rec. 284, 25 Pittsb. Leg. J. (Pa.) 59. And see The Garland, 5 Fed. 924, to the effect that although by the common law, and apparently also by the civil law, no action will lie to recover for the death of a human being, it seems that in admiralty a libel by a father to recover for the loss of the services of his minor son, killed in a collision, will be sustained.

28. *Ex p.* Detroit River Ferry Co., 104 U. S. 519, 26 L. ed. 815; *Ex p.* Gordon, 104 U. S. 515, 26 L. ed. 814; The Glendale, 81 Fed. 633, 42 U. S. App. 546, 26 C. C. A. 500; Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. 883, 43 U. S. App. 190, 20 C. C. A. 86; The Transfer No. 4, 61 Fed. 364, 20 U. S. App. 570, 9 C. C. A. 521; *In re* Humboldt Lumber Manufacturers' Assoc., 60 Fed. 428; The City of Norwalk, 55 Fed. 98; Oleson *v.* The Ida Campbell, 34 Fed. 432; The Garland, 5 Fed. 924; *In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599; Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 262, 5 Fed. 75; The Highland Light, Chase (U. S.) 150, 12 Fed. Cas. No. 6,477; The Steamship Tonawanda, 13 Phila. (Pa.) 464, 34 Leg. Int. (Pa.) 394. *Contra,* Welsh *v.* The North Cambria, 40 Fed. 655; The Manhasset, 18 Fed. 918; The Sylvan Glen, 9 Fed. 335; Armstrong *v.* Beadle, 5 Sawy. (U. S.) 484, 1 Fed. Cas. No. 541.

and where the local law creates a lien therefor a libel *in rem* will lie against the vessel.[29]

F. Raising Question and Waiver of Jurisdiction. Admiralty will entertain a libel where there is an apparent jurisdiction on the face of it and no opposition;[30] but at any stage of a proceeding in admiralty, until final hearing, the question of jurisdiction is open.[31] A demurrer is the proper remedy where it appears from the libel that the court has no jurisdiction of the case.[32] Where the want of jurisdiction does not so appear, the question of jurisdiction should not be disposed of on motion, but on hearing.[33]

In England it is held that courts of admiralty have jurisdiction of such cases *in personam* (The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; *Ex p.* Gordon, 104 U. S. 515, 26 L. ed. 814; The Orwell, 13 P. D. 80; The Gertrude, 12 P. D. 204; The Bernina, 12 P. D. 58, 11 P. D. 31, 13 App. Cas. 1) but not *in rem* (The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; The Vera Cruz, 9 P. D. 88, 96, 10 App. Cas. 59 [*overruling* The Franconia, 2 P. D. 163]; Smith *v.* Brown, L. R. 6 Q. B. 729; The Explorer, L. R. 3 A. & E. 289; The Sylph, L. R. 2 A. & E. 24; The Guldfaxe, L. R. 2 A. & E. 325; The Steamship Beta *v.* Rollando, L. R. 2 P. C. 447).

In Canada the jurisdiction is in doubt, but will probably be maintained. Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. 883, 43 U. S. App. 190, 20 C. C. A. 86; Monaghan *v.* Horn, 7 Can. Supreme Ct. 409.

Death on high seas.— It follows from the rule stated in the text that a right created by the legislature of a state can have no extra-territorial force so far as their actions are concerned, and that neither the courts of admiralty nor those of common law will entertain jurisdiction of an action for damages for wrongfully causing death upon the high seas, although it may occur upon the vessel of a nation whose law creates a right of action in such cases. The Alaska, 130 U. S. 201, 9 S. Ct. 461, 32 L. ed. 923; Rundell *v.* La Campagnie Generale Transatlantique, 100 Fed. 655, 40 C. C. A. 625; The E. B. Ward, Jr., 16 Fed. 255; Armstrong *v.* Beadle, 5 Sawy. (U. S.) 484, 1 Fed. Cas. No. 541. But see The E. B. Ward, Jr., 17 Fed. 456, holding that where the statute of a state gives a right of action for wrongfully causing death, admiralty will entertain jurisdiction of the tort of the vessel upon the high seas resulting in death, where her owners reside in that state and the home port of the vessel is therein, the vessel thereby being a part of its territory.

Effect of state statute of limitations.— A state statute limiting the time for which the action causing death may be brought conditions the right, and controls in the admiralty court. The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358; Laidlaw *v.* Oregon, R., etc., Co., 81 Fed. 876, 26 C. C. A. 665.

See also *infra*, V, M, 5.

29. The Willamette, 70 Fed. 874, 44 U. S. App. 26, 18 C. C. A. 366, 31 L. R. A. 715; The Premier, 59 Fed. 797; The Oregon, 73 Fed. 846, 45 Fed. 62, 42 Fed. 78; The Highland Light, Chase (U. S.) 150, 12 Fed. Cas. No. 6,477.

30. Skidmore *v.* The Polly, 22 Fed. Cas. No. 12,923.

31. Charleston Bridge Co. *v.* The John C. Sweeney, 55 Fed. 540; Ward *v.* Thompson, Newb. Adm. 95, 29 Fed. Cas. No. 17,162.

This rule applies in its full extent, however, only where the want of jurisdiction springs from the subject-matter of the action (Benedict Adm. (3d ed.) § 368). Thus a plea to the merits waives any irregularity existing on account of filing the libel at a time when the vessel is not within the district (St. Paul F. & M. Ins. Co. *v.* The Lake Superior, 21 Fed. Cas. No. 12,244, 7 Chic. Leg. N. 259, 5 Ins. L. J. 73), or, in case of seizure, **an exception** based on the place of seizure (The Sloop Abby, 1 Mason (U. S.) 360, 1 Fed. Cas. No. 14) or, on a libel for wages, an exception on the ground that the wages were earned by a foreign seaman on a foreign vessel (The Brucklay Castle, 13 Sawy. (U. S.) 521, 36 Fed. 923) and so, too, after joining issue upon a libel in admiralty *in rem*, and filing a cross-bill asking for affirmative relief against the libellants *in personam*, an exception or plea of the want of an admiralty lien comes too late (The Fifeshire, 11 Fed. 743).

Effect of filing stipulation.— A stipulation filed to obtain the release of a vessel is not a waiver of the question as to its original liability to seizure in admiralty. The Fidelity, 16 Blatchf. (U. S.) 569, 8 Fed. Cas. No. 4,758 [*affirming* 9 Ben. (U. S.) 333, 8 Fed. Cas. No. 4,757]; Manchester *v.* Hotchkiss, 16 Fed. Cas. No. 9,004, 10 Am. L. Reg. N. S. 379, 13 Int. Rev. Rec. 125.

32. Knight *v.* The Brig Attila, Crabbe (U. S.) 326, 14 Fed. Cas. No. 7,881.

33. Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 478; Cushing *v.* Laird, 4 Ben. (U. S.) 70, 6 Fed. Cas. No. 3,508. See, however, Wenberg *v.* A Cargo of Mineral Phosphate, 15 Fed. 285, to the effect that the question of jurisdiction may be raised on motion to dismiss the libel before the cause is reached on the calendar, although not raised by exceptions before answer.

Objection to jurisdiction of foreign warship.— Exception to the jurisdiction of the court, in a civil action brought by a private suitor against an armed ship of a friendly power, is properly taken by suggestion filed in the name of the United States by the United States attorney. The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287 [*reversing* 16 Fed. Cas. No. 8,786]; The Pizarro *v.* Matthias, 19 Fed. Cas. No. 11,199, 10 N. Y. Leg. Obs. 97.

Question of which marshal first seized the vessel in waters over which both district

V. PROCEDURE AND PRACTICE.

A. By What Governed — 1. In General. The procedure and practice of the admiralty courts in the United States does not conform to the laws of the state where the court is held, but, like the equity practice, it is uniform throughout the United States and conforms in general to the admiralty practice in other nations.[34] The process and methods of procedure in such courts are even more free from technical rules than is the case with courts of equity.[35]

2. Rules of Court. The procedure in the admiralty courts is largely governed and regulated by rules made therefor by the supreme court in pursuance of congressional authority;[36] and in cases not provided for by the statutes or the rules laid down by the supreme court the inferior courts also have power to make rules for the regulation of their practice.[37]

B. Kinds and Nature of Remedies — 1. In General. There are two kinds of actions in admiralty, which are known as suits *in personam* and suits *in rem*.[38]

2. Suits In Personam. Suits *in personam* are those brought directly against persons as defendants to enforce a personal liability, wherein the relief sought is against the individual without reference to any particular property or thing;[39]

courts exercise jurisdiction should be raised by a petition by the marshal, and not by a plea to the jurisdiction by a party in whose favor the marshal held process. The Steamer Circassian, 1 Ben. (U. S.) 128, 5 Fed. Cas. No. 2,721.

34. U. S. Rev. Stat. (1878), § 914; Benedict Adm. (3d ed.) c. 19.

Causes arising abroad.— Suits brought in admiralty for causes arising abroad should be tried according to the practice and principles of the courts of admiralty of this country wholly irrespective of any local law. The Eagle, 8 Wall. (U. S.) 15, 19 L. ed. 365.

Right to submit to arbitration.— There is nothing in the nature of the admiralty jurisdiction which prevents parties in an admiralty court from submitting their case by rule of the court to arbitration. An award under such arbitration is to be construed and its effect determined by the same general principles which would govern it in a court of common law or of equity. U. S. *v.* Farragut, 22 Wall. (U. S.) 406, 22 L. ed. 879.

Where court has no original jurisdiction. — Where the court in which a statutory proceeding was brought had no original admiralty jurisdiction it was held that the practice must be in accordance with the procedure at common law and not according to the admiralty procedure. McAfee *v.* The Barque Creole, 1 Phila. (Pa.) 190, 8 Leg. Int. (Pa.) 82, 15 Fed. Cas. No. 8,655.

35. Richmond *v.* New Bedford Copper Co., 2 Lowell (U. S.) 315, 20 Fed. Cas. No. 11,800.

36. The Steamer St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; Ward *v.* Chamberlin, 29 Fed. Cas. No. 17,152, 9 Am. L. Reg. 171, 2 West. L. Month. 621; Scott *v.* The Propeller Young America, Newb. Adm. 107, 21 Fed. Cas. No. 12,550; U. S. Rev. Stat. (1878), § 917.

These rules neither create nor displace liens.— The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; Saylor *v.* Taylor, 77 Fed. 476, 42 U. S. App. 206, 23 C. C. A. 343.

37. U. S. Rev. Stat. (1878), §§ 913, 918; U. S. Rev. Stat. (Suppl. 1891), p. 901, c. 517; The Hudson, 15 Fed. 162; Matter of The Steam Propeller Epsilon, 6 Ben. (U. S.) 378, 8 Fed. Cas. No. 4,506; Benedict Adm. (3d ed.) §§ 328, 599.

38. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921; The Sloop Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 9,434; Benedict Adm. (3d ed.) § 359.

39. Atkins *v.* Fibre Disintegrating Co., 18 Wall. (U. S.) 272, 21 L. ed. 841; Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369; The Sloop Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 9,434; Clarke *v.* New Jersey Steam Nav. Co., 1 Story (U. S.) 531, 5 Fed. Cas. No. 2,859.

As to attachment and garnishment in personal actions against parties not within the jurisdiction of the court see *infra*, V, I, 2, c.

Recovery of vessel under claim of ownership.— A suit for the recovery of a vessel under a claim of ownership must be conducted as a suit *in personam*. Blanchard *v.* The Cavalier, 3 Fed. Cas. No. 1,508.

Repairs on domestic vessel.— A suit *in personam* lies for repairs furnished on a domestic vessel. Endner *v.* Greco, 3 Fed. 411.

Intervention by stipulation.— Where, before the institution of a suit *in rem*, the thing proceeded against by the libel had been deposited with or acquired by agents with full notice to them of the libellant's claim upon it, and on its arrest the agents intervened in the suit by stipulation and answered the libel at large, it was held that the suit might be treated as a suit *in personam* against them. Reed *v.* Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646.

Suit transformed to one in rem.— On a libel *in personam* against a subcharterer to recover freight the respondent will be al-

and sometimes, where public policy forbids a proceeding *in rem*, a recovery may be had by a proceeding *in personam*.[40]

3. Suits In Rem — a. In General. A suit *in rem* is one brought against a vessel, cargo, or some thing or *res* as defendant, without process or prayer for relief against any person as defendant, and in which the owner of the property sued is not recognized until he comes in, claims, and defends.[41]

b. Necessity for Lien — (I) *In General.* A suit *in rem* is always founded upon a maritime lien, or a statutory lien in the nature of a maritime lien, to foreclose or enforce which is the object of the suit; and in the absence of such a lien the remedy *in rem* will not lie.[42]

(II) *Causes Arising out of Contract.* A proceeding *in rem* will not lie on a maritime contract unless a lien is annexed to such contract by law;[43] but where the law attaches a lien to the contract it may be enforced *in rem*.[44]

lowed, on petition, to pay the freight-moneys into court to abide the decision of a contest between the owner and charterer as to a claim for demurrage in which he is not interested, and a suit against him will be enjoined though the result will be to turn the proceeding into one *in rem* against the freight. Copp *v.* Decastro, etc., Sugar Refining Co., 8 Ben. (U. S.) 321, 6 Fed. Cas. No. 3,215.

40. The Public Bath No. 13, 61 Fed. 692; The F. C. Latrobe, 28 Fed. 377. See also, generally, *supra*, IV, D, 3, b.

41. The J. W. French, 13 Fed. 916; Reed *v.* Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646; Carson *v.* Jennings, 1 Wash. (U. S.) 129, 5 Fed. Cas. No. 2,464.

A court of admiralty can only proceed *in rem* against the thing itself, or *quasi in rem* against the proceeds thereof. Carson *v.* Jennings, 4 Cranch (U. S.) 2, 2 L. ed. 531 [*affirming* 1 Wash. (U. S.) 129, 5 Fed. Cas. No. 2,464].

No personal judgment against owner.— Where a libel joins both the owner and the vessel as defendants, but contains no prayer for monition or personal judgment, and no monition is served, or attachment of property is made, to bring the owner in, the court cannot render a personal judgment against him when he appears by attorney merely to answer the libel *in rem* and defend the vessel. The Ethel, 66 Fed. 340, 30 U. S. App. 214, 13 C. C. A. 504. See also *infra*, V, Q, 4.

Effect of serving monition on owner.— Where the suit as begun is one *in rem*, the fact that the marshal serves the process issued against the vessel upon the owner, and fails to arrest the vessel, does not convert the suit into one *in personam*. The L. B. X., 88 Fed. 290.

42. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; The Henry Dennis, 47 Fed. 918; The Guiding Star, 18 Fed. 263; Bartlette *v.* The Viola, 2 Fed. Cas. No. 1,083, 3 Chic. Leg. N. 245; The Larch, 2 Curt. (U. S.) 427, 14 Fed. Cas. No. 8,085; Beane *v.* The Schooner Mayurka, 2 Curt. (U. S.) 72, 2 Fed. Cas. No. 1,175; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713, 4 Adm. Rec. 647; The Celestine, 1 Biss. (U. S.) 1, 5 Fed. Cas. No. 2,541; Boon *v.* The Hornet, Crabbe (U. S.) 426, 3 Fed. Cas. No. 1,640; The Schooner Southron *v.* O'Riley, 21 Ala. 228.

43. Vandewater *v.* The Steamship Yankee Blade, McAll. (U. S.) 9, 28 Fed. Cas. No. 16,847; Milne *v.* The John Cook, 17 Fed. Cas. No. 9,617*a*.

Contract for carriage.— An action *in rem* will not lie for the breach of a contract of affreightment, no part of which has been performed (The Monte A., 12 Fed. 331), or for breach of an executory contract to carry a passenger on a particular vessel, where the vessel has never entered on the performance thereof, since the lien upon which the right to proceed *in rem* depends does not attach until the passenger has placed himself within the care and under the control of the master (The Eugene, 83 Fed. 222).

Refusal to make voyage.— A suit *in rem* will not lie against a vessel chartered to take a cargo or a certain voyage because her master and owners refused to take the cargo on board or to run the voyage. The Schooner General Sheridan, 2 Ben. (U. S.) 294, 10 Fed. Cas. No. 5,319.

Misrepresentation or concealment of facts. — In the case of a charter-party a suit *in rem* against the vessel is not maintainable for misrepresentation or concealment of facts by her master or owner in respect to her tonnage or capacity. The Eli Whitney, 1 Blatchf. (U. S.) 360, 8 Fed. Cas. No. 4,345.

General average loss.— There is no maritime lien created by a general average loss, and consequently admiralty has no jurisdiction *in rem*. Beane *v.* The Schooner Mayurka, 2 Curt. (U. S.) 72, 2 Fed. Cas. No. 1,175.

The wages of the master constitute no lien upon the vessel which can be enforced *in rem*. The Gate City, 5 Biss. (U. S.) 200, 10 Fed. Cas. No. 5,267; Bartlette *v.* The Viola, 2 Fed. Cas. No. 1,083, 3 Chic. Leg. N. 245; Willard *v.* Dorr, 3 Mason (U. S.) 91, 29 Fed. Cas. No. 17,679; The Ship Grand Turk, 1 Paine (U. S.) 73, 10 Fed. Cas. No. 5,683.

Mate suing as master.— A mate cannot sue *in rem* for services rendered as captain. The Schooner Leonidas, Olc. Adm. 12, 15 Fed. Cas. No. 8,262.

Money advanced on the personal credit of master or owner cannot be recovered by a libel *in rem*. Maitland *v.* The Brig Atlantic, Newb. Adm. 514, 16 Fed. Cas. No. 8,980.

44. Wood *v.* Canal Boat Wilmington, 5 Hughes (U. S.) 205, 48 Fed. 566; The Wil-

(III) *Causes Arising out of Tort.* With but few exceptions there is a lien for a maritime tort which may be enforced *in rem*,[45] and damages for death by wrongful act may be recovered in such an action under a local law creating the right of action, where a lien is expressly created by such local law, but not otherwise.[46]

(IV) *Recovery of Penalties.* Sometimes provision is made by statute for a proceeding *in rem* to recover a statutory penalty.[47]

c. Necessity for Seizure of Property. It is held that an actual seizure of the property is necessary to give the court jurisdiction over it,[48] but it is not essential that the marshal shall continuously retain it in his custody,[49] and if a vessel is within the district at the time process is served, the court has jurisdiction though it departs before the libel is filed, and is seized on its subsequent return into the district.[50]

C. Joinder of Causes — 1. Proceeding In Rem and In Personam for Same Cause — a. In General. There is no abstract incompatibility between proceedings *in rem* and proceedings *in personam* which forbids them to be joined in one action when based on the same cause, if such joinder is calculated to advance the ends of substantial justice;[51] and so, where such joinder is not prohibited by the supreme court rules, the personal remedy and the remedy against the property may be sought in the same action.[52] Whether or not one proceeding shall be

liam Law, 14 Fed. 792; The Williams, Brown Adm. 208, 29 Fed. Cas. No. 17,710; Stone *v.* The Relampago, 23 Fed. Cas. No. 13,486; Knox *v.* The Schooner Ninetta, Crabbe (U. S.) 534, 14 Fed. Cas. No. 7,912; The Schooner Leonidas, Olc. Adm. 12, 15 Fed. Cas. No. 8,262.

Claim for wharfage.— A vessel using a wharf becomes liable for a reasonable compensation, and this charge, except when the vessel belongs in the same port with the wharf, may be enforced by a proceeding *in rem* in the district. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373; The Canal-Boat Kate Tremaine, 5 Ben. (U. S.) 60, 14 Fed. Cas. No. 7,622.

Materialman's lien.— A materialman employed in building or repairing a domestic ship has a lien upon her as security for his payment, and may therefore proceed *in rem* against the vessel. The Selt, 3 Biss. (U. S.) 344, 21 Fed. Cas. No. 12,649.

45. The Anaces, 93 Fed. 240, 34 C. C. A. 558; The Arkansas, 5 McCrary (U. S.) 364, 17 Fed. 383; McGrath *v.* Candalero, Bee Adm. 64, 16 Fed. Cas. No. 8,810; Todd *v.* The Tulchen, 14 Phila. (Pa.) 550, 37 Leg. Int. (Pa.) 237.

Assault and battery.— Under Admiralty Rule 16, actions for damages for assaults must be brought *in personam* and not *in rem* (The Lyman D. Foster, 85 Fed. 987; The Miami, 78 Fed. 818; Smith *v.* The Ship Challenger, 2 Wash. Terr. 447, 7 Pac. 851), but where a seaman was bitten by a dog which was chained under a table in the cabin, it was held not to be a case of assault and battery within the meaning of the rule (The Lord Derby, 17 Fed. 265).

Injury by escape of steam.— The acts of congress confine the remedy *in rem* for injuries from injurious escape of steam to actions brought by passengers, and the remedy is *in personam* against the owners for such injuries done to others on board. The Highland Light, Chase (U. S.) 150, 12 Fed. Cas. No. 6,477.

46. The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; The Wydale, 37 Fed. 716; The Manhasset, 18 Fed. 918. See also *supra*, IV, E, 9, c, (II).

47. Pollock *v.* The Steam-Boat Sea Bird, 3 Fed. 573; The Arctic, 11 Fed. 177 note (overcrowding passenger vessel); The Lewellen, 4 Biss. (U. S.) 167, 15 Fed. Cas. No. 8,308 (neglect to have name of steamer conspicuously painted on wheel-house and pilot-house).

Carrying dangerous fluids.— The penalty for carrying burning or explosive fluids by passenger steamers cannot be recovered by a proceeding *in rem*. U. S. *v.* The C. B. Church, 1 Woods (U. S.) 275, 25 Fed. Cas. No. 14,762.

48. Brennan *v.* Steam-Tug Anna P. Dorr, 4 Fed. 459. But see Jones *v.* The Richmond, 13 Fed. Cas. No. 7,492, wherein a personal appearance was held to be equivalent to an attachment of the property.

49. The Tug E. W. Gorgas, 10 Ben. (U. S.) 460, 8 Fed. Cas. No. 4,585.

50. The Queen of the Pacific, 61 Fed. 213; Kelsey *v.* The William Kallahan, 14 Fed. Cas. No. 7,680.

51. The Zenobia, Abb. Adm. 48, 30 Fed. Cas. No. 18,208.

52. Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271; The Prussia, 100 Fed. 484; La Normandie, 58 Fed. 427, 14 U. S. App. 655, 7 C. C. A. 285 [*affirming* 40 Fed. 590]; The City of Carlisle, 14 Sawy. (U. S.) 179, 39 Fed. 807, 5 L. R. A. 52; Draper *v.* The O. C. Clary, 7 Fed. Cas. No. 4,071; The Sloop Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 9,434.

Libellant not compelled to elect between remedies.— Where a libel is filed for a cause of action upon which both vessel and master may be together liable, the court will not make an order that the libellant elect between

stayed until the remedy is exhausted in the other is a question for the discretion of the court, to be determined with reference to the convenient administration of justice;[53] but a failure of the respondent to object to a misjoinder until final hearing on appeal will operate to waive the objection.[54]

b. When Joinder Not Allowed by Admiralty Rules. In cases covered by the admiralty rules of the supreme court, proceedings *in rem* and *in personam* cannot be joined in the same libel, except where provision is made in the rules for such joinder.[55]

2. Joinder of Different Causes. A libellant may and should join in the same libel as many maritime causes of action as he may have against the defendant or *res*, whether founded on contract or tort, or both;[56] but separate and distinct causes cannot be joined against defendants not jointly liable.[57]

3. Consolidation of Actions. Where a vessel or other property is the defendant, and several persons are asserting distinct claims against or rights to it in separate proceedings before the same court, which cannot make a decree for one without affecting the claims or rights of the others, they all will be consolidated

the remedy *in rem* and that *in personam*, nor that he submit to have either the arrest of the respondent or the attachment against the vessel vacated. The Zenobia, Abb. Adm. 48, 30 Fed. Cas. No. 18,208.

Charter-parties and contracts of affreightment.— In suits on charter-parties or contracts of affreightment, proceedings *in rem* and *in personam* may be joined. The Baracoa, 44 Fed. 102; The Director, 26 Fed. 708; The Monte A., 12 Fed. 331; The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150; Arthur *v.* The Schooner Cassius, 2 Story (U. S.) 81, 1 Fed. Cas. No. 564.

Action for freight.— An action *in rem* against goods shipped may be joined with an action *in personam* against the consignees for freight. Vaughan *v.* Six Hundred and Thirty Casks of Sherry Wine, 7 Ben. (U. S.) 506, 28 Fed. Cas. No. 16,900; Thatcher *v.* McCulloh, Olc. Adm. 365, 23 Fed. Cas. No. 13,862.

Unlawful seizure.— An action *in rem* against a vessel engaged in making an unlawful seizure and *in personam* against her master will lie for the tort. The Sloop Martha Anne, Olc. Adm. 18, 16 Fed. Cas. No. 9,146.

53. La Normandie, 58 Fed. 427, 14 U. S. App. 655, 7 C. C. A. 285 [*affirming* 40 Fed. 590].

54. The Willamette, 72 Fed. 79, 44 U. S. App. 96, 18 C. C. A. 373.

55. The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; The Alida, 12 Fed. 343; Dean *v.* Bates, 2 Woodb. & M. (U. S.) 87, 7 Fed. Cas. No. 3,704; Hale *v.* Washington Ins. Co., 2 Story (U. S.) 176, 11 Fed. Cas. No. 5,916; Citizens Bank *v.* Nantucket Steamboat Co., 2 Story (U. S.) 16, 5 Fed. Cas. No. 2,730.

56. U. S. Rev. Stat. (1878), § 978; The Queen of the Pacific, 61 Fed. 213; The Director, 13 Sawy. (U. S.) 479, 36 Fed. 335, 26 Fed. 708; The Prinz Georg, 19 Fed. 653; The Anchoria, 9 Fed. 840; The Dauntless, 7 Fed. 366; The Lucy Anne, 3 Ware (U. S.) 253, 15 Fed. Cas. No. 8,596; The Sloop Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 9,434; The Brig Hunter, 1 Ware (U. S.) 251, 12 Fed. Cas. No. 6,904.

Actions ex contractu and ex delicto.— Parties may join in one libel causes of action arising *ex contractu* and those arising *ex delicto*, where such causes are so united that the same evidence will apply to all. Borden *v.* Hiern, Blatchf. & H. Adm. 293, 3 Fed. Cas. No. 1,655.

Claims for wages and advances.— A seaman may recover both for wages and for money advanced to the ship's use in the same action, and, where the proceeding is *in rem*, may join with a co-libellant claiming wages only; but not where the proceeding is *in personam*. The Sloop Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 9,434.

Claims for wages and damages for assault. It has been held that a seaman cannot join a claim for damages for an assault with one for wages in an action against the master (The Guiding Star, 2 Flipp. (U. S.) 596, 1 Fed. 347. *Contra*, Borden *v.* Hiern, Blatchf. & H. Adm. 293, 3 Fed. Cas. No. 1,655) or in an action *in rem* against the vessel (Pratt *v.* Thomas, 1 Ware (U. S.) 437, 19 Fed. Cas. No. 11,377). See also Davis *v.* Adams, 93 Fed. 977, wherein it was held that a libel for damages on the alleged ground that libellant was induced to visit a vessel by fraudulent pretenses, and there detained and compelled to go on a voyage, sounds in tort, and a recovery cannot be had thereunder for wages due the libellant for his services as seaman rendered under shipping-articles which he signed.

Claims for penalty and for damages.— A claim for a fine recoverable or a forfeiture incurred under a statute cannot be joined with a claim for damages or other personal claims. The Prinz Georg, 19 Fed. 653; Knowlton *v.* Boss, 1 Sprague (U. S.) 163, 14 Fed. Cas. No. 7,901; The Dimon, 2 Gall. (U. S.) 306, 7 Fed. Cas. No. 3,917.

Maritime and non-maritime causes cannot be joined. The Steam-boat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677.

57. Heney *v.* The Josie, 59 Fed. 782; Roberts *v.* Skolfield, 3 Ware (U. S.) 184, 20 Fed. Cas. No. 11,917; Thomas *v.* Lane, 2 Sumn. (U. S.) 1, 23 Fed. Cas. No. 13,902.

and tried together;[58] and the same will be done where the causes of action are of a like nature and involve substantially the same question, arising out of the same act or transaction, though against different vessels.[59]

4. SEVERANCE. Where claimants admit one of several causes of action, but deny others, the causes may be severed and judgment rendered upon the admitted cause, notwithstanding such severance destroys the right of appeal by reducing the amount in dispute.[60]

D. Venue. A libel *in personam* is not a "civil suit" within the meaning of the statute requiring actions to be brought in the district of defendant's residence.[61] A libel *in rem* may be prosecuted in any district in which the property may be apprehended,[62] and where a suit *in rem* has been instituted in a district court a petition by the owners to limit liability should be filed in the same district.[63]

E. Parties — 1. LIBELLANTS — a. Parties Entitled to Relief. The parties actually entitled to relief are the proper libellants in admiralty,[64] and a person lacking the capacity to proceed in his own name may sue by next friend.[65] If it appears

58. The North Star, 106 U. S. 17, 1 S. Ct. 41, 27 L. ed. 91; The Eliza Lines, 61 Fed. 308; The Queen of the Pacific, 61 Fed. 213; The Sarah E. Kennedy, 25 Fed. 672; The Prinz Georg, 19 Fed. 653, 23 Fed. 906; The Dauntless, 7 Fed. 366; The Sloop Merchant, Abb. Adm. 1, 17 Fed. Cas. No. 9,434. See also Benedict Adm. (3d ed.) § 404.

59. The Washington, 9 Wall. (U. S.) 513, 19 L. ed. 787; The Steam-Tug Burke, 4 Cliff. (U. S.) 582, 4 Fed. Cas. No. 2,159.

60. Larrinaga *v.* Two Thousand Bags of Sugar, 40 Fed. 507.

61. Manchester *v.* Hotchkiss, 16 Fed. Cas. No. 9,004, 10 Am. L. Reg. N. S. 379, 13 Int. Rev. Rec. 125. But see Wilson *v.* Pierce, 30 Fed. Cas. No. 17,826, 15 Law Rep. 137; The L. B. X., 88 Fed. 290.

Foreign corporations.—The act of congress of March 3, 1887, c. 373, § 1, providing that no civil suit shall be brought before a district or circuit court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, does not apply to causes of admiralty and maritime jurisdiction, and a libel *in personam* may be maintained against a foreign corporation in any district in which service may be had upon it. *In re* Louisville Underwriters, 134 U. S. 488, 10 S. Ct. 587, 33 L. ed. 991; *In re* St. Paul, etc., Ins. Co., 134 U. S. 493 note, 10 S. Ct. 589, 33 L. ed. 994 note; Atkins *v.* Fibre Disintegrating Co., 1 Ben. (U. S.) 118, 2 Fed. Cas. No. 600 [*affirmed* in 18 Wall. (U. S.) 272, 21 L. ed. 841].

62. The Slavers, 2 Wall. (U. S.) 383, 17 L. ed. 911; Killam *v.* The Schooner Eri, 3 Cliff. (U. S.) 456, 14 Fed. Cas. No. 7,765; Town *v.* Steamship Western Metropolis, 28 How. Pr. (N. Y.) 283, 24 Fed. Cas. No. 14,114; The Ada, 2 Ware (U. S.) 408, 1 Fed. Cas. No. 38.

Departure of vessel before libel filed.— Jurisdiction is acquired over a vessel which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on alias monition. The Queen, 78 Fed. 155.

The character or occupation of the parties has nothing to do with determining the jurisdiction of an admiralty court. Kellum *v.* Emerson, 2 Curt. (U. S.) 79, 14 Fed. Cas. No. 7,669.

Libel brought in wrong division.—Where a libel *in rem* is brought in the wrong division, the objections thereto being purely formal and it being probable that the case will be tried on issues of fact, a motion by respondent to transfer the cause to the right division should be granted (The Willamette, 53 Fed. 602); and the claimant, by appearing, securing the release of the vessel, and having the case transferred to another division, waives any objection on the ground that the suit was instituted in the wrong division (The Willamette, 70 Fed. 874, 44 U. S. App. 26, 18 C. C. A. 366, 31 L. R. A. 715).

63. *In re* The Luckenback, 26 Fed. 870.

Fund equitably representing lost vessel.— Proceedings to limit the liability of shipowners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. *In re* Leonard, 14 Fed. 53.

District where liability arose.— A proceeding to limit the liability of a ship-owner is properly brought in the district where the stranding occurred out of which the liability arose, where the property which such owner seeks to abandon is within such district and no suit has been instituted in any other district. The Steamship John Bramall, 10 Ben. (U. S.) 495, 13 Fed. Cas. No. 7,334.

64. Fretz *v.* Bull, 12 How. (U. S.) 466, 13 L. ed. 1068; Byrnes *v.* The Rockaway, 4 Fed. Cas. No. 2,274; Messena *v.* The Neilson, 17 Fed. Cas. No. 9,493*a*; Benedict Adm. (3d ed.) § 380.

By surviving partner in firm-name.— The fact that proceedings are brought in the firm-name by the surviving partner is not a valid objection where it appears that the claimants, in dealing with the survivor, knew that after his copartner's death he continued to do business in the name of the firm. Byrnes *v.* The Rockaway, 4 Fed. Cas. No. 2,274.

65. **Minors.**— A minor may recover his wages as seaman upon a libel promoted by his father as next friend, where the father has agreed that the son may receive his own

from the libel that the libellant is not entitled to sue, the respondent may demur; but if the incapacity does not appear, but exists in fact, he must plead it in bar.[66]

b. Suit for Use of Another. In certain cases one person is permitted to sue for the use of another where he represents such other in some capacity connected with the transaction; as the owner for the insurers;[67] the master for the owner and others;[68] the carrier for the freight-owners;[69] the consignee for his principals;[70] or an assignee for the assignor.[71]

c. Persons Holding by Assignment or Subrogation. As a general rule persons holding claims by assignment are entitled to sue therefor in admiralty in their own names,[72] or to continue suits already begun by their assignors,[73] and the same is true of parties holding by subrogation.[74]

d. Joinder of Libellants. Parties whose interests or claims are based upon a cause of action common to all, though separate and distinct as between themselves, may unite as libellants, whether the claims arise out of contract or tort.[75]

wages (Davis *v.* The Brig Seneca, Gilp. (U. S.) 34, 7 Fed. Cas. No. 3,651), and admiralty will protect the rights of the minor against the misconduct of such next friend (The Etna, 1 Ware (U. S.) 474, 8 Fed. Cas. No. 4,542).

When minor may sue in own name.— A minor may recover wages as a seaman in his own name when the contract was made personally with him and it does not appear that he has a parent, guardian, or tutor entitled to receive them (The Schooner David Faust, 1 Ben. (U. S.) 183, 7 Fed. Cas. No. 3,595) and in such action the respondent is not entitled to require the appointment of a guardian *ad litem* or next friend for the libellant (Wicks *v.* Ellis, Abb. Adm. 444, 29 Fed. Cas. No. 17,614).

Person unable to understand English language.— A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel. He should sue under the guardianship of a committee, a next friend, or a trustee. Sunday *v.* Gordon, Blatchf. & H. Adm. 569, 23 Fed. Cas. No. 13,616.

66. Knight *v.* The Brig Attila, Crabbe (U. S.) 326, 14 Fed. Cas. No. 7,881.

67. Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271; Fretz *v.* Bull, 12 How. (U. S.) 466, 13 L. ed. 1068; Fairgrieve *v.* Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; The Grand Republic, 10 Fed. 398; The Anchoria, 9 Fed. 840.

Mortgagee for insurers.—A mortgagee may sue in his own name for the benefit of the insurers. The Grand Republic, 10 Fed. 398.

The authority of the libellant to recover for the use of the insurers must appear. The Anchoria, 9 Fed. 840.

When insurer may sue in own name.—The insurance company may sue the offending party in its own name, or in the name of the owner, when it has paid the latter the full amount of the loss; but when the insurance paid is not equal to the damage done, the insured must sue and can recover the entire damage, although he will be a trustee for the insurance company for the surplus remaining after the satisfaction of his own claim. Fairgrieve *v.* Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135.

68. Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271; Commander-in-chief, 1 Wall. (U. S.) 43, 17 L. ed. 609; Thatcher *v.* McCulloh, Olc. Adm. 365, 23 Fed. Cas. No. 13,862; Benedict Adm. (3d ed.) §§ 384, 404.

69. The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. ed. 993; Thatcher *v.* McCulloh, Olc. Adm. 365, 23 Fed. Cas. No. 13,862.

70. The Water Witch, 1 Black (U. S.) 494, 17 L. ed. 155; The Nail City, 22 Fed. 537. The consignee may sue either in his own name or the name of his principal. McKinlay *v.* Morrish, 21 How. (U. S.) 343, 16 L. ed. 100.

71. The Prussia, 100 Fed. 484, wherein the libellant also had a claim of his own arising out of the same facts.

72. Fairgrieve *v.* Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190; Park *v.* The Hull of the Edgar Baxter, 37 Fed. 219; Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 4 McCrary (U. S.) 636, 14 Fed. 699; The Liberty No. 4, 7 Fed. 226; The Sarah J. Weed, 2 Lowell (U. S.) 555, 21 Fed. Cas. No. 12,350; Swett *v.* Black, 1 Sprague (U. S.) 574, 23 Fed. Cas. No. 13,690; Cohan *v.* The Rolling Wave, 6 Fed. Cas. No. 2,959*a*; Cobb *v.* Howard, 3 Blatchf. (U. S.) 524, 5 Fed. Cas. No. 2,924; Morin *v.* Steamboat F. Sigel, 10 Minn. 250; Reynolds *v.* Steamboat Favorite, 10 Minn. 242.

Claim for supplies and repairs.— The right to sue in admiralty to enforce a claim for supplies and repairs to a vessel is personal, and cannot be maintained for the benefit of an assignee of a due-bill or promissory note given to secure the claim. Reppert *v.* Robinson, Taney (U. S.) 492, 20 Fed. Cas. No. 11,703.

73. Burke *v.* The Brig M. P. Rich, 1 Cliff. (U. S.) 308, 4 Fed. Cas. No. 2,161; Seaver *v.* The Carroni, 21 Fed. Cas. No. 12,593.

74. The Cadiz, 20 Fed. 157; Mutual Safety Ins. Co. *v.* The Ship George, Olc. Adm. 89, 17 Fed. Cas. No. 9,981.

75. Fretz *v.* Bull, 12 How. (U. S.) 466, 13 L. ed. 1068; Jacobsen *v.* Dalles, etc., Nav. Co., 93 Fed. 975; The Queen, 40 Fed. 694 (seamen and passengers joined with owners

Misjoinder of parties libellant, when not objected to, will not prevent a decree.[76]

e. Striking Out Libellant. The name of a libellant who has no interest in the suit may, on a proper application, be stricken from the record if it does not appear that the respondent will be deprived of any means of defense thereby.[77]

2. Defendants — a. In Proceedings In Personam. In a proceeding *in personam* all persons whose liability is joint only must be made defendants,[78] and where the liability is several only it must be enforced severally.[79] Where, however, as in case of a tort, the liability is both joint and several, the libellant may proceed against the wrong-doers either jointly or severally to recover his entire damages,[80] though, if he does not join all who may legally be joined in one action, but proceeds against them severally in different suits, he is not permitted to recover costs in more than one action.[81] If the libellant, by reason of certain facts alleged, is uncertain which of two defendants is liable to him for freight, he may sue them jointly and pray for alternative relief.[82]

b. In Proceedings In Rem. Where the proceeding is *in rem* and no personal judgment is sought, the non-joinder of some of the owners of the property attached is immaterial;[83] and where the attached property is released on a bond to abide the judgment, the omitted owners are not entitled to be made parties to

to recover damages for collision); The Prinz Georg, 23 Fed. 906, 19 Fed. 653 (joinder of several passengers seeking to recover penalties for voluntarily withholding provisions); Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 4 McCrary (U. S.) 636, 14 Fed. 699 (joinder of several shippers for damages caused by common disaster); Donovan *v.* Dymond, 3 Woods (U. S.) 141, 7 Fed. Cas. No. 3,993 (action by joint owners to recover freight); The Sam Gaty, 5 Biss. (U. S.) 190, 21 Fed. Cas. No. 12,276; The Propeller Richard Doane, 2 Ben. (U. S.) 111, 20 Fed. Cas. No. 11,765 (all the owners of vessel injured by collision); The Steamer City of Paris, 1 Ben. (U. S.) 529, 5 Fed. Cas. No. 2,766 (insurers joined with owners to recover damages for collision); The Young Mechanic, 3 Ware (U. S.) 58, 30 Fed. Cas. No. 18,182; The Hull of a New Ship, 2 Ware (U. S.) 203, 12 Fed. Cas. No. 6,859; American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303.

Same person libellant and respondent.— A joint action *in personam* cannot be maintained by several libellants constituting a firm of ship-builders, for repairs put on a vessel of which one of the firm is part-owner and is made a respondent with the other owners. The Brothers, 5 Hughes (U. S.) 282, 7 Fed. 878.

Vessels under contract of mateship.— Where two vessels are under a contract of mateship there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion. Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720.

76. Coast Wrecking Co. *v.* Phœnix Ins. Co., 7 Fed. 236.

77. Thompson *v.* The Jachin, 23 Fed. Cas. No. 13,959; The Falcon, 4 Blatchf. (U. S.) 367, 8 Fed. Cas. No. 4,618.

Necessary parties — Indemnity for costs. Where part of the owners of a vessel brought an action in the name of all, it was held that non-consenting owners could not have their names stricken out, but were entitled to have the suit stayed until they were indemnified against costs. Richmond *v.* New Bedford Copper Co., 2 Lowell (U. S.) 315, 20 Fed. Cas. No. 11,800.

78. Card *v.* Hines, 35 Fed. 598, wherein it was held that the respondent, one of the owners of the vessel, might show by plea that there were other owners who should be made parties.

Objection for non-joinder.— The non-joinder of proper respondents in an action *in personam* can be taken advantage of only by plea in abatement. Reed *v.* Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646.

79. Matern *v.* Gibbs, 1 Sprague (U. S.) 158, 16 Fed. Cas. No. 9,273, wherein it was held that the master and owners of a whaleship were not liable to be sued jointly by a seaman for his lay or share. See also Benedict Adm. (3d ed.) § 387.

80. The Washington, 9 Wall. (U. S.) 513, 19 L. ed. 787; The F. W. Vosburgh, 93 Fed. 481; The St. Lawrence, 19 Fed. 328; The Franconia, 21 Blatchf. (U. S.) 263, 16 Fed. 149.

81. U. S. Rev. Stat. (1878), §§ 977, 978.

82. Neall *v.* Curran, 93 Fed. 831. See also The Emily, 9 Wheat. (U. S.) 381, 6 L. ed. 116; Brig Caroline *v.* U. S., 7 Cranch (U. S.) 496, 3 L. ed. 417.

83. The F. W. Vosburgh, 93 Fed. 481; Card *v.* Hine, 39 Fed. 818. See also U. S. Rev. Stat. (1878), § 977.

Purchaser of vessels wrongfully seized.— In an action *in rem* to recover the possession of a derelict vessel wrongfully seized by the wreck-master of a county of the state of New York under N. Y. Rev. Stat. pt. 1, c. 20, tit. 12, and sold under order of the county judge, if the purchaser has obtained possession he is the only necessary party defendant, and it is improper to join the wreck-master. The Margaretta, 29 Fed. 324.

defend the suit, as the subsequent judgment can be only against the obligors on the bond.[84]

3. Death of Party Pending Action. An action *in personam* abates by the death of plaintiff or defendant, and must be revived in the name of his personal representative within a reasonable time;[85] but in an action *in rem* the death of claimant before trial, after filing his claim and answer defending against the libel, does not cause the suit to abate.[86]

F. Pleadings — 1. Requisites of Particular Pleading — a. The Libel — (I) *In General* — (A) *Formal Requisites.* The libel must be addressed to the court or the judge thereof,[87] and signed by the libellant or his agent.[88] It must show that the libellant is the party entitled to maintain the proceedings,[89] and that the defendant is the party liable;[90] but the property to be attached need not be specified in the libel,[91] and under a prayer for general relief damages may be recovered.[92]

(B) *What Precision Requisite.* The technical precision of common-law pleadings is not required of a libel in admiralty, and it is sufficient if it set forth substantially all the necessary facts;[93] but it must set forth the material

84. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447; National Board of Mar. Underwriters *v.* Melchers, 45 Fed. 643. See also Coleman *v.* Martin, 6 Blatchf. (U. S.) 119, 6 Fed. Cas. No. 2,985.

85. New York City *v.* White, 59 Fed. 617; The Ship Norway, 1 Ben. (U. S.) 493, 18 Fed. Cas. No. 10,357; Nevitt *v.* Clarke, Olc. Adm. 316, 18 Fed. Cas. No. 10,138.

Survival of actions.— It has been held that causes of action in admiralty for personal torts do not survive the death of the person injured (Crapo *v.* Allen, 1 Sprague (U. S.) 184, 6 Fed. Cas. No. 3,360), but the contrary has been held (The Sea Gull, Chase (U. S.) 145, 21 Fed. Cas. No. 12,578), and it has also been held that a father is entitled to recover for consequential injuries to his minor son by assault and beating on the high seas, although death resulted therefrom (Plummer *v.* Webb, 1 Ware (U. S.) 69, 19 Fed. Cas. No. 11,234).

86. Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507; The James A. Wright, 10 Blatchf. (U. S.) 160, 13 Fed. Cas. No. 7,191.

87. The Joseph Gorham, 13 Fed. Cas. No. 7,537, 7 Law Rep. 135, 2 N. Y. Leg. Obs. 388.

88. Hardy *v.* Moore, 4 Fed. 843, wherein the libel was signed by a proctor.

89. **Showing libellant's property rights.**— The libel must show that the libellant had such an interest or right in the property involved as entitles him to bring the action. Minturn *v.* Alexandre, 5 Fed. 117; Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791.

When in rem need not state occupation and residence.— Libels in civil actions *in rem* need not state the occupation and residence of the libellant. The J. R. Hoyle, 4 Biss. (U. S.) 234, 13 Fed. Cas. No. 7,557.

Where corporation joined as libellant.— Where parties joined as libellants are corporations the libel should so aver. Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 4 McCrary (U. S.) 636, 14 Fed. 699.

Libellant suing "for all other interests."— A libel for salvage, in the name of a British naval officer and the British consul, joining with him, "for all other interests," where the vessel rescued by the British naval vessel was sent home in charge of the officer, was held not fatally defective. Robson *v.* The Huntress, 2 Wall. Jr. C. C. (U. S.) 59, 20 Fed. Cas. No. 11,971; The Brig Huntress, 1 Phila. (Pa.) 122, 7 Leg. Int. (Pa.) 202, 12 Fed. Cas. No. 6,912, 3 Am. L. J. N. S. 307, 4 Pa. L. J. Rep. 510.

90. **Alleging defendant's ownership of vessel.** — A libel *in personam* against the owners of a vessel for damages arising out of a collision is defective when it fails to aver that respondent was the owner of the vessel at the time of the collision. The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727. See also Danace *v.* The Magnolia, 37 Fed. 367. But, although one of the owners of a vessel is sued for a collision jointly with the other general owners in a libel which does not describe him as owner *pro hac vice,* a decree may be made against him alone upon proof of the proper facts. Thorp *v.* Hammond, 12 Wall. (U. S.) 408, 20 L. ed. 419.

Party not named in prayer for relief.— Where a party proceeded against is named in the body of the libel, a decree *secundum allegata et probata* may be rendered against him, although he is not named in the prayer for relief. Nevitt *v.* Clarke, Olc. Adm. 316, 18 Fed. Cas. No. 10,138.

Charging defendants as common carriers.— Where the suit is *in personam* against the master or owners of the vessel to recover for injuries to goods, they must be charged in the libel as common carriers in order to render them liable as such carriers; but this is not necessary when the suit is *in rem.* Seller *v.* Steamship Pacific, 1 Oreg. 409.

91. Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369.

92. Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507; Peru *v.* The North America, 19 Fed. Cas. No. 11,017*a*.

93. Oakes *v.* U. S., 174 U. S. 778, 19 S. Ct. 864, 43 L. ed. 1169; London Assur. Co. *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Davis *v.* Adams, 102 Fed. 520, 42 C. C. A. 493 [*reversing* 93 Fed. 977]; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; The Anaces, 93 Fed. 240, 34 C. C. A. 558 [*reversing* 87 Fed. 565]; Comings *v.* The Ida Stockdale, 6 Fed. Cas. No. 3,052, 22 Pittsb. Leg. J. (Pa.) 9.

Allegation that money is still due and un-

facts relied on, so that a plain and direct issue may be made up on the charge,[94] and must set forth in distinct articles each separate and distinct ground on which libellant relies, so that defendant may be enabled to answer them separately.[95] It need not allege, however, matters which defendant should properly set up in his answer by way of defense,[96] and when the answer sets up facts not alleged in the libel the court may decree in favor of libellants on such facts, notwithstanding their omission from the libel.[97]

(C) *Necessity of Alleging Jurisdictional Facts.* The libel must aver sufficient facts to show that the cause is one within the admiralty jurisdiction,[98] but it has been held unnecessary to aver that a vessel is engaged in navigation,[99] and the court will take judicial notice that the waters on which a contract was performed are navigable without an averment to that effect.[1]

(D) *Exhibits.* A libel founded on a charter-party or contract of affreightment should state that fact, and a copy of the charter-party or contract should be annexed to the libel.[2]

(E) *Waiver of Objections.* Objections to defects of form in a libel should be raised by special exceptions, else they are waived,[3] and if the exceptions in an

paid.— An allegation that a certain sum loaned by the master on the security of the first earnings of the vessel is still due and unpaid will dispense with an allegation that it has not been paid out of the earnings. Brown *v.* The Brig Cadmus, 2 Paine (U. S.) 564, 4 Fed. Cas. No. 1,997.

94. London Assur. Co. *v.* Companhia de Mcagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; The Corsair, 145 U. S. 335, 12 S. Ct. 949, 36 L. ed. 727; The Gazelle, 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496; The Anaces, 93 Fed. 240, 34 C. C. A. 558; Jacobsen *v.* Dalles, etc., Nav. Co., 93 Fed. 975; The Conde Wifredo, 77 Fed. 324, 41 U. S. App. 438, 467, 609, 23 C. C. A. 187; Danace *v.* The Magnolia, 37 Fed. 367; The Bark Havre, 1 Ben. (U. S.) 295, 11 Fed. Cas. No. 6,232; Jenks *v.* Lewis, 1 Ware (U. S.) 43, 13 Fed. Cas. No. 7,280.

Omission of material facts.— An omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to libellant if the court can see there was no design on his part in omitting to state them. The Quickstep, 9 Wall. (U. S.) 665, 19 L. ed. 767.

Showing manner in which damage arose.— A libel against a tug to recover damages for the abandonment of a contract to tow a barge during an entire season should point out the manner in which the alleged damage arose. The Oscoda, 66 Fed. 347.

95. McWilliams *v.* The Steam-Tug Vim, 2 Fed. 874; Treadwell *v.* Joseph, 1 Sumn. (U. S.) 390, 24 Fed. Cas. No. 14,157; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673.

Matter in aggravation of damages.— General ill treatment and oppression on the part of the master, relied on in aggravation of damages in a suit by a seaman for assault, must be propounded in a distinct allegation. Pettingill *v.* Dinsmore, 2 Ware (U. S.) 212, 19 Fed. Cas. No. 11,045.

96. The Brig Aurora *v.* U. S., 7 Cranch (U. S.) 382, 3 L. ed. 378; Mott *v.* Frost, 45 Fed. 897.

97. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162, 15 L. ed. 584; The Rapid Transit, 52 Fed. 320; Moore *v.* The Robilant, 42 Fed. 162.

98. U. S. *v.* La Vengeance, 3 Dall. (U. S.) 297, 1 L. ed. 610; U. S. *v.* One Raft of Timber, 5 Hughes (U. S.) 404, 13 Fed. 796; Jones *v.* The Coal Barges, 3 Wall. Jr. C. C. (U. S.) 53, 13 Fed. Cas. No. 7,458; Boon *v.* The Hornet, Crabbe (U. S.) 426, 3 Fed. Cas. No. 1,640; Thomas *v.* Lane, 2 Sumn. (U. S.) 1, 23 Fed. Cas. No. 13,902.

99. The Illinois, Brown Adm. 497, 12 Fed. Cas. No. 7,004. But see People *v.* The Steamer America, 34 Cal. 676, wherein it was held that in an action for wharfage there must be an allegation that the vessel was engaged in navigating the high seas.

Enforcing lien before vessel launched.— Where the maritime law gives the materialman a lien for materials and labor in the building of a vessel it may be enforced *in rem* before the vessel is launched. But to give the admiralty court jurisdiction it must appear by the libel and record that the vessel is of the size for maritime employment and that her business was to be maritime navigation on the lakes or high seas. Parmlee *v.* The Propeller Charles Mears, Newb. Adm. 197, 18 Fed. Cas. No. 10,766.

1. Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 478.

2. Card *v.* Hines, 33 Fed. 189; Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 4 McCrary (U. S.) 636, 14 Fed. 699. *Compare* Chamberlain *v.* The Forgorm, 46 Fed. 202, in which a libel was held sufficient though failing to set out the bill of lading under which it was alleged certain goods had been delivered to the libellee.

3. Admiralty Rule 24.

Lack of precision and certainty.— Where a libel lacks precision and certainty in alleging facts, but is not excepted to in that respect, the court may dispose of a motion to vacate an attachment issued thereunder upon an as-

answer are not insisted upon at the opening of the trial they will be considered as waived.[4]

(II) *Information for Penalty or Forfeiture*—(A) *In General.* In an information or libel[5] for a forfeiture or penalty for the violation of a statute the formality and technical precision of an indictment at common law are not required: it is sufficient if the offense be so set forth as to bring it clearly within the statute on which the information is founded,[6] and it is not essential that such pleading conclude "against the form of the statute."[7] The information must always show, however, with reasonable certainty, that there has been an act or omission violative of the statute.[8]

(B) *Charging in Alternative.* Stating a charge in the alternative is good if each alternative constitutes an offense under the statute,[9] and proof of the offense charged in either alternative will support the information.[10]

(III) *Supplemental Libel.* Matters occurring prior to the commencement of the suit may be set up by supplemental libel,[11] and when filed before the

sumption of facts as broad as the libel will warrant, or as is claimed on behalf of libellant. Essler *v.* Worth, 8 Fed. Cas. No. 4,533*a*.

No averment of ownership in libellant.—On a libel for the non-delivery of goods, the want of averment of ownership in the libellant is waived where the point is not raised in any way in the answer. The Steamship Ville de Paris, 3 Ben. (U. S.) 276, 28 Fed. Cas. No. 16,942.

Misjoinder of causes.—The objection that a suit joins a libel *in personam* with a libel *in rem* should be made by exception to the libel before answer. The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52.

4. White *v.* The Cynthia, 29 Fed. Cas. No. 17,546*a*, 10 Reporter 232.

5. Libel essentially an information.—A libel on a seizure in the admiralty is in its terms and essence an information. The word "information" is not exclusively applicable to common-law proceedings. The Samuel, 1 Wheat. (U. S.) 9, 4 L. ed. 23.

6. The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531; The Merino, 9 Wheat. (U. S.) 391, 6 L. ed. 118; The Emily, 9 Wheat. (U. S.) 381, 6 L. ed. 116; The Samuel, 1 Wheat. (U. S.) 9, 4 L. ed. 23; The Schooner Hoppet *v.* U. S., 7 Cranch (U. S.) 389, 3 L. ed. 380; U. S. *v.* La Vengeance, 3 Dall. (U. S.) 297, 1 L. ed. 610.

Following language of statute.—An information pursuing the words of the statute is sufficient. U. S. *v.* The Brig Neurea, 19 How. (U. S.) 92, 15 L. ed. 531; The Merino, 9 Wheat. (U. S.) 391, 6 L. ed. 118; The Emily, 9 Wheat. (U. S.) 381, 6 L. ed. 116; The Idaho, 29 Fed. 187.

Need not anticipate defense.—In a libel for a seizure it is not necessary to state any fact that constitutes the claimant's defense, or a ground of exception to the operation of the law on which the libel is founded. The Brig Aurora *v.* U. S., 7 Cranch (U. S.) 382, 3 L. ed. 378.

Seizure of property.—An information for a forfeiture must allege the seizure of the property (U. S. *v.* One Raft of Timber, 5 Hughes (U. S.) 404, 13 Fed. 796; The Washington, 4 Blatchf. (U. S.) 101, 29 Fed. Cas. No. 17,221; The Schooner Silver Spring, 1 Sprague (U. S.) 551, 22 Fed. Cas. No. 12,858) and the place of such seizure (U. S. *v.* One Raft of Timber, 5 Hughes (U. S.) 404, 13 Fed. 796).

Intent to defraud the revenue.—In an information under the act of congress of 1796, c. 128, § 67, against goods on account of their differing in description from the contents of the entry, it is not necessary to allege an intention to defraud the revenue. Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430, 6 L. ed. 128.

Violation of embargo laws.—A libel against a vessel for violating the embargo laws need not state the particular character of the vessel. U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 347, 26 Fed. Cas. No. 15,612.

Unlading goods without permit.—In a libel under the act of congress of March 2, 1799, § 50, for unlading goods without a permit it is not necessary to state the time and place of importation nor the vessel in which it was made; an allegation that they were unknown being sufficient. Locke *v.* U. S., 7 Cranch (U. S.) 339, 3 L. ed. 364.

Vessel engaged in trade without license.—A libel under the act of congress of Feb. 28, 1793, § 32, providing for the forfeiture of a vessel employed in any other trade than that for which she is licensed, need not specify the particular trade in which the vessel was engaged at the time of the seizure. U. S. *v.* Schooner Paryntha Davis, 1 Cliff. (U. S.) 532, 27 Fed. Cas. No. 16,003.

7. The Merino, 9 Wheat. (U. S.) 391, 6 L. ed. 118; The Idaho, 29 Fed. 187.

8. The Pope Catlin, 31 Fed. 408; Eighteen Thousand Gallons of Distilled Spirits, 5 Ben. (U. S.) 4, 8 Fed. Cas. No. 4,317; U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 347, 26 Fed. Cas. No. 15,612; The Schooner Betsy, 1 Mason (U. S.) 354, 3 Fed. Cas. No. 1,365; The Sloop Nancy, 1 Gall. (U. S.) 67, 17 Fed. Cas. No. 10,008.

9. The Emily, 9 Wheat. (U. S.) 381, 6 L. ed. 116; Brig Caroline *v.* U. S., 7 Cranch (U. S.) 496, 3 L. ed. 417.

10. The Emily, 9 Wheat. (U. S.) 381, 6 L. ed. 116.

11. Eight Hundred and Forty-One Tons of Iron Ore, 15 Fed. 615.

Supplemental libel in replication.—Where

return-day of the process it becomes part of the pleadings which respondent is bound to answer without further notice.[12]

b. The Answer — (I) *In General.* Strict and technical formality is not required of the answer, but it must set forth fully, clearly, and explicitly the matters relied on,[13] otherwise an exception for insufficiency will lie to compel a further and better answer,[14] but if no exception is taken the reading of testimony cannot be objected to on the ground of the insufficiency of the answer.[15] Impertinent and irrelevant allegations will be stricken out on motion,[16] and where several averments are inconsistent and are not excepted to, the court will adopt that one which is least favorable to the pleader.[17] If matters of defense are anticipated in the libel a simple denial thereof in the answer is equivalent to an averment to the contrary.[18]

(II) *Responsiveness to Allegations of Libel.* The answer, even when made without oath,[19] must meet each material allegation of the libel with an admission, a denial, or a defense,[20] though a failure to notice an allegation does not admit it as truth, and it must nevertheless be proved.[21] It is not necessary, however, to answer specifically mere conclusions of law[22] or narrative statements in the libel alleging no damages and claiming no particular remedy,[23] and the defendant

the libellant relies on new matter in avoidance of the allegations of the answer he should put it on the record by a supplemental libel, to which the respondents should answer. Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720; Gladding *v.* Constant, 1 Sprague (U. S.) 73, 10 Fed. Cas. No. 5,468.

When allowed to stand as original libel.— A libel fatally defective is not helped by a supplemental libel setting up subsequent matters; but a supplemental libel may, for cause, be allowed to stand as an original libel as of that date. Henderson *v.* Three Hundred Tons of Iron Ore, 38 Fed. 36.

12. Thomas *v.* Gray, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898.

13. Commander-in-chief, 1 Wall. (U. S.) 43, 17 L. ed. 609; Virginia Home Ins. Co. *v.* Sundberg, 54 Fed. 389; The Bark Havre, 1 Ben. (U. S.) 295, 11 Fed. Cas. No. 6,232; The Schooner Navarro, Olc. Adm. 127, 17 Fed. Cas. No. 10,059; The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150.

Insufficient averment of mutual agreement. — An averment that coal was furnished with "the intention, expectation, and anticipation" that the price therefor should be deducted from certain freights is not equivalent to an allegation that such was the mutual agreement of the parties. Anderson *v.* Pacific Coast Co., 99 Fed. 109.

14. The California, 1 Sawy. (U. S.) 463, 4 Fed. Cas. No. 2,312.

15. The Rocket, 1 Biss. (U. S.) 354, 20 Fed. Cas. No. 11,975.

16. The Gustavia, Blatchf. & H. Adm. 189, 11 Fed. Cas. No. 5,876.

17. The Bark Olbers, 3 Ben. (U. S.) 148, 18 Fed. Cas. No. 10,477.

18. Burrill *v.* Crossman, 69 Fed. 747, 35 U. S. App. 608, 16 C. C. A. 381.

19. The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150.

20. The Dictator, 30 Fed. 699; The Propeller Sun, 1 Biss. (U. S.) 373, 23 Fed. Cas. No. 13,612; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673; The Ship Elizabeth *v.* Rickers, 2 Paine (U. S.) 291, 8 Fed. Cas. No. 4,353.

Particular defense by plea or answer.— When the respondent wishes to avail himself of any particular matter of defense he must present it with proper averments in his answer, or by plea. The William Harris, 1 Ware (U. S.) 373, 29 Fed. Cas. No. 17,695.

Answer after overruling of plea.— A plea to a libel which sets up no matter in defense is substantially a demurrer, and when such plea is overruled it is in the discretion of the court to allow an answer to be filed or to enter a decree at once for the damages claimed. The Sea Gull, Chase (U. S.) 145, 21 Fed. Cas. No. 12,578.

Insufficient answer.— An answer is insufficient which admits some of the averments of the libel, but concludes: "He denies the other allegations of the fourth article, as therein alleged, and refers to the allegations of the eighth article of the answer;" such eighth article being a narrative somewhat different from the libellant's. Virginia Home Ins. Co. *v.* Sundberg, 54 Fed. 389.

Respondent "ignorant" of matter alleged. — An allegation that the respondent is "ignorant" of a matter alleged in the libel is, it seems, sufficient. The City of Salem, 7 Sawy. (U. S.) 477, 10 Fed. 843.

Effect of omission where testimony conflicting.— The fact that the answer in a collision case, when put in, did not deny the averment of the libel that the tack was properly beat out, is to be considered on a conflict of testimony on that point, even though the answer was allowed to be amended on the hearing by inserting such a denial. Whitney *v.* The Steamboat Empire State, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17,586.

21. The Dictator, 30 Fed. 699; Clarke *v.* Brig Dodge Healy, 4 Wash. (U. S.) 651, 5 Fed. Cas. No. 2,849.

22. The Gustavia, Blatchf. & H. Adm. 189, 11 Fed. Cas. No. 5,876.

23. The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150.

is not required to answer an allegation where by so doing he would expose himself to a punishment, penalty, or forfeiture.[24]

(III) *Setting Up New Matter.* When the answer sets up matter in avoidance of the allegations of the libel it must admit such allegations,[25] at least to a reasonable intendment,[26] but new matter constituting a defensive allegation should be articled and pleaded separately and not blended with the response to an allegation of the libel.[27]

(IV) *Setting Up Matter in Abatement.* Matter in abatement may be set up along with an answer to the merits.[28]

(V) *As Intervening or Cross Libel.* A mere answer cannot be made to serve the purpose of an intervening or cross libel, where no process is prayed for or issued against the libellant or the vessel.[29]

c. The Reply. No reply is allowed to an answer in admiralty, even though it sets up new matter, such matter being considered as denied by the libellant;[30] but the libellant may amend his libel so as to confess and avoid, or explain, or add to the new matter set forth in the answer, and the defendant must then answer such amendments.[31]

2. Interrogatories. The libellant may require the defendant and any garnishee to answer on oath all interrogatories propounded by him at the close of the libel touching the allegations thereof,[32] and the defendant may also require the libellant to answer in like manner any interrogatories propounded to him regarding any matters charged in the libel or set up in the answer by way of defense.[33] But all interrogatories are subject to exceptions on the ground that the answering thereof will expose the party answering to a prosecution or punishment for crime, or to a penalty or forfeiture of property for a penal offense.[34]

24. Pollock *v.* Steam-Boat Laura, 5 Fed. 133; Pollock *v.* The Steam-Boat Sea Bird, 3 Fed. 573.

25. Treadwell *v.* Joseph, 1 Sumn. (U. S.) 390, 24 Fed. Cas. No. 14,157.

As to taking advantage of set-off, recoupment, or counter-claim by way of answer, see *infra*, V, H, 1.

26. The Brig Aldebaran, Olc. Adm. 130, 1 Fed. Cas. No. 150, wherein it was held that where a libel alleged that a particular agreement was made, and a written instrument was executed, and the instrument embodied the substance of such agreement, an admission, by the answer, of the execution of the instrument, was substantially an admission of its contents.

27. The Whistler, 8 Sawy. (U. S.) 232, 13 Fed. 295; The California, 1 Sawy. (U. S.) 463, 4 Fed. Cas. No. 2,312.

28. The Lindrup, 70 Fed. 718. But the answer must in such case demand the same judgment and be subject to the same rules as if a former dilatory plea had been employed. Reed *v.* Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646.

29. Ward *v.* Chamberlain, 21 How. (U. S.) 572, 16 L. ed. 219; Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627.

30. Admiralty Rule 51; Moore *v.* The Robilant, 42 Fed. 162; The Brig Sarah Ann, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12,342.

Previous to Admiralty Rule 51, which was promulgated in 1854, it was the practice to allow a reply to the answer. See The Mary Jane, Blatchf. & H. Adm. 390, 16 Fed. Cas. No. 9,215; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; Coffin *v.* Jenkins, 3 Story (U. S.) 108, 5 Fed. Cas. No. 2,948; Gladding *v.* Constant, 1 Sprague (U. S.) 73, 10 Fed. Cas. No. 5,468; Thomas *v.* Gray, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898.

31. Admiralty Rule 51; Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720.

32. Admiralty Rules 23, 27, 37; The Edwin Baxter, 32 Fed. 296; Scobel *v.* Giles, 19 Fed. 224; The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597. See also The Serapis, 37 Fed. 436; Benedict Adm. (3d ed.) § 477.

Production of papers.— Where a paper has been intrusted to libellant for the benefit of both parties, the court, on motion, will order its production before answer (The Voyageur de la Mer, 1 Sprague (U. S.) 372, 28 Fed. Cas. No. 17,025). But an inspection of documents or letters not in issue cannot be obtained by means of interrogatories (Havermeyers, etc., Sugar Refining Co. *v.* Compania Transatlantica Espanola, 43 Fed. 90).

When to be propounded.—Under Admiralty Rule 23, which requires the libellant's interrogatories to be propounded "at the close of the libel," the libellant may not, of course, propound interrogatories to the claimant after the filing of the answer. But he may apply for leave to amend his libel, and add at the close of the amended libel the desired interrogatories. The Edwin Baxter, 32 Fed. 296.

33. Admiralty Rule 22; The Mexican Prince, 70 Fed. 246; The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597; Benedict Adm. (3d ed.) § 477.

34. Admiralty Rules 31, 32. And see Counselman *v.* Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. ed. 1110; Pollock *v.* Steam-Boat Laura, 5 Fed. 133.

3. EXCEPTIONS. Wherever a pleading, report, or proceeding is insufficient, irregular, or objectionable it may be excepted to by the opposite party.[35] The exception should be interposed on the return-day of the process or the day appointed for answering,[36] and while strict technical formality is not required, yet it must state in clear and definite terms the particular ground on which it is based.[37] A hearing on an exception must be determined on the pleadings,[38] but facts judicially known to the court may be brought before it in an exceptive allegation attached to exceptions.[39]

4. VERIFICATION. In admiralty, verification is usually required, whatever may be the form of the pleading, whether it be a libel,[40]

In La Bourgogne, 104 Fed. 823, the court said: "But the mere loss of its [petitioner's] right to a limitation of liability under this statute, through proof of 'privity' with the cause of the damage, would not be of itself such a 'forfeiture' as to exempt the petitioner from answering interrogatories, or from compulsory testimony as a witness. The exemption can only be based upon the liability to such penalties or forfeitures as may be the subjects of a penal or criminal proceeding. See U. S. Const. Amendm. V; U. S. Rev. Stat. (1878), § 860."

35. **Effect of exception.**— Exceptions to a pleading in admiralty have the effect of a demurrer, and also that of a motion to make the pleading more definite and certain. Quinn *v.* The Steamboat Transport, 1 Ben. (U. S.) 86, 20 Fed. Cas. No. 11,516.

In collision cases, exceptions to pleadings are permitted only when made in good faith for the sole purpose of obtaining the full statement of facts which the law requires. The Intrepid, 42 Fed. 185.

Impertinence and insufficiency.—Exceptions to an answer for insufficiency and impertinence are taken for entirely different causes, and therefore they cannot be taken at the same time. The Whistler, 8 Sawy. (U. S.) 232, 13 Fed. 295.

Exception with several specifications.— When exceptions to an answer are drawn with several specifications the failure to sustain any specification is fatal to the exception. The Intrepid, 42 Fed. 185.

Assumption that exception properly taken. — Where, after the argument of exceptions to a libel, a brief is filed in which for the first time the point is made that the facts set up in the exceptions cannot be thus raised, but are available only by answer, the court will consider the questions presented upon the assumption, made by both parties in the argument, that such facts were properly presented. The Haytian Republic, 57 Fed. 508.

36. Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163.

37. The Active, Deady (U. S.) 165, 1 Fed. Cas. No. 33; The Schooner Navarro, Olc. Adm. 127, 17 Fed. Cas. No. 10,059; Witherspoon *v.* Wallis, 2 Ala. 667.

Specifying line and page.—Exceptions should briefly but clearly specify by line and page the points excepted to. The Dictator, 30 Fed. 699.

An exception for irrelevancy, taken to a pleading which is not irrelevant, but is insufficient only, will be overruled. The Elizabeth Frith, Blatchf. & H. Adm. 195, 8 Fed. Cas. No. 4,361.

Where answer responsive to libel.— Where an answer is not full, explicit, and distinct as to each separate allegation of the libel, exceptions for insufficiency will lie to compel a further and better answer; but if the answer is responsive no exceptions will lie to it on the ground that it is not a defense to the suit, whether the matter be impertinent or not. The California, 1 Sawy. (U. S.) 463, 4 Fed. Cas. No. 2,312.

38. Prince Steam-Shipping Co. *v.* Lehman, 39 Fed. 704, 5 L. R. A. 464.

Waiver of exceptions.— Exceptions in an answer will be deemed to have been waived if not determined before proof is taken at the trial. Aumach *v.* The Queen of the South, 2 Fed. Cas. No. 657*a*.

39. The Seminole, 42 Fed. 924.

40. Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170; Hutson *v.* Jordan, 1 Ware (U. S.) 393, 12 Fed. Cas. No. 6,959. But unless the rules of the court in which the action is brought require the libel to be verified, it seems that verification is unnecessary. The J. R. Hoyle, 4 Biss. (U. S.) 234, 13 Fed. Cas. No. 7,557; Coffin *v.* Jenkins, 3 Story (U. S.) 108, 5 Fed. Cas. No. 2,948. See also Benedict Adm. (3d ed.) § 413.

Failure to raise objection in time.— After the rejection of a motion to dismiss proceedings in a libel, a second application on the ground that the libel was not verified will not be sustained. Such objection was presumptively known to counsel at the time of the first application, and, not having been embodied in that motion, could not be raised subsequently. Nelson *v.* Bell, 17 Fed. Cas. No. 10,101*a*.

The libellant's answer to interrogatories propounded by the defendant must be on oath. Admiralty Rule 32.

Omission of libellant to sign may be remedied by amendment and will not be considered after judgment. Hardy *v.* Moore, 4 Fed. 843.

Omission of subscription by clerk.— It may be shown, in opposition to a motion to set aside the proceeding for want of verification of the libel, that the oath was in fact regularly and duly administered, though the clerk's name was not subscribed. Nelson *v.* Bell, 17 Fed. Cas. No. 10,101*a*.

Omission of notary's seal.— In The Tug E. W. Gorgas, 10 Ben. (U. S.) 460, 8 Fed. Cas. No. 4,585, it was held that a notary's seal was not necessary to a due verification of a libel

claim,[41] or answer.[42] Where a libel is verified by an attorney in fact for the libellant, his authority to act need not appear, but may be established when called in question.[43]

5. Amendments — a. In General. In admiralty the power to allow amendments is very broad, and where a party shows merits he will nearly always be permitted to amend his pleadings in matters of substance as well as of form,[44] though the court will sometimes impose conditions,[45] and the matter is one resting in the sound judicial discretion of the court, and leave will not be granted to amend where the application is without equity or its allowance would prejudice the opposite party.[46]

b. Time of Amendment. The court can, at discretion, allow the pleadings to be amended at any stage of the cause prior to a final decree,[47] and sometimes leave to amend will be granted on appeal.[48]

sworn to before him, and that its absence was at most only an irregularity which could not be taken advantage of after decree in another proceeding before another court.

Amended libel.— Where the vessel is seized under a libel and released on stipulation, an amended libel thereafter filed, when the libellants are beyond the jurisdiction of the court, need not be verified. The Marion, 79 Fed. 104.

41. Admiralty Rule 26.

42. Admiralty Rule 27; Hutson *v.* Jordan, 1 Ware (U. S.) 393, 12 Fed. Cas. No. 6,959; Gammell *v.* Skinner, 2 Gall. (U. S.) 45, 9 Fed. Cas. No. 5,210. But see Richardson *v.* Cleaveland, 5 Port. (Ala.) 251.

43. Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170, wherein it was further held that a mere general employment as proctor or attorney at law to prosecute a demand in a court of admiralty was not sufficient to authorize the party employed to verify a libel as attorney in fact of the libellant.

44. U. S. Rev. Stat. (1878), § 954; Admiralty Rules 24, 51; Davis *v.* Adams, 102 Fed. 520, 42 C. C. A. 493 [*reversing* 93 Fed. 977]; The City of New Orleans, 33 Fed. 683; The Maryland, 19 Fed. 551; The Imogene M. Terry, 19 Fed. 463; The Rhode Island, 17 Fed. 554; U. S. *v.* One Hundred and Twenty-Three Casks of Distilled Spirits, 1 Abb. (U. S.) 573, 27 Fed. Cas. No. 15,943; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,019, 21 Law Rep. 589, 1 West. L. Month. 159; Brown *v.* The Brig Cadmus, 2 Paine (U. S.) 564, 4 Fed. Cas. No. 1,997; Davis *v.* Leslie, Abb. Adm. 123, 7 Fed. Cas. No. 3,639.

Filing amendment.— A writing should be filed containing the matters of amendment as a distinct proceeding in the case under Admiralty Rule 24, but such writing may extend to a new draft of the libel. Comings *v.* The Ida Stockdale, 6 Fed. Cas. No. 3,052, 22 Pittsb. Leg. J. (Pa.) 9.

Costs of amendment as to form.— Amendments of mere form, not going to the merits of the case and not of such a character as to prejudice the respondent, will not entitle him to costs. Olsen *v.* Schooner Edwin Post, 6 Fed. 314.

Waiver of objections.— While a court of admiralty has no power to permit a libel to be amended by striking out the name of a sole libellant and substituting another in its place, any objection to such an amendment is waived by proceeding in the trial without objecting. The Detroit, Brown Adm. 141, 7 Fed. Cas. No. 3,832.

45. The George Taulane, 22 Fed. 799; Hudson Coal Co. *v.* The Minnie R. Childs, 12 Fed. Cas. No. 6,836, 1 N. J. L. J. 42.

46. The Horace B. Parker, 74 Fed. 640, 33 U. S. App. 503, 20 C. C. A. 572; Burrill *v.* Crossman, 65 Fed. 104; New Haven Steam-Boat Co. *v.* Mayor, etc., 36 Fed. 716; The Keystone, 31 Fed. 412; The Thomas Melville, 31 Fed. 486; The Alanson Sumner, 28 Fed. 670; The Corozal, 19 Fed. 655; McCarthy *v.* Eggers, 10 Ben. (U. S.) 688, 15 Fed. Cas. No. 8,681; The Iola, 13 Fed. Cas. No. 7,057, 11 N. Y. Leg. Obs. 263; Williams *v.* The Steamship Columbia, 1 Wash. Terr. 95.

47. The J. E. Trudeau, 54 Fed. 907, 2 U. S. App. 596, 4 C. C. A. 657; The Schooner Edwin Post, 6 Fed. 206; Comings *v.* The Ida Stockdale, 6 Fed. Cas. No. 3,052, 22 Pittsb. Leg. J. (Pa.) 9; The Meteor, 17 Fed. Cas. No. 9,498; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,019, 21 Law Rep. 589, 1 West. L. Month. 159; Star *v.* The White Cloud, 22 Fed. Cas. No. 13,306; Nevitt *v.* Clarke, Olc. Adm. 316, 18 Fed. Cas. No. 10,138.

48. Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; The Charles Morgan, 115 U. S. 69, 5 S. Ct. 1172, 29 L. ed. 316; The Edward, 1 Wheat. (U. S.) 261, 4 L. ed. 86; Mason *v.* Ervine, 27 Fed. 240; Warren *v.* Moody, 9 Fed. 673; The Pennsylvania, 12 Blatchf. (U. S.) 67, 19 Fed. Cas. No. 10,951; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673; Anonymous, 1 Gall. (U. S.) 22, 1 Fed. Cas. No. 444. But see Udall *v.* The Steam-ship Ohio, 17 How. (U. S.) 17, 15 L. ed. 42; The Mabey, 10 Wall. (U. S.) 419, 19 L. ed. 963; The Philadelphian, 60 Fed. 423, 21 U. S. App. 90, 9 C. C. A. 54.

Remanding case for amendment.— Where the pleadings in admiralty are so deficient that the appellate court cannot properly apply the evidence in the record or justly determine the rights of the parties, there being no apparent design to suppress the facts, the court will set aside the decree below and remand the case for the filing of amended pleadings and taking additional evidence. Smith *v.* Elmer E. Wood Transp. Co., 103 Fed. 685, 43 C. C. A. 347. See also The Edward, 1 Wheat. (U. S.) 261, 4 L. ed. 86.

c. Of Libel — (I) *In General.* It is always within the discretion of the court to allow the libel to be amended as to matters either of form or of substance,[49] even though the liability of sureties be affected thereby.[50]

(II) *Change in Parties.* The libel may be amended as to the parties by changing the character in which the libellant sues,[51] or by dismissing some of the libellants;[52] but a sole libellant cannot be stricken out and another substituted in his place.[53]

(III) *Change in Form of Proceeding.* In cases where actions *in rem* and *in personam* may be joined in one libel, a libel *in rem* may be amended so as to call for a personal judgment;[54] but where the joinder of such actions is improper an amendment changing the suit *in rem* to one *in personam* is not permissible.[55]

(IV) *Introducing New Cause of Action.* An entirely new cause of action not germane to that presented in the original libel cannot be added by amendment.[56]

49. Davis *v.* Adams, 102 Fed. 520, 42 C. C. A. 493 [*reversing* 93 Fed. 977]; O'Connell *v.* One Thousand and Two Bales of Sisal Hemp, 75 Fed. 408; The Samuel Marshall, 49 Fed. 754; Douse *v.* Sargent, 48 Fed. 695; Rosenthal *v.* The Louisiana, 37 Fed. 264; U. S. *v.* One Hundred and Twenty-Three Casks of Distilled Spirits, 1 Abb. (U. S.) 573, 27 Fed. Cas. No. 15,943; Town *v.* Steamship Western Metropolis, 28 How. Pr. (N. Y.) 283, 24 Fed. Cas. No. 14,114; Dexter *v.* The Richmond, 7 Fed. Cas. No. 3,865, 4 Law Rep. 20; Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791; American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303.

As to amount of damages.—An amendment will be allowed in actions of tort increasing the *ad damnum* allegations, the recovery not being restricted to the amount claimed. McCready *v.* The Brother Jonathan, 15 Fed. Cas. No. 8,732*a*. See also The St. John, 7 Blatchf. (U. S.) 220, 21 Fed. Cas. No. 12,224.

Information — Inserting other offenses.— The United States, upon finding evidence of violations of the revenue laws committed by a vessel during the same period as those for which she has already been libeled, may take advantage of such discovery by amending the libel (The Haytian Republic, 57 Fed. 508). But an amendment by inserting a new substantive offense will not be allowed where the statute of limitations has run against it (The Schooner Harmony, 1 Gall. (U. S.) 123, 11 Fed. Cas. No. 6,081).

Changing allegations as to ownership.— An information against a vessel for smuggling may be amended so as to change the allegations as to the ownership of the vessel. U. S. *v.* The Steamship The Queen, 4 Ben. (U. S.) 237, 27 Fed. Cas. No. 16,107.

Necessity for issuance of process.—A party who has entered a general appearance in the suit is bound to take notice of a subsequent amendment without further service (Card *v.* Hines, 36 Fed. 573) but where the amendment brings the case within the jurisdiction of the court, a decree should not be rendered to operate upon parties who have not appeared unless an alias monition be issued on the amended petition (*In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599).

50. Boden *v.* Demwolf, 56 Fed. 846; The Maggie Jones, 1 Flipp. (U. S.) 635, 16 Fed. Cas. No. 8,947; Darrell *v.* The Alice Gray, 6 Fed. Cas. No. 3,579; McCready *v.* The Brother Jonathan, 15 Fed. Cas. No. 8,732*a*; The Schooner Harmony, 1 Gall. (U. S.) 123, 11 Fed. Cas. No. 6,081.

51. The Manhasset, 19 Fed. 430.

52. Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271; The Manhasset, 19 Fed. 430; U. S. *v.* The Steamship The Queen, 11 Blatchf. (U. S.) 416, 27 Fed. Cas. No. 16,108.

53. The Detroit, Brown Adm. 141, 7 Fed. Cas. No. 3,832.

54. The Monte A., 12 Fed. 331; One Hundred and Eighteen Sticks of Timber, 10 Ben. (U. S.) 86, 18 Fed. Cas. No. 10,519.

A change of the action from tort to contract, to conform to the proof, will be permitted where libellant has mistaken his legal rights and such amendment works no injustice to defendant, but is in accord with equity and natural justice. Davis *v.* Adams, 102 Fed. 520, 42 C. C. A. 493 [*reversing* 93 Fed. 977].

55. The Steam Ship Zodiac, 5 Fed. 220; The Young America, Brown Adm. 462, 30 Fed. Cas. No. 18,178.

Where proceeding must be joint.— Under Admiralty Rule 22, requiring that in possessory suits there shall be a joint proceeding *in rem* and *in personam*, the libel cannot be amended so as to make the suit one *in personam* only. Kynoch *v.* The Propeller S. C. Ives, Newb. Adm. 205, 14 Fed. Cas. No. 7,958.

Where no lien exists.—When, in proceedings *in rem* instituted for the breach of an executory maritime contract, the *res* has been released on bond and the claimants have appeared only to except to the libel and object to the jurisdiction, and it is conceded that no lien exists, leave to amend by proceeding *in personam* will not be granted. The General Sedgwick, 29 Fed. 606.

56. The Iona, 80 Fed. 933, 52 U. S. App. 199, 26 C. C. A. 261; U. S. *v.* One Hundred and Twenty-Three Casks of Distilled Spirits, 1 Abb. (U. S.) 573, 27 Fed. Cas. No. 15,943; The Steamship Circassian, 2 Ben. (U. S.) 171, 5 Fed. Cas. No. 2,723.

d. Of Answer. An amendment of the answer in a matter of substance will be allowed with great caution and only under extraordinary circumstances,[57] and an application will be denied where its allowance would work a hardship on the opposite party.[58]

6. Pleadings and Proof. While the technical rules of common-law pleading do not prevail in admiralty, yet there must be a substantial agreement between the pleadings and proof, and no evidence is admissible except such as applies to matters put in issue by the pleadings.[59] Thus a libellant cannot introduce evidence in support of a matter not put in issue by the pleadings;[60] nor can a defendant prove a defense not alleged in his answer,[61] as, for instance, a defense in the

57. Lamb *v.* Parkman, 14 Fed. Cas. No. 8,019, 21 Law Rep. 589, 1 West. L. Month. 159.

Withdrawing admission in answer.—An answer containing an admission of a contract as stated in the libel may, by leave of court, be afterward amended by withdrawing the admission; but this will not relieve respondent from the effect of his admission as evidence. Kenah *v.* The Tug John Markee Jr., 3 Fed. 45; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,019, 21 Law Rep. 589, 1 West. L. Month. 159. But see The Mary C., 1 Hask. (U. S.) 474, 16 Fed. Cas. No. 9,201, wherein it was held that an answer could not be amended after the hearing so as to contradict a material admission therein.

Exception for repugnance — When too late. — After the court has allowed a party to file his amended answer to a libel in admiralty, an exception to it on the ground of repugnancy to the original answer comes too late and will not prevail. Steamboat Belfast *v.* Boon, 41 Ala. 50.

58. The Horace B. Parker, 74 Fed. 640, 33 U. S. App. 503, 20 C. C. A. 572; The Prindiville, Brown Adm. 485, 19 Fed. Cas. No. 11,435; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,019, 21 Law Rep. 589, 1 West. L. Month. 159.

59. McKinlay *v.* Morrish, 21 How. (U. S.) 343, 16 L. ed. 100; The Earnwell, 68 Fed. 228; Hays *v.* Pittsburgh, etc., Packet Co., 33 Fed. 552; The Pope Catlin, 31 Fed. 408; The Morton, Brown Adm. 137, 17 Fed. Cas. No. 9,864; Turner *v.* The Ship Black Warrior, McAll. (U. S.) 181, 24 Fed. Cas. No. 14,253; Campbell *v.* Steamer Uncle Sam, McAll. (U. S.) 77, 4 Fed. Cas. No. 2,372; Soule *v.* Rodocanachi, Newb. Adm. 504, 22 Fed. Cas. No. 13,178; Kellum *v.* Emerson, 2 Curt. (U. S.) 79, 14 Fed. Cas. No. 7,669; Kramme *v.* The Ship New England, Newb. Adm. 481, 14 Fed. Cas. No. 7,930; Reppert *v.* Robinson, Taney (U. S.) 492, 20 Fed. Cas. No. 11,703; The Washington Irving, Abb. Adm. 336, 29 Fed. Cas. No. 17,243; Davis *v.* Leslie, Abb. Adm. 123, 7 Fed. Cas. No. 3,639; The Steamboat Rhode Island, Olc. Adm. 505, 20 Fed. Cas. No. 11,745; The William Harris, 1 Ware (U. S.) 373, 29 Fed. Cas. No. 17,695; The Brig Sarah Ann, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12,342; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673; Orne *v.* Townsend, 4 Mason (U. S.) 541, 18 Fed. Cas. No. 10,583; U. S. *v.* The Hunter, Pet. C. C. (U. S.) 10, 26 Fed. Cas. No. 15,428.

Ill treatment of seaman by master and mate. — An allegation of a combination between the master and mate to ill-treat and oppress a seaman is not supported by proof that each of them separately assaulted and ill-treated him without some presumptive evidence of concert between them. Jenks *v.* Lewis, 1 Ware (U. S.) 43, 13 Fed. Cas. No. 7,280.

When objection to be taken.— In order to entitle either party to the benefit of a variance, objection must be taken when the evidence is offered at the trial, and it comes too late if made after the evidence is closed and the cause is under argument. Dunstan *v.* The Steamtug R. R. Kirkland, 3 Hughes (U. S.) 641, 8 Fed. Cas. No. 4,181.

Where cause submitted on pleadings.— Upon the submission of the cause on the pleadings, averments of new matter in the answer, or matters alleged in the libel and denied generally, must be wholly disregarded as unproved, except in so far as they may be admissions against interest. The River Mersey, 48 Fed. 686. See also The Iris, 1 Lowell (U. S.) 520, 13 Fed. Cas. No. 7,062.

60. McKinlay *v.* Morrish, 21 How. (U. S.) 343, 16 L. ed. 100; Pinkham *v.* Rutan, 31 Fed. 496; Soule *v.* Rodocanachi, Newb. Adm. 504, 22 Fed. Cas. No. 13,178; Kellum *v.* Emerson, 2 Curt. (U. S.) 79, 14 Fed. Cas. No. 7,669; U. S. *v.* The Hunter, Pet. C. C. (U. S.) 10, 26 Fed. Cas. No. 15,428. But see The Cambridge, 2 Lowell (U. S.) 21, 4 Fed. Cas. No. 2,334, wherein it was held that libellant could rely as well on matters shown by defendant's evidence as on those alleged in the libel.

Alleging contract — Proof of tort.— A libel which sets up an express contract as the cause of suit is not sustained by proof of a mere tort. Hays *v.* Pittsburgh, etc., Packet Co., 33 Fed. 552.

Action to recover penalty.— When a penalty is demanded against a vessel on grounds not set out in the libel, the demand will be ignored. The Pope Catlin, 31 Fed. 408.

Cannot recover in different capacity.— Libellants cannot recover in a capacity different from that in which they sue. The Sarah E. Kennedy, 29 Fed. 264.

61. The Earnwell, 68 Fed. 228; Reppert *v.* Robinson, Taney (U. S.) 492, 20 Fed. Cas. No. 11,703; Orne *v.* Townsend, 4 Mason (U. S.) 541, 18 Fed. Cas. No. 10,583.

Joint tort — Separate answer.— Where, in case of a joint tort, separate answers are put in, each respondent must rely for his defense upon his answer and the proof. Gardner *v.* Bibbins, Blatchf. & H. Adm. 356, 9 Fed. Cas. No. 5,222.

nature of a counter-claim.[62] But technical variances or departures in the pleadings, not operating to the surprise of the opposite party, will be disregarded.[63] Thus, in an action on a contract, a variation between the contract and the pleadings and proof will not defeat the action where substantial justice can be done.[64] Evidence of special damage may be given under a general allegation.[65]

G. Claim and Intervention — 1. Claimant and Intervener Distinguished. A claimant is a person who assumes the position of a defendant and demands the redelivery to himself of the property arrested, while an intervener is one who merely seeks the protection of his interest in such property, or the payment of his claim in the ultimate disposition of the case, without demanding a redelivery of the property.[66]

2. Claim — a. In General. In an action *in rem* a party desiring to appear and defend must file a claim to the property libeled,[67] averring the claimant's interest under oath[68] in a direct and issuable form, and not by way of recitals.[69] Where a claimant has been guilty of laches in failing to intervene until after judgment *pro confesso* and order of sale, he will be required to pay libellant's costs as a condition of opening the decree.[70]

Laches.— The defense that a lien has been lost by laches, if not pleaded, is not available. The Shady Side, 23 Fed. 731.

62. White *v.* The Ranier, 45 Fed. 773.

Cross-claims for breach of oral agreement. — On a libel to recover a balance due for repairs made to a tug under a written contract, a cross-claim for damages founded upon the claimed breach of an extrinsic oral agreement cannot be considered when neither the answer nor the cross-libel sets up that the writing did not embody the entire contract. Any evidence which may have crept into the case in respect to such supposed oral agreement is irrelevant and inadmissible. The Bertha, 91 Fed. 272, 62 U. S. App. 437, 33 C. C. A. 509.

63. The Cambridge, 2 Lowell (U. S.) 21, 4 Fed. Cas. No. 2,334; West *v.* Silver Wire, etc., Mfg. Co., 5 Blatchf. (U. S.) 477, 3 Fish. Pat. Cas. 306, 29 Fed. Cas. No. 17,425; West *v.* Steamer Uncle Sam, McAll. (U. S.) 505, 29 Fed. Cas. No. 17,427; The Clement, 2 Curt. (U. S.) 363, 5 Fed. Cas. No. 2,879; Crawford *v.* The William Penn, 3 Wash. (U. S.) 484, 6 Fed. Cas. No. 3,373.

Variance as to name.— Shipping-articles signed by "William Henderson" as cook and steward are admissible on a libel for wages by "William Henry." Henry *v.* Curry, Abb. Adm. 433, 11 Fed. Cas. No. 6,381.

64. The General Meade, 20 Fed. 923; Talbot *v.* Wakeman, 23 Fed. Cas. No. 13,731*a*; Crawford *v.* The William Penn, 3 Wash. (U. S.) 484, 6 Fed. Cas. No. 3,373.

In The Kendal, 56 Fed. 237, a stevedore's libel for services in loading a vessel alleged that they were rendered at the master's request, and that therefore there became due the sum demanded. There was no allegation that the services were reasonably worth that sum. It was held that this language did not necessarily import an implied contract and a claim on *quantum meruit*, and there was no variance when the proof showed an express contract.

Where no question raised as to terms of contract.— Where a motion to dismiss a libel is made without objection, and the charter-party is presented to the court and commented on by counsel, no question being raised as to its terms, and is also referred to in the answer to the interrogatories, libellants are not entitled to have the question determined according to the allegations of the libel rather than the provisions of the charter-party. The Serapis, 36 Fed. 707.

Contract in name of agent—Action by principal.— A charter-party under seal, made out in the name of a person who acted merely as agent for another, without stating that fact, is admissible in evidence on a libel for breach of contract brought by the principal. Talbot *v.* Wakeman, 19 How. Pr. (N. Y.) 36, 23 Fed. Cas. No. 13,731.

65. West *v.* Steamer Uncle Sam, McAll. (U. S.) 505, 29 Fed. Cas. No. 17,427.

66. Admiralty Rules 26, 34, 43; The Two Marys, 12 Fed. 152, 154, wherein the court said: "The two modes of asserting such a lienor's claim are not harmonious, and should not be authorized at the same time as against the same party."

67. Admiralty Rule 26; Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206; Benedict Adm. (3d ed.) §§ 461–464.

Separate claims.— Where separate claims are interposed, though the libel be joint against the whole property, each claim is treated as a distinct proceeding in the nature of a several suit on which there may be an independent hearing, decree, and appeal. Stratton *v.* Jarvis, 8 Pet. (U. S.) 4, 8 L. ed. 846.

Estoppel of claimant to assert lien.—Where a claim of property is asserted by one as its owner, and its release is obtained by him on stipulation for its appraised value, he cannot, by subsequently setting up in his answer a lien thereon in his favor, obtain a share of the proceeds of such bond. Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627.

68. Read *v.* Owen, 9 Port. (Ala.) 180.

69. Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206.

70. The America, 56 Fed. 1021. See also The Mary, 9 Cranch (U. S.) 126, 3 L. ed. 678.

b. Who May Claim. The claimant is an actor, and is entitled to go before the court in that character only where he has the legal or equitable title to the property arrested, or a proprietary interest therein;[71] but an objection that the claimant has no such interest must be raised before the hearing upon the claim and answer.[72]

3. Intervening Libels and Petitions — a. Under Rule 34. Where a vessel has been arrested and is in custody under a libel, or where her proceeds are in court, all other persons holding maritime liens enforceable in the admiralty against such vessel may file intervening libels in the pending case against the vessel, with a prayer that process issue thereon, only in case a stipulation is filed for the release of the vessel.[73] But intervention is allowed only where the vessel is still in cus-

71. U. S. *v.* Four Hundred and Twenty-Two Casks of Wine, 1 Pet. (U. S.) 547, 7 L. ed. 257; The R. W. Skillinger, 1 Flipp. (U. S.) 436, 21 Fed. Cas. No. 12,181; Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206. In Revenue Cutter No. 1, Brown Adm. 76, 79, 20 Fed. Cas. No. 11,713, the court said: "It is not sufficient to entitle a party to intervene and defend, when it is simply shown that he has an interest in the question litigated. He must have rights in the vessel itself, that is, an ownership either general or special in the property, or such a claim as operates directly upon it by way of a lien, statutory or maritime."

Agent.— A claim may be asserted by an agent under oath as to his belief of the verity of the claim and with proof of his authority. U. S. *v.* Four Hundred and Twenty-Two Casks of Wine, 1 Pet. (U. S.) 547, 7 L. ed. 257; The Schooner Adeline, 9 Cranch (U. S.) 244, 3 L. ed. 719; Read *v.* Owen, 9 Port. (Ala.) 180.

An administrator appointed in another state who has not taken out letters within the jurisdiction of the court may intervene in behalf of his intestate in a suit *in rem* against a vessel which was the property of the intestate at his death. The Boston, Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669.

Consul.— A consul may claim on behalf of his fellow-citizens, though restitution cannot be decreed without specific proof of the individual proprietary interests. The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268; The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229; The London Packet, 1 Mason (U. S.) 14, 15 Fed. Cas. No. 8,474.

Insurers.— Insurers cannot make claim unless the property has been abandoned to them and they have accepted it. The Ship Packet, 3 Mason (U. S.) 255, 18 Fed. Cas. No. 10,654; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400, 11 Fed. Cas. No. 6,376.

Mortgagee.— In the absence of the owner the mortgagee may be permitted to appear as claimant. The Selt, 3 Biss. (U. S.) 344, 21 Fed. Cas. No. 12,649.

False claim.— If a party attempt to impose upon the court by knowingly or fraudulently claiming as his own property belonging in part to others, he is not entitled to a restitution of that portion which he may ultimately establish as his own. The Dos Hermanos, 2 Wheat. (U. S.) 76, 4 L. ed. 189.

Substitution by amendment of claim.— Claims may be amended so as to substitute a new party as owner and claimant, provided the latter submits himself to the jurisdiction by filing a stipulation. The Eliza Lines, 61 Fed. 308; The Bark Archer, 9 Ben. (U. S.) 455, 1 Fed. Cas. No. 507; The Bark Laurens, Abb. Adm. 302, 14 Fed. Cas. No. 8,121.

72. The Prindiville, Brown Adm. 485, 19 Fed. Cas. No. 11,435; The Boston, Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669.

How objection raised.— If the lack of interest appears on the face of the claim, the objection is to be taken by way of exception; if it does not so appear, the objection should be taken by an exceptive allegation putting the right in issue. The Prindiville, Brown Adm. 485, 19 Fed. Cas. No. 11,435.

73. U. S. Rev. Stat. (1878), §§ 921, 978, 982; Admiralty Rules 34, 35; Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627; The Julia, 57 Fed. 233; The Oregon, 45 Fed. 62; The Two Marys, 12 Fed. 152; George *v.* Skeates, 19 Ala. 738.

A mortgagee in possession is competent to intervene and contest claims affecting liens upon the vessel. The Old Concord, Brown Adm. 270, 2 Abb. (U. S.) 20 note, 18 Fed. Cas. No. 10,482; The Dubuque, 2 Abb. (U. S.) 20, 7 Fed. Cas. No. 4,110; Home Ins. Co. *v.* The Concord, 12 Fed. Cas. No. 6,659, 2 Chic. Leg. N. 249, 17 Pittsb. Leg. J. (Pa.) 148; The Jenny Lind, 3 Blatchf. (U. S.) 513, 13 Fed. Cas. No. 7,287; Elmore *v.* The Alida, 8 Fed. Cas. No. 4,419, 13 Leg. Int. (Pa.) 369; Thomas *v.* The Kosciusko, 23 Fed. Cas. No. 13,901, 11 N. Y. Leg. Obs. 38; Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163.

An insurer may intervene if he has the equitable right to the whole or any part of the damages claimed. The Propeller Monticello *v.* Mollison, 17 How. (U. S.) 152, 15 L. ed. 68; The Brig Ann C. Pratt, 1 Curt. (U. S.) 340, 1 Fed. Cas. No. 409.

Prior attaching creditor.— A creditor who has attached the thing in a suit against the owner before the seizure may intervene. The Mary Anne, 1 Ware (U. S.) 99, 16 Fed. Cas. No. 9,195; The Louisetta, 2 Gall. (U. S.) 307, 15 Fed. Cas. No. 8,535.

When a vessel is arrested by a lien creditor and has not been delivered on stipulation, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed. The Young Mechanic, 3 Ware (U. S.) 58, 30 Fed. Cas. No. 18,182.

In a petitory or possessory suit materialmen

tody or has been sold and the proceeds paid into court; and it is too late to intervene after the vessel has been released on bond.[74] An objection to the right of the party to intervene must be taken before the hearing, else it will be regarded as waived.[75]

b. Under Rule 43. Where the proceeds are in the registry of the court, intervening libels may be filed against them by lienors, and persons holding liens not independently enforceable in admiralty may file petitions in the pending case for the allowance and payment of their claims out of the surplus after first satisfying maritime claims in full.[76]

H. Set-Off, Recoupment, and Counter-Claim — 1. Setting Up by Answer. It is generally held that no jurisdiction exists in admiralty to allow the set-off of independent claims[77] or claims involving different parties,[78] but defendant may set up as a defense in his answer any matters of set-off, recoupment, or counter-claim arising out of the cause of action stated in the libel, and involving only the same parties.[79] When thus set up defensively by answer the counter-claim or set-

cannot intervene to enforce a lien which they may have upon the vessel. The Taranto, 1 Sprague (U. S.) 170, 23 Fed. Cas. No. 13,751.

Insufficient interest.— A petition to intervene and contest a suit *in rem* should not be granted where the petitioner shows no interest in the *res*, but is concerned in the result only by virtue of his having agreed to indemnify the claimants. The Steamship Idaho, 4 Ben. (U. S.) 272, 12 Fed. Cas. No. 6,996.

Libel for forfeiture.— A person who has acquired a lien on a vessel by attachment may intervene on a subsequent libel of the vessel for a forfeiture, and contest such forfeiture. He is not obliged to wait until after decree to file his petition against the proceeds, as a decree against the vessel would annihilate his claim. The Mary Anne, 1 Ware (U. S.) 99, 16 Fed. Cas. No. 9,195.

Necessity of passing upon claim.— Before one can be admitted as an intervener under Admiralty Rule 34, his claim must be passed upon by the court (The Clara A. McIntyre, 94 Fed. 552), and the court may impose terms before admitting him (The America, 56 Fed. 1021).

74. The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943; Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627; The Willamette, 70 Fed. 874, 44 U. S. App. 26, 18 C. C. A. 366, 31 L. R. A. 715.

75. Thomas *v.* The Kosciusko, 23 Fed. Cas. No. 13,901, 11 N. Y. Leg. Obs. 38; Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163.

76. Admiralty Rule 43; The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729; The E. V. Mundy, 22 Fed. 173; The Dubuque, 2 Abb. (U. S.) 20, 7 Fed. Cas. No. 4,110; The Old Concord, Brown Adm. 270, 2 Abb. (U. S.) 20 note, 18 Fed. Cas. No. 10,482; Matter of The L. B. Goldsmith, Newb. Adm. 123, 15 Fed. Cas. No. 8,152; The Jenny Lind, 3 Blatchf. (U. S.) 513, 13 Fed. Cas. No. 7,287; Leland *v.* The Ship Medora, 2 Woodb. & M. (U. S.) 92, 15 Fed. Cas. No. 8,237; The Boston, Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669; The Stephen Allen, Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 13,361; The Mary Anne, 1 Ware (U. S.) 99, 16 Fed. Cas. No. 9,195; The Santa Anna, Blatchf. & H. Adm. 79, 21 Fed. Cas. No. 12,325; The Louisetta, 2 Gall. (U. S.) 307, 15 Fed. Cas. No. 8,535.

77. O'Brien *v.* Sixteen Hundred and Fourteen Bags of Guano, 48 Fed. 726; The Zouave, 29 Fed. 296; The Brig Susan E. Voorhis, 10 Ben. (U. S.) 380, 23 Fed. Cas. No. 13,633; Snow *v.* Carruth, 1 Sprague (U. S.) 324, 22 Fed. Cas. No. 13,144; The Steamboat Hudson, Olc. Adm. 396, 12 Fed. Cas. No. 6,831; The Schooner Leonidas, Olc. Adm. 12, 15 Fed. Cas. No. 8,262; Willard *v.* Dorr, 3 Mason (U. S.) 161, 29 Fed. Cas. No. 17,680. But see The City of New Bedford, 20 Fed. 57; The C. B. Sandford, 22 Fed. 863, wherein it was held that a maritime claim of the defendant arising out of an independent transaction could be set off against the libellants and that such was the rule of the civil law.

Non-maritime claims cannot be set off in admiralty. The Two Brothers, 4 Fed. 158; Bains *v.* The Schooner James and Catherine, Baldw. (U. S.) 544, 2 Fed. Cas. No. 756.

Exorbitant demand for damages.— The court will, on a summary application, relieve against an exorbitant demand for damages in a libel, and a claimant who has given bonds for the full amount of such claim is therefore not entitled to set off against libellants' damages the amount paid to the stipulators as compensation for signing his stipulation for value. The Stelvio, 30 Fed. 509.

78. White *v.* The Ranier, 45 Fed. 773, wherein defendant was not allowed to set off a counter-claim against libellant and another.

79. The Sapphire, 18 Wall. (U. S.) 51, 21 L. ed. 814; The Reuben Doud, 9 Biss. (U. S.) 458, 3 Fed. 520; The Steamboat Hudson, Olc. Adm. 396, 12 Fed. Cas. No. 6,831.

Enforcing claim for contribution.— Where the owner of the cargo recovers his whole damage from one of two vessels in fault, the vessel sued may set off in another suit between the owners of the two vessels, tried at the same time, the one half of the damage to the cargo which ought to be paid by the other vessel. The Canima, 17 Fed. 271. See also The Hercules, 20 Fed. 205.

Facts not constituting set-off.— In a suit by an assignee to recover freight earned under a charter-party, a claim, set up in the

off can only go to diminish or extinguish libellant's demand, and no decree for an excess can be rendered for defendant.[80]

2. SETTING UP BY CROSS-LIBEL — a. In General. Whenever a respondent has a claim against the libellant arising out of the same cause of action, he may file a cross-libel thereon and recover a decree which is set off against the decree in favor of the libellant,[81] and he may also recover any excess over the libellant's claim;[82] but this is allowed only where defendant's claim arises out of the cause of action on which the libel is founded.[83]

b. Security Required of Original Libellant. When a cross-libel is filed, whether *in rem* or *in personam*,[84] the original libellant is required to give security in the usual form and amount to respond in damages as claimed in such cross-libel, unless the court shall otherwise direct; and proceedings on the original libel will be stayed until such security is filed.[85] Such security should be required as well

answer, for coal, which it is alleged was furnished by defendant to libellant's assignor, after the making of the charter-party, "solely in reliance on the said contract of affreightment, and with the intention, expectation, and anticipation" that the price of such coal would be retained from the freight earned under such contract, but without alleging any agreement to that effect, does not constitute a set-off which can be entertained by a court of admiralty, the rule permitting a set-off for advances made upon the credit of the particular debt or demand sued on being limited to cases where there was an agreement that they should be so paid. Anderson *v.* Pacific Coast Co., 99 Fed. 109.

80. The Nadia, 18 Fed. 729; The Reuben Doud, 9 Biss. (U. S.) 458, 3 Fed. 520; Kennedy *v.* Dodge, 1 Ben. (U. S.) 311, 14 Fed. Cas. No. 7,701; Snow *v.* Carruth, 1 Sprague (U. S.) 324, 22 Fed. Cas. No. 13,144.

Claim available only once.— In Nichols *v.* Tremlett, 1 Sprague (U. S.) 361, 18 Fed. Cas. No. 10,247, it was held that if defendant sets up a breach of contract by the ship-owner merely to repel his claim for demurrage, he may afterward, when again sued, maintain a cross-libel for damages sustained by such breach; but not if he avail himself of such claim for damages by way of recoupment in the first suit.

81. Admiralty Rule 53; Ward *v.* Chamberlain, 21 How. (U. S.) 572, 16 L. ed. 219; The Highland Light, 88 Fed. 296; Genthner *v.* Wiley, 85 Fed. 797; The Giles Loring, 48 Fed. 463; The Ciampa Emilia, 39 Fed. 126; Nichols *v.* Tremlett, 1 Sprague (U. S.) 361, 8 Fed. Cas. No. 10,247; Snow *v.* Carruth, 1 Sprague (U. S.) 324, 22 Fed. Cas. No. 13,144.

Matters already adjudicated.— A cross-action cannot be maintained which seeks a retrial of matters already adjudicated between the parties. The Schooner Navarro, Olc. Adm. 127, 17 Fed. Cas. No. 10,059.

Right to sue independently.— A defendant is not obliged to set up his counter-claim by cross-libel. He may prosecute it independently in another district. Brooklyn, etc., Ferry Co. *v.* The Morrisania, 35 Fed. 558.

82. Snow *v.* Carruth, 1 Sprague (U. S.) 324, 22 Fed. Cas. No. 13,144.

83. The Frank Gilmore, 73 Fed. 686; Southwestern Transp. Co. *v.* Pittsburg Coal Co., 42 Fed. 920; Henderson *v.* Three Hundred Tons of Iron Ore, 38 Fed. 36; The Zouave, 29 Fed. 296; The C. B. Sandford, 22 Fed. 863; Crowell *v.* The Schooner Theresa Wolf, 4 Fed. 152.

Extrinsic understandings or agreements.— On a libel to recover a balance due for repairs on a tug under a written contract, a cross-claim for damages, founded upon the alleged breach of extrinsic oral understandings or agreements, cannot be considered when neither the answer nor the cross-libel sets up that the writing did not embody the entire contract. Any evidence in respect to such oral agreements is irrelevant and inadmissible. The Bertha, 91 Fed. 272, 62 U. S. App. 437, 33 C. C. A. 509.

Must be between same parties.— It is not the office of a cross-libel to enforce a new subject-matter introduced into the litigation by strangers to the original suit, and thus create a new libel. Admiralty Rule 53 clearly indicates that parties other than the original parties cannot be joined either as libellants or respondents in a cross-libel. The Ping-On, 7 Sawy. (U. S.) 483, 11 Fed. 607.

84. The Toledo, Brown Adm. 445, 23 Fed. Cas. No. 14,077.

Original libel in personam — Attachment of vessel.— Admiralty Rule 53, requiring security from the respondent in a cross-libel for a counter-claim arising out of the same transaction as the original libel, applies to a case in which the original libel was *in personam*, but the vessel to which the suit relates was attached. The proceeding is then in effect *in rem*. Lochmore Steamship Co. *v.* Hagar, 78 Fed. 642.

85. Admiralty Rule 53; The Electron, 48 Fed. 689; Vianello *v.* The Credit Lyonnais, 15 Fed. 637; The George H. Parker, 1 Flipp. (U. S.) 606, 10 Fed. Cas. No. 5,334; The Steamer Bristol, 4 Ben. (U. S.) 55, 4 Fed. Cas. No. 1,889.

Where libel by master instead of owners.— The fact that suit to recover damages for the sinking of a vessel by collision is instituted by the master instead of by the owners does not withdraw the case from the application of Admiralty Rule 53, requiring the giving of security by the libellant to respond in damages as claimed in a cross-libel; nor should the court be influenced, in requiring such security,

where the libeled vessel is in custody as where she has been released on bond or stipulation;[86] but the cross-libellant must act promptly, and a motion for security comes too late after the witnesses have been summoned and the case is ready to proceed.[87]

I. Process and Appearance — 1. In General — a. Process. When a libellant has filed his libel and stipulation for costs, the clerk issues the process or writ prayed for to the marshal, for execution and return in accordance with the principles, rules, and usages of admiralty courts.[88] Defects in the process or service may be waived by failure to take advantage of them seasonably;[89] and errors of form may be amended or corrected by the court.[90] If execution or service cannot be made by the return-day an alias writ may issue to the marshal.[91]

b. Appearance. By appearing generally and answering to the merits a respondent waives objections to the process and is bound by the decision in the cause.[92] And so, where the corporate owners of a vessel seized in a proceeding *in rem* voluntarily appear as claimants, though under the wrong name, they are parties to the suit, and no objection can be taken to the decree for want of process against them.[93] But a general appearance in an action *in rem* is limited by the nature of the action and the property seized.[94]

by the fact that the libellant is individually unable to furnish it. Old Dominion Steamship Co. *v.* Kufahl, 100 Fed. 331.

Refusal to give security.— The original libellant cannot, on refusing to give security, at his option indefinitely retain the vessel in his custody by submitting to a stay of proceedings. Empresa Maritima a Vapor *v.* North, etc., American Steam Nav. Co., 16 Fed. 502.

Insufficient excuse for not giving security. — An objection by the respondent in a cross-suit to give security, on the ground that he cannot do so "without serious embarrassment to his business, and great expense and sacrifice," is insufficient. Compagnie Universelle du Canal Interoceanique *v.* Belloni, 45 Fed. 587.

86. Empresa Maritima a Vapor *v.* North, etc., American Steam Nav. Co., 16 Fed. 502.

87. Franklin Sugar Refining Co. *v.* Funch, 66 Fed. 342; The George H. Parker, 1 Flipp. (U. S.) 606, 10 Fed. Cas. No. 5,334.

Review of decision denying motion.— A decision denying a demand for security on a cross-libel on the ground of inexcusable delay in demanding it, if reviewable at all, should not be reversed unless it clearly appears that the court's action was unwarrantable. Franklin Sugar Refining Co. *v.* Funch, 73 Fed. 844, 39 U. S. App. 219, 20 C. C. A. 61 [*affirming* 66 Fed. 342].

88. U. S. Rev. Stat. (1878), §§ 911–913; Benedict Adm. (3d ed.) §§ 417–443; Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369, wherein the fact that a particular process in frequent use in the admiralty courts of the United States had fallen into disuse in England was held to be no reason for its rejection.

Service where cross-libel filed.— In The Eliza Lines, 61 Fed. 308, service of the monition on a cross-libel was allowed to be made on the proctors of the non-resident owners. But see Nichols *v.* Tremlett, 1 Sprague (U. S.) 361, 18 Fed. Cas. No. 10,247.

89. Robinson *v.* The Lillie Mills, 20 Fed. Cas. No. 11,958; Reed *v.* The Fanny, 20 Fed. Cas. No. 11,645*a*.

The giving of a stipulation for value to obtain the release of a vessel waives all defects in the service of process. The Acadia, Brown Adm. 73, 1 Fed. Cas. No. 24.

90. U. S. Rev. Stat. (1878), § 954.

Not amendable on appeal.—On appeal from a district court, defective process cannot be cured by amendment. The City of Lincoln, 19 Fed. 460.

91. Hardy *v.* Moore, 4 Fed. 843.

92. Mina *v.* I. & V. Florio Steamship Co., 23 Fed. 915; Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202.

Appearance by one partner for all.— In a suit against partners, if one entitles his plea for all the partners, and the proctor appears for all, it is a sufficient appearance for all. Hills *v.* Ross, 3 Dall. (U. S.) 331, 1 L. ed. 623.

Where not a general appearance.— Where the record shows that on the return-day a certain person "appears for the respondents and has a week to perfect an appearance and to answer," it will not be regarded as an appearance which operates as a voluntary submission to the jurisdiction. The Aberfoyle, Abb. Adm. 242, 1 Fed. Cas. No. 16.

93. Virginia, etc., Steam Nav. Co. *v.* U. S., Taney (U. S.) 418, 28 Fed. Cas. No. 16,973.

94. The Monte A., 12 Fed. 331.

Appearance of claimant not admission of former ownership.— Where, in a collision case, a stipulation was executed by one part-owner conditioned to pay the amount of the decree, it was held that though another part-owner appeared by proctor and claimed the vessel as part-owner, such appearance was not an admission of ownership at the time of the collision. The Steam-Ship Zodiac, 5 Fed. 220.

Seizure under invalid warrant of arrest.— Where a release bond is given after seizure of a vessel under an invalid warrant of arrest, the claimant being then ignorant of such invalidity, the recital in such bond that the claimant and his surety personally appeared and submitted themselves to the jurisdiction

2. In Suits In Personam — a. Monition. The mesne process in a suit *in personam* may be by a simple monition in the nature of a summons to appear and answer to the suit,[95] and where this is the case the marshal makes service on defendant by delivering to him a copy of the monition.[96]

b. Arrest of the Person. Another form of process provided by the admiralty rules for such suits is a warrant of arrest of the person,[97] and a respondent properly arrested under such process must remain in custody until he gives bond or stipulation to satisfy the decree against him.[98] But imprisonment for debt on process from admiralty courts has now been abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been abolished on similar or analogous process issuing from a state court.[99]

c. Attachment. Where the respondent in a suit *in personam* cannot be found within the district by the officer, his appearance may be compelled by attaching property belonging to him within the jurisdiction of the court;[1] but such attach-

of the court is not a waiver of the illegality and does not operate as an appearance in the suit. The Berkeley, 58 Fed. 920.

No personal judgment against owner.— Where a libel against both the vessel and its owner contains no prayer for monition and personal judgment, and no service of monition or attachment of property is made on the owner, his appearance to answer the libel *in rem* gives the court no jurisdiction to enter a personal judgment against him. The Ethel, 66 Fed. 340, 30 U. S. App. 214, 13 C. C. A. 504.

95. Admiralty Rule 2.

96. Benedict Adm. (3d ed.) § 421.

Agent of foreign corporation.— In Christie *v.* Davis Coal, etc., Co., 92 Fed. 3, it was held that where a foreign railroad company maintained an office within the district where a portion of the regular business of the company was conducted by a local agent in making rates for through freight and procuring business contracts, service of process upon said local agent was sufficient to give the court jurisdiction for the purpose of making the corporation a third party defendant, upon a petition on the analogy of Admiralty Rule 59.

97. Admiralty Rules 2, 3.

Security required.— On a libel against the master and two mates of a vessel for an assault and battery upon libellant by the two mates, who are not in the jurisdiction, where there is no evidence that the master knew of the mates' intention to assault libellant or could have prevented it, an order of arrest will not be issued without the security usually required in such cases. Cole *v.* Tollison, 40 Fed. 303.

98. Gardner *v.* Isaacson, Abb. Adm. 141, 9 Fed. Cas. No. 5,230.

As to stipulation or bail for the release of the person see *infra*, V, L, 3.

Discharge of respondent.— Where a libellant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, which was already in litigation between the parties in the courts of the state in which they resided, it was held that respondent should be discharged from the arrest (Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170). But a motion to discharge respondent from arrest on the ground that libellant has no legal cause of action will not be granted where the evidence read upon the motion in behalf of the respective parties is contradictory as to the merits (Wicks *v.* Ellis, Abb. Adm. 444, 29 Fed. Cas. No. 17,614).

99. Admiralty Rule 47; Chiesa *v.* Conover, 36 Fed. 334; The Carolina, 14 Fed. 424; Louisiana Ins. Co. *v.* Nickerson, 2 Lowell (U. S.) 310, 15 Fed. Cas. No. 8,539; Van Stratton *v.* Borbock, 28 Fed. Cas. No. 16,876*a*; The Kentucky, 4 Blatchf. (U. S.) 448, 14 Fed. Cas. No. 7,717; Bell *v.* Nelson, 3 Fed. Cas. No. 1,257, 8 Leg. Int. (Pa.) 22. But see Hanson *v.* Fowle, 1 Sawy. (U. S.) 497, 11 Fed. Cas. No. 6,041.

Previous to the amendment of Rule 47, promulgated in 1850, it was held that the act of congress adopting statutes abolishing imprisonment for debt did not apply to process of arrest in admiralty. Hodge *v.* Bemis, 12 Fed. Cas. No. 6,557, 2 Am. L. J. N. S. 337, 12 Law Rep. 470; Gaines *v.* Travis, Abb. Adm. 422, 9 Fed. Cas. No. 5,180; Marshall *v.* Bazin, 16 Fed. Cas. No. 9,125, 7 N. Y. Leg. Obs. 342; Gardner *v.* Isaacson, Abb. Adm. 141, 9 Fed. Cas. No. 5,230.

Personal injury and cruelty to seaman.— U. S. Rev. Stat. (1878), § 990, and Admiralty Rule 47, do not affect the power of a federal court sitting in admiralty to issue a warrant of arrest as process to compel defendant to respond to a claim for damages for personal injury and cruelty inflicted on a seaman. Bolden *v.* Jensen, 69 Fed. 745.

1. Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369; The Alpena, 7 Fed. 361; Louisiana Ins. Co. *v.* Nickerson, 2 Lowell (U. S.) 310, 15 Fed. Cas. No. 8,539; Cushing *v.* Laird, 4 Ben. (U. S.) 70, 6 Fed. Cas. No. 3,508; Barnes *v.* Steamship Co., 6 Phila. (Pa.) 479, 25 Leg. Int. (Pa.) 196, 2 Fed. Cas. No. 1,021; Bell *v.* Nelson, 3 Fed. Cas. No. 1,257, 8 Leg. Int. (Pa.) 22; Smith *v.* Milu, Abb. Adm. 373, 22 Fed. Cas. No. 13,081; Reed *v.* Hussey, Blatchf. & H. Adm. 525, 20 Fed. Cas. No. 11,646; The Invincible, 2 Gall. (U. S.) 29, 13 Fed. Cas. No. 7,054; Bouysson *v.* Miller, Bee Adm. 186, 3 Fed. Cas. No. 1,709.

Foreign corporation.— The district courts of the United States, as courts of admiralty, may award attachments against the property

ment is authorized only where the respondent cannot be found after a reasonable search,[2] and where the officer arrests the person he cannot at the same time attach the property.[3] It has been held also that an attachment is not justified where the respondent is within the district, but cannot be arrested because of a state law abolishing imprisonment for debt.[4] On the appearance of respondent the attachment will be discharged, but if there be no appearance the property will be held until the final disposition of the case.[5]

d. Garnishment. If respondent cannot be found, his effects and credits in the hands of third persons may be reached by garnishment.[6] In order to bring the garnishee into court he must be served with citation or notice calling upon him to appear and answer,[7] and after this has been done it becomes the right and duty of the garnishee to put in an answer.[8] If, after being properly served, the garnishee make default, execution may issue against the effects and credits of the principal in his hands, or he may be compelled to answer by compulsory process; and the court may in its discretion allow him to answer upon terms.[9]

3. In Suits In Rem — a. In General. The usual process in proceedings *in rem* is by warrant of arrest of the ship, goods, or other thing to be arrested,[10] which generally contains also a monition to all interested parties to appear and show cause.[11] On the issuance of such process the marshal is required to take

of foreign corporations found within their local jurisdiction. Atkins *v.* Fibre Disintegrating Co., 18 Wall. (U. S.) 272, 21 L. ed. 841; Clarke *v.* New Jersey Steam Nav. Co., 1 Story (U. S.) 531, 5 Fed. Cas. No. 2,859.

2. International Grain Ceiling Co. *v.* Dill, 10 Ben. (U. S.) 92, 13 Fed. Cas. No. 7,053.

Return alleging reasonable effort.— An attachment under an ordinary process *in personam* will not be vacated upon the ground that the marshal attached the property without having made any proper effort to serve defendant, where the marshal returned that he made a reasonable effort to serve defendant before making the attachment. Harriman *v.* Rockaway Beach Pier Co., 5 Fed. 461.

3. Grace *v.* Evans, 3 Ben. (U. S.) 479, 10 Fed. Cas. No. 5,650.

4. The Bremena *v.* Card, 38 Fed. 144. But see Bolden *v.* Jensen, 69 Fed. 745.

5. Essler *v.* Worth, 8 Fed. Cas. No. 4,533*a*.

6. Manro *v.* Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369; The Alpena, 7 Fed. 361; Trask *v.* Pelletier, 24 Fed. Cas. No. 14,146; Smith *v.* Miln, Abb. Adm. 373, 22 Fed. Cas. No. 13,081, wherein the court fully and ably discusses the whole subject of garnishment in admiralty proceeding.

7. Smith *v.* Miln, Abb. Adm. 373, 22 Fed. Cas. No. 13,081.

Must be named in writ.— The process will be set aside after service as to garnishees not named in the writ. Trask *v.* Pelletier, 24 Fed. Cas. No. 14,146.

Sufficient notice.— Personal service on the garnishees of a process containing a clause of foreign attachment, and a notice of what the process demands, and for what cause, and of the time and place when the garnishees must appear and answer, was held to be a sufficient attachment of any credits and effects of respondent in their hands. Cushing *v.* Laird, 4 Ben. (U. S.) 70, 6 Fed. Cas. No. 3,508.

8. Shorey *v.* Rennell, 1 Sprague (U. S.) 418, 22 Fed. Cas. No. 12,807.

Courses open to garnishee.— The duty of the garnishee on appearance is to discharge himself of the effect of the citation by showing that he holds nothing belonging to the debtor, or by specifying exactly what he does hold and submitting himself in respect thereto to the court; or he may contest the justness or amount of libellant's demand. Smith *v.* Miln, Abb. Adm. 373, 22 Fed. Cas. No. 13,081.

9. Shorey *v.* Rennell, 1 Sprague (U. S.) 418, 22 Fed. Cas. No. 12,807.

Not a matter of right.— After such default the garnishee is not entitled as of right to put in an answer, except to state facts which have occurred since the default. McDonald *v.* Rennel, 16 Fed. Cas. No. 8,765, 21 Law Rep. 157.

10. Admiralty Rule 9.

Sufficiency of warrant.— A warrant authorizing a marshal to take possession of a vessel must bear teste in the name of the judge of the court from which it issues and be under the seal of such court; but a warrant is not exceptionable on the ground that it comes from the judge in contradistinction to the court. Bowler *v.* Eldridge, 18 Conn. 1.

When property has been sold or otherwise disposed of, so that it cannot be reached *in specie*, the process may be enforced against the proceeds. The Schooner George Prescott, 1 Ben. (U. S.) 1, 10 Fed. Cas. No. 5,339.

11. Benedict Adm. (3d ed.) § 434.

Necessity of monition or notice.— A proceeding *in rem* binds the *res* without a personal notice to the party interested. The Globe, 2 Blatchf. (U. S.) 427, 10 Fed. Cas. No. 5,483 [*reversing* 10 Fed. Cas. No. 5,484, 3 Am. L. J. N. S. 337, 13 Law Rep. 488, 8 West. L. J. 241]. See also Williamson *v.* Brooks, 3 Ala. 32; Bierne *v.* The Steam Boat Triumph, 2 Ala. 738; Bowler *v.* Eldridge, 18 Conn. 1.

Objection for insufficient description of property.— An objection that the monition did not sufficiently describe the property to be attached is insufficient where the marshal has not been thereby misled and attached the wrong property. Lands *v.* A Cargo of Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 478.

the property into his possession for safe custody,[12] though it is not always necessary to take actual possession.[13] Notice of the seizure should be given by publication.[14] On the return-day the marshal must return the warrant stating what has been done under it.[15]

b. Damages for Wrongful Arrest. The arrest and detention of a vessel by legal process in a suit *in rem* which, although unfounded, is free from malice or bad faith on the part of libellant, will not entitle the claimant to damages.[16]

4. What Property Subject to Process. All appurtenances, boats, tackle, apparel, machinery, or other apparatus or appliances used on board a vessel when the lien of libellant attaches, constitute a part thereof, and should be seized by the marshal although they may be stored on shore or otherwise separated from the vessel when suit is brought.[17] But property of the government in the public

12. Admiralty Rule 9.

Property in custody of state officer.— A marshal's return stating a seizure of the vessel, but that at such time the vessel was in the custody of a state sheriff, does not imply such seizure as to give the court jurisdiction. The practice in such cases is to await the termination of the custody of the state sheriff. The Steamer Circassian, 1 Ben. (U. S.) 128, 5 Fed. Cas. No. 2,721; The Julia Ann, 1 Sprague (U. S.) 382, 14 Fed. Cas. No. 7,577. A sheriff's levy under an attachment is terminated by an order of the state court appointing a receiver of the debtor; and a seizure by the marshal, then in possession, with the sheriff's consent, under admiralty process, becomes legal. The Ferryboats Roslyn and Midland, 9 Ben. (U. S.) 119, 20 Fed. Cas. No. 12,068.

13. Snow *v.* One Hundred and Eighty and Three Fourths Tons of Scrap Iron, 11 Fed. 517.

Property already in marshal's custody.— Where a vessel is in the custody of the marshal, his receipt of a warrant of arrest in another suit, with intent to levy it, is a constructive levy, notwithstanding that he returns the warrant "withheld." The Haytian Republic, 60 Fed. 292.

Property in custody of collector.— Where a cargo, libeled for freight, is in the custody of the collector, the service of the monition on him by the marshal, by exhibiting the original process and leaving a copy thereof, is a sufficient caption of the *res* to give the court jurisdiction to order a sale thereof subject to the claims of the United States for duties and expenses. Two Hundred and Fifty Tons of Salt, 5 Fed. 216.

14. Admiralty Rule 9; Benedict Adm. (3d ed.) § 434.

Personal service equivalent to publication. — In proceedings *in rem* against a vessel, personal service on the owner dispenses with the usual publication. Henning *v.* Steamer St. Helena, 5 La. Ann. 349.

15. Benedict Adm. (3d ed.) § 434; The Steamer Circassian, 1 Ben. (U. S.) 128, 5 Fed. Cas. No. 2,721, wherein it was held that the marshal, being responsible for the execution of the process put into his hands, should be left free to state what he did with it subject to that responsibility.

Return not importing seizure.— To process issued in a suit *in rem* the marshal made return: "November 3, 1875, attached the steam tug Anna P. Dorr, her tackle, etc., by serving a copy of this writ, personally, on John Carse, part owner of same, and by serving November 5, 1875, a copy of this writ at residence of Captain E. F. Christian on wife." It was held that the return did not import a seizure of the tug. Brennan *v.* Steam-Tug Anna P. Dorr, 4 Fed. 459.

Conclusiveness as to place of seizure.— An unnecessary statement in the marshal's return as to the place of seizure of a vessel in a suit *in rem* is not conclusive of the court's jurisdiction over the *res*, and it may be shown by testimony, under a plea to the jurisdiction, that the seizure was in fact made outside the territorial jurisdiction of the court. The Lindrup, 70 Fed. 718.

16. The Wasco, 53 Fed. 546; Portland Shipping Co. *v.* The Alex. Gibson, 44 Fed. 371; Thompson *v.* Lyle, 3 Watts & S. (Pa.) 166.

Upon a tender of the accrued costs by a libellant on the voluntary dismissal of his libel the court will not, upon application of the claimant, inquire into damages caused him by an unfounded arrest of the ship. The Brig Oriole, Olc. Adm. 67, 18 Fed. Cas. No. 10,573.

Seizure without order of court.— But a libellant who procures the seizure and detention of vessels for the purpose of enforcing an alleged lien against them without an order of the court, when, on the facts stated in his libel, he has no lien, is liable in damages to the owners, even though he acted in good faith, as an attachment issues as of course in such cases on the filing of the libel, and a special order of the court is not required. Briggs Excursion Co. *v.* Fleming, 40 Fed. 593.

17. The Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627; The Merrimac, 29 Fed. 157; The Edwin Post, 11 Fed. 602.

Undivided interest.— Proceedings *in rem* cannot be instituted against the undivided interest of an owner in the vessel. Manhattan F. Ins. Co. *v.* The Schooner C. L. Breed, 1 Flipp. (U. S.) 655, 16 Fed. Cas. No. 9,021.

Property seized by collector of customs.— Where goods have been seized by the collector of customs for duties, a constructive seizure may be made by the marshal by serving the collector with a copy of the process and giving notice to the warehouseman; and thereupon the court may proceed to decree a sale

service, or in the possession of an officer of the government, is exempt from seizure;[18] and the same is true of property owned by a city and devoted to the service of the public.[19] The question of exemption must be raised by claim and answer, and not by motion,[20] and the burden of proof is upon the party claiming the exemption.[21]

J. Disposition of Property Pending Suit. Property arrested on process from an admiralty court is, in contemplation of law, in the custody of the court and cannot be withdrawn except by some person who shall establish a title to it;[22] and if such property be taken from the officer in whose custody it is, its return will be enforced by summary process.[23] Where no one appears to make claim, the court will retain possession of the property for a year and a day;[24] but if it be perishable in nature or be deteriorating in value it will be sold and the proceeds brought into court to abide the event.[25] On the dissolution of an attachment the marshal should restore the property to the person from whom it was taken.[26]

K. Tender and Payment into Court — 1. In General. An offer to pay, so conditioned as not to constitute a legal tender, can have no effect to extinguish libellant's maritime lien.[27] A payment into court by defendant operates as an admission that the amount paid in is due on the claim in suit,[28] though plaintiff

of the property. Two Hundred and Fifty Tons of Salt, 5 Fed. 216. See also Jorgensen *v.* Three Thousand One Hundred and Seventy-Three Casks of Cement, 40 Fed. 606. But a possessory suit may also be brought directly against the collector where the goods are not dutiable. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; *In re* Fassett, 142 U. S. 479, 12 S. Ct. 295, 35 L. ed. 1087.

18. Long *v.* The Tampico, 16 Fed. 491; The Othello, 5 Blatchf. (U. S.) 342, 18 Fed. Cas. No. 10,611.

19. The F. C. Latrobe, 28 Fed. 377; The Protector, 20 Fed. 207; The Fidelity, 16 Blatchf. (U. S.) 569, 8 Fed. Cas. No. 4,758; The Police Boat Seneca, 8 Ben. (U. S.) 509, 21 Fed. Cas. No. 12,668.

20. The Steamer Circassian, 1 Ben. (U. S.) 128, 5 Fed. Cas. No. 2,721; The Othello, 5 Blatchf. (U. S.) 342, 18 Fed. Cas. No. 10,611; Cartwright *v.* The Schooner Othello, 1 Ben. (U. S.) 43, 5 Fed. Cas. No. 2,483.

21. Long *v.* The Tampico, 16 Fed. 491.

22. U. S. *v.* The Schooner La Jeune Eugenie, 2 Mason (U. S.) 409, 26 Fed. Cas. No. 15,551.

Where the title to a vessel could not be determined pending an accounting between the parties, the possession was awarded to the master, who was part-owner, on his own stipulation. Coverdale *v.* The Schooner North America, Crabbe (U. S.) 420, 6 Fed. Cas. No. 3,289.

23. The Phebe, 1 Ware (U. S.) 368, 19 Fed. Cas. No. 11,066; The Joseph Gorham, 13 Fed. Cas. No. 7,537, 7 Law Rep. 135, 2 N. Y. Leg. Obs. 388, property in possession of marshal of another district.

Property taken without order of court.— Where petitioner, without order of the court, has obtained possession of property from the marshal who had seized the same on process *in rem*, the court will not order the marshal to deliver possession. The Steam Ferry Boat Roslyn, 8 Ben. (U. S.) 455, 20 Fed. Cas. No. 12,067.

24. Stratton *v.* Jarvis, 8 Pet. (U. S.) 4, 8 L. ed. 846.

25. The Willamette Valley, 63 Fed. 130; The Mendota, 14 Fed. 358; Stoddard *v.* Read, 2 Dall. (U. S.) 40, 23 Fed. Cas. No. 13,470.

Sale on claimant's motion pending suit.— A sale of a libeled vessel may be ordered before final decree, on claimant's motion, where libellant does not object after due notice, and especially where claimant is financially responsible and personally liable for all lawful demands against it growing out of the collision question. The Nevada, 85 Fed. 681.

Right to sell after appeal.— In Jennings *v.* Carson, 4 Cranch (U. S.) 2, 2 L. ed. 531, it was held that the *res* does not follow an appeal into the appellate court, but remains in the court below, which may order it sold as perishable notwithstanding the appeal. See also Jones *v.* Walker, Brunn. Col. Cas. (U. S.) 25, 3 N. C. 475, 13 Fed. Cas. No. 7,506.

Effect of sale.— Such a sale extinguishes all liens upon the property sold, whether arising under the maritime law or created by act of the owners or by state statutes. The Evangel, 94 Fed. 680; The Trenton, 4 Fed. 657.

26. The Schooner Two Marys, 10 Ben. (U. S.) 558, 24 Fed. Cas. No. 14,300.

In case of conflicting claims the marshal should not deliver the property without the order of the court. The Schooner Two Marys, 10 Ben. (U. S.) 558, 24 Fed. Cas. No. 14,300.

Delivery to wrong person.— Where, upon discontinuance of a suit *in rem*, the marshal delivers the *res* to the wrong person, the court cannot make a summary order for its return, because, the suit having been discontinued, the jurisdiction is gone. The remedy of the rightful owner is by action against the marshal. The Propeller Jack Jewett, 2 Ben. (U. S.) 353, 13 Fed. Cas. No. 7,121.

27. L'Hommedieu *v.* The H. L. Dayton, 38 Fed. 926. See, generally, Tender.

28. Higbee *v.* Ninety-Six Hundred Cases Tomatoes, 59 Fed. 783; Ye Seng Co. *v.* Corbitt, 7 Sawy. (U. S.) 368, 9 Fed. 423.

may prosecute his action for the remainder of his claim, taking the risk of liability for costs if he does not succeed.[29]

2. Compelling or Permitting Payment. When moneys have become the substitute for a vessel or cargo, libellant may require the moneys to be paid into court,[30] and on a libel *in personam* against a subcharterer to recover freight he may be allowed to pay the freight-money into court to abide the decision of a contest between the owner and the charterer as to a claim in which he is not interested.[31]

3. Withdrawal of Moneys Deposited. Where money is tendered and deposited in court, libellant may withdraw it at any time upon an order of the court, sufficient being reserved to cover costs,[32] but on appeal such deposit remains in the lower court, and the appellate court has no authority to order its payment.[33]

L. Stipulations and Bail — 1. In General. Provision is made in the admiralty rules for stipulations and bail-bonds to be given for the release of persons and property arrested under process from admiralty courts.[34] Such instruments are interpreted, as to the extent and limitation of the responsibility created by them, by the intention of the court which required them, and not by the intention of the parties who are bound by them.[35]

2. As Security for Costs. By long-standing practice in courts of admiralty, parties prosecuting, defending, or intervening are required to give stipulations for costs, and provision is made to that effect in the rules of the various district courts;[36] and such a stipulation may be enforced against the entire estates of the

29. Ye Seng Co. *v.* Corbitt, 7 Sawy. (U. S.) 368, 9 Fed. 423. See *infra*, V, V, 2, d.

30. The Queen of the Pacific, 9 Sawy. (U. S.) 421, 18 Fed. 700 (in which case a vessel and cargo which had been saved from a common peril proceeded to their destination, where the cargo was delivered and the consignee deposited a sum of money equal to twenty per cent. of its value, to cover general average, etc., and it was held that in a suit against the vessel and cargo for salvage libellant might elect to treat such deposit as a substitute for the cargo delivered and require the agent of the vessel to bring same into court to answer the judgment); The Schooner George Prescott, 1 Ben. (U. S.) 1, 10 Fed. Cas. No. 5,339 (holding that where a master of a vessel removed and sold her sails by virtue of a mortgage held by him, and the vessel was afterward libeled by other parties, the master could be compelled to pay the proceeds of the sails into court).

Assertion of claim to money paid in.— Where money has been paid into the registry as a substitute for freight attached, on an appeal to enforce a lien for wages on such freight-moneys, other parties who claim an interest therein should file their claim and set up their rights by answer to the libel. The Canal-Boat Monadnock, 5 Ben. (U. S.) 357, 17 Fed. Cas. No. 9,704.

31. Copp *v.* Decastro, etc., Sugar Refining Co., 8 Ben. (U. S.) 321, 6 Fed. Cas. No. 3,215, holding that the suit against respondent under the conditions mentioned in the text will be enjoined, though the result would be to turn the proceeding into one *in rem* against the freight.

32. Higbee *v.* Ninety-Six Hundred Cases Tomatoes, 59 Fed. 783; Califarno *v.* MacAndrews, 51 Fed. 300. See also Ye Seng Co. *v.* Corbitt, 7 Sawy. (U. S.) 368, 9 Fed. 423.

Interest.— Where respondent serves written notice of consent to withdrawal by libellant, on an order, of the whole or any part of the sum tendered and deposited, no further interest will accrue on such part of libellant's claim. Califarno *v.* MacAndrews, 51 Fed. 300.

33. Mignano *v.* McAndrews, 56 Fed. 300, 1 U. S. App. 312, 4 C. C. A. 4.

34. Admiralty Rules 3, 4, 10, 11, 25, 35; Benedict Adm. (3d ed.) § 493.

Necessity of conforming to statute.— In The Brig Struggle, 1 Gall. (U. S.) 476, 23 Fed. Cas. No. 13,550, it was held that a bond voluntarily given upon the delivery of property, on appeal, on application of claimant, was good, although the condition did not exactly conform to the statute under which it was drawn.

Waiver of defects in execution.— A defective execution of a stipulation will be deemed waived unless excepted to before the close of the term next after the opposite party has notice of the defect. The Infanta, Abb. Adm. 327, 13 Fed. Cas. No. 7,031.

Reserving right to deny legality of custody. — The court may permit a stipulation to be given to satisfy the decree, reserving to the stipulator the right to deny the legality of the custody claimed by the marshal, and, if successful in such denial, to ask to be relieved therefrom. The Ferryboats Roslyn and Midland, 9 Ben. (U. S.) 119, 20 Fed. Cas. No. 12,068.

Stipulation in double the amount claimed. — A stipulation directed to be taken in double the amount of the demand will not be construed as a stipulation simply for costs. The Ferryboats Roslyn and Midland, 9 Ben. (U. S.) 119, 20 Fed. Cas. No. 12,068.

35. Lane *v.* Townsend, 1 Ware (U. S.) 289, 14 Fed. Cas. No. 8,054.

36. See the rules of the district courts; and Raymond *v.* La Compagnie Générale, etc., 90 Fed. 105; Rawson *v.* Lyon, 15 Fed. 831.

In an action by an informer, unless he be an officer whose duty it is to institute the pro-

stipulators.[37] Security for costs is usually not required, however, in salvage cases [38] or in suits by seamen for wages,[39] and under an act of congress any poor person can bring a suit in an admiralty court without giving security, upon filing an affidavit of poverty.[40]

3. For Release of Person or Attached Property. Where defendant has been arrested in a suit *in personam* he may be released from custody on giving bail, with sufficient sureties, to appear in the suit and abide by all orders of the court and pay the decree rendered therein,[41] and property attached in such actions may be released on a like bond.[42]

ceedings, the court may require him to give security for costs, and, on his failure to do so, may strike out his name and let the suit proceed in the name of the United States alone. U. S. *v.* The Steamboat Planter, Newb. Adm. 262, 27 Fed. Cas. No. 16,054.

Waiver.— The right to require security for costs may be waived by the opposite party. Pharo *v.* Smith, 18 How. Pr. (N. Y.) 47, 19 Fed. Cas. No. 11,062; Polydore *v.* Prince, 1 Ware (U. S.) 411, 19 Fed. Cas. No. 11,257.

Omission of respondent to give security.— The libellant is not entitled to ground any proceedings on the omission of respondent to give security for costs. Gaines *v.* Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179; Gaines *v.* Spann, 2 Brock. (U. S.) 81, 9 Fed. Cas. No. 5,178.

Demanding additional security.— The affidavit on a motion for additional security for costs may be made by the proctor of the party. The Brig Harriet, Olc. Adm. 222, 11 Fed. Cas. No. 6,096.

Delay caused by libellant.— An increased stipulation for costs should not be required from the claimant on account of a delay in the progress of the action occasioned or obtained by libellant. The Bark Laurens, Abb. Adm. 302, 14 Fed. Cas. No. 8,121.

37. Admiralty Rule 21; The Steamboat Delaware, Olc. Adm. 240, 7 Fed. Cas. No. 3,762; The Baltic, Blatchf. & H. Adm. 149, 2 Fed. Cas. No. 826.

Consent to rehearing after final decree.— A consent to a rehearing by the parties to a suit will not affect the rights of a surety in a stipulation for costs who has been discharged by a previous final decree. The Martha, Blatchf. & H. Adm. 151, 16 Fed. Cas. No. 9,144.

38. The Cetewayo, 7 Fed. 128.

39. The Shelbourne, 30 Fed. 510; The Arctic, Brown Adm. 347, 1 Fed. Cas. No. 509*a*; Chambers *v.* The Henry Kneeland, 5 Fed. Cas. No. 2,581*a*; Collins *v.* Hathaway, Olc. Adm. 176, 6 Fed. Cas. No. 3,014.

But in other actions a seaman will generally be required to give a stipulation for costs in the same manner as any other suitor. The Schooner Caroline and Cornelia, 2 Ben. (U. S.) 105, 5 Fed. Cas. No. 2,420; The Ship Great Britain, Olc. Adm. 1, 10 Fed. Cas. No. 5,736.

40. U. S. Rev. Stat. (Suppl. 1891), p. 41; Thomas *v.* Thorwegan, 27 Fed. 400; Wheatley *v.* Hotchkiss, 1 Sprague (U. S.) 225, 29 Fed. Cas. No. 17,483; Polydore *v.* Prince, 1 Ware (U. S.) 410, 19 Fed. Cas. No. 11,257.

Juratory caution.—Under a strict rule that a stipulation for costs must be filed with the libel, on proper showing one may be allowed to sue on a "juratory caution;" and, a libel having been filed with security which was shown to be bad, on motion to file additional security the court ordered additional security to be put in within five days, at the end of which time it might be shown that it could not be furnished and the case proceed on its merits. The Phœnix, 36 Fed. 272.

41. Admiralty Rules 2–7, 47; U. S. Rev. Stat. (1878), §§ 990, 991; Grace *v.* Evans, 3 Ben. (U. S.) 479, 10 Fed. Cas. No. 5,650; Gardner *v.* Isaacson, Abb. Adm. 141, 9 Fed. Cas. No. 5,230; Lane *v.* Townsend, 1 Ware (U. S.) 289, 14 Fed. Cas. No. 8,054.

Stipulation to satisfy decree always necessary.— In suits *in personam*, in whatever way defendant is brought into court, he must give a stipulation to satisfy the decree before he can be admitted to defend, instead of giving stipulation for costs only. Millard *v.* Craig, 17 Fed. Cas. No. 9,547, 8 Leg. Int. (Pa.) 22.

Governed by equitable considerations.— In holding respondents to bail admiralty is governed largely by equitable considerations. Martin *v.* Walker, Abb. Adm. 579, 16 Fed. Cas. No. 9,170.

State laws as to bail of the person.—Where the state laws provide for bail of the person under less severe conditions their provisions control. U. S. Rev. Stat. (1878), §§ 990, 991; Admiralty Rule 47; Stone *v.* Murphy, 86 Fed. 158; Louisiana Ins. Co. *v.* Nickerson, 2 Lowell (U. S.) 310, 15 Fed. Cas. No. 8,539. And see Benedict Adm. (3d ed.) § 424.

Surrender of principal by sureties.— Under a stipulation for appearance to answer and abide the court's decision the sureties are not irrevocably bound by a return of *non est inventus;* but they may surrender the principal at any time before decree against them, on citation to show cause. Lane *v.* Townsend, 1 Ware (U. S.) 289, 14 Fed. Cas. No. 8,054. *Compare* Cure *v.* Bullus, Abb. Adm. 555, 6 Fed. Cas. No. 3,486.

42. Admiralty Rule 4; Pope *v.* Seckworth, 46 Fed. 858; Brown *v.* Burrows, 2 Blatchf. (U. S.) 340, 4 Fed. Cas. No. 1,996. See also Todd *v.* The Bark Tulchen, 2 Fed. 600; Jaycox *v.* Chapman, 10 Ben. (U. S.) 517, 13 Fed. Cas. No. 7,243; International Grain Ceiling Co. *v.* Dill, 10 Ben. (U. S.) 92, 13 Fed. Cas. No. 7,053.

Must pay costs of attachment.— In giving a bond to relieve property taken by a clause of foreign attachment, defendant must pay the costs of the attachment as a condition of being permitted to defend the cause on its merits. Millard *v.* Craig, 17 Fed. Cas. No. 9,547, 8 Leg. Int. (Pa.) 22, 17 Fed. Cas. No. 9,548.

4. For Safe Return of Vessel, in Possessory Suit. The owners of a majority interest in a vessel, in case of disagreement with the minority owners, may be required by the latter, in a libel for possession, to give bail for the safe return of the vessel.[43] They may also, in such case, avail themselves of the right to give an ordinary release bond,[44] and cannot recover damages for the loss resulting from the seizure if they fail to do so.[45]

5. For Release of Property Seized In Rem — a. In General. Where a vessel or other property has been seized under a libel *in rem* on the instance side of a court of admiralty the claimant may have the same delivered to him upon filing a stipulation or bond with proper sureties;[46] and the claimant of a part of the property seized may thus procure its delivery to him while the remainder is left in custody.[47] A stipulation voluntarily given by a claimant before the seizure of the vessel gives the court jurisdiction to proceed with the cause just as if the stipulation had been given after the vessel had been taken into custody.[48] Such stipulation cannot be taken by the clerk, but must be taken in court, at chambers, or before a commissioner.[49] If no bond or stipulation be given, the court may, if it thinks best, order the property to be sold and the proceeds brought into court or otherwise disposed of.[50]

43. See *supra*, IV, E, 7, c; Burr *v.* The St. Thomas, 4 Fed. Cas. No. 2,195, 8 Leg. Int. (Pa.) 22. See also The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175; The Two Marys, 16 Fed. 697.

The amount due upon an accounting between the majority and the minority owners cannot be applied to diminish the liability of the stipulators on a bond given for the safe return of the vessel. The Brig Susan E. Voorhis, 10 Ben. (U. S.) 380, 23 Fed. Cas. No. 13,633.

44. Under U. S. Rev. Stat. (1878), § 941.

45. The Poconoket, 61 Fed. 106. But see Treat *v.* The Schooner Rainbow, 1 Ben. (U. S.) 40, 24 Fed. Cas. No. 14,161.

46. U. S. Rev. Stat. (1878), §§ 940, 941; Admiralty Rules 10, 11; The Sloop Martha C. Burnite, 10 Ben. (U. S.) 196, 16 Fed. Cas. No. 9,147; The Canal-Boat Monadnock, 5 Ben. (U. S.) 357, 17 Fed. Cas. No. 9,704; Poland *v.* Brig Spartan, 1 Ware (U. S.) 130, 19 Fed. Cas. No. 11,246; The Brig Alligator, 1 Gall. (U. S.) 145, 1 Fed. Cas. No. 248; Rouse *v.* Jayne, 14 Ala. 727; Stedman *v.* Patchin, 34 Barb. (N. Y.) 218; Benedict Adm. (3d ed.) § 447.

Seizure for forfeiture.— A vessel seized for a forfeiture will not be released to the claimant on a bond given under Admiralty Rules 10 or 11. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; The Mary N. Hogan, 17 Fed. 813. But see U. S. *v.* The Sloop Pitt, 2 Wheel. Crim. (N. Y.) 602, 27 Fed. Cas. No. 16,052.

Stipulator bound by default decree.— When a stranger to an original libel *in rem*, claiming to be the owner, gives a release bond to restore the vessel as the court shall direct, pay damages for its use and detention, and "perform any other judgment which the court may render," etc., he thereby becomes a party to the cause and is bound by a default decree thereafter entered in accordance with the stipulation of the bond. Briggs *v.* Taylor, 84 Fed. 681, 28 C. C. A. 518.

Where United States claimant.— Inasmuch as a suit brought in the district court to enforce a lien on a vessel given by state laws is not a "proceeding under the laws of any state," but is under the laws of the United States, the government, if claimant such suit, is not entitled to have the *res* discharged from arrest by giving a stipulation under U. S. Rev. Stat. (1878), § 3753. The Revenue Cutter, 4 Sawy. (U. S.) 136, 20 Fed. Cas. No. 11,712.

Proceedings to limit liability.— The act of congress of March 3, 1851, to limit the liability of ship-owners, confers no power on the court to discharge the vessel from all liens upon her on the filing of a stipulation by the owners, in the full value of the vessel and freight, for the benefit of all parties having claims upon her. But this may be done under the general admiralty powers of the court. Place *v.* The Steamboat City of Norwich, 1 Ben. (U. S.) 89, 19 Fed. Cas. No. 11,202.

Appraisement without notice to opposite party.— An appraisement by an appraiser nominated by the clerk without notice to the opposite party will be set aside. Alliance Ins. Co. *v.* The Morning Light, 1 Fed. Cas. No. 246*a*.

Who may bond proceeds.— On a libel on bottomry bond, where the vessel is sold and the proceeds paid into court, one claiming as a mortgagee in possession under an overdue and unpaid mortgage will be allowed to bond the proceeds rather than the libellant whose claim is denied in the pleadings. The Bark Archer, 10 Ben. (U. S.) 99, 1 Fed. Cas. No. 508.

47. Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627.

48. The Frank Vanderkerchen, 87 Fed. 763.

49. The Jeanie Landles, 9 Sawy. (U. S.) 102, 17 Fed. 91, wherein it was also held that, if the stipulation be taken at chambers, notice thereof must be given to the marshal by writ of supersedeas issued by the clerk; if taken before a commissioner, notice must be given to the marshal by order issued by the commissioner.

50. Benedict Adm. (3d ed.) § 447; Empresa Maritima a Vapor *v.* North, etc., American Steam Nav. Co., 16 Fed. 502.

b. Sufficiency of Instrument — (I) *As to Form and Amount.* Strict formality is not required of such an instrument, and it seems that a bond which is good as a common-law obligation is sufficient though not in exact conformity with the statute under which given.[51] The amount of the bail is a matter largely in the discretion of the court,[52] and after a proper bond has been given to the marshal the libellant cannot exact any additional stipulation.[53]

(II) *As to Sureties.* In the absence of satisfactory proof to the contrary the court will presume that the security is sufficient,[54] but the stipulator will be required to keep his stipulation good in the matter of sureties until the final determination of the case, and to furnish new sureties if necessary.[55]

c. Effect of Release — (I) *As Discharge of Lien.* Where a vessel has been fairly released from custody on a valid stipulation or bond, it returns to the claimant forever discharged from the lien which was the foundation of the proceedings in which it was arrested,[56] and the court has no power to order the vessel back into custody,[57] even by consent of the parties,[58] nor to compel the payment of the purchase-money into court, where it has been sold subsequently to the release;[59] nor can it be arrested again on another libel for the same cause of action.[60] But in case of any mistake or fraud in entering into the stipulation, and

51. Munks *v.* Jackson, 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641; The Brig Struggle, 1 Gall. (U. S.) 476, 23 Fed. Cas. No. 13,550; Murphy *v.* Roberts, 30 Ala. 232; Rouse *v.* Jayne, 14 Ala. 727; Bell *v.* Thomas, 8 Ala. 527; Whitsett *v.* Womack, 8 Ala. 466; Franklin *v.* Pendleton, 3 Sandf. (N. Y.) 572.

Omission of amount.— The release bond of a vessel is not rendered invalid by the mere omission, from the condition clause, of the specified sum to be paid in case of default, when the bond contains a distinct obligation to pay the appraised value. The Haytian Republic, 59 Fed. 476, 15 U. S. App. 288, 8 C. C. A. 182 [*affirming* 57 Fed. 508].

52. Peru *v.* The North America, 19 Fed. Cas. No. 11,017*a*.

Where claims exceed value of vessel.— The vessel may be discharged on a stipulation for its full value, though the claims for which libels are filed exceed such amount (The Ship Antelope, 1 Ben. (U. S.) 521, 1 Fed. Cas. No. 481), and the amount of the freight is not to be included in the stipulation (The Bark Vivid, 3 Ben. (U. S.) 397, 28 Fed. Cas. No. 16,977).

Full value of vessel, cargo, and freight.— A vessel, cargo, and freight attached on a libel on a bottomry bond will be bonded for their full amount, although the proceeds of the vessel alone are sufficient to meet the claims. The Bark Archer, 9 Ben. (U. S.) 455, 1 Fed. Cas. No. 507.

Reduction of amount.— In a proper case the court will reduce the amount to a reasonable security for the claim. The Iris, 100 Fed. 104, 40 C. C. A. 301; The Monarch, 30 Fed. 283; Forbes *v.* The Steamship Merrimac, 1 Ben. (U. S.) 68, 9 Fed. Cas. No. 4,927.

53. Gaines *v.* Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179.

54. The Snap, 24 Fed. 510.

Married woman not competent.—A married woman will not be accepted as surety on a stipulation in admiralty. The Ship Antelope, 1 Ben. (U. S.) 521, 1 Fed. Cas. No. 481.

55. **The insolvency of a surety** is sufficient ground for compelling claimant to give additional security (The City of Hartford, 11 Fed. 89; The Virgo, 13 Blatchf. (U. S.) 255, 28 Fed. Cas. No. 16,976), and on his failure to do so his answer may be stricken out and the libellant granted a decree enforceable against claimant and his sureties to the same extent as would be proper if no issue had been raised on the merits (The Fred M. Lawrence, 94 Fed. 1017, 36 C. C. A. 631 [*affirming* 88 Fed. 910]).

56. U. S. *v.* Ames, 24 Fed. Cas. No. 14,440; The Old Concord, Brown Adm. 270, 2 Abb. (U. S.) 20 note, 18 Fed. Cas. No. 10,482; Home Ins. Co. *v.* The Concord, 12 Fed. Cas. No. 6,659, 2 Chic. Leg. N. 249, 17 Pittsb. Leg. J. (Pa.) 148. But see Thompson *v.* Steamboat Julius D. Morton, 8 Ohio St. 222.

Cannot require additional security.— After a vessel has been released on stipulation the court has no authority to require the claimant to give any additional security. The Mutual, 78 Fed. 144.

57. The Cleveland, 98 Fed. 631; The Hattie Bell, 65 Fed. 119; The Wm. Murtagh, 17 Fed. 259; Roberts *v.* The Steamship Huntsville, 3 Woods (U. S.) 386, 20 Fed. Cas. No. 11,904; The Thales, 10 Blatchf. (U. S.) 203, 23 Fed. Cas. No. 13,856; The Old Concord, Brown Adm. 270, 2 Abb. (U. S.) 20 note, 18 Fed. Cas. No. 10,482; The Union, 4 Blatchf. (U. S.) 90, 24 Fed. Cas. No. 14,346; The White Squall, 4 Blatchf. (U. S.) 103, 29 Fed. Cas. No. 17,570.

No judgment for sale of vessel.— After bond has been given for the release of a vessel a judgment ordering its sale cannot be rendered. Richardson *v.* Cleaveland, 5 Port. (Ala.) 251; St. Louis Perpetual Ins. Co. *v.* Ford, 11 Mo. 295.

58. Senab *v.* The Josephine, 21 Fed. Cas. No. 12,663, 4 Centr. L. J. 262.

59. The Union, 4 Blatchf. (U. S.) 90, 24 Fed. Cas. No. 14,346.

60. The Wm. Murtagh, 17 Fed. 259; The Thales, 3 Ben. (U. S.) 327, 23 Fed. Cas. No. 13,855, 10 Blatchf. (U. S.) 203, 23 Fed. Cas. No. 13,856. See also The Wild Ranger, Brown & L. 84.

Remedy of wife on libel by husband.— Where the owner of a vessel injured by col-

of the improvident discharge of the vessel, the court may, on application within a reasonable time, order it back into custody.[61]

(II) *As to Other Liens and Charges.* When released, the vessel returns to the claimant subject to all previously existing liens and charges except that on account of which she was seized;[62] and she is also subject to charges or liens accruing subsequent to her release.[63]

d. Liability on Instrument — (I) *In General.* A bond or stipulation conditioned that the parties shall perform the decree of "the court" means the court which shall ultimately decide the cause; and an appellate court has jurisdiction to render judgment on such instrument against the principals and stipulators;[64] but the sureties are not bound to respond to claims set up by intervening petitions subsequent to the release,[65] and where the obligation of the stipulator is for a

lision files a libel against the offending vessel, his wife cannot file another independent libel for the same collision and cause the offending vessel to be arrested a second time, but she must make herself a party to her husband's suit. The William F. McRae, 23 Fed. 557.

Remedy of owner of cargo on libel by owner of vessel.— The vessel cannot be arrested again, on a libel by the owner of the cargo on the same cause of action, but his proper course is by petition to be made a co-libellant on the first suit. The Nahor, 9 Fed. 213.

The fact that the first suit was discontinued by libellant will not operate to make the arrest in the second suit an original arrest. The Thales, 10 Blatchf. (U. S.) 203, 23 Fed. Cas. No. 13,856.

61. The Union, 4 Blatchf. (U. S.) 90, 24 Fed. Cas. No. 14,346.

The proper process to regain the property, where it is in the possession of one not a party to the stipulation, is a monition and not an execution. The Gran Para, 10 Wheat. (U. S.) 497, 6 L. ed. 375.

Void bond.— Where the bond is void because not conforming to the terms of the statute under which drawn, the court will enforce the redelivery of the vessel. The Brig Struggle, 1 Gall. (U. S.) 476, 23 Fed. Cas. No. 13,550.

Where only surety a married woman.—The discharge of a vessel on the execution and improvident acceptance of a bond in which the only surety was a married woman does not prevent the rearrest of the vessel. The Favorite, 2 Flipp. (U. S.) 86, 8 Fed. Cas. No. 4,698.

Must be seized before final judgment on bond.— The question whether a case is made for the recall of property seized in admiralty, to release which bond has been given, must be determined before a final decree on the bond is rendered in the district court or in the appellate court. Action on that question cannot be reviewed in the supreme court [Bradley, J., dissenting]. U. S. *v.* Ames, 99 U. S. 35, 25 L. ed. 295.

62. Roberts *v.* The Steamship Huntsville, 3 Woods (U. S.) 386, 20 Fed. Cas. No. 11,904; U. S. *v.* Towns, 7 Ben. (U. S.) 444, 28 Fed. Cas. No. 16,534; The Union, 4 Blatchf. (U. S.) 90, 24 Fed. Cas. No. 14,346; Carroll *v.* The Steamboat T. P. Leathers, Newb. Adm. 432, 5 Fed. Cas. No. 2,455.

Contract made while vessel in custody.— Where an arrested vessel in any manner again comes into possession of the owner, he cannot defeat a lien against her on the ground that the contract out of which it arose was made, and the consideration for it rendered, while the vessel was in the custody of the law. The Schooner Witch Queen, 3 Sawy. (U. S.) 17, 30 Fed. Cas. No. 17,915.

63. The Union, 4 Blatchf. (U. S.) 90, 24 Fed. Cas. No. 14,346.

Waiver of priority over subsequent libellants.— A libellant who consents to the release of a vessel libeled and seized under process waives his priority of claim as against subsequent libellants under whose libels the vessel is condemned and sold. The Steamtug A. R. Gray, 7 Ben. (U. S.) 483, 1 Fed. Cas. No. 519.

64. The Belgenland, 108 U. S. 153, 2 S. Ct. 383, 27 L. ed. 685, 16 Fed. 430; U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 380, 26 Fed. Cas. No. 15,613.

Bond conditioned in alternative.— In the case of a libel against a steamboat for work and labor, where the bond of the stipulators is conditioned in the alternative, for the payment of the judgment which may be rendered "at the next term of the court," or for the forthcoming and delivery of the boat to answer the sentence and decree of the court, it binds them for the performance of the condition on the final disposition of the cause, although the judgment may be delayed. Murphy *v.* Roberts, 30 Ala. 232.

Sureties cannot take advantage of irregularities.— The sureties on a bond or stipulation cannot take advantage of any irregularity in the proceedings. U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 380, 26 Fed. Cas. No. 15,613; The Brig Alligator, 1 Gall. (U. S.) 145, 1 Fed. Cas. No. 248.

Limitation of liability.— Where, upon arrest, a vessel is released on a stipulation given for her value, and by subsequent amendment in the progress of the cause the statutes in limitation of liability are allowed to be pleaded, the owners are not estopped by the stipulation from showing that the stipulated value included the value of subsequent repairs. The Doris Eckhoff, 30 Fed. 140.

65. The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943; Laidlaw *v.* Oregon R., etc., Co., 81 Fed. 876, 48 U. S. App. 430, 26 C. C. A. 665; The Willamette, 70 Fed. 874, 44 U. S.

definite sum, he cannot be compelled to pay more than that amount, unless guilty of default or contumacy.[66] After the death of one of the obligors in a joint and several bond the court will proceed against the survivors, or, at the option of the obligees, against the representative of the deceased also.[67]

(II) *Release of Liability.* A stipulator will be discharged from his undertaking where the vessel is subsequently arrested on libels by others and sold, and the proceeds brought into court,[68] and where a libel *in rem* is dismissed by default the claimant may, without notice to the libellant, enter an order canceling the stipulation.[69] But an amendment of the libel neither increasing nor diminishing the liability of the sureties will not release them from their obligation.[70]

M. Special Defenses — 1. In General. Matter which is properly the subject of a cross-claim cannot be set up as a defense to a libel against the vessel.[71]

2. Another Action Pending or Past — a. In General. A court of admiralty has authority to stay proceedings in any case before it, in order to prevent injustice,[72] as where a cross-libel is necessary in order that defendant may set up his whole claim.[73] But in order that the proceedings in one libel may be a bar to a second, the second suit must be the same as the first in respect to subject-matter, parties, rights asserted, and relief demanded, and must be founded upon the same facts and for the same basis of relief.[74] The pendency of a libel for forfeiture in

App. 26, 18 C. C. A. 366, 31 L. R. A. 715; The T. W. Snook, 51 Fed. 244.

66. The Wanata, 95 U. S. 600, 24 L. ed. 461; The Ann Caroline, 2 Wall. (U. S.) 538, 17 L. ed. 833; The Sydney, 47 Fed. 260. But see The Maggie M., 33 Fed. 591; The Steam Propeller Belle, 5 Ben. (U. S.) 57, 3 Fed. Cas. No. 1,270.

Bond for double amount of claim.— Under a release bond with a penalty for double the amount of libellant's claim, conditioned to answer and abide by the decree of the court, issued to the marshal pursuant to U. S. Rev. Stat. (1878), § 941, to obtain the release of a vessel, a decree may be entered against the obligors for the amount of libellant's claim and the costs, although a separate stipulation may have been filed for the costs, provided the decree does not exceed the amount of the penalty of the bond. The Madgie, 31 Fed. 926.

Subrogation of sureties.— When sureties in a release bond have paid a decree thereon they may be subrogated to the claim of libellant against their principal. The Madgie, 31 Fed. 926; Carroll *v.* The Steamboat T. P. Leathers, Newb. Adm. 432, 5 Fed. Cas. No. 2,455.

67. The Ship Octavia, 1 Mason (U. S.) 149, 18 Fed. Cas. No. 10,423.

Decree against deceased stipulator.— A decree rendered against a stipulator after his death, although in ignorance of that fact, is void and will be set aside on motion. The Clara Davidson, 5 Fed. Cas. No. 2,791, 6 Wkly. Notes Cas. (Pa.) 356.

68. Livingston *v.* The Steamship Jewess, 1 Ben. (U. S.) 21 note, 15 Fed. Cas. No. 8,412.

Application to remand vessel to custody.— An application by stipulators to have their stipulation canceled and the vessel remanded to custody in a case where a subsequent libel had been filed claiming damages to an amount equaling the full value of the vessel, was held to be premature where made before the return of process in the latter suit. The Ship Empire, 1 Ben. (U. S.) 19, 8 Fed. Cas. No. 4,472.

69. The Brig Antelope, 1 Ben. (U. S.) 343, 1 Fed. Cas. No. 480, wherein it was further held that the claimant, by waiving the decree and consenting to the reinstatement of the cause, might revive the liability of the sureties on the stipulation, provided such proceedings did not affect them injuriously.

70. Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271; Boden *v.* Demwolf, 56 Fed. 846; U. S. *v.* Mosely, 7 Sawy. (U. S.) 265, 8 Fed. 688; The Maggie Jones, 1 Flipp. (U. S.) 635, 16 Fed. Cas. No. 8,947.

71. Maxwell *v.* The Powell, 1 Woods (U. S.) 99, 16 Fed. Cas. No. 9,324, holding that it was no defense to a libel against a vessel for failure to deliver goods that no credit was given for freight earned in carrying other goods. See also The Dove, 91 U. S. 381, 23 L. ed. 354.

72. La Normandie, 58 Fed. 427, 14 U. S. App. 655, 7 C. C. A. 285; The Albert Schultz, 12 Fed. 156; The Steamship Idaho, 4 Ben. (U. S.) 272, 12 Fed. Cas. No. 6,996, in which case the proceedings in one of three litigations involving title to the same property, brought in different courts, were stayed unless libellant should elect to stay proceedings in the other.

73. **Stay pending termination of cross-suit.** — In a suit for towage, a defendant who has a counter-claim for damages for negligent performance of the contract in excess of libellant's claim cannot recover the full damages by answer, but only by cross-libel; and, as he cannot split his cross-demand, but must try it in the cross-suit, he is entitled to have the libel and cross-libel heard together, if brought in the same court: and if brought in different courts, judgment on the libel should be stayed until reasonable opportunity is had for the trial of the counter-claim in the cross-libel. The Ciampa Emilia, 39 Fed. 126.

74. The Haytian Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. ed. 930.

Owner of cargo not party.— The dismissal of a libel *in rem*, brought by the owner of a vessel destroyed in collision, will not bar a

one district against a vessel for a violation of law is no bar to a libel in another district for other violations of a similar character before the first suit was brought, although she was released by a bond for her entire value in the first case, and all the violations might have been joined therein.[75]

b. Action In Rem as Bar. A pending action *in rem* is not a bar to one by the same libellant *in personam* for the same cause,[76] unless defendants gave a stipulation in the former for the full amount of the claim.[77] The action *in personam* will not be stayed pending an appeal in the proceeding *in rem*,[78] though it is held that the court in which both of such proceedings are pending may stay the entry of a decree on the libel *in rem* until it is ascertained whether it will be necessary to recur to the security given in that suit.[79]

c. Another Action in State Court. The pendency of a replevin suit in a state court is not a legal bar which may be pleaded in abatement to a libel *in rem* in the United States courts to enforce the right or lien against the property,[80] though it is held that the pendency of a replevin suit in a state court to settle the right of property in a vessel is a bar to a libel in admiralty to settle the same right between the same persons.[81] The right of a seaman to sue in admiralty *in personam* for his wages is in no manner affected by an attachment of his wages by trustee process issuing out of a state court,[82] and the bringing of a suit in a state court which is afterward dismissed or discontinued before the hearing is not a bar to a suit in admiralty for the same cause.[83] On the other hand, a court of admiralty may order proceedings in execution of its judgment to pause until the termination of a suit in equity in a state court.[84]

3. Premature Commencement of Suit — a. In General. The premature commencement of a suit in admiralty to enforce a freight lien is not jurisdictional,[85]

libel *in personam* by the owner of the cargo, where the latter was not a party to the first proceeding and no notice was given or publication made as required by the admiralty rule. Bailey *v.* Sundberg, 49 Fed. 583, 1 U. S. App. 101, 1 C. C. A. 387.

Objection.— After a decision for libellants *in rem* for freight and demurrage it cannot be objected that freight has been found due libellants in a pending suit *in personam* (Brookman *v.* Sixty Barrels of Molasses, 4 Fed. Cas. No. 1,941*a*), and a prior decree as a defense in an admiralty cause in favor of the party for whom it was rendered should be given in evidence, and not set up by summary motion to prevent further hearing or to try the fact upon affidavits (Reed *v.* The Fanny, 20 Fed. Cas. No. 11,645*a*).

75. The Haytian Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. ed. 930. See also *supra*, V, L, 5, c, (II).

76. Providence Washington Ins. Co. *v.* Wager, 35 Fed. 364; Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279 [*citing* The Sabine, 101 U. S. 384, 25 L. ed. 982; The Steam-Ship Zodiac, 5 Fed. 220], holding that the action *in rem* was no bar to a subsequent action *in personam*, the latter being a remedy which could not be maintained in a proceeding *in rem*, because, under Admiralty Rule 15, in cases of collision, the remedies *in personam* and *in rem* cannot be maintained in the same action.

77. Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279.

78. Providence Washington Ins. Co. *v.* Wager, 35 Fed. 364.

79. La Normandie, 58 Fed. 427, 14 U. S. App. 655, 7 C. C. A. 285. See also Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279.

80. A Raft of Spars, Abb. Adm. (U. S.) 291, 20 Fed. Cas. No. 11,528; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559.

Nature of objection.— If the pendency of an action in a state court can be set up at all as an objection to a proceeding *in rem* in admiralty, the objection can be made only by a dilatory or declinatory exception. The Ship Prince Albert, 5 Ben. (U. S.) 386, 19 Fed. Cas. No. 11,426.

81. **Not a technical bar.**— Such matter is not technically a bar as a plea of *lis pendens*, but is effectively so in order to prevent a conflict of jurisdiction. Taylor *v.* The Royal Saxon, 1 Wall. Jr. C. C. (U. S.) 311, 23 Fed. Cas. No. 13,803.

82. Bourne *v.* Ross, 17 Fed. 703.

83. The Pioneer, 21 Fed. 426; Bingham *v.* Wilkins, Crabbe (U. S.) 50, 3 Fed. Cas. No. 1,416.

84. The Albert Schultz, 12 Fed. 156, holding that after judgment in favor of a party having a claim upon the residuum in the registry, the court of admiralty will proceed as indicated in the text, when it is brought to its notice that an equitable action of nullity has been instituted in a state court to annul the transfer by which such party held title to the claim on the ground of fraud and simulation.

85. Clark *v.* Five Hundred and Five Thousand Feet of Lumber, 65 Fed 236, 24 U. S. App. 509, 12 C. C. A. 628.

and such an objection will not require a dismissal of a libel, but will affect only the question of costs.[86]

b. Objection. Objection that a libel is prematurely brought must be raised promptly,[87] and will be waived if an answer is filed to the merits and the case is brought to a hearing,[88] or by other acts indicating such intention.[89]

4. Contributory Negligence — a. In General. Courts of admiralty are not bound by the common and civil law rules governing cases of contributory negligence, but award or withhold damages according to principles of equity and justice in the exercise of a sound discretion.[90] Therefore contributory negligence on the part of libellant is not, of necessity, a bar to his recovery,[91] but the court will apportion the damages.[92] When both vessels in a collision are in fault they must bear the damage in equal parts, the one suffering the least being decreed to pay to the other the amount necessary to make them equal, or one half the difference between the respective losses sustained.[93]

b. Injuries Resulting in Death. Under statutes giving the representatives of one whose death is caused by injuries an action for the damages resulting therefrom, it is held that such rights are to be administered according to the practice of the common law, and contributory negligence will bar the action;[94] and where such negligence is a defense in the particular state the action cannot be maintained in admiralty.[95]

86. The Pioneer, 53 Fed. 279. Where a vessel has been attached and sold as perishable, and the funds paid into court, a libel for a debt acknowledged to exist will not be dismissed on the ground that it was not due at the time of the commencement of the suit. The Papa, 46 Fed. 576. *Contra*, The Martha, Blatchf. & H. Adm. 151, 16 Fed. Cas. No. 9,144, holding that where exception is duly taken on that ground a libel brought before right of action perfected must be dismissed, notwithstanding the right becomes perfected during the progress of the suit.

87. By exception on the return-day of warrant. Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163.

Plea in abatement or demurrer.—Objection that suit was prematurely brought must be raised by plea in abatement or demurrer, where the right of action is perfected before final hearing. The Isaac Newton, Abb. Adm. 11, 13 Fed. Cas. No. 7,089.

88. Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163; The Edward, Blatchf. & H. Adm. 286, 8 Fed. Cas. No. 4,289.

Costs without plea in abatement.— Although no plea in abatement is filed on the ground of a premature commencement of the suit, the court will protect the parties in the adjustment of costs from any injustice arising therefrom. The Isaac Newton, Abb. Adm. 11, 13 Fed. Cas. No. 7,089.

89. The Salem's Cargo, 1 Sprague (U. S.) 389, 21 Fed. Cas. No. 12,248, holding that in a libel against a cargo to recover the balance due under a charter-party, before the cargo had been discharged from the vessel, a previous agreement by the claimant that such a libel should be commenced, and his assisting the officer in arresting the goods, and afterward obtaining them by giving stipulation without objection, was a waiver of any right which he might have had to object to the time of instituting the suit.

90. Olsen *v.* Flavel, 13 Sawy. (U. S.) 232, 34 Fed. 477; The Wanderer, 20 Fed. 140; McCord *v.* The Steamboat Tiber, 6 Biss. (U. S.) 409, 15 Fed. Cas. No. 8,715.

91. The Daylesford, 30 Fed. 633.

Plea of former adjudication.— A plea of a former common-law adjudication is not sufficient unless it appear that the ground of adjudication was the absence of fault on the part of defendant and not proof of a fault on the part of plaintiff. The City of Rome, 49 Fed. 392.

92. The Max Morris, 137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586; Smith *v.* Shakopee, 103 Fed. 240; The Mystic, 44 Fed. 398; Anderson *v.* The Ashebrooke, 44 Fed. 124; The Truro, 31 Fed. 158; The Mabel Comeaux, 24 Fed. 490; The Wanderer, 20 Fed. 140; The Explorer, 20 Fed. 135.

Extent of rule.— The admiralty rule above stated extends to all cases of maritime tort occasioned by concurring negligence. The Max Morris, 28 Fed. 881. Thus, where the contributory negligence of libellant in descending an unsafe ladder on board ship was not wilful, gross, or inexcusable, and libellee was guilty of negligence in not providing a safe ladder, the former is entitled to recover a portion of his damages and will be allowed nothing for his pain and suffering, but will be allowed the wages he would have earned but for the accident. The Truro, 31 Fed. 158.

93. The Chattahoochee, 173 U. S. 540, 543, 19 S. Ct. 491, 43 L. ed. 801 [*citing* The North Star, 106 U. S. 17, 1 S. Ct. 41, 27 L. ed. 91]; The Potomac, 105 U. S. 630, 26 L. ed. 1194; The Schooner Catharine *v.* Dickinson, 17 How. (U. S.) 170, 15 L. ed. 233.

94. Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. 883, 43 U. S. App. 190, 20 C. C. A. 86 [*citing* Mills *v.* Armstrong, 13 App. Cas. 1, 12 P. D. 58, 11 P. D. 31, construing Lord Campbell's act].

95. The A. W. Thompson, 39 Fed. 115.

5. Limitation of Action — Laches — a. No Statutory Period. Except in criminal cases[96] and those of a quasi-criminal character, as for offenses against the revenue laws for which forfeitures are enforced by proceedings *in rem* in admiralty,[97] no period of limitation is fixed for the commencement of suits in admiralty.[98] The exercise of admiralty and maritime jurisdiction in the United States courts is governed entirely by the legislation of congress and the general principles of maritime law.[99] They are not controlled by the periods of limitation prescribed by state statutes.[1]

b. Stale Demands — (I) *General Rule.* Independently, however, of any limitations, courts of admiralty will not entertain suits for stale demands, and they adopt the principle that laches or delay will, under proper circumstances, constitute a valid defense.[2]

(II) *Application of Rule* — (A) *Generally.* While no arbitrary or fixed period of time is established as an inflexible rule, the delay which will defeat a proceeding in admiralty must in every case depend upon the peculiar equitable circumstances presented,[3] as upon the former opportunities for the enforcement of the claim and the change of circumstances affecting the rights and conditions of parties; and after a reasonable opportunity has been had for the enforcement of a claim, it will be held stale as against third persons who have in good faith

96. See Criminal Law.

97. U. S. Rev. Stat. (1878), § 1047; Benedict Adm. (3d ed.) §§ 604, 606*a*.

98. Benedict Adm. (3d ed.) § 604.

99. The Queen, 78 Fed. 155 [*affirmed* in Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135].

English statute not applicable.— The statute of Anne limiting suits in admiralty for seamen's wages to a certain period does not apply to suits in the courts of the United States. Willard *v.* Dorr, 3 Mason (U. S.) 91, 29 Fed. Cas. No. 17,679.

1. The Queen, 78 Fed. 155 [*affirmed* in Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135]; The Queen of the Pacific, 61 Fed. 213; Willard *v.* Dorr, 3 Mason (U. S.) 91, 29 Fed. Cas. No. 17,679; Brown *v.* Jones, 2 Gall. (U. S.) 477, 4 Fed. Cas. No. 2,017.

2. The Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896; The Brig Sarah Ann, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12,342.

3. The Key City, 14 Wall (U. S.) 653, 20 L. ed. 896; The Blenheim, 5 Sawy. (U. S.) 192, 3 Fed. Cas. No. 1,539; The Harriet Ann, 6 Biss. (U. S.) 13, 11 Fed. Cas. No. 6,101.

Claims not stale.— Long delay not shown to have led to losses. Joy *v.* Allen, 2 Woodb. & M. (U. S.) 303, 13 Fed. Cas. No. 7,552.

Delay in proceeding against vessel to recover penalty until the recovery of judgment in a personal action against the master. Hatch *v.* The Steam-Boat Boston, 3 Fed. 807.

Demand for loss of freight prosecuted on the first arrival of the vessel within the district where the cause of action arose. The Blenheim, 5 Sawy. (U. S.) 192, 3 Fed. Cas. No. 1,539. See also The Ship Mary, 1 Paine (U. S.) 180, 16 Fed. Cas. No. 9,186.

Delay of interveners, in a suit *in rem*, in issuing process against the vessel, resulting from a mistaken belief that a stipulation under the original libel under which the vessel had been released before they had filed their claims was security for the payment thereof, where the mistake was not disclosed until a decision of the supreme court reversing a decision below in favor of the interveners. The Oregon, 73 Fed. 846.

A libel by seamen of a schooner against a steamship for loss by collision, where the process was not issued for five years after filing the libel and it appeared that proceedings were pending against the steamship by the owners of the schooner. The Steamship Leo, 5 Ben. (U. S.) 486, 15 Fed. Cas. No. 8,252, 8 Ben. (U. S.) 506, 15 Fed. Cas. No. 8,253.

Delay pending another case arising out of the same transaction and substantially involving the merits of the case at bar. Jones *v.* The Richmond, 13 Fed. Cas. No. 7,492.

Stale demands.—Twelve years' unexplained delay. Willard *v.* Dorr, 3 Mason (U. S.) 161, 29 Fed. Cas. No. 17,680.

Unexplained delay in filing a libel in 1873 for a collision occurring in 1868. The Columbia, 13 Blatchf. (U. S.) 521, 6 Fed. Cas. No. 3,036.

Six and a half years' delay in bringing libel for loss of cargo by collision, waiting, by advice of counsel, until a litigation as to the fault of the vessels had been decided in a suit by the owner of the lost vessel, nothing preventing suit during this period. Nesbit *v.* The Amboy, 36 Fed. 925.

A libel *in personam* filed against a well-known merchant, accessible daily, eight and a half years after action had accrued, though ineffectual proceedings *in rem* for the satisfaction of the same claim had been pending most of that period. Scull *v.* Raymond, 18 Fed. 547.

Failure by a member of a whaling crew to prosecute the vessel-owners for his share of oil lost abroad until nearly six years have elapsed and the master is dead and insolvent. Joy *v.* Allen, 2 Woodb. & M. (U. S.) 303, 13 Fed. Cas. No. 7,552.

acquired interests in the vessel by lien or purchase.[4] More leniency is applied where conditions have not so changed or rights of third parties intervened,[5] and

4. The Nikita, 62 Fed. 936, 23 U. S. App. 564, 10 C. C. A. 674; The Young America, 30 Fed. 789; The Thomas Sherlock, 22 Fed. 253; Coburn *v.* Factors, etc., Ins. Co., 20 Fed. 644; The Bristol, 20 Fed. 800; The Robert Gaskin, 9 Fed. 62; The Harriet Ann, 6 Biss. (U. S.) 13, 11 Fed. Cas. No. 6,101 (holding that two seasons is enough to bar a claim for wages on the western lakes); Smith *v.* Sturgis, 3 Ben. (U. S.) 330, 22 Fed. Cas. No. 13,111; Stillman *v.* The Steamboat Buckeye State, Newb. Adm. 111, 23 Fed. Cas. No. 13,445.

Enforcement as against purchaser.— Where a lien is to be enforced to the detriment of a purchaser for value without notice or demand, the defense of laches will be held valid under a shorter time and a more rigid scrutiny of the circumstances of the delay than where the claimant is the owner at the time the lien accrues. The Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896. See also, in this connection, The Lyndhurst, 48 Fed. 839 (delay for nearly a year to take steps to enforce his lien by one furnishing supplies, though the vessel had been all the time within easy reach of process); The Bristol, 20 Fed. 800 (four years after damage done held laches as against owners who purchased two years after the collision and after taking every means to ascertain the existence of any liens); The Harriet Ann, 6 Biss. (U. S.) 13, 11 Fed. Cas. No. 6,101; Griswold *v.* The Steamer Nevada, 2 Sawy. (U. S.) 144, 11 Fed. Cas. No. 5,839 (holding that two years' delay to enforce a claim against a vessel which in the meantime had been within the jurisdiction repeatedly would bar the claim as against a mortgagee without notice under the mortgage made nine months after the cause of action accrued); The D. M. French, 1 Lowell (U. S.) 43, 7 Fed. Cas. No. 3,938; The Favorite, 1 Biss. (U. S.) 525, 8 Fed. Cas. No. 4,696 (holding that a libel for loss of goods filed two years and ten months after the loss, and after a *bona fide* assignee of the shipper's bill of lading had seized the boat, cannot be maintained, though the boat has been released on bond); The Scow Bolivar, Olc. Adm. 474, 3 Fed. Cas. No. 1,609 (holding that an action *in rem* for wages by a seaman of a small sailing-craft plying on the Hudson river between Troy, Bristol, and the city of New York, cannot be maintained after a year from the sale of the vessel to a *bona fide* purchaser without notice of the outstanding wages, especially if the seaman was present and knew of the sale); The Utility, Blatchf. & H. Adm. 218, 28 Fed. Cas. No. 16,806 (holding that a lien for supplies furnished in New York to a vessel owned in North Carolina was lost through laches where more than two years had elapsed and no demand had been made of the master who contracted the debt, or of those who owned the vessel, when the debt was contracted, and the vessel had since made several voyages between New York and North Carolina and had been sold at public auction to a *bona fide* purchaser without notice of the debt).

Simply filing a libel is notice to no one and will not prevent a claim becoming stale, but taking out an attachment and placing it in the hands of the marshal of the district where the vessel is owned will have that effect. The Emma L. Coyne, 8 Fed. Cas. No. 4,466, 11 Chic. Leg. N. 98. See also The Robert Gaskin, 9 Fed. 62.

Lien based on running account.— Where a maritime lien for repairs was based on a running account extending over nearly four years, and during the whole of that time the account was reduced by payments made with considerable regularity, the last payment having been made within a week before the libel was filed to enforce the lien, it was held that the libel was not barred by laches, though the last repairs were made nearly a year before filing the libel, and that the claim should not be postponed to those of other lienors who furnished supplies to the vessel while the payments to libellant were being made. The John Dillon, 46 Fed. 527.

Where witnesses have perished.— In The Alaska, 33 Fed. 107, it was held that libellants were not guilty of laches by waiting eleven months after the vessel had been sunk by collision, though in the interval the offending steamer had passed into the possession of a third party without notice of the collision, where the libellants' most important witness had perished with the sunken vessel.

Pursuit of vessel into another district.— Where the lien-holder and owner are both residents of the same district there is no obligation on the part of the former to pursue the vessel into another district in order to prevent his claim from becoming stale. The C. N. Johnson, 19 Fed. 782; The Emma L. Coyne, 8 Fed. Cas. No. 4,466, 11 Chic. Leg. N. 98. See also MARITIME LIENS.

5. **Where no bona fide rights intervene.**— Where no claims of subsequent purchasers, lienors, or encumbrancers intervene, a maritime lien will not become stale or barred from lapse of time through a delay of two years in filing the libel, merely on the ground that some witnesses have been lost by the respondent. The Martino Cilento, 22 Fed. 859; The Galloway C. Morris, 2 Abb. (U. S.) 164, 7 Phila. (Pa.) 572, 27 Leg. Int. (Pa.) 204, 9 Fed. Cas. No. 5,204, holding that where there has been no change of ownership forbearance to enforce a seaman's lien for wages until after twenty-one months' continuous service will not render his claim stale. So, though service may be had upon foreign owners through an agent, failure to sue for sixteen months and until the first return of the ship to port, for personal injuries received while stowing cargo, will not prevent the maintenance of a suit *in rem*, where no other liens or rights have intervened, as by suing *in personam* the injured party would be compelled to waive his lien and rely on a personal judgment against the non-resident foreigners. The Conde Wifredo, 77 Fed. 324, 41 U. S. App. 438, 467, 609, 23 C. C. A. 187.

in order to apply the rule of strictness in scrutinizing the circumstance of the delay as against subsequent intervening rights, the subsequent transfer of the possession must be without notice to the purchaser of the existing claim.[6]

(B) *Reference to Analogies of Statutory Limitations.* While courts of admiralty are not bound by local statutes, in determining the question of laches they govern themselves by the analogies of the common-law or statutory limitations in the absence of special or exceptional circumstances.[7]

(III) *Necessity of Pleading as Defense.* The defense that a claim is barred as stale cannot be made unless it is properly raised by pleading it in the answer.[8]

N. Dismissal and Discontinuance — 1. In General. It is not improper to dismiss a libel on exceptions thereto,[9] and where the evidence is conflicting, and the claim is not established, and the court cannot render a satisfactory judgment, it may dismiss the libel without prejudice and without costs.[10]

2. Dismissal as to Party to Be Sworn. In a joint libel against two or more persons for a marine tort the court may dismiss the libel as to one, even if there is some evidence against him, for the purpose of permitting him to be used as a witness, if justice requires it.[11]

3. Effect of Dismissal as to Cross-Libel. If a cross-libel is dismissed, all the issues in the original suit remain as they were, and open for consideration;[12] but if the libel is dismissed, a cross-libel not so connected with the subject-matter of the libel as to be maintainable must also be dismissed.[13]

4. Dismissal for Want of Prosecution. According to the proper admiralty practice, each party is expected to attend court, and, when his causes are called, either bring them on for trial or by order of court or consent of the adversary

6. The Carrie, 46 Fed. 796.

Who is an innocent purchaser.— Where the purchaser was told by the seller that a seaman had claims on the boat, a claim for seaman's wages is not stale as against such purchaser where the libel was not filed for eighteen months after the services performed. The Steamboat Argo, 7 Ben. (U. S.) 304, 1 Fed. Cas. No. 515.

Accident notorious.— A libel for a collision filed after change of ownership is not barred where the accident was so notorious that the possibility of claims arising therefrom could not escape reasonable diligent inquiry on the part of the purchaser, and in such case the eleven months' delay in filing the libel was held not to be unreasonable. The Columbia, 27 Fed. 704.

Barge taken in payment of debt.— One who takes a barge in payment of a debt is not an innocent purchaser so as to be entitled to the benefit of the rule that when the business in which a vessel is engaged is divided into distinct seasons of activity old claims must be enforced before the debts growing out of the next season are incurred. The Alfred J. Murray, 60 Fed. 926.

7. Bailey *v.* Sundberg, 49 Fed. 583, 1 U. S. App. 101, 1 C. C. A. 387; Southard *v.* Brady, 36 Fed. 560; Scull *v.* Raymond, 18 Fed. 547; The Blenheim, 5 Sawy. (U. S.) 192, 3 Fed. Cas. No. 1,539; Hall *v.* Hudson, 2 Sprague (U. S.) 65, 11 Fed. Cas. No. 5,935; Scammon *v.* Cole, 3 Cliff. (U. S.) 472, 21 Fed. Cas. No. 12,432; Jay *v.* Allen, 1 Sprague (U. S.) 130, 13 Fed. Cas. No. 7,235; The Brig Sarah Ann, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12,342.

Application of rule.— In The Frank Moffat, 2 Flipp. (U. S.) 291, 9 Fed. Cas. No. 5,060, it was held that where there had been no change of ownership libellant was not barred of his action if he commenced it within the time prescribed by the statute of limitations. But in Nesbit *v.* The Amboy, 36 Fed. 925, it was held that the period of limitation fixed by statute in common-law actions should not be extended by discretion in admiralty cases except for some cause of practical inability to sue or for some peculiarity of a maritime nature which has been recognized in a court of admiralty and makes it a matter of justice that the discretion should be so applied.

8. The Melissa, Brown Adm. 476, 16 Fed. Cas. No. 9,400; The Platina, 3 Ware (U. S.) 180, 19 Fed. Cas. No. 11,210; Jones *v.* The Richmond, 13 Fed. Cas. No. 7,492; The Steamboat Swallow, Olc. Adm. 334, 23 Fed. Cas. No. 13,665.

Bona fide purchaser.— In order to maintain the defense of stale claim it is necessary to allege and prove that respondents are purchasers in good faith for a valuable consideration and without notice of the existence of the claim. The Melissa, Brown Adm. 476, 16 Fed. Cas. No. 9,400.

9. The Pauline, 1 Biss. (U. S.) 390, 19 Fed. Cas. No. 10,848 [*following* Vandewater *v.* Mills, 19 How. (U. S.) 82, 15 L. ed. 554].

10. The Elsie Fay, 48 Fed. 700.

11. Elwell *v.* Martin, 1 Ware (U. S.) 45, 8 Fed. Cas. No. 4,425, holding, however, that where there is any evidence to inculpate such party the dismissal cannot be demanded as a matter of right.

12. The Dove, 91 U. S. 381, 23 L. ed. 354.

13. Kemp *v.* Brown, 43 Fed. 391.

have them continued; or, if his adversary be not present, have them dismissed or decided by default.[14] In analogy to the practice of a court of equity, if that court will not dismiss a suit because some of the joint complainants refuse to proceed, a court of admiralty will not dismiss a libel under like circumstances.[15]

5. Voluntary Discontinuance or Dismissal. After the introduction of pertinent evidence on the merits, plaintiff cannot suffer a nonsuit, so as not to be barred, unless by consent of the opposite party or on leave of court for sufficient reason,[16] though the rule recognized in some of the state courts is also followed, that a libellant has the right, at any stage of the cause, to dismiss his libel on payment of costs.[17]

O. Evidence and Method of Taking Proof — 1. In General — a. Dependent on Rules of Particular District. No rules for producing or taking evidence in admiralty have been prescribed by the supreme court under its statutory authority,[18] and therefore each district court follows its own rules as to the examination of witnesses. In some districts the testimony is reduced to writing before a commissioner,[19] while in others the witnesses are heard orally by the court.[20]

b. Competency of Witnesses. The laws of the state in which the admiralty court is held control the competency of witnesses,[21] and objections to evidence on

14. The Mariel, 6 Fed. 831 (holding that where the claimant has an equal right to move the cause, the practice of the court does not authorize a dismissal of the libel for libellant's delay in bringing it to a hearing after issue joined); Benedict Adm. (3d ed.) § 598 (wherein it appears that this is the practice of the supreme court of the United States).

Refusal to go to trial.— Douglass *v.* The Ship Washington, Crabbe (U. S.) 452, 7 Fed. Cas. No. 4,033, wherein the libel was dismissed for delay in prosecuting the same, because the libellant refused the option of going to trial on the libel and an answer and replication filed on the day appointed for a special hearing.

Accidental absence of witness.— A suit will not be dismissed for failure to prosecute it where it was placed on the calendar immediately after issue joined, but was not called for trial by reason of the accidental absence of witnesses. Chambers *v.* The Henry Kneeland, 5 Fed. Cas. No. 2,581*a*, in which case the claimants did not notice the cause on their part, as they were authorized to do under rule, and it was considered that libellants were not guilty of such neglect in the matter as entitled the claimants to have the libel dismissed.

15. Richmond *v.* New Bedford Copper Co., 2 Lowell (U. S.) 315, 20 Fed. Cas. No. 11,800.

16. Folger *v.* The Robert G. Shaw, 2 Woodb. & M. (U. S.) 531, 9 Fed. Cas. No. 4,899.

Agreement to discontinue.— A verbal agreement between the parties for a settlement and discontinuance of a libel in admiralty, upon the terms of which the parties afterward differed, and which agreement was not set up in answer, cannot be insisted upon as having ousted the jurisdiction of the court. The Robert Jenkins, 22 Fed. 797.

17. The Brig Oriole, Olc. Adm. 67, 18 Fed. Cas. No. 10,573.

See, further, Dismissal and Nonsuit.

Additional stipulations.— On a voluntary dismissal of a libel and tender of accrued costs to claimant, the court will not entertain a motion to compel libellant to file additional stipulations in the cause, and to award out of such securities an indemnity to claimant for the wrongful prosecution of the action. The Brig Oriole, Olc. Adm. 67, 18 Fed. Cas. No. 10,573.

18. U. S. Rev. Stat. (1878), § 862.

Reception of evidence and taking testimony after judgment.— Notwithstanding an order of court closing all testimony in a cause after a limited time under a commission, the court will enlarge it upon proof of newly discovered evidence which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof. The Schooner Ruby, 5 Mason (U. S.) 451, 20 Fed. Cas. No. 12,103. See also The Glide, 68 Fed. 719, 25 U. S. App. 406, 15 C. C. A. 627. In this case, on the hearing of a cause, claimant, a non-resident, failed to appear, and libellant's evidence was taken, and the case adjourned. On the adjourned day claimant failed to appear, and his proctor failed to give a reason for his absence, and the case proceeded to judgment for libellant. It appeared that claimant was prevented by sickness from attending or advising with his proctor, and it was held proper to permit him to take evidence pending an appeal.

19. The Guy C. Goss, 53 Fed. 826.

20. Oral testimony in admiralty cases should not be taken down by questions and answers, but in the narrative form. The Syracuse, 6 Blatchf. (U. S.) 238, 23 Fed. Cas. No. 13,718.

21. U. S. Rev. Stat. (1878), § 858; Ryan *v.* Bindley, 1 Wall. (U. S.) 66, 17 L. ed. 559; Wright *v.* Bales, 2 Black (U. S.) 535, 17 L. ed. 264; Vance *v.* Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97; The Trial, Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170.

Examination of parties.— Since the act of July 2, 1864, parties to actions in the courts of the United States are no longer excluded as witnesses (U. S. Rev. Stat. (1878), § 858), but prior to the passage of that act, while in

the ground of competency must be made at the hearing. They come too late if made on the argument.[22]

c. Admissibility — (I) *In General.* A court of admiralty, being judge both of the law and fact, is not confined to the strict rules of the common law in respect to the admission of evidence,[23] and may take notice of matters not strictly proved.[24]

(II) *Declarations and Admissions.* The declarations of the master concerning the contract of the seamen are admissible in a suit against the owners, though not strictly part of the *res gestæ*,[25] and a statement by the advocate of the party, in open court, the day after the hearing, made by authority of the party, may be taken as an admission in contradiction of the evidence submitted by him.[26]

(III) *Documentary Evidence* — (A) *In General.* An entry made in a vessel's log with full knowledge or opportunity for ascertaining the truth must be accepted as the truth when it tells against the party making it;[27] and the vessel's

many cases parties were allowed to testify in their own behalf where the strict rules of the common law excluded them (Benedict Adm. (3d ed.) § 534), it was held that state statutes admitting parties as witnesses did not apply in admiralty (The Ship William Jarvis, 1 Sprague (U. S.) 485, 29 Fed. Cas. No. 17,697; The Australia, 3 Ware (U. S.) 240, 2 Fed. Cas. No. 667; The Independence, 2 Curt. (U. S.) 350, 13 Fed. Cas. No. 7,014); but the testimony of the libellants themselves in an action *in rem*, the one for the other, although legally admissible, ought to be narrowly scrutinized and received with caution (The Steamboat Swallow, Olc. Adm. 334, 23 Fed. Cas. No. 13,665; Graham *v.* Hoskins, Olc. Adm. 224, 10 Fed. Cas. No. 5,669).

The master of a vessel who hypothecated her on bottomry is a competent witness in favor of the holder of the bottomry, particularly if released by him (Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163) or for the owner in a suit *in rem* for wages by one of the ship's company (The Steamboat Hudson, Olc. Adm. 396, 12 Fed. Cas. No. 6,831).

22. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97.

23. Elwell *v.* Martin, 1 Ware (U. S.) 45, 8 Fed. Cas. No. 4,425.

Estimates of damage — When admissible.— Good faith in the prosecution of claims forbids that vague or loose estimates of damage should be received where proper evidence has been voluntarily parted with by the suitor. Estimates may be received, however, where the proper evidence has been parted with through misapprehension as to the extent of the suitor's rights, though in such cases he should not recover beyond the lowest estimates of the most credible witnesses. Wolff *v.* The Vaderland, 18 Fed. 733.

Evidence at former trial — When inadmissible.— After a vessel libeled for collision had been released on stipulation, intervening libels were filed, on which a trial was had, and a judgment rendered for interveners, which was reversed on appeal, on the ground that the liability of the claimant on the stipulation could not be increased by the subsequent filing of new claims, and that, as the vessel had been discharged, the court could not adjudicate such claims. It was held that under such decision, which in effect determined that the vessel was not a party to the judgment, after new process had been issued on the intervening petitions, and the vessel again taken into custody, the parties were not the same, so as to render testimony taken on the former trial admissible on a second trial. The Oregon, 89 Fed. 520.

24. The Bark J. F. Spencer, 3 Ben. (U. S.) 337, 13 Fed. Cas. No. 7,315.

25. The Enterprise, 2 Curt. (U. S.) 317, 8 Fed. Cas. No. 4,497.

Declarations by one not understanding English.—A foreign master, who understands and speaks English imperfectly, will not be charged upon his declarations or admissions in that language without clear proof that he well understood the meaning of what was addressed to him and that used by him in reply. The Bark Lotty, Olc. Adm. 329, 15 Fed. Cas. No. 8,524.

26. The Steam Tugs Harry and May Flower, 9 Ben. (U. S.) 524, 11 Fed. Cas. No. 6,147.

Sufficient admission of ownership.— A tender by respondents on libel for services as stewardess of a ship is an admission of ownership of the vessel. Jones *v.* Crowell, 13 Fed. Cas. No. 7,459.

Admission insufficient to establish demand against proceeds.— The admissions of the owner of a boat, made after the boat was placed in the custody of the law and had been ordered to be sold, are not competent to establish demands made against the proceeds of the sale of the boat. Renshaw *v.* Steamboat Pawnee, 19 Mo. 532.

27. The Newfoundland, 89 Fed. 510. But the charges made on the shipping-papers of advances to the seamen in the course of the voyage are not evidence until verified by the suppletory oath of the master. The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597.

Memorandum-book.— Written entries by the captain in a memorandum-book, made a month afterward from alleged contemporaneous entries in pencil, erased, are not entitled, as evidence, to the weight of a log-book properly kept, or of written contemporaneous entries. Brink *v.* Lyons, 18 Fed. 605.

manifest is also admissible under some circumstances.[28] So, too, when the evidence is found in commercial documents executed abroad, such documents may be considered without strict proof when the *res gestæ* afford the highest practical guaranties for their authenticity and correctness. But this practice should not be extended so as to justify any laches in obtaining full proof, the necessity of which could have been reasonably foreseen.[29]

(B) *Secondary Evidence* — (1) In General. In an action on shipping-articles parol evidence of their contents may be given on proving a reasonable excuse for not producing them.[30]

(2) Copies. Under certain circumstances copies may be introduced in evidence in lieu of the original papers.[31]

d. Production of Books and Papers. A proceeding *in rem* is not within the statute of 1789, which authorizes an order to produce books and writings on the trial of actions at law.[32]

28. Thus, on a libel charging a vessel with having violated the embargo acts in departing from a port in the United States and proceeding to Antigua, it appeared that she was at Camden, N. C., in December and January, and was in the port of Norfolk in April, and it was held that the report and manifest of her cargo, with the affidavit made by the captain before the collector at Norfolk, were admissible to show that she took in her cargo at Antigua. U. S. *v.* The Schooner Little Charles, 1 Brock. (U. S.) 347, 26 Fed. Cas. No. 15,612. So, too, on a prosecution for smuggling, a paper purporting on its face to be the manifest of the steamer was shown to have been produced from the usual place of deposit in the custom-house for ships' manifests, and it was shown that no other manifest for the voyage was on file, but no other proof of its genuineness was offered. The paper was held admissible in evidence. The Steamer Missouri, 4 Ben. (U. S.) 410, 17 Fed. Cas. No. 9,653.

29. The Boskenna Bay, 22 Fed. 662.

The official certificate of a notary proves the making of a marine protest and what it contains. It is competent evidence in a court of admiralty, and the examination of the notary by commission, in order to prove the protest, is not necessary. The Gallego, 30 Fed. 271.

30. The Brig Osceola, Olc. Adm. 450, 18 Fed. Cas. No. 10,602; Patten *v.* Park, Anth. N. P. (N. Y.) 46.

In a suit upon shipping-articles by a seaman to recover wages for a voyage, if the articles are not produced by the master or owner at the trial, after due requirement by the seaman, his statement of the contents thereof, when disputed, will be *prima facie* evidence of the same. But when a seaman ships under articles at Boston in December, 1842, and at New Orleans in March, 1843, and leaves the ship at Bordeaux in June, 1843, and in his libel filed against the vessel in this court for wages on those voyages he prays that "the shipping-articles may be produced by the master or owner," that is not such notice or requirement as will render his statement proof of their contents. The Brig Osceola, Olc. Adm. 450, 18 Fed. Cas. No. 10,602.

31. Documents relating to condemnation and sale.— Copies of documents relating to the condemnation and sale of a vessel, certified by the British consul to be copies of official documents on file in his office, and which had been proved by deposition a considerable time before the trial, so that the parties were not taken by surprise, were admissible in evidence. The Bark J. F. Spencer, 3 Ben. (U. S.) 337, 13 Fed. Cas. No. 7,315.

Protest.— A copy of protest offered in evidence without proof of its correctness as a copy,— where it was shown that a protest was made at the time and place where the copy purported to have been made, and that it was signed by the mate, and the mate, though called as a witness, was not asked in relation to the truth of the copy and did not dispute it,— was admissible. The Bark Vivid, 4 Ben. (U. S.) 319, 28 Fed. Cas. No. 16,978.

Records of foreign vice-admiralty court.— The proceedings of a vice-admiralty court of a foreign nation were held to be sufficiently verified by proof of the handwriting of the judge, and of the register of the court, to a certificate that the papers were a true copy from the records. Mumford *v.* Bowne, Anth. N. P. (N. Y.) 56.

Shipping-articles.— It seems that where original shipping-articles are proved before a commissioner and redelivered to the vessel, which thereupon pursues her voyage, a copy, certified by the commissioner, is competent evidence upon the hearing. Henry *v.* Curry, Abb. Adm. 433, 11 Fed. Cas. No. 6,381.

Continuance granted to procure originals.— In a suit to enforce a bottomry bond executed in a distant foreign country, though an attested copy thereof is not admissible in evidence, yet, being produced, the court will grant a continuance, that the original may be procured. The Jerusalem, 2 Gall. (U. S.) 191, 13 Fed. Cas. No. 7,293.

No witness to correctness of copy.— A copy of a survey of a vessel, not purporting to have been made by any one connected with her, is not admissible against her, no witness able to prove or disprove its correctness being called or shown to be within reach. The Bark Vivid, 4 Ben. (U. S.) 319, 28 Fed. Cas. No. 16,978.

32. U. S. *v.* Twenty-Eight Packages of Pins, Gilp. (U. S.) 306, 28 Fed. Cas. No. 16,561.

e. Weight and Sufficiency. The admiralty court will determine facts upon the principles which govern trials by jury.[33]

2. Depositions. In admiralty, as well as in other courts, the testimony of absent witnesses or those about to depart from the jurisdiction may be taken *de bene esse*[34] or under a commission designated as a *dedimus potestatem* with annexed interrogatories,[35] or, in cases of foreign witnesses, by letters rogatory addressed to a foreign tribunal, requesting its aid in taking the evidence;[36] or, where no suit is pending, a court of equity may direct the taking of depositions *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States; and such depositions or similar ones taken

33. The Schooner Romp, Olc. Adm. 196, 20 Fed. Cas. No. 12,030.

Balance in favor of greatest number of witnesses.— When there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides, the balance of evidence will be regarded as in favor of the party having the greatest number. The Brig Napoleon, Olc. Adm. 208, 17 Fed. Cas. No. 10,015.

Presumptions.— A neglect to state material facts within the knowledge of the party will be taken most unfavorably against him (Poole *v.* The Washington, 19 Fed. Cas. No. 11,271, 9 N. Y. Leg. Obs. 321), and where the evidence is such as to leave the circumstances and cause of a personal injury so uncertain that the court can give no logical reason for determining the issue in libellant's favor, the presumption that the person charged with the tort is not guilty must be maintained (The Meta, 88 Fed. 21).

34. U. S. Rev. Stat. (1878), §§ 863–865; Benedict Adm. (3d ed.) §§ 520–530. But under Rule 8 of the Fifth Circuit, depositions cannot be taken *de bene esse* in the circuit court of appeals, but only by a commission, under Supreme Court Rule 12. The Beeche Dene, 55 Fed. 526, 2 U. S. App. 582, 5 C. C. A. 208.

Cannot be taken in foreign country.— Depositions *de bene esse* cannot be taken in a foreign country under U. S. Rev. Stat. (1878), § 863. Cortes Co. *v.* Thannhauser, 21 Blatchf. (U. S.) 552, 18 Fed. 667.

The production of books and papers may be enforced on such examination, but not merely to refresh the memory of the witness. U. S. *v.* Tilden, 10 Ben. (U. S.) 566, 28 Fed. Cas. No. 16,522.

Suppression of deposition.— A deposition thus taken may be suppressed on motion, but it must be done promptly and before trial. Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Doane *v.* Glenn, 21 Wall. (U. S.) 33, 22 L. ed. 476.

Waiver of objection.— When a witness is examined *de bene esse* out of court in an admiralty cause by the claimants, and is cross-examined by the libellant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants. The Brig Osceola, Olc. Adm. 450, 18 Fed. Cas. No. 10,602.

35. U. S. Rev. Stat. (1878), §§ 866–870; Benedict Adm. (3d ed.) §§ 531, 532.

By what practice governed.— U. S. Rev. Stat. (1878), § 866, authorizing any of the courts of the United States to issue commissions to take depositions "according to common usage," does not require a court of admiralty to conform to the practice in the state courts, and it may by rule provide a different method for taking depositions. The Westminster, 96 Fed. 766.

Representation of adverse party.— Under Rule 40 in admiralty of the district court for the eastern district of Pennsylvania, which permits parties to attend the examination of witnesses whose testimony is taken on commission, either personally or by their proctors, if the adverse party desires to be represented at such an examination he should furnish the name and address of his representative to the party taking out the commission, or to the commissioner, or file the same with his cross-interrogatories, in which case it will be the duty of the commissioner to give such representative notice. The Westminster, 96 Fed. 766.

The oral cross-examination of witnesses on a commission abroad may be allowed as a condition of waiving objection of irregularity in the motion for the commission. The Steamship Louisiana, 1 Ben. (U. S.) 328, 15 Fed. Cas. No. 8,536.

Taking for use on appeal.— A commission to take testimony cannot be issued by the circuit court in an admiralty case, after an appeal has been taken to the supreme court, until after the supreme court, on motion, has decided the question as to the admissibility of the evidence. The Ocean Queen, 6 Blatchf. (U. S.) 24, 18 Fed. Cas. No. 10,411.

Commission issued to wife of witness.— Where an application was made for a commission to examine a witness who resided near Goa, in the East Indies, it appearing that no one was known who could be named as commissioner, except the wife of the witness, she was named as commissioner. The Ship Norway, 2 Ben. (U. S.) 121, 18 Fed. Cas. No. 10,358.

Commission refused when.— An application in the supreme court by appellant for a commission to take testimony of certain witnesses will be refused where no excuse was shown by applicant why the witnesses were not examined either by the district or the circuit courts. The Mabey, 13 Wall. (U. S.) 738, 20 L. ed. 473.

36. U. S. Rev. Stat. (1878), §§ 875, 4071; Benedict Adm. (3d ed.) § 533; Conklin Adm. 640.

under state laws and admissible in the state courts will be admissible afterward, when suit is brought involving the matters.[37]

5. ANSWERS TO INTERROGATORIES. Answers to interrogatories annexed to the pleadings stand, as evidence, like the pleadings only. What is admitted needs no further proof; but, as respects matters that still remain at issue, answers to interrogatories are not affirmative evidence in favor of the party making them.[38]

4. PLEADINGS AS EVIDENCE—a. In General. Neither party can contradict by proof the averments in his pleading,[39] and the opposite party is entitled to rely thereon as an admission of facts.[40] Nor do such allegations require proof unless denied and put in issue.[41]

b. Allegations in Libel. The allegations of one of the parties in a libel are not evidence for him.[42]

c. Allegations in Answer. The answer to the libel, though on oath, is not evidence,[43] but it may be referred to, to explain ambiguities in the testimony and in aid of presumptions arising from the evidence to supply connecting links in the proof.[44]

d. Claim. A claim to a vessel and cargo filed in an admiralty cause, though sworn to, is not evidence.[45]

37. U. S. Rev. Stat. (1878), §§ 866, 867.

Deposition taken in another suit.— In a suit for collision by the master of a vessel in behalf of the cargo-owners, libellant cannot read in evidence a deposition taken in behalf of the owners of the vessel in a suit by them for the same collision. The Steamboat John H. Starin, 9 Ben. (U. S.) 331, 13 Fed. Cas. No. 7,351.

Irregularities insufficient to exclude depositions.— The depositions of witnesses for claimant will not be suppressed because taken before answer, where prejudice to libellant does not appear. The Ship Pride of the Ocean, 10 Ben. (U. S.) 610, 19 Fed. Cas. No. 11,419. See also Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97, where no preliminary proof was made of the witness's materiality, the deposition was not sealed up, and no notice of its being filed was given, but it appeared that the commissioner who took it was clerk of the court, and that the objecting proctor knew that it had been taken, and it was thereupon admitted.

38. The Serapis, 37 Fed. 436; Cushman *v.* Ryan, 1 Story (U. S.) 91, 6 Fed. Cas. No. 3,515; Matter of The L. B. Goldsmith, Newb. Adm. 123, 15 Fed. Cas. No. 8,152, to the effect that sworn answers to special interrogatories in admiralty are not conclusive as to disputed facts. Their effect at most is to turn the scale when *in equilibrio*. They are no more evidence for one party than for the other, and will not be conclusive for either if the weight of proof is on the other side, or if, by self-contradiction, suspicion attaches to the answers themselves. But see The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597, to the effect that answers under oath to special interrogatories are evidence in the cause, as well in favor of as against the party answering.

39. Totten *v.* The Pluto, 24 Fed. Cas. No. 14,106.

40. Ward *v.* The Brig Fashion, Newb. Adm. 8, 6 McLean (U. S.) 152, 29 Fed. Cas. No. 17,154; Totten *v.* The Pluto, 24 Fed. Cas. No. 14,106.

41. Ward *v.* The Brig Fashion, Newb. Adm. 8, 6 McLean (U. S.) 152, 29 Fed. Cas. No. 17,154.

42. Benedict Adm. (3d ed.) § 518; The Brig Osceola, Olc. Adm. 450, 18 Fed. Cas. No. 10,602, holding that the statement of the seaman in the libel is incompetent evidence to prove services rendered by him on board the vessel under shipping-articles. And see Jay *v.* Almy, 1 Woodb. & M. (U. S.) 262, 13 Fed. Cas. No. 7,236, to the effect that such allegations are not evidence for libellant unless called for by the other side, and are then to be weighed as they deserve, without requiring, in all cases, more than one witness to overcome them.

43. The Australia, 3 Ware (U. S.) 240, 2 Fed. Cas. No. 667; The Crusader, 1 Ware (U. S.) 448, 6 Fed. Cas. No. 3,456.

The equity rule requiring two witnesses, or one witness and corroborating circumstances, to overcome the denial in the answer, is not recognized in admiralty courts. Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232; Sherwood *v.* Hall, 3 Sumn. (U. S.) 127, 21 Fed. Cas. No. 12,777; Hutson *v.* Jordan, 1 Ware (U. S.) 393, 12 Fed. Cas. No. 6,959; U. S. *v.* The Schooner Matilda, Brunn. Col. Cas. (U. S.) 258, 5 Hughes (U. S.) 44, 26 Fed. Cas. No. 15,741.

Admission against interest.— In an action *in rem* for a collision, the answer of the owners of the colliding vessel, admitting facts to their prejudice, will prevail in favor of libellants against the testimony of the pilot of the vessel to the contrary. The Santa Claus, Olc. Adm. 428, 21 Fed. Cas. No. 12,327. And while an answer containing an admission of a contract as stated in the libel may, by leave of court, be afterward amended by withdrawing the admission, this will not relieve respondent from the effect of his admission as evidence. Kenah *v.* The Tug John Markee, Jr., 3 Fed. 45.

44. The Crusader, 1 Ware (U. S.) 448, 6 Fed. Cas. No. 3,456.

45. The Schooner Thomas and Henry *v.* U. S., 1 Brock. (U. S.) 367, 23 Fed. Cas. No. 13,919.

P. Hearing or Trial — 1. By Court — a. In General. The procedure on a trial in an admiralty court is extremely informal, being governed in large measure by the circumstances of the particular case.[46] The libels or petitions are heard in the order in which they are brought up,[47] and after the testimony has been taken the cause is argued and submitted to the court, usually with written briefs.[48] Sometimes the court will keep the case open in the interest of justice, in order to allow a party to produce further proof.[49]

b. Right to Jury Trial. Independently of statute there is no right to a trial by jury in civil cases in admiralty.[50] By statute the right to demand a jury trial is given in certain cases arising upon the lakes and navigable waters connecting the same,[51] but even in these cases the verdict is held to be advisory merely, and may be disregarded by the court if, in the opinion of the judge, it fails to do substantial justice.[52]

2. Before Commissioners — a. Reference to Commissioners — (I) *When Ordered.* Under Admiralty Rule 44, whenever the court deems it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of an admiralty suit to one or more commissioners appointed by it to hear the parties and make report thereon.[53] Submission of matters to commission-

46. See Benedict Adm. (3d ed.) §§ 513–540.

47. The Fanny, 2 Lowell (U. S.) 508, 8 Fed. Cas. No. 4,638.

48. The Honora Carr, 31 Fed. 842, wherein it was said that the practice of submitting a cause without argument or brief and leaving the court to ascertain and determine the issues upon the pleadings and proofs was not to be encouraged.

49. Benedict Adm. (3d ed.) § 540; Devine *v.* The Tiverton, 35 Fed. 529; Ingraham *v.* Albee, Blatchf. & H. Adm. 289, 13 Fed. Cas. No. 7,044.

Reserving question of damages and costs.— Where the evidence shows that libellants' scow was old, decayed, and improperly constructed, and that she sank from a blow which would not have injured a staunch and seaworthy craft, and libellants have not had full opportunity to meet this evidence, which would, unexplained, warrant a decree for a moiety, the court will reserve the question of damages and costs until the coming in of the commissioner's report. The Gilson, 35 Fed. 333.

Point reserved for further argument.— Where a point is reserved for further argument and consideration after a trial and decree in the case, it must be upon the pleadings and proofs as they stood on the original hearing. Abbey *v.* The Steamboat Robert L. Stevens, 22 How. Pr. (N. Y.) 78, 1 Fed. Cas. No. 8, 21 Law Rep. 41.

50. Gillet *v.* Pierce, Brown Adm. 553, 10 Fed. Cas. No. 5,437; Clark *v.* U. S., 2 Wash. (U. S.) 519, 5 Fed. Cas. No. 2,837.

Criminal cases.— As to the right to a jury trial in a criminal case in admiralty see Juries.

Forfeitures and penalties.— Suits in admiralty to enforce forfeitures and penalties are civil suits, and a jury is not demandable therein. The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644; Whelan *v.* U. S., 7 Cranch (U. S.) 112, 3 L. ed. 286; U. S. *v.* The Schooner Betsey and Charlotte, 4 Cranch (U. S.) 443, 2 L. ed. 673; U. S. *v.* La Vengeance, 3 Dall. (U. S.) 297, 1 L. ed. 610; The Paolina S., 18 Blatchf. (U. S.) 315, 11 Fed. 171; Clark *v.* U. S., 2 Wash. (U. S.) 519, 5 Fed. Cas. No. 2,837. See also The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125.

Effect of trial by jury.— In Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202, wherein a question was left to the jury, it was held on appeal that, though a court of admiralty had no power to try causes by jury, yet, as the appellate court would have come to the same conclusion on the evidence, the decree of the lower court on the verdict would be affirmed.

51. U. S. Rev. Stat. (1878), § 566; Gillet *v.* Pierce, Brown Adm. 553, 10 Fed. Cas. No. 5,437.

To what cases statute applies.— In admiralty causes of contract or tort arising upon the lakes, if either vessel concerned in such action be of twenty tons burden and upward, enrolled and licensed for the coasting trade, and employed in navigation between different states, either party to such action may demand a trial by jury; but if both vessels be foreign, or engaged in trade between places in the same state, or the action be other than one of contract or tort, it seems that neither party is entitled to a jury trial. The City of Toledo, 73 Fed. 220; Bigley *v.* The Venture, 21 Fed. 880; The Erie Belle, 20 Fed. 63.

Pleadings must show that act applies.—The party demanding a jury must bring himself, by his pleadings, within the provisions of the act. Gillet *v.* Pierce, Brown Adm. 553, 10 Fed. Cas. No. 5,437.

52. The City of Toledo, 73 Fed. 220; The Empire, 19 Fed. 558.

53. The Wavelet, 25 Fed. 733, holding that when a cause is referred to the clerk as such commissioner it is not necessary to assign any special reason for such reference; The Ship E. C. Scranton, 2 Ben. (U. S.) 81, 8 Fed. Cas. No. 4,271.

Special instances.— Where it appears that the main question relates to an account the court may properly refer the case to a commis-

ers may be made either at the instance of a party or by the court of its own motion.[54]

(II) *Scope and Effect of Reference.* The reference of questions of fact to commissioners is for the purpose of obtaining their opinion and advice in aid of the court,[55] and the court will not hear questions arising on a reference to compute damages at the instance of the parties unless they have submitted such questions to the commissioner.[56]

b. Proceedings before Commissioners — (I) *In General.* Under Admiralty Rule 44 commissioners have all the powers usually given to or exercised by masters in chancery.[57] An award of damages on a reference in admiralty is not invalidated by the fact that the commissioner sat outside the territorial jurisdiction of the court.[58]

(II) *Scope of Reference and Issues.* Under an order of reference the parties are confined to a contest of the matters referred,[59] but a statement in the opinion under which a final decree is entered, as to a fact affecting the amount of damages and not material to a determination on the question of liability settled by the decree, is not binding on a reference under such decree to ascertain the amount of damages, and either party may introduce evidence before the commissioner touching the extent of the damage.[60]

(III) *Taking Testimony.* Under the admiralty rule referred to, the commissioners have the power to administer oaths and examine the parties and witnesses touching the matters referred to them.[61]

(IV) *Objections before Commissioner.* In case of improper or irregular proceedings by the commissioner in conducting the hearing, either party may arrest the same until the question as to the proper method or action to be pursued can be certified by the commissioner to the court for confirmation.[62] It has been held that objections to the admission of evidence,[63] or to a ruling on the credibility of a witness, unless the objection rests wholly on the question of law,[64] or to the pro-

sioner (Shaw *v.* Collyer, 4 Blatchf. (U. S.) 370, 18 How. Pr. (N. Y.) 238, 21 Fed. Cas. No. 12,718); and where the rights of the parties depend upon questions of nautical skill or seamanship the court may refer the matter to persons skilled in navigation and act upon their report (The Brig Emily, Olc. Adm. 132, 8 Fed. Cas. No. 4,453).

54. Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202.

Objection to reference.— See *infra* V, P, 2, c, (III), (C).

55. See Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202; and *infra*, V, P, 2, c, (II).

56. The Ship E. C. Scranton, 2 Ben. (U. S.) 81, 8 Fed. Cas. 4,271. See also *infra*, V, P, 2, b, (II).

57. The Ship E. C. Scranton, 2 Ben. (U. S.) 81, 8 Fed. Cas. No. 4,271.

58. The William H. Bailey, 103 Fed. 799.

59. Amount due on default judgment.— Under an order of reference entered by consent to ascertain the amount due libellant after defendant's default, defendant can only contest libellant's claim. Mitchell *v.* Kelsey, 17 Fed. Cas. No. 9,663.

60. The Ship Shand, 4 Fed. 925.

61. Admiralty Rule 44; Benedict Adm. (3d ed.) p. 389.

Ex parte evidence without notice.— Commissioners should not hear *ex parte* evidence without notice to the other party on a reference to state damages. The Schooner Lively, 1 Gall. (U. S.) 315, 15 Fed. Cas. No. 8,403.

Evidence received out of time.— Where libellant rested, after examining three witnesses, without giving notice of an intention to offer further proof at a later stage, and claimant thereupon filed a motion to dismiss for want of sufficient evidence to sustain the libel, but, without waiting to submit the motion to the court, proceeded before the commissioner to take evidence on his side after notice that the motion was not waived, it was held that claimant was entitled to have the case decided on the evidence of the first three witnesses, unaided by that adduced by libellant on cross-examination of claimant's witnesses, or in rebuttal where no sufficient reason appeared for receiving such evidence out of time. The Guy C. Goss, 53 Fed. 826.

62. The Ship E. C. Scranton, 4 Ben. (U. S.) 127, 8 Fed. Cas. No. 4,272.

Certificate necessary.— Application to the court can be had only on a certificate as to the proceedings of the commissioner. The Ship E. C. Scranton, 2 Ben. (U. S.) 81, 8 Fed. Cas. No. 4,271, 4 Ben. (U. S.) 127, 8 Fed. Cas. No. 4,272.

63. The Bark Emilie, 4 Ben. (U. S.) 235, 8 Fed. Cas. No. 4,451; The Schooner Transit, 4 Ben. (U. S.) 138, 24 Fed. Cas. No. 14,138.

Waiver on prior trial.— Where a party neglects at the trial to object to the competency of evidence he will be deemed to have waived his right to object on a subsequent reference to the clerk. The Trial, Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170.

64. See Burton *v.* The Commander in Chief, 4 Fed. Cas. No. 2,215 [*affirmed* without noticing this point in 4 Fed. Cas. No. 2,216, and 1 Wall. (U. S.) 43, 17 L. ed. 609].

priety of the action of the commissioner in refusing to allow a witness to be sworn,[65] should be raised in this manner and not by exception to his report; but this has been denied, and the proper practice is said to be that where no facts are shown making it necessary to have the immediate opinion of the court, a reference should proceed to a report, leaving the parties to reserve their exceptions.[66]

c. Report of Commissioner — (I) *In General — Sufficiency.* A report of the matters referred should state facts and conclusions and should not detail the evidence at length.[67] The report should state the principles upon which damages are assessed, and not merely the gross sum assessed, without any explanation.[68]

(II) *Effect and Conclusiveness.* Where the witnesses have been heard before the commissioner, his decisions upon questions of fact as to which there was conflicting evidence will be adopted by the court unless clearly erroneous;[69] but such finding is not conclusive upon the court, and if clearly erroneous or there is a manifest preponderance of testimony against it, it will be reversed.[70]

(III) *Exception to Report* — (A) *In General.* After the filing of a commissioner's report either party may except thereto.[71] In fact, objection to the report must be made by formal exception filed thereto,[72] and on appeal a report to which no exception was taken below is not open to revision.[73]

65. The Ship E. C. Scranton, 4 Ben. (U. S.) 127, 8 Fed. Cas. No. 4,272.

66. The Brigantine Beaver, 8 Ben. (U. S.) 594, 3 Fed. Cas. No. 1,200, wherein it is said that cases may arise in which it would be proper to take the opinion of the court as to the correctness of the ruling of the commissioner at the time of the objection, as where the evidence to be offered is to be given by a witness about to go to sea, or where the testimony may be lost if not taken, but that where no such emergency is shown the cause should proceed to a report, which, with the evidence and ruling of the commissioners, can be brought before the court upon proper exceptions to the conclusions of the report and to such rulings of the commissioner as were objected to at the time. Such a practice seems to be approved in Commander-in-Chief, 1 Wall. (U. S.) 43, 17 L. ed. 609 [*affirming* this case in 4 Fed. Cas. No. 2,216, on the merits without referring to this particular point]; The Bulgaria, 83 Fed. 312; The Trial, Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170; Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6,637. See also *infra*, V, P, 2, c, (III), (B).

Objection before commissioner.— An objection based on the evidence, sought to be made the ground of an exception to the report, must have been specifically raised before the commissioner. The Bulgaria, 83 Fed. 312.

67. The Trial, Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170.

68. Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 64, 2 L. ed. 208.

The proper practice is to report the amount ascertained as damages by reason of a collision as "the damages sustained by libellant by reason of a collision," and a report merely of a certain amount as due libellant is erroneous. The Steam Ferry-Boat Baltic, 3 Ben. (U. S.) 195, 2 Fed. Cas. No. 824.

Demand of specification of details.— A report as to the amount of libellant's claim is not objectionable in omitting a detail of the allowance, unless defendant has demanded a specification. Mitchell *v.* Kelsey, 17 Fed. Cas. No. 9,663.

Amount of costs.— An award which states the amount due and that libellants are entitled to costs is sufficiently certain without stating the amount of the costs. The Ship Liverpool Packet, 2 Sprague (U. S.) 37, 15 Fed. Cas. No. 8,407.

69. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 17 S. Ct. 572, 41 L. ed. 1004, 61 Fed. 408, 20 U. S. App. 568, 9 C. C. A. 553; The Elton, 83 Fed. 519, 42 U. S. App. 666, 31 C. C. A. 496; Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720; The Isaac Newton, Abb. Adm. 588, 13 Fed. Cas. No. 7,090; Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6,637; The Steamboat Narragansett, Olc. Adm. 388, 17 Fed. Cas. No. 10,020.

70. The Cayuga, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188; Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202.

71. Benedict Adm. (3d ed.) § 466.

72. The Cayuga, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188; Howe *v.* The Lexington, 12 Fed. Cas. No. 6,767*b*.

An appeal from a decree on a commissioner's report awarding damages will not be dismissed on motion, but must be heard in the usual way where the appellant appeared before the commissioner and contested the damages, though he took no exception to the report of the commissioner to whom the cause was referred on appellant's default on the merits. Farrell *v.* Campbell, 7 Blatchf. (U. S.) 158, 8 Fed. Cas. No. 4,682.

When report not conclusive.— Where a surplus after allowance of claims remains in court subject to distribution, there is no one before the court to except to the report, and the decree does not follow the report as a matter of course, though not excepted to, but the court will take it upon itself to see that the proper owners of the surplus receive it. Harper *v.* The New Brig, Gilp. (U. S.) 536, 11 Fed. Cas. No. 6,090.

73. The Ship Virgin *v.* Vyfhius, 8 Pet. (U. S.) 538, 8 L. ed. 1036.

Trial de novo on appeal.— But in Ross *v.* Southern Cotton-Oil Co., 41 Fed. 152, it was held that a trial in the circuit court on appeal

(B) *Sufficiency of Exception.* The exception should be sufficiently clear and particular to bring to the notice of the court the errors alleged and to enable it to ascertain them without an unreasonable examination of the record.[74]

(C) *Matter Reviewed on Exception.* An exception to the report of a commissioner draws in question only the reasons upon which the report is founded,[75] and when his authority is limited by the order of reference an excess of authority should be objected to by motion to reject the report or for a rehearing on the merits.[76] The decree of the court cannot be attacked by exceptions to the commissioner's report thereunder.[77]

d. Recommittal. The court may recommit a report or allow a rehearing on the merits where there has been an irregular or improper procedure on the part of the commissioner.[78]

Q. Decree[79]**— 1. Conformity to Issues.** A decree in admiralty should correspond with the issues in the pleadings;[80] but under a prayer for general relief it is competent for the court to pass such decree as may be required by the proof, although not fully and precisely stated in the libel.[81]

in admiralty cases being *de novo*, appellant could object to damages found by a commissioner in the district court, though no exceptions were filed.

74. Commander-in-Chief, 1 Wall. (U. S.) 43, 17 L. ed. 609, holding that if the exception is that the commissioner received improper and immaterial evidence it should show what the evidence was; if that he had no evidence to justify his report it should set forth what evidence he did have; and if that he had admitted evidence of incompetent witnesses it should give the names of the witnesses and specify why they were incompetent, what they swore to, and why their evidence should have been rejected; The Cayuga, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188.

Method of ascertaining damages.— An exception to the method adopted by the commissioner in ascertaining damages is not good unless the report or the exception shows what the method was. The Schooner Transit, 4 Ben. (U. S.) 138, 24 Fed. Cas. No. 14,138.

75. The Columbus, Abb. Adm. 37, 6 Fed. Cas. No. 3,041. See *supra*, V, P, 2, b, (IV).

Objection to reference.— Objection to an order of reference on the ground of illegality or impropriety cannot be raised on exception to the report of the commissioner. The Rhode Island, Abb. Adm. 100, 20 Fed. Cas. No. 11,740*a*.

76. The Steamboat New Jersey, Olc. Adm. 444, 18 Fed. Cas. No. 10,162.

Irregularity of the report should be raised by motion founded upon the irregularity and not by exception. The Columbus, Abb. Adm. 37, 6 Fed. Cas. No. 3,041.

77. Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 5 McCrary (U. S.) 265, 16 Fed. 800; Burton *v.* The Commander in Chief, 4 Fed. Cas. No. 2,215; Hovey *v.* The Sarah E. Brown, 12 Fed. Cas. No. 6,744; Waterman *v.* Morgan, 29 Fed. Cas. No. 17,259.

78. The Steamboat New Jersey, Olc. Adm. 444, 18 Fed. Cas. No. 10,162.

Recommittal to referee not ordered.— An award in a salvage case will not be recommitted because counsel for the libellants omitted to call the attention of the referee to a matter which might have influenced the referee, if his attention had been called to it, to increase the amount of salvage. The Ship Liverpool Packet, 2 Sprague (U. S.) 37, 15 Fed. Cas. No. 8,407.

79. Medium of payment.— Where advances in a foreign port are made in gold, and drafts for the amount on the owners show that the payment to the parties making the advances is to be also in gold, the court may direct that its decree be entered for the amount in like currency. The Emily Souder, 17 Wall. (U. S.) 666, 21 L. ed. 683.

80. Ward *v.* Brig Fashion, Newb. Adm. 41, 6 McLean (U. S.) 195, 29 Fed. Cas. No. 17,155.

Incorporation of collateral matter.— The opinion of the court on collateral matters should not be incorporated in the decree. Ward *v.* Brig Fashion, Newb. Adm. 41, 6 McLean (U. S.) 195, 29 Fed. Cas. No. 17,155.

On recovery by several libellants.— Where several libellants, having distinct damage interests, recover in a cause, the decree may be in form for recovery by all of the aggregate sum, and directing a distribution to each of the sums respectively adjudicated to them. The City of Alexandria, 44 Fed. 361.

On recovery against several defendants.— In case of a joint admiralty suit against several, the court may, if equity require it, pass a decree apportioning the damages among the respondents, instead of passing a decree against them jointly. Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507.

Provision as to costs.— A decree final in other respects is not converted into an interlocutory one because it directs a taxation of costs. Craig *v.* Steamer Hartford, McAll. (U. S.) 91, 6 Fed. Cas. No. 3,333.

81. Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671; Pratt *v.* Thomas, 1 Ware (U. S.) 437, 19 Fed. Cas. No. 11,377.

Inconsistent relief.— Where specific relief is asked for, even though there be a prayer for general relief, the court cannot grant a relief which is inconsistent with, or entirely different from, that which is prayed. Wilson *v.* Graham, 4 Wash. (U. S.) 53, 30 Fed. Cas. No. 17,804.

2. ENROLLMENT. Decrees in admiralty are deemed to be enrolled as of the term in which they are made.[82]

3. DECREE BY DEFAULT — a. In General. If defendant, on the return-day of the process, does not appear and contest the suit, either by exceptions to the libel or by answering it, the court pronounces him to be in default and a decree *pro confesso* is entered.[83]

b. Nature of Decree. A decree *pro confesso* in admiralty is not final, and merely authorizes the court to hear the case *ex parte*, either directly or by reference to a commissioner to ascertain and report the amount due.[84]

c. Setting Aside Default. The court may, in its discretion, on good cause shown, set aside a decree by default and grant leave to answer.[85]

4. DECREE IN PERSONAM IN SUIT IN REM. As a rule, a decree *in personam* will not be entered in a suit *in rem* except upon amendment and the issue of a new process *in personam*, or the general appearance of the owner *in personam*.[86]

5. ALLOWANCE OF INTEREST. The allowance of interest by way of damages is in the discretion of the court.[87]

6. OPERATION AND EFFECT OF DECREE — a. In General. The decree of a court

82. The Steamboat New England, 3 Sumn. (U. S.) 495, 18 Fed. Cas. No. 10,151.

83. Rostron *v.* The Water Witch, 44 Fed. 95; U. S. *v.* The Steamer Mollie, 2 Woods (U. S.) 318, 26 Fed. Cas. No. 15,795; Sanders *v.* The Sea Fowl, 21 Fed. Cas. No. 12,296*a*; Baxter *v.* The Dona Fermoas, 2 Fed. Cas. No. 1,123*a*; The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597; Meaher *v.* Tindal, 41 Ala. 385.

Amicus curiæ.— Where defendant has neglected to put in an answer through ignorance of the practice of the court, and is at the time of the hearing absent, the court is not precluded from receiving any evidence which his counsel may offer as *amicus curiæ*. The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597.

Waiver of irregularities in entering.— Libellant entered an irregular default against respondent, and moved the cause on for hearing on a reference to a commissioner. Respondent appeared, took no objection, but consented to adjournments. It was held that his appearance before the referee constituted a voluntary consent on his part to waive the irregularities committed and to submit the case to the determination of the commissioner. Gaines *v.* Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179.

84. Cape Fear Towing, etc., Co. *v.* Pearsall, 90 Fed. 435, 61 U. S. App. 521, 33 C. C. A. 161; The Lopez, 43 Fed. 95; The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597; Sanders *v.* The Sea Fowl, 21 Fed. Cas. No. 12,296*a*.

85. Northrop *v.* Gregory, 2 Abb. (U. S.) 503, 18 Fed. Cas. No. 10,327; Van Winkle *v.* Jarvis, 3 Ben. (U. S.) 573, 28 Fed. Cas. No. 16,883; The Schooner Grapeshot, 2 Ben. (U. S.) 527, 10 Fed. Cas. No. 5,702; The Duiveland, 7 Fed. Cas. No. 4,122; The Caroline Casey, 5 Fed. Cas. No. 2,421*a*; Scott *v.* The Propeller Young America, Newb. Adm. 107, 21 Fed. Cas. No. 12,550; Gaines *v.* Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179; Gaines *v.* Spann, 2 Brock. (U. S.) 81, 9 Fed. Cas. No. 5,178; Read *v.* Owen, 9 Port. (Ala.) 180.

Accounting for laches and showing meritorious defense.— In order to set aside a default and obtain leave to answer, respondent must satisfactorily account for his laches, and exhibit, either by answer or affidavit, a meritorious defense. Scott *v.* The Propeller Young America, Newb. Adm. 107, 21 Fed. Cas. No. 12,550; Warner *v.* The Ralph Post, 29 Fed. Cas. No. 17,187.

Right of appeal.— Defendant cannot apply to have a default set aside after a decree has been made which would give a right of appeal as from a final decree. The Duiveland, 7 Fed. Cas. No. 4,122.

Terms may be imposed as a condition to opening a default. Van Winkle *v.* Jarvis, 3 Ben. (U. S.) 573, 28 Fed. Cas. No. 16,883.

86. The Monte A., 12 Fed. 331.

Rule 21 in admiralty does not authorize a personal judgment against the claimants in an action *in rem*, except against such as have signed the stipulation given in lieu of the vessel seized. Atlantic Mut. Ins. Co. *v.* Alexandre, 16 Fed. 279.

Action in personam aided by attachment.— In a suit *in personam*, the defendants not being within the district, but their property being attached, and no appearance entered, the decree will not be against the defendants personally, but only against the property attached. Boyd *v.* Urquhart, 1 Sprague (U. S.) 423, 3 Fed. Cas. No. 1,750.

87. The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153. See also The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111, wherein it was held that where a ship and cargo have been sold, the gross amount of the sales, with interest, is allowed, on a decree of restitution.

Liquidated demands.— Interest may be allowed on liquidated demands in admiralty the same as at law. The Steamboat Swallow, Olc. Adm. 334, 23 Fed. Cas. No. 13,665.

Stale claims.— In a suit upon stale claims not resting upon express contract, a court of admiralty, in rendering a decree for libellant, may refuse interest. Mitchell *v.* Kelsey, 17 Fed. Cas. No. 9,664.

of admiralty in a proceeding *in rem* is conclusive in respect of the matter on which it decides as against all the world.[88] It has been held, however, that if a former decree is relied on as a defense, the record must show that the matter in question was actually set up and passed upon.[89]

b. Lien. A decree for the payment of money, in an admiralty suit *in personam*, stands as a lien, on the same footing as a decree in equity.[90]

7. Collateral Attack. Where a court has jurisdiction of the *res* in a proceeding *in rem*, its decree cannot be collaterally attacked for errors and irregularities appearing therein.[91]

8. Enforcement of Decree — a. Decree for Payment of Money. An admiralty decree for the payment of money can be enforced only by an attachment or a capias against the person of defendant, or a fieri facias against his goods and chattels.[92]

88. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Slocum *v.* Mayberry, 2 Wheat. (U. S.) 1, 4 L. ed. 169; Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507; Bailey *v.* Sundberg, 49 Fed. 583, 1 U. S. App. 101, 1 C. C. A. 387; Peters *v.* Warren Ins. Co., 3 Sumn. (U. S.) 389, 19 Fed. Cas. No. 11,035; The Schooner Navarro, Olc. Adm. 127, 17 Fed. Cas. No. 10,059; The Mary Anne, 1 Ware (U. S.) 99, 16 Fed. Cas. No. 9,195; Jones *v.* Walker, Brunn. Col. Cas. (U. S.) 25, 3 N. C. 475, 13 Fed. Cas. No. 7,506; Bowler *v.* Eldridge, 18 Conn. 1; Stewart *v.* Warner, 1 Day (Conn.) 142, 2 Am. Dec. 61; Zeno *v.* Louisiana Ins. Co., 2 La. 533; Cucullu *v.* Orleans Ins. Co., 6 Mart. N. S. (La.) 11; Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Blanque *v.* Peytavin, 4 Mart. (La.) 458, 6 Am. Dec. 705; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Buchanan *v.* Biggs, 2 Yeates (Pa.) 232; Campbell *v.* Williamson, 2 Bay (S. C.) 237.

Decree of foreign court of admiralty.— The decree of a foreign court of admiralty of competent jurisdiction, acting *in rem*, is conclusive. Williams *v.* Armroyd, 7 Cranch (U. S.) 423, 3 L. ed. 392; Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507; The Garland, 16 Fed. 283; Peters *v.* Warren Ins. Co., 3 Sumn. (U. S.) 389, 19 Fed. Cas. No. 11,035; Bowler *v.* Eldridge, 18 Conn. 1; Stewart *v.* Warner, 1 Day (Conn.) 142, 2 Am. Dec. 61; Zeno *v.* Louisiana Ins. Co., 2 La. 533; Cucullu *v.* Orleans Ins. Co., 6 Mart. N. S. (La.) 11; Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Blanque *v.* Peytavin, 4 Mart. (La.) 458, 6 Am. Dec. 705; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Campbell *v.* Williamson, 2 Bay (S. C.) 237. But American courts of admiralty are not bound by the decision of a foreign court, not of admiralty, based on principles different from those recognized by such courts and leading to a different result, though professedly deciding according to American law. Lang *v.* Holbrook, Crabbe (U. S.) 179, 14 Fed. Cas. No. 8,057.

Decree against one libellant.— Though seamen may join in admiralty in a suit for wages, a decree against one does not affect the claims of the rest. Oliver *v.* Alexander, 6 Pet. (U. S.) 143, 8 L. ed. 349.

89. The Vincennes, 3 Ware (U. S.) 171, 28 Fed. Cas. No. 16,945; Duncan *v.* Stokes, 47 Ga. 593.

Illustrations.— A judgment against the owners of a vessel in a suit to charge them personally with the penalties incurred, under U. S. Rev. Stat. (1878), § 4465, for carrying a greater number of passengers than was stated in the certificate of inspection, is not conclusive against their vendees in a subsequent suit *in rem* in admiralty to enforce against the vessel the lien of the penalties, under U. S. Rev. Stat. (1878), § 4469. The Boston, 8 Fed. 628.

In a libel on a bottomry bond, the overruling of a plea alleging the disability of libellants to sue, on the ground that at the time the suit was brought and the plea was filed they were alien enemies, does not prevent respondents from pleading in bar that at the time the contract was entered into libellants were alien enemies, and for that reason the contract was void. Crawford *v.* The William Penn, 3 Wash. (U. S.) 484, 6 Fed. Cas. No. 3,373.

Where a libel for the breach of a charter-party alleges that respondent is the sole owner of the vessel, and the charter-party filed therewith is made by certain agents of the owners, a judgment on demurrer that the libel is not defective for the apparent variance does not preclude respondent from showing by plea the fact that there are other owners, necessary parties. Card *v.* Hines, 35 Fed. 598.

90. Ward *v.* Chamberlain, 2 Black (U. S.) 430, 17 L. ed. 319; The Ship Potomac, 2 Black (U. S.) 581, 17 L. ed. 263.

The real estate of a surety is subject to an execution in admiralty. The Kentucky, 4 Blatchf. (U. S.) 448, 14 Fed. Cas. No. 7,717.

91. Otis *v.* The Rio Grande, 1 Woods (U. S.) 279, 18 Fed. Cas. No. 10,613; Kelsey *v.* Beers, 16 Abb. Pr. (N. Y.) 228.

92. Ward *v.* Chamberlin, 29 Fed. Cas. No. 17,152, 9 Am. L. Reg. 171, 2 West. L. Month. 621; The Steamboat Delaware, Olc. Adm. 240, 7 Fed. Cas. No. 3,762.

Enforcement against person not party to stipulation.— The failure of a successful libellant to enforce his decree against a part-owner, who alone had given a stipulation conditioned to pay the amount that might be awarded on final decree, does not authorize execution to issue against the other part-owner, who was no party to the stipulation accepted by libellant. The Steam-Ship Zodiac, 5 Fed. 220.

Enforcement against property in registry. If the property in a suit *in personam*

b. Decree of Another Court. One admiralty court has jurisdiction of a libel to carry into effect the decree of another admiralty court.[93]

c. Summary Judgment against Stipulators. Summary judgment against stipulators to pay the decree or costs may be entered upon the rendition of decree against the principal where the time for appeal or the time given them to show cause in opposition thereto has expired;[94] and execution may issue immediately thereon.[95]

9. Opening, Amending, and Vacating Decree. Courts of admiralty have power to open their own decrees during the term at which they were passed.[96]

against defendants be money in the registry, the decree will be satisfied therefrom. Boyd *v.* Urquhart, 1 Sprague (U. S.) 423, 3 Fed. Cas. No. 1,750.

Enforcement by garnishment.— A debt due respondent from a third person may be attached in admiralty to satisfy a decree *in personam*. Lee *v.* Thompson, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202.

Notice of decree before proceedings to enforce.— No notice need be given the opposite party of a final decree before proceedings to enforce it. Gaines *v.* Travis, Abb. Adm. 422, 9 Fed. Cas. No. 5,180.

93. Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507; Otis *v.* The Rio Grande, 1 Woods (U. S.) 279, 18 Fed. Cas. No. 10,613; The Centurion, 1 Ware (U. S.) 490, 5 Fed. Cas. No. 2,554; Bowler *v.* Eldridge, 18 Conn. 1; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549.

Court of another district.— A court of admiralty may, at the instance of a party, and without letters of request, enforce a decree *in personam* for the payment of costs rendered by an admiralty court in another district. Pennsylvania R. Co. *v.* Gilhooley, 9 Fed. 618.

94. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447; The C. F. Ackerman, 14 Blatchf. (U. S.) 360, 5 Fed. Cas. No. 2,564; Nelson *v.* U. S., Pet. C. C. (U. S.) 235, 17 Fed. Cas. No. 10,116; The Brig Alligator, 1 Gall. (U. S.) 145, 1 Fed. Cas. No. 248; McLellan *v.* U. S., 1 Gall. (U. S.) 227, 16 Fed. Cas. No. 8,895; Murphy *v.* Roberts, 30 Ala. 232; Gardner *v.* Tyler, 16 Abb. Pr. (N. Y.) 17.

Defenses.— The right of libellant to have summary judgment against a stipulator for value is not affected by the death of a co-stipulator, or by the fact that libellant had not exhausted his remedy against the claimant of the vessel. The C. F. Ackerman, 14 Blatchf. (U. S.) 360, 5 Fed. Cas. No. 2,564.

Effect of summary judgment.— A summary personal judgment does not conclude defendants, in an action upon the judgment, from disputing the jurisdiction of the district court by showing that they never executed the bond, or that the attorney who assumed to execute it in their names had no authority to do so. Gardner *v.* Tyler, 16 Abb. Pr. (N. Y.) 17.

Notice of judgment.— Stipulators in a bond conditioned for the payment of the judgment which may be rendered at the next term of court, or for the forthcoming and delivery of the boat to answer sentence and decree of the court, are not entitled to notice before the rendition of judgment against them. Murphy *v.* Roberts, 30 Ala. 232. See also Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447.

Premature rendition.— In case of a libel against a steamboat, where the bond of the stipulators is conditioned for the payment of the judgment which may be rendered at the next term of court, or for the forthcoming and delivery of the boat to answer sentence and decree of the court, it is erroneous to render judgment against the stipulators on the bond at the same time the judgment of condemnation is rendered against the boat. Murphy *v.* Roberts, 30 Ala. 232. See also Bell *v.* Thomas, 8 Ala. 527.

95. Matter of Snow, 2 Curt. (U. S.) 485, 22 Fed. Cas. No. 13,141; Gaines *v.* Travis, Abb. Adm. 422, 9 Fed. Cas. No. 5,180; Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6,637; The Steamboat Delaware, Olc. Adm. 240, 7 Fed. Cas. No. 3,762; Hunter *v.* McCraw, 32 Ala. 518.

Attachment.— The liability of sureties on a stipulation for value cannot be enforced by an attachment to compel them to comply with its conditions. The Blanche Page, 16 Blatchf. (U. S.) 1, 3 Fed. Cas. No. 1,524.

Contempt.— A court of admiralty has no power to punish sureties on a stipulation for value, for contempt in failing to comply with the provisions of the decree. The Blanche Page, 16 Blatchf. (U. S.) 1, 3 Fed. Cas. No. 1,524.

Sequestration.— A court of admiralty has no power to enforce a decree against sureties in a stipulation for value, by sequestration of their property. The Blanche Page, 16 Blatchf. (U. S.) 1, 3 Fed. Cas. No. 1,524.

Notice of execution.— The award which grants execution upon a final decree authorizes it against all parties embraced in the decree, and there is no necessity of special notice, to the surety of respondent, of an application for an execution against him. Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6,637.

96. Miller *v.* The Ship Resolution, 2 Dall. (U. S.) 19, 1 L. ed. 271; Hatch *v.* The Newport, 44 Fed. 300; The Havilah, 39 Fed. 333; The Newport, 38 Fed. 669; The Madgie, 31 Fed. 926; The Vaderland, 19 Fed. 527; Mainwaring *v.* The Bark Carrie Delap, 1 Fed. 880; The Tug John Cooker, 10 Ben. (U. S.) 488, 13 Fed. Cas. No. 7,337; Thomassen *v.* Whitwell, 9 Ben. (U. S.) 458, 23 Fed. Cas. No. 13,930; Snow *v.* Edwards, 2 Lowell (U. S.) 273, 22 Fed. Cas. No. 13,145; The Schooner George Prescott, 1 Ben. (U. S.) 1, 10 Fed. Cas. No.

10. Libel to Review Decree. A libel of review will lie in admiralty even after the term at which the original decree was passed.[97]

R. Sale of Property and Distribution of Proceeds or Remnants—

1. Sale of Property — a. Right to Sale. Where a libellant, in a suit *in rem* in admiralty, establishes a clear legal right to a condemnation and sale, there is no discretionary power in the court to refuse or postpone an order of sale.[98]

b. Notice of Sale. A sale of property after condemnation in suits *in rem* must be on the notice prescribed by the admiralty rules.[99]

c. Confirmation of Sale. Sales must be confirmed by the court before the purchaser is entitled to the property.[1]

d. Title of Purchaser. Where property is sold under a decree *in rem* in admiralty, all liens thereon are extinguished,[2] and a clear and indefeasible title is vested in the purchaser.[3]

e. Compelling Completion of Purchase. A court of admiralty may compel a purchaser at a judicial sale to complete his purchase.[4]

5,339; The Illinois, Brown Adm. 13, 12 Fed. Cas. No. 7,003; The Grotius, 1 Gall. (U. S.) 503, 11 Fed. Cas. No. 5,844.

As to opening default decree see *supra*, V, Q, 3, c.

At subsequent term.— A court of admiralty has no power on motion to modify its decree at a subsequent term. Pettit *v.* One Steel Lighter, 104 Fed. 1002; The Annex No. 3, 38 Fed. 620; The Comfort, 23 Blatchf. (U. S.) 371, 32 Fed. 327; The Oriental, 2 Flipp. (U. S.) 6, 18 Fed. Cas. No. 10,569*a*; Petty *v.* Merrill, 12 Blatchf. (U. S.) 11, 19 Fed. Cas. No. 11,051; The Schooner Major Barbour, Blatchf. Prize Cas. 310, 16 Fed. Cas. No. 8,984; The Illinois, Brown Adm. 13, 12 Fed. Cas. No. 7,003; Sloman *v.* Wyssman, 22 Fed. Cas. No. 12,955*a*; The Steamboat New England, 3 Sumn. (U. S.) 495, 18 Fed. Cas. No. 10,151; The Martha, Blatchf. & H. Adm. 151, 16 Fed. Cas. No. 9,144.

Terms may be imposed as a condition of opening a decree. The America, 56 Fed. 1021.

97. Jackson *v.* Munks, 58 Fed. 596; Snow *v.* Edwards, 2 Lowell (U. S.) 273, 22 Fed. Cas. No. 13,145; Northwestern Car Co. *v.* Hopkins, 4 Biss. (U. S.) 51, 18 Fed. Cas. No. 10,334; Janvrin *v.* Smith, 1 Sprague (U. S.) 13, 13 Fed. Cas. No. 7,220.

Pendency of writ of error.— A motion will not lie to review a decree after writ of error lodged. McGrath *v.* Candalero, Bee Adm. 64, 16 Fed. Cas. No. 8,810.

98. Davis *v.* A New Brig, Gilp. (U. S.) 473, 7 Fed. Cas. No. 3,643.

Security for proceeds.— Where a vessel is libeled, it is proper practice, before a sale on default, to require security of libellant to answer for the sum received to any person claiming a right or presenting his interest within a year. Read *v.* Owen, 9 Port. (Ala.) 180.

99. The Hornet, Abb. Adm. 57, 12 Fed. Cas. No. 6,704.

Effect of want of publication.— In a proceeding to enforce the sale of a vessel to discharge a maritime lien, though the want of notice by publication may furnish grounds for opening the decree, yet it does not render the proceedings void. Daily *v.* Doe, 3 Fed. 903.

1. The New Hampshire, 18 Fed. Cas. No. 10,160, 23 Int. Rev. Rec. 311.

Rights of purchaser at unconfirmed sale.— Where the purchaser of a vessel at a judicial sale, not confirmed by the court, obtains possession of her without authority and expends labor upon her, and a resale is afterward ordered, he is not entitled to maintain a libel for his services. The New Hampshire, 18 Fed. Cas. No. 10,160, 23 Int. Rev. Rec. 311.

2. The Trenton, 4 Fed. 657; Stewart *v.* Fagan, 2 Woods (U. S.) 215, 23 Fed. Cas. No. 13,426; Phegley *v.* Steamboat David Tatum, 33 Mo. 461, 84 Am. Dec. 57; Ritter *v.* Steamboat Jamestown, 23 Mo. 348; Kelsey *v.* Beers, 16 Abb. Pr. (N. Y.) 228. But see Schuchardt *v.* The Angeleque, 21 Fed. Cas. No. 12,483*a*, wherein it was held that where mortgagees of a vessel decline to appear as claimants in a suit against a vessel by materialmen, and the vessel is sold in satisfaction of the materialmen's claim, the mortgagees appearing at the sale, and giving notice to the bidders of their lien, the lien of the mortgage is not affected by the sale.

Foreign attachments are not proceedings *in rem*, and the sale of a vessel on adjudication therein will not give the purchaser a title superior to that of a prior mortgagee. Cole *v.* The Brandt, 6 Fed. Cas. No. 2,978.

3. The Garland, 16 Fed. 283; The Morning Star, 14 Fed. 866; The Trenton, 4 Fed. 657; Daily *v.* Doe, 3 Fed. 903.

Sale to defraud creditors.— If the owner fraudulently and collusively procure his vessel to be sold under the forms of law, and himself become the purchaser, for the purpose of cutting off just claims against her, such sale is void as against creditors. Thompson *v.* Steamboat Julius D. Morton, 8 Ohio St. 222.

Taking subject to power of court to vacate sale.— The purchasers of property under a decree in admiralty take subject to the power of the court to vacate the sale. The Steamer Sparkle, 7 Ben. (U. S.) 528, 22 Fed. Cas. No. 13,207.

Warranty.— On a sale by the marshal, under an order of court, no warranty is implied, neither the marshal nor his agent having any authority to warrant the article sold. The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174.

4. The Kate Williams, 2 Flipp. (U. S.) 50, 14 Fed. Cas. No. 7,623.

f. Setting Aside Sale. A court of admiralty has power, in a proper case, to set aside a sale of condemned property.[5]

g. Payment of Proceeds into Registry. Where property has been ordered sold by the admiralty on process *in rem*, the gross proceeds of the sale, deducting only expenses thereof, should be paid into the registry.[6]

2. Distribution of Proceeds or Remnants — a. Jurisdiction. Whenever proceeds or remnants are rightfully in the possession and custody of admiralty, it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest,[7] to ascertain to whom these proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof.[8]

b. Mode of Proceeding. The party entitled to the remnant or surplus in court after a sale may obtain it by petition or motion.[9]

Excuse for refusal to complete purchase.— On a motion for an attachment for contempt in refusing to pay in the purchase-price of a tug purchased at a judicial sale thereof, it is no defense that the purchaser did not get all the property that formerly belonged to the vessel, where it was announced at the sale that the vessel was sold "as she is," although the published notices designated the vessel, "her boats, tackle, apparel, furniture, and appurtenances." The Kate Williams, 2 Flipp. (U. S.) 50, 53, 14 Fed. Cas. No. 7,623.

But the refusal of an auctioneer employed by the marshal, without authority, to allow the purchaser to take the vessel, unless he pay $25 auctioneer's fees and $5 for a bill of sale, will relieve the purchaser from his obligation to perfect the sale, so that he will not be liable for a deficiency resulting on the resale. The John E. Mulford, 18 Fed. 455.

Summary process.— Where the purchaser on a marshal's sale takes possession without paying the price, the court will enforce by summary process either a redelivery of the property in specie or payment of the purchase-money. The Phebe, 1 Ware (U. S.) 368, 19 Fed. Cas. No. 11,066.

5. The New York, 93 Fed. 495; The Ruby, 38 Fed. 622; The Garland, 16 Fed. 283; The Steamer Sparkle, 7 Ben. (U. S.) 528, 22 Fed. Cas. No. 13,207; The Schooner George Prescott, 1 Ben. (U. S.) 1, 10 Fed. Cas. No. 5,339; Freeman *v.* The Albany, 9 Fed. Cas. No. 5,083*a*.

Fraud.— A sale will be set aside for fraud of the purchaser, or of the officer who conducted it, or for fraudulent negligence or misconduct in any other person connected with it (The Steamer Sparkle, 7 Ben. (U. S.) 528, 22 Fed. Cas. No. 13,207); but a simple allegation of fraud in a petition to set aside a sale of a vessel without setting forth the facts which constitute the fraud is insufficient (The Kaloolah, Brown Adm. 55, 14 Fed. Cas. No. 7,602).

Inadequacy of price.— A sale in admiralty will be set aside where there was a combination between the persons in possession of the vessel and libellant, and the price was grossly inadequate. The Steamer Sparkle, 7 Ben. (U. S.) 528, 22 Fed. Cas. No. 13,207.

Laches.— Where the mortgagee of a vessel knew of the institution of a suit against her in time to intervene, and knew of the sale before its confirmation, but suffered six months to elapse before making application to set the sale aside, his laches will preclude him from any relief. Pease *v.* The Propeller Napoleon, Newb. Adm. 37, 19 Fed. Cas. No. 10,883. See also U. S. *v.* The Steamboat Austin, 9 Ben. (U. S.) 350, 24 Fed. Cas. No. 14,479; Seaver *v.* The Carroni, 21 Fed. Cas. No. 12,593.

6. The Phebe, 1 Ware (U. S.) 360, 19 Fed. Cas. No. 11,065.

Money erroneously paid out.— Where money has been paid by an order of the district court, under an erroneous construction of an act of congress, before a final order of the circuit court in which the suit is pending, the latter will grant a rule on the person who received the money to return it. The Ariadne, Pet. C. C. (U. S.) 455, 1 Fed. Cas. No. 526. See also Osborn *v.* U. S., 91 U. S. 474, 23 L. ed. 388.

7. As to disposition of property pending suit see *supra*, V, J.

8. Osborn *v.* U. S., 91 U. S. 474, 23 L. ed. 388; The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729; The Sybil, 4 Wheat. (U. S.) 98, 4 L. ed. 522; The Templar, 59 Fed. 203; *In re* Goodrich Transp. Co., 26 Fed. 713; The E. V. Mundy, 22 Fed. 173; The Guiding Star, 18 Fed. 263; Covert *v.* The British Brig Wexford, 3 Fed. 577; Matter of The L. B. Goldsmith, Newb. Adm. (U. S.) 123, 15 Fed. Cas. No. 8,152; The Ship Panama, Olc. Adm. 343, 18 Fed. Cas. No. 10,703; The Stephen Allen, Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 13,361.

9. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729; Petrie *v.* The Steam-Tug Coal Bluff No. 2, 3 Fed. 531; Justi Pon *v.* The Arbustei, 14 Fed. Cas. No. 7,589, 6 Am. L. Reg. 511; Matter of The L. B. Goldsmith, Newb. Adm. 123, 15 Fed. Cas. No. 8,152; The Ship Panama, Olc. Adm. 343, 18 Fed. Cas. No. 10,703; The Stephen Allen, Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 13,361; Zane *v.* The Brig President, 4 Wash. (U. S.) 453, 30 Fed. Cas. No. 18,201.

Execution against proceeds.— A creditor, by judgment in a state court, of the owners of the vessel, even though he have a decree *in personam* also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty.

c. Necessity of Order of Court. A distribution of the proceeds of sale should not be made without an order of court.[10]

d. Claims Entitled to Share — (I) *In General.* The remnants of proceeds on the sale of a vessel under the process of the court are a representative of the vessel, and subject to claims which might be enforced against her *in rem.*[11]

(II) *Claims Not Enforceable in Admiralty.* As a rule an admiralty court will not order to be paid out of surplus proceeds in the registry a demand which could not be enforced in admiralty by a suit either *in rem* or *in personam.*[12] It has been held, however, that a claim for which a lien is given by a state law may be paid out of the registry, though such lien is not enforceable in admiralty.[13]

The Lottawanna, 20 Wall. (U. S.) 201, 22 L. ed. 259.

Filing libel to enforce mortgage.— Where a vessel has been libeled and sold in admiralty, and the proceeds are in the registry of the court, a mortgagee cannot file a libel against the proceeds. Schuchardt *v.* Babbidge, 19 How. (U. S.) 239, 15 L. ed. 625.

Necessity of presentation of claim.— The claims of officers of the court for fees and expenses upon proceeds in the registry must be presented to the court for allowance. The Phebe, 1 Ware (U. S.) 360, 19 Fed. Cas. No. 11,065.

Proof of claim.— In disposing of a fund in its registry it is competent for a court of admiralty to require proof of the right of the claimant to any part of the same. Dent *v.* Radmann, 1 Fed. 882. See also Rostron *v.* The Water Witch, 44 Fed. 95.

10. The Collector, 6 Wheat. (U. S.) 194, 5 L. ed. 239; Keane *v.* The Brig Gloucester, 2 Dall. (U. S.) 36, 1 L. ed. 278.

Effect of order for payment.— Where the proceeds of sale of a vessel are paid into court, claims against the fund will be barred after order for the payment of the money out of the registry. The J. W. Tucker, 20 Fed. 129.

Waiver of order.— If there be no *mala fides* the assent and ratification of all the parties will cure the irregularity of a distribution without an order of court. The Collector, 6 Wheat. (U. S.) 194, 5 L. ed. 239.

11. The Steamboat Syracuse, 9 Ben. (U. S.) 348, 23 Fed. Cas. No. 13,716; The Ship Trimountain, 5 Ben. (U. S.) 246, 24 Fed. Cas. No. 14,175; Town *v.* The American Banner, 24 Fed. Cas. No. 14,112*a*; Remnants in Court, Olc. Adm. 382, 20 Fed. Cas. No. 11,697; Mutual Safety Ins. Co. *v.* The Ship George, Olc. Adm. 89, 17 Fed. Cas. No. 9,981; The Santa Anna, Blatchf. & H. Adm. 79, 21 Fed. Cas. No. 12,325; Gardner *v.* The Ship New Jersey, 1 Pet. Adm. 223, 9 Fed. Cas. No. 5,233.

Claims arising on the last voyage, and those for watching the vessel in port to the time of her seizure by the marshal, may be allowed out of the surplus proceeds in the registry, as against the assignee in bankruptcy. The Ship Trimountain, 5 Ben. (U. S.) 246, 24 Fed. Cas. No. 14,175.

Claim of assignee.— Admiralty Rule 43, providing that any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for a delivery thereof to him, does not authorize a proceeding by petition against a sum in court awarded from the proceeds of the sale of a vessel to one who rendered salvage services, such petition having been filed by a third person, asserting no interest in the vessel but alleging a promise by the party to whom the salvage compensation was so awarded to pay half the amount thereof to the petitioner. Sheldrake *v.* The Chatfield, 52 Fed. 495.

Loan to discharge lien.— A loan to the master to enable him to discharge a lien for seaman's wages, and relieve the boat from arrest, may be satisfied out of the surplus in the registry. The Fanny, 8 Fed. Cas. No. 4,637.

12. The Lottawanna, 20 Wall. (U. S.) 201, 22 L. ed. 259; The Lydia A. Harvey, 84 Fed. 1000; Miller *v.* The Peerless, 45 Fed. 491; The Fanny, 8 Fed. Cas. No. 4,637; Brackett *v.* The Brig Hercules, Gilp. (U. S.) 184, 3 Fed. Cas. No. 1,762; Gardner *v.* The Ship New Jersey, 1 Pet. Adm. 223, 9 Fed. Cas. No. 5,233. But see Petrie *v.* The Steam-Tug Coal Bluff No. 2, 3 Fed. 531, wherein it was held that any person having an interest in a fund in the registry of a court of admiralty may apply by petition to have his claim satisfied out of the fund, although he may not be entitled to prosecute a suit in admiralty to enforce his claim. See also The Skylark, 2 Biss. (U. S.) 251, 22 Fed. Cas. No. 12,928, wherein it was held that district courts in admiralty exercise equity powers in the distribution of a surplus arising under a sale, whether the parties have maritime liens or not.

13. The Mary Zephyr, 6 Sawy. (U. S.) 427, 2 Fed. 824; The Harrison, 2 Abb. (U. S.) 74, 1 Sawy. (U. S.) 353, 9 Fed. Cas. No. 5,038; The Island City, 1 Lowell (U. S.) 375, 13 Fed. Cas. No. 7,109. See also Harper *v.* The New Brig, Gilp. (U. S.) 536, 11 Fed. Cas. No. 6,090, wherein it was held that one who purchased materials on his personal responsibility, and then delivered them to the owner of a ship, to be used in the construction thereof, and who afterward received from the owner a bill of sale of the ship to secure him for such materials and for money advances, though having no right to enforce his claim as a preferred lien in admiralty, is entitled to a surplus remaining in court after the sale of the vessel by a proceeding *in rem* in admiralty on libels by others.

(III) *Claims on Which Lien Is Lost.* One whose lien for a claim has been lost may be paid out of remnants remaining in the registry.[14]

(IV) *Mortgages.* A mortgage debt against a vessel will, in marshaling her proceeds for distribution, be entitled, after satisfaction of privileged and lien debts, to payment as against the owner.[15]

e. Order of Payment of Claims—(I) *In General.* In the disposition of the proceeds of a vessel it is the custom of some courts to pay different claims in the following order: costs of sale, and those incident to the custody of the vessel; seamen's wages, unless there be subsequent salvage; claims for towage and necessaries furnished in a foreign port; claims for supplies and materials furnished in the home port, for which a lien is given by the state law; mortgages.[16]

(II) *Attachment in State Court.* An attachment proceeding in a state

14. Town *v.* The American Banner, 24 Fed. Cas. No. 14,112*a*; The Boston, Blatchf. & H. Adm. 309, 3 Fed. Cas. No. 1,669; The Stephen Allen, Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 13,361; Zane *v.* The Brig President, 4 Wash. (U. S.) 453, 30 Fed. Cas. No. 18,201.

Claim of materialman.— A materialman whose lien is discharged by the giving of credit is still entitled, upon petition, to be paid out of remnants and surplus remaining in the registry. Zane *v.* The Brig President, 4 Wash. (U. S.) 453, 30 Fed. Cas. No. 18,201.

15. The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654; The Katie O'Neil, 65 Fed. 111; United Hydraulic Cotton-Press Co. *v.* The Alexander McNeil, 24 Fed. Cas. No. 14,404, 20 Int. Rev. Rec. 175; Bartlette *v.* The Viola, 2 Fed. Cas. No. 1,083, 3 Chic. Leg. N. 245; Remnants in Court, Olc. Adm. 382, 20 Fed. Cas. No. 12,697; Leland *v.* The Ship Medora, 2 Woodb. & M. (U. S.) 92, 15 Fed. Cas. No. 8,237. But see The Hendrik Hudson, 11 Fed. Cas. No. 6,358, 17 Law Rep. 93, 2 West. L. Month. 343, wherein it was held that an ordinary common-law chattel mortgage on a vessel, though given for the purchase-money, and filed and recorded as required by the law of the state to which the vessel belongs and the law of the United States, does not entitle the mortgagee to claim the surplus of the proceeds of a ship, sold under the process and decree of a court of admiralty, in preference to a privileged creditor who has a maritime lien.

Agreement for mortgage.— A person having an agreement for a mortgage upon a vessel has no such interest in the thing as will entitle him to claim the proceeds of her sale in the registry of the court. The Favorite, 3 Sawy. (U. S.) 405, 8 Fed. Cas. No. 4,699.

Mortgagee as purchaser.— The fact that the purchaser of a vessel in a proceeding *in rem* is also the owner of a mortgage thereon does not extinguish the mortgage, but the same becomes a charge upon the proceeds of the vessel, and the purchaser thereof may, upon petition, obtain payment of the amount due upon the mortgage out of such proceeds, all other claims against the vessel having been satisfied. The Steamboat Syracuse, 9 Ben. (U. S.) 348, 23 Fed. Cas. No. 13,716.

16. The City of Tawas, 3 Fed. 170; The Rodney, Blatchf. & H. Adm. 226, 20 Fed. Cas. No. 11,993. But see The Kate Hinchman, 6 Biss. (U. S.) 367, 14 Fed. Cas. No. 7,620, wherein the proceeds of a vessel sold on a libel for wages were distributed in the following order: wages and costs; recorded mortgages; clerk's, marshal's, and proctor's fees; supplies at the home port.

Priority between affreightment and claims of materialmen.— Maritime liens arising out of contracts of affreightment, and liens not resting upon the necessities of the ship or the hazards of navigation, are subordinate to the claims of materialmen, bottomry bond holders, salvors, and collision claimants. The America, 1 Fed. Cas. No. 288, 16 Law Rep. 264, 2 West. L. Month. 279; The Unadilla, 24 Fed. Cas. No. 14,333, 9 Chic. Leg. N. 427.

Priority between factors and possessors of cargo.— Factors entitled to a certain sum as commissions are not entitled to the proceeds of sale of a cargo as against *bona fide* possessors thereof, but the court will decide upon the equities of all concerned, and decree the amount of the lien to the factors, and the residue to the other claimants. The Ship Packet, 3 Mason (U. S.) 334, 18 Fed. Cas. No. 10,655.

Priority between hypothecations and mortgages.— On the sale of a vessel in a suit *in rem*, persons claiming by hypothecations made by the master to secure loans for necessary repairs and supplies are entitled to be paid out of the proceeds in court before a prior mortgage. Furniss *v.* The Brig Magoun, Olc. Adm. 55, 9 Fed. Cas. No. 5,163. See also Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*c*.

Priority between mortgages and insurance premiums.— Claims for insurance premiums and moneys advanced to disburse ships in a foreign port, in so far as they are not maritime liens, cannot be paid out of surplus moneys in the registry arising from the sale of the vessels in priority to the claims of a mortgagee of the vessels. The Allianca, 65 Fed. 245.

Priority between salvage and seamen's wages.— In marshaling claims for payment from the proceeds of sale, salvage is entitled to be paid in preference to prior claims for seamen's wages. The Athenian, 3 Fed. 248.

Priority between sureties for claimants and mortgagees.— Sureties for claimants, who are compelled to pay a salvage decree, are not entitled to priority over valid mortgages which antedated the salvage services. Roberts *v.* The Huntsville, 3 Woods (U. S.) 386, 20 Fed. Cas. No. 11,904.

court, not followed by a decree, does not give the attaching creditor any priority over a creditor subsequently filing a libel in admiralty.[17]

(III) *Libellant First Instituting Proceedings.* Original libellants are not entitled to priority in the distribution of the proceeds of the sale of a vessel over equal-rank claimants who have subsequently instituted proceedings for the enforcement of their demands.[18]

(IV) *Liens of Same Class.* Maritime liens of the same class, upon a vessel sold under order of a court of admiralty, should be paid out of the proceeds in the inverse order of the dates of the creation of such liens.[19]

f. Marshaling Assets. It has been held that admiralty will marshal the fund in its registry only between lien-holders and owners.[20]

S. Appeals — 1. Jurisdiction. As heretofore shown, the appellate jurisdiction in admiralty is, in certain classes of cases, vested in the circuit court of appeals, and in other classes in the supreme court.[21]

2. Orders and Decrees from Which Appeals Lie — a. General Rule. The appellate courts have jurisdiction of appeals only from final decrees.[22]

b. Application of the Rule — (I) *Interlocutory Decrees.* Thus an appeal

17. Schmidt *v.* The Superb, 21 Fed. Cas. No. 12,467. But see The Daniel Kaine, 35 Fed. 785 (wherein it appeared that after seizure of a vessel by the marshal on process in admiralty, but before sale, a writ of fieri facias out of a state court on a judgment against one of the part-owners of the vessel was put in the hands of a sheriff. It was held that, as against defendant in the execution, plaintiff therein acquired a lien as soon as his writ reached the sheriff's hands, and that, after satisfaction of all admiralty liens and liens of domestic creditors under the local statute, the execution creditor was entitled to defendant's remaining share of the surplus); The Lady Franklin, 2 Biss. (U. S.) 121, 14 Fed. Cas. No. 7,983 (wherein it was held that a federal court, in distributing the proceeds of a sale made to satisfy a maritime lien, will distribute them to the parties entitled under the law, state or federal; and parties who might have perfected their liens under the state law, had not the issue come into admiralty, are entitled to priority out of the proceeds); The Skylark, 2 Biss. (U. S.) 251, 22 Fed. Cas. No. 12,928 (wherein it was held that the purchaser of a vessel under execution from a state court has no superior rights as against the decree of an admiralty court enforcing a maritime lien).

Intervention by attaching sheriff.— A sheriff who, after attaching a vessel in a suit by a creditor against her owner, permits, without opposition, her seizure by the marshal under admiralty process, is a competent party to intervene in the admiralty suit and claim the proceeds in the registry. Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483.

18. The Lady Boone, 21 Fed. 731; The J. W. Tucker, 20 Fed. 129; The Arcturus, 18 Fed. 743; The Fanny, 2 Lowell (U. S.) 508, 8 Fed. Cas. No. 4,638. But see The Sea Lark, 34 Fed. 52, wherein it was held that where the time fixed by the rules of court for making defense has elapsed, and the libel has been taken for confessed, but the formal decree of condemnation and sale has not been entered, on account of the absence of the judge, any maritime claimant who comes in afterward by petition does so subject to the libel, and cannot be paid till libellant is paid in full, though his claim was originally prior to the libel.

Failure to intervene or institute suit.— A person injured by a collision instituted proceedings against the vessel in fault, and at his own expense prosecuted the suit to condemnation. It was held that another person injured, who took no part in the suit, could not share in the proceeds of the sale of the vessel until the claim of the first party had been satisfied. Woodworth *v.* Corn Exch. Ins. Co., 5 Wall. (U. S.) 87, 18 L. ed. 517.

So a creditor holding a maritime lien, who proceeds *in rem* and obtains a final decree before another creditor, having a coördinate claim, has instituted proceedings or intervened in the prior suit to enforce his lien, is entitled to be paid his debt in preference to such other creditor. The America, 1 Fed. Cas. No. 288, 16 Law Rep. 264, 2 West. L. Month. 279.

19. The America, 1 Fed. Cas. No. 288, 16 Law Rep. 264, 2 West. L. Month. 279. See also Steamboat Raritan *v.* Smith, 10 Mo. 527, wherein it was held that on a judicial sale of a boat to satisfy a lien the proceeds will be distributed according to the priority of liens.

20. The Edith, 94 U. S. 518, 24 L. ed. 167. See also The Ship Sailor Prince, 1 Ben. (U. S.) 461, 21 Fed. Cas. No. 12,219, wherein it was held that the principle that where one creditor has two funds to resort to, while another has security on only one of such funds, the former will be compelled to resort to the other fund, will not be applied in admiralty at the instance of a mere mortgagee.

21. See *supra*, III, B.

22. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; Montgomery *v.* Anderson, 21 How. (U. S.) 386, 16 L. ed. 160; Mordecai *v.* Lindsay, 19 How. (U. S.) 199, 15 L. ed. 624; Chace *v.* Vasquez, 11 Wheat. (U. S.) 429, 6 L. ed. 511; The Palmyra, 10 Wheat. (U. S.) 502, 6 L. ed. 376; The Eugene, 87 Fed. 1001, 59 U. S. App. 513, 31 C. C. A. 345; The Alert, 61 Fed. 113, 26 U. S. App. 63, 9 C. C. A. 390; The Delaware, 33 Fed. 589.

ordinarily does not lie from an interlocutory decree, although it has been said that a party may appeal from an interlocutory decree having the effect of a final decree, or he may, at his election, wait until the final decree is positively entered and then take an appeal.[23]

(II) *Amendment of Record Inserting Final Decree.* The appellate court cannot allow an amendment of the record on appeal, by agreement of the parties, inserting a final decree so as to give jurisdiction.[24]

(III) *Pro Forma Decrees.* It has been held that an appeal will lie from a final decree even though it is entered *pro forma* without a trial upon the merits.[25]

c. Finality of Decrees — (I) *In General.* A final decree has been defined to be the determination by the court, upon the issue presented by the pleadings, which ascertains and finds absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation and puts an end to the suit.[26] Where a decree decides finally, so far as the court can, the matter in dispute between the parties, it is final,[27] and since the allowance of costs is within the discretion of the court, a decree in admiralty may be final, and therefore

23. The Steamboat New England, 3 Sumn. (U. S.) 495, 18 Fed. Cas. No. 10,151.

24. Mordecai *v.* Lindsay, 19 How. (U. S.) 199, 15 L. ed. 624.

25. The Steamer Oregon *v.* Rocca, 18 How. (U. S.) 570, 15 L. ed. 515. *Contra*, Hindley *v.* The Wellington, 12 Fed. Cas. No. 6,513, 21 Int. Rev. Rec. 14.

26. Loring *v.* Illsley, 1 Cal. 24. Where a ship was libeled for loss of freight, and the decree was entered for the full amount against the ship, it was held that this was a final decree and appealable as between libellants and the ship, although there had been no determination of the question of responsibility as between the owner and charterer, which had been raised by a petition filed in the cause by the owner. The Alert, 61 Fed. 113, 26 U. S. App. 63, 9 C. C. A. 390.

27. Thus the decree of the district court refusing an order for the sale of a vessel on an application by one of two owners, who have an equal interest, is final, and an appeal lies therefrom. Davis *v.* The Brig Seneca, Gilp. (U. S.) 34, 7 Fed. Cas. No. 3,651.

Decrees concerning funds in court.— There can be no final decree concerning funds which remain in the custody of the court except one which terminates the custody. Montgomery *v.* Anderson, 21 How. (U. S.) 386, 16 L. ed. 160; Cushing *v.* Laird, 15 Blatchf. (U. S.) 219, 6 Fed. Cas. No. 3,510; U. S. *v.* A Canoe, 5 Hughes (U. S.) 490, 25 Fed. Cas. No. 14,718; George *v.* Saunders, 19 Ala. 744.

Decrees in salvage cases.— A decree in a salvage case, rendered before the charges and expenses of keeping and selling the property are ascertained and the salvage apportioned, and which merely awards a certain rate of salvage out of the proceeds after deducting the charges and expenses, is not a final decree, but at most is only an interlocutory decree in the nature of a final decree. The Steamboat New England, 3 Sumn. (U. S.) 495, 18 Fed. Cas. No. 10,151.

Decrees of condemnation.— A decree in admiralty for the condemnation of a vessel is not final if the libel also claims the condemnation of the cargo, which has been delivered to the respondents at an appraised value and the money deposited with the register. Dayton *v.* U. S., 131 U. S. lxxx, appendix, 18 L. ed. 169.

Decree of dismissal.— On the ground that the decree is not final it has been held that no appeal lies from a decree dismissing a libel for want of prosecution (The Merchant, 4 Blatchf. (U. S.) 105, 17 Fed. Cas. No. 9,436) or for want of evidence (The Delaware, 33 Fed. 589); but it has been held that a decree in a prize cause, dismissing, with costs, a claim to property libeled as prize of war, and directing execution to issue for the costs, is a final judgment from which an appeal lies, although no disposition is made of the libel or the property (Withenbury *v.* U. S., 5 Wall. (U. S.) 819, 18 L. ed. 613).

Decree of reference to a commissioner.— A decree in a suit *in rem* on a bottomry bond, referring the case to a commissioner to ascertain the amount and report to the court, with liberty to either party to move to frame the decree thereon, is not final and appealable. The Yuba, 4 Blatchf. (U. S.) 314, 30 Fed. Cas. No. 18,192.

Decree sustaining exceptions with permission to amend.— Where a decree sustains exceptions to the libel and gives permission to amend within a certain time, the prosecution of an appeal within the prescribed time is an election to waive the right to amend so that the decree takes effect immediately and becomes a final appealable decree. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897.

Orders relating to executions.— An order denying a motion for a perpetual stay of execution, and to set aside a levy pursuant to the execution, is not a final decree, within the meaning of the statute, from which an appeal lies (The Elmira, 16 Fed. 133). And after a purchaser at execution has been put into possession by the sheriff, and has been dispossessed by the former owner, a subsequent order directing the sheriff again to put the purchaser into possession, being void, is not a final judgment and is therefore not appealable (Loring *v.* Illsley, 1 Cal. 24).

appealable, although there is an omission to decree costs.[28] A denial of a motion to open a default, being discretionary, is not appealable.[29]

(II) *Action on Report of Commissioners Necessary to Make Decree Appealable.* No appeal lies from a decree of restitution, etc., until the report of the commissioners to ascertain the damages has been acted on by the court.[30] And in the case of a libel *in personam* for damages, if a decree be rendered for the recovery of damages, and commissioners be appointed to ascertain the amount thereof, no appeal lies from such decree till the commissioners have made their report and it has been acted on by the court.[31]

3. Parties — a. In General. An appeal may, generally speaking, be taken by any person who is a party to the proceedings,[32] but not by a person who is neither a party nor privy to the judgment or decree.[33]

b. Joinder and Severance. Separate appeals by several parties asserting an interest in common, affected by a single decree, will not be permitted ;[34] but when the decree is several and independent as to different parties, each may appeal separately.[35] It has been held, also, that on a joint decree against respondents for a maritime tort there may be separate appeals where respondents have severed in their pleadings or jointly pleaded a general denial.[36]

c. Dismissal as to Improper Parties. An appeal may be dismissed as to improper parties thereto without affecting the proper ones.[37]

d. Amendment Bringing in New Parties. An amendment as to bringing in new parties was not allowed on appeal from the district to the circuit court.[38]

e. Appeal in Name of Vessel. An appeal or writ of error cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate or associated aggregation of persons.[39]

4. Time for Taking Appeal — a. In General. All appeals in admiralty cases to the circuit court of appeals must, unless otherwise specially provided, be taken

28. Sloop Leonede *v.* U. S., 1 Wash. Terr. 153.

29. Cape Fear Towing, etc., Co. *v.* Pearsall, 90 Fed. 435, 33 C. C. A. 161.

30. The Palmyra, 10 Wheat. (U. S.) 502, 6 L. ed. 376.

31. Chace *v.* Vasquez, 11 Wheat. (U. S.) 429, 6 L. ed. 511.

32. The claimants of an informer's share after condemnation and sale of forfeited property may seek a review of a judgment or decree of distribution made by the district court. Wheaton *v.* U. S., 8 Blatchf. (U. S.) 474, 29 Fed. Cas. No. 17,487.

33. Aiken *v.* Smith, 54 Fed. 894, 2 U. S. App. 445, 4 C. C. A. 652.

Claimants in prize cases who are not parties in the district court cannot be heard in the supreme court. The William Bagaley, 5 Wall. (U. S.) 377, 18 L. ed. 583.

Sureties on a release bond, although they are bound by the decree, are not parties and cannot appeal. The Glide, 72 Fed. 200, 42 U. S. App. 276, 18 C. C. A. 504; Aiken *v.* Smith, 54 Fed. 894, 2 U. S. App. 445, 4 C. C. A. 652. But see Hardee *v.* Wilson, 146 U. S. 179, 13 S. Ct. 39, 36 L. ed. 933; The City of Naples, 69 Fed. 794, 32 U. S. App. 613, 16 C. C. A. 421.

Although seamen may join in suits for wages, a decree against one does not affect the claims of the rest and entitle them to appeal. Oliver *v.* Alexander, 6 Pet. (U. S.) 143, 8 L. ed. 349.

34. Hardee *v.* Wilson, 146 U. S. 179, 13 S. Ct. 39, 36 L. ed. 933; Downing *v.* McCartney, 131 U. S. xcviii, appendix, 19 L. ed. 757. See also Thomas *v.* Lane, 2 Sumn. (U. S.) 1, 23 Fed. Cas. No. 13,902.

Thus it has been held that part of the damage claimants who intervene in proceedings in admiralty for limitation of liability cannot maintain a separate appeal from a decree limiting liability without effecting a severance in respect to the others. The Columbia, 67 Fed. 942, 44 U. S. App. 326, 15 C. C. A. 91.

35. Stratton *v.* Jarvis, 8 Pet. (U. S.) 4, 8 L. ed. 846; The Columbia, 73 Fed. 226, 44 U. S. App. 326, 19 C. C. A. 436.

The master of a libeled vessel who enters a claim stating that he is the lawful bailee of the owner named in the claim, and who gives a release bond with surety, may alone appeal from the decree of the trial court, and thereby bring the whole case before the appellate court, though the owner and surety both appear of record and may join in the appeal if they wish. Aiken *v.* Smith, 54 Fed. 894, 2 U. S. App. 445, 4 C. C. A. 652.

36. Thomas *v.* Lane, 2 Sumn. (U. S.) 1, 23 Fed. Cas. No. 13,902.

37. Aiken *v.* Smith, 54 Fed. 894, 2 U. S. App. 445, 4 C. C. A. 652.

38. Mason *v.* Ervine, 27 Fed. 240. See also The City of Paris, 14 Blatchf. (U. S.) 531, 5 Fed. Cas. No. 2,767; Aiken *v.* Smith, 54 Fed. 894, 2 U. S. App. 445, 4 C. C. A. 652.

39. Steamboat Burns, 9 Wall. (U. S.) 237, 19 L. ed. 620; Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206.

within six months, and appeals from that court to the supreme court must be taken within one year, after the entry of the order, judgment, or decree;[40] but appeals from the district or circuit court to the supreme court may be taken within two years,[41] except that appeals in prize cases are limited to thirty days after the rendering of the decree.[42]

b. Effect of Delay in Perfecting Appeal. Where an appeal in admiralty is not taken within the prescribed time it will be dismissed.[43]

5. Method of Taking Appeal — a. In General. In the absence of specially prescribed rules the practice of the court will govern as to notice and appeal bonds.[44]

b. Notice of Appeal. A notice to the effect that the appellant appeals from the decree, signed by the party or his proctor, may be filed with the clerk and served on the opposite party or his proctor.[45]

c. Bond to Stay Proceedings. If appellant desires to stay proceedings under the decree he must give bonds therefor within the time prescribed by the rules of the court.[46]

d. Security for Costs. But while the giving of a bond to stay the proceedings is a matter which lies within the discretion of appellant, as a general rule he must in any event give bond for the costs of the appeal.[47] It has been held, however, that where an appeal in admiralty has been taken by petition and citation, and appellee has been served with notice and has appeared, the appeal has a standing irrespective of the bond.[48]

e. Sufficiency of the Appeal Bond. An appeal bond should be executed by the appellant personally, if resident within the district,[49] with at least one surety,[50] and should run in favor of all the persons whom the appeal is intended to bring before the court.[51] It may be taken before a United States commissioner in the absence of a rule of court providing otherwise.[52]

f. Petition for Appeal and Assignment of Errors — (1) *Necessity For.* The circuit courts of appeals have adopted a rule requiring an appellant to file a peti-

40. U. S. Rev. Stat. (Suppl. 1891), p. 904, §§ 6, 11.

The act of March 3, 1891 (26 U. S. Stat. at L. 829, § 11), allowing an appeal to be taken to the circuit court of appeals at any time within six months, applies to an admiralty proceeding. The City of Naples, 69 Fed. 794, 32 U. S. App. 613, 16 C. C. A. 421.

41. U. S. Rev. Stat. (1878), § 1008. See also Allen *v.* Southern Pac. R. Co., 173 U. S. 479, 19 S. Ct. 518, 43 L. ed. 775.

42. U. S. Rev. Stat. (1878), § 1009.

43. U. S. *v.* Five Thousand One Hundred Dollars in Specie, 1 Woods (U. S.) 14, 25 Fed. Cas. No. 15,119.

Under the former system it was held that if appellant delayed perfecting his appeal until within a very short time before the term of the appellate court, the appellee might notice the cause for hearing (Nall *v.* The Steamer Illinois, 6 McLean (U. S.) 413, 17 Fed. Cas. No. 10,005) or continue it at his option (Backus *v.* Schooner Marengo, 6 McLean (U. S.) 499, 2 Fed. Cas. No. 713).

44. Otis *v.* Rio Grande, 1 Woods (U. S.) 593, 18 Fed. Cas. No. 10,614.

There is no general admiralty rule relating to the taking of appeals or the giving of bonds therefor. Rule 45 applies to the former practice. The Canary No. 2, 22 Fed. 536.

45. U. S. Rev. Stat. (1878), § 1000; C. C. A. Rules 13, 14.

46. The Infanta, Abb. Adm. 327, 13 Fed. Cas. No. 7,031.

Instrument valid as common-law obligation. — Where an undertaking given on appeal in a territorial court sitting in admiralty was treated by respondent as entitling appellants to a stay, and no attempt was made by respondent to enforce the judgment, the undertaking was valid as a common-law obligation. Braithwaite *v.* Jordan, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

47. Hayford *v.* Griffith, 3 Blatchf. (U. S.) 34, 11 Fed. Cas. No. 6,263; Providence Washington Ins. Co. *v.* Wager, 37 Fed. 59; The Brantford City, 32 Fed. 324; Mason *v.* Ervine, 27 Fed. 240; Sloop Leonede *v.* U. S., 1 Wash. Terr. 153.

The practice of exempting seamen from giving security for costs was founded upon their presumed inability, and therefore a seaman may be required to give security for costs on appeal unless he prove by satisfactory affidavits that he is unable to do so. Wheatley *v.* Hotchkiss, 1 Sprague (U. S.) 225, 29 Fed. Cas. No. 17,483.

48. The Natchez, 27 Fed. 309 [*distinguishing* The City of Lincoln, 19 Fed. 460].

49. The Grand Republic, 10 Fed. 398.

50. The Grand Republic, 10 Fed. 398; The Infanta, Abb. Adm. 327, 13 Fed. Cas. No. 7,031.

51. Mason *v.* Ervine, 27 Fed. 240; The City of Lincoln, 19 Fed. 460.

Amendment by adding appellees. — An appeal bond fatally defective in that it names but one of several appellees cannot be amended. The City of Lincoln, 19 Fed. 460.

52. The Canary No. 2, 22 Fed. 536.

tion for appeal setting forth the nature and date of filing of the successive pleadings in the case, with the action of the court thereon; and also an assignment of errors setting forth separately and particularly each error asserted and intended to be urged; and unless this is done the court will not hear or regard alleged errors except at its own option or request.[53] While a plain error may be noticed and considered,[54] the appellate court usually will not consider points not raised below nor assigned as error.[55]

(II) *Sufficiency of the Assignment.* The assignment of errors must be specific,[56] and an assignment that the court erred in allowing certain claims, which the evidence adduced by libellant did not substantiate, is too general to be considered,[57] as is an assignment "that the court erred in holding that libellant was entitled to any compensation for the injuries received."[58]

(III) *Supplemental Assignments.* For good cause shown, additional assignments of error may, on motion, be allowed to be filed.[59]

6. Allowance, Citation, and Apostles — a. Allowance and Citation. When the appeal has been allowed and the bond therefor approved by a judge of the circuit court of appeals or a district judge, a citation signed by the judge and returnable in thirty days is issued and served on appellee, notifying him thereof and designating the time for him to appear in the appellate court.[60]

b. The Apostles. It is the duty of the clerk, after an appeal is allowed and citation issued, to make up, certify, and transmit the record in the case to the appellate court. This must be done within thirty days after the filing of the notice of appeal.[61]

7. Effect of Appearance by Appellee. The appearance of appellee in an admiralty suit and his participation in the proceedings before the appellate court estop him from denying that there is a valid appeal pending.[62]

8. Effect of Appeal and Stay Bond. The taking of an appeal and giving of a supersedeas bond suspends and vacates the decree, and the case is heard *de novo* in the appellate court;[63] but it has been held that the taking of such appeal does

53. C. C. A. Rule 11.

54. U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452.

55. The Sapphire, 18 Wall. (U. S.) 51, 21 L. ed. 814; The Vaughan and Telegraph, 14 Wall. (U. S.) 258, 20 L. ed. 807; Commander-in-chief, 1 Wall. (U. S.) 43, 17 L. ed. 609; The Three Friends, 85 Fed. 424, 52 U. S. App. 571, 29 C. C. A. 244; The Armonia, 81 Fed. 227, 39 U. S. App. 638, 26 C. C. A. 338; Brauer *v.* Campania Navagacian La Flecha, 66 Fed. 776, 35 U. S. App. 44, 14 C. C. A. 88 [*affirmed* in 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398]; The Ping-On, 7 Sawy. (U. S.) 483, 11 Fed. 607; Harris *v.* Wheeler, 8 Blatchf. (U. S.) 1, 11 Fed. Cas. No. 6,129; Meagher *v.* The Steamboat Lizzie, 2 Woods (U. S.) 243, 16 Fed. Cas. No. 9,377. But see Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; The Fideliter, 1 Abb. (U. S.) 577, 1 Sawy. (U. S.) 153, 8 Fed. Cas. No. 4,755.

No objection to the admissibility of any deposition, deed, grant, exhibit, or transaction will be allowed on the trial in the circuit court of appeals, unless objection was taken and entered of record in the court below. C. C. A. Rule 12.

56. The Chattahoochee, 173 U. S. 540, 19 S. Ct. 491, 43 L. ed. 801, 74 Fed. 899, 33 U. S. App. 510, 21 C. C. A. 162.

57. The Natchez, 78 Fed. 183, 41 U. S. App. 708, 24 C. C. A. 49.

58. Lafourche Packet Co. *v.* Henderson, 94 Fed. 871, 36 C. C. A. 519.

59. Cory *v.* Penco, 76 Fed. 997, 39 U. S. App. 762, 22 C. C. A. 675.

60. C. C. A. Rule 14. See also Freeman *v.* Clay, 48 Fed. 849, 2 U. S. App. 151, 1 C. C. A. 115.

61. C. C. A. Rule 14.

This rule requires the clerk to follow Admiralty Rule 52 of the supreme court; and when the record is not made up in accordance therewith the appellate court will not be obliged to hear the evidence. The Alijandro, 56 Fed. 621, 15 U. S. App. 98, 6 C. C. A. 54.

62. The Natchez, 27 Fed. 309.

Want of monition to appear on appeal is cured by an actual appearance. Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507.

63. The Louisville *v.* Halliday, 154 U. S. 657, 14 S. Ct. 1190, 25 L. ed. 771; Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; The Charles Morgan, 115 U. S. 69, 5 S. Ct. 1172, 29 L. ed. 316; Yeaton *v.* U. S., 5 Cranch (U. S.) 281, 3 L. ed. 101; U. S. *v.* Schooner Peggy, 1 Cranch (U. S.) 103, 2 L. ed. 49; The Rio Grande, 23 Wall. (U. S.) 458, 23 L. ed. 158; *Ex p.* Sawyer, 21 Wall. (U. S.) 235, 22 L. ed. 617; The Lucille, 19 Wall. (U. S.) 73, 22 L. ed. 64; U. S. *v.* Preston, 3 Pet. (U. S.) 57, 7 L. ed. 601; Cleveland *v.* Chisholm, 90 Fed. 431, 62 U. S. App. 164, 33 C. C. A. 157; The Brandywine, 87 Fed. 652, 59 U. S. App. 16, 31 C. C. A. 187; Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466; Nelson *v.* White, 83 Fed. 215, 48 U. S. App. 656, 32 C. C. A. 166; The Coquitlam, 77

not operate to prevent the entry of judgment against stipulators in the court below.[64]

9. Form and Contents of Record on Appeal — a. In General. Elaborate provision is made for the form and contents of the record on appeal by the admiralty rules.[65]

b. Inclusion of Statement of Facts or Evidence. Unless there be an agreed statement of facts, or a statement is made by the court below of the evidence adduced or the facts proved,[66] the evidence presented in the court below must all appear in the transcript of appeal, otherwise the appellate court will decline to try the cause.[67] And it has been held that the records should be so prepared as to show which witnesses were examined in the presence of the district judge, and which were not so examined.[68]

10. Appeals from Territorial Courts. The practice on appeal from a territorial court in admiralty is regulated by the rules and usages of courts in admiralty[69] and not by the territorial statutes.[70]

11. Proceedings on Appeal — a. General Character and Effect of Appeals —

Fed. 744, 48 U. S. App. 103, 23 C. C. A. 438; The Philadelphian, 60 Fed. 423, 21 U. S. App. 90, 9 C. C. A. 54; The E. A. Packer, 58 Fed. 251, 14 U. S. App. 684, 7 C. C. A. 216; Singlehurst *v.* La Compagnie Generale Transatlantique, 50 Fed. 104, 1 U. S. App. 126, 1 C. C. A. 487; The Sirius, 54 Fed. 188, 7 U. S. App. 660, 4 C. C. A. 273; Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 U. S. App. 57, 1 C. C. A. 314; The State of California, 49 Fed. 172, 7 U. S. App. 20, 1 C. C. A. 224; The Havilah, 48 Fed. 684, 1 U. S. App. 1, 1 C. C. A. 77; The Cassius, 41 Fed. 367; The Hesper, 18 Fed. 696; Steamer Saratoga *v.* Four Hundred and Thirty-Eight Bales of Cotton, 1 Woods (U. S.) 75, 21 Fed. Cas. No. 12,356; Dutcher *v.* Woodhull, 7 Ben. (U. S.) 313, 8 Fed. Cas. No. 4,204.

64. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152. It was held that an appeal from an order refusing an application, on a cross-libel, for security and stay, under Admiralty Rule 53, did not suspend the proceedings in the original suit. Franklin Sugar-Refining Co. *v.* Funch, 73 Fed. 844, 39 U. S. App. 219, 20 C. C. A. 61.

Control of property pending appeal.—Under the former system it was held that upon an appeal from the district to the circuit court in a proceeding *in rem*, the property or its proceeds followed the cause into the circuit court (The Wanata, 95 U. S. 600, 24 L. ed. 461; The Lottawanna, 20 Wall. (U. S.) 201, 22 L. ed. 259; The Grotius, 1 Gall. (U. S.) 503, 11 Fed. Cas. No. 5,844; Davis *v.* The Brig Seneca, Gilp. (U. S.) 34, 7 Fed. Cas. No. 3,651; U. S. *v.* Towns, 7 Ben. (U. S.) 444, 28 Fed. Cas. No. 16,534) and that the district court could not make any order concerning the property (The Grotius, 1 Gall. (U. S.) 503, 11 Fed. Cas. No. 5,844), except that it might, for the protection of the property, order its sale if it were perishable (Jones *v.* Walker, Brunn. Col. Cas. (U. S.) 25, 3 N. C. 475, 13 Fed. Cas. No. 7,506). But it was held that on a further appeal to the supreme court the property remained subject to the disposition of the circuit court and did not follow the cause into the supreme court (The Collector, 6 Wheat. (U. S.) 194, 5 L. ed. 239; Hayford *v.* Griffith, 3 Blatchf. (U. S.) 34, 11 Fed. Cas. No. 6,263).

65. Admiralty Rule 52.

Setting out a rule violated.—The holding of the trial court that a vessel was in fault in violating a rule of the supervising inspector cannot be reviewed on appeal, where such rule is not set out in the record or the briefs, for the appellate court cannot take judicial notice of such rules. The Clara, 55 Fed. 1021, 14 U. S. App. 346, 5 C. C. A. 390.

66. Where there is nothing in the certificate of the judge to the statement of facts, or elsewhere in the transcript, to show that the adverse party was present when the statement was made up, or had any notice that it would be made, in the absence of a showing of one or both of these facts, the certificate to the statement will be of no avail, and the appeal should be dismissed. U. S. *v.* The Lone Fisherman, 3 Wash. Terr. 316, 13 Pac. 617.

67. *In re* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; The Edward H. Blake, 92 Fed. 202, 63 U. S. App. 507, 34 C. C. A. 297; Nelson *v.* White, 83 Fed. 215, 48 U. S. App. 656, 32 C. C. A. 166; The Glide, 72 Fed. 200, 42 U. S. App. 276, 18 C. C. A. 504, 68 Fed. 719, 25 U. S. App. 406, 15 C. C. A. 627; The Philadelphian, 60 Fed. 423, 21 U. S. App. 90, 9 C. C. A. 54; The Alijandro, 56 Fed. 621, 15 U. S. App. 98, 6 C. C. A. 54; Gloucester Ins. Co. *v.* Younger, 2 Curt. (U. S.) 322, 10 Fed. Cas. No. 5,487.

68. The Gypsum Prince, 67 Fed. 612, 35 U. S. App. 165, 14 C. C. A. 573.

69. The Sylvia Handy, 143 U. S. 513, 12 S. Ct. 464, 36 L. ed. 246; *In re* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232.

70. Braithwaite *v.* Jordan, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238. In Steamboat Zephyr *v.* Brown, 2 Wash. Terr. 44, 3 Pac. 186, it was held that the rule of the civil law regulated the mode of appeal in admiralty cases in Washington Territory, and that, in the absence of a rule or statute, an appeal was to be taken during the sitting of the court or at least at the time of sentence and to the term of the appellate court next after the term at which the decree was rendered.

(I) *Appeal a Trial De Novo* — (A) *In General.* An appeal in admiralty from the district court to the higher courts vacates the decree appealed from, and the cause is heard *de novo.*[71]

(B) *Presumption from Record.* An appellate court will indulge in presumptions in favor of the correctness of the decree below, except where the record is indefinite or silent as to controlling facts.[72]

(C) *Conflicting Evidence Below.* The decision of a trial court in admiralty upon questions of fact, based upon conflicting testimony or the credibility of witnesses examined before the judge, will not be reversed on appeal unless there is a decided preponderance of evidence against it, or a mistake is clearly shown;[73] but where the trial judge, who has heard the witnesses, decides disputed questions of fact without giving proper weight to the testimony of witnesses who were in the best position to observe the facts, his conclusions of fact will not be followed by the circuit court of appeals.[74]

71. The Louisville *v.* Halliday, 154 U. S. 657, 14 S. Ct. 1190, 25 L. ed. 771; Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; Merchants' Mut. Ins. Co. *v.* Allen, 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858; The Ethel, 31 Fed. 576; Two Hundred and Fifty Barrels of Molasses *v.* U. S., Chase (U. S.) 502, 24 Fed. Cas. No. 14,293.

Successive and concurrent decisions on questions of fact.— The rule is well settled that successive and concurrent decisions of two courts in the same case on mere questions of fact will not be reversed on appeal unless clearly shown to be erroneous. Smith *v.* Burnett, 173 U. S. 430, 19 S. Ct. 442, 43 L. ed. 756; The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181; Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; The Richmond, 103 U. S. 540, 26 L. ed. 313; The Quickstep, 9 Wall. (U. S.) 665, 19 L. ed. 767; Morewood *v.* Enequist, 23 How. (U. S.) 491, 16 L. ed. 516; The Providence, 98 Fed. 133, 38 C. C. A. 670; The S. S. Wilhelm, 59 Fed. 169, 16 U. S. App. 356, 8 C. C. A. 72.

Concurrence of master and judge.— A master's findings of fact, concurred in by the court, will be disturbed on appeal only when there is no evidence to support them or when they are against the manifest weight of the testimony. Furrer *v.* Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. ed. 649; Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664.

72. *In re* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; Bixby *v.* Deemar, 54 Fed. 718, 13 U. S. App. 243, 4 C. C. A. 559. See also The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152; The State of California, 54 Fed. 404, 7 U. S. App. 20, 4 C. C. A. 393.

73. The Ludvig Holberg, 157 U. S. 60, 15 S. Ct. 477, 39 L. ed. 620, 43 Fed. 117; The Lady Pike, 21 Wall. (U. S.) 1, 22 L. ed. 499; Walsh *v.* Rogers, 13 How. (U. S.) 283, 14 L. ed. 147; Cleveland *v.* Chisholm, 90 Fed. 431, 62 U. S. App. 164, 33 C. C. A. 157; The Captain Weber, 89 Fed. 957, 32 C. C. A. 452; The Brandywine, 87 Fed. 652, 59 U. S. App. 16, 31 C. C. A. 187; The Elton, 83 Fed. 519, 42 U. S. App. 666, 31 C. C. A. 496; The City of Augusta, 80 Fed. 297, 50 U. S. App. 39, 25 C. C. A. 430; The Lucy, 74 Fed. 572, 42 U. S. App. 100, 20 C. C. A. 660; The City of Naples, 69 Fed. 794, 32 U. S. App. 613, 16 C. C. A. 421; The Aktieselskabet Banan *v.* Hoadley, 60 Fed. 447, 20 U. S. App. 344, 9 C. C. A. 61; The S. S. Wilhelm, 59 Fed. 169, 16 U. S. App. 356, 8 C. C. A. 72; The Alijandro, 56 Fed. 621, 15 U. S. App. 98, 6 C. C. A. 54; The Charles Hebard, 56 Fed. 315, 6 U. S. App. 641, 5 C. C. A. 516; The Buffalo, 55 Fed. 1019, 14 U. S. App. 373, 5 C. C. A. 388; The Venezuela, 55 Fed. 416, 14 U. S. App. 236, 5 C. C. A. 159; The Warrior, 54 Fed. 534, 7 U. S. App. 559, 4 C. C. A. 498; The City of New York, 54 Fed. 181, 14 U. S. App. 39, 4 C. C. A. 268; The Jersey City, 51 Fed. 527, 1 U. S. App. 244, 2 C. C. A. 365; The Parthian, 48 Fed. 564; The Albany, 48 Fed. 565; Duncan *v.* The Gov. Francis T. Nicholls, 44 Fed. 302; Cooper *v.* The Saratoga, 40 Fed. 509; The Rockaway, 25 Fed. 775; Ayer *v.* The Steamer Glaucus, 4 Cliff. (U. S.) 166, 2 Fed. Cas. No. 683.

Where the testimony has been taken in a cause before a commissioner or examiner, and not before the judge below, and it is all before the appellate court, that court will examine it for itself and reach its own conclusions. In such case the decision of the trial judge on questions of fact is not entitled to the same controlling weight as where he saw and heard the witnesses testify. The Sappho, 94 Fed. 545, 36 C. C. A. 395; The Joseph B. Thomas, 86 Fed. 658, 56 U. S. App. 619, 30 C. C. A. 333; The Glendale, 81 Fed. 633, 42 U. S. App. 546, 26 C. C. A. 500; The Cayuga, 59 Fed. 483, 16 U. S. App. 577, 8 C. C. A. 188; Duncan *v.* The Gov. Francis T. Nicholls, 44 Fed. 302; The Ludvig Holberg, 43 Fed. 120; Levy *v.* The Thomas Melville, 37 Fed. 271.

74. The Albany, 81 Fed. 966, 51 U. S. App. 507, 27 C. C. A. 28; The Gypsum Prince, 67 Fed. 612, 35 U. S. App. 165, 14 C. C. A. 573.

Where there has been a clear and palpable mistake, or a violation of just principles, or the award was unreasonably excessive or inadequate, the appellate court will modify the amount. Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; Post *v.* Jones, 19 How. (U. S.) 150, 15 L. ed.

(II) *Failure to File Cross-Appeal.* Where a party has not appealed from a decree affecting him, but the other party has, the former cannot have the decree modified or reversed in his favor.[75]

b. Powers of Appellate Court — (I) *Admission of Further Evidence* — (A) *In General.* An appellate court will admit new evidence, and, if necessary, will award commissions to take such evidence where it appears that the requirements of justice call for such a course;[76] but further evidence will ordinarily be allowed by the appellate court only where some satisfactory excuse is given for the failure to examine the witnesses in the courts below.[77] However, new testimony will be admitted on appeal in admiralty when the court is of the opinion that under all the circumstances substantial justice requires it, though a satisfactory excuse is not given for failing to produce the testimony below.[78]

(B) *Testimony Withheld Below.* Where testimony has been deliberately withheld in the lower court, an appellate court will not admit it.[79]

(C) *Weight of New Testimony.* New testimony introduced on an appeal in admiralty is not entitled to the same consideration as testimony given in the court below.[80]

(D) *Method of Taking Testimony.* New evidence cannot, under the admiralty rules, be taken by deposition *de bene esse*, but only by a commission which should not issue of course, but only, as has been stated, when it appears that the testimony is material or a good excuse for not offering it in the trial court is given.[81]

(II) *Amendment of Pleadings.* Amendments may be made in the appellate court not only as to form, but as to matters of substance;[82] but the power of

618; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; The Lamington, 86 Fed. 675, 57 U. S. App. 653, 30 C. C. A. 271; Compagnie Commerciale De Transport, etc. *v.* Charente Steamship Co., 60 Fed. 921, 13 U. S. App. 662, 9 C. C. A. 292; The Bay of Naples, 48 Fed. 737, 1 U. S. App. 47, 1 C. C. A. 81; Murphy *v.* Ship Suliote, 5 Fed. 99.

75. Stratton *v.* Jarvis, 8 Pet. (U. S.) 4, 8 L. ed. 846; McDonough *v.* Dannery, 3 Dall. (U. S.) 188, 1 L. ed. 563; The J. & J. McCarthy; 61 Fed. 516, 26 U. S. App. 11, 9 C. C. A. 600; The F. W. Vosburgh, 50 Fed. 239, 1 U. S. App. 143, 1 C. C. A. 508; Shaw *v.* Folsom, 40 Fed. 511; Allen *v.* Hitch, 2 Curt. (U. S.) 147, 1 Fed. Cas. No. 224; Airey *v.* Merrill, 2 Curt. (U. S.) 8, 1 Fed. Cas. No. 115; Merrill *v.* Arey, 3 Ware (U. S.) 215, 17 Fed. Cas. No. 9,468. But see Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; The Umbria, 59 Fed. 489, 11 U. S. App. 612, 8 C. C. A. 194; The Galileo, 29 Fed. 538; Steamer Saratoga *v.* Four Hundred and Thirty-Eight Bales of Cotton, 1 Woods (U. S.) 75, 21 Fed. Cas. No. 12,356.

76. The Western Metropolis, 12 Wall. (U. S.) 389, 20 L. ed. 394; The Potomac, 8 Wall. (U. S.) 590, 19 L. ed. 511; The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405; Hawthorne *v.* U. S., 7 Cranch (U. S.) 107, 3 L. ed. 284; Brig James Wells *v.* U. S., 7 Cranch (U. S.) 22, 3 L. ed. 256; The Lisbonense, 53 Fed. 293, 11 U. S. App. 693, 3 C. C. A. 539; The Venezuela, 52 Fed. 873, 1 U. S. App. 314, 3 C. C. A. 319; The Stonington, 25 Fed. 621; The Morning Star, 14 Fed. 866; Rose *v.* Himely, Bee Adm. 313, 20 Fed. Cas. No. 12,045; Cushman *v.* Ryan, 1 Story (U. S.) 91, 6 Fed. Cas. No. 3,515; Carrigan *v.* The Charles Pitman, 1 Wall. Jr. C. C. (U. S.) 307, 5 Fed. Cas. No. 2,444; Phelps *v.* The Steamship City of Panama, 1 Wash. Terr. 615.

An appellate court should not receive as new evidence in an admiralty case a deposition by a witness who testified in the trial below concerning the very matters referred to in the deposition, when no ground for introducing additional proof is shown. The Sirius, 54 Fed. 188, 7 U. S. App. 660, 4 C. C. A. 273.

77. The Juniata, 91 U. S. 366, 23 L. ed. 208; The Mabey, 10 Wall. (U. S.) 419, 19 L. ed. 963; The Iron Chief, 63 Fed. 289, 22 U. S. App. 473, 11 C. C. A. 196; The Lurline, 57 Fed. 398, 14 U. S. App. 150, 5 C. C. A. 165; The Beeche Dene, 55 Fed. 526, 2 U. S. App. 582, 5 C. C. A. 208; The Sirius, 54 Fed. 188, 7 U. S. App. 660, 4 C. C. A. 273; Singlehurst *v.* La Compagnie Generale Transatlantique, 50 Fed. 104, 1 U. S. App. 126, 1 C. C. A. 487; The Stonington, 25 Fed. 621; The B. B. Saunders, 23 Blatchf. (U. S.) 185, 23 Fed. 303.

78. Red River Line *v.* Cheatham, 60 Fed. 517, 23 U. S. App. 19, 9 C. C. A. 124.

79. The B. B. Saunders, 23 Blatchf. (U. S.) 185, 23 Fed. 303.

80. Taylor *v.* Harwood, Taney (U. S.) 437, 23 Fed. Cas. No. 13,794; The Brig Busy, 2 Curt. (U. S.) 586, 4 Fed. Cas. No. 2,232.

81. The London Packet, 2 Wheat. (U. S.) 371, 4 L. ed. 264; The Beeche Dene, 55 Fed. 526, 2 U. S. App. 582, 5 C. C. A. 208.

82. The Charles Morgan, 115 U. S. 69, 5 S. Ct. 1172, 29 L. ed. 316; The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531; The Morning Star, 14 Fed. 866; Warren *v.* Moody, 9 Fed. 673; Anonymous, 1 Gall. (U. S.) 22, 1 Fed. Cas. No. 444; Taylor *v.* Harwood, Taney (U. S.) 437, 23 Fed. Cas. No. 13,794; Weaver *v.* Thomson, 1 Wall. Jr. C. C. (U. S.) 343, 29 Fed. Cas. No. 17,311; Reppert *v.* Robinson,

the court on appeal to allow amendments to the pleadings, so as to let in new evidence and new grounds of defense, should be exercised only in order to bring the merits of the controversy fairly before the court. They should be allowed only when justice requires and on a showing therefor.[83]

(III) *Dismissal of Libel.* The higher court, on appeal, has the right to dismiss the libel in the court below, but will not do so unless the findings of the district judge are against libellant and are warranted by the proof, and unless the new testimony introduced in the appellate court does not substantially change them.[84]

c. Decree — (I) *In General.* Since the effect of an appeal is to call for a new trial, the appellate court may direct such a decree to be entered and such proceedings to be taken as it may think proper.[85]

(II) *Partial Affirmance.* It is competent for the appellate court to partially confirm a decree in admiralty rendered by a lower court and reversed as to other points.[86]

(III) *Partial Reversal.* Where only part of a decree has been appealed from in case of a reversal, the remaining parts remain in full force and themselves become a part of the reversing decree.[87]

(IV) *Allowance of Interest.* When a decree in favor of libellant, which includes interest, is affirmed, he will be awarded interest on the whole decree unless special circumstances induce the court to disallow it,[88] but not for the time pending the appeal where libellant has appealed either by direct or cross appeal.[89]

d. Mandate to Lower Court. The appellate court does not execute its own

Taney (U. S.) 492, 20 Fed. Cas. No. 11,703; The Morton, Brown Adm. 137, 17 Fed. Cas. No. 9,864. But see The Mabey, 10 Wall. (U. S.) 419, 19 L. ed. 963; The Philadelphian, 60 Fed. 423, 21 U. S. App. 90, 9 C. C. A. 54.

Remand for amendment.— Where the libel is so defective that a decree cannot be entered upon it, but the evidence in the record shows merit, but does not conform to the allegations, the appellate court will not amend the libel, but will remand it to the lower court with directions to permit an amendment and for a new trial. The Mary Ann, 8 Wheat. (U. S.) 380, 5 L. ed. 641; The Divina Pastora, 4 Wheat. (U. S.) 52, 4 L. ed. 512; The Edward, 1 Wheat. (U. S.) 261, 4 L. ed. 86; The Schooner Adeline, 9 Cranch (U. S.) 244, 3 L. ed. 719; Brig Caroline *v.* U. S., 7 Cranch (U. S.) 496, 3 L. ed. 417; The Schooner Anne *v.* U. S., 7 Cranch (U. S.) 570, 3 L. ed. 442. See also The Watchful, 6 Wall. (U. S.) 91, 18 L. ed. 763; The Glide, 72 Fed. 200, 42 U. S. App. 276, 18 C. C. A. 504; Remington *v.* Atlantic Royal Mail Steam Nav. Co., 6 Blatchf. (U. S.) 153, 20 Fed. Cas. No. 11,695.

83. Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; The Charles Morgan, 115 U. S. 69, 5 S. Ct. 1172, 29 L. ed. 316; The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531; The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405; The Venezuela, 52 Fed. 873, 1 U. S. App. 314, 3 C. C. A. 319; The Alexander Folsom, 52 Fed. 403, 6 U. S. App. 153, 3 C. C. A. 165; Sorensen *v.* Keyser, 51 Fed. 30, 2 U. S. App. 177, 2 C. C. A. 92; Singlehurst *v.* La Compagnie Generale Transatlantique, 50 Fed. 104, 1 U. S. App. 126, 1 C. C. A. 487; The Thomas Melville, 34 Fed. 350; Phenix Ins. Co. *v.* Liverpool, etc., Steamship Co., 22 Blatchf. (U. S.) 372, 22 Fed. 730; The Morning Star, 14 Fed. 866; Warren *v.* Moody, 9 Fed. 673; The Morton, Brown Adm. 137, 17 Fed. Cas. No. 9,864; Anonymous, 1 Gall. (U. S.) 22, 1 Fed. Cas. No. 444; Taylor *v.* Harwood, Taney (U. S.) 437, 23 Fed. Cas. No. 13,794; Weaver *v.* Thomson, 1 Wall. Jr. C. C. (U. S.) 343, 29 Fed. Cas. No. 17,311; Reppert *v.* Robinson, Taney (U. S.) 492, 20 Fed. Cas. No. 11,703; The John Jay, 3 Blatchf. (U. S.) 67, 13 Fed. Cas. No. 7,352; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,019, 21 Law Rep. 589, 1 West. L. Month. 159.

84. Jacobs *v.* Ousatonic Water Co., 10 Fed. 826.

85. See Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 U. S. App. 57, 1 C. C. A. 314.

86. The Willamette, 72 Fed. 79, 44 U. S. App. 96, 18 C. C. A. 373.

87. The Roarer, 1 Blatchf. (U. S.) 1, 20 Fed. Cas. No. 11,876.

88. The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153; The Umbria, 59 Fed. 475, 11 U. S. App. 691, 8 C. C. A. 181, 59 Fed. 489, 11 U. S. App. 612, 8 C. C. A. 194 [*following* The Blenheim, 18 Fed. 47, and *disapproving* Deems *v.* Albany and Canal Line, 14 Blatchf. (U. S.) 474, 7 Fed. Cas. No. 3,736]. See also New Zealand Ins. Co. *v.* Earnmoor Steamship Co., 79 Fed. 368, 48 U. S. App. 245, 24 C. C. A. 644; The Natchez, 78 Fed. 183, 41 U. S. App. 708, 24 C. C. A. 49; The H. F. Dimock, 77 Fed. 226, 38 U. S. App. 647, 23 C. C. A. 123; The North Star, 62 Fed. 71, 22 U. S. App. 242, 10 C. C. A. 262; The Grapeshot, 2 Woods (U. S.) 42, 10 Fed. Cas. No. 5,703.

89. The Express, 59 Fed. 476, 11 U. S. App. 749, 8 C. C. A. 182; The C. P. Raymond, 36 Fed. 336; The Rebecca Clyde, 12 Blatchf. (U. S.) 403, 20 Fed. Cas. No. 11,622. See also The North Star, 62 Fed. 71, 22 U. S. App. 242, 10 C. C. A. 262.

decrees, but enters an order for a mandate to issue to the lower court directing what decree should be entered there; and thereupon the clerk, after taxing the costs[90] and attaching a statement thereof to the mandate, transmits the same to the court below, which accordingly enters the decree as directed, and execution may then be issued thereon against the defeated party and his sureties.[91]

T. Certifying Questions to the Supreme Court — 1. Statutory Provision For. The act of March 3, 1891, provides that the circuit court of appeals may at any time certify to the supreme court of the United States any question or proposition of law concerning which it desires the instruction of that court for its proper decision.[92]

2. Cases in Which Questions May Be Certified. Where the case presents no peculiarity rendering it appropriate for the circuit court of appeals to certify questions to the supreme court, an application therefor will be denied, and this will be done if the supreme court has passed on the question in a former case.[93]

3. Certificate and Record. Where a circuit court of appeals certifies a question or proposition of law to the supreme court for its decision, the certificate must contain a proper statement of the facts out of which the same arises, and if application is thereupon made to the supreme court that the whole record may be sent up to it for its consideration, decision, review, or determination, as if the whole matter or cause had been brought up on appeal or error, the applicant must furnish the supreme court with a certified copy of the entire record.[94]

U. Writ of Certiorari — 1. Power of Supreme Court to Review by Certiorari. As already shown, the supreme court may require by certiorari certain cases to be certified up for its review and determination with the same power and authority as if the case had been brought up by appeal or writ of error.[95]

2. Extent of Power — a. In General. The power of the supreme court in certiorari extends to every case pending in the circuit court of appeals, and may be exercised at any time during such pendency, provided the case is one which otherwise would be finally determined in that court; but the power will be sparingly exercised and is properly invoked only where questions of gravity and importance are involved.[96]

b. Necessity for a Final Decree. Ordinarily the writ of certiorari will not issue until after a final decree in the court of appeals.[97]

c. What Matters Reviewable. Where a case has been certified to the supreme court, the whole case is then open for examination, although it may have been in the circuit court of appeals on a second appeal and that court was limited to certain questions;[98] but only errors assigned by the petitioner can be considered, although the case was heard in the circuit court of appeals on appeals by both parties.[99]

d. Time of Applying for Writ. Application for the writ of certiorari may be

90. If any question arises as to costs it should be settled by motion before the mandate is sent down. The State of California, 54 Fed. 404, 7 U. S. App. 20, 4 C. C. A. 393.

91. Smith *v.* Pendergast, 82 Fed. 504; The Sydney, 47 Fed. 260; Deems *v.* Albany and Canal Line, 14 Blatchf. (U. S.) 474, 7 Fed. Cas. No. 3,736; C. C. A. Rule 32.

92. U. S. Rev. Stat. (Suppl. 1891), p. 903, § 6.

93. Lau Ow Bew *v.* U. S., 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340 [*reversing* 47 Fed. 641, 7 U. S. App. 1, 1 C. C. A. 1], 141 U. S. 583, 12 S. Ct. 43, 35 L. ed. 868.

94. Supreme Court Rule 37; U. S. Rev. Stat. (Suppl. 1891), p. 903, § 6.

95. See *supra*, III, B, 4.

96. Forsyth *v.* Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. ed. 1095; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; Lau Ow Bew *v.* U. S., 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340 [*reversing* 47 Fed. 641, 7 U. S. App. 1, 1 C. C. A. 1], 141 U. S. 583, 12 S. Ct. 43, 35 L. ed. 868; *In re* Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. ed. 125. See also The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126; *In re* Tampa Suburban R. Co., 168 U. S. 583, 18 S. Ct. 177, 42 L. ed. 589.

97. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 20 S. Ct. 480, 41 L. ed. 1004; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937.

98. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 20 S. Ct. 480, 41 L. ed. 1004.

99. Hubbard *v.* Tod, 171 U. S. 474, 19 S. Ct. 14, 43 L. ed. 246.

made at any time within a year from the judgment or decree in the circuit court of appeals, if that is during the next term of the supreme court.[1]

e. Petition and Proceedings. Application for certiorari is made by a petition setting forth the questions involved, and having attached thereto a certified copy of the entire record in the circuit court of appeals. A copy of the petition should be served on the opposite party, with notice of the time it will be presented, and proof of such service should be filed with the petition. Briefs may be filed on both sides, but no oral argument is allowed.[2]

f. Court to Which Writ Issues. The fact that the mandate of the circuit court of appeals, affirming the decree of the district court, has gone down, does not prevent the supreme court from issuing the writ to the circuit court of appeals.[3]

V. Costs[4] — **1. Control of Court Over.** Costs in admiralty are in the discretion of the court and will be allowed or refused according to the general equities of the case.[5]

2. Parties To and Against Whom Awarded — a. Prevailing Party. The prevailing party is generally entitled to costs.[6] They do not, however, necessarily follow the decree, and may be allowed, withheld, or divided without regard to the ultimate termination of the proceeding.[7]

1. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937.

2. Supreme Court Rule 37.

3. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937.

4. As to security for costs see *supra*, V, L, 2.

5. The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175; The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153; Harmony *v.* U. S., 2 How. (U. S.) 210, 11 L. ed. 239; The Asiatic Prince, 103 Fed. 676; Munson *v.* Straits of Dover Steamship Co., 102 Fed. 926; The E. A. Shores Jr., 79 Fed. 987; The Horace B. Parker, 76 Fed. 238, 33 U. S. App. 677, 22 C. C. A. 418; Union Ice Co. *v.* Crowell, 55 Fed. 87, 5 U. S. App. 270, 5 C. C. A. 49; The Olympia, 52 Fed. 985; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586, 8 Reporter 806, 7 Wkly. Notes Cas. (Pa.) 509; Taylor *v.* Woods, 3 Woods (U. S.) 146, 23 Fed. Cas. No. 13,809; The David Morris, Brown Adm. 273, 7 Fed. Cas. No. 3,596; Regan *v.* The Amaranth, 20 Fed. Cas. No. 11,664; The Joshua Barker, Abb. Adm. 215, 13 Fed. Cas. No. 7,547; The Ship Moslem, Olc. Adm. 374, 17 Fed. Cas. No. 9,876; Shaw *v.* Thompson, Olc. Adm. 144, 21 Fed. Cas. No. 12,726; Hill *v.* The Triumph, 12 Fed. Cas. No. 6,500, 2 N. Y. Leg. Obs. 115; The Martha, Blatchf. & H. Adm. 151, 16 Fed. Cas. No. 9,144.

Novel case.— Where the question as to the liability for injuries in a collision is novel, the court may refuse to award costs. The Steam Propeller Leo, 3 Ben. (U. S.) 569, 15 Fed. Cas. 8,250.

Successive libels.— Costs and disbursements, as against a fund realized from the sale of a vessel, will be allowed only to the first libel filed, and not to the successive libels. The J. W. Tucker, 20 Fed. 129.

6. The Baltimore, 8 Wall. (U. S.) 377, 19 L. ed. 463; Forace *v.* Salinas, 50 Fed. 284; The Weatherby, 49 Fed. 463; Pettie *v.* Boston Tow-Boat Co., 44 Fed. 382; The Robert Jenkins, 22 Fed. 797; The Rialto, 15 Fed. 124; The Tiger Lily, 14 Fed. 591; The Steamer Leipsic, 5 Fed. 108; The Melissa, Brown Adm. 476, 16 Fed. Cas. No. 9,400; The Brig Wexford, 6 Ben. (U. S.) 119, 29 Fed. Cas. No. 17,472; *In re* Keefer, 14 Fed. Cas. No. 7,636, 3 Chic. Leg. N. 125, 4 Nat. Bankr. Reg. 389; Johnson *v.* The Industry, Hoffm. Op. 488, 13 Fed. Cas. No. 7,391; Dominy *v.* The Brig D'Alberti, 1 Ben. (U. S.) 77, 7 Fed. Cas. No. 3,977; Two Hundred and Ninety Barrels of Oil, 1 Sprague (U. S.) 475, 24 Fed. Cas. No. 14,294; Jones *v.* Crowell, 13 Fed. Cas. No. 7,459; Regan *v.* The Amaranth, 20 Fed. Cas. No. 11,664; The Caithenshire, Abb. Adm. 163, 4 Fed. Cas. No. 2,294; The Ship Moslem, Olc. Adm. 374, 17 Fed. Cas. No. 9,876; Leland *v.* The Ship Medora, 2 Woodb. & M. (U. S.) 92, 15 Fed. Cas. No. 8,237.

7. Hall *v.* Witter, 93 Fed. 977; The Glencairn, 78 Fed. 379; The O. C. De Witt, 59 Fed. 620; Union Ice Co. *v.* Crowell, 55 Fed. 87, 5 U. S. App. 270, 5 C. C. A. 49; The D. L. & W. No. 6 C, 53 Fed. 284; The Rapid Transit, 52 Fed. 320; The Komuk, 50 Fed. 618; The Benison, 36 Fed. 793; The Jefferson, 31 Fed. 489; The Ellen Holgate, 30 Fed. 125; The Rosedale, 20 Fed. 447; The Maryland, 19 Fed. 551; The L. B. Snow, 15 Fed. 282; The Pennsylvania, 15 Fed. 814; The Plymouth Rock, 12 Fed. 927; The Sebastian Bach, 12 Fed. 172; The Steamboat Massachusetts, 10 Ben. (U. S.) 177, 16 Fed. Cas. No. 9,258; The Steamboat Rhode Island, 8 Ben. (U. S.) 50, 20 Fed. Cas. No. 11,742; The Steam Ferry-Boat Baltic, 3 Ben. (U. S.) 195, 2 Fed. Cas. No. 824; The Steamboat Jack Jewett, 2 Ben. (U. S.) 463, 13 Fed. Cas. No. 7,122; The R. P. Chase, 3 Ware (U. S.) 294, 20 Fed. Cas. No. 12,099; The Susan, 3 Ware (U. S.) 222, 23 Fed. Cas. No. 13,631; The Young Mechanic, 3 Ware (U. S.) 58, 30 Fed. Cas. No. 18,182; The Cabot, Abb. Adm. 150, 4 Fed. Cas. No. 2,277; The Bark Childe Harold, Olc. Adm. 275, 5 Fed. Cas. No. 2,676; The Ship Moslem, Olc. Adm. 374, 17 Fed. Cas. No. 9,876; Shaw *v.*

b. Each Party in Part Successful. Where each party is in part successful, the costs may be distributed.[8]

c. On Dismissal of Libel—(I) *In General.* Though costs are usually imposed on libellant on the dismissal of a libel,[9] a dismissal may be without costs to libellant if he had strong probable cause of action.[10]

(II) *For Want of Jurisdiction.* Where a suit *in rem* in admiralty is dismissed because the court had no jurisdiction over the *res*, no decree as to costs can be made. In such case each party is responsible to the officers of the court for the costs incurred at his instance.[11]

d. Tender of Amount Due. Where the amount due is tendered before suit, libellant will not be entitled to costs.[12]

Thompson, Olc. Adm. 144, 21 Fed. Cas. No. 12,726; The Steamboat Swallow, Olc. Adm. 4, 23 Fed. Cas. No. 13,664.

Claim of excessive amount.— Where a libel is sustained for only a small part of the amount demanded, costs may be refused. The Stelvio, 34 Fed. 431; The Marinin S., 28 Fed. 664; Irzo *v.* Perkins, 10 Fed. 779; The Bark Edward Albro, 10 Ben. (U. S.) 668, 8 Fed. Cas. No. 4,290; The Brig Gomez de Castro, 10 Ben. (U. S.) 540, 10 Fed. Cas. No. 5,525; The John Walls, Jr., 1 Sprague (U. S.) 178, 13 Fed. Cas. No. 7,432; McGinnis *v.* Carlton, Abb. Adm. 570, 16 Fed. Cas. No. 8,799.

Costs of reference.— A libellant who is entitled to recover for the loss of a barge through the negligence of a tug, but who, being an expert, falsely testifies as to her value, and procures other witnesses to make statements as to her value which he knows to be incorrect, for the purpose of enhancing the amount of his recovery, should be required to pay the costs of a reference to ascertain such value. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 U. S. App. 57, 1 C. C. A. 314.

Libel before maturity of debt.— Costs will be given against a libellant who sues for a debt before it is due, even though the libel is retained. The Papa, 46 Fed. 576.

8. The Leonard Richards, 41 Fed. 818; The Steamship Isabella, 8 Ben. (U. S.) 139, 13 Fed. Cas. No. 7,099; Simpson *v.* Caulkins, Abb. Adm. 539, 22 Fed. Cas. No. 12,880; The Steamboat New Jersey, Olc. Adm. 444, 18 Fed. Cas. No. 10,162; Shaw *v.* Thompson, Olc. Adm. 144, 21 Fed. Cas. No. 12,726; Thomas *v.* Gray, Blatchf. & H. Adm. 493, 23 Fed. Cas. No. 13,898.

9. The Nahor, 9 Fed. 213; The Police Boat Seneca, 8 Ben. (U. S.) 509, 21 Fed. Cas. No. 12,668; Winne *v.* The Carroll, 30 Fed. Cas. No. 17,876*a*; Faber *v.* The Newark, 8 Fed. Cas. No. 4,602; The Steamboat Swallow, Olc. Adm. 4, 23 Fed. Cas. No. 13,664.

10. The Geneva, 26 Fed. 647; Thurber *v.* The Sloop Fannie, 8 Ben. (U. S.) 429, 23 Fed. Cas. No. 14,014; The Steam Ferry-Boat Warren, 2 Ben. (U. S.) 498, 29 Fed. Cas. No. 17,192; The Martha, Blatchf. & H. Adm. 151, 16 Fed. Cas. No. 9,144; McDermott *v.* The S. G. Owens, 1 Wall. Jr. C. C. (U. S.) 370, 16 Fed. Cas. No. 8,748, wherein costs were not allowed on the dismissal of an unfounded claim for a lien, where it appeared that the owners of the vessel had profited by libellant's services, which constituted a personal demand, under circumstances not quite honorable; The Eliza and Abby, Blatchf. & H. Adm. 435, 8 Fed. Cas. No. 4,349.

On grounds not pleaded.—Costs may be disallowed where the libel is dismissed upon grounds not pleaded. The Ocean Express, 22 Fed. 176.

"Without costs to either party."— Where a decree is made dismissing a libel in admiralty "without costs to either party," it merely imports that the parties are not liable to each other for any costs, but does not affect the liability of a party to the clerk for his fees for services rendered to such party. Matter of Stover, 1 Curt. (U. S.) 201, 23 Fed. Cas. No. 13,507.

11. The Lindrup, 70 Fed. 718; Abbey *v.* The Steamboat Robert L. Stevens, 22 How. Pr. (N. Y.) 78, 1 Fed. Cas. No. 8, 21 Law Rep. 41; The McDonald, 4 Blatchf. (U. S.) 477, 16 Fed. Cas. No. 8,756.

Want of jurisdiction not apparent.— The rule is otherwise where want of jurisdiction does not appear by the averments of the libel, but is only disclosed by subsequent pleadings or evidence. In such case costs may be adjudged against libellant on dismissing the libel. The City of Florence, 56 Fed. 236; Lowe *v.* The Canal Boat Benjamin, 1 Wall. Jr. C. C. (U. S.) 187, 15 Fed. Cas. No. 8,565.

12. The Dennis Valentine, 57 Fed. 398, 14 U. S. App. 491, 6 C. C. A. 409; The Serapis, 37 Fed. 436; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586; 8 Reporter 806, 7 Wkly. Notes Cas. (Pa.) 509; The Steamer Propeller M. M. Caleb, 9 Ben. (U. S.) 159, 17 Fed. Cas. No. 9,682; One Hundred and Twelve Sticks of Timber, 8 Ben. (U. S.) 214, 18 Fed. Cas. No. 10,524; The Bark Alaska, 3 Ben. (U. S.) 391, 1 Fed. Cas. No. 129; Davis *v.* Five Hundred and Seventy-Four Bags of Coffee, 7 Fed. Cas. No. 3,633*a*; The Sunshine, Brown Adm. 75, 23 Fed. Cas. No. 13,623; Hessian *v.* The Steamboat Edward Howard, Newb. Adm. 522, 12 Fed. Cas. No. 6,436; Dedekam *v.* Vose, 7 Fed. Cas. No. 3,732; Evans *v.* The Ship Charles, Newb. Adm. 329, 8 Fed. Cas. No. 4,556.

Recovery in excess of tender.— Where each party makes an offer of settlement, libellant is entitled to costs where he recovers more than he is offered, though much less than he has demanded. The Walter W. Pharo, 1 Lowell (U. S.) 437, 29 Fed. Cas. No. 17,124.

Sufficiency of tender.— A tender or offer of payment relied on to bar costs should be a continuing offer. The Walter W. Pharo, 1 Lowell (U. S.) 437, 29 Fed. Cas. No. 17,124.

3. Items Taxable[13] — a. In General. The compensation to be taxed and allowed attorneys, solicitors, proctors,[14] clerks,[15] marshals,[16] commissioners,[17] witnesses,[18] jurors, and printers, is fixed by statute.[19] Items of costs not specified in the statute may, however, be allowed.[20]

And a payment of money into court, on plea of tender, at the filing of the answer, will not affect the question of costs, unless it is specified how much is tendered as payment of the claim and how much for costs. The Good Hope, 40 Fed. 608. So an offer to pay wages at the owner's counting-house, and a refusal to pay elsewhere, does not exonerate him from costs. The Sarah Jane, Blatchf. & H. Adm. 401, 21 Fed. Cas. No. 12,348.

13. As to items taxable on appeal, see *infra*, V, V, 4, b.

14. Fees of proctors.— The Baltimore, 8 Wall. (U. S.) 377, 19 L. ed. 463; The Ethel, 59 Fed. 474; The Medusa, 47 Fed. 821; Mellor *v.* Cox, 46 Fed. 662; Kelly *v.* The Topsy, 45 Fed. 486; The W. B. Castle, 16 Fed. 927; The Bay City, 2 Flipp. (U. S.) 703, 3 Fed. 47; The Ship Liverpool Packet, 2 Sprague (U. S.) 37, 15 Fed. Cas. No. 8,407; Sturgis *v.* The Joseph Johnson, 23 Fed. Cas. No. 13,576*a*; Dedekam *v.* Vose, 3 Blatchf. (U. S.) 77, 7 Fed. Cas. No. 3,730.

A "final hearing," within U. S. Rev. Stat. (1878), § 824, upon which libellant's proctor becomes entitled to a docket-fee, is a submission of the case for determination on the merits, or the submission of some question the disposition of which finally ends the case. The Mount Eden, 87 Fed. 483; The H. C. Grady, 84 Fed. 226; The Anchoria, 23 Fed. 669; The Alert, 15 Fed. 620; Hayford *v.* Griffith, 3 Blatchf. (U. S.) 79, 11 Fed. Cas. No. 6,264.

Same proctor representing different libellants.— A proctor representing more than one libellant on final hearing, though under independent libels, is entitled to but one docket-fee. The Mount Eden, 87 Fed. 483; The H. C. Grady, 84 Fed. 226; The Brig Jeremiah, 10 Ben. (U. S.) 338, 13 Fed. Cas. No. 7,290.

15. Fees of clerks.— The Thomas Fletcher, 24 Fed. 481; The Schooner F. Merwin, 10 Ben. (U. S.) 403, 9 Fed. Cas. No. 4,893; The Yacht Siren, 9 Ben. (U. S.) 194, 22 Fed. Cas. No. 12,910.

Docket-fees.— Where separate claims and demands are filed, which could, and properly should, be united, all the causes of action being proven by the same witnesses in the same depositions, all the parties appearing by the same attorneys, and the causes covered by one final decree, it is error for the court to allow more than one docket-fee. The State of Missouri, 76 Fed. 376, 46 U. S. App. 245, 22 C. C. A. 239.

Payment out of proceeds.— Where a vessel is sold by a trustee under the limited liability act, and the proceeds are paid into court, the clerk's commission is payable from such proceeds, though the owner appears and contests the liability of the vessel. The Vernon, 36 Fed. 113.

"Receiving, keeping, and paying out money."— Where a decree for salvage is rendered, but the claim is paid without sale of the vessel libeled, the clerk, under U. S. Rev. Stat. (1878), § 828, giving him a commission for "receiving, keeping, and paying out money" in pursuance of any order of court, of a given per cent. of the amount "received, kept, and paid," is not entitled to any compensation. Smith *v.* The Morgan City, 39 Fed. 572.

16. Fees of marshals.— *In re* The Allegheny, 85 Fed. 463; Jorgensen *v.* Three Thousand One Hundred and Seventy-Three Casks of Cement, 40 Fed. 606; Smith *v.* The Morgan City, 39 Fed. 572; The Vernon, 36 Fed. 113; Robinson *v.* Fifteen Thousand Five Hundred and Sixteen Bags of Sugar, 35 Fed. 603; The Georgeanna, 31 Fed. 405; The San Jacinto, 30 Fed. 266; The Nellie Peck, 25 Fed. 463; The Wavelet, 25 Fed. 733; The Perseverance, 22 Fed. 462; The Colorado, 21 Fed. 592; The J. W. Dennis, 19 Fed. 799; The John E. Mulford, 18 Fed. 455; The Jeanie Landles, 17 Fed. 91; The Clintonia, 11 Fed. 740; The Schooner F. Merwin, 10 Ben. (U. S.) 403, 9 Fed. Cas. No. 4,893; The Steamship Acadia, 10 Ben. (U. S.) 482, 1 Fed. Cas. No. 23; The Canal Boat Independent, 9 Ben. (U. S.) 489, 13 Fed. Cas. No. 7,016; The City of Washington, 13 Blatchf. (U. S.) 410, 5 Fed. Cas. No. 2,772; The Steamship Circassian, 6 Ben. (U. S.) 512, 5 Fed. Cas. No. 2,725; The Steamship Russia, 5 Ben. (U. S.) 84, 21 Fed. Cas. No. 12,170.

17. Fees of commissioners.— Kelly *v.* The Topsy, 45 Fed. 486; Dalzell *v.* The Daniel Kaine, 31 Fed. 746; The Frisia, 27 Fed. 480; The Wavelet, 25 Fed. 733; The Sallie P. Linderman, 22 Fed. 557; The Schooner F. Merwin, 10 Ben. (U. S.) 403, 9 Fed. Cas. No. 4,893.

18. Fees of witnesses.— Leary *v.* The Miranda, 40 Fed. 607; The Syracuse, 36 Fed. 830.

Party as witness.— Witness fees and mileage for the attendance of a party to an admiralty suit cannot be taxed in his favor against the other party. The Schooner Elizabeth and Helen, 4 Ben. (U. S.) 101, 8 Fed. Cas. No. 4,354.

Proof of payment.— The affidavit of a proctor that certain expenses have been actually incurred is not a sufficient voucher to authorize the clerk to tax such expenses as witness fees; and, if the opposing proctor object to such proof, the receipt of the witness, or the affidavit of the proctor that he has actually paid the fees, should be required. The Sallie P. Linderman, 22 Fed. 557.

Witness out of district.— Where a witness attends from out of the district, mileage can be taxed only to the extent of one hundred miles. The Vernon, 36 Fed. 113.

19. U. S. Rev. Stat. (1878), §§ 823–853.

20. The Sallie P. Linderman, 22 Fed. 557; Simpson *v.* One Hundred and Ten Sticks of Hewn Timber, 7 Fed. 243; The Schooner F. Merwin, 10 Ben. (U. S.) 403, 9 Fed. Cas. No.

b. Compromise or Settlement of Litigation. The officers of court cannot be deprived of their fees by a compromise or settlement out of court.[21]

c. Error in Taxation. An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered.[22]

4. On Appeal — a. In General. The successful party to an appeal is usually awarded costs.[23] It has been held, however, that an appellant, in fault for delays before the circuit court, on appeal may be charged with the costs in the circuit court of appeals, though successful in obtaining a reversal.[24]

4,893; The Steam Ferry-Boat Baltic, 3 Ben. (U. S.) 195, 2 Fed. Cas. No. 824.

Costs of bond for release.— Where the claimant of a libeled vessel gives a bond for her release, and a decree is eventually rendered in his favor, the expense actually incurred by him in procuring the execution of the bond for her release by a surety company is a legitimate item of costs, to be taxed in his favor. The South Portland, 95 Fed. 295. *Compare* The Willowdene, 97 Fed. 509.

Insurance on arrested vessel.— Money paid by the marshal for insurance of an arrested vessel cannot be taxed as costs. Burke *v.* The Brig M. P. Rich, 1 Cliff. (U. S.) 509, 4 Fed. Cas. No. 2,162.

Stenographer's fees.— A direction made in open court that the testimony given in court be taken down by a stenographer is sufficient to entitle the stenographer's fees to be taxed by the successful party. The E. Luckenback, 19 Fed. 847.

21. Erratt *v.* Humphreys, 102 Fed. 925; The Bella, 91 Fed. 540; The Ontonagon, 19 Fed. 800.

Right of proctor to fees.— A proctor may have a decree for costs on a compromise or settlement made without his knowledge or consent. Collins *v.* Nickerson, 1 Sprague (U. S.) 126, 6 Fed. Cas. No. 3,016; The Victory, Blatchf. & H. Adm. 443, 28 Fed. Cas. No. 16,937; The Sarah Jane, Blatchf. & H. Adm. 401, 21 Fed. Cas. No. 12,348; Trask *v.* The Dido, 24 Fed. Cas. No. 14,142, 1 Haz. Reg. (Pa.) 9. But libellant's proctor cannot hold defendant responsible for his costs in a suit where the cause of action was settled by libellant and respondent before the hearing. Peterson *v.* Watson, Blatchf. & H. Adm. 487, 19 Fed. Cas. No. 11,037; Purcell *v.* Lincoln, 1 Sprague (U. S.) 230, 20 Fed. Cas. No. 11,471. And the proctor of libellant, having given notice to respondent that he should ask only for a decree for costs, cannot at the hearing proceed for damages. Angell *v.* Bennett, 1 Sprague (U. S.) 85, 1 Fed. Cas. No. 387.

22. Collins *v.* Hathaway, Olc. Adm. 176, 6 Fed. Cas. No. 3,014; Elliott *v.* The Leah H. Miller, 8 Fed. Cas. No. 4,393*a*. See also The Caithenshire, Abb. Adm. 163, 4 Fed. Cas. No. 2,294.

Appeal from taxation.— An assignment of error in respect to the clerk's taxation of costs cannot be considered when there is nothing in the record to show that the matter was brought to the attention of the judge below. The Robert Graham Dun, 70 Fed. 270, 33 U. S. App. 297, 17 C. C. A. 90.

23. The Baltimore, 8 Wall. (U. S.) 377, 19 L. ed. 463; Western Assurance Co. *v.* Southwestern Transp. Co., 68 Fed. 923, 30 U. S. App. 373, 16 C. C. A. 65; The J. & J. McCarthy, 61 Fed. 516, 26 U. S. App. 11, 9 C. C. A. 600; The Umbria, 59 Fed. 475, 8 C. C. A. 181, 11 U. S. App. 691; Healy *v.* Cox, 46 Fed. 663; Mellor *v.* Cox, 46 Fed. 662; Ross *v.* Southern Cotton-Oil Co., 41 Fed. 152; The C. P. Raymond, 36 Fed. 336; The Galileo, 29 Fed. 538; The Dentz, 29 Fed. 525; The Emily B. Souder, 15 Blatchf. (U. S.) 185, 8 Fed. Cas. No. 4,458; The Bedford, 5 Blatchf. (U. S.) 200, 3 Fed. Cas. No. 1,216; Gonzales *v.* Minor, 2 Wall. Jr. C. C. (U. S.) 348, 10 Fed. Cas. No. 5,530; Godfrey *v.* Gilmartin, 2 Blatchf. (U. S.) 340, 10 Fed. Cas. No. 5,498; The Schooner Margaret *v.* The Steamboat Connestoga, 2 Wall. Jr. C. C. (U. S.) 116, 16 Fed. Cas. No. 9,070.

Apportionment of costs.— Costs on appeal may be apportioned between the parties. The C. P. Raymond, 36 Fed. 336; The Warren, 23 Blatchf. (U. S.) 282, 25 Fed. 782; The Eleanora, 17 Blatchf. (U. S.) 88, 8 Fed. Cas. No. 4,335; The Shady Side, 17 Blatchf. (U. S.) 132, 21 Fed. Cas. No. 12,692.

Failure to decree costs.— The failure of the circuit court of appeals to decree costs to appellants on their appeal, even if intentional, affords no ground for complaining of a subsequent decree of the district court, as the error, if any, should have been corrected by motion in the appellate court before the mandate issued. The State of California, 54 Fed. 404, 7 U. S. App. 20, 4 C. C. A. 393.

Modification of decree.— Costs on appeal will not be awarded to either party where a decree of the district court is affirmed in so far as it dismissed the libel, but reversed as to the award of costs of claimant. The McDonald, 4 Blatchf. (U. S.) 477, 16 Fed. Cas. No. 8,756.

Recovery of less than three hundred dollars. — It has been held that the statute (U. S. Rev. Stat. (1878), § 968), providing that where "a libellant, upon his own appeal, recovers less than three hundred dollars, exclusive of costs, he shall not be allowed, but at the discretion of the court may be adjudged to pay, costs," relates to all the costs affected by the appeal. The Cassius, 41 Fed. 367.

Reversal on new evidence.— When an admiralty decree is reversed on appeal on new evidence not accessible at the time of the trial below, neither party being in fault in respect thereto, each party should pay his own costs on appeal. The Oxford, 66 Fed. 590, 30 U. S. App. 153, 13 C. C. A. 647. See also Carrigan *v.* The Charles Pitman, 1 Wall. Jr. C. C. (U. S.) 307, 5 Fed. Cas. 2,444.

24. The Ethel, 66 Fed. 340, 30 U. S. App. 214, 13 C. C. A. 504.

b. Items Taxable. An appeal being a new trial, the question of costs is to be disposed of as an original question.[25]

5. Ownership of Costs. Fees in a cause in admiralty are the individual property of the persons by whom they were earned, and not of the suitors or parties.[26]

ADMISSIBLE. Proper to be received.[1]

ADMISSION. The act of admitting or allowing to enter; the act of expressing assent to a proposition; acknowledgment.[2] (Admission: As Evidence, see Criminal Law; Evidence. As Ground of Estoppel, see Estoppel. By Answer or Pleading, see Equity; Pleading. By Default or Failure to Deny, see Equity; Judgments; Pleading. By Demurrer or Exception — to Pleading, see Equity; Pleading; to Evidence, see Trial. By Stipulation, see Stipulations. Of Assets by Executor or Administrator, see Executors and Administrators. Of Liability — Barred by Limitation, see Limitations of Actions; Discharged in Bankruptcy or Insolvency Proceedings, see Bankruptcy; Insolvency. Of Title as Interruption of Adverse Possession, see Adverse Possession. To Citizenship, see Aliens. To Partnership, see Partnership. To Practice — Law, see Attorney and Client; Medicine or Surgery, see Physicians and Surgeons. To Prevent — Change of Venue, see Venue; Continuance, see Continuances; Taking of Deposition, see Depositions.)

ADMIT. To allow, receive, or take; to suffer one to enter; to give possession; to license.[3]

ADMITTANCE. The form of giving seizin of a copyhold estate, corresponding with livery of seizin of a freehold.[4]

ADMITTENDO CLERICO. A writ of execution upon a right of presentation to a benefice being recovered in *quare impedit*, addressed to the bishop or his metropolitan, requiring him to admit and institute the clerk or presentee of the plaintiff.[5]

ADMITTENDO IN SOCIUM. A writ for associating certain persons, as knights and other gentlemen of the county, to justices of assize on the circuit.[6]

ADMIXTURE. See Confusion of Goods.

ADMONITION. A judicial or ecclesiastical reprimand.[7]

25. Pettie *v.* Boston Tow-Boat Co., 49 Fed. 464, 1 U. S. App. 57, 1 C. C. A. 314.

As to items taxable in trial court see *supra*, V, V, 3.

Clerk's fees for record.— As Admiralty Rule 52 requires that the record on appeal shall contain the testimony on both sides, the clerk is entitled to a fee for such services. The Alice Tainter, 14 Blatchf. (U. S.) 225, 1 Fed. Cas. No. 196.

Docket-fees.— In cross-appeals heard together on the same evidence, only one docket-fee is taxable. The Rabboni, 84 Fed. 681, 50 U. S. App. 294, 28 C. C. A. 517.

A docket-fee of one dollar paid to the clerk on delivering a note of issue on an appeal is taxable. The Alice Tainter, 14 Blatchf. (U. S.)225, 1 Fed. Cas. No. 196.

Proctor's docket-fee.— As an appeal in admiralty suspends the original decree, and there is no final hearing until that in the appellate court, the proctor's docket-fee of twenty dollars, allowed on final hearing in admiralty, accrues in case of appeal only in the circuit court, and should be charged but once. The Lillie, 42 Fed. 179. See also Dedekam *v.* Vose, 3 Blatchf. (U. S.) 153, 7 Fed. Cas. No. 3,731.

Reading deposition.— A fee for reading on appeal a deposition read below is not taxable. Dedekam *v.* Vose, 3 Blatchf. (U. S.) 77, 7 Fed. Cas. No. 3,730.

Unnecessary matter in record.—Where both parties have unnecessarily encumbered the record no costs will be allowed. The Ashland, 19 Fed. 651.

26. Aiken *v.* Smith, 57 Fed. 423, 13 U. S. App. 394, 6 C. C. A. 414; Collins *v.* Hathaway, Olc. Adm. 176, 6 Fed. Cas. No. 3,014.

Effect of injunction.—An injunction granted in a proceeding to limit the liability of a ship-owner, restraining the prosecution of suits pending against the ship-owner, will not prohibit the collection of the taxable costs in such suits. Matter of Norwich, etc., Transp. Co., 10 Ben. (U. S.) 193, 18 Fed. Cas. No. 10,361.

1. Black L. Dict.
2. Century Dict.
3. Black L. Dict.

Synonym of "tolerate." — "Admit" is sometimes used as a synonym of "tolerate," as in the expression "if any of the evidence in the case admits of two or more constructions." Skipper *v.* Reeves, 93 Ala. 332, 336, 8 So. 804; Pollak *v.* Searcy, 84 Ala. 259, 262, 4 So. 137.

4. Burrill L. Dict.
5. Wharton L. Lex.
6. Jacob L. Dict.
7. Wharton L. Lex.

ADMONITIO TRINA. A triple or threefold warning, given, in old times, to a prisoner standing mute, before he was subjected to the *peine forte et dure*.[8]

ADM'R. An abbreviation of the word "administrator."[9]

ADNICHILED. Annulled; canceled; made void.[10]

ADNULLARE. To ANNUL,[11] *q. v.*

ADOLESCENCE. That age which follows puberty and precedes the age of majority. It commences for males at fourteen, and for females at twelve years completed, and continues until twenty-one years complete.[12]

ADONQUES. Then.[13]

ADOPT. To take and receive as one's own that which is not naturally so.[14]

ADOPTION. Receiving as one's own what is new or not natural.[15] (Adoption: Of Children, see ADOPTION OF CHILDREN. Of Constitution or Amendment thereto, see CONSTITUTIONAL LAW. Of Local Option Law, see INTOXICATING LIQUORS. Of Municipal Charter, see MUNICIPAL CORPORATIONS. Of Statute Subject to Acceptance by Local Authority, see STATUTES.)

8. Black L. Dict.

9. Moseley *v.* Mastin, 37 Ala. 216, holding that the appellate court will take judicial notice of the fact, when the abbreviation follows plaintiff's name in the complaint.

10. Jacob L. Dict.

11. Burrill L. Dict.

12. Bouvier L. Dict.

13. Kelham Dict.

14. People *v.* Norton, 59 Barb. (N. Y.) 169, 195.

Distinguished from "enact."— "Much was said in argument about the meaning of the terms 'adopt' and 'enact,' and there is no doubt a difference. To 'enact' implies the creating anew a law which did not exist before; but 'adopt' no doubt implies the making that their own which was created by another, as the adoption of our statute laws of Great Britain, as they stood, by the Colonial Government." Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539, 557.

15. People *v.* Norton, 59 Barb. (N. Y.) 169, 195.

ADOPTION OF CHILDREN

EDITED BY WILLIAM A. KETCHAM

CROSS-REFERENCES

For Legitimation of Bastards, see Bastards.

I. Definition.

Adoption has been defined to be the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.[1]

II. History.

While the adoption of children is a practice of the greatest antiquity,[2] which was recognized by the civil law from its earliest date[3] and obtains in the continental nations of Europe whose jurisprudence follows the civil law,[4] it was unknown to the common law of England and exists in the states of the Union solely by virtue of statute.[5] While all the statutes which have been enacted

1. Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

Other definitions of the word have been given as follows: "An act by which a person appoints as his heir the child of another." Russell *v.* Russell, 84 Ala. 48, 51, 3 So. 900 [*citing* Rapalje & L. L. Dict.]; Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446.

"To take a stranger into one's family, as son and heir; to take one who is not a child and treat him as one, giving him the title and privileges and rights of a child." Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Russell *v.* Russell, 84 Ala. 48, 3 So. 900; Vidal *v.* Commagère, 13 La. Ann. 516; People *v.* Norton, 59 Barb. (N. Y.) 169, 196; Webster Dict.

"To receive and to treat as a son or daughter one who is the child of another." Worcester Dict. [*cited* in Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Russell *v.* Russell, 84 Ala. 48, 51, 3 So. 900].

"The legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of a parent in respect to such minor." N. Y. Act of June 25, 1873, c. 830 [*quoted* in Abbott L. Dict.; Smith *v.* Allen, 32 N. Y. App. Div. 374, 380, 53 N. Y. Suppl. 114].

2. **Adoption is said to have been known** among the Assyrians and Egyptians (Matter of Upton, 16 La. Ann. 175), the ancient Jews (Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Matter of Upton, 16 La. Ann. 175; Vidal *v.* Commagère, 13 La. Ann. 516. *Contra*, Unforsake's Succession, 48 La. Ann. 546, 19 So. 602), the Greeks and Romans (Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Keegan *v.* Geraghty, 101 Ill. 26; Foley *v.* Foley, 61 Ill. App. 577; Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788; Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446; Matter of Upton, 16 La. Ann. 175; Vidal *v.* Commagère, 13 La. Ann. 516; Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321; Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500; Matter of Thorne, 155 N. Y. 140, 49 N. E. 661; Ballard *v.* Ward, 89 Pa. St. 358), and the ancient Germans (Vidal *v.* Commagère, 13 La. Ann. 516; Matter of Thorne, 155 N. Y. 140, 49 N. E. 661).

"**It appears to have been a necessary concomitant** of the type of archaic society when the family constituted the unit of the community, and was an important factor in developing society into the broader community called the state. Mr. Maine, in his work of Ancient Law, says: 'We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to regard the fiction of adoption as so closely simulating the reality of kinship that neither law nor opinion makes the slightest difference between the real and adoptive connection.'" Morrison *v.* Sessions, 70 Mich. 297, 306, 38 N. W. 249, 14 Am. St. Rep. 500.

3. Krug *v.* Davis, 87 Ind. 590; Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635; Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

4. Abney *v.* De Loach, 84 Ala. 393, 398, 4 So. 757; Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321; Matter of Thorne, 155 N. Y. 140, 49 N. E. 661.

In Louisiana and Texas adoption is said to have been introduced from the law of France and Spain. Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446; Vidal *v.* Commagère, 13 La. Ann. 516; Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321. But in Louisiana it was expressly abolished by the Code of 1808. Matter of Upton, 16 La. Ann. 175; Vidal *v.* Commagère, 13 La. Ann. 516.

5. *Alabama.*— Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

Arkansas.— Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430.

California.— Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; *Ex p.* Clark, 87 Cal. 638, 25 Pac. 967; Matter of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *Ex p.* Chambers, 80 Cal. 216, 22 Pac. 138.

Illinois.— Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Keegan *v.* Geraghty, 101 Ill. 26; Foley *v.* Foley, 61 Ill. App. 577.

Indiana.— Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788; Krug *v.* Davis, 87 Ind. 590; Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446.

Kentucky.— Power *v.* Hafley, 85 Ky. 671, 4 S. W. 683.

authorizing the adoption of children are of comparatively recent date,[6] it now exists in nearly all the states.[7]

III. Constitutionality of Statutes.

Although numerous attacks have been made on the constitutionality of statutes relating to adoption they have been held uniformly to be constitutional[8] except where they interfere with vested rights[9] or where the act failed to state the object thereof in its title.[10]

IV. Who May Adopt.

A. In General. The statutes contemplate that persons desirous of adopting children shall be of suitable age to enter into parental relations,[11] and the mere fact that one is in the senile age of life does not render him incompetent.[12]

B. Husband and Wife — 1. Jointly. While it would be inconsistent with the general scope and purpose of the statute to permit two or more persons representing different families jointly or concurrently to adopt the same child, that objection does not apply to a joint proceeding by husband and wife;[13] and a husband and wife may jointly adopt a child.[14]

2. Separately — a. In General. In the absence of statutory provision to the

Massachusetts.— Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

Michigan.— Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

Missouri.— Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92; Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635.

New York.— Smith *v.* Allen, 161 N. Y. 478, 55 N. E. 1056; Matter of Thorne, 155 N. Y. 140, 49 N. E. 661; Carroll *v.* Collins, 6 N. Y. App. Div. 106, 40 N. Y. Suppl. 54; Godine *v.* Kidd, 64 Hun (N. Y.) 585, 19 N. Y. Suppl. 335.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.—Ballard *v.* Ward, 89 Pa. St. 358.

Tennessee.— Helms *v.* Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535.

Texas.— Eckford *v.* Knox, 67 Tex. 200, 2 S. W. 372.

Washington.— Matter of Renton, 10 Wash. 533, 39 Pac. 145.

6. Krug *v.* Davis, 87 Ind. 590.

One of the first, if not the very first, of the states whose jurisprudence is based exclusively on the common law, to introduce the legal adoption of children, was Massachusetts, where it was done by Mass. Stat. (1851), c. 324. Gray, C. J., in Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

7. In Clarkson *v.* Hatton, 143 Mo. 47, 55, 44 S. W. 761, 65 Am. St. Rep. 635, the court said: "Adoption . . . exists in this country by the statutes of every state so far as we have had occasion to examine."

8. **Power of adoption conferred on judge.**— In Matter of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252, it was held that a provision of the code conferring power to perform the ceremony of adoption upon the judge, as distinguished from the court, was constitutional.

Power of child to hold real estate, when adopted in another state, is not in conflict with Ind. Const. art. 8, § 2, describing what shall constitute the common-school fund. State *v.* Meyer, 63 Ind. 33.

Without consent of father.— Statutes authorizing the adoption of a child on the application of its mother and without the consent of the father, where the latter has relinquished his claim to such child by abandonment, are not in conflict with any provisions of the constitution. Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

Without notice to child or relatives.— A state may authorize its courts, in the exercise of the power and duty of *parens patriæ*, to conduct proceedings for the adoption of minor children, without notice by publication or otherwise to the child, its parents, relatives, or next of kin. Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665.

9. Sewall *v.* Roberts, 115 Mass. 262.

10. People *v.* Congdon, 77 Mich. 351, 43 N. W. 986, holding Mich. Laws (1861), No. 26 (How. Anno. Stat. Mich. (1882), c. 242) unconstitutional for this reason.

11. Krug *v.* Davis, 87 Ind. 590.

Thus Mass. Pub. Stat. (1882), c. 148, § 1, authorizes a person over twenty-one to adopt a person younger than himself. Collamore *v.* Learned, 171 Mass. 99, 50 N. E. 518. And Cal. Civ. Code (1897), § 222, provides that "the person adopting a child must be at least ten years older than the person adopted."

12. Collamore *v.* Learned, 171 Mass. 99, 50 N. E. 518, where an adoption by an uncle seventy years of age was sanctioned.

13. Krug *v.* Davis, 87 Ind. 590.

14. Markover *v.* Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Krug *v.* Davis, 87 Ind. 590 [Woods, C. J., dissenting]; Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635.

contrary either spouse may adopt a child without the other joining.[15] In such cases, however, the consent of the non-adopting spouse is sometimes necessary.[16]

b. One Spouse Insane. Where the statute provides that both husband and wife must join in a petition for adoption, it is doubtful if one spouse alone can adopt where the other is insane.[17]

C. Tutor or Guardian. A tutor or guardian may adopt his ward.[18]

D. Unmarried Person. In the absence of statutory provision to the contrary an unmarried person may adopt.[19]

V. Who May Be Adopted.

A. Minors or Adults. With respect to the age of the child some statutes provide expressly for the adoption of "minors,"[20] but in others only the word "child" is used. Under such statutes some courts have held that only minors can be adopted,[21] while others have held that adults may be.[22]

B. Waif. A child whose parents are unknown, who has no guardian, and has not been given up in writing, for the purpose of adoption, to a charitable institution incorporated by law, may be adopted by decree of the proper court.[23]

VI. Proceedings for Adoption.

A. In General. A statute providing a mode for adoption implies that it cannot be done legally in any other way,[24] and in order to effect an adoption there must be a substantial compliance with all the essential requirements of the law under which the right is claimed.[25] Statutes authorizing the adoption of chil-

15. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Barnhizel *v.* Ferrell, 47 Ind. 335; Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635.

16. See *infra*, VI, B, 2, b, (I).

17. Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303, where, under such a statute, the court said that it is doubtful if, where the husband is insane, the court will allow his conservator to join with the wife in the petition, since an "adoption of this kind, if it were allowed to take place, would make the adopted child heir of its insane adopting father, and thus the property of that father would be made to pass away from the natural heirs without any intelligent consent or choice on his part."

18. Unforsake's Succession, 48 La. Ann. 546, 19 So. 602; Sewall *v.* Roberts, 115 Mass. 262; Bancroft *v.* Bancroft, 53 Vt. 9.

As to consent in such cases see *infra*, VI, B, 2, f, (II).

19. Krug *v.* Davis, 87 Ind. 590.

20. See, for example, Iowa Code, § 2307 [*quoted* in McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447]; La. Act (1872), No. 31 [*quoted* in Vollmer's Succession, 40 La. Ann. 593, 4 So. 254]; N. Y. Act of June 25, 1873 [*quoted* in Smith *v.* Allen, 32 N. Y. App. Div. 374, 53 N. Y. Suppl. 114].

21. A. H. G.'s Petition, 1 Wkly. Notes Cas. (Pa.) 576; Williams *v.* Knight, 18 R. I. 333, 27 Atl. 210; Moore's Petition, 14 R. I. 38.

22. Markover *v.* Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Collamore *v.* Learned, 171 Mass. 99, 50 N. E. 518; *In re* Moran, 151 Mo. 555, 52 S. W. 377; Moran *v.* Moran, 151 Mo. 558, 52 S. W. 378.

In Collamore *v.* Learned, 171 Mass. 99, 50 N. E. 518, the court approved an adoption by an uncle of two nieces and a nephew aged respectively forty-three, thirty-nine, and twenty-five.

23. Edds, Appellant, 137 Mass. 346.

24. Johnson *v.* Terry, 34 Conn. 259.

Thus a mere agreement between a mother and uncle is insufficient to create the relation of parent and child between the uncle and child, when the statute requires the proceeding to be by petition to a certain court (Foley *v.* Foley, 61 Ill. App. 577), and a verbal agreement is insufficient to constitute an adoption where the statute provides for a written agreement to be duly acknowledged (Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008). So, too, in Fuselier *v.* Masse, 4 La. 423, it was held that since, by the laws of Spain, adoption could take place in but two ways,— by authority of the king, or by a judicial decree on proof of certain facts,— an instrument purporting to adopt a party, and passed in 1799 before the commandant of Opelousas as a notarial act, is invalid, and cannot be aided by the maxim, "*Omnia rite acta.*" The court cannot presume both a decree and the previous formalities requisite.

25. *California.*—Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; *Ex p.* Clark, 87 Cal. 638, 25 Pac. 967; *Ex p.* Chambers, 80 Cal. 216, 22 Pac. 138.

Illinois.— Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303.

Iowa.— Tyler *v.* Reynolds, 53 Iowa 146, 4 N. W. 902 [*followed* in Shearer *v.* Weaver, 56 Iowa 578, 9 N. W. 907].

Missouri.— Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92.

New York.— Smith *v.* Allen, 161 N. Y. 478, 55 N. E. 1056 [*affirming* 32 N. Y. App. Div. 374, 53 N. Y. Suppl. 114].

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204,

dren should not be construed so narrowly, however, as to defeat the manifest legislative intent.[26]

B. Jurisdiction — 1. In General — a. May Be Conferred on Particular Court. Exclusive original jurisdiction in proceedings for adoption may be conferred on a particular court or courts.[27]

b. Residence of Parties — (I) *All Parties.* In some cases it has been held that the court must have jurisdiction over the parties seeking to adopt the child, over the child to be adopted, and over its natural parents.[28]

(II) *Of Adoptive Parent.* Under some statutes the proceedings must be had in the county where the adoptive parent resides,[29] but under such statutes a temporary residence in the county has been held sufficient.[30]

(III) *Of Child.* In some states an order for the adoption of a child can be made only in the county in which the child resides,[31] even though the will of the father, proved in another county, requests such adoption.[32]

2. Consent — a. In General. Consent lies at the foundation of statutes of adoption, and, if they require it to be given and submitted, the jurisdiction of the subject-matter cannot be acquired without it.[33]

b. Of Adoptive Parent — (I) *When Necessary.* Some statutes require the person adopting a child to sign a consent to such adoption,[34] and where the statute provides that neither husband nor wife can adopt a child without the other's consent, such consent is of course necessary.[35]

(II) *Sufficiency of Consent.* The consent need not be actually signed in

20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.— *In re* Susman, 28 Pittsb. Leg. J. N. S. (Pa.) 101.

Wyoming.— Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

26. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380, where the court said: "In determining what provisions of the law are essential and therefore mandatory, the statute is to receive a sensible construction, and its intention is to be ascertained, not from the literal meaning of any particular word or single section, but from a consideration of the entire statute, its spirit and purpose."

27. Thus the Illinois act of April 22, 1867, confers exclusive original jurisdiction upon the circuit and county courts of the state. And the city court of Alton, having concurrent jurisdiction "within the city of Alton," has no jurisdiction to enter an order of adoption of a child, where none of the parties to be affected by the proceeding reside within the city limits, even though they appear before the court in person and submit to its jurisdiction. Weinhard *v.* Tynan, 53 Ill. App. 17 [*affirmed*, on other grounds, in Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014].

Judge may act anywhere in county.— Under Ohio Rev. Stat. § 4182, which provides for the filing of a declaration appointing one to stand as heir at law to the declarant in the event of his death, and for the making of an entry upon the journal by the judge, and a record of the proceedings, such declaration may be made before a judge of the probate court within his county at a place other than the office of said court. Bird *v.* Young, 56 Ohio St. 210, 46 N. E. 819.

Conflict of jurisdiction.— The fact that a child is under the jurisdiction of a court, under Cal. Civ. Code, § 138, in divorce proceedings between its parents, does not prevent another court from having jurisdiction of the same child in proceedings for its adoption on the consent of the parent to whose custody it has been given. Younger *v.* Younger, 106 Cal. 377, 39 Pac. 779.

28. Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. See also Foster *v.* Waterman, 124 Mass. 592, where it was held that in the absence of any other evidence of the law of New Hampshire as to the adoption of a child than that afforded by N. H. Gen. Stat. (1867), c. 169, §§ 3–6, the provision that the decree be made in the county where the petitioner or the child resides implies that the statute was intended to be limited to cases in which all the parties have their domicile in that state, and does not apply to the case of an adoption therein of a child domiciled there by persons then and since domiciled in Massachusetts.

29. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

30. Sankey's Case, 4 Pa. Co. Ct. 624 [*affirmed* in Wolf's Appeal, (Pa. 1888) 13 Atl. 760 (*followed* in Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665)].

31. Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430.

32. Rives *v.* Sneed, 25 Ga. 612.

33. Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

34. N. Y. Laws (1873), c. 830 [*quoted* in People *v.* Bloedel, 16 N. Y. Suppl. 837].

35. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Vollmer's Succession, 40 La. Ann. 593, 4 So. 254.

presence of the judge if signed and filed before the parties appear,[36] and even where the statute provides that the person adopting a child shall, in the presence of the county judge, sign the consent to such adoption, this does not require the county judge to witness the signature.[37]

c. Of Charitable Society. Where orphan asylums are authorized to consent to the adoption of children under their care in the same manner that parents are authorized to consent to the adoption of minor children, an order authorizing the adoption of a minor child in the care of an orphan asylum is not sufficient without the consent of the managers of the asylum.[38] In order to entitle a charitable society to consent to adoption it must maintain an actual home or asylum where children are supported and cared for,[39] and must have supported the child one year.[40]

d. Of Child.— (I) *When Necessary.* Some statutes provide that the consent of the child shall be necessary when he is above a certain age.[41]

(II) *Presumption as to.* When the child was above the age mentioned in the statute at the time of his adoption it will be presumed that he assented thereto, if for his benefit, unless his dissent expressly appears.[42]

e. Of Guardian Ad Litem. A guardian *ad litem* may consent to adoption where the parents of the child are unknown and no one consents to the adoption or appears, where the statute of the state authorizes him so to do.[43]

f. Of Natural Parents or Guardian — (I) *In General* — (A) *When Necessary.* Under some statutes, with certain exceptions enumerated therein,[44] the consent of the natural parents or guardian of a child is an indispensable requisite to its adoption,[45] and the statutes in this respect have received a strict construction.[46]

36. Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380, since the material thing under the statute is merely that the parties shall consent in presence of the judge, and that such consent shall be manifest by writing then delivered.

37. People *v.* Bloedel, 16 N. Y. Suppl. 837 [*affirming* 4 N. Y. Suppl. 110], where, on habeas corpus by the mother of an adopted child to recover the child from its adoptive parents, the failure of the county judge to witness their consent was held to be not available to the mother, whose consent he did witness.

38. *Ex p.* Chambers, 80 Cal. 216, 22 Pac. 138.

39. *In re* Sleep, 6 Pa. Dist. 256, where it was held that a society, incorporated in Illinois, and having a superintendent for Pennsylvania who selects advisory boards in different places, and which is organized for the purpose of procuring children from their parents, or others in charge of them, and placing them with persons who will have them legally adopted, and which maintains no actual home or asylum for children in Pennsylvania, is not the next friend of a child, nor is it such a "charitable institution" as is provided for in the Pennsylvania act of May 19, 1887, authorizing institutions to consent to the adoption of a child.

40. Booth *v.* Van Allen, 7 Phila. (Pa.) 401; *In re* Sleep, 6 Pa. Dist. 256.

41. See, for example, the statutes quoted in the following cases: Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500; Luppie *v.* Winans, 37 N. J. Eq. 245; Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Child's consent is unnecessary under Mo. Rev. Stat (1879), § 599. Matter of Clements, 78 Mo. 352.

42. Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

43. Edds, Appellant, 137 Mass. 346.

44. See *infra*, VI, B, 2, f, (I), (B).

45. *Illinois.*— Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303.

Iowa.— Burger *v.* Frakes, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735.

Louisiana.— Vollmer's Succession, 40 La. Ann. 593, 4 So. 254.

New Jersey.— Luppie *v.* Winans, 37 N. J. Eq. 245 [*reversing In re* Winans, 5 N. J. L. J. 250].

Ohio.— *In re* Olson, 3 Ohio N. P. 304.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.— Matter of Bastin, 10 Pa. Super. Ct. 570; Booth *v.* Van Allen, 7 Phila. (Pa.) 401.

46. Consent apparently unnecessary.—Thus, though N. J. Act March 9, 1877, § 1 (Rev. p. 1345), by its express terms requires the consent of parents to the adoption of their children only when they are above the age of fourteen, such consent is none the less necessary where the child is below that age, unless it is a case where the consent is expressly dispensed with by subsequent provisions of the section. Winans *v.* Luppie, 47 N. J. Eq. 302, 20 Atl. 969 [*affirming* Luppie *v.* Winans, 37 N. J. Eq. 245 (*reversing In re* Winans, 5 N. J. L. J. 250)].

Consent of bastard's mother.— Under the Pennsylvania act of May 4, 1855, providing

(B) *When Unnecessary* — (1) IN GENERAL. Where the statutes of adoption do not require the consent of natural parents such consent is of course unnecessary.[47]

(2) IN CASE OF ABANDONMENT — (a) RULE STATED. Where a parent has relinquished all claims on his minor child by abandonment, his consent to the adoption of such child is unnecessary.[48]

(b) WHAT CONSTITUTES ABANDONMENT. To constitute such an abandonment by a parent as will deprive him of the right to prevent the adoption of his child, there must be some conduct on his part which evinces a settled purpose to forego all parental duties.[49] But merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment.[50]

(3) IN CASE OF DIVORCE. Where the natural parent has been deprived of the custody of his child in divorce proceedings, his consent is not necessary,[51] and this rule is not changed by the fact that the divorce was granted prior to the enactment of the statute dispensing with consent in such cases.[52]

(II) *WHEN GUARDIAN IS ALSO ADOPTER.* Where the adoptive parent was also guardian, consent by him as guardian has been held to be sufficient.[53]

for the adoption of an infant child on the consent of the parents, or the surviving parent, or, if there be none, on the consent of the next friend, where the mother of an illegitimate child is living her consent must be obtained before adoption. Booth *v.* Van Allen, 7 Phila. (Pa.) 401.

Effect of death of consenting parent.— The Pennsylvania act of May 19, 1887, requires consent of parents or surviving parent, or of next friend, guardian, etc., if there are no parents; and hence where it appears that the consenting surviving parent died before a petition of adoption was presented, and no one competent to consent intervened, the act has not been complied with, and the proceedings must be quashed. Matter of Bastin, 10 Pa. Super. Ct. 570.

47. Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635; Matter of Clements, 78 Mo. 352.

48. *New Jersey.*— Winans *v.* Luppie, 47 N. J. Eq. 302, 20 Atl. 969 [*reversing* Luppie *v.* Winans, 37 N. J. Eq. 245].

New York.—Von Beck *v.* Thomsen, 44 N. Y. App. Div. 373, 60 N. Y. Suppl. 1094; Matter of Larson, 31 Hun (N. Y.) 539.

Ohio.— *In re* Olson, 3 Ohio N. P. 304.

Oregon.—Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

South Dakota.— Richards *v.* Matteson, 8 S. D. 77, 65 N. W. 428.

Wyoming.— Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

Effect of divorce following abandonment.— The fact that, before the adoption of a child whose mother had been abandoned by her husband, the father procured a decree of divorce in a foreign state, in which he was awarded the care and custody of such child, does not affect the validity of the adoption, where his abandonment continued after such decree and up to the time of adoption. Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

Time to adopt limited.—N. Y. Laws (1873), c. 830, as amended by N. Y. Laws (1887), c. 703, § 11, declares that whenever a child has been abandoned the person maintaining it may adopt it, without the consent of its parent, within six months from the time such person obtained custody of the child. It has been held that, since the limitation in such section applied only where the child was abandoned after its enactment, a person maintaining a child abandoned previous to the adoption of the statute was entitled to adopt it without the consent of the parent, though proceedings therefor were not begun within the time limited. Von Beck *v.* Thomsen, 44 N. Y. App. Div. 373, 60 N. Y. Suppl. 1094.

49. Winans *v.* Luppie, 47 N. J. Eq. 302, 20 Atl. 969 [*reversing* Luppie *v.* Winans, 37 N. J. Eq. 245]. In this case it was held that where a widowed mother allowed her female child of five years old to be taken by others to be maintained and educated, stating that she would never reclaim her, and allowed the child to remain five years, during which the child became accustomed to a station in life much above her mother's, and to a degree of comfort and luxury that the latter could not afford, there was such an abandonment.

Seven years' failure to provide.— A woman who for seven years has neglected to provide for her child cannot complain that the American Female Guardian Society has adopted it without her consent. Matter of Larson, 31 Hun (N. Y.) 539.

50. With grandmother three days.— That a mother, whose husband was a drunkard and had ordered dealers to supply her with nothing more to eat, left her child in the care of its grandmother for three days, does not constitute such an abandonment of the child as justifies the entry of a decree for its adoption without the mother's consent. *In re* Olson, 3 Ohio N. P. 304.

With mother six years.— A father does not abandon his child by permitting it to remain undisturbed in the custody of its mother for six years, during which time he exercises no legal control over it. Johnson *v.* Terry, 34 Conn. 259.

51. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Baker *v.* Strahorn, 33 Ill. App. 59.

52. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

53. Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Sewall *v.* Roberts, 115 Mass. 262; Bancroft *v.* Bancroft, 53 Vt. 9.

3. NOTICE — a. To Child. Notice to the child is not necessary in the absence of a specific statutory provision requiring it.[54]

b. To Natural Parents. In some states jurisdiction to order adoption can be acquired only after notice to the parent or surviving parent of the child.[55] But notice to the father of a bastard,[56] or to a parent who has abandoned his child,[57] is unnecessary.

C. By Agreement or Deed — 1. NATURE OF PROCEEDING. In a number of the states the proceeding for adoption is by a written instrument, declaration, or statement, more in the nature of a deed than anything else, which is required to be executed, attested, acknowledged, and filed for record in some designated place.[58] In such states the adoption of a child is not a judicial proceeding, although the sanction of a judicial officer is required for its consummation, but is essentially one of contract between the parties whose consent is required.[59]

2. EXECUTION. The instrument must be executed by the persons intending to adopt,[60] but the fact that it was not executed in the presence of the judge before whom the proceedings were had is immaterial where he certifies in his order that the persons adopting the child appeared before him with the child, and that they executed the necessary consents.[61]

3. REQUISITES OF AGREEMENT OR DEED — a. Following Language of Statute. Where the agreement or deed plainly shows an intent to follow the language of the statute it is sufficient.[62]

54. Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665, holding that the fact that a child was outside the state when the decree of adoption was rendered, and was not notified of the proceeding, did not oust the court of jurisdiction, when the child's domicile was in the state, and notice was served on its guardian, who appeared and contested the proceeding.

55. Lee *v.* Back, 30 Ind. 148; Humphrey, Appellant, 137 Mass. 84; Schiltz *v.* Roenitz, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483.

Parent out of state.— Hill's Code Oreg. §§ 2938, 2939, provide that the parents of the child, or the survivor of them, shall consent in writing to the adoption, unless they be dead, or in prison for more than three years, or have deserted the child. Section 2940 provides that where a parent does not consent he shall be personally served with a copy of the petition or order, if found in the state; if not, publication is to be made for three weeks in a newspaper printed in the county. Under these provisions it has been held that unless the father of the child consents, or, being out of the state, is served as above, the court acquires no jurisdiction by reason of the mother's consent, and the proceedings are void. Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

56. Gibson, Appellant, 154 Mass. 378, 28 N. E. 296, for the reason that he is not a legal parent within the meaning of the statute.

57. Parsons *v.* Parsons, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894; Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

Necessary to conclusiveness of finding of abandonment.— It has been held, however, that to render the order conclusive upon the father on the fact of abandonment he must have been served with notice. Schiltz *v.* Roenitz, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483 [*approved* in Parsons *v.* Parsons, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894].

58. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

Notarial act sufficient.— La. Act (1872), No. 31, providing for the manner of adopting children, dispenses with the judicial permission previously required by Act (1865), No. 48. A notarial act is the only act now required. Vollmer's Succession, 40 La. Ann. 593, 4 So. 254.

Analogy to deed.— Where the proceeding is by written instrument, declaration, or statement, "the maker or declarant is analogous to the grantor in an ordinary deed, the adopted child is the grantee, and the thing granted is the irrevocable right, capacity, or qualification to inherit, or succeed to the property of the adopter, in case he should die intestate." Somerville, J., in Abney *v.* De Loach, 84 Ala. 393, 399, 4 So. 757.

59. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; Matter of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

60. Long *v.* Hewitt, 44 Iowa 363, where the instrument intended to effect the adoption of an infant was signed and acknowledged by his surviving parent, but the persons intending to adopt failed to execute it by reason of the illness of the justice in whose possession the instrument was, and the child resided with the intended parents for a year and a half, and it was held that a legal adoption was not accomplished.

61. Von Beck *v.* Thomsen, 44 N. Y. App. Div. 373, 60 N. Y. Suppl. 1094.

62. Thus where the law provided that one may, by deed, adopt a child as his "heir and

b. Joinder of Unnecessary Party. Where a wife joins with her husband in a declaration of adoption intended to be the act of her husband alone, the declaration is not thereby rendered void, but the wife's consent will be regarded as surplusage.[63]

c. Description of Child. So long as the agreement or deed contains a complete identification of the child it is not necessary that it state the child's real name[64] or disclose his age.[65]

d. Acknowledgment — (I) *In General.* Agreements or deeds of adoption are required generally to be acknowledged. Some statutes prescribe that such acknowledgment shall be in the form required for acknowledgments of deeds affecting real estate,[66] but in the absence of such provision an acknowledgment made in substantial conformity to the form prescribed for ordinary conveyances is sufficient.[67]

(II) *By Husband and Wife.* Where it is required that the wife separately acknowledge a deed of adoption by her husband, a deed not so acknowledged is absolutely void though it shows on its face that the wife signed it and was present when it was acknowledged by her husband.[68]

(III) *Place of Acknowledgment.* Where the statute requires the acknowledgment to be before the judge of probate of the county where the declarant resides, a declaration beginning with the name of the state and county, and describing declarant as "of said county and state," acknowledged before the probate judge of such county, shows a compliance therewith.[69]

4. Examination of Parties. The statutory provision requiring the judge to examine all parties to the proceeding, separately, is directory merely,[70] and the examination of a child under the age of consent is not necessary.[71]

5. Order of Approval — a. In General. The order or entry which the statute requires should be made is in no sense a judgment,[72] and the statute lays down no rules by which its form shall be measured and its sufficiency tested.[73]

devisee," but the deed adopted the child as "heir or devisee," while otherwise plainly showing an intent to follow the statute, the adoption was held valid. Fosburgh *v.* Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201.

For forms of agreements or deeds of adoption see the following cases:

Alabama.—Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

California.— Matter of Evans, 106 Cal. 562, 39 Pac. 860.

Iowa.— Hilpire *v.* Claude, 109 Iowa 159, 80 N. W. 332; Long *v.* Hewitt, 44 Iowa 363.

Michigan.— Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

Missouri.— Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92; Fosburgh *v.* Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201; Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881.

Nebraska.— Martin *v.* Long, 53 Nebr. 694, 74 N. W. 43.

Ohio.— Bird *v.* Young, 56 Ohio St. 210, 46 N. E. 819.

Pennsylvania.— Ballard *v.* Ward, 89 Pa. St. 358; *In re* Sleep, 6 Pa. Dist. 256.

Vermont.— Bancroft *v.* Bancroft, 53 Vt. 9.

63. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

64. Fosburgh *v.* Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201, where the adoption of a child by deed under the surname of its adoptive parents, without disclosing his former name, was held valid, the identity of the child being otherwise clearly indicated.

See also Bancroft *v.* Bancroft, 53 Vt. 9, where, under the Vermont act of Nov. 22, 1870, it was held immaterial that the name of the child adopted did not appear in the body of the instrument of affiliation.

65. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

66. Hilpire *v.* Claude, 109 Iowa 159, 80 N. W. 332, where an acknowledgment made before a deputy clerk of a district court was held sufficient, Iowa Code (1873), § 277, authorizing certain officers, among whom are included deputy clerks of the district courts, to administer oaths and take and certify acknowledgments of instruments in writing.

67. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

See, generally, Acknowledgments.

68. Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92.

69. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

70. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

71. Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380, for the reason that the object of such examination is to satisfy the judge, among other things, that a child over the age of twelve freely consents to the adoption.

72. Matter of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; Matter of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; Bird *v.* Young, 56 Ohio St. 210, 46 N. E. 819.

73. Matter of Evans, 106 Cal. 562, 39 Pac. 860, holding that an order, indorsed on an

b. By Whom Made. The order may be made by the judge,[71] or by an acting judge.[75]

c. Declaring Status of Child. The order may declare that the child is to be regarded as the child of both husband and wife, where both have joined in the agreement.[76]

d. Examination of Parties. The order need not show upon its face that all the parties to the proceeding were examined by the judge in the manner directed by the statute.[77]

e. Name of Adoptive Parent. The order should disclose the true name of the adoptive parent.[78]

f. Residence of Adoptive Parent. The order need not show upon its face that the adoptive parent resided in the county where the order was made at the time of the adoption.[79]

g. Conclusiveness of Order. An order of the probate court permitting the adoption of an infant is conclusive so far as that court is concerned. Such court has no further jurisdiction in the matter.[80]

6. Recording — a. Necessity for. Where the statutes require that the instrument of adoption be recorded, the act is not complete until such condition is complied with,[81] though the instrument was almost entirely destroyed by accident soon after it was executed, by reason of which it became impossible to make record of it.[82]

b. Manner of Recording. A declaration properly made is not invalid because recorded in the book of deeds and wills instead of on the minutes of the court,[83] nor will the omission of the recorder to index the parties as grantor and grantee

agreement of adoption, reciting that the agreement is "hereby approved, and ordered to be filed with the clerk," is sufficient.

Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199, holding that in the absence of any statute prescribing the manner in which a probate judge's records shall be kept, or of evidence showing that he kept them in any other way than by writing them out on sheets of paper, a record on a detached piece of paper retained among the papers of his office, showing his consent and approval of the adoption of a child, was sufficient.

For forms of orders approving agreements for adoption see the following cases:

California.— Matter of Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

Michigan.— Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

Nebraska.— Martin *v.* Long, 53 Nebr. 694, 74 N. W. 43.

New York.— People *v.* Bloedel, 4 N. Y. Suppl. 110.

Ohio.— Bird *v.* Young, 56 Ohio St. 210, 46 N. E. 819.

74. Bird *v.* Young, 56 Ohio St. 210, 46 N. E. 819.

75. Matter of Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146, where it was held that an order for adoption, made by the court and signed by an acting judge, was not invalid because not made and signed by the regular judge in chambers, and the words "by the court" may be rejected as surplusage.

76. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

77. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

78. *Ex p.* Clark, 87 Cal. 638, 25 Pac. 967, where, on petition for a writ of habeas corpus by the parent for possession of her child, the answer was signed by "John D. Reulein," who claimed the child under an agreement to adopt signed by "David Reulein" and an order of adoption to "Jacob Reulein," and it was held that the child must be surrendered to the petitioner, the order showing no right in "John D. Reulein."

79. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163 [*distinguishing Ex p.* Clark, 87 Cal. 638, 25 Pac. 967].

80. Matter of Bush, 47 Kan. 264, 27 Pac. 1003.

81. Tyler *v.* Reynolds, 53 Iowa 146, 4 N. W. 902; *In re* Susman, 28 Pittsb. Leg. J. N. S. (Pa.) 101.

82. Gill *v.* Sullivan, 55 Iowa 341, 7 N. W. 586.

Conflicting claims to child.— A doubt has been thrown upon this question, however, by the case of Fouts *v.* Pierce, 64 Iowa 71, 19 N. W. 854, where a mother executed articles of adoption of a child to defendant, who neglected to have them recorded for several years, during which time the mother married plaintiff and executed articles of adoption to him, which he immediately recorded; and the court held, without deciding who was the legally adopted parent of the child, that the question of the right of the parties to the custody of the child would be decided on the ground of the child's best interest, and not solely on the ground of legal parentage.

83. Abney *v.* De Loach, 84 Ala. 393, 4 So. 757, the only object of recording being to furnish some definite evidence of the fact that the transaction was genuine and in good faith, and as a perpetual memorial of the fact that it was complete.

render the instrument invalid, although the statute provides for indexing in such manner.[84]

c. Time of Recording. The instrument should be filed for record while the child is a minor[85] and in the lifetime of the adopting party.[86]

7. Effect of Collateral Agreement. A collateral agreement signed by the adopter a few days after the execution of the deed of adoption, providing that the mother could have the child "at any time she calls for him," does not revoke the adoption.[87]

D. By Judicial Proceeding — 1. Nature of Proceeding. In many states adoption is accomplished by petition to the proper court, stating certain requisite facts, upon which a decree is made by the court which judicially confers on the child the right and status authorized by the particular statute. This is a judicial proceeding, involving the rendition of the judgment by the court by which the new status of the child is determined.[88]

2. Requisites of Petition — a. In General. The petition is jurisdictional in its character, and the facts which are required by the statute to give the court jurisdiction must appear upon the face of the petition itself.[89] The petition is not, however, to be construed technically.[90]

b. Parties to Petition. Where the statute provides that neither husband nor wife can adopt a child without the consent of the other, both husband and wife should join in the petition,[91] but in the absence of such a statute a married man may adopt a child without his wife joining in the petition.[92]

c. Abandonment by Natural Parent. Where the petition alleges the abandonment of a child it must make a case strictly within the provisions of the statute relating to such abandonment.[93]

d. Child Not Sister or Aunt of Petitioners. Even where the statute forbids the adoption of a sister or aunt, the petition need not allege that the child is not a sister or aunt of the petitioners, or of either of them.[94]

e. Consent of Natural Parent. Where the petition alleges the death or abandonment of one parent it must show that the parent who has the actual custody and guardianship of the child consents to the adoption.[95]

f. Residence and Name of Natural Parents. The petition should state the residence and name of the child's natural parents, if living and known,[96] or should allege that such residence and name are known.[97]

84. Hilpire *v.* Claude, 109 Iowa 159, 80 N. W. 332.

85. McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

86. Black *v.* Castle, 7 Hawaii 273; Shearer *v.* Weaver, 56 Iowa 578, 9 N. W. 907 [*following* Tyler *v.* Reynolds, 53 Iowa 146, 4 N. W. 902].

87. Matter of Clements, 78 Mo. 352 [*affirming* 12 Mo. App. 592].

88. Somerville, J., in Abney *v.* De Loach, 84 Ala. 393, 4 So. 757.

89. Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Foley *v.* Foley, 61 Ill. App. 577.

90. Edds, Appellant, 137 Mass. 346.

For forms of petitions for adoption see the following cases:

Arkansas.— Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430.

Hawaii.— Paris *v.* Kealoha, 11 Hawaii 450.

Illinois.— Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014; Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320; Weinhard *v.* Tynan, 53 Ill. App. 17; Meyers *v.* Meyers, 32 Ill. App. 189.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.— Sankey's Case, 4 Pa. Co. Ct. 624; Wolf's Appeal, (Pa. 1888) 13 Atl. 760.

Tennessee.— Bland *v.* Gollaher, (Tenn. Ch. App. 1898) 48 S. W. 320.

91. Buckley *v.* Frasier, 153 Mass. 525, 27 N. E. 768; Bland *v.* Gollaher, (Tenn. Ch. App. 1898) 48 S. W. 320.

92. Barnhizel *v.* Ferrell, 47 Ind. 335.

93. Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303, where, under Ill. acts (1874), § 3, providing that the court must be satisfied that the parents of the child, or the survivor of them, had deserted his or her family, or such child, for the space of one year next preceding the application, a petition for adoption which alleged the death of the child's father, but did not allege that the surviving mother had deserted the child for one year next preceding the petition, but merely alleged that she had deserted the child, was held fatally defective.

94. Edds, Appellant, 137 Mass. 346.

95. Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320; Foley *v.* Foley, 61 Ill. App. 577.

96. Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430; Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Foley *v.* Foley, 61 Ill. App. 577.

97. Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303.

g. Residence of Child. The petition should state the residence of the child sought to be adopted.[98]

h. Residence of Petitioner. It is not required that it shall be stated in the petition that the petitioner resides in the county.[99]

i. Signature. Even where the statute requires both a husband and wife to join in the petition, it is not necessary that it should be signed by both where it is in the name of both.[1]

3. Appointment of Guardian Ad Litem. Where the parents of the child are unknown, and no one consents to the adoption or appears, the court may appoint a guardian *ad litem* for the child, with power to give or withhold consent to the adoption,[2] but a failure to appoint such guardian is at the most an irregularity which will render the decree voidable by the infant.[3]

4. Order or Decree — a. Finding of Truth of Allegations in Petition. Some statutes provide that the order or decree must contain a finding that the allegations in the petition are true.[4]

b. Residence of Adoptive Parents. A decree confirming the adoption of a child need not affirmatively show that the adoptive parents were residents of the county.[5]

c. Terms of Adoption. Some statutes require the benefits to be conferred to be specifically set out in the decree,[6] but it has been held that all the terms of adoption need not be recited where the effect of the adoption is fixed by another section of the statute.[7]

5. Entry of Order Nunc pro Tunc. After a lapse of more than twenty years, a motion to enter an order in proceedings to adopt a child *nunc pro tunc* ought not to be entertained.[8]

E. Appeal. No appeal will lie from an order of adoption in the absence of a statute authorizing it.[9] Where the statute provides that "any petitioner or any

98. Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430.

99. Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320.

1. Bland *v.* Gollaher, (Tenn. Ch. 1898) 48 S. W. 320.

2. Edds, Appellant, 137 Mass. 346.

3. Sewall *v.* Roberts, 115 Mass. 262.

4. Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303.

Effect of contradictory recitals.— A recital that the mother of the child abandoned her for more than a year is not overcome by recitals that the mother was living, and objected to the adoption, and appeared in court with her objections, and that eight months previously the mother applied to the court for a similar order for adoption of the child by another, so as to preclude the court from making the order for want of appearance of jurisdictional facts. Richards *v.* Matteson, 8 S. D. 77, 65 N. W. 428.

For forms of orders or decrees of adoption see the following cases:

Arkansas.— Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430.

Hawaii.— Paris *v.* Kealoha, 11 Hawaii 450.

Illinois.— Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303; Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014; Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320; Weinhard *v.* Tynan, 53 Ill. App. 17.

Indiana.— Barnes *v.* Allen, 25 Ind. 222.

Massachusetts.— Foster *v.* Waterman, 124 Mass. 592.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.— Sankey's Case, 4 Pa. Co. Ct. 624; Wolf's Appeal, (Pa. 1888) 13 Atl. 760.

South Dakota.— Richards *v.* Matteson, 8 S. D. 77, 65 N. W. 428; Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

Tennessee.— Bland *v.* Gollaher, (Tenn. Ch. App. 1898) 48 S. W. 320.

5. Crocker *v.* Balch, 104 Tenn. 6, 55 S. W. 307, where it was said that, the court having general jurisdiction in such matters, the residence will be presumed.

6. Beaver *v.* Crump, 76 Miss. 34, 23 So. 432, holding that heirship as a benefit was not included unless specifically conferred by the decree, and that where the petition stated that petitioner proposed to devise to the minor all the balance of his property that he did not specifically devise or bequeath to others, the description was too indefinite to authorize a decree of specific performance of the petition as a contract to convey.

7. Crocker *v.* Balch, 104 Tenn. 6, 55 S. W. 307.

8. Weinhard *v.* Tynan, 53 Ill. App. 17 [*affirmed* in Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014].

9. Meyers *v.* Meyers, 32 Ill. App. 189; Lewis' Appeal, (Pa. 1887) 10 Atl. 126; Matter of Bastin, 10 Pa. Super. Ct. 570.

Certiorari.— A review can be had only by writ of certiorari. Matter of Bastin, 10 Pa. Super. Ct. 570.

such child" may appeal from the decree, the next of kin of a petitioner, whose application for the adoption of an infant has been granted, have no right to appeal from the decree.[10] But under a statute providing that the child may appeal by next friend the father may act as such next friend, subject to the power of the court to substitute another in case he be found an improper person to act as such, even where it is alleged that the father had abandoned his child.[11]

VII. Evidence of Adoption.

There is no presumption that minor children living with a man who is not their father have been adopted by him.[12] The fact of adoption is established by an order of the court in the proceedings by which the child is adopted,[13] but where the adoption paper has been lost and the probate records of the county burned, circumstantial evidence, including the acts and declarations of the party, is admissible.[14]

VIII. Revoking or Setting Aside Adoption.

A. In General — 1. Jurisdiction. An application to revoke an order or decree of adoption should be presented to the court in which the order or decree was made.[15] This rule, however, must not be construed as abrogating the right of the higher court to control the custody of infants by the writ of habeas corpus.[16]

2. Who May Act. The administrator and collateral heirs of a deceased person have no standing in court to petition for the vacation of an adoption by their decedent,[17] except where the order was obtained by fraud while the next of kin were absent from the state and unaware of the conditions,[18] even though the proceedings might not be conclusive against the natural parent of the adopted child;[19] nor has a mere stranger to the proceedings;[20] and even on the petition of the person adopting, and the consent of the next friend who consented to the adoption, the decree cannot be rescinded in the absence of statutory provision therefor.[21] But a decree will be vacated on petition of the natural and adoptive parents of

Habeas corpus.— A parent who thinks his child is unlawfully taken or withheld from his custody may have an investigation under a writ of habeas corpus to ascertain and assert his rights. Meyers *v.* Meyers, 32 Ill. App. 189.

10. Gray *v.* Gardner, 81 Me. 554, 18 Atl. 286.

11. Murray *v.* Barber, 16 R. I. 512, 17 Atl. 553.

12. Matter of Romero, 75 Cal. 379, 17 Pac. 434. See also Matter of Renton, 10 Wash. 533, 39 Pac. 145, where it is said that "adoption has never been sustained by mere presumptions."

13. Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

14. Moore *v.* Bryant, 10 Tex. Civ. App. 131, 31 S. W. 223.

Insufficient evidence.— Where the only testimony offered by claimant was that of claimant's mother, who testified that she and decedent signed a paper before an alderman, which he termed a legal adoption paper, and it also appeared in evidence that decedent, twenty years before his death, returned claimant, who was then less than four years old, to her mother, after paying her board for one week and giving her a pair of shoes, all relations ceasing at that time, it was held that an adoption of claimant by decedent was not sufficiently shown. *In re* McCann, 9 Pa. Dist. 184.

15. Matter of Trimm, 30 Misc. (N. Y.) 493, 63 N. Y. Suppl. 952.

16. People *v.* Paschal, 68 Hun (N. Y.) 344, 22 N. Y. Suppl. 881, where it was held that N. Y. Laws (1884), c. 438, § 12, which provides for an application to the surrogate's court for a rescission of an agreement of adoption, does not deprive the supreme court of jurisdiction to take a child from its adoptive parents by habeas corpus, on proper showing.

17. Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Wolf's Appeal, (Pa. 1888) 13 Atl. 760 [*affirming* Sankey's Case, 4 Pa. Co. Ct. 624]; Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

18. Tucker *v.* Fisk, 154 Mass. 574, 28 N. E. 1051.

19. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

20. Sewall *v.* Roberts, 115 Mass. 262, holding that a decree of the probate court granting the petition of a guardian to adopt his ward cannot be avoided by a stranger to the injury of the child, although no guardian *ad litem* was appointed.

21. *In re* Theil, 14 Wkly. Notes Cas. (Pa.) 422, holding that the order cannot be revoked at least until the child is twenty-one.

a minor child where it appears that such a course is for the best interests of the child, and that property rights have vested, or are likely to vest, in her.[22]

3. Grounds — a. In General. It requires more than mere irregularities to annul the relationship when entered into with honesty of purpose, especially when lived up to for many years and severed only by the hand of death.[23]

b. Fraud. A decree of adoption may be set aside where it was procured by fraud or misrepresentation.[24]

c. Motive of Adoption. An adoption will not be set aside because it was made for the purpose of making the adopted persons the adopter's heirs at law, in order to take away any inducement to others, who might have been his heirs, to oppose his will.[25]

d. Want of Consent. The order will be set aside where it is procured without the consent of the child's parent, on an allegation that she had abandoned it, if such charge were untrue,[26] or unless the child has been supported for a year by a charitable institution which consented to its adoption;[27] but the mere fact that the mother of an illegitimate child was under eighteen years old when she assented to the order is not sufficient to warrant such revocation.[28]

4. When Application Must Be Made. The application to revoke an adoption must be made promptly, and where parties have submitted to adoption proceedings as valid for a considerable length of time they are estopped by their conduct from changing their position to the prejudice of the child.[29]

5. Appeal. An appeal will lie from an order dismissing an application to revoke a decree of adoption.[30]

B. Collateral Attack. While ordinarily a decree of adoption cannot be attacked collaterally,[31] yet it has been held that, the proceeding being under a special statute and not according to the course of the common law, the court in which the proceeding is had *quoad hoc* must be considered as an inferior court,

22. *In re* Gatjkowski, 12 Pa. Co. Ct. 191; *In re* Blair, 11 Wkly. Notes Cas. (Pa.) 239.

23. Matter of Evans, 106 Cal. 562, 39 Pac. 860.

For form of petition for revocation of adoption see Sankey's Case, 4 Pa. Co. Ct. 624 [*affirmed* in Wolf's Appeal, (Pa. 1888) 13 Atl. 760].

For form of order vacating order of adoption see Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

24. Lee *v.* Back, 30 Ind. 148; Tucker *v.* Fisk, 154 Mass. 574, 28 N. E. 1051; Booth *v.* Van Allen, 7 Phila. (Pa.) 401.

An allegation that an adopted child knew that the adoptive father was of unsound mind, and, with the view of becoming his heir, permitted the adoption, does not show such fraud as would invalidate the order of adoption. Brown *v.* Brown, 101 Ind. 340. But an allegation that a father has abandoned his child in a jurisdiction where such abandonment renders notice to him unnecessary is such fraud. Lee *v.* Back, 30 Ind. 148.

25. Collamore *v.* Learned, 171 Mass. 99, 50 N. E. 518.

26. *In re* Olson, 3 Ohio N. P. 304.

27. *In re* Sleep, 6 Pa. Dist. 256.

28. Matter of Bush, 47 Kan. 264, 27 Pac. 1003.

29. Parsons *v.* Parsons, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894.

Thus a delay for ten years by the heirs to take proceedings to set aside an order of adoption is fatal. Brown *v.* Brown, 101 Ind. 340. But a delay of five months on the part of the next of kin of an adoptive parent, after his death, in seeking to revoke the decree of adoption on the grounds that it was procured by fraud, is not such laches as will defeat the application where the fraud was not known to the next of kin until the death of the adoptive parent. Tucker *v.* Fisk, 154 Mass. 574, 28 N. E. 1051.

30. Tucker *v.* Fisk, 154 Mass. 574, 28 N. E. 1051. But see Rives *v.* Sneed, 25 Ga. 612, where it is said that if, after the superior court has passed an order of adoption, it has the power to rescind such order, it is a matter of discretion which the appellate court cannot control.

Refusal of single justice to frame issues for the jury on appeal from a decree of probate declining to revoke a decree of adoption, asked for on the ground that the petitioner for adoption was insane, and that fraud and undue influence were exercised, will not be disturbed. McKay *v.* Kean, 167 Mass. 524, 46 N. E. 120.

31. *Hawaii.*— Paris *v.* Kealoha, 11 Hawaii 450.

Illinois.— Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320.

Indiana.— Brown *v.* Brown, 101 Ind. 340.

Tennessee.— Crocker *v.* Balch, 104 Tenn. 6, 55 S. W. 307.

Wyoming.— Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

and unless all jurisdictional facts appear in the record itself the judgment in the proceeding will be void upon collateral attack.[32]

C. Effect of Revocation. Where an order of adoption has been set aside by the proper court, the status of the child is the same as if no proceedings of adoption had ever been had, and the child may be again given in adoption to the same parties.[33]

IX. Effect of Adoption.

A. On Adoptive Parent — 1. In General. The rights of the parent by adoption are treated substantially as those of a natural parent,[34] although the adoptive parent does not succeed to all the rights of a natural parent.[35]

2. Appointment of Testamentary Tutor. The adopter cannot appoint a testamentary tutor to the adopted to the exclusion of the natural father.[36]

3. Custody of Child. An adoptive parent is entitled to the custody of the adopted child as against all persons,[37] including the child's guardian[38] (unless it be the true parents when they have not consented),[39] and may enforce his rights by action and have an injunction against interference with the child by the father or any other person.[40]

4. Right to Dispose of Property by Will. By the weight of authority the laws permitting the adoption of children confer on them simply the ordinary rights of inheritance, and do not affect the power of the adoptive parent to dispose of his property by will,[41] even though the will was made prior to the adoption.[42]

32. Morris *v.* Dooley, 59 Ark. 483, 28 S. W. 30, 430; Foley *v.* Foley, 61 Ill. App. 577.

33. Matter of Trimm, 30 Misc. (N. Y.) 493, 63 N. Y. Suppl. 952.

34. Schouler Dom. Rel. § 232; Cofer *v.* Scroggins, 98 Ala. 342 [*following* 13 So. 115, 39 Am. St. Rep. 54; Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802]; *In re* Clements, 12 Mo. App. 592.

Want of religious belief on part of adoptive parent does not affect his rights under a deed of adoption. Thompson, J., in *In re* Clements, 12 Mo. App. 592.

35. Hence the adoption of the ward by the tutor in no wise relieves the latter from his responsibility as tutor. Unforsake's Succession, 48 La. Ann. 546, 19 So. 602.

Recent legislation has broadened the rights of adoptive parents in Louisiana. Haley's Succession, 49 La. Ann. 709, 22 So. 251.

36. Matter of Upton, 16 La. Ann. 175. But see Haley's Succession, 49 La. Ann. 709, 22 So. 251, where it was held that when a child has been unquestionably adopted by a person, as appears from pleadings which admit the fact, adoption will be held as made, not only presumably with the mother's consent, but under the conditions required or permitted by law, and that the mother of the adopted child, advised of the death of the adoptive mother, and that the latter in her will had appointed a testamentary executor under whose control said child should remain during its minority, should not be permitted to obtain an appointment as tutrix, ignoring the adoption and its possible legal results, and the claims and pretensions of the executor under the law.

37. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54 [*following* Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802]; Armitage *v.* Hoyle, 2 How. Pr. N. S. (N. Y.) 438.

Contra, in Texas, where the child does not become an inmate of the adoptive parent's family and where the natural parent is not only entitled to his custody but liable for his support. Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008; Eckford *v.* Knox, 67 Tex. 200, 2 S. W. 372.

38. Rives *v.* Sneed, 25 Ga. 612. But see Forstall's Succession, 25 La. Ann. 430, where it was said that there is nothing in the statutes relative to adoption which, being construed with the various articles of the civil code on the subject of tutorship, implies that the legislature, in permitting the adoption of children, had any intention to abridge the right of a natural tutor to the personal care and control of his minor child or to the administration of the child's property.

39. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54 [*following* Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802].

40. Armitage *v.* Hoyle, 2 How. Pr. N. S. (N. Y.) 438.

41. Russell *v.* Russell, 84 Ala. 48, 3 So. 900; Fiske *v.* Pratt, 157 Mass. 83, 31 N. E. 715; Bowdlear *v.* Bowdlear, 112 Mass. 184; Westerman *v.* Schmidt, 80 Mo. App. 344; Wright's Estate, 11 Pa. Co. Ct. 492.

Contra, Hosser's Succession, 37 La. Ann. 839, holding that the rights conferred by adoption cannot be divested by the will of the adoptive parent, and that in such case a devise by a married woman, leaving no forced heir, of the bulk of her estate to her husband, is reducible to the disposable portion. See also Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875, where, the consent of a mother to the adoption of her child having been obtained under an agreement that he should have a share of the property of the adoptive parent, it was held that the latter could not deprive such child of his rights by a fraudulent disposal of the property in his lifetime or by will.

42. Russell *v.* Russell, 84 Ala. 48, 3 So. 900; Davis *v.* Fogle, 124 Ind. 41, 23 N. E.

5. Services and Earnings of Child. The adoptive parent is entitled to the services and earnings of the adopted child[43] and in his own name may sue for such earnings[44] or for an injury to such child.[45]

B. On Child — 1. In General. The law of the domicile of the parties is generally the rule which governs the creation of the status of an adopted child.[46] Adoption, when legally conducted, terminates the relations between the child and its natural parents,[47] making him a child of the adoptive parents.[48]

2. Where One Spouse Does Not Consent. Where one spouse does not join in the proceedings for adoption no such confidential relation exists between such spouse and the child as will justify equity in interfering in case of a breach thereof in a business transaction between the two.[49] Nor is the child an heir of such spouse.[50]

3. Claim for Services. An adopted child can have no claim for services rendered to the adoptive parent during the existence of the relationship.[51] And, in the absence of anything to show an express or implied contract, an adopted child who has been designated as heir at law of the husband cannot recover for services rendered to the widow after he became of age.[52]

4. Domicile. Where an adoptive parent removes, in good faith, to another state, taking the adopted child with him, and acquires a *bona fide* domicile in such state, the domicile of the child becomes the same.[53]

5. Right of Inheritance — a. By Child — (I) *In General.* The authorities unite in affirming that for all purposes of inheritance from the adoptive parent the adopted child becomes and is the lawful child of such adoptive parent save in so far as the statute authorizing the adoption may otherwise provide.[54] Such

860, 7 L. R. A. 485; Bowdlear *v.* Bowdlear, 112 Mass. 184. But see Hilpire *v.* Claude, 109 Iowa, 159, 80 N. W. 332, where it was held that the adoption of a child by a testator operates as a revocation of a previously executed will.

43. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54 [*following* Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802].

44. Tilley *v.* Harrison, 91 Ala. 295, 8 So. 802, where plaintiff and his minor adopted son and defendant having made a contract by which plaintiff agreed that the son should work for defendant for a certain salary and the son merely agreed to carry out the obligations of the father, the contract not stipulating to whom the money should be payable, it was held that the contract was made by plaintiff, who alone was entitled to receive the salary and give an acquittance therefor, and might sue therefor in his own name.

45. Must allege ownership of services.— Under Ind. Rev. Stat. (1894), § 267, providing that the father (or, in case of his death, desertion, or imprisonment, the mother) may maintain an action for the injury or death of a child, a complaint in an action by a woman for injury to her adopted son is insufficient unless it alleges the ownership of his services, the particulars of his adoption, or his emancipation from the control of his natural parents. Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058.

46. Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

47. Schiltz *v.* Roenitz, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483.

But see *supra*, IX, A, 3, 5 and *infra*, IX, B, 5, a, (II).

48. *In re* Clements, 12 Mo. App. 592.

49. Nulton's Appeal, 103 Pa. St. 286.

50. See *infra*, IX, B, 5, a, (V).

51. Brown *v.* Welsh, 27 N. J. Eq. 429, holding that where such child's money, with her knowledge and consent, is applied to her use after her majority, she cannot sue to recover it back.

52. Finch *v.* Finch, 4 Cinc. L. Bul. 908, 7 Ohio Dec. (Reprint) 673.

53. Woodward *v.* Woodward, 87 Tenn. 644, 11 S. W. 892.

54. *Alabama.*— Abney *v.* De Loach, 84 Ala. 393, 4 So. 757; Russell *v.* Russell, 84 Ala. 48, 3 So. 900.

California.—Matter of Evans, 106 Cal. 562, 39 Pac. 860; Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Matter of Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

Indiana.— Patterson *v.* Browning, 146 Ind. 160, 44 N. E. 993; Markover *v.* Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788; Krug *v.* Davis, 87 Ind. 590; Isenhour *v.* Isenhour, 52 Ind. 328; Barnhizel *v.* Ferrell, 47 Ind. 335; Barnes *v.* Allen, 25 Ind. 222.

Iowa.— Hilpire *v.* Claude, 109 Iowa 159, 80 N. W. 332; Wagner *v.* Varner, 50 Iowa 532.

Kentucky.— Atchison *v.* Atchison, 89 Ky. 488, 12 S. W. 942; Power *v.* Hafley, 85 Ky. 671, 4 S. W. 683; Russell *v.* Russell, 14 Ky. L. Rep. 236.

Louisiana.— Vidal *v.* Commagère, 13 La. Ann. 516.

Massachusetts.— Fiske *v.* Pratt, 157 Mass.

inheritable right does not conflict with the statute of descents, for the statute in regard to adoption points out who are to be considered "children" within the meaning of the statute of descents,[55] nor with the right of the adoptive parent to dispose of his property by will.[56] However, as against an adopted child, the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship and is a rule of succession according to nature which has prevailed from time immemorial.[57] Hence a child by adoption cannot inherit from the adoptive parents unless the act of adoption has been done in strict accordance with the statute.[58]

83, 31 N. E. 715; Buckley *v.* Frasier, 153 Mass. 525, 27 N. E. 768.

Michigan.— Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

Missouri.— Moran *v.* Moran, 151 Mo. 558, 52 S. W. 378; Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635; Moran *v.* Stewart, 132 Mo. 73, 33 S. W. 443 [*following* Moran *v.* Stewart, 122 Mo. 295, 26 S. W. 962]; Fosburgh *v.* Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201.

Nebraska.— Martin *v.* Long, 53 Nebr. 694, 74 N. W. 43.

New York.— Dodin *v.* Dodin, 16 N. Y. App. Div. 42, 44 N. Y. Suppl. 800; Simmons *v.* Burrell, 8 Misc. (N. Y.) 388, 28 N. Y. Suppl. 625.

Pennsylvania.— Rowan's Estate, 132 Pa. St. 299, 19 Atl. 82; Johnson's Appeal, 88 Pa. St. 346; Schafer *v.* Eneu, 54 Pa. St. 304; Rowan's Estate, 6 Pa. Co. Ct. 461, 24 Wkly. Notes Cas. (Pa.) 158.

Tennessee.— Helms *v.* Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535.

Texas.— Eckford *v.* Knox, 67 Tex. 200, 2 S. W. 372.

Contra, in the District of Columbia, where an adopted child cannot inherit the property of the person adopting him, unless by will. Moore *v.* Hoffman, 2 Hayw. & H. (U. S.) 173, 17 Fed. Cas. No. 9,764*a*.

Where adoption is under special act the right of inheritance of an adopted child is fixed by the act itself. Webb *v.* Jackson, 6 Colo. App. 211, 40 Pac. 467.

Where the adoption is by a parol agreement the child can participate in the distribution of the personalty. *In re* Susman, 28 Pittsb. Leg. J. N. S. (Pa.) 101.

A child will inherit from her adoptive parents where the articles of adoption provide that if she should remain with them until her majority she should receive five hundred dollars, and further bestow on her "equal rights and privileges of children born in lawful wedlock," the provision as to money not being exclusive as to property rights. Martin *v.* Long, 53 Nebr. 694, 74 N. W. 43.

Adopted child takes by purchase.— An adopted child, under the statute of Massachusetts, is a child, and is issue, and takes by purchase, unless cut off by later statute. Tirrell *v.* Bacon, 3 Fed. 62.

Bars right to contest will.— After the adoption of a minor who by the laws of the state is entitled to succeed to the estate of its adoptive parent, the parent's other relatives have no capacity to contest his will or to oppose any disposition of his estate to which the adopted child does not object. Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

Prevent lapsing of legacy to adoptive parent. — It has been held that an adopted child may take a legacy given by will to one of its adoptive parents, and thus prevent the legacy from lapsing when the legatee dies before the testator. Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446; Warren *v.* Prescott, 84 Me. 483, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L. R. A. 435. But see Schafer *v.* Eneu, 54 Pa. St. 304, where it was held that adopted children do not take under a devise to trustees for the sole and separate use of a married woman for life, and on her death to be conveyed to her children and the heirs of her children forever.

55. Fosburgh *v.* Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201.

56. See *supra*, IX, A, 4.

57. Keegan *v.* Geraghty, 101 Ill. 26.

Statute cannot act retrospectively.— A deed of adoption of one's niece as his daughter, made and executed in 1863, the adoptive parent dying intestate in 1870, will not authorize the divesting of the estate of his natural children by a proceeding under the act of April 2, 1872, which authorized adoption by deed, even though the act was intended to be retrospective. Ballard *v.* Ward, 89 Pa. St. 358.

See also Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635, in which case it was held that under Mo. Rev. Stat. (1855), p. 355, c. 32, § 5, changing an estate in fee tail into a life-estate in the grantee, with remainder to his children or issue of a deceased child, or, if the grantee have no issue, then to his heirs, in force when a deed was made to one and his "bodily heirs," at which time there was no statute authorizing the adoption of a child as one's heir, the remainder limited by such deed did not vest in a child subsequently adopted by the grantee under 1 Wagner's Stat. p. 256, § 3, giving such child the same rights for support and treatment as a child has by law against lawful parents.

58. *California.*— *Ex p.* Clark, 87 Cal. 638, 25 Pac. 967.

Illinois.— Watts *v.* Dull, 184 Ill. 86, 56 N. E. 303.

Iowa.— Shearer *v.* Weaver, 56 Iowa 578, 9 N. W. 907; Gill *v.* Sullivan, 55 Iowa 341, 7 N. W. 586; Tyler *v.* Reynolds, 53 Iowa 146, 4 N. W. 902.

Kansas.— Renz *v.* Drury, 57 Kan. 84, 45 Pac. 71.

New York.— Smith *v.* Allen, 161 N. Y. 478, 55 N. E. 1056 [*affirming* 32 N. Y. App. Div.

(II) *From Both Adoptive and Natural Parents.* In the absence of statute to the contrary an adopted child may inherit both from its adoptive parent and from[59] or through[60] its natural parent.

(III) *From Collateral or Lineal Kindred of Adoptive Parent.* An adopted child cannot inherit from the collateral kindred of its adoptive parent,[61] from the ancestors of such parent,[62] or from his natural children.[63]

(IV) *From Widow of Adoptive Parent by Second Marriage.* Under a statute providing that if a man marry a second time and have no children by the marriage, but has children alive by a previous wife, the land which at his death descends to his second wife shall at her death descend to his children, such land will descend to a child adopted by the husband and first wife[64] or by the widow after his second marriage,[65] but not to a child adopted by a widow prior to a second marriage.[66]

(V) *When Adopted a Second Time.* The heirship created by the adoption of a child is not destroyed by a second adoption after the death of the first adoptive parent.[67]

(VI) *When Adopted by One Spouse.* When a child is adopted by only one spouse he does not become the heir of the other.[68]

(VII) *When Adopted in Foreign State.* Where a child is adopted under the laws of a state making such adopted child the heir of its adoptive parent, such adoption entitles the child to inherit the latter's land situated in another state where the laws of adoption are substantially the same.[69]

374, 53 N. Y. Suppl. 114]; Matter of Thorne, 155 N. Y. 140, 49 N. E. 661 [*affirming* 23 N. Y. App. Div. 624, 48 N. Y. Suppl. 1116]; Carroll *v.* Collins, 6 N. Y. App. Div. 106, 40 N. Y. Suppl. 54.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

59. Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788; Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635.

60. Wagner *v.* Varner, 50 Iowa 532, where, under Iowa Code, §§ 2310, 2453, 2454, a father having adopted two children of his daughter, and afterward died, leaving no will, it was held that the children so adopted would inherit from him as his own children, and would also inherit the share of their deceased mother.

But see Delano *v.* Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698, holding that where — under Mass. Pub. Stat. (1882), c. 148, §§ 6, 7, enacting that, when a child is adopted under its provisions, all the rights of parental relationship shall exist between him and the adoptive parent except as to succession to property, and shall terminate (except as to marriage) between the child and his natural kindred; and that the child shall inherit from the adoptive parent, and stand to the legal descendants of the latter, but to no other of his kindred, as his lawful child, but that such child shall not, by such adoption, become incompetent to inherit from his natural kindred — a grandson had been adopted by his grandfather the former could only inherit from the latter as his adopted son, and not by representation of his deceased father also.

61. Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Keegan *v.* Geraghty, 101 Ill. 26.

62. Meader *v.* Archer, 65 N. H. 214, 23 Atl. 521; Phillips *v.* McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; Quigley *v.* Mitchell, 41 Ohio St. 375. See also Sunderland's Estate, 60 Iowa 732, 13 N. W. 655, where it was held that a child adopted in another state, under a special act which provided that she should inherit "from" her adoptive parents as if she were their child, is not the "heir" of her adoptive father within Iowa Code, § 2454, providing that the heirs of a deceased child of an intestate shall inherit his estate in the same manner as though the child had outlived the intestate, and cannot inherit her father's share of his father's estate.

63. Keegan *v.* Geraghty, 101 Ill. 26; Barnhizel *v.* Ferrell, 47 Ind. 335; Helms *v.* Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535 [*distinguishing* McKamie *v.* Baskerville, 86 Tenn. 459, 7 S. W. 194].

64. Markover *v.* Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806.

65. Patterson *v.* Browning, 146 Ind. 160, 44 N. E. 993.

66. Isenhour *v.* Isenhour, 52 Ind. 328.

67. Patterson *v.* Browning, 146 Ind. 160, 44 N. E. 993.

68. Webb *v.* Jackson, 6 Colo. App. 211, 40 Pac. 467; Sharkey *v.* McDermott, 16 Mo. App. 80.

69. *California.*— Matter of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

Illinois.— Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Keegan *v.* Geraghty, 101 Ill. 26.

Kansas.— Gray *v.* Holmes, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207.

Massachusetts.— Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

Rhode Island.— Melvin *v.* Martin, 18 R. I. 650, 38 Atl. 467.

Right dependent on filing transcript of adoption.— Under Ind. Rev. Stat. (1881), § 829, providing that, on filing in a circuit court of this state a transcript of the record of a legal

(VIII) *When Adoption Set Aside.* Where, on the application of the adoptive father and the natural parent, the adoption has been set aside, the child will not inherit under a will of the adoptive father giving his estate to his "lawful heirs." [70]

(IX) *Payment of Collateral Inheritance Tax.* An adopted child is not exempted from the payment of the collateral inheritance tax, only lineal descendants being exempt from such tax.[71]

(X) *How Determined in Equity.* The rights of one claiming as an heir by an indenture between his father and the intestate, and also by a statutory adoption and decree, cannot be determined by a bill in equity unless his status as such child has been settled in an action at law or in the probate court.[72]

b. From Child. With respect to inheritance from an adopted child there is some confusion of opinion, it having been held in some cases that on the death of such child his estate goes to his relations by blood and not to those by adoption,[73] while in others a contrary view obtains.[74] In some states statutes prescribe the disposition of property derived from an adoptive parent.[75]

adoption in another state, the person adopted shall have the same rights as if originally adopted in this state, the rights of a person so adopted may be enforced though the transcript was filed after his majority and after the death of the adopting parties. Markover *v.* Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806.

70. Morrison *v.* Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500. But see Russell *v.* Russell, 14 Ky. L. Rep. 236, where it was held that the fact that an orphans' home, subsequent to the death of the person adopting the child, had canceled the contract of adoption in consideration of another person adopting the child, did not deprive the child of its right of inheritance under the original article of adoption.

71. Com. *v.* Ferguson, 137 Pa. St. 595, 20 Atl. 870, 10 L. R. A. 240; Tharp *v.* Com., 58 Pa. St. 500; Com. *v.* Nancrede, 32 Pa. St. 389; Wright's Estate, 11 Pa. Co. Ct. 492; Wayne's Estate, 2 Pa. Co. Ct. 93; Daisey's Estate, 15 Wkly. Notes Cas. (Pa.) 403; Packard's Appeal, 37 Leg. Int. (Pa.) 135.

This also was the rule in New York prior to N. Y. Laws (1887), c. 713. Matter of Miller, 110 N. Y. 216, 18 N. E. 139 [*affirming* 47 Hun (N. Y.) 394, 6 Dem. (N. Y.) 119]; Matter of Kemeys, 56 Hun (N. Y.) 117, 9 N. Y. Suppl. 182; Warrimer *v.* People, 6 Dem. Surr. (N. Y.) 211. After the passage of such act, however, adopted children were exempted (Matter of Butler, 58 Hun (N. Y.) 400, 12 N. Y. Suppl. 201; Matter of Spencer, 1 Connoly Surr. (N. Y.) 208, 4 N. Y. Suppl. 395), although a child of an adopted child was still required to pay (Matter of Bird, 2 Connoly Surr. (N. Y.) 376, 11 N. Y. Suppl. 895).

72. Ross *v.* Ross, 123 Mass. 212.

73. *Hawaii.*— *In re* Namauu, 3 Hawaii, 484.

Missouri.— Reinders *v.* Koppelmann, 68 Mo. 482, 30 Am. Rep. 802.

Ohio.— Upson *v.* Noble, 35 Ohio St. 655.

Pennsylvania.— Com. *v.* Powel, 16 Wkly. Notes Cas. (Pa.) 297.

Wisconsin.— Hole *v.* Robbins, 53 Wis. 514, 10 N. W. 617.

See also Hill *v.* Nye, 17 Hun (N. Y.) 457, where it was held that the parents' parol gift and surrender of their child, followed by his practical adoption and maintenance until of age by the donees, does not deprive his parents of the right to inherit as his next of kin; and Daisey's Estate, 15 Wkly. Notes Cas. (Pa.) 403, where it was held that under the Pennsylvania act of May 4, 1855, providing that, where adoptive parents shall have natural children, such natural children and the adopted children shall inherit from and through each other as if all were natural children, the natural children of an adoptive parent have not the right to inherit from an adopted child on his death intestate, where either of the adoptive parents are alive, since under Pa. Act (1833), § 3, children do not inherit from each other unless both of their parents are dead. The whole of such adopted child's estate in this case went to her natural brothers and sisters, her natural parents both being dead.

74. Paul *v.* Davis, 100 Ind. 422; Humphries *v.* Davis, 100 Ind. 369; Davis *v.* Krug, 95 Ind. 1 [*overruling* Barnhizel *v.* Ferrell, 47 Ind. 335]. See also Foley's Estate, 1 Wkly. Notes Cas. (Pa.) 301. In this case a child born in another state was adopted there. By the law of that state the adopted child became, to all legal intents, the child of the person adopting it, and the parents of the child were deprived of all legal right, as respects the child, during its minority. The child went to Pennsylvania, where she died a minor and unmarried, leaving certain personal estate which was claimed by both the adoptive and the natural father, who were citizens of the state of the adoption. It was held that the estate should go to the adoptive father, and not in accordance with the intestate laws of Pennsylvania.

75. Thus Ohio Rev. Stat. § 3140, relative to the descent of property inherited by an adopted child from an adoptive parent, provides that in case of the death of such adopted child, without issue, after the death of the adoptive parent, the property of such parent shall descend to his or her next of kin, and not to the next of kin of the adopted child. It has been held that such statute does not apply to property which the adopted child has

c. Through Child. The heirs of an adopted child will inherit through him a share of the estate of a deceased adoptive parent just as if such adopted child were a child by blood of such parent.[76]

6. Right to Homestead Exemption. An adopted child, like a natural one, is entitled, during minority, to a claim of homestead exemption.[77]

7. Right under Policy of Insurance. An adopted child may recover the amount due on a life-insurance policy made payable to his adoptive mother if she survives her husband, otherwise to their children for their use, he being the only child surviving at her death,[78] or may recover his proportionate share if there are other children.[79]

C. On Natural Parent. While it has been held that by consent to adoption the natural parent relinquishes all parental rights,[80] yet, if the order is invalid on its face, the child must be surrendered to the natural parent, even though proceedings are pending to amend the record and make the order valid.[81]

D. On Widow of Adoptive Parent. Where an adopted child is capable of inheriting, the existence of such child has the same effect, under statutes relating to a widow's share of her deceased husband's estate, as does the existence of natural children.[82] But where the child has been adopted by the husband alone, the wife can alien her estate received from him,[83] and on her death it will pass to her heirs and not to such adopted child.[84]

X. Contracts for Adoption.

A. Validity of Contract. A parent may make a valid contract for the delivery of his child to a charitable institution to be adopted into a good family,[85] but where such contract undertakes to destroy the identity of the child and to hide it from its mother, and to hide its mother and parentage from it, such contract is void as against public policy.[86]

B. Action for Breach. An action will lie for damages resulting from a breach of contract for adoption, the measure of damages being governed by the law of the state where the contract was to be performed.[87]

conveyed prior to his death. Spangenberg *v.* Guiney, 2 Ohio N. P. 39, 3 Ohio Dec. 163.

76. Pace *v.* Klink, 51 Ga. 220; Gray *v.* Holmes, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207; Power *v.* Hafley, 85 Ky. 671, 4 S. W. 683. See also Lathrop *v.* Young, 25 Ohio St. 451, where it is said that an adopted heir is given the legal status of a child of the adopter by the Ohio acts of April 20, 1854, and March 29, 1859, and the statute requires such adopted heir to be regarded as such child in tracing descent to or from him in the cases therein specified; but in cases not coming within those acts the operation of the statute of descents is the same as if they had not been passed.

77. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54.

78. Martin *v.* Ætna L. Ins. Co., 73 Me. 25.

79. Von Beck *v.* Thomsen, 44 N. Y. App. Div. 373, 60 N. Y. Suppl. 1094.

80. Matter of Clements, 78 Mo. 352. But see Barnhizel *v.* Ferrell, 47 Ind. 335, where it was held that under the Indiana act of March 2, 1855, the mother of the adopted child, by consenting to the adoption, consents that the adoptive father shall occupy the position of a father to the child, and that she will occupy that of a mother, the father being alive, but does not surrender her maternal rights.

81. *Ex p.* Clark, 87 Cal. 638, 25 Pac. 967.

82. Atchison *v.* Atchison, 89 Ky. 488, 12 S. W. 942; Buckley *v.* Frasier, 153 Mass. 525, 27 N. E. 768; Moran *v.* Moran, 151 Mo. 558, 52 S. W. 378; Moran *v.* Stewart, 132 Mo. 73, 33 S. W. 443; Moran *v.* Stewart, 122 Mo. 295, 26 S. W. 962; Rowan's Estate, 132 Pa. St. 299, 19 Atl. 82; Rowan's Estate, 6 Pa. Co. Ct. 461, 24 Wkly. Notes Cas. (Pa.) 158.

83. Keith *v.* Ault, 144 Ind. 626, 43 N. E. 924.

84. Barnes *v.* Allen, 25 Ind. 222; Stanley *v.* Chandler, 53 Vt. 619.

85. Dumain *v.* Gwynne, 10 Allen (Mass.) 270, where it was held that where a married woman has been compelled to live separate from her husband by reason of his crime and drunkenness, and thereupon gives up her children to a charitable institution established to furnish homes to destitute children, although without consent of husband, under contract by which the children are to be adopted into a good family and she is not to seek to deprive such family of them, the contract is valid.

86. *In re* Sleep, 6 Pa. Dist. 256, for the reason that such a contract tends directly to encourage illegitimacy and ignores the affection of a mother for her child and the respect a child should have for a parent.

87. Sandham *v.* Grounds, 94 Fed. 83, 36 C. C. A. 103, where it was held that the

C. Effect of Contract — 1. On Child — a. May Sue in Name of Quasi-Adoptive Parent. One who has been taken to the house of another to be by him adopted, but has not taken his name, may maintain a suit in such name, though not as yet legally adopted.[88]

b. Right of Inheritance from Quasi-Adoptive Parent — (I) *In General.* The implied covenant arising from a contract to adopt, not legally executed, where the child has fulfilled its part of the contract, is that the infant should receive a child's share of the estate of the foster parent.[89] In case of intestacy that share is fixed by the intestate laws, but if there is a will it is fixed by the will.[90]

(II) *Specific Performance* — (A) *Right to.* Where the contract has been partially or fully performed by the child, equity, at the suit of the child or his heirs, will decree specific performance of an agreement by a testator or intestate to adopt such child and to make a settlement of property on him, when the contract did not amount to a legal adoption,[91] or when there has been an adoption under a statute subsequently held unconstitutional;[92] but to maintain such action it must appear that the alleged promisor induced the child to believe that he was his heir.[93]

(B) *Consideration.* As a rule the surrender by the parents of a child of all control over him and his services and companionship constitutes a valuable consideration for a promise of adoption;[94] but the surrender of an illegitimate child by its mother to its father will not constitute such consideration.[95]

measure of damages under the law of Pennsylvania was not the value of the share of the promisor's estate which would have been inherited by the promisee at his death, but the value of the services rendered or outlay incurred by the promisee on the faith of the promise, with interest.

88. Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489.

89. Swartz *v.* Steel, 8 Ohio Cir. Ct. 154; *In re* Susman, 29 Pittsb. Leg. J. N. S. (Pa.) 83; Durkee *v.* Durkee, 59 Vt. 70, 8 Atl. 490.

90. *In re* Susman, 29 Pittsb. Leg. J. N. S. (Pa.) 83. See also Vanduyne *v.* Vreeland, 12 N. J. Eq. 142, 11 N. J. Eq. 370, where, an uncle having agreed with the father of his nephew to take the child in tender infancy, treat him as a son, and that the child should have his property when he died, in pursuance of which agreement the boy lived with his uncle twenty-five years, it was held that the uncle was entitled to the control and use of his property during his life, and was not bound to secure it to his nephew by deed, but that all he should die possessed of should go to the nephew.

91. *Hawaii.*— Beckley *v.* Lucas, 8 Hawaii 40.

Missouri.— Nowack *v.* Berger, 133 Mo. 24, 34 S. W. 489, 54 Am. St. Rep. 663, 31 L. R. A. 810; Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126; Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881; Sharkey *v.* McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270 [*reversing* 16 Mo. App. 80].

New Jersey.— Van Tine *v.* Van Tine, (N. J. 1888) 15 Atl. 249, 1 L. R. A. 155.

New York.— Gates *v.* Gates, 34 N. Y. App. Div. 608, 54 N. Y. Suppl. 454; Godine *v.* Kidd, 64 Hun (N. Y.) 585, 19 N. Y. Suppl. 335; Heath *v.* Heath, 18 Misc. (N. Y.) 521, 42 N. Y. Suppl. 1087.

Vermont.— Durkee *v.* Durkee, 59 Vt. 70, 8 Atl. 490.

United States.— Jaffee *v.* Jacobson, 48 Fed. 21, 4 U. S. App. 4, 1 C. C. A. 11, 14 L. R. A. 352.

Canada.— Roberts *v.* Hall, 18 Can. L. J. N. S. 328.

See also Fuselier *v.* Masse, 4 La. 423, where it was held that a formal deed of adoption, invalid as such because not executed before the proper tribunal, would be enforced to the extent of enabling the adopted child to be the heir of the adoptive parents at their death, where the adoptive parents had no forced heirs at the time the adoption was made.

92. Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

93. Durkee *v.* Durkee, 59 Vt. 70, 8 Atl. 490, where defendant secured the passage of an act of legislature enabling him to adopt plaintiff as his son by executing and recording an instrument to that effect, but never executed the instrument. In an action for specific performance by plaintiff, claiming the rights of an heir, it was held that a finding of the master that plaintiff was induced to believe that he was defendant's son did not amount to a finding that defendant induced him to believe so, and that, although plaintiff had worked for defendant for years in such belief, he was not entitled to relief.

94. Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881; Godine *v.* Kidd, 64 Hun (N. Y.) 585, 19 N. Y. Suppl. 335.

Failure of consideration.— Where the promisor dies before the children have actually been placed in his custody, the consideration of his promise has failed. Jaffee *v.* Jacobson, 48 Fed. 21, 4 U. S. App. 4, 1 C. C. A. 11, 14 L. R. A. 352.

95. Wallace *v.* Rappleye, 103 Ill. 229, because the surrender of the child by the mother

(c) *Evidence*—(1) Burden of Proof. The burden is on the person claiming the benefit of an alleged contract for adoption to establish it by clear, cogent, and convincing evidence.[96]

(2) Admissibility. An adoption paper, though not proven or recorded so as to constitute a legal adoption, may be competent evidence of a contractual relation between the quasi-adoptive parent and child,[97] but proof of casual remarks made from time to time by the alleged promisor, but not in the presence of plaintiff, are insufficient to establish an agreement for adoption.[98]

(3) Competency of Claimant. One seeking to enforce the specific performance of a contract for adoption is incompetent to testify in such action where the other party is dead.[99]

(4) Variance. An alleged contract that a testator would adopt plaintiff as his child and would grant and devise to her all his property at his death is not supported by evidence that the testator agreed to adopt plaintiff as his child and make her his heir. Such evidence places adopted child only in the position of a natural one.[100]

(5) In Rebuttal. Where it is sought to use a party claiming under a contract of adoption as a witness in rebuttal as to matters occurring since the appointment of the administrator of decedent, the offer of evidence should be confined to such subsequent matters.[101]

c. Insurable Interest in Life of Quasi-Adoptive Parent. A single woman who has lived with an old man and been treated by him as his daughter, although not in fact adopted, has an insurable interest in the life of such man.[102]

2. On Natural Parent. Where there has been an agreement of adoption, but no valid adoption has ever been had, the natural parent may revoke the gift and resume the custody of his child.[103]

3. On Quasi-Adoptive Parent. Where a child has been received under an agreement not amounting to an adoption and is subsequently surrendered voluntarily to his parents under a mutual understanding that the agreement should be canceled, there can be no recovery by the quasi-adoptive parent for the board and care of such child;[104] but where the agreement has been revoked by the natural parent alone, it has been held that the quasi-adoptive parent is entitled to recover for the child's maintenance while in his care.[105]

ADPROMISSOR. In Scotch law, a guarantor, surety, or cautioner.[1]

AD PROXIMUM ANTECEDENS FIAT RELATIO, NISI IMPEDIATUR SENTENTIA. A maxim meaning "relative words refer to the next antecedent, unless by such a construction the meaning of the sentence would be impaired."[2]

AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES, AD QUÆSTIONEM LEGIS NON RESPONDENT JURATORES. A maxim meaning "it is the office of

is beneficial rather than detrimental, and the custody and care of it by the father in his own family circle is an inconvenience to him.

96. Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126.

97. *In re* Susman, 28 Pittsb. Leg. J. N. S. (Pa.) 101.

98. Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126.

99. Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126.

100. Davis *v.* Hendricks, 99 Mo. 478, 12 S. W. 887.

101. Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126.

102. Carmichael *v.* Northwestern Mut. Ben. Assoc., 51 Mich. 494, 16 N. W. 871.

103. *Ex p.* Field, 12 Cinc. L. Bul. 45, 9 Ohio Dec. (Reprint) 286; Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008. But see Matter of Lesslier, 17 Abb. Pr. (N. Y.) 397 note, where it is said that the abstract right of a mother to her child may be waived by an agreement which is insufficient as an adoption, and where the mother seeks to recover the child from the people who have cared for and supported it for ten years, the duty of the court will be discharged by merely inquiring whether there is any improper restraint, and, if there is, by discharging the child therefrom.

104. Zent *v.* Fuchs, 14 N. Y. Suppl. 806, 38 N. Y. St. 720.

105. Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008.

1. Black L. Dict.

2. Broom Leg. Max.

the judge to instruct the jury in points of law — of the jury to decide on matters of fact." [3]

ADQUIRERE. To Acquire,[4] *q. v.*

AD QUOD DAMNUM. Literally, "to what damage." A writ which ought to be issued before the crown grants further liberties, as a fair, market, etc., which may be prejudicial to others. It is addressed to the sheriff, to inquire what damage it may do to make such grant. It is also used to inquire of lands given in mortmain to any house of religion, etc.[5]

ADRECTARE. To do right; to satisfy; to make amends.[6]

ADRESSER. To prepare.[7]

ADS. See Ad Sectam.

ADSCRIPTI. Joined to by writing; annexed to.[8]

ADSCRIPTITII GLEBÆ. A term applied to tenants by villein socage, and commonly supposed to denote a condition approaching nearer to that of slaves than of freemen.[9]

AD SECTAM. Literally, "at the suit." These words were used in entitling causes or papers on the part of a defendant in a suit, generally in the abbreviated form "*ads;*" [10] but sometimes "*adsm*" or "*ats.*" [11]

ADSECURARE. To make secure, as by giving pledges.[12]

ADSESSORES. Assessors; an ancient title of masters in chancery.[13]

ADSM. See Ad Sectam.

ADSTIPULATOR. An accessory party to a promise, who receives the same promise as his principal did, and can equally receive and exact payment.[14]

AD TERMINUM QUI PRÆTERIIT. A writ of entry that lay for the lessor and his heirs when a lease had been made of lands or tenements for the term of life or years, and after the term was expired the lands were withheld from the lessor by the tenant or other person possessing the same.[15]

AD TRISTEM PARTEM STRENUA EST SUSPICIO. A maxim meaning "suspicion strongly rests on the unfortunate side." [16]

ADTUNC. Then.[17]

AD TUNC ET IBIDEM. Literally, "then and there." The technical name of that part of an indictment containing the statement of the subject-matter "then and there being found." [18]

ADULT. One who has attained the full age of twenty-one years.[19] (Adult: Age of Majority, see Infants. Aggravated Assault by, see Assault and Battery. Capacity of — To Adopt or Be Adopted, see Adoption of Children; To Marry, see Marriage; To Vote, see Elections.)

ADULTER. An adulterer.[20]

3. Broom Leg. Max.
4. Burrill L. Dict.
5. Wharton L. Lex.
6. Burrill L. Dict.
7. Kelham Dict.
8. Bouvier L. Dict.
9. Burrill L. Dict.
10. Abbott L. Dict.; Bowen *v.* Wilcox, etc., Sewing Mach. Co., 86 Ill. 11.
11. Abbott L. Dict.; Burrill L. Dict.
12. Stimson L. Gloss.
13. Burrill L. Dict.
14. Rapalje & L. L. Dict.
15. Brown L. Dict. [*citing* Fitzherbert Nat. Brev. 201].

The writ was abolished by 3 & 4 Wm. IV, c. 27, § 36.

16. Tayler L. Gloss.
17. Burrill L. Dict.

Used in the expression *adtunc existens*,— then being, in Reg. *v.* Fenton, Yelv. 28.

18. Bouvier L. Dict.
19. Galbraith *v.* State, (Tex. App. 1890) 13 S. W. 607; Henkel *v.* State, 27 Tex. App. 510, 512, 11 S. W. 671; Hall *v.* State, 16 Tex. App. 6, 10, 49 Am. Rep. 824; George *v.* State, 11 Tex. App. 95; Schenault *v.* State, 10 Tex. App. 410 [*citing* Bouvier L. Dict.; Webster Dict.; Wharton L. Lex.]; Raven *v.* Waite, 1 Swanst. 553.

Lunatics and persons of unsound mind are not included in the term "adult" as used in General Order 645, relating to suits of foreclosure and sale. Warnock *v.* Prieur, 12 Ont. Pr. 264.

20. Black L. Dict.

The feminine form is *adultera.* Black L. Dict.

ADULTERATION

EDITED BY CHARLES L. LEWIS
Associate Justice of Supreme Court of Minnesota

CROSS-REFERENCES

For Examination and Inspection of Articles of Merchandise by Public Authorities, see INSPECTION.

Imitations of Articles of Drink or Food, see FOOD; INTOXICATING LIQUORS.

Penalties for Adulterating, Actions to Recover, see FOOD.

Police Power and Regulations Respecting Public Health, see COMMERCE; CONSTITUTIONAL LAW; DRUGGISTS; FOOD; HEALTH; MUNICIPAL CORPORATIONS.

Sale of Adulterated Articles, see SALES.

Substitutes for Articles of Drink or Food, see FOOD; INTOXICATING LIQUORS.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

"Adulteration" has been defined as the act of corrupting or debasing. The term is generally applied to the act of mixing up with food or drink intended to be sold, other matters of an inferior quality, and usually of a more or less deleterious character.[1] But what shall and what shall not constitute an adulteration within the meaning of a particular statute must of course depend upon the terms of the statute, especially where such terms have been construed by the court.[2]

II. NATURE OF OFFENSE.

A. In General. The offenses of adulteration, or of selling adulterated substances, are in their nature infringements of the rights of citizens, and constitute a fraud and imposition upon their persons, health, and property.[3]

B. At Common Law. The selling of unwholesome provisions, or the mixture of poisonous ingredients in food or drink designed for any individual, is an indictable offense at common law, whether done through malice or from a mere desire of gain.[4]

C. By Statute — 1. In General. The law governing the offenses of adulteration, or of selling adulterated food, is for the most part laid down by statutes defining the offenses.[5] Such statutes have been considered constitutional as a

1. Black L. Dict.; Bouvier L. Dict. 105; Brown L. Dict.

For further definitions see State *v.* Newton, 45 N. J. L. 469; People *v.* West, 44 Hun (N. Y.) 162; Com. *v.* Hough, 1 Pa. Dist. 51.

2. Thus it was held under the definition of adulterated foods in the Ohio act of March 20, 1884 [as *amended* April 22, 1890], that, where a considerable portion of the oil of the cocoa bean had been extracted and the remaining portion sold, there was no violation of a statute which provided that "an article of food shall be deemed to be adulterated if any valuable or necessary constituent or ingredient had been abstracted from it," the court basing its opinion on the fact that such an article was not a compound or mixture. Rose *v.* State, 11 Ohio Cir. Ct. 87.

Adulterated milk.— Many of the states have defined by statute the standard or proportion of ingredients by which milk may be determined to be adulterated. The exact proportions differ in many instances, but the adulteration or non-adulteration is in each case laid down and defined by the statute of the particular state. See *infra*, III; also State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344, wherein it was held that under R. I. Pub. Stat. c. 127, § 5 [as *amended* Act March 23, 1882, § 3], defining what shall constitute adulterated milk, the offense lies in the intent to sell or exchange such milk, and not in the possession thereof.

3. State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; Com. *v.* Evans, 132 Mass. 11; State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; State *v.* Newton, 45 N. J. L. 469; People *v.* West, 106 N. Y. 296, 12 N. E. 610, 60 Am. Rep. 452.

Oath of liquor-dealers.— As a prevention of fraud in this respect it is by statute in some states made a condition precedent to the sale of spirituous liquors that the proposed seller appear before some officer designated in the statute and make oath or affidavit that he will not adulterate the same, and that he give bond to such effect. State *v.* Ferguson, 72 Mo. 297 [*citing* 1 Wagner's Stat. Mo. art. 1, c. 75]; Levi *v.* State, 4 Baxt. (Tenn.) 289 [*citing* Tenn. Acts (1859–1860), c. 81, § 4; Tenn. Acts (1860), c. 61; Tenn. Code, § 1733*d*]. These statutes have been held applicable to druggists dispensing liquor in the course of their business. State *v.* Ferguson, 72 Mo. 297; Newman *v.* State, 7 Lea (Tenn.) 617. See also, generally, DRUGGISTS.

Under the Tennessee statute it has been held that an oath "not to mix or adulterate with any poisonous substance whatever" is not a compliance with the provision "not to mix or adulterate with any substance whatever." Hall *v.* State, 9 Lea (Tenn.) 574.

4. State *v.* Buckman, 8 N. H. 203, 29 Am. Dec. 646; Roscoe Crim. Ev. 379 [*quoted* in Goodrich *v.* People, 19 N. Y. 574, 577, 3 Park. Crim. (N. Y.) 622, 627]; 2 Russ. Crimes 286.

Polluting spring.— In State *v.* Buckman, 8 N. H. 203, 29 Am. Dec. 646, it was held that the pollution of the waters of a spring was an indictable offense at common law, since it was a mixture of poisonous ingredients with the drink of another to such an extent as to impair his health. See also, generally, WATERS.

5. See statutes cited or construed in the following cases:

Iowa.— State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

Louisiana.— State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249; State *v.* Labatut, 39 La. Ann. 513, 2 So. 550.

Massachusetts.—Com. *v.* Warren, 160 Mass. 533, 36 N. E. 308; Com. *v.* Wetherbee, 153 Mass. 159, 26 N. E. 414; Com. *v.* Smith, 143 Mass. 169, 9 N. E. 631; Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217; Com. *v.* Bowers, 140 Mass. 483, 5 N. E. 469; Com. *v.* Evans, 132 Mass. 11; Com. *v.* Luscomb, 130

legitimate exercise of the police power of the state, not impairing fundamental rights of life, liberty, or property.[6]

2. MUNICIPAL REGULATIONS. A city council in like manner, in the exercise of its police power, may adopt regulations prohibiting adulteration or the sale of adulterated food,[7] and a grant of power conferred upon a municipal corporation for this purpose is not repealed by a general statute to the same effect pertaining to the entire state.[8]

III. WHAT CONSTITUTES ADULTERATION.

A. In General. Where there is no statutory definition applicable to the particular article claimed to be adulterated, the fact of adulteration must necessarily depend upon the sufficiency of the evidence adduced, to bring the offense within the term as ordinarily understood.[9]

B. Adulteration of Milk — 1. IN GENERAL. Milk, being a common article of food, has received more statutory consideration on this account, and the question as to what percentage of original and foreign substances shall constitute an adulteration is usually laid down in express terms by statute.[10]

Mass. 42; Com. *v.* Farren, 9 Allen (Mass.) 489; Com. *v.* Flannelly, 15 Gray (Mass.) 195.

New Hampshire.— State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

New Jersey.— State *v.* Newton, 45 N. J. L. 469.

New York.— People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Bischoff, 14 N. Y. St. 581; People *v.* Thompson, 14 N. Y. Suppl. 819; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628; People *v.* Hodnett, 68 Hun (N. Y.) 341, 22 N. Y. Suppl. 809; People *v.* West, 44 Hun (N. Y.) 162; People *v.* Mahaney, 41 Hun (N. Y.) 26; People *v.* Schaeffer, 41 Hun (N. Y.) 23.

Ohio.— Weller *v.* State, 53 Ohio St. 77, 40 N. E. 1001; Bainbridge *v.* State, 30 Ohio St. 264; Rose *v.* State, 11 Ohio Cir. Ct. 87; Myer *v.* State, 10 Ohio Cir. Ct. 226.

Rhode Island.— State *v.* Groves, 15 R. I. 208, 2 Atl. 384; State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

Texas.— Sanchez *v.* State, 27 Tex. App. 14, 10 S. W. 756; Cantee *v.* State, (Tex. App. 1889) 10 S. W. 757.

England.— Fitzpatrick *v.* Kelly, L. R. 8 Q. B. 337; Crofts *v.* Taylor, 19 Q. B. D. 524.

Artificial coloring of vinegar.— Where, in the manufacture of vinegar, low wine, formed from fermented grain, was passed through roasted malt for the sole purpose of coloring the vinegar, the vinegar contained artificial coloring matter within 84 Ohio Laws (1887), 216, § 2 [as *amended* 85 Ohio Laws (1888), 259], prohibiting the adulteration and artificial coloring of vinegar. Weller *v.* State, 53 Ohio St. 77, 40 N. E. 1001.

Poisonous adulterant.— To constitute the offense of selling adulterated food under N. Y. Laws (1881), c. 407, it must appear that the substance used for adulteration was poisonous. People *v.* Bischoff, 14 N. Y. St. 581.

What constitutes a sale.— The delivery of milk to the purchaser of a *table d'hôte* breakfast, as a part of such breakfast, is as much a sale of the milk, within Mass. Stat. (1886), c. 318, § 2, as if a special price had been put on it or it had been bought and paid for by itself. Com. *v.* Warren, 160 Mass. 533, 36 N. E. 308.

6. *Iowa.*— State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

Minnesota.— State *v.* Sherod, (Minn. 1900) 83 N. W. 417; State *v.* Aslesen, 50 Minn. 5, 52 N. W. 220, 36 Am. St. Rep. 620.

New Hampshire.— State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

New Jersey.— State *v.* Newton, 45 N. J. L. 469.

New York.— People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107 [*reversing* 37 Hun (N. Y.) 319]; Polinsky *v.* People, 73 N. Y. 65; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628.

7. State *v.* Stone, 46 La. Ann. 147, 15 So. 11; Kansas City *v.* Cook, 38 Mo. App. 660; Polinsky *v.* People, 73 N. Y. 65; People *v.* Justices, 7 Hun (N. Y.) 214. See also, generally, MUNICIPAL CORPORATIONS.

Regulations by board of health.— In Polinsky *v.* People, 73 N. Y. 65, it was held that statutory provisions relating to the sale of adulterated milk in the city of New York did not cover the whole subject of traffic in milk, but that the board of health had power to make additional regulations. See also, generally, HEALTH.

8. State *v.* Labatut, 39 La. Ann. 513, 2 So. 550. See also State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.

9. See *supra*, I, II.

10. **Percentage of adulteration.**— By reference to the statutes cited or construed in the following list of cases it will be seen that the percentages of original and foreign substances allowed, while of slight variance, are not uniform in all of the states.

Massachusetts.— Com. *v.* Wetherbee, 153 Mass. 159, 26 N. E. 414; Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217; Com. *v.* Bowers, 140 Mass. 483, 5 N. E. 469; Com. *v.* Evans, 132 Mass. 11; Com. *v.* Luscomb, 130 Mass. 42.

New Hampshire.— State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

New Jersey.— State *v.* Newton, 45 N. J. L. 469.

New York.— People *v.* Thompson, 14 N. Y. Suppl. 819; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628; People *v.* Hodnett,

2. Analysis. The question whether the relative percentage of the several ingredients correspond to the requirements of the statute is usually determined by analysis,[11] and where there is no evidence to impeach or rebut the correctness of the chemical analysis it is only a matter of form to submit to the jury the question whether defendant's milk was adulterated within the meaning of the statute.[12]

C. Water as an Adulterant. Where the effect of using water as an adulterant is to lower or diminish the nutritive power of the substance with which it is mixed, the courts have almost invariably held that there is an adulteration within the meaning of the statute.[13]

D. Notice of Adulteration. It is in some cases provided by statute that where the adulterant consists of a matter or ingredient not injurious to health, and not intended fraudulently to increase the bulk, weight, or measure of the original substance, and the customer has notice of the adulteration, either by printed notice or label, there has been no offense committed.[14] Under this class of cases are to be found statutes regulating the sale of substances having the semblance of butter or cheese, but not wholly made from pure cream or milk, requiring each package to be marked or stamped with the name of each substance used in or entering into the composition of the article proposed to be sold.[15]

68 Hun (N. Y.) 341, 22 N. Y. Suppl. 809; People *v.* Schaeffer, 41 Hun (N. Y.) 23.

Rhode Island.— State *v.* Groves, 15 R. I. 208, 2 Atl. 384; State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

England.— Crofts *v.* Taylor, 19 Q. B. D. 524; Gage *v.* Elsey, 10 Q. B. D. 518.

Milk colored with annatto.— Under Mass. Stat. (1886), c. 318 [*amending* Mass. Pub. Stat. (1882), c. 57, § 5], punishing the sale of milk "to which water or any foreign substance has been added," a person may be convicted who sells skimmed milk colored by adding to it annatto. Com. *v.* Wetherbee, 153 Mass. 159, 26 N. E. 414. See also Com. *v.* Schaffner, 146 Mass. 512, 16 N. E. 280, a prosecution for having in possession with intent to sell milk containing a certain foreign substance, to wit, "annatto coloring matter," where it was held to be immaterial whether a coloring matter put into milk is injurious or not, the addition of any foreign substance being an offense.

Skimmed milk.— Under the Pennsylvania act of May 25, 1878, making it an offense to sell adulterated milk, and the Pennsylvania act of July 7, 1885, declaring skimmed milk with less than six per cent. of cream to be adulterated, selling skimmed milk does not constitute the offense of selling adulterated milk unless it contains less than six per cent. of cream. Com. *v.* Hough, 1 Pa. Dist. 51.

11. By whom made.— This analysis is sometimes to be made by an officer or officers designated in the statute (State *v.* Newton, 45 N. J. L. 469), while in other cases, no specific officer being designated, a mere proof by competent analysis is sufficient (Com. *v.* Evans, 132 Mass. 11; State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344, 27 Alb. L. J. 478).

12. People *v.* Hodnett, 68 Hun (N. Y.) 341, 22 N. Y. Suppl. 809; People *v.* Thompson, 14 N. Y. Suppl. 819; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628. See also *infra*, IX.

13. Com. *v.* Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. *v.* Farren, 9 Allen (Mass.) 489; People *v.* West, 44 Hun (N. Y.) 162. *Contra*, however, see People *v.* Fauerback, 5 Park. Crim. (N. Y.) 311, wherein it was held that there should be evidence that the adulterant used was of such a character as to render the articles impure and unwholesome, and that the fact that water had been added to milk without any other ingredient was not in itself sufficient to show that there was an adulteration within the meaning of a statute forbidding the adulteration of milk and traffic in impure or unwholesome milk.

14. 38 & 39 Vict. c. 63, § 8; Gage *v.* Elsey, 10 Q. B. D. 518; Sandys *v.* Small, 3 Q. B. D. 449; Webb *v.* Knight, 2 Q. B. D. 530.

In Gage *v.* Elsey, 10 Q. B. D. 518, it was held that where a dealer had sold certain liquor to a customer, which had been adulterated by the addition of water, and at the same time called his attention to a notice stating that all spirits were sold as "diluted spirits, no alcoholic strength guaranteed," there was no sale to the prejudice of the customer and that no offense had been committed under 38 & 39 Vict. c. 63, § 6. See also Sandys *v.* Small, 3 Q. B. D. 449.

Notice by label.— However, under N. Y. Laws (1881), c. 407, relating to the selling of adulterated food, it was held that the presence or absence of a label did not constitute an element of the offense. People *v.* Bischoff, 14 N. Y. St. Rep. 581.

15. Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429 [*citing* Ohio Rev. Stat. § 7090].

So, also, have been upheld statutes regulating the sale of lard and lard compounds (State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355 [*citing* 22 Iowa Gen. Ass. c. 79]; State *v.* Aslesen, 50 Minn. 5, 52 N. W. 220, 36 Am. St. Rep. 620 [*citing* Minn. Laws (1891), c. 12]) and a similar statute with reference to the sale of baking-powder containing alum (Stolz *v.* Thompson, 44 Minn. 271, 46 N. W. 410). See also, generally, Food.

IV. GUILTY KNOWLEDGE.

A. In General. As a general rule it is not necessary to prove that defendant had knowledge that the article in question was adulterated.[16]

B. As Essence of the Offense. The rule as above stated cannot, however, be accepted as universal. The necessity of guilty knowledge or intent as an ingredient of the offense is in some cases determined by the wording of the statute, or the particular section thereof, under which a conviction is sought;[17] but where the statute in express terms prohibits the sale of an adulterated article which is represented to be pure, it is enough to show a sale, and there need be no proof of criminal intent.[18]

16. Com. *v.* Warren, 160 Mass. 533, 36 N. E. 308; Com. *v.* Evans, 132 Mass. 11; Com. *v.* Smith, 103 Mass. 444; Com. *v.* Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. *v.* Nichols, 10 Allen (Mass.) 199; Com. *v.* Farren, 9 Allen (Mass.) 489; People *v.* Kibler, 106 N. Y. 321, 12 N. E. 795; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628; People *v.* Mahaney, 41 Hun (N. Y.) 26; People *v.* Schaeffer, 41 Hun (N. Y.) 23; Altschul *v.* State, 8 Ohio Cir. Ct. 214; State *v.* Smith, 10 R. I. 258.

Absence of criminal intent on the part of the accused is immaterial under the New York statutes forbidding the sale of adulterated butter (People *v.* Mahaney, 41 Hun (N. Y.) 26) or adulterated milk (People *v.* Kibler, 106 N. Y. 321, 12 N. E. 795; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107; People *v.* Schaeffer, 41 Hun (N. Y.) 23).

17. Com. *v.* Flannelly, 15 Gray (Mass.) 195; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Schaeffer, 41 Hun (N. Y.) 23 [*following* People *v.* Mahaney, 41 Hun (N. Y.) 26]; Sanchez *v.* State, 27 Tex. App. 14, 10 S. W. 756; Cantee *v.* State, (Tex. App. 1889) 10 S. W. 757.

Applications of the rule, generally.— Thus, under a statute one section of which imposes a penalty upon any person who wilfully admixes with any article of food or drink any injurious or poisonous ingredient to adulterate it for sale, and another section of which imposes a penalty on any person who shall sell any article of food or drink with which, to his knowledge, any ingredient injurious to health has been mixed, and on every person who shall sell as unadulterated any article of food or drink which is adulterated, it has been held that under the first section a guilty knowledge is required, while under the second section the fact that defendant should sell articles as "unadulterated" which are adulterated, and in such a way as to mislead the buyer, is sufficient without further proof of guilty knowledge. Fitzpatrick *v.* Kelly, L. R. 8 Q. B. 337.

In passing upon the question of guilty intent the court, in People *v.* Schaeffer, 41 Hun (N. Y.) 23 [*following* People *v.* Mahaney, 41 Hun (N. Y.) 26], said: "The offense aimed at by the statutes under consideration is the sale of adulterated milk, which is shown to be adulterated when tested by the standard set by the act. That the seller had knowledge of the adulteration need not be shown. The first section, which defines the offense of which defendant is convicted, is silent as to the intent, while other sections defining other offenses make the intent a necessary ingredient." See also People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107 [*reversing* 37 Hun (N. Y.) 319], the decision in the court of appeals being based on the dissenting opinion of Learned, J., in the court below.

In Dilley *v.* People, 4 Ill. App. 52, it was held that an instruction to the effect that if the jury found that A had sold milk to B, and had delivered the same to one of his own servants, by whom the same was delivered to B in the same condition in which it was when he received it from A, and that on its delivery to B it was examined and found to be adulterated, they should find A guilty, was erroneous, as the milk might, as a matter of fact, have been adulterated when A delivered it to his servant, and still A might not have done it or been privy to the transaction.

Adulteration before importation.— In Roberts *v.* Egerton, L. R. 9 Q. B. 494, a tea-dealer was convicted of selling an adulterated tea which he had guaranteed as pure. It appeared that the tea had been adulterated before importation and the seller had no knowledge of such adulteration. It was held, however, that, being in the tea-trade, the defendant must be taken to have a competent knowledge of his profession, and, where it was shown that such knowledge was general among other dealers, the conviction should be allowed to stand.

18. Com. *v.* Flannelly, 15 Gray (Mass.) 195; People *v.* Thompson, 14 N. Y. Suppl. 819; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628; People *v.* Mahaney, 41 Hun (N. Y.) 26; Altschul *v.* State, 8 Ohio Cir. Ct. 214. See also cases cited *supra*, note 16.

Professional milkmen.— In Com. *v.* Flannelly, 15 Gray (Mass.) 195, in speaking of the question of guilty knowledge, the court said: "The legislature, knowing the difficulty of proving the guilty knowledge or belief of adulteration, intended to hold those who were engaged in the sale of milk as a business or trade to a stricter rule, and impose upon them the duty of ascertaining the purity of the article which they offered for sale."

V. What Persons Liable.

A. Master. In this class of cases the act of the servant is the act of the master, and the latter is liable where the servant has acted within the scope of his duty.[19]

B. Servant. The servant also, it seems, under the provisions of the particular statute, may be guilty of the offense.[20]

VI. Jurisdiction.

The jurisdiction of prosecutions for adulteration or sale of adulterated products, as a general rule, belongs to courts having a general criminal jurisdiction.[21] The fact, however, that the statute provides that a certain court shall have jurisdiction, does not necessarily render such court's jurisdiction exclusive, or oust from jurisdiction another court which had before taken cognizance of such cases.[22]

VII. Indictment or Complaint.

A. In General. Indictments or complaints for the selling or having in possession adulterated substances, being based upon statutes defining the offense, will be held sufficient when they substantially follow the words of the particular statute under which they are drawn[23] and allege all the facts and circum-

19. Com. *v.* Warren, 160 Mass. 533, 36 N. E. 308; Com. *v.* Vieth, 155 Mass. 442, 29 N. E. 577; Com. *v.* Haynes, 107 Mass. 194; Meyer *v.* State, 54 Ohio St. 242, 43 N. E. 164. See also Com. *v.* Smith, 143 Mass. 169, 9 N. E. 631.

In Com. *v.* Haynes, 107 Mass. 194, a sale by defendant was sufficiently proved by showing that defendant, whose father owned a milk route, carried the milk to the customers; that defendant and another employee knowingly adulterated the milk with water while on their way to distribute the same to the customers; and that defendant handed one of the cans of adulterated milk from the wagon to his co-employee, who delivered it to the purchaser.

Inadvertent sale by servant.— The master may be held liable for an inadvertent sale made by his servant in the course of his business. Com. *v.* Warren, 160 Mass. 533, 36 N. E. 308.

Sale without consent of master.— So where the sale was made in the absence of the master, without his knowledge or consent, he may be held liable. Com. *v.* Vieth, 155 Mass. 442, 29 N. E. 577.

Possession by servant.— Where the master was indicted for having in his possession for the purpose of selling and for selling adulterated milk, it was held that proof of the possession of such adulterated milk by his servant was not sufficient to convict without evidence that the servant was acting for and under instructions from his master. State *v.* Smith, 10 R. I. 258.

But in Com. *v.* Proctor, 165 Mass. 38, 42 N. E. 335, it was held that the possession of a servant is the possession of the master, the prosecution being under Mass. Stat. (1886), c. 318, § 2, and Mass. Stat. (1894), c. 425, for selling adulterated milk.

20. Meyer *v.* State, 54 Ohio St. 242, 43 N. E. 164; Myer *v.* State, 10 Ohio Cir. Ct. 226.

In the Meyer case cited *supra* it was held that one who sells impure and adulterated wine is subject to fine under the Ohio act of March 20, 1884, although at the time of the sale he is the agent of a principal who resides without the state.

In the Myer case cited *supra* the court held that an agent for a wine house in another state, who takes orders for adulterated wine in the state, and procures the transportation of the goods directly to the purchaser in the state, is guilty of a misdemeanor under the Ohio statute making any person guilty of a misdemeanor "who shall manufacture or cause the same to be done with intent to sell, or shall sell, or offer to sell," any adulterated wine within the state.

21. Com. *v.* Haynes, 107 Mass. 194 [*citing* Mass. Gen. Stat. c. 114, § 6]; People *v.* Harris, 123 N. Y. 70, 25 N. E. 317 [*citing* N. Y. Laws (1862), c. 467; N. Y. Laws (1884), c. 202; N. Y. Laws (1885), c. 183].

22. People *v.* Harris, 123 N. Y. 70, 25 N. E. 317; People *v.* Austin, 49 Hun (N. Y.) 396, 3 N. Y. Suppl. 578.

Thus it was held in Com. *v.* Haynes, 107 Mass. 194, that Mass. Stat. (1868), c. 263, § 2, which provided that the penalty prescribed for selling adulterated milk might be recovered on complaint before any court of competent jurisdiction, did not exclude the superior court from jurisdiction of an indictment for the offense.

23. Com. *v.* Keenan, 139 Mass. 193, 29 N. E. 477; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; Haas *v.* State, 2 Ohio Dec. 177. See also Meyer *v.* State, 2 Ohio Dec. 233, wherein it was held that an affidavit charging that defendant sold for

stances necessary to bring defendant within the terms of the statute creating and defining the offense.[24]

B. Description of Article Adulterated. There should be a description of the article claimed to be adulterated, sufficient to show that it is within the contemplation of the statute;[25] but there need be no particular description of the substance, as to either its ingredients or its use,[26] unless such a descrip-

blackberry wine "a certain compound and mixture consisting of wine, sugar, water, alcohol, salicylic acid, and aniline red," charged a violation of the Ohio act of March 26, 1891, forbidding the sale of adulterated wine, and did not come within Ohio Rev. Stat. § 7456-26, excepting from the operation of the statute wine sold for medicinal purposes.

24. Com. *v.* Rowell, 146 Mass. 128, 15 N. E. 154; Com. *v.* O'Donnell, 1 Allen (Mass.) 593; Com. *v.* Flannelly, 15 Gray (Mass.) 195; People *v.* West, 44 Hun (N. Y.) 162.

Description of defendant.— Where the statute under which the indictment is drawn is applicable only to those who are engaged in the business of selling milk, the indictment must allege that the defendant belongs to that class of persons. Com. *v.* Flannelly, 15 Gray (Mass.) 195.

It is not necessary to allege that defendant was a member of a partnership, as such allegation is not descriptive of the offense. Com. *v.* Rowell, 146 Mass. 128, 15 N. E. 154.

Name of purchaser.— In People *v.* Burns, 53 Hun (N. Y.) 274, 7 N. Y. Crim. 92, 6 N. Y. Suppl. 611, it was held that an indictment which neither named the purchaser of the impure article nor stated that his name was unknown, was defective as not stating particularly the acts constituting the offense.

Negativing exceptions.— In Com. *v.* Kenneson, 143 Mass. 418, 9 N. E. 761, it was held that a complaint under Mass. Stat. (1886), c. 318, § 2, prohibiting the having in one's possession milk "not of good standard quality" with intent to sell the same, and establishing a different standard for the months of May and June, need not negative the exception of the months of May and June, where it alleges the unlawful possession on the first day of July.

That lard was stamped "pure," etc.— Under the Iowa statute which provides that no person shall sell any lard, or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, under any label bearing the words "refined," "pure," "family," unless every package in which the article is sold is marked "compound lard" it was held that an information charging a violation of such act is sufficient if it alleges in substance that defendant sold a package, or bucket, filled with an article intended for use as lard which contained other ingredients than pure fat of healthy swine, and that such bucket or package did not bear on the top or outer side the name, and proportion in pounds and fractional parts thereof, of each ingredient contained therein, as provided by the statute, without alleging that it was stamped "pure," "refined," "family," or "compound" lard. State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

25. **Liquor.**— Under an Ohio statute providing for the inspection of liquor it was held that the liquor sold must be alleged to have remained uninspected, and that it was not sufficient to allege that it was not inspected in the county where the sale was made and that the cask bore no inspector's brand. Woodworth *v.* State, 4 Ohio St. 487.

Milk.— An indictment charging that defendant had in his possession with intent to sell "milk" to which a certain foreign substance had been added was held sufficient where it was shown that boric acid had been added to "cream." Com. *v.* Gordon, 159 Mass. 8, 33 N. E. 709.

So it has been held unnecessary to allege that the milk was cow's milk. Com. *v.* Farren, 9 Allen (Mass.) 489.

Mustard.— In Haas *v.* State, 2 Ohio Dec. 177, it was held that an affidavit charging defendant with selling to a certain person, on a day stated, in a specified county, "a certain quantity of food, to wit, ground mustard," which was adulterated with starch, is sufficient to put him on his trial.

Indefinite description.— Where the indictment charges defendant with fraudulently adulterating "a certain substance intended for food, to wit: one pound of confectionery," it was held insufficient and uncertain, the word "confectionery" being a generic term for many articles. Com. *v.* Chase, 125 Mass. 202.

Quantity of adulterated substance.— An indictment which alleges that defendant had in his "possession milk to which a certain foreign substance had been added, to wit, annatto coloring matter," with intent unlawfully to sell the same, is sufficient without naming the quantity. Com. *v.* Schaffner, 146 Mass. 512, 16 N. E. 280.

26. **Allegation as to ingredients.**— Where an indictment charges the defendant with having in his possession with intent to sell milk containing a less percentage of milk solids than is required by the statute, it is not necessary to allege further that the milk has been analyzed and found deficient, such fact being a matter of proof. Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217; Com. *v.* Bowers, 140 Mass. 483, 5 N. E. 469. Nor is it necessary to allege or prove the cause which reduced the quality of the milk below the legal standard. Com. *v.* Keenan, 139 Mass. 193, 29 N. E. 477, wherein it was held that under Mass. Pub. Stat. (1882), c. 57, § 5, providing that no person shall sell, or have in his possession with intent to sell, "adulterated milk, or milk to which water or any foreign substance has been added," and § 9, defining adulterated milk to be milk containing more than eighty-seven per cent. of watery fluid, or less than thirteen per cent. of milk

tion is necessary to properly charge the offense as defined by the particular statute.[27]

C. Description of Adulterant. While it is not necessary to describe particularly what were the noxious materials used in the adulteration,[28] yet where such description is attempted the proof must agree with the allegations.[29]

D. Guilty Knowledge or Intent. It is not necessary to allege that defendant had knowledge that the article sold was adulterated,[30] unless such knowledge is by the particular statute made one of the essential ingredients of the offense.[31] Nor is it necessary to allege that it was defendant's intent to injure any particular person or person's health.[32]

E. Joinder of Counts and Offenses. The rules as to joinder of counts and offenses applicable to criminal trials in general obtain in this class of indictments,[33] and defendant may be charged in different counts of the same indict-

solids, a complaint is sufficient which alleges that defendant had in his possession, with intent to sell, a certain quantity of adulterated milk, to wit, milk "containing less than thirteen per cent. of milk solids."

Allegation of use.— In Haas *v.* State, 2 Ohio Dec. 177 [*criticising* Vester *v.* State, 2 Ohio Dec. 170], it was held that the presumption was that where a customer called for an article generally used for food, it was his intention so to use it, and there was no necessity of an allegation that the same was to be used as food. See also State *v.* Kelly, 54 Ohio St. 166, 43 N. E. 163.

27. State *v.* Newton, 45 N. J. L. 469, wherein it was held that under N. J. Laws (1882), c. 82, § 4, declaring that milk shown to contain more than eighty-eight per centum of watery fluids, or less than twelve per centum of milk solids, shall be deemed adulterated milk within the meaning of the act, a complaint for selling, and having in possession with intent to sell, milk under such standard, should be special, and not in the form of a complaint for selling milk which is in fact adulterated.

28. Rex *v.* Dixon, 3 M. & S. 11, holding that where the adulterant was described as unwholesome and unfit for the food of man, it was sufficient.

29. An allegation that defendant had in his possession one pint of adulterated milk, "to which milk water had been added," with intent to sell the same, is not supported, it seems, by proof that defendant had added water to pure milk. Com. *v.* Luscomb, 130 Mass. 42 [*cited* with approval in Com. *v.* Keenan, 139 Mass. 193, 29 N. E. 477].

30. Com. *v.* Farren, 9 Allen (Mass.) 489; Haas *v.* State, 2 Ohio Dec. 177. See also *supra*, IV.

Hence, in People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, in a prosecution under N. Y. Laws (1885), c. 183, § 3, providing that no person or persons shall sell, supply, or bring to be manufactured to any butter or cheese manufactory any milk diluted with water, etc., it was held that an indictment charging that defendant did wrongfully, unlawfully, and knowingly supply and bring to be manufactured into cheese to a cheese manufactory then and there situate, etc., a certain quantity of milk, which said milk was then and there diluted with water, for the purpose of having the same manufactured into cheese, sufficiently states the offense.

31. Com. *v.* Flannelly, 15 Gray (Mass.) 195, holding that a complaint for selling adulterated milk under Mass. Stat. (1856), c. 222, providing for the punishment of any person who shall sell adulterated milk knowing or having reason to believe that the milk was adulterated, must allege that defendant knew, or had reason to know, that the milk was adulterated. And to the same effect see People *v.* Fauerback, 5 Park. Crim. (N. Y.) 311.

Sufficient allegation of knowledge.— In Sanchez *v.* State, 27 Tex. App. 14, 10 S. W. 756, it was held that an information under Willson's Crim. Stat. Tex. § 656, charging that defendant "did unlawfully and knowingly offer for sale" adulterated milk, was not open to the objection that it did not charge that defendant knew that the milk was adulterated.

32. Rex *v.* Dixon, 3 M. & S. 11. See also People *v.* West, 44 Hun (N. Y.) 162, wherein it was held that an indictment under N. Y. Laws (1884), c. 202, § 3, providing that no person shall sell, supply, or bring to be manufactured to any butter or cheese manufactory any milk diluted with water, etc., was not defective for the reason that it was not alleged therein that the manufactory to which the milk was brought was not a private factory used by the defendant alone, and the cheese manufactured for the market by reason of which third persons would be injured, the circumstances supposed being matters of defense.

Intent to be used as human food.— In State *v.* Kelly, 54 Ohio St. 166, 43 N. E. 163 [*reversing* 2 Ohio Dec. 239], it was held that an affidavit to charge a violation of the Ohio act of March 20, 1884, "to provide against the adulateration of food and drugs," need not charge that an adulterated article of food is sold to be used as human food.

33. Thus an indictment which alleges that defendant "did unlawfully keep, offer for sale, and sell" adulterated milk, charges but one offense. Com. *v.* Nichols, 10 Allen (Mass.) 199.

So an indictment is not bad for duplicity because it alleges that defendant sold "adulterated milk to which a large quantity, that

ment with selling and having in possession for the purpose of sale adulterated articles.[34]

VIII. DEFENSES.

Defendant may always show such matters of defense as tend to remove him beyond the contemplation of the statute under which he is being prosecuted;[35] but where the statute in express terms declares the possession or sale of an article below a given standard to be an offense, a defendant who is shown to have had in his possession or to have made a sale of such an article will not be allowed to prove, by way of defense, any extenuating circumstances either on his own part[36] or with respect to the purchaser.[37]

IX. EVIDENCE.

A. Of Defendant's Intent. Defendant's intention to sell is to be gathered from his acts and from the time, place, and circumstances of their commission, all of which evidence is competent to be submitted to the jury either upon the question of intent[38] or upon the question of his possession with intent to sell.[39]

is to say four quarts, of water, had been added," since the mixing of milk with water is an adulteration, and but one offense is charged. Com. *v.* Farren, 9 Allen (Mass.) 489. See also *supra*, III, C.

In Polinsky *v.* People, 73 N. Y. 65, it was held that an indictment purporting to proceed exclusively upon an ordinance of the city of New York prohibiting the bringing of adulterated milk into the city was not bad for duplicity in that it contained averments which might sustain a count for the offense of selling adulterated milk under N. Y. Laws (1862), c. 467 [as *amended* N. Y. Laws (1864), c. 544].

34. Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217. But where the complaint charges in one count both possession and sale of the prohibited article the question whether the prosecutor will be required to elect upon which charge he will rely depends upon the discretion of the court. People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820. See also People *v.* Fulle, 12 Abb. N. Cas. (N. Y.) 196, where the complaint charged the selling of adulterated cream of tartar for a drug and food, in violation of a statute, and the prosecution was compelled to elect on which part of the charge it would proceed, and elected to try defendant for selling as a drug.

35. Good faith of defendant.— On a prosecution for selling adulterated molasses, defendant may show that he purchased it believing it to be pure, and in good faith sold it as such without intent to deceive. Kelly *v.* State, 2 Ohio Dec. 239.

Sale of skim milk.— Where defendant was indicted for selling milk below the statutory standard, he may show as a defense that he sold the milk from a can marked "skim milk." Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217.

Failure to supply sample for analysis.— Upon a prosecution for failure to supply a sample for analysis as required under the Ohio statute, defendant should be allowed to prove that he did not offer for sale the articles in question. Margolius *v.* State, 1 Ohio N. P. 264.

36. Thus it is no defense that the milk has been reduced below the statutory standard by a removal of part of the cream, where the same has been sold as pure milk. Com. *v.* Bowers, 140 Mass. 483, 5 N. E. 469.

Special contract to deliver milk at a dairy will be no defense where it is below the legal standard. Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930.

That the article was patented was not considered sufficient as a defense in a prosecution under Ohio Rev. Stat. § 7090, forbidding the sale of adulterated food unless stamped with a notice of its ingredients. Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429.

37. Failure to post notice.— The fact that the purchaser, a manufacturer of cheese, did not post a notice of the statute in the receiving-room of his factory, as required by the act, was held no defense to a prosecution for its violation. Bainbridge *v.* State, 30 Ohio St. 264.

38. Thus the fact that the adulterated milk was in the wagon of defendant, with his name thereon, standing at an early hour upon the public streets; that defendant's servant was on the wagon, which contained several eight-quart cans, from which the sample was taken, was held evidence of an intent to sell, which was properly submitted to the jury. Com. *v.* Smith, 143 Mass. 169, 9 N. E. 631.

But in Meyer *v.* State, 2 Ohio Dec. 233, where defendant was prosecuted for selling adulterated wine, it was held not to be error to exclude defendant's evidence that he had no knowledge that the liquor was impure, where the other testimony plainly shows that he knew its quality.

39. The fact that defendant was on a wagon with a license-number containing milk cans, from one of which was taken the adulterated milk, is competent evidence to go to the jury as to whether defendant was in possession of the milk with intent to sell the same. Com. *v.* Rowell, 146 Mass. 128, 15 N. E. 154. See also Com. *v.* Smith, 143 Mass. 169, 9 N. E. 631, a complaint under Mass. Pub. Stat. c. 57, § 5, for having in possession adulterated milk with intent unlawfully to sell it.

B. Relating to Analysis. In prosecutions under statutes designating the method of seizure for analysis, the provisions of the statute must be strictly complied with in order that the analysis may be admissible in evidence;[40] but where the adulterated substance is seized for analysis under circumstances not contemplated in the statute, the competency of the evidence as to its quality is to be determined by the rules of common law,[41] and defendant may give evidence tending to impeach the correctness of the analysis.[42]

40. Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511. See also Com. *v.* Spear, 143 Mass. 172, 9 N. E. 632, wherein it is held that the question whether the addition, by the inspector, of a few drops of carbolic acid to that part of the milk reserved for defendant affected the sample so as to constitute a failure to comply with the provisions of Mass. Stat. (1884), c. 310, § 3, relating to the analysis of milk, is a question of fact for the jury.

Failure to seal securely.— The fact that the bottle in which the sample was kept was not securely sealed, so as to render the bottle air-tight, was held an insufficient compliance with a statute [Mass. Stat. (1884), c. 310] requiring the same to be "sealed." Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511. But in Com. *v.* Kenneson, 143 Mass. 418, 9 N. E. 761, it was held that Mass. Stat. (1884), c. 310, § 4, providing for the reservation and sealing before analysis, was repealed by Mass. Stat. (1886), c. 318, §§ 1, 3, and that under the latter statute evidence of an analysis was admissible in a charge for adulteration, though the sample was not given until two hours after the analysis.

Where two samples of milk were taken from defendant's wagon and analyzed, evidence is admissible as to both. Com. *v.* Schaffner, 146 Mass. 512, 16 N. E. 280, also holding that the prosecution need not be required to elect between the two samples.

41. Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930, holding that in such cases the testimony of any person who had sufficient skill to make an analysis of milk, and who actually analyzed some of the milk in question, was admissible; Com. *v.* Spear, 143 Mass. 172, 9 N. E. 632.

In Com. *v.* Coleman, 157 Mass. 460, 32 N. E. 662, it was held that the fact that the collector of samples made a "purchase of milk" in a restaurant for analysis, and without giving the owner an opportunity to ask for a sealed sample, would not render evidence incompetent to show that the milk was below the legal standard.

Under the English statute it is not necessary for the officer to notify the seller or his agent of his intention to have the sample analyzed, or to deliver over a portion of the sample. Rouch *v.* Hall, 6 Q. B. D. 17.

A rule of evidence is not established by statutes providing that milk shown by analysis to contain less than a certain per cent. of milk solids, etc., shall be deemed adulterated. State *v.* Newton, 45 N. J. L. 469; People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107 [*reversing* 37 Hun (N. Y.) 319]; State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

Testimony of one not an official inspector may be received to show adulteration. Com. *v.* Spear, 143 Mass. 172, 9 N. E. 632, wherein it was held that Mass. Pub. Stat. (1882), c. 57, § 2, and Mass. Stat. (1884), c. 310, § 3, providing for an analysis of milk by public inspectors, did not operate as providing an exclusive mode of proving adulteration.

So, also, evidence having been introduced to show that a particular foreign substance has been added to milk, a chemist who has analyzed the latter may testify what the milk was, independently of that. Com. *v.* Schaffner, 146 Mass. 512, 16 N. E. 280.

The sworn certificate of a milk-inspector appointed to analyze milk may be admitted in evidence in a prosecution under Mass. Stat. (1864), c. 122, if it further appears that the inspector was a witness in the case and testified to all the facts set forth in the certificate. Com. *v.* Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711.

Evidence that defendant's cows were properly fed, not being offered for the purpose of discrediting the analysis of the milk put in on behalf of the prosecution, was held to have been properly excluded where defendant was indicted under N. H. Laws (1883), c. 42. State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

42. State *v.* Groves, 15 R. I. 208, 2 Atl. 384. See also People *v.* Hodnett, 68 Hun (N. Y.) 341, 22 N. Y. Suppl. 809, which was an action brought under N. Y. Laws (1885), c. 183, to recover a penalty for selling adulterated milk.

So, where it appeared that defendant had on hand four cans of milk, and among the number one can of skimmed milk, and it did not appear from the evidence from which can the inspectors had taken the milk claimed to be adulterated, a judgment of conviction was reversed. The prosecution was under N. Y. Laws (1885), c. 183, an exception being made in the case of skimmed milk for use in the county in which it is produced. People *v.* Thompson, 14 N. Y. Suppl. 819.

Official analysis not conclusive.— In State *v.* Newton, 45 N. J. L. 469, it was held that N. J. Laws (1882), c. 82, § 2, prohibiting the sale of adulterated milk, and providing that milk shall be deemed adulterated which is shown, by analysis of a member of the board of public analysts, to contain less than twelve per cent. of milk solids, does not render the act of the analyst conclusive of the guilt of the defendant in selling adulterated milk, and thereby render the act unconstitutional, but merely prohibits the sale of milk containing less than twelve per cent. of milk solids.

C. Variance. In prosecutions for selling adulterated articles the rule against variance has been applied with respect to the admission of evidence.[43]

ADULTERINE. The issue of adulterous intercourse.[1]

ADULTERINE GUILDS. Traders acting as a corporation without a charter, and paying a fine annually for permission to exercise their usurped privileges.[2]

ADULTERINUS. Corrupt; spurious; counterfeit; forged.[3]

ADULTERIUM. A fine imposed for the commission of adultery.[4]

ADULTERIUM NON PROBET CONTRA ALIUM SOLA MULIERIS CONFESSIONE. A maxim meaning "adultery is not proved against another by the confession of the woman."[5]

ADULTEROUS BASTARDS. Those produced by an unlawful connection between two persons, who, at the time when the child was conceived, were, either of them or both, connected by marriage with some other person.[6]

43. What constitutes a variance.— In an indictment charging defendant with having in his custody and possession, with intent to sell the same, "one pint of adulterated milk, to which milk water had been added," the allegation is descriptive, and is not supported by proof that the milk in question was adulterated by adding water to pure milk. Com. *v.* Luscomb, 130 Mass. 42.

In State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419, evidence that pure milk does not always come up to the standard fixed by the statute was held not to be admissible upon a trial for selling adulterated milk.

In People *v.* Fulle, 12 Abb. N. Cas. (N. Y.) 196, defendant was indicted for selling an adulterated cream of tartar for a drug and food. Upon being forced to an election the prosecution went to trial upon the sale as a drug. Upon proof that the sale had been made as a food, it was held a variance notwithstanding the fact that under the statute sale as a food was an offense.

What does not constitute variance.— The variance between an averment in an indictment for selling adulterated milk in violation of Mass. Stat. (1864), c. 122, § 4, that the milk was sold to a woman, and proof that the woman, in buying the milk, was acting as her husband's agent, is not fatal, where defendant had no notice, express or implied, at the time of sale, that the woman was so acting. Com. *v.* Farren, 9 Allen (Mass.) 489.

In Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217, it was held that where a complaint contained two counts, the first charging defendant with selling adulterated milk and the second with having such milk in his possession for sale, the same milk being intended in both counts, and the having in possession being on the same day as the sale and preliminary to it, the court properly refused an instruction that if a consummated sale was proven there could be no conviction under the second count.

1. Bouvier L. Dict.
2. Wharton L. Lex. [*citing* 1 Smith Wealth of Nations, c. 10].
3. Burrill L. Dict.
4. Wharton L. Lex.
5. Adams Gloss. [*citing* Betts *v.* Betts, 1 Johns. Ch. (N. Y.) 197, 199].
6. La. Rev. Civ. Code (1875), art. 182.

ADULTERY

Edited by William A. Ketcham

CROSS-REFERENCES

For Adultery:
As Affecting Dower Rights, see DOWER.
As Affecting Rights of Inheritance, see DESCENT AND DISTRIBUTION.
As Ground for Divorce, see DIVORCE.
Provoking Homicide, see HOMICIDE.

For Bigamy, see Bigamy.
Criminal Conversation, see Husband and Wife.
Fornication, see Fornication.
Lascivious Cohabitation, see Lewdness.
Lewdness, see Lewdness.
Living in Adultery, see Lewdness.
For General Matters Relating to Criminal Law and Criminal Procedure, see Criminal Law.

I. Definition.

Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.[1]

II. Nature and Elements of the Offense.

A. In General — 1. At Common Law. Adultery as a crime was unknown to the common law.[2]

2. By Canon Law. Under the canon law, however, adultery was considered a crime and was punishable by ecclesiastical censure,[3] and included all cases of incontinence by married persons, whether committed by a married man with a single or married woman, or by a married woman with a single or married man.[4]

3. By Statute — a. In General. Adultery, not being a common-law offense, is not punishable in this country unless made so by statute.[5] Most of the states, however, have passed statutes creating and defining the offense.[6]

1. Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict.

According to the ecclesiastical law the offense of adultery is defined by Godolphin as "the inconstancy of married persons, or of persons whereof the one at least is under the conjugal vow." State *v.* Searle, 56 Vt. 516, 518. See also State *v.* Roth, 17 Iowa 336.

The civil law defines adultery to be the "carnal knowledge of another man's wife." Smitherman *v.* State, 27 Ala. 23; State *v.* Weatherby, 43 Me. 258, 69 Am. Dec. 59. By the civil law adultery could be committed only by the unlawful sexual intercourse of a man with a married woman. "The connection of a married man with a single woman does not make him guilty of the crime of adultery." Com. *v.* Call, 21 Pick. (Mass.) 509, 511, 32 Am. Dec. 284 [*quoting* Wood's Inst. 272].

2. *Arkansas.*—Crouse *v.* State, 16 Ark. 566.
Iowa.— State *v.* Roth, 17 Iowa 336.
Massachusetts.— Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Com. *v.* Putnam, 1 Pick. (Mass.) 136.
Mississippi.—Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.
New Hampshire.—State *v.* Marvin, 35 N. H. 22.
New Jersey.— State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397.
Pennsylvania.— Com. *v.* Kilwell, 1 Pittsb. (Pa.) 255.
Vermont.— State *v.* Cooper, 16 Vt. 551.
Virginia.—Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

3. *Iowa.*— State *v.* Roth, 17 Iowa 336.
Massachusetts.— Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.
Mississippi.—Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.
New Hampshire.—State *v.* Marvin, 35 N. H. 22.
Pennsylvania.— Com. *v.* Kilwell, 1 Pittsb. (Pa.) 255.
Vermont.— State *v.* Cooper, 16 Vt. 551.
England.— Burgoyne *v.* Free, 2 Hagg. Ecc. 456.

4. Com. *v.* Kilwell, 1 Pittsb. (Pa.) 255; State *v.* Searle, 56 Vt. 516.

5. Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465; State *v.* Brunson, 2 Bailey (S. C.) 149.

6. See *infra*, II, A, 3, b.

Failure to define "sexual intercourse."— A statute defining adultery to be the unlawful voluntary sexual intercourse of a married person with one of the opposite sex is not invalid for uncertainty in that it fails to define what constitutes sexual intercourse. State *v.* Whealey, 5 S. D. 427, 59 N. W. 211.

Conspiracy to commit adultery is also made an offense in some states, but a mere agreement between a man and a woman to commit the offense is not indictable as a conspiracy to commit the crime. Miles *v.* State, 58 Ala. 390; Shannon *v.* Com., 14 Pa. St. 226. See also, generally, Conspiracy.

Solicitation to commit adultery is not an indictable offense unless made so by statute. Smith *v.* Com., 54 Pa. St. 209, 93 Am. Dec. 686. *Compare* State *v.* Avery, 7 Conn. 266, 267, 18 Am. Dec. 105.

Solicitation cannot be considered as an attempt to commit the offense. State *v.* Butler, 8 Wash. 194, 35 Pac. 1093, 40 Am. St. Rep. 900, 25 L. R. A. 434.

b. What Constitutes the Statutory Offense — (I) *Difference of Opinion.* The question as to what will constitute the statutory offense of adultery has not received uniform decision among the courts of the several states.[7]

(II) *The Better Doctrine.* Since the gist of the crime, independently of statutory enactments, is the danger of introducing spurious heirs into a family, whereby a man may be charged with the maintenance of children not his own,[8] it would seem to be the better doctrine that a man cannot be guilty of adultery by sexual intercourse with an unmarried woman;[9] and where he is criminally

7. Where both parties are married, each party, if guilty of any offense, is guilty of adultery. Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120; State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Hunter *v.* U. S., 1 Pinn. (Wis.) 91, 39 Am. Dec. 277. See also *supra*, I; and cases cited *infra*, in this note, as to the guilt of both parties "where either party is married."

Where either party is married, under some statutes the offense of adultery is complete, and both parties are guilty thereof.

Alabama.— Walker *v.* State, 104 Ala. 56, 16 So. 7; Banks *v.* State, 96 Ala. 78, 11 So. 404; White *v.* State, 74 Ala. 31; Buchanan *v.* State, 55 Ala. 154; State *v.* Glaze, 9 Ala. 283; State *v.* Henton, 6 Ala. 864.

Georgia.— *Compare* Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120.

Illinois.— Miner *v.* People, 58 Ill. 59.

Iowa.— State *v.* Mahan, 81 Iowa 121, 46 N. W. 855; State *v.* Wilson, 22 Iowa 364; State *v.* Roth, 17 Iowa 336.

Maine.— State *v.* Weatherby, 43 Me. 258, 69 Am. Dec. 59. See also State *v.* Hutchinson, 36 Me. 261.

New Hampshire.—State *v.* Taylor, 58 N. H. 331; State *v.* Wallace, 9 N. H. 515.

South Carolina.— Hull *v.* Hull, 2 Strobh. Eq. (S. C.) 174 [a civil case, but often cited and quoted as authority in this connection].

Texas.— Edwards *v.* State, 10 Tex. App. 25; Parks *v.* State, 3 Tex. App. 337.

In Buchanan *v.* State, 55 Ala. 154, however, it is held that, according to the better opinion, where one party is married and the other is single, the former is guilty of adultery and the latter of fornication, while in Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120, it was held that under Ga. Pen. Code, § 381, where one of the parties was married and the other single, each was guilty of the statutory offense denominated "adultery and fornication." See, generally, Fornication.

Where neither party is married it has been held that neither is guilty of adultery. If guilty of any offense at all under the statute it is fornication. Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120; State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397; State *v.* Connoway, Tappan (Ohio) 90. See also, generally, Fornication.

Where man is married and woman is single, under some statutes it has been held that the man is guilty of adultery (Com. *v.* Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State *v.* Fellows, 50 Wis. 65, 6 N. W. 239; Hunter *v.* U. S., 1 Pinn. (Wis.) 91, 39 Am. Dec. 277); under others that the man is not guilty of adultery (State *v.* Connoway, Tappan (Ohio) 90); under others that the man is guilty of fornication (State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397); and under others that both the man and the woman are guilty of fornication (State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; State *v.* Armstrong, 4 Minn. 335).

Where woman is married and man is single, under some statutes it has been held that both the man and woman are guilty of adultery (State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; State *v.* Pearce, 2 Blackf. (Ind.) 318; Names *v.* State, 20 Ind. App. 168, 50 N. E. 401; Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; State *v.* Connoway, Tappan (Ohio) 90; State *v.* Fellows, 50 Wis. 65, 6 N. W. 239 [but see Hunter *v.* U. S., 1 Pinn. (Wis.) 91, 39 Am. Dec. 277]); and under others that the man is merely a fornicator (Respublica *v.* Roberts, 1 Yeates (Pa.) 6; Com. *v.* Lafferty, 6 Gratt. (Va.) 672), while the woman is an adulteress (Com. *v.* Kilwell, 1 Pittsb. (Pa.) 255).

Reason for lack of uniformity of decisions. — This difference of opinion among the courts as to what constitutes the offense arises from the fact that the decisions are founded upon codes of law materially different from each other. Accordingly the doctrine announced in a particular case is dependent upon the individual statute under which the defendant is being prosecuted. Com. *v.* Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397.

8. *Alabama.*—Smitherman *v.* State, 27 Ala. 23.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

Maine.— State *v.* Weatherby, 43 Me. 258, 69 Am. Dec. 59.

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

New Hampshire.—State *v.* Wallace, 9 N. H. 515.

New Jersey.— State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397.

Ohio.— State *v.* Connoway, Tappan (Ohio) 90.

9. State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; State *v.* Armstrong, 4 Minn. 335; State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397; State *v.* Connoway, Tappan (Ohio) 90.

liable for the offense, the fact arises from some feature of the statute which brings the act within the definition given of the crime.[10]

(III) *Where the Statute Does Not Define the Offense.* Where no definition of the crime is contained in the statute making adultery a punishable offense, resort must be had to established definitions sanctioned by books of authority and adopted by long usage.[11]

B. Consent of Woman. The consent of the woman is not necessary, and as against the man he may be guilty, although the connection was effected by force and against the will of the woman.[12]

C. Mistake of Parties — 1. In General. The fact that a person is guilty of the offense of adultery through an erroneous belief that he or she is within the terms of the law is, as a general rule, no excuse for the commission of the crime.[13]

2. Mistake of Fact. In marriage the law does not presume death until after an unexplained absence of seven years, and a party to a marriage who remarries and cohabits before the expiration of that period may, under the statute, be guilty of the offense of adultery.[14] In such cases the marriage is presumed to continue until a dissolution by divorce or death is shown.[15]

3. Mistake of Law — a. In General. The fact that the parties thought that they had a right to marry and were so advised will afford no excuse where one of them has a living husband or wife at the time.[16] A woman, however, is not criminally guilty of adultery unless she had knowledge of a prior marriage or continued to cohabit after such knowledge.[17]

b. Invalid Divorce. So a defendant may be guilty of the offense, where, erroneously believing himself to be legally divorced, he remarries and cohabits under the second marriage.[18]

10. State *v.* Armstrong, 4 Minn. 335.

11. Com. *v.* Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State *v.* Armstrong, 4 Minn. 335; State *v.* Connoway, Tappan (Ohio) 90.

Distinction in civil and criminal actions.— In Smitherman *v.* State, 27 Ala. 23, 25, the court said: "The term 'adultery,' as used in our code, should be construed with reference to the subjects-matter with which it stands connected. When used with reference to divorce, it is to be taken in the canonical sense of that term, and embraces the infidelity of the husband to his wife . . . ; but when considered with reference to the criminal law it imports such sexual intercourse as violates another man's bed — as may entail a spurious issue upon the defrauded husband."

12. State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Sanders, 30 Iowa 582; Com. *v.* Bakeman, 131 Mass. 577, 41 Am. Rep. 248; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207.

Woman drugged.—The fact that the woman was drugged at the time of the commission of the offense, and in consequence was not guilty, will not excuse the man, even where the two are jointly indicted. Com. *v.* Bakeman, 131 Mass. 577, 41 Am. Rep. 248.

Joint criminal intent.— In Alonzo *v.* State, 15 Tex. App. 378, 384, 49 Am. Rep. 207 [*quoted* in State *v.* Cutshall, 109 N. C. 764, 768, 14 S. E. 107, 26 Am. St. Rep. 599] the court said: "While it is true that, to constitute adultery, there must be a joint physical act, it is certainly not true that there must be a joint criminal intent."

13. State *v.* Cody, 111 N. C. 725, 16 S. E. 408. See also *infra*, VI, D.

Guilty knowledge or intent is not an element of the offense and need not be proved. Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; State *v.* Cody, 111 N. C. 725, 16 S. E. 408; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

14. State *v.* Henke, 58 Iowa 457, 12 N. W. 477; Com. *v.* Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685; Com. *v.* Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653.

15. People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

16. State *v.* Goodenow, 65 Me. 30.

17. Banks *v.* State, 96 Ala. 78, 11 So. 404; Vaughan *v.* State, 83 Ala. 55, 3 So. 530; Hildreth *v.* State, 19 Tex. App. 195.

The presumption of such knowledge must be strong enough to repel all reasonable doubt. Vaughan *v.* State, 83 Ala. 55, 3 So. 530.

18. State *v.* Whitcomb, 52 Iowa 85, 2 N. W. 970, 35 Am. Rep. 258; State *v.* Goodenow, 65 Me. 30; State *v.* Watson, 20 R. I. 354, 39 Atl. 193.

Decree set aside for fraud.—Defendant may be convicted after a second marriage, where his decree has been set aside for fraud in its procurement. State *v.* Watson, 20 R. I. 354, 39 Atl. 193.

Marriage in another state.—The facts that a wife obtained divorce for the fault of her husband, and that he subsequently married again in another state, do not render him guilty of the crime of adultery. State *v.* Weatherby, 43 Me. 258, 69 Am. Dec. 59.

III. Who May Prosecute.

A. In General. The offense is usually prosecuted by the state.[19]

B. Special Statutory Provision. By statute in some states, however, it is provided that no prosecution for adultery can be commenced except by complaint of the husband or wife,[20] the object being to exempt the party from prosecution except at the instance of the husband or wife.[21]

IV. Joinder of Parties Defendant.

While it is not necessary to join both the man and the woman in the same indictment,[22] yet such course may be pursued at the election of the prosecution,[23] and in such cases the indictment must be construed as if it alleged that the acts constituting the offense, and charged to have been done by the defendants jointly, were also done by each of the defendants separately.[24]

V. Indictment or Information.[25]

A. Charging in Language of Statute — 1. In General. An indictment

19. See *infra*, V.

20. State *v.* Smith, 108 Iowa 440, 79 N. W. 115; State *v.* Oden, 100 Iowa 22, 69 N. W. 270; State *v.* Andrews, 95 Iowa 451, 64 N. W. 404; State *v.* Corliss, 85 Iowa 18, 51 N. W. 1154; State *v.* Maas, 83 Iowa 469, 49 N. W. 1037; State *v.* Mahan, 81 Iowa 121, 46 N. W. 855; State *v.* Stout, 71 Iowa 343, 32 N. W. 372; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; Bush *v.* Workman, 64 Iowa 205, 19 N. W. 910; State *v.* Henke, 58 Iowa 457, 12 N. W. 477; State *v.* Wilson, 22 Iowa 364; State *v.* Baldy, 17 Iowa 39; State *v.* Dingee, 17 Iowa 232; State *v.* Roth, 17 Iowa 336; People *v.* Isham, 109 Mich. 72, 67 N. W. 819; People *v.* Dalrymple, 55 Mich. 519, 22 N. W. 20; People *v.* Davis, 52 Mich. 569, 18 N. W. 362; Bayliss *v.* People, 46 Mich. 221, 9 N. W. 257; People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; Parsons *v.* People, 21 Mich. 509; State *v.* Brecht, 41 Minn. 50, 42 N. W. 602; State *v.* Armstrong, 4 Minn. 335; Matter of Smith, 2 Okla. 153, 37 Pac. 1099.

Extent of prosecution.—Statutes requiring the prosecution to be commenced by the husband or wife do not demand that the same shall be prosecuted to conviction. After it has been commenced it may be continued without further co-operation on their part (State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Dingee, 17 Iowa 232; State *v.* Baldy, 17 Iowa 39) or may be discontinued by request (People *v.* Dalrymple, 55 Mich. 519, 22 N. W. 20.

Effect of remarriage after divorce.— Upon the remarriage of a husband and wife after a divorce the husband may institute a complaint against a third person for adultery committed with the wife during their former marriage. State *v.* Smith, 108 Iowa 440, 79 N. W. 115. But after divorce and before remarriage there can be no prosecution. Matter of Smith, 2 Okla. 153, 37 Pac. 1099.

21. State *v.* Oden, 100 Iowa 22, 69 N. W. 270; State *v.* Roth, 17 Iowa 336. Such provisions are grounded in the regard which the law has for the marital relation, and the right of the husband and wife to condone the wrongs of either toward the other. State *v.* Oden, 100 Iowa 22, 69 N. W. 270; State *v.* Corliss, 85 Iowa 18, 51 N. W. 1154; State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

22. Disharoon *v.* State, 95 Ga. 351, 22 S. E. 698; Bigby *v.* State, 44 Ga. 344; Wasden *v.* State, 18 Ga. 264; State *v.* Dingee, 17 Iowa 232; State *v.* Searle, 56 Vt. 516.

Where one party only was arrested, where both were jointly indicted, it has been held that the one arrested might be tried separately and legally convicted. State *v.* Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883.

Dismissal of the prosecution as to one party, where both are charged with the commission of the offense, will not bar a conviction of the other. Solomon *v.* State, 39 Tex. Crim. 140, 45 S. W. 706.

23. *Alabama.*—McAlpine *v.* State, 117 Ala. 93, 23 So. 130.

Maine.— State *v.* Bartlett, 53 Me. 446.

Massachusetts.— Com. *v.* Bakeman, 131 Mass. 577, 41 Am. Rep. 248; Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

North Carolina.— State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599; State *v.* Parham, 50 N. C. 416.

Vermont.— See also State *v.* Brink, 68 Vt. 659, 35 Atl. 492.

24. Manel *v.* State, 37 Ala. 160; Com. *v.* Bakeman, 131 Mass. 577, 41 Am. Rep. 248.

25. **Forms of indictments or informations** for adultery are set out in the following cases:

Alabama.— Love *v.* State, (Ala. 1899) 27 So. 217.

Iowa.— State *v.* Mahan, 81 Iowa 121, 46 N. W. 855.

Maine.— State *v.* Hutchinson, 36 Me. 261.

Missouri.— State *v.* Clawson, 30 Mo. App. 139.

Nebraska.— Lord *v.* State, 17 Nebr. 526, 23 N. W. 507.

North Carolina.— State *v.* Tally, 74 N. C. 322; State *v.* Cowell, 26 N. C. 231.

which follows the language of the statute will generally be held sufficient.[26]

2. Under Statutes Authorizing Prosecution Only on Complaint of Spouse. Where the prosecution can be commenced only upon the complaint of the husband or wife, it is not necessary to allege such fact,[27] and evidence thereof may be introduced without averment.[28]

B. Certainty. Setting out the offense so plainly and distinctly that the jury can clearly understand its nature will be sufficient.[29]

C. Naming Offense. It is not necessary that the technical name of the crime be stated.[30]

D. Description of Parties. No particular description of the parties is required other than may be sufficient to bring them within the terms of the statute.[31]

Pennsylvania.—Helfrich *v.* Com., 33 Pa. St. 68, 75 Am. Dec. 579.

Texas.— Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

Vermont.— State *v.* Miller, 60 Vt. 90, 12 Atl. 526.

Wisconsin.— Ketchingman *v.* State, 6 Wis. 426.

26. *Alabama.*— Love *v.* State, (Ala. 1899) 27 So. 217.

Georgia.—Bigby *v.* State, 44 Ga. 344; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Illinois.— Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

Indiana.— State *v.* Chandler, 96 Ind. 591.

North Carolina.—State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90; State *v.* Lyerly, 52 N. C. 158.

Pennsylvania.— Davis *v.* Com., (Pa. 1886) 7 Atl. 194.

Texas.—Swancoat *v.* State, 4 Tex. App. 105.

Vermont.— State *v.* Miller, 60 Vt. 90, 12 Atl. 526.

Extent and limits of the rule.— Whether an indictment in the words of the statute is sufficient or not depends upon the manner of stating the offense in the statute; if every fact necessary to constitute the offense is charged or necessarily implied by following the language of the statute, an indictment in such language is sufficient; otherwise not. State *v.* Miller, 60 Vt. 90, 12 Atl. 526.

In some states it is made a special offense for a white person and a negro to live together in adultery, and where such statutes exist it is sufficient to charge the offense in the terms of the statute. Love *v.* State, (Ala. 1899) 27 So. 217 [*citing* Ala. Code (1876), § 4189].

See also, generally, Lewdness.

The exact words of the statute, however, need not be used, as a substantial following of their meaning is all that is required.

Indiana.— State *v.* Chandler, 96 Ind. 591.

Missouri.— State *v.* Clawson, 30 Mo. App. 139.

Nebraska.— Lord *v.* State, 17 Nebr. 526, 23 N. W. 507.

North Carolina.— State *v.* Tally, 74 N. C. 322.

Pennsylvania.—Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. 26.

Texas.—Holland *v.* State, 14 Tex. App. 182; Swancoat *v.* State, 4 Tex. App. 105.

27. State *v.* Andrews, 95 Iowa 451, 64 N. W. 404; State *v.* Maas, 83 Iowa 469, 49 N. W. 1037; People *v.* Isham, 109 Mich. 72, 67 N. W. 819; State *v.* Brecht, 41 Minn. 50, 42 N. W. 602. See also *supra*, III, B.

Admission by attorney.— The complaint, warrant, and information need not allege that complainant was defendant's wife. It is enough that it appears that the marriage was admitted before the examining magistrate by defendant's attorney, the presumption being that the admission was made in defendant's presence, and such admission is binding on him. People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

28. State *v.* Andrews, 95 Iowa 451, 64 N. W. 404; State *v.* Maas, 83 Iowa 469, 49 N. W. 1037.

Averment not conclusive.— An averment that the prosecution was commenced upon the complaint of the husband or wife of defendant is not conclusive upon the latter, and he or she may controvert the averment. State *v.* Roth, 17 Iowa 336.

29. Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90.

Thus, where the indictment sets out the elements of the offense of adultery, it will be held good, although it attempts to set out another crime. Disharoon *v.* State, 95 Ga. 351, 22 S. E. 698. See also State *v.* Green, Kirby (Conn.) 87; Com. *v.* Squires, 97 Mass. 59.

Further specifications.— Where the indictment sets forth the offense with common-law strictness and particularity, defendant is not, as a matter of legal right, entitled to any further specifications of the crime with which he is charged. State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

30. State *v.* Baldy, 17 Iowa 39, wherein it is held that an indictment which contains the facts constituting the offense is sufficient although it does not set out the technical name of the crime.

31. See *infra*, V, G, H.

Hence it is not necessary to allege the age,[32] race,[33] or sex[34] of the parties; and the indictment may allege the woman's name to be unknown.[35]

E. Averments as to Place and Time. While it is not necessary to allege the particular place within the county where the act was committed, yet it must appear from the evidence that it was within the jurisdiction of the court.[36] As a general rule the time of the act as laid is immaterial.[37] A day upon which the offense was committed should be alleged, but it will constitute no variance if the evidence does not show that the crime was committed on the very day charged.[38]

F. Averments as to Carnal Knowledge. Any term or expression which clearly conveys the idea of illicit connection is sufficient.[39]

G. Averments as to Marriage. It must be alleged that at least one of the parties was, at the time of the commission of the offense, married[40] to some person other than the one with whom the offense is charged to have been committed,[41]

32. Averment of age — Surplusage.— An averment of the woman's age is surplusage and need not be proved if the indictment states facts necessary to make out the crime. State *v.* Ean, 90 Iowa 534, 58 N. W. 898.

33. Miscegenation.—An indictment against a white man and a negro need not set out the race of each. Mulling *v.* State, 74 Ga. 10.

34. McLeod *v.* State, 35 Ala. 395 [*following* State *v.* Glaze, 9 Ala. 283]; Hildreth *v.* State, 19 Tex. App. 195.

"Maiden."— The word "maiden," used in an indictment for adultery, does not necessarily mean a virgin, but merely a young unmarried woman. State *v.* Shedrick, 69 Vt. 428, 38 Atl. 75.

"Spinster."— So in State *v.* Guest, 100 N. C. 410, 6 S. E. 253, it was held no ground for an arrest of judgment that the indictment against two defendants described the female as a "spinster."

35. State *v.* Ean, 90 Iowa 534, 58 N. W. 898; Com. *v.* Tompson, 2 Cush. (Mass.) 551.

36. Com. *v.* Horton, 2 Gray (Mass.) 354.

Name of the town.— So it was held unnecessary to allege the name of the town where the defendant resided, even where the officers of such town were entitled to a share in the fine. Duncan *v.* Com., 4 Serg. & R. (Pa.) 449.

37. *Georgia.*— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Iowa.— State *v.* Briggs, 68 Iowa 416, 27 N. W. 358.

Massachusetts.—Com. *v.* Merriam, 14 Pick. (Mass.) 518, 25 Am. Dec. 420; Com. *v.* Putnam, 1 Pick. (Mass.) 136.

Michigan.— People *v.* Davis, 52 Mich. 569, 18 N. W. 362.

Texas.— Wood *v.* State, (Tex. Crim. 1899) 51 S. W. 235.

But in Com. *v.* Seymour, 2 Brewst. (Pa.) 567, where the indictment charged the offense to have been committed in 1800, it was held that it could not be amended by inserting the words "sixty-eight" in a blank left unfilled in the indictment.

"One thousand eight hundred and nine seven."— An allegation that the offense was committed in "one thousand eight hundred and nine seven" is sufficient to show its commission in 1897. Wood *v.* State, (Tex. Crim. 1899) 51 S. W. 235.

38. State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; Com. *v.* Cobb, 14 Gray (Mass.) 57. See also *infra*, VIII, E.

Duplicity.— Where the indictment in one count charges defendant with several acts of adultery with the same person at different times, it charges more than one offense and is bad for duplicity. Com. *v.* Fuller, 163 Mass. 499, 40 N. E. 764.

39. Com. *v.* Squires, 97 Mass. 59; Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. 26, 23 Wkly. Notes Cas. (Pa.) 405; Davis *v.* Com., (Pa. 1886) 7 Atl. 194; State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

In Helfrich *v.* Com., 33 Pa. St. 68, 75 Am. Dec. 579, an allegation that defendant did "commit adultery" was held sufficient without otherwise alleging carnal knowledge, since such term not only implied but expressed carnal knowledge.

Indefinite allegation.— Where the indictment alleged that the defendant was found in bed with another man's wife "under circumstances affording presumption of an illicit and felonious intention," it was held bad for not alleging what the illicit intention was. State *v.* Miller, 60 Vt. 90, 12 Atl. 526; State *v.* Chillis, Brayt. (Vt.) 131.

40. State *v.* Hutchinson, 36 Me. 261; State *v.* Thurstin, 35 Me. 205, 58 Am. Dec. 695; Com. *v.* Reardon, 6 Cush. (Mass.) 78; Tucker *v.* State, 35 Tex. 113; Clay *v.* State, 3 Tex. App. 499.

Implied allegation.— In Alabama, where adultery consists in the illicit commerce of two persons of different sexes one of whom at least is married, it has been held unnecessary to allege that either person is married, since the term "adultery" implies that fact without further allegation. State *v.* Hinton, 6 Ala. 864.

Marriage of both parties.— Where the indictment alleges that defendant is a married man it is sufficient without alleging that the other party was a married woman. But it may allege that both parties are married. State *v.* Hutchinson, 36 Me. 261 [*quoting* Com. *v.* Reardon, 6 Cush. (Mass.) 78].

41. State *v.* Hutchinson, 36 Me. 261; Moore *v.* Com., 6 Metc. (Mass.) 243, 39 Am. Dec. 724; State *v.* Clark, 54 N. H. 456; Tucker *v.* State, 35 Tex. 113; Hildreth *v.* State, 19 Tex. App. 195.

but any form of allegation which clearly and distinctly shows this fact will be held sufficient.[42]

H. Naming Husband or Wife of Defendant. It being made apparent from the allegations that the parties do not occupy the relation of husband and wife, it is not necessary further to allege the name or names of the legal spouse or spouses.[43]

I. Averments of Guilty Knowledge. Where guilty knowledge is part of the definition of the offense under the particular statute, it must be averred.[44] It seems, however, that under an indictment for adultery the defendant may be convicted of fornication if the evidence shows that he is guilty of that offense.[45]

VI. DEFENSES.

A. Defendant's Previous Good Character. Defendant's previous good character will not of itself constitute a defense.[46]

B. Former Acquittal of Bigamy. A former acquittal of bigamy will not constitute a defense to a charge of adultery.[47]

C. Innocence of Co-Defendant. The innocence of a co-defendant does not enure to the benefit of another defendant who is guilty.[48]

D. Mistake of Parties. While it is no defense that the parties were mistaken as to the law, and had no intention of committing the offense,[49] it seems, however, that the woman may set up her lack of knowledge of a prior marriage of her husband, where she ceased to cohabit with him upon becoming aware of such marriage.[50]

E. Subsequent Marriage. A subsequent marriage of one or both of the parties will not be deemed a valid defense where the specific offense antedates the ceremony.[51]

VII. COMPETENCY OF WITNESSES.

A. In General. The general rules governing the competency of witnesses in criminal cases are applicable to the offense of adultery.[52]

42. Thus an allegation that the woman is the lawful wife of another man is a sufficient allegation that she is not the wife of defendant (Names *v.* State, 20 Ind. App. 168, 50 N. E. 401; State *v.* Hutchinson, 36 Me. 261; Com. *v.* Reardon, 6 Cush. (Mass.) 78); and where the indictment alleged the name of the wife and further alleged that defendant committed adultery with another named woman, without otherwise alleging carnal knowledge, it was held sufficient without a further allegation that the latter was not his wife (Helfrich *v.* Com., 33 Pa. St. 68, 75 Am. Dec. 579).

43. Davis *v.* Com., (Pa. 1886) 7 Atl. 194; Hildreth *v.* State, 19 Tex. App. 195; Collum *v.* State, 10 Tex. App. 708. *Contra*, in Com. *v.* Corson, 2 Pars. Eq. Cas. (Pa.) 475, where it was held that upon an indictment against a married woman the name of her husband must be stated.

Under Texas statute.— Under the Texas statute it is not necessary to allege or prove the name of the person to whom one of the adulterers is married, and when so alleged it may be rejected as surplusage. Collum *v.* State, 10 Tex. App. 708 [*citing* Tex. Rev. Pen. Code, § 333].

44. Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

Incestuous adultery.— Upon an indictment for incestuous adultery it is not necessary to charge a common knowledge of the relationship, if the charge of knowing the relationship is made against the party indicted. Morgan *v.* State, 11 Ala. 289.

45. State *v.* Cowell, 26 N. C. 231; Respublica *v.* Roberts, 1 Yeates (Pa.) 6.

Evidence showing marriage of both parties. — Upon an indictment for adultery alone defendant cannot be convicted of fornication if the evidence shows that both parties were married. Smitherman *v.* State, 27 Ala. 23.

46. State *v.* Donovan, 61 Iowa 278, 16 N. W. 130.

47. Swancoat *v.* State, 4 Tex. App. 105, the reason being that bigamy and adultery are not the same offenses.

48. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

49. State *v.* Whitcomb, 52 Iowa 85, 2 N. W. 970, 35 Am. Rep. 258; State *v.* Goodenow, 65 Me. 30. See also *supra*, II, C.

50. Banks *v.* State, 96 Ala. 78, 11 So. 404; Vaughan *v.* State, 83 Ala. 55, 3 So. 530; State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

51. Marrying paramour.— A party cannot set up as a defense that she has subsequently obtained a divorce from her husband and married her paramour. Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

Remarrying his former wife after a divorce, with knowledge of adultery committed with her by a third person during the former marriage, does not condone the offense of the third person so as to bar a criminal prosecution against such person. State *v.* Smith, 108 Iowa 440, 79 N. W. 115.

52. Bishop Stat. Crimes, § 688.

B. Accomplices — 1. In General. The rule that at common law a *particeps criminis*, notwithstanding the turpitude of his conduct, is not, on that account, an incompetent witness so long as he remains unconvicted and sentenced for an infamous crime,[53] has been applied to prosecutions for adultery.[54]

2. Necessity of Corroboration. The testimony of the accomplice must be corroborated by evidence tending to connect defendant with the commission of the offense,[55] and the degree of credit which ought to be given to the evidence is a matter exclusively within the province of the jury.[56] While such persons cannot be introduced as witnesses for one another, they may claim a severance, and if one or more be acquitted they may testify in behalf of the others.[57]

C. Husband and Wife — 1. At Common Law. At common law neither a husband nor a wife can be a witness for or against the other in a prosecution for adultery.[58]

2. By Statute. In some states, however, statutes exist which make the testimony of the husband or wife competent in such cases.[59]

53. Morrill *v.* State, 5 Tex. App. 447.

54. *Alabama.*— State *v.* Crowley, 13 Ala. 172.

Iowa.— State *v.* Henderson, 84 Iowa 161, 50 N. W. 758.

Texas.— Wiley *v.* State, 33 Tex. Crim. 406, 26 S. W. 723; Merritt *v.* State, 10 Tex. App. 402; Morrill *v.* State, 5 Tex. App. 447.

Utah.— U. S. *v.* Kershaw, 5 Utah 618, 19 Pac. 194.

Wisconsin.— Ketchingman *v.* State, 6 Wis. 426.

55. State *v.* Henderson, 84 Iowa 161, 50 N. W. 758; Wiley *v.* State, 33 Tex. Crim. 406, 26 S. W. 723; Merritt *v.* State, 10 Tex. App. 402; U. S. *v.* Kershaw, 5 Utah 618, 19 Pac. 194; State *v.* Colby, 51 Vt. 291.

So it was held in State *v.* Mims, 39 S. C. 557, 17 S. E. 850, that the confession of defendant's paramour, if not connected with some act of confession of his own in the nature of a joint acknowledgment, was not admissible.

56. State *v.* Crowley, 13 Ala. 172; Morrill *v.* State, 5 Tex. App. 447.

Modification of rule.—The common-law rule as to the testimony of accomplices in this respect has been modified by statute in some states. Morrill *v.* State, 5 Tex. App. 447; Rutter *v.* State, 4 Tex. App. 57; U. S. *v.* Kershaw, 5 Utah 618, 19 Pac. 194.

57. Morrill *v.* State, 5 Tex. App. 447; Rutter *v.* State, 4 Tex. App. 57.

58. *Alabama.*— Cotton *v.* State, 62 Ala. 12.

Connecticut.— State *v.* Gardner, 1 Root (Conn.) 485.

Georgia.— Starke *v.* State, 97 Ga. 193, 23 S. E. 832.

Maine.— State *v.* Welch, 26 Me. 30, 45 Am. Dec. 94.

Michigan.— People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

Missouri.— State *v.* Berlin, 42 Mo. 572.

Pennsylvania.— Com. *v.* Jailer, 1 Grant (Pa.) 218.

Texas.— Thomas *v.* State, 14 Tex. App. 70.

Wisconsin.— Mills *v.* U. S., 1 Pinn. (Wis.) 73.

The reason for the exclusion of the testimony is founded partly on the identity of interests, and partly on a principle of public policy which deems it necessary to guard the security and confidence of private life even at the risk of an occasional failure of justice. State *v.* Welch, 26 Me. 30, 45 Am. Dec. 94.

Extent and limits of rule—Evidence against a co-defendant of spouse.— The wife is not a competent witness against any co-defendant tried with her husband, if the evidence concern the husband, though it is not directly given against him. Cotton *v.* State, 62 Ala. 12.

Husband of paramour.— The husband of the woman with whom the adultery is alleged to have been committed is not a competent witness for the prosecution. State *v.* Gardner, 1 Root (Conn.) 485; State *v.* Welch, 26 Me. 30, 45 Am. Dec. 94; Com. *v.* Gordon, 2 Brewst. (Pa.) 569. *Contra*, Morrill *v.* State, 5 Tex. App. 447.

Subsequent divorce.—A husband who since the commission of the offense has obtained a divorce is a competent witness to prove a marriage with his former wife. State *v.* Dudley, 7 Wis. 664.

59. Lord *v.* State, 17 Nebr. 526, 23 N. W. 507. See also State *v.* Hazen, 39 Iowa 648 [*following* State *v.* Bennett, 31 Iowa 24]; Roland *v.* State, 9 Tex. App. 277; Morrill *v.* State, 5 Tex. App. 447,— in which cases the wife was allowed to testify against the husband.

By statute in Pennsylvania the wife is expressly authorized to testify to the marriage, upon a charge of adultery against the husband. Com. *v.* Mosier, 135 Pa. St. 221, 19 Atl. 943 [*citing* Pa. act of May 23, 1887, P. L. 158], holding also that in such case the fact that she testified as a witness before the grand jury will be no cause for quashing the indictment, as it will be presumed, in the absence of proof, that she testified only to the marriage.

VIII. EVIDENCE.

A. Burden of Proof — **1. As to Criminal Intent.** The prosecution is not required to prove a criminal intent; the intent is inferred from the fact of intercourse, and any extenuating circumstances must be shown by defendant.[60]

2. As to Death of Absent Spouse. The onus of proving the death of the absent spouse, where seven years have not elapsed, is on defendant.[61]

3. As to Knowledge of Existence of Living Wife. Where there is evidence tending to show that defendant cohabited with a man following a *prima facie* valid marriage between them, the burden of proof is upon the state to prove that she knew that the man already had a living wife.[62]

4. To Rebut Presumption of Marriage. Testimony of spouse, together with proof of continued cohabitation, raises such a presumption of marriage as to make it incumbent upon defendant to rebut the presumption.[63]

5. To Show Prosecution Commenced by Spouse. Where the prosecution can be commenced only upon complaint of the spouse, proof of the fact of such commencement must be adduced at the trial.[64]

B. Admissibility — **1. Admissions and Confessions** — **a. Of Defendant.** Admissions or confessions of guilt, when shown to be voluntary,[65] may be received in evidence as proof of the offense of adultery,[66] especially where they are corroborated.[67]

b. Of Co-Defendant. The admissions or confessions of one co-defendant are not admissible in evidence against the other.[68]

60. State *v.* Goodenow, 65 Me. 30; State *v.* Cody, 111 N. C. 725, 16 S. E. 408; State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207.

61. Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111.

62. Banks *v.* State, 96 Ala. 78, 11 So. 404.

63. State *v.* Wilson, 22 Iowa 364.

64. State *v.* Stout, 71 Iowa 343, 32 N. W. 372; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Henke, 58 Iowa 457, 12 N. W. 477.

65. McAlpine *v.* State, 117 Ala. 93, 23 So. 130.

Declarations at time of arrest.— Declarations of defendant while being arrested are admissible upon the trial, where, at the time they were made, no charge had been made against him, and they were couched in such language as suggested no hope or fear on his part. Love *v.* State, (Ala. 1899) 27 So. 217.

66. *Alabama.*— McAlpine *v.* State, 117 Ala. 93, 23 So. 130; Owens *v.* State, 94 Ala. 97, 10 So. 669; Love *v.* State, (Ala. 1899) 27 So. 217; Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111; Morgan *v.* State, 11 Ala. 289.

Georgia.— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Iowa.— State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Sanders, 30 Iowa 582.

Maine.— State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115; Ham's Case, 11 Me. 391; Cayford's Case, 7 Me. 57.

Massachusetts.— Com. *v.* Holt, 121 Mass. 61.

Michigan.— People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

Missouri.— State *v.* McDonald, 25 Mo. 176.

Pennsylvania.— Com. *v.* Manock, (Pa. 1880) 2 Crim. L. Mag. 239.

Texas.— Boger *v.* State, 19 Tex. App. 91.

Exact language not required.— In State *v.* Donovan, 61 Iowa 278, 16 N. W. 130, it was held that the testimony of a witness as to certain admissions made by defendant might be given to the jury, although the witness could not remember the exact language used at the time.

Incestuous adultery.— Upon an indictment against a father for adultery with his daughter, his confessions as to their relationship are admissible in evidence. Morgan *v.* State, 11 Ala. 289.

67. Birth of bastard child.—Adultery may be proved by the direct confession of defendant, corroborated by evidence that the woman had been delivered of a bastard child. Com. *v.* Morrissey, 175 Mass. 264, 56 N. E. 285. See also Powell *v.* State, (Tex. Crim. 1898) 44 S. W. 504.

68. *Alabama.*— Gore *v.* State, 58 Ala. 391.

Iowa.— State *v.* McGuire, 50 Iowa 153.

Kentucky.— Frost *v.* Com., 9 B. Mon. (Ky.) 362.

Massachusetts.— Com. *v.* Thompson, 99 Mass. 444.

Missouri.— State *v.* Berry, 24 Mo. App. 466.

North Carolina.— State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512. See also *supra*, VII, B.

Admission of distinct acts.— Two defendants cannot be jointly convicted of a single act of adultery upon the admission by one of an act of adultery committed at one time, and the admission by the other of a different act committed at another time. Com. *v.* Cobb, 14 Gray (Mass.) 57.

c. Of Third Persons. Admissions and communications between the injured wife and parties interested in the prosecution, to which defendant was not privy, should not be admitted against him.[69]

2. As to Defendant's Chastity. Evidence is admissible as to the chastity of defendant,[70] but it is not permissible to impeach the veracity of a male witness by such evidence.[71]

3. As to Intercourse — a. In General. Circumstantial evidence, such as the acts and conduct of the parties toward each other, is always admissible as evidence of their guilt.[72]

b. Suspicious Circumstances. Suspicious actions and incriminating circumstances are admissible as showing an adulterous inclination.[73]

4. As to Paternity. Resemblance of a seven-months-old child to its reputed father is inadmissible to establish paternity.[74]

5. As to Time of Commission. The state may show that the act was committed at any time within the statute of limitations.[75]

6. Similar Acts — a. In General. Facts tending to prove a similar but distinct offense are admissible for the purpose of raising an inference or presumption that defendant committed the particular act with which he was charged.[76]

b. Prior Acts of Familiarity. Evidence may be introduced of prior acts of

69. Com. *v.* Franklin, 6 Gray (Mass.) 346; People *v.* Montague, 71 Mich. 447, 39 N. W. 585.

Admissions in defendant's absence.—Declarations of defendant's paramour and her daughter, made in the defendant's absence, that such paramour was a married woman with a living husband, are inadmissible to prove such fact as against defendant. Whicker *v.* State, (Tex. Crim. 1900) 55 S. W. 47.

70. Blackman *v.* State, 36 Ala. 295; Com. *v.* Gray, 129 Mass. 474, 37 Am. Rep. 378.

71. State *v.* Clawson, 30 Mo. App. 139.

"Foolishly fond of women."— On cross-examination, a witness cannot be allowed to state, without explanation, that defendant had the reputation of being foolishly fond of women, after defendant has adduced evidence of general good character. Cauley *v.* State, 92 Ala. 71, 9 So. 456.

72. Cole *v.* State, 6 Baxt. (Tenn.) 239.

Time of begetting child.—In Com. *v.* O'Connor, 107 Mass. 219, it was held that the fact that a woman was delivered of a child which might have been begotten about the time of the adultery charged is inadmissible to show intercourse.

To rebut presumption of guilt.—Where the parties were taken under circumstances warranting a presumption of guilt, they were not entitled to introduce evidence to show a conversation, before leaving home, in which no intention of adultery was expressed. Com. *v.* Bowers, 121 Mass. 45.

73. People *v.* Girdler, 65 Mich. 68, 31 N. W. 624; State *v.* Marvin, 35 N. H. 22; State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90; State *v.* Pinehart, 106 N. C. 787, 11 S. E. 512.

Letter written by the woman to defendant and received by him is admissible in evidence to show the disposition of the parties. State *v.* Butts, 107 Iowa 653, 78 N. W. 687.

Mere suspicion or jealousy cannot be adduced as evidence. State *v.* Crowley, 13 Ala. 172; Weems *v.* State, 84 Ga. 461, 11 S. E. 501; State *v.* Pope, 109 N. C. 849, 13 S. E. 700; State *v.* Waller, 80 N. C. 401; Graham *v.* State, 28 Tex. App. 9, 11 S. W. 781, 19 Am. St. Rep. 809.

74. Hilton *v.* State, (Tex. Crim. 1899) 53 S. W. 113.

75. *Georgia.*— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Iowa.— State *v.* Smith, 108 Iowa 440, 79 N. W. 115; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358.

Maine.— State *v.* Williams, 76 Me. 480.

Massachusetts.— Com. *v.* Cobb, 14 Gray (Mass.) 57.

Minnesota.— State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

Tennessee.— Cole *v.* State, 6 Baxt. (Tenn.) 239.

Texas.— Swancoat *v.* State, 4 Tex. App. 105.

See also People *v.* Davis, 52 Mich. 569, 18 N. W. 362; Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241.

Acts prior to filing of complaint.— Where it appeared that the complaint upon which the information was based was filed one month before the information, and there was more evidence to show adultery after the complaint was filed than before, a charge of the court that authorized a conviction for an offense at any time within two years before the filing of the information was held erroneous, since the time should have been limited prior to the filing of the complaint. Proctor *v.* State, 37 Tex. Crim. 366, 35 S. W. 172.

76. Com. *v.* Nichols, 114 Mass. 285, 19 Am. Rep. 346; State *v.* Jackson, (N. J. 1900) 46 Atl. 767. See also Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110. *Compare* Brevaldo *v.* State, 21 Fla. 789, a prosecution for living in an open state of adultery, where such evidence was admitted to explain similar acts committed within the period named

familiarity between the same parties, as tending to establish an adulterous disposition.[77]

c. Subsequent Acts of Familiarity. Subsequent acts which tend to show an illicit continuation of the relation may be proved as characterizing the conduct of the parties,[78] even where such acts had taken place outside of the county in which the offense is prosecuted.[79]

C. Opinion Evidence. Mere opinion as to the guilt of the parties is inadmissible.[80]

D. Weight and Sufficiency — 1. In General. The oath of one credible witness is sufficient for conviction.[81] But a single act of adultery is not of itself sufficient to prove a prior act.[82] The weight to be given to the evidence is a question for the jury to decide, taking into consideration all the circumstances of the case.[83]

in the indictment, but not for the purpose of convicting defendant of a substantive offense committed anterior to such period.

According to the earlier cases in Massachusetts such evidence was not admissible. Com. *v.* Lahey, 14 Gray (Mass.) 91; Com. *v.* Thrasher, 11 Gray (Mass.) 450; Com. *v.* Horton, 2 Gray (Mass.) 354. These cases were severely criticised both by Mr. Bishop and in the case of State *v.* Jackson, (N. J. 1900) 46 Atl. 767. The doctrine at present in that state is as stated in the text. Com. *v.* Nichols, 114 Mass. 285, 19 Am. Rep. 346.

77. *Alabama.*—Cross *v.* State, 78 Ala. 430; Alsabrooks *v.* State, 52 Ala. 24; McLeod *v.* State, 35 Ala. 395; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

Florida.— Brevaldo *v.* State, 21 Fla. 789.

Iowa.— State *v.* Briggs, 68 Iowa 416, 27 N. W. 358.

Maine.— State *v.* Williams, 76 Me. 480.

Massachusetts.— Com. *v.* Durfee, 100 Mass. 146; Com. *v.* Lahey, 14 Gray (Mass.) 91; Com. *v.* Morris, 1 Cush. (Mass.) 391; Com. *v.* Merriam, 14 Pick. (Mass.) 518, 56 Am. Dec. 420; Com. *v.* Putnam, 1 Pick. (Mass.) 136.

Michigan.— People *v.* Davis, 52 Mich. 569, 18 N. W. 362.

Nebraska.— State *v.* Way, 5 Nebr. 283.

New Hampshire.— State *v.* Marvin, 35 N. H. 22; State *v.* Wallace, 9 N. H. 515.

New Jersey.— State *v.* Jackson, (N. J. 1900) 46 Atl. 767; Snover *v.* State, (N. J. 1899) 44 Atl. 850.

North Carolina.— State *v.* Pippin, 88 N. C. 646; State *v.* Kemp, 87 N. C. 538.

Tennessee.— Cole *v.* State, 6 Baxt. (Tenn.) 239.

Vermont.— State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

Acts prior to statute of limitations.— Acts tending to show adulterous connection anterior to the statute of limitations are admissible in support of evidence of the commission of the act charged. State *v.* Guest, 100 N. C. 410, 6 S. E. 253; State *v.* Potter, 52 Vt. 33. In such case they should be shown to belong to a continuous series of improprieties. People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169; People *v.* Davis, 52 Mich. 569, 18 N. W. 362. In Com. *v.* Morris, 1 Cush. (Mass.) 391, the exact date of the acts sought to be proved was in doubt. It was held, however, that the evidence was admissible, and that the nearness of the time was a circumstance affecting the effect of the evidence and not its competency.

Husband's prior accusations.—Evidence that on other occasions than that of the alleged offense defendant's husband had accused her of similar acts, of which she was not guilty, is irrelevant. Com. *v.* Trider, 143 Mass. 180, 9 N. E. 510.

78. *Alabama.*—Alsabrooks *v.* State, 52 Ala. 24.

Illinois.— Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

Maine.— State *v.* Williams, 76 Me. 480; State *v.* Witham, 72 Me. 531.

Michigan.—People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169.

North Carolina.—State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90.

Tennessee.— Cole *v.* State, 6 Baxt. (Tenn.) 239.

Texas.— Funderburg *v.* State, 23 Tex. App. 392, 5 S. W. 244.

Vermont.— State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

Contra, Cain *v.* Pierce, 11 Gray (Mass.) 447.

79. Crane *v.* People, 168 Ill. 395, 48 N. E. 54; Com. *v.* Nichols, 114 Mass. 285, 19 Am. Rep. 346; State *v.* Guest, 100 N. C. 410, 6 S. E. 253; Funderburg *v.* State, 23 Tex. App. 392, 5 S. W. 244.

For purpose of corroboration only.—In such cases the jury should be instructed that such evidence can be considered only for the purpose of corroboration. Funderburg *v.* State, 23 Tex. App. 392, 5 S. W. 244.

When given by defendant's paramour, such evidence should not be considered. Hilton *v.* State, (Tex. Crim. 1899) 53 S. W. 113.

80. Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111; Webb *v.* State, 24 Tex. App. 164, 5 S. W. 651; McKnight *v.* State, 6 Tex. App. 158.

81. Com. *v.* Cregor, 7 Gratt. (Va.) 591.

82. Traverse *v.* State, 61 Wis. 144, 20 N. W. 724.

83. *Alabama.*— Hall *v.* State, 88 Ala. 236, 7 So. 340, 16 Am. St. Rep. 51; State *v.* Crowley, 13 Ala. 172.

2. To Show Carnal Knowledge — a. Circumstantial Evidence — (I) *In General.* In almost every case of adultery the fact of carnal intercourse is inferred by circumstances;[84] but the circumstances upon which a conviction is sought must be such as would lead the guarded discretion of a reasonable and just man to the conclusion that the offense had been committed,[85] and where the circumstances are merely incriminating, the weight of the evidence should be left to the jury.[86]

(II) *Opportunity to Commit.* While defendant is not to be presumed guilty of the crime from the mere fact of his opportunity to commit the act,[87] yet, where adulterous disposition is shown to exist between the parties at the time of the alleged offense, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place.[88]

b. Emission. It is not necessary to show that the act of sexual intercourse was completed by emission.[89]

3. To Show Marriage — a. In General. An existing marriage must be established by strict proof as in the case of bigamy.[90] A marriage in fact, as distin-

Connecticut.— State *v.* Green, Kirby (Conn.) 87.

Iowa.— State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Henke, 58 Iowa 457, 12 N. W. 477.

North Carolina.— State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512.

Texas.— Morrill *v.* State, 5 Tex. App. 447.

84. Com. *v.* Gray, 129 Mass. 474, 37 Am. Rep. 378; State *v.* Chancy, 110 N. C. 507, 14 S. E. 780; Com. *v.* Mosier, 135 Pa. St. 221, 19 Atl. 943; Cole *v.* State, 6 Baxt. (Tenn.) 239; Baker *v.* U. S., 1 Pinn. (Wis.) 641.

Evidence wholly circumstantial may be sufficient to support a conviction. Com. *v.* Gray, 129 Mass. 474, 37 Am. Rep. 378.

Positive proof of the act is not required, and, from the nature of the offense, is not easily made. State *v.* Chaney, (Iowa 1900) 81 N. W. 454; State *v.* Poteet, 30 N. C. 23 [*followed* in State *v.* Eliason, 91 N. C. 564]; Baker *v.* U. S., 1 Pinn. (Wis.) 641. See also Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

That the defendant traveled over the county in a peddler's cart, taking with him a woman whom he presented as his wife, was held sufficient evidence to convict of adultery, without any eye-witnesses to an act of intercourse. Stewart *v.* State, (Tex. Crim. 1898) 43 S. W. 979.

85. *Alabama.*— Blackman *v.* State, 36 Ala. 295.

Nebraska.— State *v.* Way, 5 Nebr. 283.

North Carolina.— State *v.* Poteet, 30 N. C. 23 [*followed* in State *v.* Eliason, 91 N. C. 564].

Pennsylvania.— Com. *v.* Manock, (Pa. 1880) 2 Crim. L. Mag. 239.

Wisconsin.—Baker *v.* U. S., 1 Pinn. (Wis.) 641.

See also State *v.* Ean, 90 Iowa 534, 58 N. W. 898; State *v.* Austin, 108 N. C. 780, 13 S. E. 219.

Hugging and kissing.— The fact that defendant and the woman were seen hugging and kissing for half an hour in a cemetery during the day-time is not alone sufficient to justify a conviction. State *v.* Wiltsey, 103 Iowa 54, 72 N. W. 415. See also Kahn *v.* State, (Tex. Crim. 1897) 38 S. W. 989.

86. State *v.* Poteet, 30 N. C. 23. See also State *v.* Witham, 72 Me. 531.

87. Weaver *v.* State, 74 Ga. 376; State *v.* Way, 6 Vt. 311. *Compare* Starke *v.* State, 97 Ga. 193, 23 S. E. 832.

88. State *v.* Way, 5 Nebr. 283. See also Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

Living in same room.—The jury were properly instructed that if a married man was found with a woman not his wife in a room with a bed in it, and stayed through the night with her there, it was sufficient to warrant a finding of adultery against him. Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345. See also Richardson *v.* State, 34 Tex. 142, where a married man and a negro woman lived together for several months in the same room.

Nocturnal visits, and the fact that defendant was seen in bed with a woman, are circumstances which lead to the reasonable conclusion of adultery. Blackman *v.* State, 36 Ala. 295. See also State *v.* Austin, 108 N. C. 780, 13 S. E. 219.

89. Com. *v.* Hussey, 157 Mass. 415, 32 N. E. 362.

90. *Alabama.*— Banks *v.* State, 96 Ala. 78, 11 So. 404; Buchanan *v.* State, 55 Ala. 154; Smitherman *v.* State, 27 Ala. 23.

Maine.— State *v.* Bowe, 61 Me. 171.

Montana.—Territory *v.* Whitcomb, 1 Mont. 359.

North Carolina.— State *v.* Manly, 95 N. C. 661.

Wisconsin.— Mills *v.* U. S., 1 Pinn. (Wis.) 73.

Although the fact is not denied by defendant, proof of marriage must be made. State *v.* Manly, 95 N. C. 661.

Proof of an actual marriage is necessary, and where it did not appear that the officer performing the ceremony was authorized by law so to do, it was held insufficient. State *v.* Bowe, 61 Me. 171.

Whether the presumption that defendant's wife is still living outweighs the presumption

guishable from one inferable from circumstances, should be shown,[91] and mere evidence of general reputation is not sufficient.[92]

b. Direct Proof — (I) *Marriage Certificate* — (A) *In General.* The most usual and direct proof of marriage is furnished by the production of the marriage certificate or a certified copy of the record.[93]

(B) *Presumptive Evidence.* In some states statutes exist which, while not excluding other modes of proof,[94] make the record presumptive evidence of marriage in criminal cases.[95]

(C) *Identification of Parties.* It seems, however, in such cases, that outside of the mere production of the marriage certificate or a certified copy thereof there must be some evidence tending to establish the identity of the parties.[96]

(II) *Witnesses to Ceremony.* The marriage may also be proved by any person who was present when the marriage took place,[97] and it is sufficient that he

of innocence depends upon the facts in each case. Howard *v.* State, 75 Ala. 27.

91. *Illinois.*— Miner *v.* People, 58 Ill. 59.

Maine.— State *v.* Bowe, 61 Me. 171; State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115 [*citing* State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742].

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

New Hampshire.— State *v.* Winkley, 14 N. H. 480.

Pennsylvania.— Com. *v.* Corson, 2 Pars. Eq. Cas. (Pa.) 475.

Woman under legal age.—In People *v.* Bennett, 39 Mich. 208, it was held that it was not sufficient to show a prior marriage of defendant to a woman under the legal age, but it must be further shown that she acquiesced in the marriage on arriving at the age of consent and before the offense.

92. *Alabama.*— Buchanan *v.* State, 55 Ala. 154.

Georgia.— Wood *v.* State, 62 Ga. 406.

Illinois.— Miner *v.* People, 58 Ill. 59.

Maine.— State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742.

Missouri.— State *v.* Coffee, 39 Mo. App. 56.

Mere opinion of witnesses is not sufficient. Webb *v.* State, 24 Tex. App. 164, 5 S. W. 651.

93. *California.*— People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

Maine.— Wedgwood's Case, 8 Me. 75.

Michigan.— People *v.* Imes, 110 Mich. 250, 68 N. W. 157; People *v.* Isham, 109 Mich. 72, 67 N. W. 819; People *v.* Broughton, 49 Mich. 339, 13 N. W. 621.

Minnesota.— State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

New Hampshire.— State *v.* Marvin, 35 N. H. 22; State *v.* Winkley, 14 N. H. 480; State *v.* Wallace, 9 N. H. 515.

North Carolina.— State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Oregon.— State *v.* Isenhart, 32 Oreg. 170, 52 Pac. 569.

Texas.— Boger *v.* State, 19 Tex. App. 91.

Vermont.— State *v.* Brink, 68 Vt. 659, 35 Atl. 492.

An unauthenticated certificate of marriage solemnized in another state is not admissible to prove the fact of marriage. Com. *v.* Morris, 1 Cush. (Mass.) 391.

94. Mode of proof not exclusive.— A statute providing that in such cases marriage may be proved by the record of the marriage certificate does not exclude other modes of proof. People *v.* Stokes, 71 Cal. 263, 12 Pac. 71; State *v.* Marvin, 35 N. H. 22.

By statute in Michigan [2 How. Anno. Stat. § 6222] domestic certificates of marriage are made admissible as evidence in criminal cases. People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

95. People *v.* Stokes, 71 Cal. 263, 12 Pac. 71; State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

Prima facie evidence.— Where it was insisted that the production of a license was necessary to the establishment of the marriage, it was held that there was no error in instructing that the marriage certificate was *prima facie* evidence of a legal marriage. State *v.* Isenhart, 32 Oreg. 170, 52 Pac. 569.

96. *California.*— People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

Maine.— Wedgwood's Case, 8 Me. 75.

Michigan.— People *v.* Isham, 109 Mich. 72, 67 N. W. 819; People *v.* Broughton, 49 Mich. 339, 13 N. W. 621.

New Hampshire.— State *v.* Winkley, 14 N. H. 480; State *v.* Wallace, 9 N. H. 515.

Vermont.— State *v.* Brink, 68 Vt. 659, 35 Atl. 492.

Testimony of husband and admissions of defendant are amply sufficient for this purpose. People *v.* Broughton, 49 Mich. 339, 13 N. W. 621.

Witness at the ceremony may identify the parties. People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

Discrepancy of names.— Evidence that the real name of the parties differed from the names stated in the marriage certificate is admissible. People *v.* Stokes, 71 Cal. 263, 12 Pac. 71; State *v.* Brink, 68 Vt. 659, 35 Atl. 492.

97. *California.*— People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

Massachusetts.— Com. *v.* Littlejohn, 15 Mass. 163; Com. *v.* Norcross, 9 Mass. 492.

Michigan.— People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

Nebraska.— Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241; Lord *v.* State, 17 Nebr. 526, 23 N. W. 507.

is able to state that the marriage was celebrated according to the usual forms, without being able to state the words used.[98]

c. Cohabitation and Other Circumstances. Cohabitation and other facts from which marriage may be inferred constitute presumptive evidence of the fact, and are commonly understood in opposition to proof by direct evidence,[99] and where a marriage is followed by cohabitation its validity will be presumed.[1]

d. Admissions and Confessions — (I) *Conflict of Opinion.* While a deliberate and voluntary admission or confession of guilt is among the most weighty and effectual proofs known to the law,[2] the question whether a defendant can be convicted upon his own admissions or confessions of marriage has not met with a uniform decision, some of the courts holding that such evidence is insufficient to convict,[3] while others have held defendant guilty upon such direct evidence alone,[4] and especially where the admissions or confessions are corroborated by other testimony.[5]

(II) *The Better Doctrine.* A distinction should be drawn in this class of cases between the mere admissibility of evidence and actual proof. That the mere uncorroborated admission or confession of defendant will establish a marriage in fact is doubted, but such evidence should be admitted to prove the fact;[6] and where the admission or confession is once made under circumstances which render it admissible, it is for the jury to determine the just degree of confidence which they may place in it.[7]

E. Variance. The evidence adduced at the trial must correspond with all of the essential allegations of the indictment, and any variance therefrom will be held a fatal defect.[8]

New Hampshire.— State *v.* Winkley, 14 N. H. 480.

Texas.— Boger *v.* State, 19 Tex. App. 91.

Wisconsin.— Mills *v.* U. S., 1 Pinn. (Wis.) 73.

Foreign marriage.— The testimony of a clergyman and others participating in a marriage ceremony, in a foreign country, between defendant and a certain woman, was held admissible. People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

98. Lord *v.* State, 17 Nebr. 526, 23 N. W. 507.

99. State *v.* Winkley, 14 N. H. 480.

1. Lord *v.* State, 17 Nebr. 526, 23 N. W. 507.

Irregularities in ceremony.— Proof of a marriage ceremony in a foreign country, and subsequent cohabitation as man and wife, is sufficient to establish the relation although it does not show that the ceremony was in accordance with the laws of such country. People *v.* Imes, 110 Mich. 250, 68 N. W. 157. So where the parties were married by a justice of the peace outside of his own country, and cohabited for fourteen years. People *v.* Girdler, 65 Mich. 68, 31 N. W. 624.

Marriage prohibited by statute.—Where by statute a marriage between a negro and a white person is declared void, cohabitation is unlawful and amounts to adultery or fornication. State *v.* Fore, 23 N. C. 378.

2. Com. *v.* Manock, (Pa. 1880) 2 Crim. L. Mag. 239.

3. People *v.* Isham, 109 Mich. 72, 67 N. W. 819; State *v.* Armstrong, 4 Minn. 335; State *v.* Medbury, 8 R. I. 543. See also State *v.* Timmens, 4 Minn. 325.

4. *Alabama.*— Owens *v.* State, 94 Ala. 97, 10 So. 669; Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111.

Georgia.— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Iowa.— State *v.* Sanders, 30 Iowa 582.

Maine.—State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115; Ham's Case, 11 Me. 391; Cayford's Case, 7 Me. 57.

Massachusetts.— Com. *v.* Holt, 121 Mass. 61.

Missouri.— State *v.* McDonald, 25 Mo. 176.

Texas.— Boger *v.* State, 19 Tex. App. 91.

Testimony of particeps criminis.—In State *v.* Bowe, 61 Me. 171, it was held that it was necessary to prove that the marriage was a valid and legal marriage, notwithstanding the general testimony of the *particeps criminis* that she was married, without giving the particulars of time, place, and officer solemnizing the contract.

5. Owens *v.* State, 94 Ala. 97, 10 So. 669; Com. *v.* Tarr, 4 Allen (Mass.) 315.

6. *Alabama.*— Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111.

Georgia.— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Kentucky.— Frost *v.* Com., 9 B. Mon. (Ky.) 362.

Maine.— State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115; Ham's Case, 11 Me. 391.

Massachusetts.— Com. *v.* Holt, 121 Mass. 61.

7. State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115.

8. Thus, where defendant was indicted for adultery with Adaline Winders, and the proof showed that the offense was committed with

IX. PUNISHMENT.

A. As a Common-Law Offense. Adultery cannot be punished as a common-law offense unless it is accompanied by other circumstances rendering it a felony or misdemeanor.[9]

B. As a Statutory Offense. Punishment for the offense is in all cases provided by statute, and usually consists of fine or imprisonment or both.[10]

AD VALOREM. See CUSTOMS DUTIES; TAXATION.

ADVANCE. To supply beforehand; to furnish on credit or before goods are delivered or work done; to furnish as a part of a stock or fund;[1] to loan;[2] to prepay on account of an anticipated debt;[3] to put forward.[4]

ADVANCEMENTS. See DESCENT AND DISTRIBUTION; GIFTS; PARENT AND CHILD; TRUSTS; WILLS.

ADVANCES. Money paid in advance of the proper time of payment;[5] money

Mary Adaline Winders, it was held a fatal variance. State *v.* Dudley, 7 Wis. 664.

Confusion of names.— Where the indictment charges the commission of the offense with a named person, and it appears that he has a son by the same name with the addition of the word "junior," defendant has a right to understand the offense as charged against the father, and evidence of adultery with the son should not be admitted. State *v.* Vittum, 9 N. H. 519.

Name by which defendant is known.—Where defendant is charged in the indictment by a name other than his true one, but it appears that he is well known by the name charged, there is no variance. State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

So where the indictment charged the offense with Roxcena W., it was allowed to be amended by adding "otherwise called Rosa W." State *v.* Arnold, 50 Vt. 731.

Erroneous allegation of marriage.— Where the indictment charges the offense to have been committed with a named woman alleged to be married, and the evidence shows that she is not married, a conviction cannot be sustained. Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120. So where the indictment charged adultery and fornication with an "unmarried" woman, and it appeared that she had a husband living six or seven years before the offense, it was held that there could be no conviction without evidence of his death. Williams *v.* State, 86 Ga. 548, 12 S. E. 743.

Bigamy.—Although the evidence may show that defendant is guilty of bigamy, yet such fact will not bar a conviction of adultery. Owens *v.* State, 94 Ala. 97, 10 So. 669; Hildreth *v.* State, 19 Tex. App. 195.

9. Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

10. *Illinois.*— Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

Indiana.— State *v.* Chandler, 96 Ind. 591.

Iowa.— State *v.* Maas, 83 Iowa 469, 49 N. W. 1037; State *v.* Mahan, 81 Iowa 121, 46 N. W. 855; State *v.* Roth, 17 Iowa 336.

New Hampshire.— State *v.* Marvin, 35 N. H. 22.

New Jersey.— State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397. But *compare* State *v.* Gray, 37 N. J. L. 368, cited *infra*, this note.

Vermont.— State *v.* Searle, 56 Vt. 516; State *v.* Way, 6 Vt. 311.

Wisconsin.— State *v.* Fellows, 50 Wis. 65, 6 N. W. 239.

Imprisonment at hard labor.— In New Jersey defendant cannot be imprisoned at hard labor for the offense. State *v.* Gray, 37 N. J. L. 368.

Extreme penalty.— Where defendant was proved to have been guilty of a long-continued adulterous intercourse with the young sister of his wife, a sentence of the extreme penalty of the law was held not excessive. State *v.* Hazen, 39 Iowa 648.

Adultery between white person and negro.—Statutes providing punishment for adultery between a negro and a white person, different from that provided for persons of the same race, have been held valid. Pace *v.* State, 69 Ala. 231, 44 Am. Rep. 513; Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739; Ford *v.* State, 53 Ala. 150; Ellis *v.* State, 42 Ala. 525; Pace *v.* Alabama, 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207.

1. *Alabama.*— Bates *v.* State Bank, 2 Ala. 451, 479.

Georgia.— Nolan *v.* Bolton, 25 Ga. 352, 356 [*citing* Webster Dict.].

Nevada.— Ormsby County *v.* State, 6 Nev. 283, 287 [*citing* Worcester Dict.].

Pennsylvania.— Hartje *v.* Collins, 46 Pa. St. 268, 273 [*citing* Webster Dict.].

Rhode Island.—Balderston *v.* National Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772.

United States.— Laflin, etc., Powder Co. *v.* Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973.

2. Morrow *v.* Turney, 35 Ala. 131, 137; Rogers *v.* Oxford Bank, 108 N. C. 574, 580, 13 S. E. 245; Oxford Bank *v.* Bobbitt, 108 N. C. 525, 538, 13 S. E. 177; Wright's Appeal, 93 Pa. St. 82, 87, 89 Pa. St. 67, 71.

3. Hoy *v.* Reade, 1 Sweeny (N. Y.) 626, 633.

4. North-western Mut. L. Ins. Co. *v.* Mooney, 108 N. Y. 118, 125, 15 N. E. 303.

5. Vail *v.* Vail, 10 Barb. (N. Y.) 69, 73; Gibbons *v.* U. S., Dev. Ct. Cl. 51.

or goods furnished others in expectation of reimbursement.[6] (Advances: By Executor or Administrator to Legatee or Distributee, see EXECUTORS AND ADMINISTRATORS. By Factor to Consignor, see FACTORS. By Landlord to Tenant, see LANDLORD AND TENANT. By Merchant to Agriculturist, see AGRICULTURE. Mortgages to Secure, see CHATTEL MORTGAGES; MORTGAGES. To Vessel, see MARITIME LIENS.)

ADVANTAGE. Preference or priority.[7]

ADVANTAGEOUSLY. Beneficially; conveniently; profitably; gainfully.[8]

ADVANTAGIUM. An advantage.[9]

ADVENIR. To come to; to become.[10]

ADVENT. A period of time recognized by the English common and ecclesiastical law, beginning on the Sunday that falls either upon St. Andrew's Day, being the thirtieth day of November, or the next to it, and continuing to Christmas Day.[11]

AD VENTREM INSPICIENDUM. See DE VENTRE INSPICIENDO.

ADVENTURA. An ADVENTURE,[12] *q. v.*

ADVENTURE. A risk or hazard;[13] a thing sent to sea, under the care of a supercargo, at the risk and for the benefit of the party sending it.[14]

ADVENTURE, BILL OF. A writing signed by a merchant, stating that the property in goods shipped in his name belongs to another, to the adventure or chance of which the person so named is to stand, with a covenant from the merchant to account to him for the produce.[15]

ADVERSARY. A litigant opponent.[16]

ADVERSE. Opposed; that which resists a claim or proceeding.[17] (Adverse: Claims — to Mining Patents, see MINES AND MINERALS; To Property Levied on or Garnished, see ATTACHMENT; EXECUTIONS; GARNISHMENT; To Real Property, see QUIETING TITLE. Enjoyment — of Easement, see EASEMENTS; Of Office, see OFFICERS. Parties — Examination before Trial, see DISCOVERY; Testimony as to Transactions with Deceased or Incompetent, see WITNESSES. Possession, see ADVERSE POSSESSION. User — of Easement, see EASEMENTS; WATERS; Of Franchise, see CORPORATIONS; Of Real Property, see ADVERSE POSSESSION; Presumption of Dedication from, see DEDICATION.)

6. Lee *v.* Byrne, 75 Ala. 132, 133; Nolan *v.* Bolton, 25 Ga. 352, 356; Ormsby County *v.* State, 6 Nev. 283, 287.

Distinguished from "advancements."—"The word, 'advances,' when taken in its strict legal sense, does not mean gifts — advancements, and does mean a sort of loan; and when taken in its ordinary and usual sense, includes both loans and gifts — loans more readily, perhaps, than gifts." Nolan *v.* Bolton, 25 Ga. 352, 355; Chase *v.* Ewing, 51 Barb. (N. Y.) 597, 612.

7. U. S. *v.* Preston, 4 Wash. (U. S.) 446, 451, 27 Fed. Cas. No. 16,087.

8. Garman *v.* Potts, 135 Pa. St. 506, 521, 19 Atl. 1071.

9. Burrill L. Dict.

10. Kelham Dict.

11. Wharton L. Lex.

12. Burrill L. Dict.

13. Cottam *v.* Mechanics, etc., Ins. Co., 40 La. Ann. 259, 260, 4 So. 510; Moores *v.* Louisville Underwriters, 14 Fed. 226, 233.

14. Burrill L. Dict.

15. Wharton L. Lex.

16. Wharton L. Lex.

17. Abbott L. Dict.

ADVERSE POSSESSION

By W. A. Martin

CROSS-REFERENCES

For Betterments in Favor of Occupying Claimant, see IMPROVEMENTS.
Conveyance of Real Property Held Adversely, see CHAMPERTY AND MAINTENANCE.
Operation and Effect of the Various Statutes of Limitations, see LIMITATIONS OF ACTIONS.
Presumption of Conveyance of Grant Arising from Possession of Real Property, see DEEDS; PUBLIC LANDS.
Title by Prescription, see EASEMENTS.

I. DEFINITION AND ELEMENTS.

Adverse possession, generally speaking, is a possession of another's land which, when accompanied by certain acts and circumstances, will vest title in the possessor.[1] No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and text-books are unanimous in declaring that the possession must be actual,[2] visible,[3] exclusive,[4] hostile,[5] and continued during the time necessary to create a bar under a statute of limitations.[6] It is, however, a matter of some difficulty to determine from the facts of any particular case when these elements exist. These matters are hereinafter considered at length.[7] In addition to these elements, which, as already stated, must always concur to give title by adverse possession, the statutes of some jurisdictions make it necessary for the claimant to hold under color of title,[8] and in others payment of taxes for the entire statutory period is necessary.[9] Good faith is also an element of

1. Black L. Dict.; Bouvier L. Dict.
2. See *infra*, II.
3. See *infra*, III.
4. See *infra*, V.
5. See *infra*, VI.
6. See *infra*, IV.
7. See *infra*, II–VI.
8. See *infra*, VII.
9. See *infra*, IX.

adverse possession in some jurisdictions, and that, too, in the absence of any special statutory requirements; but the decisions on this question are very conflicting.[10]

II. Actual Possession.

A. Necessity. That an adverse claim to land may ripen into a perfect title by virtue of the statutes of limitations it is primarily essential that the possession relied upon be actual.[11] The constructive possession of land is always in the

10. See *infra*, VIII, where these decisions have received careful consideration.

11. *Alabama.*—Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Murray *v.* Hoyle, 97 Ala. 588, 11 So. 797; Rivers *v.* Thompson, 46 Ala. 335; Shipman *v.* Baxter, 21 Ala. 456; Dexter *v.* Nelson, 6 Ala. 68.

Arkansas.— Greer *v.* Anderson, 62 Ark. 213, 35 S. W. 215; Scott *v.* Mills, 49 Ark. 266, 4 S. W. 908; Trapnall *v.* Burton, 24 Ark. 371; Conway *v.* Kinsworthy, 21 Ark. 9.

California.— Buckley *v.* Mohr, (Cal. 1899) 58 Pac. 261; Berniaud *v.* Beecher, 71 Cal. 38, 11 Pac. 802; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Polack *v.* McGrath, 32 Cal. 15.

Connecticut.— Huntington *v.* Whaley, 29 Conn. 391.

Delaware.— Bartholomew *v.* Edwards, 1 Houst. (Del.) 17.

Florida.— Barrs *v.* Brace, 38 Fla. 265, 20 So. 991; Caro *v.* Pensacola City Co., 19 Fla. 766.

Georgia.— Strong *v.* Powell, 92 Ga. 591, 20 S. E. 6; Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912; Durham *v.* Holeman, 30 Ga. 619.

Illinois.— Fuller *v.* Dauphin, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; Champaign *v.* McMurray, 76 Ill. 353; Clark *v.* Lyon, 45 Ill. 388; Cook *v.* Norton, 43 Ill. 391; Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169; Turney *v.* Chamberlain, 15 Ill. 271.

Indiana.— Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822; Worthley *v.* Burbanks, 146 Ind. 534, 45 N. E. 779; Silver Creek Cement Co. *v.* Union Lime, etc., Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721.

Iowa.— Brown *v.* Rose, 55 Iowa 734, 7 N. W. 133; Booth *v.* Small, 25 Iowa 177.

Kentucky.— King *v.* Hunt, (Ky. 1890) 13 S. W. 214; Jones *v.* McCauley, 2 Duv. (Ky.) 14; Smith *v.* Morrow, 7 J. J. Marsh. (Ky.) 442; Weaver *v.* Froman, 6 J. J. Marsh. (Ky.) 213; Curtis *v.* Forman, 4 Bibb (Ky.) 513.

Louisiana.— Hart *v.* Foley, 1 Rob. (La.) 378; Ellis *v.* Prevost, 19 La. 251; Green *v.* Hudson, 7 La. 120.

Maine.— Jewett *v.* Whitney, 51 Me. 233; Putnam Free School *v.* Fisher, 38 Me. 324; Thayer *v.* McLellan, 23 Me. 417.

Maryland.— Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703; Hoye *v.* Swan, 5 Md. 237.

Massachusetts.— Morrison *v.* Chapin, 97 Mass. 72; Simmons *v.* Nahant, 3 Allen (Mass.) 316; Bates *v.* Norcross, 14 Pick. (Mass.) 224; Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227.

Michigan.— Beaufait *v.* Dolson, 110 Mich. 146, 67 N. W. 1110.

Minnesota.— Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220; Greene *v.* Dwyer, 33 Minn. 403, 23 N. W. 546.

Mississippi.— Davis *v.* Bowmar, 55 Miss. 671; Huntington *v.* Allen, 44 Miss. 654.

Missouri.— Whyte *v.* St. Louis, 153 Mo. 80, 54 S. W. 478; Farrar *v.* Heinrich, 86 Mo. 521; Norfleet *v.* Hutchins, 68 Mo. 597; Mylar *v.* Hughes, 60 Mo. 105; Bowman *v.* Lee, 48 Mo. 335; De Graw *v.* Taylor, 37 Mo. 310; St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

Montana.— Lockey *v.* Horsky, 4 Mont. 457, 2 Pac. 19.

Nebraska.— Twohig *v.* Leamer, 48 Nebr. 247, 67 N. W. 152; Omaha, etc., L. & T. Co. *v.* Parker, 33 Nebr. 775, 51 N. W. 139, 29 Am. St. Rep. 506.

Nevada.— Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 93 Am. Dec. 409.

New Hampshire.— Little *v.* Downing, 37 N. H. 355; Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190; Hale *v.* Glidden, 10 N. H. 397; Smith *v.* Hosmer, 7 N. H. 436, 28 Am. Dec. 354.

New Jersey.— Cornelius *v.* Giberson, 25 N. J. L. 1.

New York.— De Lancey *v.* Hawkins, 23 N. Y. App. Div. 8, 49 N. Y. Suppl. 469; Finn *v.* Lally, 1 N. Y. App. Div. 411, 37 N. Y. Suppl. 437; De Lancey *v.* Piepgras, 63 Hun (N. Y.) 169, 17 N. Y. Suppl. 681, 138 N. Y. 26, 33 N. E. 822, 73 Hun (N. Y.) 607, 26 N. Y. Suppl. 806, 141 N. Y. 88, 35 N. E. 1089; Ogden *v.* Jennings, 66 Barb. (N. Y.) 301, 62 N. Y. 526; Becker *v.* Van Valkenburgh, 29 Barb. (N. Y.) 319; Lane *v.* Gould, 10 Barb. (N. Y.) 254; People *v.* Livingston, 8 Barb. (N. Y.) 253; Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511; Jackson *v.* Oltz, 8 Wend. (N. Y.) 440; Buttery *v.* Rome, etc., R. Co., 14 N. Y. St. 131; Miller *v.* Platt, 5 Duer (N. Y.) 272.

North Carolina.— Brown *v.* Morisey, 124 N. C. 292, 32 S. E. 687; Shaffer *v.* Gaynor, 117 N. C. 15, 23 N. E. 154; Williams *v.* Wallace, 78 N. C. 354; Wallace *v.* Maxwell, 32 N. C. 110, 51 Am. Dec. 380; Den *v.* Herring, 5 N. C. 414; Cutler *v.* Blackman, 4 N. C. 368.

Ohio.— Boal *v.* King, Wright (Ohio) 223.

Pennsylvania.— Schwab *v.* Bickel, 11 Pa. Super. Ct. 312; Bear Valley Coal Co. *v.* Dewart, 95 Pa. St. 72; Broad Top Coal, etc., Co. *v.* Riddlesburg Coal, etc., Co., 65 Pa. St. 435; Armstrong *v.* Caldwell, 53 Pa. St. 284; Hole *v.* Rittenhouse, 25 Pa. St. 491; Sheik *v.* McElroy, 20 Pa. St. 25; Murphy *v.* Springer, 1 Grant (Pa.) 73; Cranmer *v.* Hall, 4 Watts &

holder of the best title, unless he has renounced it; and this constructive possession can never be ousted by anything less than an actual possession maintained for the necessary period.[12] Hence a mere claim to land, unaccompanied by actual possession, will not ripen into a title, however long and persistently such claim is asserted.[13] Nor will the fact that such claim is asserted under a deed, though recorded, have any greater effect.[14]

B. What Constitutes — 1. General Principles. Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it, and in taking the profits of which it is susceptible.[15] This dominion may con-

S. (Pa.) 36; Sorber *v.* Willing, 10 Watts (Pa.) 141; Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111; Bradford *v.* Guthrie, 4 Brewst. (Pa.) 351.

South Carolina.— Steedman *v.* Hilliard, 3 Rich. (S. C.) 101; Slice *v.* Derrick, 2 Rich. (S. C.) 627; Alston *v.* McDowall, McMull. (S. C.) 444; Harrington *v.* Wilkins, 2 McCord (S. C.) 289; Turnipseed *v.* Busby, 1 McCord (S. C.) 279; Bailey *v.* Irby, 2 Nott & M. (S. C.) 343, 10 Am. Dec. 609.

Tennessee.— O'Dell *v.* Swaggerty, (Tenn. Ch. 1897) 42 S. W. 175; Hicks *v.* Tredericks, 9 Lea (Tenn.) 491; Smith *v.* Lee, 1 Coldw. (Tenn.) 549; Scales *v.* Cockrill, 3 Head (Tenn.) 432.

Texas.— Conn *v.* Franklin, (Tex. 1892) 19 S. W. 126; Carley *v.* Parton, 75 Tex. 98, 12 S. W. 950; Mason *v.* Stapper, (Tex. 1888) 8 S. W. 598; Bracken *v.* Jones, 63 Tex. 184; Sellman *v.* Hardin, 58 Tex. 86; Moss *v.* Berry, 53 Tex. 632; Peyton *v.* Barton, 53 Tex. 298; Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585.

Vermont.— Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405; Soule *v.* Barlow, 49 Vt. 329; Paine *v.* Hutchins, 49 Vt. 314.

Virginia.— Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

West Virginia.—Wilson *v.* Braden, (W. Va. 1900) 36 S. E. 367; Oney *v.* Clendenin, 28 W. Va. 34.

Wisconsin.— Kurz *v.* Miller, 89 Wis. 426, 62 N. W. 182; Allen *v.* Allen, 58 Wis. 202, 16 N. W. 610.

United States.—Ward *v.* Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. ed. 1195; White *v.* Burnley, 20 How. (U. S.) 235, 15 L. ed. 886; Lemoine *v.* Dunklin County, 38 Fed. 567; Potts *v.* Gilbert, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347.

Canada.— Louisburg Land Co. *v.* Tutty, 17 Nova Scotia 401; Des Barres *v.* Shey, 8 Nova Scotia 327 [on appeal to the privy council, 29 L. T. Rep. N. S. 592]; Doe *v.* Rattray, 7 U. C. Q. B. 321.

See 1 Cent. Dig. tit. "Adverse Possession," § 77 *et seq.*

Actual possession either substantial or virtual.— Actual possession may consist either in an occupancy in fact of the whole tract claimed, or an occupancy of part thereof in the name of the whole, where there is sufficient evidence of the bounds of the whole that is claimed as one entirety, and the circumstances are such that the law extends the possession of the part that is occupied to these bounds. This latter may be termed a "virtual possession," in order to distinguish it from the other kind of actual possession, which is called "substantial," or *pedis possessio.* But whatever terms may be used to give precision to the subject, the attributes which pertain to an actual possession belong to it, whether it be substantial or virtual. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465.

12. *Arkansas.*—Conway *v.* Kinsworthy, 21 Ark. 9.

Kentucky.— Jones *v.* McCauley, 2 Duv. (Ky.) 14.

Nebraska.— Troxell *v.* Johnson, 52 Nebr. 46, 71 N. W. 968.

New York.— Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567.

North Carolina.—London *v.* Bear, 84 N. C. 266; Johnston *v.* Pate, 83 N. C. 110; Williams *v.* Wallace, 78 N. C. 354, Dobbs *v.* Gullidge, 20 N. C. 68; Kennedy *v.* Wheatley, 3 N. C. 607.

13. State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; Dennett *v.* Crocker, 8 Me. 239; Goltermann *v.* Schiermeyer, 125 Mo. 291, 28 S. W. 616; Linen *v.* Maxwell, 67 N. H. 370, 40 Atl. 184; Johnson *v.* Conant, 64 N. H. 109, 7 Atl. 116; Towle *v.* Ayer, 8 N. H. 57.

A residence in the vicinity of the land merely, and a claim to it, though such claim is generally recognized and spoken of in the neighborhood and affirmed by the vicinage, unaccompanied by any of the acts and indicia of ownership, is insufficient to constitute possession. Wood *v.* McGuire, 15 Ga. 202.

Invasion of rights necessary.— An adverse claim must be accompanied by such invasion of the rights of the opposite party as to give a cause of action for the trespass. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted, and consequently his rights are unaffected. Abell *v.* Harris, 11 Gill & J. (Md.) 367.

14. Lipscomb *v.* McClellan, 72 Ala. 151; Eagle, etc., Mfg. Co. *v.* Brunswick Bank, 55 Ga. 44.

Holder of a deed executed by a debtor in fraud of creditors cannot claim by adverse possession when he has never taken possession of the land or exercised any rights of ownership over it. Jones *v.* Wilson, 69 Ala. 400.

15. *California.*— Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Barstow *v.* Newman, 34 Cal. 90.

sist in and be shown by a great number and almost endless combination of acts, and where the statutes of limitations have not designated certain things as requisites, the law has prescribed no particular manner in which possession shall be maintained and made manifest.[16] Nor, on the other hand, has the law attempted to lay down any precise rules by which the sufficiency of a given set of facts to constitute possession may be determined.[17] It is ordinarily sufficient if the acts of ownership are of such a nature as a party would exercise over his own property and would not exercise over another's.[18] Actuality of possession is a question compounded of law and fact,[19] and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title,[20] the character of the land, and the purpose to which it is adapted and for which it has been used.[21] All these circumstances must be taken into consideration by the jury, whose peculiar province it is to pass upon the question.[22] The only rule

Indiana.— Collett *v.* Vanderburgh County, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321.

Kansas.— Anderson *v.* Burnham, 52 Kan. 454, 34 Pac. 1056; Gilmore *v.* Norton, 10 Kan. 491.

Mississippi.— Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137.

Nebraska.— Omaha, etc., L. & T. Co. *v.* Parker, 33 Nebr. 775, 51 N. W. 139, 29 Am. St. Rep. 506; Malcom *v.* Hanson, 32 Nebr. 50, 48 N. W. 883; Tourtelotte *v.* Pearce, 27 Nebr. 57, 42 N. W. 915; Gue *v.* Jones, 25 Nebr. 634, 41 N. W. 555; Levy *v.* Yerga, 25 Nebr. 764, 41 N. W. 773, 13 Am. St. Rep. 525; Tex *v.* Pflug, 24 Nebr. 666, 39 N. W. 839, 8 Am. St. Rep. 231.

North Carolina.— Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760.

Tennessee.—Copeland *v.* Murphey, 2 Coldw. (Tenn.) 64.

Possession in the law does not mean that a man has to have his feet on every square foot of ground before it can be said that he is in possession. If he asserts the right of ownership over the property, such as improving it or using it for any purpose, that is possession, although the man may not live on it. The control, management, and direction that he may take with reference to the property, although he has never been on it, where it is under his control, management, and direction, may be sufficient to establish the possession. It may be established by inclosure, by cultivation, by the erection of buildings or other improvements, or, in fact, by any use that clearly indicates the appropriation and actual use of a person claiming to hold it. Latta *v.* Clifford, 47 Fed. 614.

16. Adams *v.* Clapp, 87 Me. 316, 32 Atl. 911; Eastern R. Co. *v.* Allen, 135 Mass. 13; Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

Exclusive possession.— When the possession of the claimant does effectually exclude that of others, it is immaterial by what acts possession may be accomplished or manifested. One method of occupation may be more satisfactory than another as evidence of exclusive possession, but there is no rule of law that a title by adverse possession can be gained only by certain particular methods of occupation. Eastern R. Co. *v.* Allen, 135 Mass. 13. See also, generally, *infra*, V.

17. Polack *v.* McGrath, 32 Cal. 15.

18. *Alabama.*— Farley *v.* Smith, 39 Ala. 38.

Illinois.— Hubbard *v.* Kiddo, 87 Ill. 578; Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169.

Michigan.— Whitaker *v.* Erie Shooting Club, 102 Mich. 454, 60 N. W. 983; Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889.

Minnesota.— Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

United States.— Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624; Boyreau *v.* Campbell, McAll. (U. S.) 119, 3 Fed. Cas. No. 1,760.

The best test of the sufficiency of possession to ripen title is the liability to which the occupant subjects himself to a possessory action. Fuller *v.* Elizabeth City, 118 N. C. 25, 23 S. E. 922; Hamilton *v.* Icard, 117 N. C. 476, 23 S. E. 354; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

19. Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 462.

20. When an entry has been made under color of title a less weight of evidence is required than when the entry was without color. Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 462. Acts which, in the case of a person who enters on land without claim of title, may be treated as mere acts of trespass, may, when done by a person under claim of title, be considered acts of ownership. Humphreys *v.* Helmes, 10 N. Brunsw. 59.

21. Houghton *v.* Wilhelmy, 157 Mass. 521, 32 N. E. 861; Bowen *v.* Guild, 130 Mass. 121; Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624.

Distinction in application of rule.— The rule requiring actual and visible occupancy will be more strictly construed in an old and populous country, where land is usually improved and inclosed, than in a new country recently settled, in which the land is only partially inclosed. Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

22. Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169; Bowen *v.* Guild, 130 Mass. 121; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

In order to acquire title to woodland there must be actual use and occupation of it, of such unequivocal character as will reasonably indicate to the owner visiting the prem-

of general applicability is that the acts relied upon to establish possession must always be as distinct as the character of the land reasonably admits of,[23] and must be exercised with sufficient continuity to acquaint the owner, should he visit the land, with the fact that a claim of ownership adverse to his title is being asserted.[24] Trivial and disconnected acts, doubtful and equivocal in their character, and which do not clearly indicate the intention with which they are performed, cannot be regarded as amounting to possession;[25] otherwise a man might be disseized without his knowledge, and the statutes of limitations might run against him while he had no ground to believe that his seizin had been interrupted.[26]

2. Application to Particular Acts — a. Actual Residence. Although the actual residence of the claimant upon the land in dispute is the most effectual mode of manifesting possession,[27] still personal occupation, except where required

ises during the statutory period that instead of such use and occupation suggesting only occasional trespasses they unmistakably indicate and assert exclusive appropriation and ownership. Adams *v.* Clapp, 87 Me. 316, 32 Atl. 911.

23. Bell *v.* Denson, 56 Ala. 444; Farley *v.* Smith, 39 Ala. 38.

24. *Illinois.*— Brooks *v.* Bruyn, 18 Ill. 539.

Kentucky.— Price *v.* Beall, (Ky. 1897) 40 S. W. 918.

Maine.— Fleming *v.* Katahdin Pulp, etc., Co., 93 Me. 110, 44 Atl. 378.

Michigan.— Whitaker *v.* Erie Shooting Club, 102 Mich. 454, 60 N. W. 983; Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889.

New York.—McTeague *v.* McTeague, 5 N. Y. Suppl. 130.

Texas.— Kimbro *v.* Hamilton, 28 Tex. 560.

Mere acts of trespass upon vacant and unenclosed lands, not amounting to an exclusive appropriation thereof, and not made under a *bona fide* ownership or under circumstances indicating such a claim, do not constitute an adverse possession. Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; Aiken *v.* Ela, 62 N. H. 400; Cornelius *v.* Giberson, 25 N. J. L. 1; Young *v.* Herdic, 55 Pa. St. 172.

Mere erection of a cabin or a shanty upon land, without use or occupation thereof, does not constitute an adverse possession. Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253. And the fact that one occupied a shanty on certain wild lands while removing timber therefrom does not show a *bona fide* and actual possession thereof as against the legal owner. McKinnon *v.* Meston, 104 Mich. 642, 62 N. W. 1014.

25. Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169; Robinson *v.* Claggett, 149 Mo. 153, 50 S. W. 280.

Fitful acts of ownership of land situated in a city, such as permitting persons on two occasions to erect a lemonade stand on the land, to be used for a day at a time, and causing some paving-stone for a sidewalk to be deposited on the land, are not sufficient, in connection with the payment of taxes and the open claim of title, to constitute adverse possession. Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

The making of one crop on land is insufficient to constitute adverse possession. Conn *v.* Franklin, (Tex. 1892) 19 S. W. 126. The fact that a person planted tobacco-beds on different portions of land for more than the statutory period, but not on one spot for more than two years in succession (the land not being inclosed except during the period of cultivation), is not evidence of adverse possession. Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607, 117 N. C. 476, 23 S. E. 354.

Occasional entries upon uninclosed and unimproved lands, not a part of and unconnected with improved and occupied lands, does not constitute actual possession. Miller *v.* Long Island R. Co., 71 N. Y. 380. A mere annual entry upon another man's land, to cut timber, to feed cattle, to hunt, or fish, can never give title. Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186. Occupation of a spot for five or six weeks annually, as a fishing place, is not a possession sufficient for the statute of limitations. McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715. The agent of one claiming to own wild land as purchaser at a sheriff's sale was personally on it very often, visiting it, to protect the possession and warn off intruders, and the purchase and agency were generally known in the neighborhood, but there was no trespassing on the lot, and no other person exercised any ownership over it. The agent returned the land, and paid taxes on it for the alleged owner, but did not live on it or build any house, fence, or other structure on it. It was held that there was not such possession as would support a title by prescription. Scott *v.* Cain, 90 Ga. 34, 15 S. E. 816.

26. Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227; Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

27. Bennett *v.* Kovarick, 23 Misc. (N. Y.) 73, 51 N. Y. Suppl. 752, 60 N. Y. Suppl. 1133. One claiming under a certificate of entry cleared portions of each forty acres covered thereby, and got wood and timber from all parts of the land, living meanwhile in a house built by him on forty acres adjoining the land covered by his certificate. He sold forty acres, but this did not sever the forty on which his house stood from the rest of the tract. It was held that his possession was adverse. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43. Possession by one's cattle and residence for a sufficient number of years

by statute,[28] is not an indispensable condition where the other circumstances sufficiently prove an established and continuous dominion.[29]

b. Improvement — (I) *Necessity.* Nor is it essential that the land should have been improved[30] or cultivated,[31] or, as a general rule, that its condition should have been changed.[32] Possession is gauged by the actual state of the land, and not with reference to its capability of being changed into another state which would have admitted of a different character of possession.[33]

(II) *Efficacy.* But the improvement of land,[34] as by building upon it.[35]

are sufficient to make the possession actual. Den *v.* Mulford, 2 N. C. 358. Actual possession may be either by residence or cultivation, but need not be by both. Susquehanna, etc., R., etc., Co. *v.* Quick, 68 Pa. St. 189.

Encroachment.— Title by adverse possession may be acquired by the encroachment of a building upon land so claimed. Lambert *v.* Huber, 22 Misc. (N. Y.) 462, 50 N. Y. Suppl. 793.

28. Under the Illinois limitation law of 1835 actual residence upon the land was required to create adverse possession. Stumpf *v.* Osterhage, 94 Ill. 115; Martin *v.* Judd, 81 Ill. 488.

So, under the Kentucky seven years' law of 1808, actual residence on the land was required to constitute adverse possession. Sanders *v.* Barbee, (Ky. 1887) 3 S. W. 528; Webbs *v.* Hynes, 9 B. Mon. (Ky.) 388, 50 Am. Dec. 515; Chiles *v.* Jones, 4 Dana (Ky.) 479; Myers *v.* Buford, 7 J. J. Marsh. (Ky.) 250; Hart *v.* Bowmar, 6 J. J. Marsh. (Ky.) 452; Robinson *v.* Neal, 5 T. B. Mon. (Ky.) 212; May *v.* Jones, 4 Litt. (Ky.) 21; Hog *v.* Perry, 1 Litt. (Ky.) 171; Anderson *v.* Turner, 3 A. K. Marsh. (Ky.) 131; Bodley *v.* Coghill, 3 A. K. Marsh. (Ky.) 614.

Texas.— The possession which, under the statutes of limitation (Pasch. Dig. art. 4624), gives to a naked possessor full property in six hundred and forty acres of land, must be continuous for the full period of ten years. The possessor must actually reside upon the land, and not merely cultivate it for ten consecutive years. Sloan *v.* Martin, 33 Tex. 417.

29. *Alabama.*— Farley *v.* Smith, 39 Ala. 38.

Arkansas.— Dorr *v.* School Dist. No. 26, 40 Ark. 237.

Illinois.— Coleman *v.* Billings, 89 Ill. 183; Kerr *v.* Hitt, 75 Ill. 51.

Minnesota.— Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

Mississippi.— Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137.

New Jersey.— Cooper *v.* Jersey City, 44 N. J. L. 634; Foulke *v.* Bond, 41 N. J. L. 527.

Pennsylvania.— Stephens *v.* Leach, 19 Pa. St. 262; Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129; Mackentile *v.* Savoy, 17 Serg. & R. (Pa.) 104; Johnston *v.* Irwin, 3 Serg. & R. (Pa.) 291.

Tennessee.— Cass *v.* Richardson, 2 Coldw. (Tenn.) 28.

Texas.— Cantagrel *v.* Von Lupin, 58 Tex. 570.

Wisconsin.— Hill *v.* Kricke, 11 Wis. 442.

United States.— Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624; Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475.

Adverse possession of unproductive lands is shown by the recording of the deed under which the occupant claims; payment of taxes; cutting of all the valuable timber; going upon the land at intervals, claiming absolute ownership; the employment of agents in the neighborhood to look after it; and the building of a brush fence around a portion cleared, without proof of actual occupancy. Worthley *v.* Burbanks, 146 Ind. 534, 45 N. E. 779.

30. Hubbard *v.* Kiddo, 87 Ill. 578; Henry *v.* Henry, 122 Mich. 6, 80 N. W. 800; Goltermann *v.* Schiermeyer, 125 Mo. 291, 28 N. W. 616; Leeper *v.* Baker, 68 Mo. 400.

31. Booth *v.* Small, 25 Iowa 177.

32. But in Virginia it has been held that while patented lands remain uncleared or in a state of nature they are not susceptible of adverse possession against an elder patentee, unless by act of ownership perfecting a change in their condition. Koiner *v.* Rankin, 11 Gratt. (Va.) 420; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

33. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

Impossibility of permanent improvement.— Where the property is so constituted as not to admit of any permanent useful improvements, and the continuous claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim, such possession will create a bar under the statute of limitations. Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169.

34. Deer Lake Co. *v.* Michigan Land, etc., Co., 89 Mich. 180, 50 N. W. 807; Den *v.* White, 1 N. J. L. 111; Smith *v.* Burtis, Anth. N. P. (N. Y.) 152; Lenhart *v.* Ream, 74 Pa. St. 59.

If a railroad locates its right of way over a strip of land, and enters thereon, throws up its embankments, and prepares its road-bed, these acts must be considered as constituting actual possession. Nashville, etc., R. Co. *v.* Mathis, 109 Ala. 377, 19 So. 384; Daniels *v.* Gualala Mill Co., 77 Cal. 300, 19 Pac. 519.

35. Congdon *v.* Morgan, 14 S. C. 587. In Williams *v.* Dongan, 20 Mo. 186, it appeared that defendant bought a claim to a tract of land and soon afterward took possession of it, built a dwelling upon it and lived therein,

clearing it of its incumbent growth,[36] reducing it to a state of cultivation,[37] opening up mines[38] or quarries,[39] cutting roads through it,[40] digging ditches to drain it,[41] or building a dike about it,[42] is always to be regarded as the most significant act of adverse possession, because such an occupancy is of a character well calculated to inform the owner both of the fact of possession and that the intrusion is not intended as a mere temporary trespass.[43]

c. **Inclosure** — (i) *Necessity.* Except in one state[44] it is not necessary, to constitute actual possession, that there should be an inclosure of the premises, unless this is expressly required by statute.[45] The erection of a fence is nothing more

cultivated the tract for eight or ten years, and then moved to another state. Afterward he paid all the taxes upon the land, had tenants on it part of the time, and, when not tenanted, had an agent in the neighborhood to rent it out for him and protect it from trespasses. It was held that this was an actual adverse possession.

Where a party erects upon a city lot of which he claims title a permanent brick building which he claims to own throughout its entire length, the circumstances attending his act amount to such a claim of title to the land upon which his building is erected as may by lapse of time ripen into title by adverse possession. Crapo *v.* Cameron, 61 Iowa 447, 16 N. W. 523.

36. Johns *v.* McKibben, 156 Ill. 71, 40 N. E. 449; Smith *v.* Bryan, 44 N. C. 180.

Meadow land.— Where one took possession of hay land under a void tax-deed, and dug out small trees from the growing grass, so as to improve the land, and made hay thereon, and permitted others to do the same, and permitted the land to be inclosed, and granted privileges in regard to the same, his possession was sufficient, when continued for the statutory period, to give him title. Twohig *v.* Leamer, 48 Nebr. 247, 67 N. W. 152. See also Lantry *v.* Parker, 37 Nebr. 353, 55 N. W. 962.

Proof of clearing and cultivating new fields, turning out old fields when worn out, and cutting wood promiscuously is sufficient to constitute adverse possession. Wallace *v.* Maxwell, 32 N. C. 110, 51 Am. Dec. 380.

Village lots.— It has been held that proof of entry, under color of title, by one not the owner, upon platted village lots covered with a growth of brush, and the cutting and burning of this growth, and the grubbing and complete clearing of the land, and the payment of taxes thereon, were sufficient to constitute a finding of disseizin and adverse possession. Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

37. *Minnesota.*— Butler *v.* Drake, 62 Minn. 229, 64 N. W. 559.

Mississippi.— Kirkman *v.* Mays, (Miss. 1893) 12 So. 443.

Nebraska.— Horbach *v.* Miller, 4 Nebr. 31.

New York.— Bennett *v.* Kovarick, 23 Misc. (N. Y.) 73, 51 N. Y. Suppl. 752.

Vermont.— Soule *v.* Barlow, 49 Vt. 329; Robinson *v.* Douglass, 2 Aik. (Vt.) 364.

38. Stephenson *v.* Wilson, 50 Wis. 95, 6 N. W. 240; Wilson *v.* Henry, 40 Wis. 594. Where defendant entered on land under a claim of title, and removed the iron ore therefrom to supply an adjoining factory, but without any actual inclosure, such entry and removal constituted an adverse possession. West *v.* Lanier, 9 Humphr. (Tenn.) 762. But the mere digging of coals in the winter, with an abandonment of the property for the rest of the year, is not sufficient. Jackson *v.* Stoetzel, 87 Pa. St. 302. See also Sequatchie Valley Coal, etc., Co. *v.* Coppinger, 95 Tenn. 526, 32 S. W. 465.

39. Jackson *v.* Oltz, 8 Wend. (N. Y.) 440. The operations of building a shed, quarrying rock, erecting a limekiln, and cutting wood, to burn it for the purpose of making lime on the land in dispute, continued uninterruptedly for more than seven years, constitute such a possession as will give a good title to the person claiming adversely under it. Moore *v.* Thompson, 69 N. C. 120. But occasionally digging sand on the land and selling it is not sufficient. Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703.

40. Spear *v.* Ralph, 14 Vt. 400; Finn *v.* Wisconsin River Land Co., 72 Wis. 546, 40 N. W. 209.

41. The entering upon, ditching, and making roads in a cypress swamp, for the purpose of getting shingles therein, and cutting down the timber trees, and making shingles out of them, is in law a possession of the swamp. Tredwell *v.* Reddick, 23 N. C. 56.

42. Chabert *v.* Russell, 109 Mich. 571, 67 N. W. 902.

43. Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299, wherein it is held that such acts upon their face manifest a use, possession, and dominion assumed over the land itself, naturally distinguishable from a mere trespass upon the land.

44. In Tennessee, in order to constitute adverse possession, there must be an actual inclosure, "where such inclosure is practicable;" but, while this is so, an actual inclosure or residence on land is not always absolutely necessary to constitute possession if there is such use and occupation of the land as from its nature and character it is capable of. Coal, etc., Co. *v.* Coppinger, 95 Tenn. 526, 32 S. W. 465; Garrett *v.* Belmont Land Co., 94 Tenn. 459, 29 S. W. 726; Hicks *v.* Tredericks, 9 Lea (Tenn.) 491; Copeland *v.* Murphey, 2 Coldw. (Tenn.) 64; Cass *v.* Richardson, 2 Coldw. (Tenn.) 28; West *v.* Lanier, 9 Humphr. (Tenn.) 762.

45. *Alabama.*— Bell *v.* Denson, 56 Ala. 444.

California.— McCreery *v.* Everding, 44 Cal. 246.

than an act presumptive of an intention to assert an ownership and possession over the property, and of this intention there are many other acts equally evincive.[46] Under the statutes of some states, where the claimant is without color of title, the land must either be protected by a substantial inclosure or "usually cultivated or improved."[47]

(II) *Sufficiency*—(A) *Inclosure Must Be Substantial.* Where adverse possession is sought to be shown by an inclosure of the land for the length of time prescribed in the statute,[48] such an inclosure must be a real and substantial one.[49] Its sufficiency depends somewhat upon the character of the land

Connecticut.—Miller *v.* Dow, 1 Root (Conn.) 412; Smith *v.* Isaacs, 1 Root (Conn.) 151.

Delaware.— Bartholomew *v.* Edwards, 1 Houst. (Del.) 17.

District of Columbia.— Holtzman *v.* Douglas, 5 App. Cas. (D. C.) 397.

Illinois.— Horner *v.* Reuter, 152 Ill. 106, 38 N. E. 747; Scott *v.* Delany, 87 Ill. 146; Kerr *v.* Hitt, 75 Ill. 51; Austin *v.* Rust, 73 Ill. 491; Brooks *v.* Bruyn, 24 Ill. 372.

Iowa.—Booth *v.* Small, 25 Iowa 177; Langworthy *v.* Myers, 4 Iowa 18.

Kansas.— Dickinson *v.* Bales, 59 Kan. 224, 52 Pac. 447; Anderson *v.* Burnham, 52 Kan. 454, 34 Pac. 1056.

Kentucky.— Moss *v.* Scott, 2 Dana (Ky.) 271.

Maryland.— Warner *v.* Hardy, 6 Md. 525, under a statute providing in express terms that actual inclosure shall not be necessary. [Before the enactment of this statute it was held that where a person claims by possession only, without showing any title, he must show an exclusive adverse possession by inclosure, and his claim cannot extend beyond it. Hoye *v.* Swan, 5 Md. 237; Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115; Cresap *v.* Hutson, 9 Gill (Md.) 269; Hammond *v.* Warfield, 2 Harr. & J. (Md.) 151.]

Michigan.— Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Beecher *v.* Galvin, 71 Mich. 391, 39 N. W. 469; Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889.

Missouri.— Leeper *v.* Baker, 68 Mo. 400.

Texas.— Richards *v.* Smith, 67 Tex. 610, 4 S. W. 571.

United States.— Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475.

In the case of a farm, in which possession is open and notorious, comporting with the ordinary management of farms, it is not necessary that the whole farm be either improved or inclosed, at least where the unimproved part, as woodland, is subservient and connected to that which is improved. Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

46. In many decisions an inclosure is spoken of as essential, because the limits of the lands in question could be marked conveniently only in that way. But the essential fact is the indication, given by the inclosure, of the limits to which the possession claimed extends. None of the authorities deny the equal efficacy with an artificial inclosure, of other defined boundaries, or means of indicating the limits of a tract to which the possession of an occupant extends. Zeilin *v.* Rogers, 21 Fed. 103.

A public right to the use of a piece of ground, in a town or city, which has been dedicated as a common, cannot be ousted by mere claim of title or possession, or by anything else than by an actual private occupancy or exclusive use, evidenced by inclosure, for the statutory period before the assertion of the public right by action. Covington *v.* McNickle, 18 B. Mon. (Ky.) 262; Alves *v.* Henderson, 16 B. Mon. (Ky.) 131.

47. Lockey *v.* Horsky, 4 Mont. 457, 2 Pac. 19; McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249; McAvoy *v.* Cassidy, 8 Misc. (N. Y.) 595, 29 N. Y. Suppl. 321; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753.

Tennessee.— In order to obtain the benefit of the Tenn. Act (1819), c. 28, § 2, a person in actual possession of land for seven years without title must actually occupy the land by a definite and notorious inclosure. Dyche *v.* Gass, 3 Yerg. (Tenn.) 396.

48. Efficacy of inclosure to prove actual possession.— In New York, under the code of civil procedure, an inclosure for the statutory period constitutes actual possession. Palmer *v.* Safft, 56 N. Y. Super. Ct. 594, 3 N. Y. Suppl. 250. In Pennsylvania, where there is some evidence to show that a fence has been maintained for twenty-one years around the land sued for, it is held proper to submit the question of adverse possession to the jury, though no one lived on the land during that time and it was not cultivated continuously. Thompson *v.* Philadelphia, etc., Coal, etc., Co., 133 Pa. St. 46, 19 Atl. 346. But in Connecticut it has been held that the mere inclosing of rough pasture land by ordinary fences is not sufficient evidence of occupation of the land inclosed. Russell *v.* Davis, 38 Conn. 562.

49. Borel *v.* Rollins, 30 Cal. 408; Wohlwend *v.* Weingardner, (Ky. 1897) 40 S. W. 928; Sharrock *v.* Ritter, (Tex. Civ. App. 1898) 45 S. W. 156; Freedman *v.* Bonner, (Tex. Civ. App. 1897) 40 S. W. 47.

Purpose with which erected.— Where one claimed title and paid taxes on vacant land for several years, and then, desiring to perfect his title by a fine and common recovery, inclosed the land with a fence and performed the other necessary acts to constitute a disseizin sufficient to support the fine, the fact that the fence was erected purely and only in order that the fine might be levied will not render the disseizin insufficient. McGregor *v.* Comstock, 17 N. Y. 162. Where the land in dispute is within the boundaries of defendant's deed, a fence erected by him within his lines and for his own purposes is not an

inclosed.[50] In California it has been held that the fence must be sufficient to protect the land against the intrusion of cattle.[51] It has been very generally held that an inclosure of the land by felling trees and lapping them one upon another,[52] or by the erection of a brush fence,[53] is not sufficient.

(B) *Inclosure Must Be Complete.* The land must be completely inclosed.[54] It is not required, however, that the lot should be inclosed on every side by an artificial inclosure.[55]

inclosure of plaintiff, an adjoining owner, and hence affords no evidence of adverse possession in the latter. Storr *v.* James, 84 Md. 282, 35 Atl. 965. Where land was claimed by actual possession and inclosure in fences, and was bounded on one side by a pond and on the other sides by other lands to which claimant had good title, though his fences did in fact surround the land in question on all sides except that next the pond, yet it was held to have been properly left to the jury to determine whether they were erected by claimant for the purpose of inclosing the land in controversy, or merely for the protection of his own. Dennett *v.* Crocker, 8 Me. 239.

50. Bolton *v.* Schriever, 49 N. Y. Super. Ct. 168.

51. A fence made of posts five feet high and set eight feet apart and joined by two boards is not a sufficient inclosure. Polack *v.* McGrath, 32 Cal. 15, holding, however, that the fence need not be so high, strong, and close as to preclude the possibility of being broken, but only such a fence as a prudent farmer erects to protect his growing crops.

Inclosing uncultivated land with a fence consisting of posts seven feet apart and one board six inches wide nailed onto the posts, totally insufficient for any purpose except to mark a line, is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed of the whole. Baldwin *v.* Simpson, 12 Cal. 560.

52. Coburn *v.* Hollis, 3 Metc. (Mass.) 125; Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230.

53. Hutton *v.* Schumaker, 21 Cal. 453; Hale *v.* Glidden, 10 N. H. 397; Smith *v.* Hosmer, 7 N. H. 436, 28 Am. Dec. 354.

But a brush and pole fence is a substantial inclosure the erection of which is sufficient to create an adverse possession. Hill *v.* Edie, 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 480, 17 N. Y. St. 255.

Suffering fence to go to decay.— Placing a fence, consisting of small posts with two rails nailed on, around a piece of land, without actually occupying the land or any part of it, and suffering the fence to go to decay in a year or two, so that it will not keep out cattle, is not sufficient to constitute *prima facie* evidence of title to the land by actual possession, as against one who enters into the actual occupation and possession of a portion of the land after the fence is broken down. Borel *v.* Rollins, 30 Cal. 408. But in Texas, where it appeared that plaintiffs had more than ten years before sued to recover the land, built a wire fence around all the land in controversy, and maintained it intact for a number of years, when gaps were cut in it and left down for two or three years, but the posts remained standing, with the wires thereon, and it could be seen that a fence was around the land, though there were gaps in it, it was held that such fence was sufficient to give notice of adverse possession and that plaintiffs were entitled to the land. Moore *v.* McCown, (Tex. Civ. App. 1892) 20 S. W. 1112. A fence which the owner attempts to keep in repair constitutes an actual inclosure for the purpose of adverse possession, though a plank is sometimes off or a panel down. Hillman *v.* White, (Ky. 1898) 44 S. W. 111.

54. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Land fenced only on two sides, one of the other sides abutting upon an unfenced highway, and the other indicated only by marked trees, is not protected by a substantial inclosure. Pope *v.* Hanmer, 74 N. Y. 240. But the fact that a portion of one end of a narrow strip lies open to the highway will not defeat adverse possession where the entire length of the strip was within the fences inclosing claimant's premises, and was cultivated as part of them. Hill *v.* Edie, 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 480.

The fencing of three sides of an oblong or square piece of land is not a sufficient inclosure to make an adverse possession so as to vest title in a wrong-doer as against the real owner, though such fences exclude the latter from the use and enjoyment of the land. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Leaving opening for convenience' sake.— If, in an action of ejectment, defendant claims title by possession, and it appears that the fence of his adjoining land was so constructed, and so far extended toward the disputed land, as to give notice to the public and to all concerned that defendant and his grantors claimed to exercise exclusive dominion over the disputed land, by extending their fence so as to include this land whenever it should be convenient to complete the inclosure, and that it was left open for the time, for convenience of use, or because it was not then of sufficient importance to be inclosed, and this has been continued for fifteen years, it will be regarded as a sufficient possession to give title. Buck *v.* Squiers, 23 Vt. 498.

55. A natural barrier in part may be utilized, provided it be of such a character as, in connection with the fence, will constitute a substantial inclosure of the land. Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Brumagim *v.* Bradshaw, 39 Cal. 24; East Hampton *v.* Kirk, 84 N. Y. 215; Sanders *v.* Riedinger, 19 Misc. (N. Y.) 289, 43 N. Y. Suppl. 127; Becker *v.* Van Valkenburgh, 29 Barb. (N. Y.) 319; Jackson *v.* Halstead, 5 Cow. (N. Y.) 216.

Cliff.— Where there was a fence on the

(c) *When Inclosure Includes Other Lands.* In New York it has been held that, although the claimant may avail himself of a fence upon the line to complete his inclosure, the statute does not contemplate that a fence located far away from the premises and including other lands should be used as a means of protection to a claim by adverse possession.[56] In other states the fact that land other than that claimed by adverse possession was embraced within the inclosure does not seem to affect its sufficiency if the whole tract inclosed was occupied and claimed for the statutory period.[57] But it has been held that a general inclosure of a large tract of land is not sufficient to constitute an actual and exclusive possession of a specific parcel within it, when it appears that much of the land within the inclosure is not claimed, and much of it is in the actual occupancy of those claiming and holding adverse possession.[58]

d. Taking Natural Products of Land — (1) *Cutting Timber.* Although there are some decisions apparently to the contrary,[59] the weight of authority sustains the rule that the mere occasional cutting of timber on land is not alone such evidence of ownership as to amount to a possession adverse to the true owner,[60]

south and west sides of the premises, and on the east and southeast was a ledge of rocks from two hundred to four hundred feet high, along which there was no artificial fence, it was held that the ledge completed the inclosure as much as a fence would have done. Becker *v.* Van Valkenburgh, 29 Barb. (N. Y.) 319. And to the same effect substantially see East Hampton *v.* Kirk, 84 N. Y. 215, 38 Am. Rep. 505.

River.— A tract of land is sufficiently inclosed where it is fenced on three sides and bounded by a river on the fourth. Sanders *v.* Riedinger, 19 Misc. (N. Y.) 289, 43 N. Y. Suppl. 127.

An inclosure which excludes the party claiming possession by reason of it, and admits the other party, cannot be called adverse to the admitted party. Silliman *v.* Paine, 1 N. Y. Suppl. 75.

56. Doolittle *v.* Tice, 41 Barb. (N. Y.) 181.

57. Hall *v.* Gittings, 2 Harr. & J. (Md.) 380; Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191. A purchased of B a tract of land which was inclosed by a fence. Within the inclosure was a small tract of land not within the description of the deed given by B to A. All the land in the inclosure remained in the possession of, and was occupied, used, and claimed by A for a period of fourteen years. It was held that the facts were sufficient to perfect A's title to the small tract by adverse possession. Urquide *v.* Flanagan, (Ida. 1900) 61 Pac. 514.

58. Walsh *v.* Hill, 41 Cal. 571.

The Texas statute [Sayles Civ. Stat. Suppl. art. 3195*a*] declaring that a tract of land owned by one person "entirely surrounded" by a tract or tracts owned, claimed, or fenced by another, is not in the adverse possession of the latter unless separated from the circumscribing land by a fence, has no application to a case where the land owned by one is merely adjacent to, and not surrounded by, that claimed and fenced by another. Green *v.* Boon, 14 Tex. Civ. App. 307, 37 S. W. 187.

59. Brett *v.* Farr, 66 Iowa 684, 24 N. W. 275 (where claimant used the land continuously to supply wood, rails, and other timber, and the land had never been used for any other purpose); Forey *v.* Bigelow, 56 Iowa 381, 9 N. W. 313 (where claimant cut timber and hay from uninclosed land, and let the right of such cutting to others); Clement *v.* Perry, 34 Iowa 564; Barker *v.* Towles, 11 La. 432; McGregor *v.* Keiller, 9 Ont. 677.

60. *Alabama.*— Burks *v.* Mitchell, 78 Ala. 61; Farley *v.* Smith, 39 Ala. 38. See also Rivers *v.* Thompson, 46 Ala. 335; Childress *v.* Callaway, 76 Ala. 128.

Georgia.— Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715; Strong *v.* Powell, 92 Ga. 591, 20 S. E. 6; Carrol *v.* Gillion, 33 Ga. 539; Durham *v.* Holeman, 30 Ga. 619; Long *v.* Young, 28 Ga. 130; Keller *v.* Dillon, 26 Ga. 701.

Illinois.— Travers *v.* McElvain, 181 Ill. 382, 55 N. E. 135; Austin *v.* Rust, 73 Ill. 491.

Kentucky.— Barr *v.* Potter, (Ky. 1900) 57 S. W. 478; Ohio, etc., R. Co. *v.* Wooten, (Ky. 1898) 46 S. W. 681; Wait *v.* Gover, (Ky. 1890) 12 S. W. 1068; Wilson *v.* Stivers, 4 Dana (Ky.) 634.

Louisiana.— Gardner *v.* Leger, 5 La. Ann. 594; Macarty *v.* Foucher, 12 Mart. (La.) 11.

Minnesota.— Washburn *v.* Cutter, 17 Minn. 361.

Missouri.— Robinson *v.* Claggitt, 145 Mo. 153, 50 S. W. 280; Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893; Goltermann *v.* Schiermeyer, 125 Mo. 291, 28 S. W. 616.

New Jersey.— Townsend *v.* Reeves, 44 N. J. L. 525.

North Carolina.— Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; McLean *v.* Smith, 114 N. C. 356, 19 S. E. 279; Bartlett *v.* Simmons, 49 N. C. 295.

Oregon.— Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.

Pennsylvania.— Douglass *v.* Lucas, 63 Pa. St. 9; Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Murphy *v.* Springer, 1 Grant (Pa.) 73.

South Carolina.— McBeth *v.* Donnelly, Dudley (S. C.) 177; White *v.* Reid, 2 Nott & M. (S. C.) 534; Bailey *v.* Irby, 2 Nott & M. 343, 10 Am. Dec. 609.

Tennessee.— Pullen *v.* Hopkins, 1 Lea (Tenn.) 741.

Texas.— Boone *v.* Hulsey, 71 Tex. 176, 9

and the additional circumstances that the claimant made a survey of the tract and marked its boundaries,[61] or paid taxes on it[62] and excluded trespassers[63] or cultivated one[64] or two[65] crops on a small part of the tract, or buried potatoes there for several years,[66] or made bricks,[67] or boiled sugar,[68] or pastured his hogs or cattle there occasionally,[69] or did other similar acts,[70] will not constitute actual posses-

S. W. 531; Stegall *v.* Huff, 54 Tex. 193; Soape *v.* Doss, 18 Tex. Civ. App. 649, 45 S. W. 387; Cook *v.* Lister, (Tex. Civ. App. 1896) 38 S. W. 380.

Vermont.— Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.

Virginia.— Anderson *v* Harvey, 10 Gratt. (Va.) 386; Pasley *v.* English, 5 Gratt. (Va.) 141.

West Virginia.— Yokum *v.* Fickey, 37 W. Va. 762, 17 S. E. 318; Oney *v.* Clendenin, 28 W. Va. 34.

Wisconsin.— Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

Canada.— Doe *v.* White, 3 N. Brunsw. 595.

Evidence that plaintiff's ancestor lived near the land for twenty years, and occasionally went upon it to cut a stick of timber, is not sufficient to show that he was in such actual possession as to raise the presumption of a grant to him. Heller *v.* Peters, 140 Pa. St. 648, 21 Atl. 416.

Interference.— Recovering possession of an interference between a seated and an unseated tract of land in an action by the owner of the seated tract against a mere intruder, and cutting timber on the interference without actual occupancy thereof, will not, under the statute of limitations, protect the owner of the seated tract in ejectment by the owner of the unseated tract having the better title to such interference. McArthur *v.* Kitchen, 77 Pa. St. 62. To the same effect see Olewine *v.* Messmore, 128 Pa. St. 470, 18 Atl. 495.

61. Slice *v.* Derrick, 2 Rich. (S. C.) 627. *Compare* also, *infra*, II, B, 2, g.

62. Scott *v.* Mills, 49 Ark. 266, 4 S. W. 908; Pullen *v.* Hopkins, 1 Lea (Tenn.) 741; Call *v.* Cozart, (Tenn. Ch. 1898) 48 S. W. 312. *Compare* also, *infra*, II, B, 2, e.

63. Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032.

64. Lane *v.* Gould, 10 Barb. (N. Y.) 254. Occupancy consisting merely in occasionally cutting and removing timber, and in raising one crop of turnips, without having inclosed any of the parcel in controversy, is insufficient to confer title. Degman *v.* Elliott, (Ky. 1888) 8 S. W. 10; Porter *v.* Kennedy, McMull. (S. C.) 354.

65. Acts during a period of eighteen years, consisting of cultivating a field for two years, occasionally cutting timber, and having an underground distillery in a swamp near the boundary, do not show sufficient open, continuous, adverse possession to go to the jury, it not appearing how long the distillery was used. Cox *v.* Ward, 107 N. C. 507, 12 S. E. 379.

66. Miller *v.* Downing, 54 N. Y. 631.

67. Williams *v.* Wallace, 78 N. C. 354.

68. Ewing *v.* Alcorn, 40 Pa. St. 492; Washabaugh *v.* Entriken, 34 Pa. St. 74, 36 Pa. St. 513. See also Voight *v.* Meyer, 42 N. Y. App. Div. 350, 59 N. Y. Suppl. 70.

69. Royall *v.* Lisle, 15 Ga. 545, 60 Am. Dec. 712; Loftin *v.* Cobb, 46 N. C. 406, 62 Am. Dec. 173; Swift *v.* Gage, 26 Vt. 224. *Compare* also, *infra*, II, B, 2, d, (III).

70. Other acts in addition to cutting timber — *Insufficient to constitute adverse possession.*— See Thistle *v.* Frostburg Coal Co., 10 Md. 129 (cutting timber and giving permission to others to cut the same, as well as offering to sell the land, going upon it, walking over it, locking up the house upon it, and carrying away the key); Parker *v.* Parker, 1 Allen (Mass.) 245 (cutting timber and trimming trees, as well as in one instance, within twenty years, cutting off entire growth of wood upon the land); Slater *v.* Jepherson, 6 Cush. (Mass.) 129 (cutting timber for use and sale, as well as clearing the land for cultivation, running lines, and marking them by lapping trees, and selling a part of the land); Musick *v.* Barney, 49 Mo. 458 (cutting rails, as well as paying the taxes for several years, erecting a temporary structure upon the land, openly claiming to own the same, but not occupying, improving, or inclosing it); Cook *v.* Farrah, 105 Mo. 492, 16 S. W. 692 (wherein it was held that where a separate tract of land, half prairie and half timber, might be easily inclosed, being fit for cultivation, the erection of a temporary structure, pasturing hogs, cutting timber, and payment of taxes under claim of ownership by one residing a mile and a half from it, did not constitute adverse possession).

Sufficient to constitute adverse possession. — Adverse possession of rough lands mostly unfit for cultivation is sufficiently shown by proof that the occupant paid all the taxes thereon which were taxed in his name, cut timber therefrom, blazed the outlines of it, claimed ownership, and offered it for sale. Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822. One who took possession of timber lands and built a shanty thereon, cut timber at various times preparatory to cultivation, and remained in possession off and on for the statutory period, acquired title, since he actually occupied the land in the only manner in which, and for the only purposes for which, it was reasonably capable of being used and occupied. Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459. An entry upon land under a deed, and possession by leasing parts of it and occasionally cutting wood upon it during the period required by the statute, although for a period of a few years no acts of ownership were exercised, is a sufficient possession to constitute a title. Menkens *v.* Ovenhouse, 22 Mo. 70. The occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust a constructive

sion. But if a person enters upon land and uses it thereafter as a wood-lot appurtenant to his farm, in the usual and ordinary way, and exercises such acts of ownership over it as are necessary to enjoy it, such acts have been held to amount to actual possession.[71]

(II) *Cutting Wild Grass.* The occasional or periodical entry upon land to cut wild grass is not an act manifesting a purpose to take possession as owner, and does not constitute actual possession.[72]

(III) *Grazing Live Stock.* The mere occupancy of land by grazing live stock upon it, without substantial inclosures or other permanent improvements, is not sufficient to support a plea of limitations.[73] But entering into possession of lands under color of title, followed by the construction and maintenance of a substantial fence, under continued use and occupation of the land for pasturage,— the only purpose for which it was adapted,— under claim of title, has been held to constitute an adverse possession of the land inclosed.[74]

(IV) *Making Sugar.* The occupancy of woodland for three or four weeks each year, for the purpose of making maple sugar, is not such a possession as will create a title by adverse possession, though continued annually for the statutory period.[75]

e. Payment of Taxes. The payment of taxes upon land does not constitute actual possession of it.[76] In some jurisdictions the fact is not even regarded as

possession by one claiming merely under a superior paper title. Bynum *v.* Carter, 26 N. C. 310. See also Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371.

71. Hubbard *v.* Kiddo, 87 Ill. 578; Brooks *v.* Bruyn, 18 Ill. 539; Colvin *v.* McCune, 39 Iowa 502; Henry *v.* Henry, 122 Mich. 6, 80 N. W. 800; Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889; Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

72. Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227; Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238; Roberts *v.* Baumgarten, 110 N. Y. 380, 18 N. E. 96, 51 N. Y. Super. Ct. 482; Wheeler *v.* Spinola, 54 N. Y. 377; Doolittle *v.* Tice, 41 Barb. (N. Y.) 181.

Other acts in addition to cutting grass.— The fact that a person cuts hay on uninclosed land, lets his cattle roam over and pasture upon it just as they pasture on adjacent uninclosed lands, and prevents people from cutting and stealing wood on the land, is not sufficient to constitute adverse possession. Lambert *v.* Stees, 47 Minn. 141, 49 N. W. 662. But the fact that defendant and his predecessors in title had gathered seaweed on inclosed land, while not alone evidence of adverse possession, may be evidence of such possession when taken in connection with the fact that they prevented other freeholders of the town from gathering seaweed there, and did so under claim of exclusive right as owners, which claim was known to plaintiffs. East Hampton *v.* Kirk, 84 N. Y. 215, 68 N. Y. 459.

73. McCloskey *v.* Hayden, 169 Ill. 297, 48 N. E. 432; Richmond Iron Works *v.* Wadhams, 142 Mass. 569, 9 N. E. 1; Hicks *v.* Tredericks, 9 Lea (Tenn.) 491; Calloway *v.* Sanford, (Tenn. Ch. 1895) 35 S. W. 776; De Las Fuentes *v.* MacDonald, 85 Tex. 132, 20 S. W. 43; Mason *v.* Stapper, (Tex. 1888) 8 S. W. 598; Murphy *v.* Welder, 58 Tex. 235; Vineyard *v.* Brundrett, 14 Tex. Civ. App. 147, 42 S. W. 232; Pendleton *v.* Snyder, 5 Tex. Civ. App. 427, 24 S. W. 363.

Payment of taxes, cutting timber, and grazing and watering one's cattle on one hundred and sixty acres of unfenced pasture and timber lands, capable of being inclosed, and a part of which was suitable for cultivation, and the burning of a limekiln on the land, do not constitute adverse possession. Nye *v.* Alfter, 127 Mo. 529, 30 S. W. 186.

Possession of an improvement used only to herd cattle, and abandoned every year when the pasture season ends, is not a possession for the purposes of the statute of limitations, or twenty-one years' adverse possession, although corners and lines were marked and cabins built upon it. Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186.

74. Ambrose *v.* Huntington, 34 Oreg. 484, 56 Pac. 513. *Compare* also, *supra*, II, B, 2, c.

In an action to quiet title, where it appeared that defendants' grantors, claiming under color of title, had entered upon the lands while they were unfenced, wild prairie lands, and that by themselves or their lessees they had occupied the lands continuously as a pasture for cattle from 1881 to 1891, paying taxes thereon, it was held that this was sufficient occupation to give defendants title by adverse possession. Dice *v.* Brown, 98 Iowa 297, 67 N. W. 253.

75. Caskey *v.* Lewis, 15 B. Mon. (Ky.) 27; Adams *v.* Robinson, 6 Pa. St. 271; Wilson *v.* Blake, 53 Vt. 305.

Such an occupancy is too desultory and fugitive to fulfil the intent of the statute. Annual entries to tap sugar-trees and boil the sap constitute rather a succession of trespasses than an actual and permanent occupancy of the ground. Adams *v.* Robinson, 6 Pa. St. 271.

76. *Arkansas.*— Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

Iowa.— Raymond *v.* Morrison, 59 Iowa 371, 13 N. W. 332; Sioux City, etc., Town Lot, etc., Co. *v.* Wilson, 50 Iowa 422.

Kansas.— Dickinson *v.* Bales, 59 Kan. 224, 52 Pac. 447.

evidence of possession,[77] and so not admissible in proof on behalf of the claimant.[78] But in other jurisdictions the courts, though regarding it as entitled to little weight, yet admit it in proof as a circumstance to show possession.[79] The accompanying circumstances that the claimant had the lands surveyed and mapped,[80] and executed a mortgage covering them,[81] and occasionally entered upon the lands to look after them [82] or employed an agent to do so,[83] or occasionally cut and carried off firewood and rails therefrom,[84] do not constitute actual possession.

f. Depositing Material. Merely depositing old machinery from a factory,[85] or refuse from a mine,[86] or piling wood [87] upon the land of another, does not constitute an actual possession of it.

g. Surveying Land and Fixing Boundaries. Entering upon land for the purpose of surveying it and fixing the boundaries of the tract claimed is not actual possession,[88] and the fact that the claimant pays the taxes [89] and enters from time to time to cut timber for use on other lands [90] is no more effective.

Louisiana.— Chamberlain *v.* Abadie, 48 La. Ann. 587, 19 So. 574.

Michigan.— Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338; Cook *v.* Rounds, 60 Mich. 310, 27 N. W. 517.

Missouri.— Chapman *v.* Templeton, 53 Mo. 463; Bollinger *v.* Chouteau, 20 Mo. 89; Cashman *v.* Cashman, 50 Mo. App. 663, 123 Mo. 647, 27 S. W. 549.

North Carolina.— Malloy *v.* Bruden, 86 N. C. 251.

Pennsylvania.— Bear Valley Coal Co. *v.* Dewart, 95 Pa. St. 72; Urket *v.* Coryell, 5 Watts & S. (Pa.) 60; Naglee *v.* Albright, 4 Whart. (Pa.) 291.

Tennessee.— Garrett *v.* Belmont Land Co., 94 Tenn. 459, 29 S. W. 726.

Vermont.— Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866; Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Reed *v.* Field, 15 Vt. 672.

United States.— Ewing *v.* Burnet, 1 McLean (U. S.) 266, 8 Fed. Cas. No. 4,591.

But where plaintiff in ejectment was shown to have paid all the taxes for thirty years, and defendant had refused to have the land assessed in his name, it was held that plaintiff had the better title. Kelsey *v.* Murray, 9 Watts (Pa.) 111.

77. Jay *v.* Stein, 49 Ala. 514; Raymond *v.* Morrison, 59 Iowa 371, 13 N. W. 332; Sioux City, etc., Town Lot, etc., Co. *v.* Wilson, 50 Iowa 422; Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567; Miller *v.* Long Island R. Co., 71 N. Y. 380; Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

78. Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333; Stevens *v.* Rhinelander, 5 Rob. (N. Y.) 285; McBeth *v.* Donnelly, Dudley (S. C.) 177.

79. Dickinson *v.* Bales, 59 Kan. 224, 52 Pac. 447; Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889; Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 462.

80. Byers *v.* Danley, 27 Ark. 77. *Compare* also, *infra*, II, B, 2, g.

81. Seymour *v.* Creswell, 18 Fla. 29.

82. Reddick *v.* Long, (Ala. 1900) 27 So. 402. See also Dickinson *v.* Bales, 59 Kan. 224, 52 Pac. 447; Sorber *v.* Willing, 10 Watts (Pa.) 141.

83. Ruffin *v.* Overby, 88 N. C. 369. See also John Henry Shoe Co. *v.* Williamson, 64 Ark. 100, 40 S. W. 703. Evidence that a person claiming title to land arranged with a neighboring farmer to look after the land, and thereafter paid the taxes assessed thereon, and that the farmer sometimes drove his cattle to the land to pasture, and authorized others to cut grass thereon, it being wild and unfenced and used by the cattle of the neighborhood as a common, and the grass being cut by any one without molestation, is not sufficient to prove actual possession. Judson *v.* Duffy, 96 Mich. 255, 55 N. W. 837.

84. Wiggins *v.* Kirby, 106 Ala. 262, 17 So. 354; Pike *v.* Robertson, 79 Mo. 615. *Compare* also, *supra*, II, B, 2, d, (I).

85. Corning *v.* Troy Iron, etc., Factory, 44 N. Y. 577.

86. Woodruff *v.* North Bloomfield Gravel Min. Co., 9 Sawy. (U. S.) 441, 18 Fed. 753.

87. Miller *v.* Downing, 54 N. Y. 631. Plowing two furrows on two sides of land, and placing a stack of boards on the land a short time afterward, are not sufficient evidence of occupancy or claim of possession to start the running of the statute of limitations. Nicholson *v.* Aronson, 58 Kan. 814, 48 Pac. 917.

The mere throwing of manure on another's land is not such an adverse possession as will give any right under the statute of limitations to him who does it, much less to a third person. Shroder *v.* Breneman, 21 Pa. St. 225.

88. Dillon *v.* Mattox, 21 Ga. 113; Brown *v.* Rose, 55 Iowa 734, 7 N. W. 133; Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227; Altemus *v.* Trimble, 9 Pa. St. 232, 34 Am. Dec. 494.

89. Bradstreet *v.* Kinsella, 76 Mo. 63. *Compare* also. *supra*, II, B, 2, e.

90. Livingston *v.* Pendergast, 34 N. H. 544; Mission of Immaculate Virgin *v.* Cronin, 143 N. Y. 524, 38 N. E. 964. *Compare* also, *supra*, II, B, 2, d, (I). Adverse possession under color of title sufficient to create possessory title may be established in New Hampshire, in the case of wild lands, by showing surveys, prosecutions for trespass, depositions *in perpetuam*, grants, and payment of taxes. Winnipiseogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542.

h. Posting Notices. The fact that the claimant of land posts notices upon it merely indicates an intention to hold the land, and is not sufficient proof of adverse possession.[91]

i. Flooding Land. In New York it has been held that the overflowing of another's land to such an extent as to make it useless constitutes an actual adverse possession,[92] but a contrary decision has been rendered in North Carolina.[93]

j. Sale of Land. The fact that one claiming a large tract of land under a deed sold and conveyed many small tracts within the boundary is insufficient to show actual possession;[94] so is the fact that the claimant offered the whole tract for sale and listed it for taxation.[95]

3. Application to Particular Kinds of Land — a. Burial-Plots. If one enters upon, sets apart, and asserts an exclusive right to a plot of land as a family burial-ground for a series of years, the use of the land for such a purpose constitutes an actual possession.[96] But where the possession is not under color of title the holding will be confined to such part of the land as is covered by the graves.[97]

b. Highways. Under the Massachusetts statute it has been held that maintaining a fence within the limits of a highway for the statutory period under a claim of right gives to the owner an absolute right to continue it there as against the public,[98] but the contrary has been held in Indiana and in Ohio.[99] Merely sowing grain and pasturing cattle on the sides of the road,[1] or occasionally piling lumber there and annually mowing and taking the grass therefrom,[2] does not amount to possession.

c. Mines. It is a general presumption that one who has the possession of the surface of land has possession of the subsoil also.[3] But when, by conveyance or reservation, a separation has been made of the ownership of the surface of land from that of the underground minerals, the owner of the former can acquire no

91. Lynde *v.* Williams, 68 Mo. 360.

92. Hammon *v.* Zehner, 21 N. Y. 118.

93. Green *v.* Harman, 15 N. C. 158.

94. Worth *v.* Simmons, 121 N. C. 357, 28 S. E. 528.

95. Fuller *v.* Elizabeth City, 118 N. C. 25, 23 S. E. 922.

96. Zirngibl *v.* Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 N. E. 431.

Sufficiency of evidence.— Proof, in ejectment, of the use of land, conveyed by a defective deed, as a burial-plot for over twenty-five years, and of an interment in a grave on the undisturbed portion thereof, the placing of a headstone thereon, and the planting of trees and shrubbery from twelve to fifteen years prior to the action, is sufficient proof of adverse possession to constitute the finding of the jury that title was thereby acquired by defendant. Conger *v.* Kinney, 16 N. Y. Suppl. 752. But evidence that plaintiff's ancestors and husband and children were buried in a certain lot; that as long as she lived in the locality she visited the lot and kept it in good repair, and when she went away left a person in charge of it, who visited it frequently and cared for it; that the person purchasing the land more than ten years before suit promised that the lot should never be troubled,— is insufficient to show title to the lot by adverse possession. Bonham *v.* Loeb, 107 Ala. 604, 18 So. 300.

97. Mooney *v.* Cooledge, 30 Ark. 640.

98. Cutter *v.* Cambridge, 6 Allen (Mass.) 20. See also, in Tennessee, Morristown *v.* Cain, (Tenn. Ch. 1897) 44 S. W. 471.

99. Fencing in a small portion of a highway, not sufficient seriously to obstruct public travel, although done by an adjoining landowner under claim of title, does not constitute an adverse possession which can ripen into title. Brooks *v.* Riding, 46 Ind. 15; McClelland *v.* Miller, 28 Ohio St. 488; Lane *v.* Kennedy, 13 Ohio St. 42.

Occupancy, by a private person, of the streets of a city, by cheap temporary wooden structures, cannot confer on him any rights against the city, no matter how long continued. Cheek *v.* Aurora, 92 Ind. 107.

1. Watkins *v.* Lynch, 71 Cal. 21, 11 Pac. 808.

2. Bliss *v.* Johnson, 94 N. Y. 235.

Defendant having included a private alleyway over the rear of his lot within the fence which surrounded his lot, and having held it adversely for ten years, paying taxes and assessments thereon, an adjoining lot-owner who during such time made no claim of right thereto cannot maintain an action for removal of obstructions therefrom. Ritzmann *v.* Aspelmeier, 89 Iowa 179, 56 N. W. 421.

3. Possession of the surface of a mining-claim location is possession of all veins, lodes, and ledges the tops or apexes of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines; and possession of the surface ground protects such veins, lodes, and ledges from the operation of the statute of limitations. Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16. See also Armstrong *v.* Caldwell, 53 Pa. St. 284.

title to the latter by his exclusive and continued enjoyment of the surface;[4] nor does the owner of the minerals lose his right or his possession by any length of non-usage.[5] He must be disseized to lose his right, and there can be no disseizin by an act which does not actually take the minerals out of his possession.[6]

d. Submerged Lands — (I) *Tide-Water and Navigable Flats* — (A) *Exclusive Use and Occupation.* The title of every one in flats over which the tide ebbs and flows, so long as they remain unoccupied and uninclosed, is subject to the public right of navigation; and therefore it has been held that the use by any one of flats by passing in vessels or boats over them and anchoring thereon is not a disseizin, and, though frequent or long-continued, will not give a title by adverse possession.[7] Like the travel upon a highway, such use is presumed to be in the exercise of a public right, and is not adverse to the owner of the fee.[8] But if flats are inclosed or otherwise actually occupied by a person claiming a right to the soil, to the exclusion of all others, such use constitutes a disseizin.[9] Thus building a wharf and using the flats covered by the water at the end and sides of it to float vessels for the purpose of loading and unloading them is a disseizin of the land covered by the wharf,[10] and at the end and sides thereof so far as it has been exclusively used by such vessels.[11] So erecting two buildings, over ground which was covered by a mill-pond, upon piles under which the water flowed, but boats could not pass, has been held to be a disseizin of the land under the buildings and under the water in the open space between the buildings, used as a passageway between them.[12]

(B) *Planting Oysters.* No title to land under water can be acquired, as against the state or its grantee, by planting oysters thereon for any length of time without other title than that so sought to be acquired.[13]

(II) *Land between High-Water and Low-Water Marks.* The fact that the owner of land, bounded on one side by high-water mark, continues the fences on his lines running to the water down to low-water mark, to prevent cattle passing around them, is not such an occupancy or inclosure of the land between high-water mark and low-water mark as will constitute adverse possession.[14] Nor does the construction of a marine railway for the conveyance of boats between the land above high-water mark and the water give any title to the land between high-water mark and low-water mark, over which the railway runs, especially when the structure is allowed to decay and is washed away before the completion of the statutory period.[15]

4. Armstrong *v.* Caldwell, 53 Pa. St. 284; Caldwell *v.* Copeland, 37 Pa. St. 427, 78 Am. Dec. 436.

5. Smith *v.* Lloyd, 9 Exch. 562; Seaman *v.* Vawdrey, 16 Ves. Jr. 390.

6. Armstrong *v.* Caldwell, 53 Pa. St. 284.

7. Drake *v.* Curtis, 1 Cush. (Mass.) 395.

8. Tufts *v.* Charlestown, 117 Mass. 401.

9. The construction of a log boom by driving piles and connecting them by boom-sticks, completely surrounding a tract of submerged land, is an actual possession of it. Allen *v.* McKay, 120 Cal. 332, 52 Pac. 828. In ejectment to determine title to part of a wharf projecting into a navigable lake it appeared that defendant had driven a line of piles between twenty and thirty years before the commencement of suit, which would exclude from plaintiff's occupancy all the disputed territory, and which was done to fix boundaries. It was held that a finding for plaintiff was error. Jones *v.* Lee, 77 Mich. 35, 43 N. W. 855.

10. Nichols *v.* Boston, 98 Mass. 39.

11. Wheeler *v.* Stone, 1 Cush. (Mass.) 313; Rust *v.* Boston Mill Corp., 6 Pick. (Mass.) 158.

12. Boston Mill Corp. *v.* Bulfinch, 6 Mass. 229.

13. People *v.* Lowndes, 55 Hun (N. Y.) 469, 8 N. Y. Suppl. 908.

14. McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249.

15. De Lancey *v.* Piepgras, 138 N. Y. 26, 33 N. E. 822, 34 N. E. 513. Where land above high-water mark was granted to one person, and the beach in front, between high-water and low-water marks, to another, merely passing over the shore with boats at high water, or landing boats on the shore at low water, by the proprietors of the land above high-water mark, and passing to and fro over the beach for a period of twenty years, does not amount to possession, there being nothing to define a possession in any particular portion of the land, and the acts being consistent with the exercise of a public right of passage when the beach was covered with water, and with an easement in the proprietor of the adjoining land, when the

(III) *Ponds.* Cutting ice on a pond and occupying part of the surface with men and horses for that purpose during a few weeks of each winter is not an actual possession of the pond.[16]

(IV) *Unnavigable Stream.* In a stream not navigable, keeping up fish-traps therein, erecting and repairing dams across it, and using it every year, during the entire fishing-season, for the purpose of catching fish, have been held to constitute an unequivocal possession thereof.[17]

e. Island Subject to Overflow. If an island which is subject to overflow is used by a claimant in the way most appropriate, considering its nature and liability to be inundated, by pasturing his stock thereon during such portion of the year as the state of the stream permits, such use has been held to constitute an adverse possession, although the island may not have been inclosed or improved.[18] But it has been held in the same state that the mere fact that one hauls sand from a barren island at intervals for over twenty years does not constitute possession adverse to a riparian owner whose deed includes the island, although such possession was as complete as the character of the island would allow.[19]

4. Sufficiency of Possession by Tenant or Agent. It is not necessary that the party claiming title by adverse possession should have been in personal occupation of the land. Possession by a tenant under him enures to his benefit and satisfies the requirements of the statute of limitations.[20] This is true whether the lease be by parol or in writing,[21] whether the tenancy is created by an arrangement with the claimant personally or through an agent,[22] and though the person claiming title is a non-resident.[23] Furthermore the rule applies although the tenant repudiates the tenancy and attorns to a third person, provided the claimant institutes suit against the lessee and recovers possession.[24] On the other hand the rule has no application when it appears that the lessee never went into possession at all, but suffered the land to remain unoccupied during the term of the lease, as the fact that the lessee was faithless to his contract must in such connection be visited upon the lessor rather than upon the true owner of the land.[25] The possession of one's agent is, for the purpose of acquiring title by adverse possession, the possession of the principal.[26]

III. Open and Notorious Possession.

A. Necessity — 1. Statement of Rule. Most courts and text-writers, in defining what is meant by the term "adverse possession," include as one of the essential

beach was uncovered. Doe *v.* Littlehale, 10 N. Brunsw. 121.

16. Gouverneur *v.* National Ice Co., 57 Hun (N. Y.) 474, 11 N. Y. Suppl. 87.

17. Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760.

18. Webbs *v.* Hynes, 9 B. Mon. (Ky.) 388, 1 Am. Dec. 515.

19. Strange *v.* Spalding, (Ky. 1895) 29 S. W. 137.

20. *Alabama.*— Elliot *v.* Dycke, 78 Ala. 150.

Arkansas.— Cox *v.* Dougherty, 62 Ark. 629, 36 S. W. 184.

California.— Barstow *v.* Newman, 34 Cal. 90.

Georgia.— Knorr *v.* Raymond, 73 Ga. 749; McMullin *v.* Erwin, 58 Ga. 427.

Illinois.— Martin *v.* Judd, 81 Ill. 488.

Maryland.— Jacob Tome Institute *v.* Crothers, 87 Md. 569, 40 Atl. 261.

Missouri.— Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032; Farrar *v.* Heinrich, 86 Mo. 521; Walser *v.* Graham, 45 Mo. App. 629.

New York.— Finlay *v.* Cook, 54 Barb. (N. Y.) 9; Jackson *v.* Ellis, 13 Johns. (N. Y.) 118.

Oregon.— Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.

South Carolina.— McColman *v.* Wilkes, 3 Strobh. (S. C.) 465; Williams *v.* McAliley, Cheves (S. C.) 200.

Tennessee.— Hornsby *v.* Davis, (Tenn. Ch. 1895) 36 S. W. 159; Hammett *v.* Blount, 1 Swan (Tenn.) 385.

Texas.—Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50; Wallace *v.* Wilcox, 27 Tex. 60.

Wisconsin.— Krebs *v.* Dodge, 9 Wis. 1.

United States.— Gregg *v.* Forsyth, 24 How. (U. S.) 179, 16 L. ed. 731.

21. Gillespie *v.* Jones, 26 Tex. 343; Cochrane *v.* Faris, 18 Tex. 850.

22. Tilton *v.* Emery, 17 N. H. 536.

23. Lindemmayer *v.* Gunst, 70 Miss. 693, 13 So. 252, 35 Am. St. Rep. 685; Langtry *v.* Parker, 37 Nebr. 353, 55 N. W. 962.

24. Coyle *v.* Franklin, 54 Fed. 644, 13 U. S. App. 81, 4 C. C. A. 538.

25. Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744.

26. Goodwin *v.* Sawyer, 33 Me. 541; Langtry *v.* Parker, 37 Nebr. 353, 55 N. W. 962; Den *v.* Moore, 3 Wall. Jr. C. C. (U. S.) 292, 20 Fed. Cas. No. 11,905.

elements thereof "open and notorious" possession. It is in general true that title by adverse possession cannot be acquired unless the possession is open and notorious, but the rule must be understood with some qualification. The following is a more correct statement thereof: In order to make good a claim of title by adverse holding the true owner must have actual knowledge of the hostile claim,[27] or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally and with a purpose to assert a claim of title adversely to his,[28] so patent that

27. *Alabama.*—Eureka Co. *v.* Norment, 104 Ala. 625, 16 So. 579; Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145; Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537; Woods *v.* Montevallo, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393.

California.— Bath *v.* Valdez, (Cal. 1885) 7 Pac. 487; Thompson *v.* Pioche, 44 Cal. 508.

Indiana.—Richwine *v.* Presbyterian Church, 135 Ind. 80, 34 N. E. 737.

Kentucky.— Buford *v.* Cox, 5 J. J. Marsh. (Ky.) 582.

Massachusetts.— Pray *v.* Pierce, 7 Mass. 381, 5 Am. Dec. 59.

Missouri.— Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; Wilkerson *v.* Thompson, 82 Mo. 317.

New York.—Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131.

North Carolina.— King *v.* Wells, 94 N. C. 344; Gilchrist *v.* McLaughlin, 29 N. C. 310.

Pennsylvania.— Henry *v.* Huff, 143 Pa. St. 548, 22 Atl. 1046.

28. *Alabama.*—Eureka Co. *v.* Norment, 104 Ala. 625, 16 So. 579; Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145; Normant *v.* Eureka Co., 98 Ala. 181, 12 So. 454, 39 Am. St. Rep. 45; Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537; Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393; Dothard *v.* Denson, 72 Ala. 541; Alexander *v.* Wheeler, 69 Ala. 332; Lucas *v.* Daniels, 34 Ala. 188; Brown *v.* Cockerell, 33 Ala. 38; Benje *v.* Creagh, 21 Ala. 151.

California.— Mauldin *v.* Cox, 67 Cal. 387, 7 Pac. 804; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Grimm *v.* Curley, 43 Cal. 250.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Georgia.— Morgan *v.* Taylor, 55 Ga. 224; Carrol *v.* Gillion, 33 Ga. 539; Doe *v.* Roe, 32 Ga. 572; Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198; Watts *v.* Griswold, 20 Ga. 732, 65 Am. Dec. 647.

Illinois.— Kerr *v.* Hitt, 75 Ill. 51; McClellan *v.* Kellogg, 17 Ill. 498; Irving *v.* Brownell, 11 Ill. 402.

Indiana.—King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303.

Iowa.— Grube *v.* Wells, 34 Iowa 148.

Kentucky.— Thruston *v.* Masterson, 9 Dana (Ky.) 228; Buford *v.* Cox, 5 J. J. Marsh. (Ky.) 582.

Louisiana.— Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629.

Maine.— Carter *v.* Clark, 92 Me. 225, 42 Atl. 398; Foxcroft *v.* Barnes, 29 Me. 128; Tilton *v.* Hunter, 24 Me. 29; Little *v.* Megquier, 2 Me. 176.

Maryland.— Beatty *v.* Mason, 30 Md. 409.

Massachusetts.— Cook *v.* Babcock, 11 Cush. (Mass.) 206; Boston, etc., R. Corp. *v.* Sparhawk, 5 Metc. (Mass.) 469; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227; Kennebeck Purchase *v.* Call, 1 Mass. 483.

Michigan.— Chabert *v.* Russell, 109 Mich. 571, 67 N. W. 902.

Minnesota.— Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Mississippi.— Dixon *v.* Cook, 47 Miss. 220; Alexander *v.* Polk, 39 Miss. 737; Gordon *v.* Sizer, 39 Miss. 805; Magee *v.* Magee, 37 Miss. 138; Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137.

Missouri.— Herbst *v.* Merrifield, 133 Mo. 267, 34 S. W. 571; Fugate *v.* Pierce, 49 Mo. 441; Musick *v.* Barney, 49 Mo. 458; Kellogg *v.* Mullen, 39 Mo. 174.

New Hampshire.— Little *v.* Downing, 37 N. H. 355; Hale *v.* Glidden, 10 N. H. 397; Smith *v.* Hosmer, 7 N. H. 436, 28 Am. Dec. 354.

New Jersey.— Foulke *v.* Bond, 41 N. J. L. 527; Cobb *v.* Davenport, 32 N. J. L. 369; Cornelius *v.* Giberson, 25 N. J. L. 1.

New York.— Hammond *v.* Zehner, 21 N. Y. 118; Union College *v.* Wheeler, 59 Barb. (N. Y.) 585; Jackson *v.* Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230.

North Carolina.— King *v.* Wells, 94 N. C. 344; Moore *v.* Thompson, 69 N. C. 120; Gilchrist *v.* McLaughlin, 29 N. C. 310.

Oregon.— Bowman *v.* Bowman, 35 Oreg. 279, 57 Pac. 546.

Pennsylvania.— Long *v.* Mast, 11 Pa. St. 189; Hawk *v.* Senseman, 6 Serg. & R. (Pa.) 21.

Rhode Island.— Draper *v.* Monroe, 18 R. I. 398, 28 Atl. 340.

South Carolina.— Barker *v.* Deignan, 25 S. C. 252.

Tennessee.— Smith *v.* Lee, 1 Coldw. (Tenn.) 549.

Texas.— Gillespie *v.* Jones, 26 Tex. 343; Galveston *v.* Menard, 23 Tex. 349; Portis *v.* Hill, 3 Tex. 273.

Vermont.— Soule *v.* Barlow, 49 Vt. 329.

Virginia.— Harman *v.* Ratliff, 93 Va. 249, 24 S. E. 1023; Turpin *v.* Saunders, 32 Gratt. (Va.) 27; Dawson *v.* Watkins, 2 Rob. (Va.) 259.

Wisconsin.— Jones *v.* Collins, 16 Wis. 594.

the owner could not be deceived, and such that if he remains in ignorance it is his own fault.[29] A clandestine entry or possession will not set the statute in motion.[30] The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely.[31]

2. Reason for Rule. "To hold otherwise," it has been said, "would be to establish a principle by which every proprietor of vacant land might be disseized without his knowledge or even the possibility of protecting himself."[32]

B. Its Effect as Constructive Notice to Disseizee. To perfect a title by adverse possession it is not necessary that the true owner should have had actual knowledge or notice of the claim. If the claimant's possession is open and notorious under claim of title it is sufficient in its character, whether the true owner knew the facts or not.[33] On open, visible, and notorious possession by the adverse claimant the law presumes notice to the true owner[34] in the absence of evidence

United States.—Bump *v.* Butler County, 93 Fed. 290.

Canada.— Doe *v.* Littlehale, 10 N. Brunsw. 121.

The term "notorious," used in defining adverse possession, means that the character of the holding must possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent. Watrous *v.* Morrison, 33 Fla. 261 14 So. 805, 39 Am. St. Rep. 139.

Applications of rule — *As between adjoining owners.*—Title by adverse possession cannot originate between adjoining owners of land in possession of the same tenant without knowledge of the adverse claim brought home to the proprietor. Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517.

As between persons claiming title from a common grantor.— In ejectment, defendant testified that he supposed his deed from a common grantor covered the lot in issue, and that he fenced and planted it, but did not testify that he ever claimed title to the knowledge of the grantor or of plaintiff, or had done any act which would charge them with knowledge of such claim or would be inconsistent with permissive occupancy. It was held that he failed to show that his occupancy amounted to a disseizin of the grantor which would bar plaintiff's action. Draper *v.* Monroe, 18 R. I. 398, 28 Atl. 340.

As between holders of conflicting patents.— Where uncleared lands have been granted by the state by conflicting patents, testimony of the junior patentee that he had possession of the lands in controversy, without any showing of visible acts of ownership, is insufficient to show adverse possession. Harman *v.* Ratliff, 93 Va. 249, 24 S. E. 1023. See also Thruston *v.* Masterson, 9 Dana (Ky.) 228, where it was held that the party claiming under a junior grant is not presumed to have had notice of an adverse claim until adverse possession is taken under an elder grant, or some distinct and notorious assertion of right made under it.

Effect of occupation under color of title.— The fact that the disseizor holds under color of title will not dispense with the necessity of possession which is actual, exclusive, and notorious as the foundation of title by adverse possession. Foulke *v.* Bond, 41 N. J. L. 527.

29. Fugate *v.* Pierce, 49 Mo. 441; Musick *v.* Barney, 49 Mo. 458.

30. Thompson *v.* Pioche, 44 Cal. 508.

31. Thompson *v.* Pioche, 44 Cal. 508.

32. Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227; Turpin *v.* Saunders, 32 Gratt. (Va.) 27; Dawson *v.* Watkins, 2 Rob. (Va.) 259.

The statute proceeds upon the ground that there has been an acquiescence, on the part of the owner of the land, in the claim which, on the part of the disseizor, was intended to be hostile and in fact is hostile to his title, and obviously it must appear that the possession or use which is claimed to be adverse was such that the owner knew or might have known that the disseizor intended to make title under it. Brown *v.* Cockerell, 33 Ala. 38; Benje *v.* Creagh, 21 Ala. 151; Thompson *v.* Pioche, 44 Cal. 517; Cobb *v.* Davenport, 32 N. J. L. 369.

33. *Iowa.*— Close *v.* Samm, 27 Iowa 503.

Massachusetts.— Samuels *v.* Borrowscale, 104 Mass. 207; Poignard *v.* Smith, 6 Pick. (Mass.) 172.

Michigan.— Bird *v.* Stark, 66 Mich. 654, 33 N. W. 754.

Mississippi.— Wilson *v.* Williams, 52 Miss. 487.

Missouri.— Key *v.* Jennings, 66 Mo. 356; Scruggs *v.* Scruggs, 43 Mo. 142; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

New Hampshire.— Forest *v.* Jackson, 56 N. H. 357.

Texas.— Craig *v.* Cartwright, 65 Tex. 413.

34. *Alabama.*—Black *v.* Tennessee, etc., Co., 93 Ala. 109, 9 So. 537; Murray *v.* Hoyle, 92 Ala. 559, 9 So. 368; Newsome *v.* Snow, 91 Ala. 641, 8 So. 377, 24 Am. St. Rep. 934; Bernstein *v.* Humes, 75 Ala. 241, 71 Ala. 260.

California.— Davis *v.* Baugh, 59 Cal. 568.

Illinois.— Illinois Cent. R. Co. *v.* Houghton, 126 Ill. 233, 18 N. E. 301, 9 Am. St. Rep. 581, 1 L. R. A. 213; Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

Indiana.— King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303.

Massachusetts.— Samuels *v.* Borrowscale, 104 Mass. 207.

Missouri.— Dausch *v.* Crane, 109 Mo. 323,

that inquiries of the true owner, prosecuted with due diligence, did not disclose such possession.[35] Such possession is the equivalent of actual notice of the claim under which it is held,[36] and if the owner fails to look after his interests until the title of the adverse claimant grows into maturity he has no one but himself to blame for the loss of his estate.[37] Where the possession is notorious no declaration of abandonment of possession on the part of the owner is necessary in order that his title may be barred.[38]

C. The Effect of Actual Knowledge by Disseizee. If the owner have actual knowledge that the possession is adverse to his title the occupancy need not be open, visible, and notorious.[39] Notoriety is important only where the adverse character of the possession is to be brought home to the owner by presumption.[40]

D. What Constitutes Such Possession. The rule is that in determining whether possession is open, visible, and notorious, so as to charge the owner with notice of an adverse claim, the nature, situation, and uses of the property are to be considered,[41] and also the quantity or proportion of the land actually occupied.[42] It is therefore difficult or impossible to specify the acts which would, under every condition, constitute open and visible possession.[43] But it has been stated that the general rule is that it is sufficient if the land is appropriated in such manner as to apprise the community that the land is in the possession and enjoyment of the person claiming it.[44] And that openness and exclusiveness are shown by such acts as will ordinarily be performed by the true owner in appropriating the land and its avails to his own use and preventing, so far as practicable, all others from using it.[45] And this seems to be the rule deducible from the majority of cases.[46]

19 S. W. 61; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 462.

Texas.— Wimberly *v.* Bailey, 58 Tex. 222.

35. Davis *v.* Baugh, 59 Cal. 568.

36. Murray *v.* Hoyle, 92 Ala. 559, 9 So. 368.

37. Royall *v.* Lisle, 15 Ga. 545, 60 Am. Dec. 712.

38. Middlesex Co. *v.* Lane, 149 Mass. 101, 21 S. E. 228.

39. *Arkansas.*— Trotter *v.* Neal, 50 Ark. 340, 7 S. W. 384.

Connecticut.— Clark *v.* Gilbert, 39 Conn. 94.

Missouri.— Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Key *v.* Jennings, 66 Mo. 356.

New Jersey.— Outcalt *v.* Ludlow, 32 N. J. L. 239.

Pennsylvania.— Jones *v.* Porter, 3 Penr. & W. (Pa.) 132.

40. Clark *v.* Gilbert, 39 Conn. 94.

Possession of land by a son under parol gift from his father is adverse as against the father, and will, if continued for the requisite statutory period, protect his title, as against the father and his children, without having been notorious. Trotter *v.* Neal, 50 Ark. 340, 7 S. W. 384.

41. Buford *v.* Cox, 5 J. J. Marsh. (Ky.) 582; Alexander *v.* Polk, 39 Miss. 737; Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137; Dawson *v.* Watkins, 2 Rob. (Va.) 259.

42. Alexander *v.* Polk, 39 Miss. 737.

43. St. Louis, etc., R. Co. *v.* Nugent, 152 Ill. 119, 39 N. E. 263; Buford *v.* Cox, 5 J. J. Marsh. (Ky.) 582; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

44. St. Louis, etc., R. Co. *v.* Nugent, 152 Ill. 119, 39 N. E. 263.

45. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443. To same effect see Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889; Glencoe *v.* Wadsworth, 48 Minn. 402, 51 N. W. 377.

46. *Indiana.*— Jeffersonville, etc., R. Co. *v.* Oyler, 82 Ind. 394.

Kansas.— Dickinson *v.* Bales, (Kan. 1900) 61 Pac. 403.

Kentucky.— Davis *v.* Young, 2 Dana (Ky.) 299.

Maine.— Alden *v.* Gilmore, 13 Me. 178.

Montana.— National Min. Co. *v.* Powers, 3 Mont. 344.

Nebraska.— Murray *v.* Romine, (Nebr. 1900) 82 N. W. 318.

New Jersey.— Foulke *v.* Bond, 41 N. J. L. 527.

New York.— Pearsall *v.* Westcott, 45 N. Y. App. Div. 34, 60 N. Y. Suppl. 816.

Pennsylvania.— Wolf *v.* Ament, 1 Grant (Pa.) 150.

Texas.— Texas, etc., R. Co. *v.* Maynard, (Tex. Civ. App. 1899) 51 S. W. 255; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098.

Washington.— Flint *v.* Long, 12 Wash. 342, 41 Pac. 49.

United States.— Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624; Florida Southern R. Co. *v.* Loring, 51 Fed. 932, 2 U. S. App. 310, 2 C. C. A. 546.

Illustrations of possession sufficiently open and notorious.— Cultivation and continued occupancy of land as a farm (Wolf *v.* Ament, 1 Grant (Pa.) 150), or a railroad company's possession of its road-bed (Jeffersonville, etc., R. Co. *v.* Oyler, 82 Ind. 394) is possession sufficiently open and notorious within the rule, and the possession has been held to be sufficiently open and notorious in the follow-

The fact that the possession of land is disputed does not make it any the less adverse, but rather the contrary, since this would necessarily seem to make more open and notorious the adverse character of such possession.[47]

IV. Duration and Continuity of Possession.

A. Necessity of Continuous Possession. In order to perfect title by adverse possession, such possession must be continuous for the whole period prescribed by the statute of limitations. Any break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession.[48] Occasional trespasses or acts of ownership do not constitute

ing cases: Where defendant's grantor held possession of a piece of land several years without color of title, pasturing and partly fencing it, and then verbally transferring it to defendant, who occupied it by pasturing cattle, cutting hay, and building additional fences, and such possession continued for more than ten years. Murray *v.* Romine, (Nebr. 1900) 82 N. W. 318. Where a purchaser of a city lot built a fence around three sides of it (the land being inaccessible from the fourth side, due to the roughness of the ground), cleared it of brush and timber, a considerable quantity of which was on it and the surrounding lots, and planted shrubbery thereon. Flint *v.* Long, 12 Wash. 342, 41 Pac. 49. Where a stranger who had taken from a cotenant of certain sea-beach lands a deed for the whole estate, and enlarged a boarding-house thereon, built docks, cut hay on the meadows, and paid taxes on the whole, claiming to be exclusive owner. Foulke *v.* Bond, 41 N. J. L. 527.

Illustrations of possession not sufficiently open and notorious.— Extending an inclosure on adjoining land over the line of another lot some ten or fifteen feet wide, and taking within such inclosure a strip of land of that width and running half across the lot, under a claim of title. Carrol *v.* Gillion, 33 Ga. 539. The building of a small cow-pen on the boundary line separating two lots of land and immediately contiguous to defendant's lands, occasional felling of trees, and permitting cattle to range over the uncultivated land. Royall *v.* Lisle, 15 Ga. 545, 60 Am. Dec. 712. The cutting for five years, from an uninclosed pine lot, by the owner of a sawmill located near such lot, of sticks to be worked up in said mill, the making of roads for hauling such logs to the mill, and the cutting, for several years more, of firewood from said lot. Watts *v.* Griswold, 20 Ga. 732, 65 Am. Dec. 647. The making of a fence on wild land, by cutting and lopping trees. Coburn *v.* Hollis, 3 Metc. (Mass.) 125.

47. Liddon *v.* Hodnett, 22 Fla. 442.

The owner of land is chargeable with notice of its locality and boundaries, and the meaning and locality of every settlement made upon it by another without his authority. One holding the superior title cannot set up his ignorance of the claim of right under which his land was occupied by an adverse claimant, in person or by agent, to defeat limitations. Brownson *v.* Scanlan, 59 Tex. 222.

48. *Alabama.*— Adler *v.* Prestwood, 122 Ala. 367, 24 So. 999; Davidson *v.* Alabama Iron, etc., Co., 109 Ala. 383, 19 So. 390; Carter *v.* Chevalier, 108 Ala. 563, 19 So. 798; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Riggs *v.* Fuller, 54 Ala. 141.

Arkansas.—Brown *v.* Hanaeur, 48 Ark. 277, 3 S. W. 27.

California.— Hagar *v.* Spect, 48 Cal. 406; San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278; Dietz *v.* Mission Transfer Co., (Cal. 1890) 25 Pac. 423.

Colorado.— Hurd *v.* McClellan, 1 Colo. App. 327, 29 Pac. 181.

Connecticut.— Smith *v.* Chapin, 31 Conn. 530.

Georgia.— Doe *v.* Roe, 32 Ga. 572; Joiner *v.* Borders, 32 Ga. 239; Byrne *v.* Lowry, 19 Ga. 27; Holcombe *v.* Austell, 19 Ga. 604.

Illinois — Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1062.

Indiana.— Peck *v.* Louisville, etc., R. Co., 101 Ind. 366; Winslow *v.* Winslow, 52 Ind. 8; Doe *v.* Brown, 4 Ind. 143.

Kentucky.— Barr *v.* Potter, (Ky. 1900) 57 S. W. 478; Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253; Jones *v.* Chiles, 2 Dana (Ky.) 25; Forman *v.* Ambler, 2 Dana (Ky.) 108; Braxdale *v.* Speed, 1 A. K. Marsh. (Ky.) 105.

Louisiana.— Lane *v.* Cameron, 37 La. Ann. 250; Innis *v.* Miller, 10 Mart. (La.) 289, 13 Am. Dec. 330.

Maine.— Fleming *v.* Katahdin Pulp, etc., Co., 93 Me. 110, 44 Atl. 378; Robinson *v.* Brown, 32 Me. 578.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.— Old South Soc. *v.* Wainwright, 156 Mass. 115, 30 N. E. 476.

Michigan.— Beecher *v.* Ferris, 117 Mich. 108, 75 N. W. 294; Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93.

Missouri — Hendrickson *v.* Grable, 157 Mo. 42, 57 S. W. 784; Three States Lumber Co. *v.* Rogers, 145 Mo. 445, 46 S. W. 1079; Norfleet *v.* Hutchins, 68 Mo. 597; Harrison *v.* Cachelin, 35 Mo. 77, 23 Mo. 117.

New Jersey.— Cornelius *v.* Giberson, 25 N. J. L. 1.

New York.— Bliss *v.* Johnson, 94 N. Y. 235; Cleveland *v.* Crawford, 7 Hun (N. Y.) 616.

North Carolina.— Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251; Gudger *v.* Hensley, 82 N. C. 481; Williams *v.* Wallace, 78 N. C. 354; Ward *v.* Herrin, 49 N. C. 23; Holdfast *v.* Shepard, 28 N. C. 361; Den *v.* Mulford, 2 N. C. 358.

such continuous possession as will ripen into a title by adverse possession,[49] although extending over the statutory period.[50] So a mere claim of ownership does not of itself amount to a continuation of possession so as to support a title by adverse possession.[51]

B. Tacking Possessions — 1. Continuous Possession in One Person Unnecessary. It does not follow, however, from what has just been said, that continuous possession in any one person is necessary for the acquisition of title by adverse possession. On the contrary, if there is privity between successive occupants holding adversely to the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding prescribed by the statute as against such title.[52]

2. Necessity for Privity between Successive Occupants — a. Statement of Rule. Nevertheless, in order that such possessions may be tacked, it is essential that privity, either of contract, estate, or blood, should exist between the successive occupants.[53] Different entries at different times by different persons between

Pennsylvania.— Groft *v.* Weakland, 34 Pa. St. 304.

Tennessee.— Grimmett *v.* Midgett, (Tenn. Ch. 1899) 57 S. W. 399; Graham *v.* Nelson, 5 Humphr. (Tenn.) 604.

Texas.— Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Gunter *v.* Meade, 78 Tex. 634, 14 S. W. 562; Holstein *v.* Adams, 72 Tex. 485, 10 S. W. 560; Ivey *v.* Petty, 70 Tex. 178, 7 S. W. 798; Satterwhite *v.* Rosser, 61 Tex. 166; Paschal *v.* Dangerfield, 37 Tex. 273; Mosely *v.* Withie, 26 Tex. 720; Kilpatrick *v.* Sisneros, 23 Tex. 113; Allen *v.* Courtney, (Tex. Civ. App. 1900) 58 S. W. 200; Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411.

Vermont.— Soule *v.* Barlow, 49 Vt. 329.

Virginia.— Atkinson *v.* Smith, (Va. 1896) 24 S. E. 901; Hollingsworth *v.* Sherman, 81 Va. 668; Stonestreet *v.* Doyle, 75 Va. 356, 40 Am. Rep. 731; Koiner *v.* Rankin, 11 Gratt. (Va.) 420.

West Virginia.— Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Oney *v.* Clendenin, 28 W. Va. 34; Core *v.* Faupel, 24 W. Va. 238.

Wisconsin.— Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534; Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355; Sydnor *v.* Palmer, 29 Wis. 226.

Canada.— Doe *v.* Littlehale, 10 N. Brunsw. 121.

49. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Barr *v.* Potter, (Ky. 1900) 57 S. W. 478; Braxdale *v.* Speed, 1 A. K. Marsh. (Ky.) 105; Forman *v.* Ambler, 2 Dana (Ky.) 108; Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251; Gudger *v.* Hensley, 82 N. C. 481.

50. Barr *v.* Potter, (Ky. 1900) 57 S. W. 478.

51. Myers *v.* McMillan, 4 Dana (Ky.) 485.

52. *Alabama.*— Riggs *v.* Fuller, 54 Ala. 141.

Connecticut.— Fanning *v.* Willcox, 3 Day (Conn.) 258.

District of Columbia.— Reid *v.* Anderson, 13 App. Cas. (D. C.) 30.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Illinois.— Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187; Weber *v.* Anderson, 73 Ill. 439; Hale *v.* Gladfelder, 52 Ill. 91.

Iowa.— Kilbourne *v.* Lockman, 8 Iowa 380.

Minnesota.— Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Mississippi.— Benson *v.* Stewart, 30 Miss. 49.

Missouri.— Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551.

Nebraska.— Lantry *v.* Wolff, 49 Nebr. 374, 68 N. W. 494; Stettnische *v.* Lamb, 18 Nebr. 619, 26 N. W. 374.

New Jersey.— Davock *v.* Nealon, 58 N. J. L. 21, 32 Atl. 675.

Ohio.— McNeely *v.* Langan, 22 Ohio St. 32.

Pennsylvania.— Graffius *v.* Tottenham, 1 Watts & S. (Pa.) 488, 37 Am. Dec. 472.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488.

Texas.— Collier *v.* Couts, 92 Tex. 234, 47 S. W. 525.

United States.— Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822; Barger *v.* Miller, 4 Wash. (U. S.) 280, 2 Fed. Cas. No. 979.

Extent of rule.— This rule is in no way affected by a statute providing that "every suit to be instituted to recover real estate, as against him, her, or them in possession under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterward." Christy *v.* Alford, 17 How. (U. S.) 601, 15 L. ed. 256.

53. *Alabama.*— Robinson *v.* Allison, (Ala. 1900) 27 So. 461; Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Riggs *v.* Fuller, 54 Ala. 141.

California.—San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278.

District of Columbia.— Reid *v.* Anderson, 13 App. Cas. (D. C.) 30.

Florida.— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Georgia.— Morrison *v.* Hays, 19 Ga. 294.

Illinois.— Ely *v.* Brown, 183 Ill. 575, 56 N. E. 181.

whom there is no privity or connected claim of rightful holding are but a succession of trespasses, and neither can furnish any support to the other.[54] Each possession is a distinct and independent wrong for which an action may be maintained.[55]

b. Reason for Rule. The reason why privity is necessary is that in its absence a new and distinct disseizin is made by each disseizor.[56] As soon as the former adverse holder quits possession, the true owner, in virtue of his legal title, is again instantly seized or possessed of the premises by operation of law, and thereby the continuity of the possession between the adverse claimants is broken.[57]

3. Between Whom Privity Exists — a. In General. Privity denotes merely

Indiana.— McEntire *v.* Brown, 28 Ind. 347; Doe *v.* Brown, 4 Ind. 143.

Kentucky.— Jones *v.* Chiles, 2 Dana (Ky.) 25; Winn *v.* Wilhite, 5 J. J. Marsh. (Ky.) 521.

Maine.— Carville *v.* Hutchins, 73 Me. 227.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.— Sawyer *v.* Kendall, 10 Cush. (Mass.) 241; Wade *v.* Lindsey, 6 Metc. (Mass.) 407; Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

Minnesota.— Hall *v.* Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 N. W. 497; Ramsey *v.* Glenny, 45 Minn. 401, 48 N. W. 322, 22 Am. St. Rep. 736; Witt *v.* St. Paul, etc., R. Co., 38 Minn. 122, 35 N. W. 862; Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Missouri.— Adkins *v.* Tomlinson, 121 Mo. 487, 26 S. W. 573; Crispen *v.* Hannavan, 50 Mo. 536; Shaw *v.* Nicholay, 30 Mo. 99; Chouquette *v.* Barada, 23 Mo. 331.

Nebraska.— Pohlman *v.* Lohmeyer, (Nebr. 1900) 83 N. W. 201; Carson *v.* Dundas, 39 Nebr. 503, 58 N. W. 141.

New Hampshire.— Locke *v.* Whitney, 63 N. H. 597, 3 Atl. 920.

New Jersey.— Colgan *v.* Pellens, 48 N. J. L. 27, 2 Atl. 633.

New York.— Smith *v.* Reich, 80 Hun (N. Y.) 287, 30 N. Y. Suppl. 167; Berkowitz *v.* Brown, 3 Misc. (N. Y.) 1, 23 N. Y. Suppl. 792; Simpson *v.* Downing, 23 Wend. (N. Y.) 316; Jackson *v.* Leonard, 9 Cow. (N. Y.) 653; Doe *v.* Campbell, 10 Johns. (N. Y.) 475.

Oregon.— Low *v.* Schaffer, 24 Oreg. 239, 33 Pac. 678; Vance *v.* Wood, 22 Oreg. 77, 29 Pac. 73.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Peet, 152 Pa. St. 488, 31 Wkly. Notes Cas. (Pa.) 404, 25 Atl. 612, 19 L. R. A. 467; Schrack *v.* Zubler, 34 Pa. St. 38; Moore *v.* Collishaw, 10 Pa. St. 224; Overfield *v.* Christie, 7 Serg. & R. (Pa.) 173.

South Carolina.— King *v.* Smith, Rice (S. C.) 10.

Tennessee.— Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641; Nelson *v.* Trigg, 4 Lea (Tenn.) 701; Baker *v.* Hale, 6 Baxt. (Tenn.) 46; Hobbs *v.* Ballard, 5 Sneed (Tenn.) 394; Vance *v.* Fisher, 10 Humphr. (Tenn.) 211; Graham *v.* Nelson, 5 Humphr. (Tenn.) 604.

Texas.— Stout *v.* Taul, 71 Tex. 438, 9 S. W. 329; Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48; Brownson *v.* Scanlan, 59 Tex. 222; Dotson *v.* Moss, 58 Tex. 152; Truehart *v.* McMichael, 46 Tex. 222; Wheeler *v.* Moody, 9 Tex. 372.

West Virginia.— Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

Wisconsin.—Ryan *v.* Schwartz, 94 Wis. 403, 69 N. W. 178; Allis *v.* Field, 89 Wis. 327, 62 N. W. 85; Dhein *v.* Beuscher, 83 Wis. 316, 53 N. W. 551.

United States.— Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822.

England.— Doe *v.* Barnard, 13 Q. B. 945, 66 E. C. L. 945; Dixon *v.* Gayfere, 17 Beav. 421; Nepean *v.* Doe, 2 M. & W. 894.

54. Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Overfield *v.* Christie, 7 Serg. & R. (Pa.) 173; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Clark *v.* Chase, 5 Sneed (Tenn.) 636.

55. Hobbs *v.* Ballard, 5 Sneed (Tenn.) 394.

Successive possessions by strangers to title — Presumption.— The mere fact that two strangers to the title succeeded each other in the possession of land raises no presumption of privity between them, and therefore, in computing the period which will give title by prescription, the last occupant is not entitled to count the time of his predecessor's possession. Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806.

56. Sawyer *v.* Kendall, 10 Cush. (Mass.) 241; Witt *v.* St. Paul, etc., R. Co., 38 Minn. 122, 35 N. W. 862.

57. *Alabama.*— Riggs *v.* Fuller, 54 Ala. 141.

California.— San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278.

Georgia.— Morrison *v.* Hays, 19 Ga. 294.

Indiana.— McEntire *v.* Brown, 28 Ind. 347.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.— Sawyer *v.* Kendall, 10 Cush. (Mass.) 241; Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

Missouri.— Crispen *v.* Hannavan, 50 Mo. 536.

Oregon.— Low *v.* Schaffer, 24 Oreg. 239, 33 Pac. 678; Vance *v.* Wood, 22 Oreg. 77, 29 Pac. 73.

Tennessee.— Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.

Texas.— Brownson *v.* Scanlan, 59 Tex. 222.

United States.— Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822; Potts *v.* Gilbert, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347.

a succession of relationships created by deed or other act or by operation of law.[58]

b. Vendor and Vendee — (I) *Voluntary Conveyances.* Except in one state[59] the law is well settled that such privity exists between vendor and vendee as will authorize the tacking of their successive possessions to perfect title by adverse possession in the vendee.[60] A vendor cannot, however, avail himself of the possession of his vendee to make up the statutory period, where the vendee repudiates the title of his vendor, to perfect title by adverse possession.[61]

(II) *Involuntary Conveyances.* A purchaser of land at a judicial sale may tack his possession to that of the person whose land is so sold, to make up the statutory period,[62] but the sale must rest on a valid decree, judgment, or order.[63] A possession under a sheriff's deed without judgment and execution against the former occupant cannot be tacked to that of such former occupant,[64] and the

58. Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534.

59. In South Carolina the rule has been settled from the earliest period to the present time that where possession of land is conveyed by the disseizor before the expiration of the statutory period necessary to bar the real owner, continuity of possession is broken, and the grantee of the disseizor cannot unite his possession to that of the disseizor in order to show adverse possession for the requisite period. Garrett *v.* Weinberg, 48 S. C. 28, 26 S. E. 3; Johnson *v.* Cobb, 29 S. C. 372, 7 S. E. 601; Ellen *v.* Ellen, 16 S. C. 132; Begues *v.* Warley, 14 S. C. 180; Congdon *v.* Morgan, 14 S. C. 587; Mazyck *v.* Wight, 2 Brev. (S. C.) 151; King *v.* Smith, Rice (S. C.) 10.

60. *Alabama.*— Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Doe *v.* Adams, 121 Ala. 664, 25 So. 716; Riggs *v.* Fuller, 54 Ala. 141.

District of Columbia.— Neale *v.* Lee, 19 D. C. 5.

Illinois.— Faloon *v.* Simshauser, 130 Ill. 649, 22 N. E. 835; Hale *v.* Gladfelder, 52 Ill. 91.

Iowa.— Kilbourne *v.* Lockman, 8 Iowa 380.

Kentucky.— Beal *v.* Brooks, 7 J. J. Marsh. (Ky.) 232, 23 Am. Dec. 401.

Maryland.— Hanson *v.* Johnson, 62 Md. 25, 50 Am. Rep. 199.

Massachusetts.— Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515.

Minnesota.— St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17; Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Missouri.— Cooper *v.* Ord, 60 Mo. 420.

Nebraska.— Murray *v.* Romine, (Nebr. 1900) 82 N. W. 318; Lantry *v.* Wolff, 49 Nebr. 374, 68 N. W. 494; Stettnische *v.* Lamb, 18 Nebr. 619, 26 N. W. 374.

Ohio.— McNeely *v.* Langan, 22 Ohio St. 32.

Oregon.— Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402.

Pennsylvania.— Hughs *v.* Pickering, 14 Pa. St. 297; Cunningham *v.* Patton, 6 Pa. St. 355; Graffius *v.* Tottenham, 1 Watts & S. (Pa.) 488, 37 Am. Dec. 472.

Tennessee.— Baker *v.* Hale, 6 Baxt. (Tenn.) 46; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Chilton *v.* Wilson, 9 Humphr. (Tenn.) 399.

Texas.— Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48; McManus *v.* Matthews, (Tex. Civ. App. 1900) 55 S. W. 589.

Vermont.— Day *v.* Wilder, 47 Vt. 583.

United States.— Lea *v.* Polk County Copper Co., 21 How. (U. S.) 493, 16 L. ed. 203; Alexander *v.* Pendleton, 8 Cranch (U. S.) 462, 3 L. ed. 624.

Successive possessions of unincorporated society and corporation.— Presumption of conveyance.— Where an unincorporated society holding property adversely becomes duly organized as a corporation, its possession prior to incorporation may be tacked to that subsequent thereto for the purpose of establishing title under the statute of limitations. The reason for this is that "the corporation . . . succeeded, without any formal conveyance, to all the property of the society and to all property held for its use. The case must be treated as if the society organized the corporation and transferred to it all the right and possession which it had." Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134, 144. To same effect see Bakersfield Town Hall Assoc. *v.* Chester, 55 Cal. 98.

61. Payne *v.* McKinney, 30 Ga. 83.

62. *Arkansas.*— Memphis, etc., R. Co. *v.* Organ, 67 Ark. 84, 55 S. W. 952.

Florida.— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Massachusetts.— Peele *v.* Chever, 8 Allen (Mass.) 89.

Oregon.— Clark *v.* Bundy, 29 Oreg. 190, 44 Pac. 282.

Pennsylvania.— Schetz *v.* Fitzwater, 5 Pa. St. 126.

Tennessee.— Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353.

Texas.— Cochrane *v.* Faris, 18 Tex. 850; Collier *v.* Couts, 92 Tex. 234, 47 S. W. 525.

The rule as stated in the text has been applied in the case of purchasers of land at a sale made pursuant to a decree of foreclosure (Memphis, etc., R. Co. *v.* Organ, 67 Ark. 84, 55 S. W. 952); to sales under decrees for partition (Clark *v.* Bundy, 29 Oreg. 190, 44 Pac. 282); and to sales by administrators for payment of debts (Peele *v.* Chever, 8 Allen (Mass.) 89).

63. Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871; Hester *v.* Coats, 22 Ga. 56; Collier *v.* Couts, 92 Tex. 234, 47 S. W. 525.

64. Hester *v.* Coats, 22 Ga. 56.

mere possession of such deed is not of itself sufficient evidence to establish privity, because it is not of itself evidence of the officer's authority to sell.[65] So it has been held that where title has been adjudicated in the plaintiff in an action of ejectment, but the defendant in possession has been decreed to have a lien upon the land, and the land has been ordered sold to satisfy it, the purchaser at a sale under such decree cannot, in a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession, subsequent to the sale, for the purpose of establishing a title by adverse possession against another who claims under the same source of title as the plaintiff in the action where the sale was had.[66]

c. Vendor and One Holding under Contract of Purchase. The occupancy of the vendee in a contract for the purchase of land is that of a tenant and enures to the benefit of the vendor for the purpose of perfecting title of the latter by adverse possession.[67] As a consequence of this rule the possession of such vendee cannot be tacked to that of his grantee to make up the statutory period.[68] Where the vendee, after occupying the land under his contract of purchase, subsequently acquires a deed thereto, his possessions before and after the acquisition of the deed may be tacked to perfect title in himself by adverse possession.[69]

d. Landlord and Tenant. The possession of landlord and tenant may be tacked to complete the bar of the statute of limitations.[70] And it is not necessary that the possession should be that of a single tenant. The landlord may tack the possession of several tenants to complete the statutory period.[71] So a temporary vacancy, such as is incident to a change of tenants, does not prevent the tacking of the various possessions.[72]

e. Ancestor and Heir. Privity such as will authorize the tacking of possessions exists between two successive holders where the latter takes under the earlier by descent.[73] This rule proceeds upon the theory that there is no new

65. Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

66. Carson *v.* Dundas, 39 Nebr. 503, 58 N. W. 141.

67. *Kentucky.*— Jarboe *v.* McAtee, 7 B. Mon. (Ky.) 279; Beal *v.* Brooks, 7 J. J. Marsh. (Ky.) 232, 23 Am. Dec. 401.

Illinois.— Kruse *v.* Wilson, 79 Ill. 233; Hale *v.* Gladfelder, 52 Ill. 91.

Missouri.— Mabary *v.* Dollarhide, 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639.

North Carolina.— Brown *v.* Brown, 106 N. C. 451, 11 S. E. 647.

Tennessee.— Valentine *v.* Cooley, Meigs (Tenn.) 613, 33 Am. Dec. 166.

Texas.— Cook *v.* Coleman, (Tex. Civ. App. 1895) 33 S. W. 756.

Washington.—McAuliff *v.* Parker, 10 Wash. 141, 38 Pac. 744.

68. Plumer *v.* Brown, 8 Metc. (Mass.) 578.

69. State Bank *v.* Smyers, 2 Strobh. (S. C.) 24; Valentine *v.* Cooley, Meigs (Tenn.) 613, 33 Am. Dec. 166. See also Brown *v.* Brown, 106 N. C. 451, 11 S. E. 647. *Contra,* Barnes *v.* Vickers, 3 Baxt. (Tenn.) 370.

Donor and donee.— Adverse possession of inclosed land by a donee before deed may be coupled with possession after deed to make out the statutory period necessary to constitute title by adverse possession. Sanders *v.* Logue, 88 Tenn. 355, 12 S. W. 722.

70. *Alabama.*— Riggs *v.* Fuller, 54 Ala. 141.

Illinois.— Schneider *v.* Botsch, 90 Ill. 577.

Massachusetts.— Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

North Carolina.—Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757.

Oregon.— Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402.

South Carolina.— King *v.* Smith, Rice (S. C.) 10.

Texas.— Virginia Bank *v.* Hedges, 38 Tex. 614.

71. Johnson *v.* McMillan, 1 Strobh. (S. C.) 143; Sims *v.* Eastland, 3 Head (Tenn.) 368; Johnson *v.* Nash, 15 Tex. 419.

72. Thompson *v.* Kauffelt, 110 Pa. St. 209, 1 Atl. 267.

73. *Alabama.*— Riggs *v.* Fuller, 54 Ala. 141.

Massachusetts.— Frost *v.* Courtis, 172 Mass. 401, 52 N. E. 515; Melvin *v.* Whiting, 13 Pick. (Mass.) 184.

Minnesota.— Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.

Missouri.— Fugate *v.* Pierce, 49 Mo. 441.

North Carolina.— University Trustees *v.* Blount, 4 N. C. 455.

Oregon.— Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402.

Pennsylvania.— Graffius *v.* Tottenham, 1 Watts & S. (Pa.) 488, 37 Am. Dec. 472.

South Carolina.— Turpin *v.* Sudduth, 53 S. C. 295, 31 S. E. 245, 306 [decided under a statute providing that the right of a person

entry or trespass, but that the possession of the ancestors is cast by operation of law upon the heir, and that there is therefore no break in the continuity of the possession,[74] and where one heir enters into possession, his possession will enure to the benefit of the estate.[75] So the possession of a tenant holding under the ancestor enures to the benefit of the heirs.[76]

f. Testator and Devisee. Such privity exists between testator and devisee as will authorize the tacking of the two possessions to make up the period necessary to acquire title by prescription,[77] and the fact that the will is not executed in compliance with the statutory requirements does not alter the rule.[78] So it has been held that there is sufficient privity between the testator, the person to whom he has devised land for life, and the remainder-man under his will, to establish a title by adverse possession if the possession by the testator and the devisees is continuous for the statutory period of limitations. Privity here is based upon the fact that both devisees claim one title under the same will.[79] So, where the life-tenant under a will never enters into possession, and the remainder-man takes possession thereunder, his possession and that of the testator may be tacked to make up the statutory period.[80]

g. Decedent and Administrator. In the absence of any statutory provisions to the contrary, the occupation of an intestate and his administrator cannot be tacked to make up the statutory period,[81] and *a fortiori* the possession of the intestate and of a grantee of the administrator cannot be tacked.[82] Where, however, the administrator has the legal right by statute to take possession and control of his real estate, his possession is in privity with that of the intestate.[83]

h. Husband and Wife. At common law a wife has no such privity of estate with her husband, in land of which he died in adverse possession, that her continued adverse possession after his decease, without deed or devise from him, can be tacked to his to give her a complete title by disseizin.[84] And the reason for

to the possession of real property shall not be impaired by reason of the death of a person in possession]; Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645; Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657; Duren *v.* Kee, 26 S. C. 219, 2 S. E. 4; Williams *v.* McAliley, Cheves (S. C.) 200.

Tennessee.— Woodruff *v.* Roysden, (Tenn. 1900) 58 S. W. 1066; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488.

Canada.— Smyth *v.* McDonald, 5 Nova Scotia, 274.

Decedent and son-in-law.— If a person die in adverse possession of a tract of land, and his son-in-law succeeds him in the possession, the relation the latter sustained to the deceased will constitute such privity as will entitle him to connect his possession with that of his father-in-law so as to give him the benefit of the latter's adverse possession. The possession of the deceased descends to his children, and if a person marries one of them the marriage will constitute such privity as will entitle him to tack his possession to that of his wife's father. St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

74. Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645.

75. Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Alexander *v.* Stewart, 50 Vt. 87.

76. Williams *v.* McAliley, Cheves (S. C.) 200.

77. Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551; Chouquette *v.* Barada, 23 Mo. 331; Hart *v.* Williams, 189 Pa. St. 31, 41 Atl. 983.

78. Hanson *v.* Johnson, 62 Md. 25, 50 Am. Rep. 199.

79. Haynes *v.* Boardman, 119 Mass. 414. *Contra*, Austin *v.* Rutland R. Co., 45 Vt. 215.

80. Miller *v.* Miller, 15 Pick. (Mass.) 57.

81. Bullen *v.* Arnold, 31 Me. 583; East Tennessee Iron, etc., Co. *v.* Ferguson, (Tenn. Ch. 1895) 35 S. W. 900. See also Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488.

82. Vance *v.* Fisher, 10 Humphr. (Tenn.) 211.

83. Ricker *v.* Butler, 45 Minn. 545, 48 N. W. 407; Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402.

84. *Indiana.*— McEntire *v.* Brown, 28 Ind. 347.

Massachusetts.— Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

Pennsylvania.— Collins *v.* Lynch, 7 Kulp (Pa.) 15.

Tennessee.— East Tennessee Iron, etc., Co. *v.* Walton, (Tenn. Ch. 1895) 35 S. W. 459; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488.

England.— Doe *v.* Barnard, 13 Q. B. 945, 66 E. C. L. 945.

The possession of the widow enures to the benefit of the heirs, and, for the purpose of perfecting title in them, may be tacked to that of the husband, and this because she cannot, without the assent of the heirs, change the character of the possession from an adverse to a friendly one. Mills *v.* Bodley, 4 T. B. Mon. (Ky.) 248.

this is that a wife has no title, seizin, or right of entry as dowress until the assignment of dower.[85] This rule is in no way affected by the fact that she resided on the land with him during his possession.[86] Where, however, by virtue of statute, the widow is entitled to occupy in common with the heir any lands in which she is entitled to dower, before assignment and until the heir shall object thereto, such an occupancy by her until objection is made by the heir will be a continuance of the possession of the husband, and such privity will exist between them as to authorize the tacking of her possession to her husband's to enable her to defeat an action by the real owner for possession.[87] And it has been held that where, by statute, the widow is entitled to quarantine in the whole property until dower is assigned to her, her possession is in privity with that of her husband.[88] If a woman in adverse possession of land marries and continues in such possession after her husband's death, her possession and his may be tacked together to make one continued adverse possession, because the husband's possession is in legal effect the possession of the wife,[89] and the duration of the possession, by a husband, of land claimed by him to belong to his wife, and to which he made no claim in any other right, may be added to the widow's possession to sustain a title by adverse possession in her.[90] An estate by the curtesy is in the nature of an estate by descent rather than purchase, and possession under such an estate may be tacked to the preceding possession of the wife so as to raise the bar of the statute of limitations.[91]

i. Squatters and Purchasers of Tax-Title. Where a purchaser of land at a void tax-sale, relying on his tax-deed, recovers possession of land from squatters thereon, the prior possession of the squatters is not by this recovery rendered available to the tax-purchaser to perfect title by adverse possession against the true owner.[92]

j. Former Occupant and Person Acquiring Title by Compromise. Where one person enters into possession, and another claims adversely to him and takes possession under such claim by consent of the first possessor, pursuant to a compromise between them, this is not a continuity of the first possession, there being no privity between the parties.[93]

4. What Conveyances or Transfers Create Privity — a. Necessity of Writing. While in one jurisdiction devolution and possession are regarded as transfers of title to land which can pass only by deed, by law, or by descent,[94] the great weight of authority is to the effect that the privity requisite to constitute continuous adverse possession by tacking the possession of the original entryman to that of another may be effected by any conveyance, agreement, or understanding that has for its object a transfer of the possession and is accompanied by a transfer in fact.[95] It does not follow that because a deed is required to transfer

85. Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

86. East Tennessee Iron, etc., Co. *v.* Walton, (Tenn. Ch. 1895) 35 S. W. 459.

87. McEntire *v.* Brown, 28 Ind. 347.

88. Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600; Chouquette *v.* Barada, 23 Mo. 331. *Contra*, Robinson *v.* Allison, (Ala. 1900) 27 So. 461, in which it was held that the right of quarantine establishes no privity; that it is not an estate in land, but a mere temporary privilege to occupy it and have its rents and profits.

89. Den *v.* Lloyd, 32 N. J. L. 326.

90. Holton *v.* Whitney, 30 Vt. 405.

91. Colgan *v.* Pellens, 48 N. J. L. 27, 2 Atl. 633.

92. Squatters, in judgment of the law, hold under the legal title, and their possession enures to its benefit. Bell *v.* Fry, 5 Dana (Ky.) 341. See also Wilson *v.* Purl, 133 Mo. 367, 34 S. W. 884.

93. Jackson *v.* Leonard, 9 Cow. (N. Y.) 653.

94. Sawyer *v.* Kendall, 10 Cush. (Mass.) 241; Ward *v.* Bartholomew, 6 Pick. (Mass.) 409.

95. *Alabama.*— Doe *v.* Adams, 121 Ala. 664, 25 So. 716.

Connecticut.— Smith *v.* Chapin, 31 Conn. 530.

Illinois.— Kepley *v.* Scully, 185 Ill. 52; 57 N. E. 187.

Minnesota.— Vandall *v.* St. Martin, 42 Minn. 163, 44 N. W. 525.

New Jersey.—Davock *v.* Nealon, 58 N. J. L. 21, 32 Atl. 675.

Pennsylvania.— Collins *v.* Lynch, 157 Pa. St. 246, 27 Atl. 721, 37 Am. St. Rep. 723.

A paper transfer evidencing a change of possession by succession is not necessary to blend the first possession into the second. The right of a person holding possession adversely may be transferred by parol.

the title to real estate that the same solemnity must be observed in the transfer of the possession where the title and possession are not united in the same person.[96]

b. Void Deeds. A deed from one possessor to another, void on its face, does not create privity so as to authorize the tacking of their respective possessions to create a title by prescription.[97]

c. Fraudulent Deeds. Where several are in adverse possession, and the period of such several possessions is more than the period of limitations, but the possessors claim from the first by successive deeds in fee simple, the possession may be connected, though the deeds were fraudulent.[98]

d. Defectively Executed Deeds. A deed executed by a married woman who is not privily examined creates privity between herself and her grantee.[99]

e. Deeds Omitting Description of or Misdescribing Land. The general rule is that possessions cannot be tacked to make out title by prescription where the deed under which the last occupant claims title does not include the land in dispute.[1] It must clearly appear in the deed that the particular premises were embraced in the deed or transfer, in whatever form it may have been made.[2] It has been held, however, that a mistake in a deed[3] whereby a portion of the premises intended to be conveyed has been omitted in the description does not prevent the

Connecticut.— Smith *v.* Chapin, 31 Conn. 530.

Florida.— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Illinois.— Faloon *v.* Simshauser, 130 Ill. 649, 22 N. E. 835; Weber *v.* Anderson, 73 Ill. 439.

Missouri.— Crispen *v.* Hannavan, 50 Mo. 536; Menkens *v.* Blumenthal, 27 Mo. 198.

Nebraska.— Murray *v.* Romine, (Nebr. 1900) 82 N. W. 318; Lantry *v.* Wolff, 49 Nebr. 374, 68 N. W. 494.

Ohio.— McNeely *v.* Langan, 22 Ohio St. 32.

Oregon.— Vance *v.* Wood, 22 Oreg. 77, 29 Pac. 73.

Pennsylvania.— Collins *v.* Lynch, 157 Pa. St. 246, 27 Atl. 721, 37 Am. St. Rep. 723; Cunningham *v.* Patton, 6 Pa. St. 355.

Tennessee.— Rembert *v.* Edmondson, 99 Tenn. 15, 41 S. W. 935, 63 Am. St. Rep. 819.

Texas.— McManus *v.* Matthews, (Tex. Civ. App. 1900) 55 S. W. 589; Mexia *v.* Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016.

Wisconsin.— Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534; Allis *v.* Field, 89 Wis. 327, 62 N. W. 85.

United States.— Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822.

96. Weber *v.* Anderson, 73 Ill. 439.

The rule is not affected by a statute providing that no estate or interest in lands other than leases for a term not exceeding one year shall be created, granted, or assigned unless by act or operation of law, or by deed or conveyance in writing, and the reason for this is that the person in possession has no "estate" until the lapse of the statutory period. Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534.

97. Simpson *v.* Downing, 23 Wend. (N. Y.) 316.

98. Clark *v.* Chase, 5 Sneed (Tenn.) 636.

99. Miller *v.* Bumgardner, 109 N. C. 412, 13 S. E. 935.

1. *Louisiana.*— Vicksburg, etc., R. Co. *v.* Le Rosen, 52 La. Ann. 192, 26 So. 854.

Massachusetts.— Ward *v.* Bartholomew, 6 Pick. (Mass.) 409.

Nebraska.— Pohlman *v.* Lohmeyer, (Nebr. 1900) 83 N. W. 201.

New York.— Smith *v.* Reich, 80 Hun (N. Y.) 287, 30 N. Y. Suppl. 167.

Wisconsin.— Allis *v.* Field, 89 Wis. 327, 62 N. W. 85; Ablard *v.* Fitzgerald, 87 Wis. 516, 58 N. W. 745; Dhein *v.* Beuscher, 83 Wis. 316, 53 N. W. 551; Sheppard *v.* Wilmott, 79 Wis. 15, 47 N. W. 1054; Graeven *v.* Dieves, 68 Wis. 317, 31 N. W. 914.

United States.— Trager *v.* Jenkins, 136 U. S. 651, 10 S. Ct. 1074, 34 L. ed. 557.

2. Allis *v.* Field, 89 Wis. 327, 62 N. W. 85; Potts *v.* Gilbert, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347. Thus it has been held that where a disseizor conveys part of the land, and the grantee, under color of the deed, enters upon the whole, the possession of the first disseizor will not avail his grantee in regard to the part not embraced in the deed. Ward *v.* Bartholomew, 6 Pick. (Mass.) 409; Blackstock *v.* Cole, 51 N. C. 560. This rule has also been applied where the former possessor by mistake occupies land not included within the boundaries defined in the deed under which he holds, and conveys by the description of his own deed. According to the weight of authority his possession of the land not included in such deed cannot be tacked to his successor's possession of such land to give the latter a prescriptive title (Ely *v.* Brown, 183 Ill. 575, 56 N. E. 181; Fell. etc., Co. *v.* Pennsylvania R. Co., (N. J. 1890) 20 Atl. 63; Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641; Graeven *v.* Dieves, 68 Wis. 317, 31 N. W. 914); although there is some authority to the contrary (Davock *v.* Nealon, 58 N. J. L. 21, 32 Atl. 675. *Compare* Neale *v.* Lee, 19 D. C. 5).

3. *Compare* cases cited *supra*, note 2.

grantee from acquiring title by prescription,[4] and that, although the deed does not accurately describe the premises intended to be conveyed, it will nevertheless create sufficient privity to authorize the tacking of the successive possessions if the acts of the parties make clear what was intended to be conveyed.[5]

f. Deeds in Which Mistake Is Made in Name of Grantee. A variance between the name of the grantee in a deed executed in pursuance of a decree, and the name of the purchaser as given in the decree, does not destroy the effect of the deed as color of title, and such deed will enable the grantee therein to tack his possession to that of the parties whose interests are sold, to make out title by adverse possession.[6]

5. Character of Possession of Predecessor Requisite to Authorize Tacking — a. In General. The possession of a prior occupant, of a character insufficient to give title by adverse possession, cannot be united with a subsequent possession of another to protect title by adverse possession in the latter.[7]

b. Effect of Possession Originating in Fraud. To entitle an occupant of land to tack the possession of his predecessor to his own to make up the statutory period, the possession of the former must not have originated in fraud of the rights of the true owner.[8]

c. Effect of Possession without Color of Title. It is not necessary, however, that the possession of the prior occupant should have been under color of title,[9] unless it is otherwise provided by statute.[10]

d. Effect of Possession without Claim of Right. Nevertheless such possession must at least be under claim of right or title.[11]

6. Effect of Intervals between Possessions of Prior and Subsequent Occupants. The possession of a prior occupant cannot be tacked to that of a subsequent occupant claiming under him, where any interval of time, whether of long or short duration, intervenes between the two possessions.[12] When premises are

4. Vandall *v.* St. Martin, 42 Minn. 163, 44 N. W. 525. See also Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187.

5. Bateman *v.* Jackson, (Tex. Civ. App. 1898) 45 S. W. 224.

6. Clark *v.* Bundy, 29 Oreg. 190, 44 Pac. 282.

7. Wheeler *v.* Ladd, 40 Ark. 108; Hoye *v.* Swan, 5 Md. 237; Brown *v.* Chicago, etc., R. Co., 101 Mo. 484, 14 S. W. 719.

8. Hammond *v.* Crosby, 68 Ga. 767; Farrow *v.* Bullock, 63 Ga. 360; Worthy *v.* Kinamon, 44 Ga. 297; Kohlman *v.* Glandi, 52 La. Ann. 700, 27 So. 116; Innis *v.* Miller, 10 Mart. (La.) 289, 13 Am. Dec. 330.

9. *Kentucky.*— Bowles *v.* Sharp, 4 Bibb (Ky.) 550.

Nebraska.— Murray *v.* Romine, (Nebr. 1900) 82 N. W. 318.

Pennsylvania.— Collins *v.* Lynch, 157 Pa. St. 246, 27 Atl. 721, 37 Am. St. Rep. 723; Parker *v.* Southwick, 6 Watts (Pa.) 377; Overfield *v.* Christie, 7 Serg. & R. (Pa.) 172.

Texas.— Cochrane *v.* Faris, 18 Tex. 850.

Vermont.— Day *v.* Wilder, 47 Vt. 583.

Illustration of rule.—Where a trespasser on land commences an improvement, and makes a gift of his right to another or authorizes a sale of it, and leaves the possession, and it is sold, and the tenant takes possession under pursuance of the contract, possession of the trespasser can be tacked to his own so as to give title to the tenant by the statute of limitations. Hughs *v.* Pickering, 14 Pa. St. 297.

10. **Statute making color of title in prior occupant necessary.**— In North Carolina it is held that color of title in a prior occupant is necessary under a statute [Code, § 141] which provides that when the person in possession of any real property, or those under whom he claims, shall have been in possession of the same under known and visible lines and boundaries under colorable title for seven years, no entry shall be made or action sustained against such possessor, etc. Morrison *v.* Craven, 120 N. C. 327, 26 S. E. 940.

11. Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569; Bakewell *v.* McKee, 101 Mo. 337, 14 S. W. 119; Holtzman *v.* Douglas, 168 U. S. 278, 18 S. Ct. 65, 42 L. ed. 466. But see Parker *v.* Southwick, 6 Watts (Pa.) 377, in which it is said that in Pennsylvania actual possession, though founded on no pretense of right, is a legitimate subject of transfer.

The rule stated has been applied in a case where the predecessor in possession at no time claimed title. Brown *v.* Chicago, etc., R. Co., 101 Mo. 484, 14 S. W. 719.

12. *Kentucky.*— Griffith *v.* Dicken, 4 Dana (Ky.) 561.

Mississippi.— Benson *v.* Stewart, 30 Miss. 49.

Missouri.— Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226.

Texas.— Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Wheeler *v.* Moody, 9 Tex. 372.

Vermont.— Winslow *v.* Newell, 19 Vt. 164.

United States.— Western Union Beef Co. *v.* Thurman, 70 Fed. 960, 30 U. S. App. 516, 17 C. C. A. 542.

Application of rule.— Where A has adverse possession for two years only, and conveys his

left vacant the adverse possession follows the title of the true owner,[13] and the statute will run only from the commencement of the last adverse possession.[14]

7. Tacking Possessions of Same Person Temporarily Interrupted. Since the constructive possession of the true owner revives when actual possession by the adverse claimant ceases, a renewed adverse possession by him after temporary abandonment cannot be tacked to his prior possession to make out the statutory period.[15] Nor can one adverse holder tack together his own several holdings when he has allowed another person to acquire the intermediate tortious possession before his own has ripened into title.[16]

8. Tacking Possessions of Different Tracts. The possession of one part of a tract of land cannot be joined to the possession of another part so as to make up the statutory period.[17]

9. Tacking Possessions under Different Statutes. Part performance of the requirements of one statute cannot be tacked to part performance of the provisions of another statute, but, to constitute the bar, all the provisions of one or the other of the sections must be complied with.[18]

C. Interruption or Breach of Continuity— 1. What Constitutes Interruption or Breach — a. Denial of Claimant's Rights by Former Owner. The mere denial by the owner of the right of the adverse occupant,[19] or loose verbal claims of title in himself,[20] or ineffectual protests short of a disturbance of the rights of the adverse claimant in a legal sense, and short of the assertion of a right in himself,[21] will not interrupt the running of the statute or prevent its becoming a bar.

b. Entry by Original Owner — (I) *General Rule as to Effect of Entry.* The general rule is that entry on the land by the original owner before the expiration of the statutory period necessary to acquire title by adverse possession arrests the running of the statute.[22]

(II) *Statutory Exceptions to Rule.* In Pennsylvania, by virtue of special statutory enactments, an entry on lands held adversely does not interrupt the running of the statute of limitations unless an action of ejectment be commenced within a year thereafter.[23]

estate several years afterward to B, who has adverse possession for eighteen years, the two years' possession by A cannot be added in order to make up the statutory period. Kilburn *v.* Adams, 7 Metc. (Mass.) 33, 39 Am. Dec. 754.

13. Turner *v.* Baker, 64 Mo. 218, 27 Am. Rep. 226.

14. Benson *v.* Stewart, 30 Miss. 49.

15. Brown *v.* Hanauer, 48 Ark. 277, 3 S. W. 27; Tegarden *v.* Carpenter, 36 Miss. 404.

16. Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703.

17. Griffith *v.* Schwenderman, 27 Mo. 412; Potts *v.* Gilbert, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347.

18. Duck Island Club *v.* Bexstead, 174 Ill. 435, 51 N. E. 831.

19. Cox *v.* Clough, 70 Cal. 345, 11 Pac. 732.

20. Robinson *v.* Phillips, 56 N. Y. 634.

21. Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Jordan *v.* Lang, 22 S. C. 159.

22. *Illinois.*— Schenck *v.* White, 53 Ill. 358.
Kentucky.— McGowan *v.* Crooks, 5 Dana (Ky.) 65.
New Jersey.— Johnston *v.* Fitzgeorge, 50 N. J. L. 470, 14 Atl. 762.
New York.— Brinkerhoff *v.* Mooney, 42 N. Y. App. Div. 420, 59 N. Y. Suppl. 158.
Pennsylvania.— Smith *v.* Steele, 17 Pa. St. 30; Hinman *v.* Cranmer, 9 Pa. St. 40.
Texas.— Evitts *v.* Roth, 61 Tex. 81; Hull *v.* Woods, (Tex. Civ. App. 1894) 25 S. W. 458.
Virginia.— Taylor *v.* Burnsides, 1 Gratt. (Va.) 165.
Wisconsin.— Lewis *v.* Disher, 32 Wis. 504.
United States.— Henderson *v.* Griffin, 5 Pet. (U. S.) 151, 158, 8 L. ed. 79, wherein it is said: "It is settled by law that an entry on land by one having the right has the same effect in arresting the progress of the limitations as a suit."
England.— Worssam *v.* Vandenbrande, 17 Wkly. Rep. 53.
"An entry is thus operative because although at the moment there exists in fact a mixed possession it is yet legally regarded as residing exclusively in the true owner by virtue of his superior right. . . . It is only by the application of this principle that any effect is consistently given to a temporary entry. The presence of the intruder is eclipsed by the better title of the entering owner, and thus the necessary character of exclusiveness is, in contemplation of law, conferred upon a holding which otherwise would be equally shared by the antagonist parties." Smith *v.* Steele, 17 Pa. St. 30, 37; Altemus *v.* Campbell, 9 Watts (Pa.) 28, 34 Am. Dec. 494.

23. Douglas *v.* Irvine, 126 Pa. St. 643, 17 Atl. 802. Similar statutes have been enacted in a number of the states, which materially modify the common-law rule as re-

(III) *Requisites and Sufficiency of Entry*—(A) *Necessity of Entry on Land Claimed.* The entry must be on the land claimed.[24] The bar of the statute is not tolled by an entry into an adjoining tract held by the same party unless the property be held together as one acquisition or estate,[25] and where there are several possessors the entry must be on each parcel possessed.[26] If the land is situate in two or more counties there must be an entry on the parcel lying in each county.[27]

(B) *Necessity of Intent to Take Possession.* When a party is once dispossessed it is not every entry upon the premises without permission that would disturb the adverse possession. He may tread upon his own soil and still be as much out of possession of it there as elsewhere.[28] An entry, to defeat a subsisting actual possession, must be with the actual intention of taking possession.[29]

(C) *Necessity of Indicating Intent to Take Possession.* This intention must be sufficiently indicated by words or acts,[30] by express declaration, or by exercise of acts of ownership inconsistent with a subordinate character.[31] Occasional or temporary intrusions upon the land will not be sufficient to interrupt the running of the statute.[32] The acts should be open and notorious, and continue unbroken

gards the preservation of the rights of the person holding the legal title by entry. See the particular statutes.

24. Pender *v.* Jones, 3 N. C. 463.

25. Nearhoff *v.* Addleman, 31 Pa. St. 279.

26. Pender *v.* Jones, 3 N. C. 463; Coke Litt. 252*b*.

27. Hord *v.* Walker, 5 Litt. (Ky.) 22, 15 Am. Dec. 39.

Reason for rule.— In ejectment brought in one county, land lying in another county cannot be recovered. Whenever a person has been ousted of his possession it is a settled rule that to regain the possession by entry the entry must pursue the action for its recovery. Hord *v.* Walker, 5 Litt. (Ky.) 22, 15 Am. Dec. 39.

28. Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186.

29. *Connecticut.*— Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186.

Kentucky.— Young *v.* Withers, 8 Dana (Ky.) 165.

Maine.— Robison *v.* Swett, 3 Me. 316.

Massachusetts.— Bowen *v.* Guild, 130 Mass. 121.

New Jersey.— Johnston *v.* Fitzgeorge, 50 N. J. L. 470, 14 Atl. 762.

New York.— Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 390.

North Carolina.— Ransom *v.* Lewis, 63 N. C. 43.

Pennsylvania.— Hood *v.* Hood, 25 Pa. St. 417; Hinman *v.* Cranmer, 9 Pa. St. 40; Altemus *v.* Campbell, 9 Watts (Pa.) 28, 34 Am. Dec. 494; Miller *v.* Shaw, 7 Serg. & R. (Pa.) 129; Bradford *v.* Guthrie, 3 Pittsb. (Pa.) 213.

Rhode Island.— New Shoreham *v.* Ball, 14 R. I. 566.

Tennessee.— Creech *v.* Jones, 5 Sneed (Tenn.) 631.

Wisconsin.— St. Croix Land, etc., Co. *v.* Ritchie, 78 Wis. 492, 47 N. W. 657.

England.— Doe *v.* Danvers, 7 East 299.

30. Robison *v.* Swett, 3 Me. 316; Hood *v.* Hood, 25 Pa. St. 417; Bradford *v.* Guthrie, 3 Pittsb. (Pa.) 213.

Acts sufficient to indicate intention.— Entry and survey of a tract have been held sufficient to arrest the running of the statute. Hood *v.* Hood, 25 Pa. St. 417; Miller *v.* Shaw, 7 Serg. & R. (Pa.) 129. Going upon the land, claiming it, with the purpose of pointing it out and selling it to another, is also sufficient. Brickett *v.* Spofford, 14 Gray (Mass.) 514. During the three years immediately following the record of a tax deed which was void for irregularities, the original owner entered upon the land to remove the pine timber, and cut roads, built sled-ways, and cut and hauled the pine from the land during two successive lumber seasons of three or four months each, but did not place any building thereon. This occupancy was open and continuous for two seasons. It terminated when the pine timber was all removed, and the land, though fitted for agricultural purposes, continued unimproved during the whole period. This was held sufficient to interrupt the running of the statute of limitations. Haseltine *v.* Mosher, 51 Wis. 443, 8 N. W. 273. *Compare* also Wilson *v.* Henry, 35 Wis. 241, where the facts warranted the interruption of the running of the statute of limitations.

Where premises are not in possession of any one.— The intent to enter and take possession need not be shown by words or declarations, but may be inferred from acts or circumstances. If no one is in actual possession at the time of the entry no declaration of purpose would be useful or necessary. Johnston *v.* Fitzgeorge, 50 N. J. L. 470, 14 Atl. 762.

31. Markley *v.* Amos, 3 Bailey (S. C.) 603.

An entry by stealth under circumstances that go to show that the party claimed no right against another is an entry for purposes other than those connected with the right to enter, and is not sufficient to break the continuity of exclusive possession in another. Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186.

32. *Kentucky.*— Young *v.* Withers, 8 Dana (Ky.) 165; McDowell *v.* Kenney, 3 J. J. Marsh. (Ky.) 516.

Massachusetts.— Bowen *v.* Guild, 130 Mass. 121.

Minnesota.— Musser-Sauntry Land, etc.,

for a sufficient time to give notice to the person interested that a claim of right is intended by them.[33] The entry must not be accidental or by invitation of the party in possession; if it is, it will not be effectual to toll the statute of limitations.[34]

(D) *Necessity of Peaceable Entry.* It has been said that, to interrupt the running of the statute in favor of a claimant by adverse possession, the entry by the owner must be peaceable, and "not with force and strong hand."[35] A rule which would allow the owner of land to arrest the operation of the statute of limitations by forcible intrusion upon the peaceable possession of an adverse occupant, and the expulsion of the latter from the premises, would be followed by the most pernicious consequences.[36] It has been held, however, that a peaceable entry upon the actual adverse possession of another, followed by an unlawful detainer, does not interrupt the adverse possession if an action for the forcible entry and detainer is commenced within a reasonable time and prosecuted to a successful termination.[37]

(E) *Sufficiency of Entry by Agent.* The general rule that entry by the owner interrupts the running of the statute of limitations in favor of the adverse claimant applies whether the entry is made by the owner in person[38] or by agent,[39] and a subsequent ratification of an entry on land by an unauthorized agent is equivalent to an entry by previous command for the purpose of suspending the running of the statute.[40]

c. Entry or Intrusion by Stranger. The mere temporary entry or intrusion[41] or occasional trespass[42] by a stranger does not interrupt the running of the stat-

Co. *v.* Tozer, 56 Minn. 443, 57 N. W. 1072.

North Carolina.— McLean *v.* Smith, 106 N. C. 172, 11 S. E. 184.

Pennsylvania.— Hollinshead *v.* Nauman, 45 Pa. St. 140.

Tennessee.— Creech *v.* Jones, 5 Sneed (Tenn.) 631.

Wisconsin.— St. Croix Land, etc., Co. *v.* Ritchie, 78 Wis. 492, 47 N. W. 657; Stephenson *v.* Wilson, 37 Wis. 482.

Continuity of possession is not broken by the former owner going over the land several times, claiming it, and endeavoring to induce the tenants to acknowledge him as their landlord. Doe *v.* Clayton, 81 Ala. 391, 2 So. 24.

33. Robison *v.* Swett, 3 Me. 316; Ransom *v.* Lewis, 63 N. C. 43; Creech *v.* Jones, 5 Sneed (Tenn.) 631; St. Croix Land, etc., Co. *v.* Ritchie, 78 Wis. 492, 47 N. W. 657.

The reason for the rule is that such acts furnish no certain intention of the assertion of claim as rightful owner, and are often, in fact, done by mere naked trespassers. Creech *v.* Jones, 5 Sneed (Tenn.) 631.

But where the owner takes possession and fences and uses the land, this will interrupt the continuity of adverse possession, although the adverse possessor is out of the state and ignorant of the entry by the owner. Brinkerhoff *v.* Mooney, 42 N. Y. App. Div. 420, 59 N. Y. Suppl. 158.

34. Hood *v.* Hood, 25 Pa. St. 417.

35. Mendenhall *v.* Price, 88 Iowa 203, 55 N. W. 321; Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729; Ferguson *v.* Bartholomew, 67 Mo. 212; Norvell *v.* Gray, 1 Swan (Tenn.) 96.

36. Ferguson *v.* Bartholomew, 67 Mo. 212.

37. Cary *v.* Edmonds, 71 Mo. 523; Ferguson *v.* Bartholomew, 67 Mo. 212.

38. See *supra*, note 22 *et seq.*

39. Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219; Ingersoll *v.* Lewis, 11 Pa. St. 212, 51 Am. Dec. 536; Hinman *v.* Cranmer, 9 Pa. St. 40.

40. Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219; Hinman *v.* Cranmer, 9 Pa. St. 40.

41. *Iowa.*— Whalley *v.* Small, 29 Iowa 288.

Nebraska.— Ballard *v.* Hansen, 33 Nebr. 861, 51 N. W. 295.

Pennsylvania.— Green *v.* Kellum, 23 Pa. St. 254, 62 Am. Dec. 332; Smith *v.* Steele, 17 Pa. St. 30.

South Carolina.— Norwood *v.* Faulkner, 22 S. C. 367, 53 Am. Rep. 717.

United States.— Henderson *v.* Griffin, 5 Pet. (U. S.) 151, 8 L. ed. 79.

Quartering of army on premises.— Where possession was disturbed by an army quartering on the property, such interference will not arrest the running of the statute where defendants resumed their possession as soon thereafter as they reasonably could. McColgan *v.* Langford, 6 Lea (Tenn.) 108.

Temporary dispossession by Indians.— In trespass to try title against one who has been run off the land by Indians and resumed possession as soon as it was safe to return, defendant cannot compute the period of his absence under a plea of limitation. Fitch *v.* Boyer, 51 Tex. 336.

A single instance of attempted interruption of an adverse user of a private way, resulting in no actual interruption, and followed by no attempt to test the right, does not destroy the presumption of a grant founded upon the user. Connor *v.* Sullivan, 40 Conn. 26, 16 Am. Rep. 10.

42. New Shoreham *v.* Ball, 14 R. I. 566; Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239.

ute in behalf of the adverse occupant. The intrusion of a trespasser will in no case interrupt the continuity of adverse possession unless continued for such a length of time that knowledge of the intrusion is presumed, or so as to become the assertion of an adverse right.[43] If they are known, they become assertions of right, and operate to break the continuity unless legal remedies are resorted to within a reasonable time to regain possession and are prosecuted to a successful determination.[44] But where legal proceedings against the intruder are promptly and successfully prosecuted there is no interruption of the continuity,[45] and the period during which the possession was interrupted cannot be deducted in computing the length of adverse possession by the claimant.[46]

d. Abandonment of Possession by Claimant — (I) *Effect of Abandonment.* Where an adverse occupant abandons possession before the statutory period has run he loses all rights acquired by his adverse holding, and the rightful owner by such abandonment is placed in the same position in all respects as he was before the intrusion took place.[47] If the claimant abandons possession after judgment in ejectment against him, this stops the running of the statute, although plaintiff in ejectment did not take possession.[48]

(II) *What Constitutes Abandonment.* In determining what acts constitute an abandonment the character of the property and the uses for which it can be adapted is of considerable importance. As every case presents a different state of facts no general rule can be stated as to what constitutes abandonment.[49]

43. Bell *v.* Denson, 56 Ala. 444; Doe *v.* Eslava, 11 Ala. 1028.

44. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349; Beard *v.* Ryan, 78 Ala. 37; Doe *v.* Eslava, 11 Ala. 1028, wherein it is said: "If the interruptions are known and repeated without legal proceedings being instituted it is said that they become *legitimæ interruptiones*, and are converted into adverse assertions of right which if not promptly and effectually litigated defeat the claim of rightful prescription."

45. Ladd *v.* Dubroca, 61 Ala. 25; Doe *v.* Eslava, 11 Ala. 1028; Prouty *v.* Tilden, 164 Ill. 163, 45 N. E. 445. See also Beard *v.* Ryan, 78 Ala. 37.

46. Ladd *v.* Dubroca, 61 Ala. 25.

47. *Alabama.*— Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837.

Arkansas.— Sharp *v.* Johnson, 22 Ark. 79.

Georgia.— Thursby *v.* Myers, 57 Ga. 155; Joiner *v.* Borders, 32 Ga. 239; Byrne *v.* Lowry, 19 Ga. 27.

Illinois.— Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896.

Iowa.— Davenport *v.* Sebring, 52 Iowa 364, 3 N. W. 403.

Kentucky.— Smith *v.* Morrow, 7 J. J. Marsh. (Ky.) 442.

Maine.— Moore *v.* Moore, 21 Me. 350; Hamilton *v.* Paine, 17 Me. 219.

Maryland.— Stump *v.* Henry, 6 Md. 201, 61 Am. Dec. 300.

Mississippi.—Nixon *v.* Porter, 38 Miss. 401.

Missouri.— Crispen *v.* Hannavan, 50 Mo. 536; Menkens *v.* Blumenthal, 27 Mo. 198; Salle *dit* Lajoye *v.* Primm, 3 Mo. 529.

New York.— Cook *v.* Travis, 20 N. Y. 400; Poor *v.* Horton, 15 Barb. (N. Y.) 485.

Oregon.— Barrell *v.* Title Guarantee Co., 27 Oreg. 77, 39 Pac. 992.

Pennsylvania.— Susquehanna, etc., R., etc., Co. *v.* Quick, 68 Pa. St. 189.

South Carolina.— Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616.

Virginia.— Hollingsworth *v.* Sherman, 81 Va. 668; Taylor *v.* Burnsides, 1 Gratt. (Pa.) 165.

West Virginia.— Core *v.* Faupel, 24 W. Va. 238.

England.— Trustees, etc., Co. *v.* Short, 58 L. J. P. C. 4, 13 App. Cas. 793, 37 Wkly. Rep. 433, 53 J. P. 132.

Abandonment by tenant.— Although a tenant be put into possession of land with the understanding that he shall hold it a certain time, yet, if he abandon the possession and leave the land vacant, the understanding that he was to hold possession will not keep the possession continuous. Thursby *v.* Myers, 57 Ga. 155. Possession of the intruder which is ineffectual for the purpose of transferring title ceases, upon its abandonment, to be effectual for any purpose. Trustees, etc., Co. *v.* Short, 58 L. J. P. C. 4, 13 App. Cas. 793, 37 Wkly. Rep. 433, 53 J. P. 132.

Extent of rule.— The adverse occupant is concluded to the same extent as if he had been evicted by process of law. Poor *v.* Horton, 15 Barb. (N. Y.) 485. The fact that the occupant intended to return does not alter the rule. Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837; Susquehanna, etc., R., etc., Co. *v.* Quick, 68 Pa. St. 189; Stephens *v.* Leach, 19 Pa. St. 262.

48. Doe *v.* Stephens, 1 Houst. (Del.) 31.

49. What does not constitute abandonment. —*Removed from land.*—A mere removal from the land without an intent to abandon it, but with an intent still to use and claim it, has been held no waiver of a previous possession. Harper *v.* Tapley, 35 Miss. 506. But where one leaves the ground personally, he must leave it under circumstances indicating that he still holds possession. Susquehanna, etc., R., etc., Co. *v.* Quick, 68 Pa. St. 189. If a per-

e. Surrender of Possession by Claimant. When an adverse claimant surrenders possession to the disseizor before the expiration of the time necessary to acquire title by prescription, this puts an end to the running of the statute in his favor, and the possession thus interrupted is not effectual for any purpose.[50] This is true although the surrender is induced by threats of the true owner that he would resort to legal proceedings.[51] An agreement to surrender before expiration of the statutory period, based on a valuable consideration, also stops the running of the statute,[52] and continued possession thereunder will not be regarded as adverse;[53]

son enters on land under color of title, and cultivates the land except for one year, during which he pastures it and keeps up the fences, it cannot be said, as a matter of law, that he has abandoned the possession because no one actually resides on the land. Perry *v.* Lawson, 112 Ala. 480, 20 So. 611. It has also been held that where a person took possession of forty acres of swampy land under claim of title, fenced it, and built a house on it, but, after living on it several years, left it vacant for two years because he was unable to find a tenant, but his improvements remained on the land and no one else took possession, he did not thereby lose possession. Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896.

Failure to exercise acts of ownership over timber land for eleven years does not conclusively show an abandonment of possession, the question being one for the jury. To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of possession. Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

Temporary user during period of unfitness for occupancy.—Where a non-possessor cleared, cultivated, and used the land adversely to and with the full knowledge of the alleged owner, and without any intent on his part to assert title, and the fence was accidentally burned, thereby rendering the active occupation of the premises unfit for use during several years, it was held that the statute did not cease to run during that non-user where there was no evidence tending to show abandonment except non-user. Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137.

Temporary non-user, when not needed.—The adverse user of an irrigating ditch, through the lands of another, only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed does not break the continuity of the user. Hesperia Land, etc., Co. *v.* Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

Where land is submerged.—When land held adversely is submerged for years, so that the holder is forced to abandon the possession, the time during which it is thus submerged cannot be counted in favor of either the holder of the legal title or the person holding adversely. Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531.

Leaving family in possession of premises.—A temporary absence by the adverse claimant from his home, he leaving his family in possession, is not such an interruption of possession as to stop the running of the statute (Smith *v.* De La Garza, 15 Tex. 150; Cunningham *v.* Brumback, 23 Ark. 336), especially where the adverse claimant claims in right of his wife (Smith *v.* De La Garza, 15 Tex. 150).

Where the cestui que trust, under a deed to secure the payment of a debt, holds for two years the property adversely to the debtor, and afterward surrendered it to the trustee to be sold under the deed of trust, and becomes himself the purchaser, it seems that he does not relinquish any right which he may have acquired by adverse possession. Turner *v.* Smith, 11 Tex. 620.

50. School Dist. No. Four *v.* Benson, 31 Me. 381; Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Blaisdell *v.* Martin, 9 N. H. 253; Warren *v.* Putnam, 63 Wis. 410, 24 N. W. 58.

Quitclaim to original owner.—Within three years after the recording of a tax-deed the grantee quitclaimed to the original owner, but the deed was not recorded. Subsequently he conveyed to a third person, who had no knowledge of the quitclaim and who duly recorded his conveyance. The land remained unoccupied for more than three years after the tax-deed was recorded. It was held that such quitclaim deed operated as an abandonment and surrender to the original owner for the constructive adverse possession which arose in the grantor's favor by virtue of his taking such tax-deed and recording it, and that after such constructive adverse possession ceased, the statute of limitations of three years ceased to run in favor of his title, and ran in favor of the original owner, and barred any right of action in favor of those claiming under the tax-deed after the expiration of the three years from the recording thereof. Warren *v.* Putnam, 63 Wis. 410, 24 N. W. 58.

Surrender to one of several cotenants.—The relinquishment and yielding up to one of several tenants in common by the disseizor, after a disseizin of five years, of all the right, seizin, possession, and betterments which the disseizor had in and to the proportion of that tenant in common in the premises, has the effect to put all the tenants in common in the seizin and possession of their shares, respectively, and to prevent the operation of the statute of limitations against any of them prior to that time. Vaughan *v.* Bacon, 15 Me. 455, 33 Am. Dec. 628.

51. Shaffer *v.* Lowry, 25 Pa. St. 252.

52. Eldridge *v.* Parish, 6 Tex. Civ. App. 35, 25 S. W. 49; Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815.

53. Eldridge *v.* Parish, 6 Tex. Civ. App. 35, 25 S. W. 49.

but an agreement by the adverse occupant to surrender after title has been acquired by adverse possession for the statutory period is void for want of consideration and does not divest him of the title.[54]

f. Recognition of Title in Another — (I) *Effect of Recognition.* Interruption of the continuity necessary to acquire title by prescription occurs when the adverse claimant recognizes the title of the disseizee. On recognition of such title his adverse possession ceases to be adverse, no matter how hostile it may previously have been,[55] and limitation does not again begin to run against the person whose title is acknowledged until the claimant repudiates his title.[56]

(II) *What Constitutes Recognition.* Title in another may be recognized in many different ways, as by agreeing to hold under another;[57] by confessing title when sued in ejectment, instead of pleading and going to trial;[58] by consenting to a conveyance by the true owner to a third person from whom the claimant takes a bond for deed;[59] by declaring title to be in another;[60] or by written admission of title in another.[61] Proceedings to foreclose a mortgage by advertisement is such an acknowledgment of the right of the mortgagor to redeem as to repel the presumption otherwise arising from occupation for more than the statutory period by the mortgagee.[62] So it has been held a recognition of the owner's title where a company, both prior and subsequent to entering the land, attempted to condemn it,[63] and proceedings by a company for the vaca-

54. Parham *v.* Dedman, 66 Ark. 26, 48 S. W. 673.

55. *Alabama.*— Sample *v.* Reeder, 107 Ala. 227, 18 So. 214.

California.— Jensen *v.* Hunter, (Cal. 1895) 41 Pac. 14; Judson *v.* Malloy, 40 Cal. 299; McCracken *v.* San Francisco, 16 Cal. 591.

Kentucky.— Roberts *v.* McGraw, 11 Bush (Ky.) 26; Ray *v.* Barker, 1 B. Mon. (Ky.) 364; Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

Louisiana.— Templet *v.* Baker, 12 La. Ann. 658.

Maine.— Lamb *v.* Foss, 21 Me. 240; Millay *v.* Millay, 18 Me. 387.

Maryland.— Campbell *v.* Shipley, 41 Md. 81.

Minnesota.— St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

Nebraska.— Nebraska R. Co. *v.* Culver, 35 Nebr. 143, 52 N. W. 886; Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

New York.— Devyr *v.* Schaefer, 55 N. Y. 446; New York *v.* Mott, 60 Hun (N. Y.) 423, 15 N. Y. Suppl. 22; Keneda *v.* Gardener, 4 Hill (N. Y.) 469.

North Carolina.— Williams *v.* Scott, 122 N. C. 545, 29 S. E. 877.

Pennsylvania.— Ingersoll *v.* Lewis, 11 Pa. St. 212, 51 Am. Dec. 536; Read *v.* Thompson, 5 Pa. St. 327; Miller *v.* Keene, 5 Watts (Pa.) 348; Deppen *v.* Bogar, 7 Pa. Super. Ct. 434; Bradford *v.* Guthrie, 3 Pittsb. (Pa.) 213.

South Carolina.— Congdon *v.* Morgan, 14 S. C. 587; Markley *v.* Amos, 2 Bailey (S. C.) 603; Harrington *v.* Wilkins, 2 McCord (S. C.) 289.

Tennessee.— Free *v.* Fine, (Tenn. Ch. 1900) 59 S. W. 384.

Texas.— Eldridge *v.* Parish, 6 Tex. Civ. App. 35, 25 S. W. 49; Robinson *v.* Bazoon, 79 Tex. 524, 15 S. W. 585.

Vermont.— Lyman *v.* Little, 15 Vt. 576.

Wisconsin.— Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815.

United States.— Daveis *v.* Collins, 43 Fed. 31.

Canada.— Doe *v.* Walker, 8 U. C. Q. B. 571.

Effect of husband's admissions on rights of wife.— Although the husband be a drunkard, and the wife supports the family by her industry, he still continues the head of the family, and any admission by him as to whether his occupation of land is adverse concludes her right after his death. Daveis *v.* Collins, 43 Fed. 31.

Rule applicable as between cotenants.— Where a tenant in common in possession recognizes his cotenant's right in the land, his possession then ceases to be adverse. House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414.

56. House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414.

57. Ray *v.* Barker, 1 B. Mon. (Ky.) 364; Read *v.* Thompson, 5 Pa. St. 327; Free *v.* Fine, (Tenn. Ch. 1900) 59 S. W. 384.

Conditional agreement to hold under another.— Where there is an agreement by the possessor under a junior grant, that if the elder patentee prevailed in an ejectment against a certain other person he would thenceforth hold under him, and such elder patentee did prevail in the action before the limitation had run, the plea of continued adverse possession will not avail. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

58. Keneda *v.* Gardner, 4 Hill (N. Y.) 469.

59. Millay *v.* Millay, 18 Me. 387.

60. Deppen *v.* Bogar, 7 Pa. Super. Ct. 434.

61. Lamb *v.* Foss, 21 Me. 240; Miller *v.* Keene, 5 Watts (Pa.) 348; McIntyre *v.* Canada Co., 18 Grant Ch. (U. C.) 367.

62. Calkins *v.* Isbell, 20 N. Y. 147.

63. Nebraska R. Co. *v.* Culver, 35 Nebr. 143, 52 N. W. 886; Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

tion of certain streets adversely to a city has been held such a recognition of the rights of the city as to break the continuity of the adverse possession.[64]

g. Taking or Offering to Take Lease from Another. The acceptance of a lease by the claimant before the statutory period has run is a waiver of adverse possession previously originated, as against the person from whom the lease is accepted,[65] and an offer to lease the land from another also breaks the continuity of the adverse possession as against such other.[66] The rule applies whether the lease is taken from the holder of the legal title[67] or from a stranger.[68] The mental capacity of the person in possession after executing a lease, thereby acknowledging another's ownership, cannot be inquired into as against an innocent purchaser.[69]

h. Offer or Attempt to Purchase Outstanding Title. On the question whether an offer or attempt by the adverse occupant to buy an outstanding title will break the continuity of his possession the decisions show much diversity of opinion.[70]

64. St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. *Contra,* Stevens *v.* Shannon, 6 Ohio Cir. Ct. 142.

For other instances of recognition of title in another see Sample *v.* Reeder, 107 Ala. 227, 18 So. 214; Campbell *v.* Shipley, 41 Md. 81; Devyr *v.* Schaefer, 55 N. Y. 446; New York *v.* Mott, 60 Hun (N. Y.) 423, 15 N. Y. Suppl. 22; Lyman *v.* Little, 15 Vt. 576.

For acts held insufficient to constitute recognition see Newsome *v.* Snow, 91 Ala. 641, 8 So. 377, 24 Am. St. Rep. 934; Ray *v.* Barker, 1 B. Mon. (Ky.) 364; Mills *v.* Bodley, 4 T. B. Mon. (Ky.) 248; Harrington *v.* Wilkins, 2 McCord (S. C.) 289; Barnett *v.* Templeman, (Tex. Civ. App. 1895) 31 S. W. 78.

65. *California.*— Abbey Homestead Assoc. *v.* Willard, 48 Cal. 614.

Illinois.— Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088.

Michigan.— Campau *v.* Lafferty, 50 Mich. 114, 15 N. W. 40.

New York.— Corning *v.* Troy Iron, etc., Factory, 34 Barb. (N. Y.) 485.

South Carolina.— Abel *v.* Hutto, 8 Rich. (S. C.) 42.

Texas.—O'Connor *v.* Dykes, (Tex. Civ. App. 1895) 29 S. W. 920.

Lease of tract including part of land held adversely.— A lease by defendant, for grazing purposes, of a tract of wild land adjoining his inclosed cultivated tract, will not prevent the running of the statute of limitations as to a strip of the former tract which had been inclosed and cultivated by defendant in accordance with a survey which he caused to be made. Tex *v.* Pflug, 24 Nebr. 666, 39 N. W. 839, 8 Am. St. Rep. 231.

66. Horton *v.* Davidson, 135 Pa. St. 186, 19 Atl. 934; Deppen *v.* Bogar, 7 Pa. Super. Ct. 434. But see Doe *v.* Hasson, 8 N. Brunsw. 451, in which it is held that a verbal offer to lease from the owner is not an acknowledgment of title within the meaning of the statute.

Application of rule.— A letter written by one in possession of land to the attorney of other claimants, in which he offers to lease the land from them, is a recognition of that title so as to prevent him from claiming adverse possession, though he afterward held longer than the statutory period, when he does nothing to indicate that such possession is adverse. Horton *v.* Davidson, 135 Pa. St. 186, 19 Atl. 934.

67. Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088; Campau *v.* Lafferty, 43 Mich. 429, 5 N. W. 648; Abel *v.* Hutto, 8 Rich. (S. C.) 42.

68. An attornment by a tenant to a stranger claiming the land, although it may be ineffectual to create the relation of landlord and tenant in consequence of an estoppel in favor of the landlord under whom he entered, would nevertheless take from the possession its adverse character. Russell *v.* Erwin, 38 Ala. 44.

69. Daveis *v.* Collins, 43 Fed. 31.

70. View that continuity is broken.— Some of the decisions hold or seem to hold without qualification that an attempt to buy the title or right of the true owner will operate to break the continuity of the possession. Gay *v.* Moffitt, 2 Bibb (Ky.) 506, 5 Am. Dec. 633; Moore *v.* Moore, 21 Me. 350; Jackson *v.* Britton, 4 Wend. (N. Y.) 507.

View that continuity is not broken.— On the other hand it is apparently held in some decisions that a mere offer by the adverse occupant to purchase an outstanding title or interest, whether of the true owner or of a third person, does not interrupt the continuity of the possession. McAllister *v.* Hartzell, 60 Ohio St. 69, 53 N. E. 715; Bannon *v.* Brandon, 34 Pa. St. 263, 75 Am. Dec. 655; Headrick *v.* Fritts, 93 Tenn. 270, 24 S. W. 11; Tobey *v.* Secor, 60 Wis. 310, 19 N. W. 99. See also Jackson *v.* Decker, 11 Johns. (N. Y.) 418.

View that continuity is not necessarily broken.— There is yet a third line of decisions, the doctrine of which is that the mere offer or attempt to purchase an outstanding title does not necessarily amount to such a recognition of title in another as to break the continuity of possession.

Iowa.— Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104.

Massachusetts.— Warren *v.* Bowdran, 156 Mass. 280, 31 N. E. 300.

Michigan.— Chapin *v.* Hunt, 40 Mich. 595.

i. Purchase of Outstanding Claim or Interest — (I) *In General.* With the exception of at least one decision in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupts the continuity of his possession,[71] it seems to be very generally conceded that an adverse occupant may purchase an outstanding title without thereby interrupting the continuity of his possession.[72] A party, it is said, may very well deny the validity of an adverse claim of title, and yet choose to buy his peace at a smaller price than be at great expense and annoyance in litigating it.[73] On the other hand it is also conceded that continuity of possession may be interrupted by the purchase of an outstanding claim or title.[74]

(II) *Interruption of Continuity as against Former Owner* — (A) *Purchase of Tax-Title.* The difficulty arises in determining under what circumstances the purchase of an outstanding claim or title is or is not a breach in the continuity of possession. In a considerable number of decisions it has been held that a purchase by an adverse occupant of the tax-title to the land is not an interruption of the continuity of the possession as against the former owner[75] unless the purchase is made for the owner under an agreement to lease the land or a portion thereof.[76]

(B) *Purchase of Title from Third Person.* So in a number of other deci-

Missouri.— Walbrun *v.* Ballen, 68 Mo. 164.

Nebraska.— Webb *v.* Thiele, 56 Nebr. 752, 77 N. W. 56; Oldig *v.* Fisk, 53 Nebr. 156, 73 N. W. 661.

According to some of these decisions, where one in possession of land offers to purchase it from the true owner before title by adverse possession has matured, and this offer is made not merely to buy an outstanding or adverse claim in order to quiet his possession or protect himself from litigation, the offer is a recognition of the owner's title and will stop the running of the statute. Pacific Mut. L. Ins. Co. *v.* Stroup, 63 Cal. 150; Central Pac. R. Co. *v.* Mead, 63 Cal. 112; Lovell *v.* Frost, 44 Cal. 471; Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104. It has also been held that an attempt by the adverse occupant to purchase an interest consistent with and not opposed to his own rights will not arrest the running of the statute. Bean *v.* Bachelder, 74 Me. 202. See also James *v.* Indianapolis, etc., R. Co., 91 Ill. 554, in which it was held that the promise of officers of a corporation to pay for land occupied and used by it within the period of limitation is not an admission of title so as to prevent the running of the statute. The court said that a promise to pay for land, although evidence of the debt, is not inconsistent with a title in the possessor to the land, as, for instance, where title has been conveyed before payment is made of the purchase-money.

71. Croan *v.* Joyce, 3 Bush (Ky.) 454.

72. *Arizona.*— Singer Mfg. Co. *v.* Tillman, (Ariz. 1889) 21 Pac. 818.

California.— Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Illinois.—O'Neal *v.* Boone, 53 Ill. 35; Clark *v.* Peckenpaugh, 46 Ill. 11.

Michigan.— Chapin *v.* Hunt, 40 Mich. 595; Johnstone *v.* Scott, 11 Mich. 232.

Minnesota.— Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

Missouri.— Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

Nebraska.— Oldig *v.* Fiske, 53 Nebr. 156, 73 N. W. 661; Omaha, etc., L. & T. Co. *v.* Hansen, 32 Nebr. 449, 49 N. W. 456.

New York.—Burhans *v.* Van Zandt, 7 Barb. (N. Y.) 91; Northrop *v.* Wright, 7 Hill (N. Y.) 476; Jackson *v.* Newton, 18 Johns. (N. Y.) 355; Jackson *v.* Smith, 13 Johns. (N. Y.) 406; Jackson *v.* Given, 8 Johns. (N. Y.) 137.

Pennsylvania.— Owens *v.* Myers, 20 Pa. St. 134, 57 Am. Dec. 693.

Wisconsin.— Meyer *v.* Hope, 101 Wis. 123, 77 N. W. 720.

United States.— Elder *v.* McClaskey, 70 Fed. 529, 37 U. S. App. 199, 17 C. C. A. 251.

Purchase of improvements.— An occupant's buying the improvements made on an interfering claim does not render his possession amicable to that interfering claim. Briscoe *v.* McGee, 1 A. K. Marsh. (Ky.) 189.

Reason for rule is based upon the principle that the adverse occupant has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 55; Omaha, etc., L. & T. Co. *v.* Hansen, 32 Nebr. 449, 49 N. W. 456.

73. Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

74. Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104; Liggett *v.* Morgan, 98 Mo. 39, 11 S. W. 241; Jackson *v.* Sears, 10 Johns. (N. Y.) 435.

75. Hayes *v.* Martin, 45 Cal. 559; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755; Omaha, etc., L. & T. Co. *v.* Hansen, 32 Nebr. 449, 49 N. W. 456; Griffith *v.* Smith, 27 Nebr. 47, 42 N. W. 749; Converse *v.* Ringer, 6 Tex. Civ. App. 51, 24 S. W. 705.

76. Hayes *v.* Martin, 45 Cal. 559.

sions it has been held that continuity of possession as against the rightful owner is not broken by purchase of some interest or title from a third person.[77]

(c) *Purchase of Former Owner's Interest.* There are some decisions which seem to hold without qualification that a purchase of the rightful owner's interest does not affect the continuity of possession.[78] In other decisions it is held that if such purchase is made with the intent of quieting title or preventing litigation the continuity of the possession will not be interrupted.[79] According to still other decisions a purchase from the rightful owner of his interest or title *prima facie* divests the possession of its hostile character.[80]

(III) *Purchase from One as Affecting Continuity against Another Claimant.* A purchase, by the adverse occupant, of the title of one or more claimants, does not interrupt the continuity of his possession as against the others.[81]

j. Sale of Premises — (I) *By Person Other Than Claimant's Grantor.* Where an adverse occupant is in possession under color of title, the fact that the land was embraced in a deed to another person executed by a person other than the claimant's grantor is not sufficient to deprive him of his title.[82]

(II) *By Adverse Occupant.* Where land held adversely is sold by the adverse occupant before title in him has matured, this does not necessarily interrupt the running of the statute.[83] As shown in another connection, the possessions of grantor and grantee may be united to make up the statutory period.[84] Nevertheless the conveyance must be followed by delivery of possession,[85] but it seems

77. O'Neal *v.* Boone, 53 Ill. 35; Clark *v.* Peckenpaugh, 46 Ill. 11; Coakley *v.* Perry, 3 Ohio St. 344; Owens *v.* Myers, 20 Pa. St. 134, 57 Am. Dec. 693.

Purchase of outstanding title as between grantor and grantee.— A grantee in a deed holds adversely to the grantor, and may strengthen his title from any other source without interrupting the continuity of his possession. Funkhouser *v.* Lay, 78 Mo. 458; Mattison *v.* Ausmuss, 50 Mo. 551.

78. Bean *v.* Bachelder, 74 Me. 202; Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 260. See also Fox *v.* Widgery, 4 Me. 214, in which it was held that if the disseizor takes from the disseizee a naked release of all his interest in the land, no relations arise between them by which one is placed in subordination to the other, and the disseizor is not estopped from denying that the disseizee had any title in the land.

79. Singer Mfg. Co. *v.* Tillman, (Ariz. 1889) 21 Pac. 818; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353.

Application of this rule.— The taking of a quitclaim deed by an adverse possessor from the heirs of the claimant's intestate is consistent with the continuance of an adverse possession. Such a deed may convey a full title to property or no interest whatever. Meyer *v.* Hope, 101 Wis. 123, 77 N. W. 720.

80. Carpentier *v.* Small, 35 Cal. 346; Cook *v.* Clinton, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816. See also Jensen *v.* Hunter, (Cal. 1895) 41 Pac. 14.

81. St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17; Converse *v.* Ringer, 6 Tex. Civ. App. 51, 24 S. W. 705.

Purchase of interest of one heir.— Where one in possession purchases an outstanding interest of heirs, the deeds are not admissions of title in other heirs whose existence was not at the time suspected by the purchaser in possession. Elder *v.* McClaskey, 70 Fed. 529, 37 U. S. App. 199, 17 C. C. A. 251 [*reversing* 47 Fed. 154].

82. Jones *v.* Graham, 80 Ga. 591, 5 S. E. 632.

83. Hardy *v.* Riddle, 24 Nebr. 670, 39 N. W. 841.

Conveyance to person incompetent to take title.— Where the statute of limitations has commenced to run against the owners of lands in the possession of another, a conveyance and delivery of possession by such adverse occupier to one incompetent to take title will not arrest the running of the statute against the owners. Title does not revert to the original owner merely because the grantee is incompetent. Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

84. See *supra*, IV, B, 3, b.

85. Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088; Holstein *v.* Adams, 72 Tex. 485, 10 S. W. 560; Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

Application of rule.— Where the original owner did not hold possession long enough to claim title it is incumbent on defendants claiming under him to supplement his possession by that of his vendee's. It did not appear that he took actual possession, or that the grantor's agent who was in possession continued to hold it for them as their tenant. The agent, not being in the actual possession of the land, sold to defendants' grantors. Defendants' grantors owned the land only a few days when they sold it to defendants, but they have nothing to show that they ever expected to take actual possession so as to raise the question as to whether they should be al-

that a reasonable time will be allowed for the purchaser to take possession before a break in the running of the statute will be declared.[86] Thus adverse possession is not interrupted by a conveyance of the premises where possession is retained and a mortgage is taken for the purchase-money and subsequently foreclosed. Nor is it material that the foreclosure proceedings are defective.[87]

(III) *Sales under Execution or Foreclosure against True Owner.* The continuity of an adverse claimant's possession is not broken merely by a sale under execution against the original owner.[88] It is interrupted, however, by the levy of an execution and delivery of seizin to the creditor.[89] A purchaser of land at a foreclosure sale succeeds to the mortgagor's title, and cannot bring suit and recover the land against a party in adverse possession after the lapse of five years from the time the cause of action accrued to the mortgagor or those under whom he claims.[90]

(IV) *Sales for Taxes.* While there is one decision maintaining the contrary doctrine,[91] the weight of authority is to the effect that the running of the statute of limitations in favor of one holding by adverse possession is interrupted by a sale for taxes.[92] Of course, if the statutory period is complete before forfeiture to the state for taxes, such title will not be thereby affected, and the state will take nothing by the forfeiture.[93]

k. Execution of Lease of Premises to Another by Claimant. Continuity of adverse possession of land necessary to keep the statute of limitations running is not interrupted by the possession of one who occupies as a tenant of the alleged adverse possessor.[94]

l. Interruption by Legal Proceedings — (I) *Unsuccessful Actions* — (A) *Against Adverse Claimant.* An unsuccessful action leading to no change of possession does not arrest the running of the statute of limitations,[95] and this is true whether the action is prosecuted to judgment[96] or whether the suit is volun-

lowed a reasonable time to do this. Nor did it appear that they were acting as agents of defendants so as to connect defendants' possession with that of the original grantor. It was held that there was a complete break in the adverse possession of the land while it was owned by defendants' grantors. Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405.

86. Gary *v.* Woodham, 103 Ala. 421, 15 So. 840; Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405.

87. Whitford *v.* Crooks, 54 Mich. 261, 20 N. W. 45.

88. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Lamar *v.* Raysor, 7 Rich. (S. C.) 509.

89. Clark *v.* Pratt, 55 Me. 546.

90. Le Roy *v.* Rogers, 30 Cal. 229, 89 Am. Dec. 88.

91. Harrison *v.* Dolan, 172 Mass. 395, 52 N. E. 513.

92. Monroe *v.* Morris, 7 Ohio 262; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765 [*affirming* 17 Fed. Cas. No. 9,822, 4 Am. L. Rev. 194]; Braxton *v.* Rich, 47 Fed. 178; Daveis *v.* Collins, 43 Fed. 31.

Extent of rule.— The fact that the true owner, by virtue of special statutory authorization, is subsequently permitted to redeem the land, does not alter the rule. Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765.

Reason for rule.— Any other rule, it has been said, would permit the statute to run against the government. Monroe *v.* Morris, 7 Ohio 262.

93. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

94. Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551; Fugate *v.* Pierce, 49 Mo. 441; Stettnische *v.* Lambe, 18 Nebr. 619, 26 N. W. 374. As sustaining this doctrine see *supra*, IV, B, 3, d.

Lease by administrator of occupant.— If land held adversely is rented by the administrator of the occupant the possession is not thereby interrupted or abandoned. Fugate *v.* Pierce, 49 Mo. 441.

95. *Alabama.*— Doe *v.* Reynolds, 27 Ala. 364.

California.— Langford *v.* Poppe, 56 Cal. 73.

Oregon.— Barrell *v.* Title Guarantee Co., 27 Oreg. 77, 39 Pac. 992.

Pennsylvania.— Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654.

Texas.— Bullock *v.* Smith, 72 Tex. 545, 10 S. W. 687.

United States.— Moore *v.* Greene, 19 How. (U. S.) 69, 15 L. ed. 533.

See also Cunningham *v.* Brumback, 23 Ark. 336, in which it was held that where adverse possession has been held for more than the statutory period the fact that there has been a protracted litigation in respect to it — the adverse party having the equitable title and a third party the legal title — does not remove the bar of the statute or prevent it from running until the legal is joined with the equitable title.

96. See cases cited *supra*, note 95.

tarily abandoned or dismissed for want of prosecution.[97] While the adverse possession of a defendant in ejectment during the pendency of the suit cannot ripen into an absolute title, yet the effect of the statute of limitations is neutralized only in respect of the particular suit and the plaintiff therein, and after the determination of that suit, the statutory limitations having meanwhile expired, no subsequent action can be brought to question that title or possession.[98]

(B) *By Adverse Claimant.* Where a person in adverse possession of land brings suit to remove a cloud from title and is defeated, his rights as against strangers to the suit are not affected, and as to such strangers limitations continue to run.[99]

(II) *Recovery of Judgment without Change of Possession*—(A) *Statement of General Rule.* Furthermore the mere recovery of a judgment will not of itself stop the running of the statute of limitations. There must be an actual change of possession by virtue of such judgment,[1] and where the plaintiff in ejectment neglects to enforce his judgment within the period laid in his demise, his right of entry under that judgment is altogether gone.[2]

(B) *Limitations of Rule*—(1) Where Decree Directs Conveyance by Claimant. The rule as stated is subject to some slight limitations. Thus the continuity of adverse possession is broken by a decree requiring the occupant to convey the land, even if the actual possession is not disturbed. The decree has the effect of a voluntary conveyance.[3]

(2) Where Parties Agree to Abide Judgment. So it has been held that an agreement that defendant shall deliver possession to plaintiff, or consent to abide the judgment for dispossession, is equivalent to dispossession.[4]

97. Langford *v.* Poppe, 56 Cal. 73; Smith *v.* Gibbon, 6 La. Ann. 684; Shields *v.* Boone, 22 Tex. 193; Caperton *v.* Gregory, 11 Gratt. (Va.) 505.

Dismissing suit as to one of several tracts in litigation.— Where a bill filed to settle all litigations concerning title to several tracts of land that had become confused by the nonpayment of mortgage-money and adverse claims under junior grants among the tracts was withdrawn from litigation, it was held that a decree as to the remaining tracts in controversy did not prevent the possession of the tract withdrawn by an adverse claimant under color of title from ripening into a good title. Wellborn *v.* Finley, 52 N. C. 228.

98. Hopkins *v.* Calloway, 7 Coldw. (Tenn.) 37.

99. Miller *v.* East, 91 Tex. 335, 43 S. W. 263 [*modifying* 16 Tex. Civ. App. 274, 41 S. E. 396].

1. *Alabama.*—Doe *v.* Reynolds, 27 Ala. 364.

California.— McGrath *v.* Wallace, 85 Cal. 622, 24 Pac. 793; Carpenter *v.* Natoma Water, etc., Co., 63 Cal. 616.

Delaware.—Doe *v.* Stevens, 1 Houst. (Del.) 240.

Kansas.—Forbes *v.* Caldwell, 39 Kan. 14, 17 Pac. 478.

Kentucky.— Smith *v.* Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122.

Missouri.— Dunn *v.* Miller, 75 Mo. 260.

New York.—Jackson *v.* Haviland, 13 Johns. (N. Y.) 229.

United States.—Smith *v.* Trabue, 1 McLean (U. S.) 87, 22 Fed. Cas. No. 13,116.

Contra, Oberein *v.* Wells, 163 Ill. 101, 45 N. E. 294; Brolaskey *v.* McClain, 61 Pa. St. 146; Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

Judgment as to another tract.— The running of the statute as to a tract of land of which one has adverse possession is not affected by a suit and adverse judgment against him, during such judgment, as to another tract. Parham *v.* Dedman, (Ky. 1898) 48 S. W. 673.

Judgment subsequently set aside.— Where the United States obtained judgment canceling a patent on land because of the patentee's fraud, being then held adversely by defendants, and which judgment was afterward set aside, the temporary revestiture of the title in the action by the judgment of cancellation was not, as against the patentee's successors, an interruption of the statute of limitations so as to break the continuity of defendants' adverse possession, their possession having been uninterrupted while the judgment was in force. Casey *v.* Anderson, 17 Mont. 167, 42 Pac. 761.

Quashal of execution and restitution of possession.— So proof that an adverse possession was interrupted, and converted into an amicable and subordinate one by the execution of a habere facias possessionem, and the acceptance of a lease, etc., by the tenant, may be effectually rebutted by a record showing that the habere facias possessionem was quashed, and restitution awarded, after legal notice and an appearance of the adverse party. Boling *v.* Ewing, 9 Dana (Ky.) 76.

2. Jackson *v.* Haviland, 13 Johns. (N. Y.) 229.

3. Gower *v.* Quinlan, 40 Mich. 572.

4. Mabary *v.* Dollarhide, 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639.

Acquiescence under judgment.— During the period for which defendant claimed to have held adverse possession of the land in contro-

(III) *Recovery of Judgment and Change of Possession.* Where a judgment has been obtained against the adverse claimant, and a change of possession made in accordance therewith, the continuity of the running of the statute is broken.[5] A suit that eventually ripens into possession stops the running of the statute of limitations regardless of whether the entry thereunder is before or after the expiration of the statutory period.[6] In contemplation of law, possession acquired by plaintiff under a judgment puts an end to the adverse possession of defendant as of the date of the institution of the suit.[7]

(IV) *Recovery of Judgment to Which Claimant Is Not a Party.* The continuity of possession of one in the actual occupancy of land under claim of title is not broken so as to affect the running of the statute in his favor by a judgment of ouster rendered in an action of ejectment for the land, brought against one not at the time in privity with him in title or possession where he was not made a party and did not appear or employ counsel in such action.[8] It has also been held that a suit against a lessee for the possession of the demised premises is not an interruption of the possession of the lessor.[9]

m. Agreement to Arbitrate. The statute of limitations ceases to run against a right of entry when the claimants agree that the matter in dispute shall be referred to an arbitrator, and that meantime the party who occupies the land

versy plaintiff instituted proceedings for the ascertainment of the boundary between his land and that of defendant; the latter was made a party, and a decree was made establishing the boundary where plaintiff claimed it to be. There was evidence that defendant was satisfied with the result. It was held that the jury were warranted in finding that there had been an interruption of adverse possession. Heinz *v.* Cramer, 84 Iowa 497, 51 N. W. 173.

5. *Alabama.*—Bishop *v.* Truett, 85 Ala. 376, 5 So. 154.

Illinois.— Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

Kentucky.—Boling *v.* Ewing, 3 Dana (Ky.) 132; Jones *v.* Chiles, 2 Dana (Ky.) 25; Doe *v.* Lively, 1 Dana (Ky.) 60.

Michigan.— Millard *v.* Hayward, 107 Mich. 219, 65 N. W. 104.

Missouri.— Dunn *v.* Miller, 75 Mo. 260; Bradley *v.* West, 68 Mo. 69.

New York.— Brady *v.* Begun, 36 Barb. (N. Y.) 533; Jackson *v.* Rightmyre, 16 Johns. (N. Y.) 314.

Oregon.— Barrell *v.* Title Guarantee Co., 27 Oreg. 77, 39 Pac. 992.

Wrongful proceedings.— Adverse possession is broken by ouster under process in ejectment, though wrongful, if an available method for regaining possession is not promptly pursued. Gould *v.* Carr, 33 Fla. 523, 15 So. 259, 24 L. R. A. 130.

6. Barrell *v.* Title Guarantee Co., 27 Oreg. 77, 39 Pac. 992.

7. Breon *v.* Robrecht, 118 Cal. 469, 50 Pac. 689, 51 Pac. 33, 62 Am. St. Rep. 247; Boling *v.* Ewing, 3 Dana (Ky.) 132; Jones *v.* Chiles, 2 Dana (Ky.) 25; Doe *v.* Lively, 1 Dana (Ky.) 60; Dunn *v.* Miller, 75 Mo. 260; Barrell *v.* Title Guarantee Co., 27 Oreg. 77, 39 Pac. 992.

Applications of rule.— Thus, where ejectment was brought within the statutory period, the fact that defendant remained in possession during the pendency of the proceedings, and that five years elapsed from the time he took possession until his eviction under the judgment, gave him no right to set up a title by prescription acquired by those remaining in possession. Breon *v.* Robrecht, 118 Cal. 469, 50 Pac. 689, 51 Pac. 33, 62 Am. St. Rep. 247. An executed judgment for plaintiff in ejectment, where suit has been commenced within the period of limitations, is conclusive, against defendant, of any asserted right founded merely upon his possession either at the time of the commencement of the action or at the time of the judgment. During the pendency of the action he can acquire no new right as against plaintiff by the mere fact that he remains in possession. During that period his right of possession is *sub judice*,— before the judge awaiting judicial determination,— and a judgment against him judicially determines that down to the date of its rendition his possession, as against plaintiff, has been wrongful. Breon *v.* Robrecht, 118 Cal. 469, 50 Pac. 689, 51 Pac. 33, 62 Am. St. Rep. 247. To same effect see Hackworth *v.* Harlan, (Ky. 1892) 19 S. W. 172.

8. Rigney *v.* De Graw, 100 Fed. 213, 214, in which it was said: "Judgments bind only the parties to the record and their privies in blood, or estate, or in law. No one is privy to a judgment whose succession to the rights of property thereby affected occurred previous to the institution of the suit."

An action of ejectment is not lis pendens as to one, not a party, who has no notice of the action, actual or constructive, and who is in possession under a bond for deed from defendant in ejectment. And such possession will ripen into an adverse title so as to defeat a writ of possession issued on a judgment rendered therein after the party in possession had occupied the premises for a sufficient length of time to acquire title by prescription. Wallace *v.* Arnold, (Ky. 1889) 10 S. W. 647; Wallace *v.* Marquett, 88 Ky. 130, 10 S. W. 374.

9. Scott *v.* Rhea, 21 Tex. 708.

shall continue in possession.[10] And where title is claimed by adverse possession up to a certain boundary, an agreement to submit the disputed boundary to arbitration will defeat the operation of the statute.[11]

n. Death of Former Owner. The running of the statute of limitations in favor of persons in adverse possession of land is not suspended by the death of the former owner.[12] By the descent cast the heirs are placed exactly in the shoes of their ancestor; and, the statute having commenced running against him in his lifetime, it continues to run without intermission against his heirs,[13] and this, too, irrespective of any disabilities under which they may have been on the death of the ancestor.[14]

o. Issuance to Another of Patent of Land Occupied. If one be in possession, under color of title, of lands with known and visible boundaries, but, before possession is continued long enough to raise the presumption of a grant, a patent is issued to another, including a part of such land, the presumption of a grant is suspended as to the lappage if the party claiming by prescription be not in actual possession of the land included therein.[15] The presumption is not suspended, however, where the party claiming by prescription is in the actual possession of the land included in the lappage.[16]

p. Absence of Occupant in Compliance with Military Orders. The involuntary absence of one in possession of land, caused by the issuance of a military order, does not break the continuity of his possession[17] unless the order is operative against both the owner and the adverse claimant. In this case the continuity of possession will be deemed to have been interrupted, because it operated to prevent the owner from taking possession as well as to cause the adverse claimant to relinquish it.[18]

q. Temporary Vacancy Incident to Change of Owners or Tenants. Periods of vacancy incident to or occasioned by change of possession, or by the substitution in the possession of one tenant for another, and which are not of longer duration than is reasonable in view of the character of the land and the uses to which it is adapted and devoted, do not constitute interruptions of possession destroying its continuity in legal contemplation, when there is no intention to abandon the possession. They are but incidents of that continuous possession which the land inherently, and in relation to the manner of its use, admits of.[19]

10. Perkins *v.* Blood, 36 Vt. 273. See also Burrus *v.* Meadors, 90 Ala. 140, 7 So. 469.

11. Hunt *v.* Guilford, 4 Ohio 310.

12. Davis *v.* Threlkeld, 58 Kan. 763, 51 Pac. 226; McIntire *v.* Funk, 5 Litt. (Ky.) 33; Haynes *v.* Jones, 2 Head (Tenn.) 371. See also Massey *v.* Rimmer, 69 Miss. 667, 13 So. 832.

Adverse possession by wife as against heirs of husband.— Possession of land by a divorced wife of the owner claiming under a void order rendered in adverse proceedings allotting the land to her is not changed into possession under her dower right by the death of the husband pending the running of the statute of limitations. Jones *v.* Thomas, 124 Mo. 586, 590, 28 S. W. 76, wherein the court said: "As her possession was, in its inception, adverse to her divorced husband and to the plaintiff, it continued to be adverse . . . and the fact that she became entitled to dower after the adverse possession began cannot change the result."

13. Haynes *v.* Jones, 2 Head (Tenn.) 371.

14. See *infra*, IV, D, 3.

15. Kitchen *v.* Wilson, 80 N. C. 191; Brown *v.* Potter, 44 N. C. 461.

16. Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607.

17. Hamilton *v.* Boggess, 63 Mo. 233.

18. Holliday *v.* Cromwell, 37 Tex. 437.

19. *Alabama.*—Gary *v.* Woodham, 103 Ala. 421, 15 So. 840.

Georgia.— Hudgins *v.* Crow, 32 Ga. 367.

Michigan.— Rayner *v.* Lee, 20 Mich. 384.

Minnesota.— Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

Texas.— Whitehead *v.* Foley, 28 Tex. 1.

Change of possession by substitution of tenants.— If one and those claiming under him hold possession of land and make a crop on it every year for seven years, an interval of two or three months between one tenant's going out and another's coming in does not amount to such an interruption of the possession as to defeat the statute of limitations. Hudgins *v.* Crow, 32 Ga. 367. In an action where adverse possession was pleaded it appeared that one who had been put in possession of the land in controversy in 1880, by the grantor of defendant, after beginning to make a crop, abandoned the land, without the landlord's knowledge, in May of that year, and that in the summer or fall of the same

This rule proceeds upon the theory that notwithstanding such interruptions of actual occupancy there is in fact no actual interruption of such acts of possession as the land is reasonably susceptible of.[20] It is not to be understood, however, from anything here said, that an interval of several years elapsing between the possessions of the incoming and outgoing tenants is a temporary vacancy within the meaning of the rule just stated.[21]

r. Temporary Breaks in Fences or Inclosures. Temporary breaks in fences or inclosures, relied upon to constitute adverse possession, will not stop the running of the statute of limitations if enough of the fence or inclosure remains to give notice of the extent of the adverse claim,[22] or if there is still an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claims of all others.[23] So the fact that fences are permitted to become dilapidated during a period when not necessary for the protection of crops does not destroy the continuity of possession,[24] and it has been held that the destruction of a division fence under claim of ownership does not break the continuity of the adverse possession of the adjacent owner.[25] On the other hand, where, after inclosure of land, the fence goes to decay, and the land remains open for several years before the person making the inclosure again takes possession, it does not constitute continuous adverse possession.[26]

s. Attornment of Claimant's Tenant to Another. The continuity of possession by an adverse claimant is not broken by the attornment of his tenant to another without his knowledge or consent,[27] unless made in pursuance of a judg-

year the landlord put another tenant in possession. It was held that these facts did not necessarily constitute a break in the continuity of the landlord's possession. Beasley *v.* Howell, 117 Ala. 439, 22 So. 989.

Change of possession by conveyance.— An interval of some days between the execution of a deed and the record thereof will not break the continuity of possession under the recorded deed, where the adverse possession of both grantor and grantee is necessary to make up the statutory period of adverse possession. A reasonable time must ordinarily intervene between the date of the deed and its record, and the change of possession in conformity with the title of record. De La Vega *v.* Butler, 47 Tex. 529; Jacks *v.* Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645. *Compare* Tegarden *v.* Carpenter, 36 Miss. 404, in which it was held that where the vendor vacated the premises for a short time before he sold to his grantee, and before the latter took possession, and it did not appear that during this time either of them exercised any ownership over the land, the adverse possession was not continuous and the two possessions could be tacked together.

20. Gary *v.* Woodham, 103 Ala. 421, 15 So. 840.

Resumption of possession by landlord.— Where the possession of land is left vacant for a short time upon the quitting of a tenant, the possession of the landlord will be deemed to have been uninterrupted if he takes possession within a reasonable time. Wilson *v.* McLenaghan, McMull. Eq. (S. C.) 35.

21. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43.

22. Williams *v.* Rand, 9 Tex. Civ. App. 631, 30 S. W. 509. See also Baldwin *v.* Durfee, 116 Cal. 625, 48 Pac. 724.

A partial removal, at times, of the fences by the adverse claimant, to enable himself and others to pass through his premises, does not destroy the continuity. Morrison *v.* Hammond, 27 Md. 604.

23. Gunter *v.* Mead, 78 Tex. 634, 14 S. W. 562.

A temporary interruption of actual residence, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenantable for the time being, will not prevent the statute from continuing to run where there is no adverse entry or offer to redeem, and where the claimant continues to exercise all acts of ownership and dominion over the premises of which the nature of the land and its condition will admit. Clark *v.* Potter, 32 Ohio St. 49.

24. Doe *v.* Anderson, 79 Ala. 209. See also Morrison *v.* Hammond, 27 Md. 604.

25. Donovan *v.* Bissell, 53 Mich. 462, 19 N. W. 146. See also Hopkins *v.* Robinson, 3 Watts (Pa.) 205, in which it was held that evidence of interruption resulting from the demolition of fences between the adverse holder and the person ousted does not break the continuity of the possession.

26. Settegast *v.* O'Donnell, 16 Tex. Civ. App. 56, 41 S. W. 84.

27. *Alabama.*— Doe *v.* Reynolds, 27 Ala. 364.

Georgia.— Sparks *v.* Conrad, 99 Ga. 643, 27 S. E. 764; Smith *v.* Granberry, 39 Ga. 381, 99 Am. Dec. 464.

Kentucky.— Middlesborough Waterworks Co. *v.* Neal, (Ky. 1899) 49 S. W. 428; Turner *v.* Thomas, 13 Bush (Ky.) 518.

Massachusetts.— Haynes *v.* Boardman, 119 Mass. 414.

Missouri.— Sutton *v.* Casselleggi, 5 Mo. App. 111.

New York.— Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 278.

England.— Hovendon *v.* Annesley, 2 Sch. & Lef. 607.

ment, decree, or order of court.[28] The holding of the tenant so attorning will be treated as the possession of the person under whom he entered.[29]

t. Absence of Claimant from State. Since the disseizor or his successor in the adverse holding may continue the adverse possession by tenants or agents against whom the owner may have his action to recover possession, the absence from the state of such disseizor or his successor does not interrupt the running of the time within which an action must be brought.[30]

2. Effect of Suspension of Statute During Period of Interruption. An interruption, though occurring during a period when the statute of limitations was suspended, is nevertheless sufficient to break the continuity of possession.[31]

3. Effect of Interruption. Whenever the running of the statute is interrupted, the possession of the true owner constructively intervenes, and the previous possession is unavailing. If the adverse holder thereafter assumes possession, the statute of limitations runs in support of his claim only from the time of the resumption.[32]

D. Time Requisite for Acquisition of Title by Adverse Possession — 1. Statutory Provisions. The time requisite for the acquisition of title by the adverse possessor is a matter which is dependent entirely on statutory regulation. These statutes are frequently changed. It is not considered worth while to cite the decisions in which the statutory period is declared, because it can be determined with much more certainty by a consultation of the statutes themselves. The only other statement which it is deemed necessary to make in this connection is, that under statutes making color of title an element of adverse possession the period of limitation is usually much shorter than in cases where color of title is not necessary.[33]

2. Effect of Suspension of Statute during Possession. Where, during the period of adverse possession, the statute of limitations is suspended by statute for a time, in computing the time necessary to perfect title by adverse possession the adverse occupant cannot avail himself of possession during the time the statute was suspended.[34]

28. Turner *v.* Thomas, 13 Bush (Ky.) 518; Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 278; Groft *v.* Weakland, 34 Pa. St. 304.

Attornment under judgment.— A recovery in ejectment by one having the better title, and the attornment of the defendant's tenant to the plaintiff under pressure of a writ of habere facias possessionem, break the continuity of the possession. Actual eviction of the tenant before accepting a lease from plaintiff in ejectment is not necessary. The surrender is equally involuntary where the attornment is the alternative of actual ouster. Groft *v.* Weakland, 34 Pa. St. 304.

29. Turner *v.* Thomas, 13 Bush (Ky.) 518.

30. St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17; St. Paul, etc., R. Co. *v.* Minneapolis, 45 Minn. 400 note, 48 N. W. 22.

31. Malloy *v.* Bruden, 86 N. C. 251; Collier *v.* Couts, 92 Tex. 234, 47 S. W. 525 [*reversing* 45 S. W. 485]; Hollingsworth *v.* Sherman, 81 Va. 668.

The reason for this is that the suspension of the statute is not for the benefit of the adverse claimant, but for that of the true owner. Collier *v.* Couts, 92 Tex. 234, 47 S. W. 525.

32. *District of Columbia.*— Reid *v.* Anderson, 13 App. Cas. (D. C.) 30.

Illinois.— Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088; Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482; Clark *v.* Lyon, 45 Ill. 388.

Indiana.— Steeple *v.* Downing, 60 Ind. 478.

Maine.— Bullen *v.* Arnold, 31 Me. 583.

New Jersey.— Cornelius *v.* Giberson, 25 N. J. L. 1.

Pennsylvania.— Olwine *v.* Holman, 23 Pa. St. 279.

Texas.— Wille *v.* Ellis, (Tex. Civ. App. 1900) 54 S. W. 922.

Virginia.— Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

United States.— Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765; Daveis *v.* Collins, 43 Fed. 31.

33. See, generally, the particular statutes; and 1 Cent. Dig. tit. "Adverse Possession," §§ 148–206, for an exhaustive collection of the cases declaring the statutory period in the various states.

34. Harrison *v.* Young, 47 Ga. 302; Kitchen *v.* Wilson, 80 N. C. 191; Benbow *v.* Robbins, 71 N. C. 338.

Hence the time during which the courts of the loyal states were closed to citizens of rebel states cannot be considered in making up title by adverse possession in one residing in a loyal state as against the true owner residing in a rebel state. Douthitt *v.* Stinson, 63 Mo. 268 [*citing* Hanger *v.* Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939]. But *compare* O'Neal *v.* Boone, 53 Ill. 35, 38, which seems to be in conflict with this view. In this case it was held that the fact that plaintiff in ejectment voluntarily entered and remained

3. Effect of Disabilities Arising Before or After Possession Commences — a. Disability Affecting Former Owner — (I) *Disability Arising Before Possession Commences.* If the true owner is under any disability at the time the adverse possession commences, the statute does not run against him so long as the disability continues.[35] So, if several disabilities exist together, the statute does not run until all are removed.[36]

(II) *Disability Arising After Possession Commences.* If the disability accrues after the adverse possession commences, this disability has no effect on the running of the statute; only those disabilities which exist at the time the right of action accrues can be availed of.[37]

b. Disability Affecting Heir of Former Owner. If an adverse possession commences in the lifetime of the ancestor it will continue to run against the heir notwithstanding any existing disability on the part of the latter, where the right accrues to him or her.[38] Though they be infants, married women, or persons of unsound mind, they are nevertheless bound to sue before the expiration of the statutory period just as much as their ancestor would have been had he lived.[39]

V. Exclusive Possession.

The rule is broadly stated in a very considerable number of decisions that exclusiveness of possession is a necessary element of title by adverse possession;[40]

within the Confederate lines, no matter for what purpose, after defendant's adverse possession had commenced, did not suspend the running of the statute. The court said: "If he went there to join the public enemy, that would be an extraordinary reason for claiming that the operation of our laws should be suspended in order that he may lose no rights. If he went there on legitimate business or as a loyal citizen, our courts would never have been closed against his suit. But, whatever his motive or his business, his act was purely voluntary, and that consideration disposes of his claim that the statute of limitations ceased to run."

Execution of trust not dependent on intervention of courts.— The doctrine that the statute of limitations was suspended during the war does not apply to the case of a mere personal trust which could have been executed by the trustee without the intervention of a court. Where the trustee neglected for more than seven years, embracing the time of the war, to execute such a trust, it was held that the statute was not suspended as against one in the adverse possession of land which was the subject of the trust. Mayo *v.* Cartwright, 30 Ark. 407.

35. Little *v.* Downing, 37 N. H. 355; Wallace *v.* Fletcher, 30 N. H. 434; Mercer *v.* Selden, 1 How. (U. S.) 37, 11 L. ed. 38.

36. Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Stowel *v.* Zouch, Plowd. 353.

Time within which suit must be brought.— Owners who are under disability when their rights were first encroached on and the right of action first accrues have, by the statute, five years to bring action after removal of the disability, though the period of twenty years may not have expired. Wallace *v.* Fletcher, 30 N. H. 434.

37. *Connecticut.*— Griswold *v.* Butler, 3 Conn. 227.

Massachusetts.— Allis *v.* Moore, 2 Allen (Mass.) 306.

New Hampshire.— Wallace *v.* Fletcher, 30 N. H. 434.

New York.— Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433.

United States.— Mercer *v.* Selden, 1 How. (U. S.) 37, 11 L. ed. 38.

Application of rule.— If an owner of land has been disseized, his subsequent insanity does not prevent the adverse title from maturing by twenty years' adverse possession. Allis *v.* Moore, 2 Allen (Mass.) 306.

38. *Connecticut.*— Griswold *v.* Butler, 3 Conn. 227.

Delaware.— Lynch *v.* Cannon, 7 Houst. (Del.) 386, 32 Atl. 391.

New York.—Becker *v.* Van Valkenburgh, 29 Barb. (N. Y.) 319; Fleming *v.* Griswold, 3 Hill (N. Y.) 85.

North Carolina.— Seawell *v.* Bunch, 51 N. C. 195.

Tennessee.— Haynes *v.* Jones, 2 Head (Tenn.) 371.

Texas.— Pease *v.* Bergen, 6 Tex. Civ. App. 639, 25 S. W. 803.

England.— Stowel *v.* Zouch, Plowd. 353.

Rule under Kentucky statute.— The act of 1809 does not bar the right of persons upon whom the title is cast at the time they are laboring under any disability, unless the statute has fully run against the ancestor; and this is true although they may inherit it jointly with others laboring under no disability. But under the act of 1796, if the ancestor dies after the statute commences, but before the right is barred, it descends upon his heirs. While laboring under such disability the right of the heirs to sue is saved. McIntire *v.* Funk, 5 Litt. (Ky.) 33. But the disability must exist in the heirs at the time the right or title first descends to them. Clark *v.* Trail, 1 Metc. (Ky.) 35.

39. Lynch *v.* Cannon, 7 Houst. (Del.) 386, 32 Atl. 391; Haynes *v.* Jones, 2 Head (Tenn.) 371.

40. *Arkansas.*— Pulaski County *v.* Stale, 42 Ark. 118.

that possession must be exclusive as well as hostile.[41] In some decisions it is either held or said that the possession must be exclusive of all persons whatsoever,

Connecticut.— Tracy *v.* Norwich, etc., R. Co., 39 Conn. 382.

Georgia.— Hill *v.* Waldrop, 57 Ga. 134.

Illinois.—Illinois Cent. R. Co. *v.* Houghton, 126 Ill. 233, 18 N. E. 301, 9 Am. St. Rep. 581, 1 L. R. A. 213; Turney *v.* Chamberlain, 15 Ill. 271.

Indiana.— Law *v.* Smith, 4 Ind. 56.

Iowa.— Hempsted *v.* Huffman, 84 Iowa 398, 51 N. W. 17.

Maine.— Roberts *v.* Richards, 84 Me. 1, 24 Atl. 425; Morse *v.* Williams, 62 Me. 445; Chadbourne *v.* Swan, 40 Me. 260; Tilton *v.* Hunter, 24 Me. 29; Little *v.* Libby, 2 Me. 242, 11 Am. Dec. 68.

Maryland.— Gittings *v.* Moale, 21 Md. 135; Thistle *v.* Frostburg Coal Co., 10 Md. 129; Stump *v.* Henry, 6 Md. 201, 61 Am. Dec. 300; Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.—Litchfield *v.* Ferguson, 141 Mass. 97, 6 N. E. 721; Bellis *v.* Bellis, 122 Mass. 414; Hittinger *v.* Eames, 121 Mass. 539; Cook *v.* Babcock, 11 Cush. (Mass.) 206; Drake *v.* Curtis, 1 Cush. (Mass.) 395; Hunt *v.* Hunt, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227. See also Smith *v.* New York, etc., R. Co., 142 Mass. 21, 6 N. E. 842.

Michigan.— Marble *v.* Price, 54 Mich. 466, 20 N. W. 531; Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93.

Missouri.— Brown *v.* Chicago, etc., R. Co., 101 Mo. 484, 14 S. W. 719.

Nebraska.— Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590; Ballard *v.* Hansen, 33 Nebr. 861, 51 N. W. 295.

New Hampshire.— Waldron *v.* Tuttle, 4 N. H. 371.

New Jersey.— Foulke *v.* Bond, 41 N. J. L. 527.

New York.— Kneller *v.* Lang, 137 N. Y. 589, 33 N. E. 555; Bridges *v.* Wyckoff, 67 N. Y. 130; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433.

North Carolina.— Gilchrist *v.* McLaughlin, 29 N. C. 310.

Pennsylvania.— Mercer *v.* Watson, 1 Watts (Pa.) 330; Overfield *v.* Christie, 7 Serg. & R. (Pa.) 173; Johnston *v.* Irwin, 3 Serg. & R. (Pa.) 291.

South Carolina.— Heyward *v.* Bennett, 3 Brev. (S. C.) 113.

Texas.— Allen *v.* Peters, 77 Tex. 59, 13 S. W. 767; Richards *v.* Smith, 67 Tex. 610, 4 S. W. 571; Gillespie *v.* Jones, 26 Tex. 343.

Virginia.— Trotter *v.* Newton, 30 Gratt. (Va.) 582; Cline *v.* Catron, 22 Gratt. (Va.) 378.

West Virginia.— Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178; Heavner *v.* Morgan, 41 W. Va. 428, 23 S. E. 874; Core *v.* Faupel, 24 W. Va. 238.

Wisconsin.— Jones *v.* Collins, 16 Wis. 594.

United States.—Ward *v.* Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. ed. 1195; Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923; Hatch *v.* Heim, 86 Fed. 436, 58 U. S. App. 544, 30 C. C. A. 171; Larwell *v.* Stevens, 2 McCrary (U. S.) 311, 12 Fed. 559; Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765.

Canada.— Doe *v.* Littlehale, 10 N. Brunsw. 121; Doe *v.* Rattray, 7 U. C. Q. B. 321.

Possession in common with public.— Occupation, when in common with the public generally, is not such exclusive possession as will constitute the basis of a title by adverse possession.

Alabama.— Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480.

Connecticut.— Tracy *v.* Norwich, etc., R. Co., 39 Conn. 382.

Maryland.— Gittings *v.* Moale, 21 Md. 135.

Massachusetts.— Hittinger *v.* Eames, 121 Mass. 539.

South Carolina.— Heyward *v.* Bennett, 3 Brev. (S. C.) 113.

Virginia.— Trotter *v.* Newton, 30 Gratt. (Va.) 582.

Possession concurrent with that of true owner.— The possession of the one claiming title by adverse possession must not have been concurrent with that of the true owner. The possession follows the title, and if the owner and others were in possession, the law construes the owner as in possession.

Arkansas.— Pulaski County *v.* State, 42 Ark. 118.

California.— Reed *v.* Smith, 125 Cal. 491, 58 Pac. 139.

Maine.— Eaton *v.* Jacobs, 49 Me. 559.

Massachusetts.— Bellis *v.* Bellis, 122 Mass. 414; Norcross *v.* Widgery, 2 Mass. 506.

Nebraska.— Smith *v.* Hitchcock, 38 Nebr. 104, 56 N. W. 791.

New Hampshire.— Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190.

Tennessee.— Fancher *v.* De Montegre, 1 Head (Tenn.) 39; McCammon *v.* Pettitt, 3 Sneed (Tenn.) 242; Berry *v.* Walden, 4 Hayw. (Tenn.) 174.

United States.— Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923; Brownsville *v.* Cavazos, 100 U. S. 138, 25 L. ed. 574; Larwell *v.* Stevens, 2 McCrary (U. S.) 311, 12 Fed. 559.

One using property in dispute, during the period of prescription, as a way to his premises, must be said to have been in exclusive possession where the owner of the record title has used it during the same period to furnish light and air to his building. Where one has been using his property for the purpose of furnishing light and air, and another has been using it for a different purpose, neither can be said to have had the exclusive use of the property. Haimeyer *v.* Tietig, 13 Cinc. L. Bul. 540, 9 Ohio Dec. (Reprint) 438.

41. Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510.

In the great majority of decisions this statement is found merely in the enunciation of the general rule that, in order to acquire

and no qualification of this doctrine is recognized by them.[42] Nevertheless this rule has been qualified in some jurisdictions, at least to this extent, that a person may, while admitting title in the federal or state government, hold exclusive of all others.[43]

VI. HOSTILE POSSESSION.

A. Necessity — 1. Statement of General Rule. The principle is well settled that to make a disseizin that will be the commencement of a new title, producing a change by which the estate is taken from the rightful owner and placed in the wrong-doer, the possession taken by the disseizor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed; otherwise, however open, notorious, constant, and long-continued it may be, the owner's action will not be barred.[44] The mere fact that the claimant has had possession

title by adverse possession, the possession must be actual, continuous, open and notorious, exclusive and hostile. In the absence of other decisions stating the doctrine more specifically the legitimate inference would be that the exclusive possession meant is a possession exclusive of all persons whatsoever. This latter phase of the question has been directly considered in many cases, and in regard to it there appears to be some conflict of authority.

42. *Alabama.*— Dothard *v.* Denson, 75 Ala. 482; New Orleans, etc., R. Co. *v.* Jones, 68 Ala. 48; Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480.

Maryland.— Gittings *v.* Moale, 21 Md. 135; Thistle *v.* Frostburg Coal Co., 10 Md. 129.

Massachusetts.— Leach *v.* Woods, 14 Pick. (Mass.) 461.

Nebraska.— Ballard *v.* Hansen, 33 Nebr. 861, 51 N. W. 295; Horbach *v.* Miller, 4 Nebr. 31.

New York.— Kneller *v.* Lang, 137 N. Y. 589, 33 N. E. 555; Howard *v.* Howard, 17 Barb. (N. Y.) 663; Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587; Smith *v.* Burtis, 9 Johns. (N. Y.) 174.

Oregon.— Altschul *v.* O'Neill, 35 Oreg. 202, 58 Pac. 95; Beale *v.* Hite, 35 Oreg. 176, 57 Pac. 322, 58 Pac. 102.

Virginia.— Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137.

West Virginia.— Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Hudson *v.* Putney, 14 W. Va. 561.

United States.—Ward *v.* Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. ed. 1195; Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Bracken *v.* Union Pac. R. Co., 75 Fed. 347, 36 U. S. App. 629, 21 C. C. A. 387.

43. Lord *v.* Sawyer, 57 Cal. 65; McManus *v.* O'Sullivan, 48 Cal. 15; Hayes *v.* Martin, 45 Cal. 559; Gibson *v.* Chouteau, 39 Mo. 536; Clemens *v.* Runckel, 34 Mo. 41, 84 Am. Dec. 69; Moore *v.* Brownfield, 7 Wash. 23, 34 Pac. 199; Francoeur *v.* Newhouse, 43 Fed. 236. Thus in some decisions it is held that in ejectment against the person setting up adverse possession it will be sufficient, to defeat the action, that a claim exclusive of the title of and adverse to plaintiff in ejectment was made, and that it is not necessary that it should be against all the world. Skipwith *v.* Martin, 50 Ark. 141, 6 S. W. 514; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755; Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815.

44. *Alabama.*— Newton *v.* Louisville, etc., R. Co., 110 Ala. 474, 19 So. 19; New Orleans, etc., R. Co. *v.* Jones, 68 Ala. 48; Collins *v.* Johnson, 57 Ala. 304.

Arkansas.— Little Rock *v.* Wright, 58 Ark. 142, 23 S. W. 876; Pulaski County *v.* State, 42 Ark. 118; Ellsworth *v.* Hale, 33 Ark. 633.

California.— McCracken *v.* San Francisco, 16 Cal. 591.

Colorado.—Hurd *v.* McClellan, 1 Colo. App. 327, 29 Pac. 181.

Connecticut.— Russell *v.* Davis, 38 Conn. 562; Hanchett *v.* King, 4 Day (Conn.) 360.

Georgia.— Gay *v.* Mitchell, 35 Ga. 139, 89 Am. Dec. 278; Moses *v.* Eagle, etc., Mfg. Co., 62 Ga. 455.

Illinois.— Bolden *v.* Sherman, 101 Ill. 483; Smith *v.* Stevens, 82 Ill. 554; Ambrose *v.* Raley, 58 Ill. 506.

Iowa.— Donahue *v.* Lannan, 70 Iowa 73, 30 N. W. 8; Brown *v.* Rose, 48 Iowa 231; Wright *v.* Keithler, 7 Iowa 92.

Kentucky.— Halbert *v.* Maysville, etc., R. Co., 98 Ky. 661, 33 S. W. 1121; Bell *v.* Fry, 5 Dana (Ky.) 341.

Louisiana.— Prevost *v.* Ellis, 11 Rob. (La.) 56.

Maine.— Worcester *v.* Lord, 56 Me. 265, 96 Am. Dec. 456; Eastport *v.* Belfast, 40 Me. 262; Chadbourne *v.* Swan, 40 Me. 260; Kinsell *v.* Daggett, 11 Me. 309; Little *v.* Libby, 2 Me. 242, 11 Am. Dec. 68.

Maryland.— Winter *v.* White, 70 Md. 305, 17 Atl. 84; Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Minnesota.— St. Paul, etc., R. Co. *v.* Hinckley, 53 Minn. 398, 55 N. W. 560; Wayzata *v.* Great Northern R. Co., 50 Minn. 438, 52 N. W. 913.

Mississippi.— Wilmot *v.* Yazoo, etc., R. Co., 76 Miss. 374, 24 So. 701.

Missouri.— Baber *v.* Henderson, 156 Mo. 566, 57 S. W. 719; Hunnewell *v.* Burchett, 152 Mo. 611, 54 S. W. 487; Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39; Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510; Johnson *v.* Prewitt, 32 Mo. 553; Taylor *v.* Planet Property, etc., Co., 78 Mo. App. 137, 2 Mo. App. Rep. 226.

Nebraska.— Smith *v.* Hitchcock, 38 Nebr. 104, 56 N. W. 791; Ballard *v.* Hansen, 33 Nebr. 861, 51 N. W. 295; Colvin *v.* Republi-

of the land for the statutory period will not suffice to satisfy the rule requiring the disseizor's possession to be hostile.[45]

2. Insufficiency of Exclusive Possession. So title cannot be acquired by holding the land "exclusively."[46] The reason for this is that possession may be exclusive and yet not hostile.[47] Hostility of possession cannot be assumed, as a matter of law, from mere exclusive possession, no matter how long continued.[48]

3. Necessity of Possession Hostile in Its Inception. While there are a number of decisions in which it is either held or said that possession, in order to ripen into title, must be hostile in its inception,[49] the great weight of authority is to the effect that although the original entry upon lands is made in subordination to the title of the real owner, the possession may become adverse.[50]

4. Necessity of Claim Hostile to Whole World — a. Statement of Rule. Some decisions hold that the statute of limitations runs only in favor of parties in possession claiming title adverse to the whole world.[51]

can Valley Land Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

New York.— Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540 [*affirming* 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053]; Kneller *v.* Lang, 137 N. Y. 589, 33 N. E. 555; Doherty *v.* Matsell, 119 N. Y. 646, 23 N. E. 994; Gross *v.* Welwood, 90 N. Y. 638; St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286; Sands *v.* Hughes, 53 N. Y. 287; Hoyt *v.* Dillon, 19 Barb. (N. Y.) 644.

North Carolina.— Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961.

Ohio.— Lane *v.* Kennedy, 13 Ohio St. 42.

Pennsylvania.—Morris *v.* Vanderen, 1 Dall. (Pa.) 64.

South Carolina.— Harvey *v.* Harvey, 26 S. C. 608, 2 S. E. 3; Bowen *v.* Team, 6 Rich. (S. C.) 298, 60 Am. Dec. 127; Wadsworthville Poor School *v.* Meetze, 4 Rich. (S. C.) 50.

Texas.— Chance *v.* Branch, 58 Tex. 490; Flanagan *v.* Boggess, 46 Tex. 330; Clark *v.* Kirby, (Tex. Civ. App. 1894) 25 S. W. 1096.

Virginia.— Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Clarke *v.* McClure, 10 Gratt. (Va.) 305.

West Virginia.— Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178.

Wisconsin.— Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534; Chloupek *v.* Perotka, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858.

United States.— Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Larwell *v.* Stevens, 2 McCrary (U. S.) 311, 12 Fed. 559; Adams *v.* Burke, 3 Sawy. (U. S.) 415 1 Fed. Cas. No. 49.

Canada.— Doe *v.* Littlehale, 10 N. Brunsw. 121.

Rule applicable to personal property.—Hostile possession is necessary to the acquisition of title to personal property by prescription. Spencer *v.* McDonald, 22 Ark. 466; McLain *v.* Winchester, 17 Mo. 49; Smoot *v.* Wathen, 8 Mo. 522.

The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the claimant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land. Ballard *v.* Hansen, 33 Nebr. 861, 51 N. W. 295.

45. Newton *v.* Louisville, etc., R. Co., 110 Ala. 474, 19 So. 19; Wright *v.* Keithler, 7 Iowa 92.

46. *Connecticut.*— Russell *v.* Davis, 38 Conn. 562.

Maine.— Eastport *v.* Belfast, 40 Me. 262; Little *v.* Libby, 2 Me. 242, 11 Am. Dec. 68.

Maryland.— Winter *v.* White, 70 Md. 305, 17 Atl. 84.

Minnesota.— St. Paul, etc., R. Co. *v.* Hinckley, 53 Minn. 398, 55 N. W. 560.

Wisconsin.— Chloupek *v.* Perotka, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858.

47. Eastport *v.* Belfast, 40 Me. 262; St. Paul, etc., R. Co. *v.* Hinckley, 53 Minn. 398, 55 N. W. 560.

48. Russell *v.* Davis, 38 Conn. 562.

49. Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896; Ambrose *v.* Raley, 58 Ill. 506; Turney *v.* Chamberlain, 15 Ill. 271; Jackson *v.* Waters, 12 Johns. (N. Y.) 365; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156; Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Adams *v.* Burke, 3 Sawy. (U. S.) 415, 1 Fed. Cas. No. 49.

50. *Michigan.*— Michigan Land, etc., Co. *v.* Thoney, 89 Mich. 226, 50 N. W. 845.

New York.— Sherman *v.* Kane, 86 N. Y. 57; Millard *v.* McMullin, 68 N. Y. 345; De St. Laurent *v.* Gescheidt, 18 N. Y. App. Div. 121, 45 N. Y. Suppl. 730; Jackson *v.* Mancius, 2 Wend. (N. Y.) 357; Jackson *v.* Brink, 5 Cow. (N. Y.) 483.

Oregon.— Pearson *v.* Dryden, 28 Oreg. 350, 43 Pac. 166.

Virginia.— Virginia Midland R. Co. *v.* Barbour, 97 Va. 118, 33 S. E. 554; Creekmur *v.* Creekmur, 75 Va. 430.

Wisconsin.— Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714.

The distinction between this class of cases and those in which no privity existed is in the degree of proof required to establish the adverse character of the possession. Creekmur *v.* Creekmur, 75 Va. 430; Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

51. McCracken *v.* San Francisco, 16 Cal. 591; Ballard *v.* Hansen, 33 Nebr. 861, 51

b. Limitations of Rule. Other decisions limit the rule at least to this extent, that a person may admit title in the United States and yet hold adversely to all others.[52] So in one state the qualification is made that a corporation chartered by act of congress, incompetent to acquire title in such state, may nevertheless maintain a possession adverse to all persons except the state.[53] Other decisions go even further, and hold that, to claim land under limitations, defendant's possession need not be adverse to the whole world, but only as to plaintiff who is asserting title in himself.[54]

These decisions proceed upon the theory that plaintiff in ejectment must ultimately recover, if at all, on the strength of his own title,[55] and if it is not meant to hold more than that the claimant in possession has sufficient right in the land to defeat an action by any person whatsoever, except the true owner, they are undoubtedly correct, because naked possession — that is, possession without even a claim of title — vests a right of property in the person who has such possession, sufficient to permit him to hold the land against all the world except the true owner.[56] If, however, the person in possession were bringing the action for the recovery of land to which he claims title by adverse possession, a different question would be presented, and he would not be permitted to recover.[57]

5. Necessity of Claim of Right or Title — a. Statement of Rule. While color of title is, as a general rule, not necessary to the acquisition of title by adverse possession,[58] claim of title or right by the occupant is in all cases necessary.[59] No matter how exclusive and hostile to the true owner the possession may

N. W. 295; Calvin *v.* Republican Valley Land Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114; Horbach *v.* Miller, 4 Nebr. 31; Altschul *v.* O'Neill, 35 Oreg. 202, 221, 58 Pac. 95, wherein it was said: "It is inconceivable that a person who claims to have the fee-simple title — the absolute and only existing title — and to have acquired it through adverse possession, could have obtained it without holding adversely to all others"; Ward *v.* Cochran, 150 U. S. 597, 14 S. Ct. 230, 37 L. ed. 1195; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; Bracken *v.* Union Pac. R. Co., 75 Fed. 347, 36 U. S. App. 629, 21 C. C. A. 387. See also Northern Pac. R. Co. *v.* Kranich, 52 Fed. 911, in which this is recognized as the general rule, but in which it is held that there are exceptions.

52. McManus *v.* O'Sullivan, 48 Cal. 15; Hayes *v.* Martin, 45 Cal. 559; Northern Pac. R. Co. *v.* Kranich, 52 Fed. 911; Francoeur *v.* Newhouse, 43 Fed. 236.

53. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

54. *Arkansas.*— Skipwith *v.* Martin, 50 Ark. 141, 6 S. W. 514.

Minnesota.— Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 260.

Missouri.— Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

North Carolina.— Brittain *v.* Daniels, 94 N. C. 781.

Texas.— Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99; Beaumont Pasture Co. *v.* Polk, (Tex. Civ. App. 1900), 55 S. W. 614; Longley *v.* Warren, 11 Tex. Civ. App. 269, 33 S. W. 304; Converse *v.* Ringer, 6 Tex. Civ. App. 51, 24 S. W. 705.

Washington.—Moore *v.* Brownfield, 7 Wash. 23, 34 Pac. 199.

55. Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

56. See Tiedeman Real Prop. 692; Liddon *v.* Hodnett, 22 Fla. 442.

57. Skipwith *v.* Martin, 50 Ark. 141, 6 S. W. 514, wherein the court said that a title which is all-sufficient as a shield might be entirely ineffective as a sword.

58. See *infra*, VII, B.

59. *Alabama.*— Bernstein *v.* Humes, 78 Ala. 134; Kennedy *v.* Townsley, 16 Ala. 239; Doe *v.* Eslava, 11 Ala. 1028; Badger *v.* Lyon, 7 Ala. 564.

California.— Thompson *v.* Pioche, 44 Cal. 508.

Illinois.— Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; Turney *v.* Chamberlain, 15 Ill. 271.

Indiana.— Maple *v.* Stevenson, 122 Ind. 368, 23 N. E. 854; Parish *v.* Kaspare, 109 Ind. 586, 10 N. E. 109; Pennington *v.* Flock, 92 Ind. 378; McCardle *v.* Barricklow, 68 Ind. 356; Palmer *v.* Wright, 58 Ind. 486; Peterson *v.* McCullough, 50 Ind. 35; Moore *v.* Worley, 24 Ind. 81.

Iowa.— Schrimper *v.* Chicago, etc., R. Co., (Iowa 1900) 82 N. W. 916; Knudson *v.* Litchfield, 87 Iowa 111, 54 N. W. 199; McCarty *v.* Rochel, 85 Iowa 427, 52 N. W. 361; Doolittle *v.* Bailey, 85 Iowa 398, 52 N. W. 337; Weinig *v.* Holcomb, 73 Iowa 143, 34 N. W. 787; Solberg *v.* Decorah, 41 Iowa 501; Larum *v.* Wilmer, 35 Iowa 244; Clagett *v.* Conlee, 16 Iowa 487; Jones *v.* Hockman, 12 Iowa 101; Wright *v.* Keithler, 7 Iowa 92.

Kentucky.— Bell *v.* Fry, 5 Dana (Ky.) 341; Norton *v.* Doe, 1 Dana (Ky.) 14.

Mississippi.— Jones *v.* Gaddis, 67 Miss. 761, 7 So. 489; Davis *v.* Bowmar, 55 Miss. 671; Adams *v.* Guice, 30 Miss. 397.

Missouri.— Baber *v.* Henderson, 156 Mo. 566, 57 S. W. 719; Hunnewell *v.* Williams, (Mo. 1900) 55 S. W. 221; Kansas City Milling Co. *v.* Riley, 133 Mo. 574, 34 S. W. 835; Wilkerson *v.* Eilers, 114 Mo. 245, 21 S. W.

be in appearance, it cannot be effectually adverse unless accompanied by the intent on the part of the occupant to make it so. The naked possession unaccompanied with any claim of right will never constitute a bar, but will enure to the advantage of the real owner.[60]

b. Operation and Extent of Rule — (I) *Effect of Possession without Claim of Title or Right.* Where a party enters upon land and takes possession without claim of title or right, his occupation is subservient to the paramount title, not adverse to it.[61] It is nothing more than a trespass,[62] and, no matter how long continued, can never ripen into a good title.[63]

(II) *Effect of Disclaimer of Title.* Where the occupant expressly disclaims title in himself, he cannot, of course, acquire title by adverse possession.[64]

(III) *Necessity of Claim of Title in Fee.* The claim must be of title

514; Mylar *v.* Hughes, 60 Mo. 105; Pease *v.* Lawson, 33 Mo. 35; Taylor *v.* Planet Property, etc., Co., 78 Mo. App. 137.

Montana.—Peter *v.* Stephens, 11 Mont. 115, 27 Pac. 403, 28 Am. St. Rep. 448.

Nebraska.— Colvin *v.* Republican Valley Land Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

New Hampshire.— Little *v.* Downing, 37 N. H. 355.

New York.— Bedell *v.* Shaw, 59 N. Y. 46; Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587; Jackson *v.* Oltz, 8 Wend. (N. Y.) 440; Jackson *v.* Thomas, 16 Johns. (N. Y.) 293.

North Carolina.— Armour *v.* White, 3 N. C. 236.

Tennessee.— Turner *v.* Turner, 2 Sneed (Tenn.) 26.

Texas.— Chance *v.* Branch, 58 Tex. 490; Portis *v.* Hill, 3 Tex. 273.

Virginia.— Atkinson *v.* Smith, (Va. 1896) 24 S. E. 901; Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Kincheloe *v.* Tracewells, 11 Gratt. (Va.) 587.

West Virginia.— Heavner *v.* Morgan, 41 W. Va. 428, 23 S. E. 874; Core *v.* Faupel, 24 W. Va. 238; Storrs *v.* Feick, 24 W. Va. 606.

Wisconsin.— Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587; Pepper *v.* O'Dowd, 39 Wis. 538; Austin *v.* Holt, 32 Wis. 478.

United States.— Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871; Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Sacket *v.* McDonnell, 8 Biss. (U. S.) 394, 21 Fed. Cas. No. 12,202; Taggart *v.* Stanbery, 2 McLean (U. S.) 543, 23 Fed. Cas. No. 13,724; Jackson *v.* Porter, 1 Paine (U. S.) 457, 13 Fed. Cas. No. 7,143.

Canada.— Stuart *v.* Ives, 1 L. C. Rep. 193.

Compare Johnson *v.* Gorham, 38 Conn. 513; French *v.* Pearce, 8 Conn. 440, 21 Am. Dec. 680; Bryan *v.* Atwater, 5 Day (Conn.) 181, 5 Am. Dec. 136, in which language is used which is apparently in conflict with what is stated in the text, but it is doubtful whether there is any real conflict with that rule.

Thus possession of land which is merely incidental and subsidiary to the commission of a trespass on the land, as by cutting and removing the timber and abandonment when that object is accomplished, although it may have continued for some weeks or months, is not such an adverse possession as will prevent the true owner of the land from maintaining trover or replevin for the timber thus taken. Austin *v.* Holt, 32 Wis. 478. So digging away some of the soil and piling railroad ties on land, when not done under claim of ownership or by the possessor of a paper title, do not constitute adverse possession within the meaning of the statute of limitations. Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674.

Possession of squatter.— The possession must be open, adverse, and continuous for the statutory period under a claim of title, to ripen into a title. A mere squatter who has not denied the real owner's title cannot acquire title by possession. Bell *v.* Fry, 5 Dana (Ky.) 341; Sacket *v.* McDonnell, 8 Biss. (U. S.) 394, 21 Fed. Cas. No. 12,202. See also Matter of New York, 63 Hun (N. Y.) 630, 18 N. Y. Suppl. 82.

Claim of title subsequent to entry.— Where the claim of right is subsequent to entry, the possession is adverse only from the time of making such claim. Wickham *v.* Henthorn, 91 Iowa 242, 59 N. W. 276; Hamilton *v.* Wright, 30 Iowa 480.

60. Colvin *v.* Republican Valley Land Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

The reason is that it may not have been taken originally, or subsequently held, with the intention to claim the property as owner, and may have been with a perfect understanding between the possessor and the proprietor that the latter is all the time to be regarded as such. Adams *v.* Guice, 30 Miss. 397.

61. *Alabama.*— Badger *v.* Lyon, 7 Ala. 564.

Missouri.— Mylar *v.* Hughes, 60 Mo. 105.

New York.—Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587.

Virginia.— Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137.

Wisconsin.— Austin *v.* Holt, 32 Wis. 478.

United States.— Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871.

62. Mylar *v.* Hughes, 60 Mo. 105.

63. Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Jackson *v.* Porter, 1 Paine (U. S.) 457, 13 Fed. Cas. No. 7,143.

64. Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569; Long *v.* Young, 28 Ga. 130; Cook *v.* Long, 27 Ga. 280; Simmons *v.* Lane, 25 Ga. 178.

or ownership in fee. A claim simply of an unexpired term of years is not in hostility to, but in accord with, the true title.[65]

B. Character of Possession by Permission or License from Owner — 1. Ordinary Status of Possession — a. General Rule. A possession by permission or license from the owner is not adverse and cannot ripen into title, no matter how long continued or however exclusive it may be.[66] The possession of the

65. Bedell *v.* Shaw, 59 N. Y. 46.

66. *Arkansas.*— Pulaski County *v.* State, 42 Ark. 118; Ellsworth *v.* Hale, 33 Ark. 633; Blakeney *v.* Ferguson, 20 Ark. 547.

California.— Jensen *v.* Hunter, (Cal. 1895) 41 Pac. 14; Nieto *v.* Carpenter, 21 Cal. 455.

Colorado.— Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Connecticut.— Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354; Catlin *v.* Decker, 38 Conn. 262.

Georgia.— Jay *v.* Whelchel, 78 Ga. 786, 3 S. E. 906; Ford *v.* Holmes, 61 Ga. 419.

Illinois.— Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109; Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506.

Kentucky.— Townsend *v.* Boyd, (Ky. 1892) 18 S. W. 365; Hall *v.* McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Shackleford *v.* Smith, 5 Dana (Ky.) 232; Chiles *v.* Jones, 4 Dana (Ky.) 479; Miller *v.* Shackleford, 4 Dana (Ky.) 264; Bruce *v.* Taylor, 2 J. J. Marsh. (Ky.) 160.

Maine.—Bucknam *v.* Bucknam, 30 Me. 494; Tinkham *v.* Arnold, 3 Me. 120.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.— Gray *v.* Bartlett, 20 Pick. (Mass.) 186, 32 Am. Dec. 208.

Michigan.— St. Joseph *v.* Seel, 122 Mich. 70, 80 N. W. 987.

Minnesota.— Cameron *v.* Chicago, etc., R. Co., 60 Minn. 100, 61 N. W. 814.

Mississippi.—Adams *v.* Guice, 30 Miss. 397.

Missouri.— Simpson *v.* Wabash R. Co., 145 Mo. 64, 46 S. W. 739; Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223; Handlan *v.* McManus, 100 Mo. 124, 16 S. W. 207, 18 Am. St. Rep. 533; Budd *v.* Collins, 69 Mo. 129.

Nebraska.— Johnson *v.* Butt, 46 Nebr. 220, 64 N. W. 691; Smith *v.* Mount, 38 Nebr. 111, 56 N. W. 793; Smith *v.* Hitchcock, 38 Nebr. 104, 56 N. W. 791; Colvin *v.* Republican Valley Land Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

New Hampshire.— Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Dodge *v.* McClintock, 47 N. H. 383; Campbell *v.* Campbell, 13 N. H. 483; Atherton *v.* Johnson, 2 N. H. 31.

New Jersey.— Kipp *v.* Den, 24 N. J. L. 854.

New York.— Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540 [*affirming* 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053]; Bird *v.* New Jersey, etc., R. Co., 3 N. Y. App. Div. 344, 38 N. Y. Suppl. 281; Coleman *v.* Pickett, 82 Hun (N. Y.) 287, 31 N. Y. Suppl. 480; Borden *v.* South Side R. Co., 5 Hun (N. Y.) 184; Luce *v.* Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; Jackson *v.* French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Babcock *v.* Utter, 1 Abb. Dec. (N. Y.) 27, 32 How. Pr. (N. Y.) 437.

North Carolina.— Rogers *v.* Mabe, 15 N. C. 180.

Oregon.— Abraham *v.* Owens, 20 Oreg. 511, 26 Pac. 1112; Curtis *v.* La Grande Hydraulic Water Co., 20 Oreg. 34, 25 Pac. 378, 23 Pac. 808, 10 L. R. A. 484; Anderson *v.* McCormick, 18 Oreg. 301, 22 Pac. 1062.

Pennsylvania.— Main Tp. School Dist. *v.* Reichard, 142 Pa. St. 226, 21 Atl. 821; Kittaning Academy *v.* Brown, 41 Pa. St. 269; Susquehanna County *v.* Deans, 33 Pa. St. 131; Black *v.* Moore, 1 Pa. St. 344.

South Carolina.— Wadsworthville Poor School *v.* Meetze, 4 Rich. (S. C.) 50; Whaley *v.* Whaley, 1 Speers (S. C.) 225, 40 Am. Dec. 594.

Tennessee.— Long *v.* Hall, (Tenn. Ch. 1898) 46 S. W. 343; Bugg *v.* Norris, 4 Yerg. (Tenn.) 325; Peeler *v.* Norris, 4 Yerg. (Tenn.) 331.

Texas.— Evans *v.* Berlocher, 83 Tex. 612, 19 S. W. 158.

Vermont.— Eddy *v.* St. Mars, 53 Vt. 462, 38 Am. Rep. 695.

West Virginia.— Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

Wisconsin.— Nau *v.* Brunette, 79 Wis. 664, 48 N. W. 649; Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

United States.—Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615; Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113; Larwell *v.* Stevens, 2 McCrary (U. S.) 311, 12 Fed. 559.

England.— Cholmondeley *v.* Clinton, 2 Jac. & W. 1.

Canada.— Doe *v.* Thompson, 3 N. Brunsw. 568; Doe *v.* Leavens, 3 U. C. Q. B. 411.

See also *infra*, VI, F, 13, 37.

Illustrations.— Where possession of Mexican lands was taken under a permit from the Spanish government in 1784, for their occupancy for grazing purposes, and was held until the death of the occupant in 1804, and after that was occupied by his descendants, who made partition of the property among themselves, it was held that the written permit prevented the acquisition of a prescriptive title. Nieto *v.* Carpenter, 21 Cal. 455. One who has come into possession under a parol agreement with the disseizor to hold adverse possession until the original owner should be barred by the statute of limitations, and to receive a moiety of the land, is not protected by that statute against the disseizor. Black *v.* Moore, 1 Pa. St. 344. Where a water company obtains a license to build a dam, and lays pipes on and through the property of the landowner, it acquires no rights which are available as an ouster by long use against the owner. Curtis *v.* La Grande Hydraulic Water Co., 20 Oreg. 34, 25 Pac. 378, 23 Pac. 808, 10 L. R. A. 484.

occupant under such circumstances is considered as the possession of him upon whose pleasure it continues.[67]

b. Extent of Rule. The rule applies whether the license or permission is from a private individual,[68] a municipal corporation,[69] or the state or federal government.[70] Nor is the rule affected by the fact that the agreement conferring the permission or license is for any reason void.[71] So the rule has been held to apply, in case of mere permissive trespasses,[72] to an occupation of land under an agreement with the owner whereby the occupant was to have the use of the land in consideration of his paying the taxes thereon;[73] to an occupation under a simple license to occupy till some terms should be arranged between the parties;[74] and to an occupant entering upon land owned by tenants in common by license of one of them.[75] The rule likewise applies to the case of a transferee of a license, although the transfer or possession terminates the license and gives the licensor the right, if he so elects, to treat the transferee as a trespasser.[76]

Where use of an alley was permissive only, and not made under a claim of right or with the intent to enjoy it without regard to the wishes of the owner of the land, the possession is not adverse. Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506.

67. Pulaski County *v.* State, 42 Ark. 118.

68. See cases cited *supra*, note 66.

69. Denver *v.* Girard, 21 Colo. 447, 42 Pac. 662; Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540 [*affirming* 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053]; St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286; Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

License to fish.— A person who has a license from the officers of a town to use a reservoir for fishing and sailing during his natural life cannot, by the use of this license, obtain an absolute title by prescription to last forever. Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354.

License to use street.— The owner of lots on each side of a street, who has inclosed and who uses the street by permission of the town, does not hold in such manner as to acquire title to the street by adverse possession. Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

What amounts to license to use street.—An ordinance granting two owners of abutting lots the right to occupy a designated portion of the sidewalk with a booth for the sale of merchandise is but a license revocable at any time, and possession thereunder is not adverse. Denver *v.* Girard, 21 Colo. 447, 42 Pac. 662.

70. Budd *v.* Collins, 69 Mo. 129; Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615.

Entry on public mineral lands.— An entry made on public mineral lands is at most an entry under license from the government, and a subsequent sale to another person by the government, and the issue of a receiver's receipt for the price thereof, so divest the government of the title that the license is *eo instanti* revoked, and the licensee cannot set up his previous possession as adverse. Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Statutory authority to build academy.— Where lands are held in trust for county buildings, a legislative authorization for the erection of an academy on the premises is but a license to the academy by the county, expressed through the legislature, to hold at will, and the holding is not adverse so as to give title by limitation. Kittaning Academy *v.* Brown, 41 Pa. St. 269.

Temporary permission to occupy for the consideration of improvements.— A, who had settled on a lot of state land, was allowed to remain there in consideration of improvement made by him until the legislature should otherwise direct. A sold his settler's right to B, and remained in possession until his death. The heirs of B obtained an order for the sale of the land on partition, and one of them, C, purchased it, receiving a sheriff's deed, and held possession for thirteen years, when D purchased the land from the estate. The legislature having passed an act providing for the sale of such land, it was held that C's possession had not been adverse to the estate. Budd *v.* Collins, 69 Mo. 129.

71. Hoban *v.* Cable, 102 Mich. 206, 60 N. W. 466; St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286 [*reversing* 12 Hun (N. Y.) 317].

Reason for rule.— If the contract is a nullity the possessor holds as tenant at will to the person from whom he derived possession, and the relation still exists. Chiles *v.* Jones, 4 Dana (Ky.) 479.

Possession, under ultra vires resolution by a city council, of a portion of the street, is not adverse. St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286 [*reversing* 12 Hun (N. Y.) 317].

Unauthorized agreement in behalf of minors.—The occupation of lands under an agreement with an assumed representative of minor owners, whether he has authority to act or not, is not adverse possession against the minor owners. Hoban *v.* Cable, 102 Mich. 206, 60 N. W. 466.

72. Susquehanna County *v.* Deans, 33 Pa. St. 131.

73. Johnson *v.* Butt, 46 Nebr. 220, 64 N. W. 691.

74. Bird *v.* New Jersey, etc., R. Co., 3 N. Y. App. Div. 344, 38 N. Y. Suppl. 281.

75. Bucknam *v.* Bucknam, 30 Me. 494.

76. Cameron *v.* Chicago, etc., R. Co., 60 Minn. 100, 61 N. W. 814.

2. What Is Requisite to Give Possession a Hostile Character — a. Knowledge or Notice to Disseizee of Hostile Claim. Where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the statute of limitations.[77] If this were not so, the greatest injustice might be done. Without such knowledge the adverse claimant has the right to rely upon the fiduciary relation under which the possession was originally taken and held.[78]

b. What Knowledge or Notice Sufficient — (1) *In General.* The statute of limitations does not begin to run until the true owner has actual notice of a hostile holding against him, or until there are acts or declarations on the part of the claimant showing the possession to have become hostile, done or made in such manner and under such circumstances as to leave no doubt that they came to the knowledge of the owner or some one representing him.[79] It must be shown that

77. *Alabama.*— Foy *v.* Welborn, 112 Ala. 160, 20 So. 604; Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604; Dejarnette *v.* McDaniel, 93 Ala. 215, 9 So. 570; Burrus *v.* Meadors, 90 Ala. 140, 7 So. 469; Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349; Bishop *v.* Truett, 85 Ala. 376, 5 So. 154; Dothard *v.* Denson, 72 Ala. 541; Alexander *v.* Wheeler, 69 Ala. 332; Collins *v.* Johnson, 57 Ala. 304; Benje *v.* Creagh, 21 Ala. 151; Harrison *v.* Pool, 16 Ala. 167.

California.— Jensen *v.* Hunter, (Cal. 1895) 41 Pac. 14; Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817.

Connecticut.— Harrall *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608.

Georgia.— Williams *v.* Cash, 27 Ga. 507, 73 Am. Dec. 739; Lawson *v.* Cunningham, 21 Ga. 454; Stamper *v.* Griffin, 20 Ga. 312, 65 Am. Dec. 628.

Illinois.— Smith *v.* Stevens, 82 Ill. 554.

Iowa.— Davenport *v.* Sebring, 52 Iowa 364, 3 N. W. 403.

Maine.— Alden *v.* Gilmore, 13 Me. 178.

Michigan.— Burke *v.* Douglass, 115 Mich. 197, 73 N. W. 133; Perkins *v.* Nugent, 45 Mich. 156, 7 N. W. 757. See also St. Joseph *v.* Geel, 122 Mich. 70, 80 N. W. 987.

Minnesota.— Cameron *v.* Chicago, etc., R. Co., 60 Minn. 100, 61 N. W. 814.

Mississippi.—Green *v.* Mizelle, 54 Miss. 220.

Missouri.— Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915; Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39; Spencer *v.* O'Neill, 100 Mo. 49, 12 S. W. 1054; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Estes *v.* Long, 71 Mo. 605; Fulkerson *v.* Brownlee, 69 Mo. 371; Budd *v.* Collins, 69 Mo. 129; Hamilton *v.* Boggess, 63 Mo. 233; Pease *v.* Lawson, 33 Mo. 35.

Nebraska.— Smith *v.* Hitchcock, 38 Nebr. 104, 56 N. W. 791.

New York.— Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540; Treadwell *v.* Inslee, 120 N. Y. 458, 24 N. E. 651.

North Carolina.— Bradsher *v.* Hightower, 118 N. C. 399, 24 S. E. 120.

Pennsylvania.— Cadwalader *v.* App, 81 Pa. St. 194; Bannon *v.* Brandon, 34 Pa. St. 263, 75 Am. Dec. 655; Hood *v.* Hood, 2 Grant (Pa.) 229.

South Carolina.— Floyd *v.* Mintsey, 7 Rich. (S. C.) 181.

Texas.— Mhoon *v.* Cain, 77 Tex. 316, 14 S. W. 24.

Vermont.—Robinson *v.* Sherwin, 36 Vt. 69; Ripley *v.* Yale, 18 Vt. 220.

Virginia.— Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157; Creekmur *v.* Creekmur, 75 Va. 430; Clarke *v.* McClure, 10 Gratt. (Va.) 305.

West Virginia.— Hudson *v.* Putney, 14 W. Va. 561.

Wisconsin.— Allen *v.* Allen, 58 Wis. 202, 16 N. W. 610; Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714; Quinn *v.* Quinn, 27 Wis. 168.

United States.— Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871; Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979; Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596; Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Graydon *v.* Hurd, 55 Fed. 724, 6 U. S. App. 610, 5 C. C. A. 258.

Personal property.— The rule stated in the text as applicable to real property applies as well to personal property. Weathers *v.* Barksdale, 30 Ga. 888; Spalding *v.* Grigg, 4 Ga. 75.

78. Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233; Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

It would be a harsh doctrine, converting the statute of limitations into a statute for the encouragement of fraud, if tenants of particular estates, or tenants having had a limited or qualified interest or holding by mere sufferance or permission, could without the knowledge of the true owners,— without notice to them of any facts putting them on inquiry,— convert their possessions into adversary possession by mere claim of title, which the statute of limitations will protect. Foy *v.* Wellborn, 112 Ala. 160, 20 So. 604; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157; Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81.

79. *Alabama.*— Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Dothard *v.* Denson, 72 Ala. 541; Harrison *v.* Pool, 16 Ala. 167.

the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him equivalent to actual notice.[80]

(II) *NECESSITY OF ACTUAL KNOWLEDGE.* Actual knowledge on the part of the owner is not an absolutely indispensable element of adverse holding by one who has entered under and in recognition of title of the true owner. The acts of the party in possession may be such as will warrant the presumption and finding that the true owner had knowledge of the adverse claim.[81]

C. Effect of Recognition or Admission of Title in Another. The possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other[82] until such occupant has

Pennsylvania.— Hood *v.* Hood, 2 Grant (Pa.) 229.

Texas.— Mhoon *v.* Cain, 77 Tex. 316, 14 S. W. 24.

Virginia.— Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233.

United States.— Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

Acts held insufficient to charge with notice. — Proceedings for the partition of land, brought by persons holding possession under license from the true owner, and to which he is not a party, followed by a sale to one of the parties and continued exclusive possession by him, are insufficient to charge the true owner with notice of a hostile claim. Budd *v.* Collins, 69 Mo. 129. Mere declarations of intent to hold adversely by the occupant are insufficient to set in motion the statute of limitations in his favor, where he entered in subserviency to the title of another. Cadwalader *v.* App, 81 Pa. St. 194. And *a fortiori* a mere undisclosed intent on the part of such occupant to hold adversely is insufficient. Some notice or act indicative of an intent to sell is necessary. Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39; Bannon *v.* Brandon, 34 Pa. St. 263, 75 Am. Dec. 655. Paying taxes, making repairs, taking rents and profits, and cutting timber are not sufficient acts to constitute adverse possession on the part of one who enters into possession of land in privity with another against whom such possession is asserted. Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233. The record of a deed from the owner of the tax-title to one in possession under permission of the owner does not affect the owner with notice that the possession of the grantee thereafter was adverse to his title. Millett *v.* Lagomarsino, (Cal. 1894) 38 Pac. 308.

The receipt of rents and profits from real estate is not of itself such a possession as to prove an ouster of the party holding the legal title, and to render void a conveyance by him, but is consistent with the supposition that the possession is in some way subordinate to the title of the owner. Averill *v.* Sanford, 36 Conn. 345.

80. Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604.

81. *Alabama.*— Alexander *v.* Wheeler, 69 Ala. 332. See also Alabama cases cited *infra*, this note.

Georgia.— Stamper *v.* Griffin, 20 Ga. 312, 65 Am. Dec. 628.

Illinois.— Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; Illinois Cent. R. Co. *v.* Houghton, 126 Ill. 233, 18 N. E. 301, 9 Am. St. Rep. 581, 1 L. R. A. 213.

Maine.— Alden *v.* Gilmore, 13 Me. 178.

Mississippi.— Green *v.* Mizelle, 54 Miss. 220.

Missouri.— Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39.

Nevertheless it has been said in a recent decision that "no kind or degree of actual hostility will of itself convert such a permissive into an adverse possession. No sort of claim of ownership on the part of the party in possession will of itself have this effect. And while it may be open to the jury in some instances to find from the circumstances of the possession that the owner has notice of its hostile and exclusive character, no exclusiveness of possession, no hostility, no claim of right antagonistic to the title, will necessarily in any case take the place of direct proof of knowledge on the part of the owner that the possession is no longer held in subserviency to him. At most, in any case, the circumstances of hostility, exclusiveness, and claim of right are only for the jury to consider as tending to show knowledge on the part of the owner, the argument being that the circumstances of the possession were such as that he must have known them, and from them that the possession was no longer held under him and in recognition of his title." Trufant *v.* White, 99 Ala. 526, 13 So. 83. To the same effect see Benje *v.* Creagh, 21 Ala. 151.

82. *California.*— Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; Farish *v.* Coon, 40 Cal. 33; McCracken *v.* San Francisco, 16 Cal. 591.

Georgia.— Wood *v.* McGuire, 17 Ga. 303.

Illinois.— Busch *v.* Huston, 75 Ill. 343.

Iowa.— Browneller *v.* Wells, 109 Iowa 230, 80 N. W. 351; McNamee *v.* Moreland, 26 Iowa 96.

Kentucky.— Haffendorfer *v.* Gault, 84 Ky. 124.

Maine.— Lamb *v.* Foss, 21 Me. 240.

Mississippi.— Rothschild *v.* Hatch, 54 Miss. 554.

Missouri.— Boynton *v.* Miller, 144 Mo. 681, 46 S. W. 754; Tomlinson *v.* Lynch, 32 Mo. 160.

Nebraska.— Roggencamp *v.* Converse, 15 Nebr. 105, 17 N. W. 361.

New York.— Erkson *v.* Johnston, 8 N. Y. App. Div. 31, 40 N. Y. Suppl. 401; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433.

North Carolina.— Graham *v.* Davidson, 32 N. C. 245.

South Carolina.— Moore *v.* Johnston, 2

changed the character of his possession, either by express declaration or by the exercise of actual ownership inconsistent with a subordinate character.[83]

D. Effect of Agreement of Adjoining Proprietors in Relation to Boundaries — 1. Fixing Permanent Boundaries — a. Statement of Rule. Where proprietors of adjoining lands agree upon, fix, and establish a boundary line between their respective tracts, and each occupies up to the boundary line, their possession is mutually adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, will ripen into a perfect title.[84] Where an

Speers (S. C.) 288; Markley *v.* Amos, 2 Bailey (S. C.) 603.

Texas.— Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750; Texas Western R. Co. *v.* Wilson, 83 Tex. 153, 18 S. W. 325; Satterwhite *v.* Rosser, 61 Tex. 166; Cox *v.* Sherman Hotel Co., (Tex. Civ. App. 1898) 47 S. W. 808.

Virginia.— Erskine *v.* North, 14 Gratt. (Va.) 60.

West Virginia.— Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178.

United States.— Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113; Adams *v.* Burke, 3 Sawy. (U. S.) 415, 1 Fed. Cas. No. 49; Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M. (U. S.) 538, 23 Fed. Cas. No. 13,446.

Admission by deeds.— The possession by defendant, who has by deeds and partitions acknowledged the title of plaintiff, is not adverse to such title. Tomlinson *v.* Lynch, 32 Mo. 160. Possession of land by defendant and other grantors, accompanied by the erection of wharves and other buildings thereon, is not adverse when the conveyance under which they claim showed that they had no title to the accepted land, and their own subsequent conveyance recognized and repeated the exception. New York *v.* Law, 53 Hun (N. Y.) 637, 6 N. Y. Suppl. 628 [*affirmed* in 125 N. Y. 380, 26 N. E. 471]. The reservation of a particular lot in a conveyance of the surrounding land is sufficient recognition, by the grantee, of title in another, to bar his claim to that lot under the statute of limitations. Olwine *v.* Holmann, 23 Pa. St. 279.

Admission, by sworn pleading, of title in another, will prevent adverse possession. Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113.

Express written admission.— If the occupant admits in writing that the land on which he lives belongs to the proprietor it is a voluntary submission to that title and a surrender of any rights acquired by prior possession. Lamb *v.* Foss, 21 Me. 240.

Intention to leave when the real owner came.— Where one enters on unseated land with the intention to leave when the real owner came, but not until then, the owner being unknown, and holds continuous possession for twenty-one years, he acquires a perfect title against the real owner which is not affected by his endeavoring to find the real owner or purchase his title, or by his declarations to strangers of his want of title and his desire and intention to buy it or be paid for his improvements when the real owner appeared. Patterson *v.* Reigle, 4 Pa. St. 201, 45 Am. Dec. 684.

Mutual agreement not to sue.— Adverse possession ceases to be such on agreement between the parties, for sufficient consideration, not to bring suit during the lifetime of either. Dietrick *v.* Noel, 42 Ohio St. 18, 51 Am. Rep. 788.

Recognition by purchase from cotenant.— Where, in partition, land cannot be divided and is assigned to one heir on condition that the value of another's share be paid in money, a purchaser with knowledge, from the heir, who takes conditional possession, cannot hold the land adversely to the right to enforce payment of the assessment against it. McKibben *v.* Salinas, 41 S. C. 105, 19 S. E. 302.

What does not amount to recognition of title in another.— Evidence that a roadmaster, in the construction of a side-track over land, promised one claiming to be the owner that he would be paid for the land occupied, is insufficient to prove that the company entered in recognition of his title. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

83. Bannon *v.* Brandon, 34 Pa. St. 263, 75 Am. Dec. 655; Moore *v.* Johnston, 2 Speers (S. C.) 288; Satterwhite *v.* Rosser, 61 Tex. 166.

84. *Alabama.*— Pittman *v.* Pittman, (Ala. 1900) 27 So. 242; Hess *v.* Rudder, 117 Ala. 525, 23 So. 136, 67 Am. St. Rep. 182; Hoffman *v.* White, 90 Ala. 354, 7 So. 816; Alexander *v.* Wheeler, 69 Ala. 332; Brown *v.* Cockerell, 33 Ala. 38.

California.— Smith *v.* Robarts, (Cal. 1885) 9 Pac. 104; White *v.* Spreckels, 75 Cal. 610, 17 Pac. 715; Johnson *v.* Brown, 63 Cal. 391; Cooper *v.* Vierra, 59 Cal. 282; Biggins *v.* Champlin, 59 Cal. 113; Moyle *v.* Connolly, 50 Cal. 295; Columbet *v.* Pacheco, 48 Cal. 395; Sneed *v.* Osborn, 25 Cal. 619.

Georgia.— Shiels *v.* Lamar, 58 Ga. 590; Watt *v.* Ganahl, 34 Ga. 290; Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— Illinois Cent. R. Co. *v.* Houghton, 126 Ill. 233, 18 N. E. 301, 9 Am. St. Rep. 581, 1 L. R. A. 213; Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150; McNamara *v.* Seaton, 82 Ill. 498; Kerr *v.* Hitt, 75 Ill. 51.

Indiana.— Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522; Wingler *v.* Simpson, 93 Ind. 201; Brown *v.* Anderson, 90 Ind. 93; Main *v.* Killinger, 90 Ind. 165; Ball *v.* Cox, 7 Ind. 453.

Iowa.— Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171; Tracy *v.* Newton, 57 Iowa 210, 10 N. W. 636; Hiatt *v.* Kirkpatrick, 48 Iowa 78; Foulke *v.* Stockdale, 40 Iowa 99; Burdick *v.* Heivly, 23 Iowa 511.

Kansas.— Sheldon *v.* Atkinson, 38 Kan. 14, 16 Pac. 68.

Kentucky.— Scheible *v.* Hart, (Ky. 1899)

agreement of this character exists, it is of course immaterial that the line thus agreed upon is not the correct one.[85]

Agreements of this character are not within the statute of frauds,[86] because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such case the agreement serves to fix the line to which the title of each extends.[87]

12 S. W. 628; Liter *v.* Shirley, (Ky. 1896) 35 S. W. 550. See also Carnish *v.* Follis, (Ky. 1898) 45 S. W. 1050.

Louisiana.— D'Arby *v.* Blanchet, 7 La. 256. See also Bisso *v.* Calvo, 20 La. Ann. 343.

Maine.— Abbott *v.* Abbott, 51 Me. 575; Faught *v.* Holway, 50 Me. 24; Moody *v.* Nichols, 16 Me. 23.

Michigan.— Greene *v.* Anglemire, 77 Mich. 168, 43 N. W. 772.

Massachusetts.— Boston, etc., R. Corp. *v.* Sparhawk, 5 Metc. (Mass.) 469; Burrell *v.* Burrell, 11 Mass. 294. See also Coyle *v.* Cleary, 116 Mass. 208.

Missouri.— Flynn *v.* Wacker, 151 Mo. 545, 52 S. W. 342; Ward *v.* Ihler, 132 Mo. 375, 34 S. W. 251; Goltermann *v.* Schiermeyer, 125 Mo. 291, 28 S. W. 616; Irwin *v.* Woodmansee, 104 Mo. 403, 16 S. W. 486; Handlan *v.* McManus, 100 Mo. 124, 16 S. W. 207, 18 Am. St. Rep. 533; Krider *v.* Milner, 99 Mo. 145, 12 S. W. 461, 17 Am. St. Rep. 549; Atchison *v.* Pease, 96 Mo. 566, 10 S. W. 159; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Majors *v.* Rice, 57 Mo. 384; Tamm *v.* Kellog, 49 Mo. 118. *Compare* Knowlton *v.* Smith, 36 Mo. 507, 88 Am. Dec. 152.

New York.— Reed *v.* Farr, 35 N. Y. 113; Baldwin *v.* Brown, 16 N. Y. 359; Race *v.* Stewart, 5 N. Y. App. Div. 598, 39 N. Y. Suppl. 438; Robinson *v.* Phillips, 1 Thomps. & C. (N. Y.) 151; Vauth *v.* Landis, 26 N. Y. Wkly. Dig. 502.

Ohio.— Smith *v.* McKay, 30 Ohio St. 409; Bobo *v.* Richmond, 25 Ohio St. 115.

Oregon.— Pearson *v.* Dryden, 28 Oreg. 350, 43 Pac. 166.

Pennsylvania.— Reiter *v.* McJunkin, 173 Pa. St. 82, 37 Wkly. Notes Cas. (Pa.) 459, 33 Atl. 1012; Kuhns *v.* Fennell, (Pa. 1888) 15 Atl. 920; Rider *v.* Maul, 46 Pa. St. 376; Brown *v.* McKinney, 9 Watts (Pa.) 565, 36 Am. Dec. 139.

Rhode Island.— O'Donnell *v.* Penney, 17 R. I. 164, 20 Atl. 305.

Texas.— Geroge *v.* Thomas, 16 Tex. 74, 67 Am. Dec. 612.

Utah.— Switzgable *v.* Worseldine, 5 Utah 386, 16 Pac. 400 [*affirming* on rehearing 5 Utah 315, 15 Pac. 144].

Vermont.— Davis *v.* Judge, 46 Vt. 655; Hodges *v.* Eddy, 38 Vt. 327; Clark *v.* Tabor, 28 Vt. 222; Spaulding *v.* Warren, 25 Vt. 316. See also Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633.

Wisconsin.— Eiden *v.* Eiden, 76 Wis. 435, 45 N. W. 322; Tobey *v.* Secor, 60 Wis. 310, 19 N. W. 99; Donahue *v.* Thompson, 60 Wis. 500, 19 N. W. 520; Bader *v.* Zeise, 44 Wis. 96.

United States.— Boyd *v.* Graves, 4 Wheat. (U. S.) 513, 4 L. ed. 628; Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

Canada.— Martin *v.* Weld, 19 U. C. Q. B. 631; Does *v.* Radich, Taylor (U. C.) 499; Elliott *v.* Bulmer, 27 U. C. C. P. 217.

Party wall.— A wall built and used continuously for twenty-one years by an adjoining owner becomes a party wall, whether the same was erected equally on the lot of each or is wholly within the lot of one of the adjoining owners. McVey *v.* Durkin, 136 Pa. St. 418, 26 Wkly. Notes Cas. (Pa.) 522, 20 Atl. 541.

What does not amount to an agreement.— Where adjoining owners, having a well defined and recognized line between their lands, together built a fence wherever they could build the cheapest and easiest, and not pretending to build on the true line, it was held that possession up to such fence would not be available to either owner to gain title beyond the true line. Morse *v.* Churchill, 41 Vt. 649.

Evidence of agreement sufficient to go to jury.— Where adjoining owners for more than twenty years had occupied up to an old fence, each owner by agreement keeping up his half, it showed such a possession, in pursuance of the location of the boundary line, as to require the submission of the question to the jury. Jones *v.* Smith, 64 N. Y. 180.

85. *Alabama.*— Hoffman *v.* White, 90 Ala. 354, 7 So. 816.

New York.— Baldwin *v.* Brown, 16 N. Y. 359.

Ohio.— Smith *v.* McKay, 30 Ohio St. 409.

Pennsylvania.— Kuhns *v.* Fennell, (Pa. 1888) 15 Atl. 920.

Canada.— Dennison *v.* Chew, 5 U. C. Q. B. O. S. 161.

86. *California.*— Smith *v.* Robarts, (Cal. 1885) 9 Pac. 104; White *v.* Spreckels, 75 Cal. 610, 17 Pac. 715.

Florida.—Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Missouri.— Ward *v.* Ihler, 132 Mo. 375, 34 S. W. 251; Atchison *v.* Pease, 96 Mo. 566, 10 S. W. 159; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Kincaid *v.* Dormey, 47 Mo. 337.

New Hampshire.— Orr *v.* Hadley, 36 N. H. 575.

Pennsylvania.— Kellun *v.* Smith, 65 Pa. St. 86; Hagey *v.* Detweiler, 35 Pa. St. 409; Perkins *v.* Gay, 3 Serg. & R. (Pa.) 327, 7 Am. Dec. 653.

Contra, White *v.* Hapeman, 43 Mich. 267, 5 N. W. 313, 38 Am. Rep. 178.

87. White *v.* Spreckels, 75 Cal. 610, 17 Pac. 715.

The line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have by such consent agreed permanently upon the limits of the extent of

b. Extent and Limits of Rule. These agreements are binding on the heirs of the parties[88] and on their grantees,[89] and, after possession has been held for the statutory period conformably to the line agreed upon, a deed by one purporting to convey the land thus in possession of the other passes nothing to the grantee.[90]

While a disputed boundary line between adjoining proprietors may be settled by agreement between them as to where the line shall be, followed by occupancy for the time necessary to bar an entry, and such occupancy will confer title regardless of where the true line is, the same is not true of the projection of such agreed line beyond the point of occupancy, and in the latter case the agreement is within the statute of frauds, and the possession of each will follow his title to the true line, to be determined by the government corners and field-notes.[91]

c. Doctrine of Estoppel as Applicable to Agreements. In a number of jurisdictions it seems to be well settled that where a boundary line is established by agreement of two adjoining owners, title up to the line thus fixed may be acquired by estoppel as well as by adverse possession. Where adjoining landowners agree upon a boundary line and enter into possession and improve the lands according to the line thus agreed upon, the parties will be concluded from afterward disputing that the line thus agreed upon is the true one, even if the statute of limitations has not run.[92]

2. Occupation up to Provisional Line Until True Line Established. Where owners of adjacent tracts, being ignorant of the location of the true line, occupy up to a line which they agree is merely provisional and to continue only until the true line is thereafter determined, neither can acquire title to any land not within the true line.[93]

3. Fixing Provisional Line for Convenience. If a line is established merely for convenience, the parties thereto recognizing the true line, the possession, by either, of the other's land, no matter how long continued, cannot ripen into title.[94]

E. Effect of Occupation under Mistake as to Boundaries — 1. View that Possession Is Necessarily Adverse. A few decisions hold without qualification that one who, through a misapprehension as to the boundaries of his land, occupies and possesses land of another for the statutory period, thereby acquires title by adverse possession to such lands.[95]

their respective lands. Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

88. Kerr *v.* Hitt, 75 Ill. 51.

89. Hiatt *v.* Kirkpatrick, 48 Iowa 78.

90. Boston, etc., R. Corp. *v.* Sparhawk, 5 Metc. (Mass.) 469.

91. Ward *v.* Ihler, 132 Mo. 375, 34 S.W. 251.

92. Johnson *v.* Brown, 63 Cal. 391; Cooper *v.* Vierra, 59 Cal. 282; Biggins *v.* Champlin, 59 Cal. 113; Moyle *v.* Connolly, 50 Cal. 295; Clark *v.* Hulsey, 54 Ga. 608, wherein it was held that neither party will be permitted to repudiate the agreement and claim a different line, whatever may have been his legal rights independent thereof; McNamara *v.* Seaton, 82 Ill. 498; Bauer *v.* Gottmanhausen, 65 Ill. 499; Yates *v.* Shaw, 24 Ill. 367; Crowell *v.* Maughs, 7 Ill. 419, 43 Am. Dec. 62.

93. *California.*— Peters *v.* Gracia, 110 Cal. 89, 42 Pac. 455; Calanchina *v.* Branstetter, 84 Cal. 249, 24 Pac. 149; Quinn *v.* Windmiller, 67 Cal. 461, 8 Pac. 14; Irvine *v.* Adler, 44 Cal. 559.

Iowa.— McNamee *v.* Moreland, 26 Iowa 96.

Michigan.— Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023.

North Carolina.— Bryson *v.* Slagle, 44 N. C. 449.

Tennessee.— Lowe *v.* Cunningham, (Tenn. Ch. 1897) 39 S. W. 1052.

Texas.— Thompson *v.* Slater, (Tex. Civ. App. 1896) 34 S. W. 357.

Vermont.— Burnell *v.* Maloney, 39 Vt. 579, 94 Am. Dec. 358.

Canada.— Doe *v.* Mathews, 6 U. C. Q. B. O. S. 461.

Compare Pierson *v.* Mosher, 30 Barb. (N. Y.) 81, in which it was held that forty years' possession under such agreement would give title.

Application of rule.— If two grants of land lap, and if, while neither grantee is settled on the lapped part, the junior grantee enters on the lappage, and clears and cultivates a field upon it with the permission of the senior grantee, on his agreeing to set back his fence whenever it would appear by survey that it was over the line of the elder grant, his possession of the field will not prevent the elder grantee, or one claiming under him, from having his lines run according to the calls of his grant. Bryson *v.* Slagle, 44 N. C. 449.

94. Burrell *v.* Burrell, 11 Mass. 294; White *v.* Hapeman, 43 Mich. 267, 5 N. W. 313; Clark *v.* Tabor, 28 Vt. 222. See also Fairfield *v.* Barrette, 73 Wis. 463, 41 N. W. 624.

95. French *v.* Pearce, 8 Conn. 440, 21 Am. Dec. 680; Metcalfe *v.* McCutchen, 60 Miss. 145; Yetzer *v.* Thoman, 17 Ohio St. 130, 91 Am. Dec. 122.

2. View That Possession without Intent to Claim Is Not Adverse. Nevertheless, according to the great weight of authority, where the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but he intends to claim only to the true line wherever it may be, the holding is not adverse.[96] In cases of mis-

The principle on which these decisions proceed is, that although the intention of the possessor to claim adversely is an essential ingredient, the very nature of the act of entering on land believing and claiming it to be one's own amounts to an assertion of his own title and a denial of the title of all others,— that it is immaterial that the possessor was mistaken, and that he would not have entered on the land if he had been better informed. French *v.* Pearce, 8 Conn. 440, 21 Am. Dec. 680.

96. *Alabama.*— Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910; Davis *v.* Caldwell, 107 Ala. 526, 18 So. 103; Alexander *v.* Wheeler, 78 Ala. 167, 69 Ala. 332; Brown *v.* Cockerell, 33 Ala. 38.

Arkansas.— Wilson *v.* Hunter, 59 Ark. 626. 28 S. W. 419; Phelps *v.* Henry, 15 Ark. 297.

California.— Smith *v.* Robarts, (Cal. 1885) 9 Pac. 104; Sheils *v.* Haleig, 61 Cal. 157.

District of Columbia.— Neale *v.* Lee, 19 D. C. 5.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139; Liddon *v.* Hodnett, 22 Fla. 442.

Georgia.— Howard *v.* Reedy, 29 Ga. 152, 74 Am. Dec. 58; Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726.

Illinois.— Grim *v.* Murphy, 110 Ill. 271.

Indiana.— Silver Creek Cement Corp. *v.* Union Lime, etc., Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721.

Iowa.— Miller *v.* Mills County, (Iowa 1900) 82 N. W. 1038; Kahl *v.* Schmidt, 107 Iowa 550, 78 N. W. 204; Jordan *v.* Ferree, 101 Iowa 440, 70 N W. 611; Greer *v.* Powell, 89 Iowa 740, 56 N. W. 440; Goldsborough *v.* Pidduck, 87 Iowa 599, 54 N. W. 431; Wacha *v.* Brown, 78 Iowa 432, 43 N. W. 269; Mills *v.* Penny, 74 Iowa 172, 37 N. W. 135, 7 Am. St. Rep. 474; Skinner *v.* Crawford, 54 Iowa 119, 6 N. W. 144; Grube *v.* Wells, 34 Iowa 148; State *v.* Welpton, 34 Iowa 144.

Kansas.— Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138; Conrad *v.* Sackett, 8 Kan. App. 635, 56 Pac. 507; Rasdell *v.* Shumway, 6 Kan. App. 45, 49 Pac. 631 [*affirmed* in 58 Kan. 818, 51 Pac. 285].

Kentucky.— Rudd *v.* Monarch, (Ky. 1895) 32 S. W. 1083; Holmes *v.* Herringer, (Ky. 1890) 13 S. W. 359; Scheible *v.* Hart, (Ky. 1889) 12 S. W. 628; Hunter *v.* Chrisman, 6 B. Mon. (Ky.) 463; McKinny *v.* Kenny, 1 A. K. Marsh. (Ky.) 460.

Louisiana.— Frederick *v.* Brulard, 6 La. Ann. 382.

Maine.— Preble *v.* Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149, 35 Am. St. Rep. 366, 21 L. R. A. 829; Dow *v.* McKenney, 64 Me. 138; Worcester *v.* Lord, 56 Me. 265, 96 Am. Dec. 456; Lincoln *v.* Edgecomb, 31 Me. 345; Ross *v.* Gould, 5 Me. 204; Brown *v.* Gay, 3 Me. 126.

Maryland.— Davis *v.* Furlow, 27 Md. 536; Cresap *v.* Hutson, 9 Gill (Md.) 269.

Massachusetts.— Holmes *v.* Turner's Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

Missouri.— McCabe *v.* Bruere, 153 Mo. 1, 54 S. W. 450; Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93; Roecker *v.* Haperla, 138 Mo. 33, 39 S. W. 454; McWilliams *v.* Samuel, 123 Mo. 659, 27 S. W. 550; Shotwell *v.* Gordon, 121 Mo. 482, 26 S. W. 341; Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; Battner *v.* Baker, 108 Mo. 311, 18 S. W. 911, 32 Am. St. Rep. 606; Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; Crawford *v.* Ahrnes, 103 Mo. 88, 15 S. W. 341; Handlan *v.* McManus, 100 Mo. 124, 16 S. W. 207, 18 Am. St. Rep. 533; Skinker *v.* Haagsma, 99 Mo. 208, 12 S. W. 659; Krider *v.* Milner, 99 Mo. 145, 12 S. W. 461, 17 Am. St. Rep. 549; Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549; West *v.* St. Louis, etc., R. Co., 59 Mo. 510; Knowlton *v.* Smith, 36 Mo. 507, 88 Am. Dec. 152.

Nevada.— McDonald *v.* Fox, 20 Nev. 364, 22 Pac. 234.

New York.— Crary *v.* Goodman, 22 N. Y. 170; Danziger *v.* Boyd, 12 N. Y. St. 64.

North Carolina.— Gilchrist *v.* McLaughlin, 29 N. C. 310; Green *v.* Harman, 15 N. C. 158.

Oregon.—King *v.* Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361; Caufield *v.* Clark, 17 Oreg. 473, 21 Pac. 443, 11 Am. St. Rep. 845.

Pennsylvania.—Comegys *v.* Carley, 3 Watts (Pa.) 280, 27 Am. Dec. 356.

Tennessee.— East Tennessee Iron, etc., Co. *v.* Ferguson, (Tenn. Ch. 1895) 35 S. W. 900; Gates *v.* Butler, 3 Humphr. (Tenn.) 447.

Texas.— Blassingame *v.* Davis, 68 Tex. 595, 5 S. W. 402.

Washington.— Phinney *v.* Campbell, 16 Wash. 203, 47 Pac. 502.

Wisconsin.— Reilley *v.* Howe, 101 Wis. 108, 76 N. W. 1114.

United States.— Schraeder Min., etc., Co. *v.* Packer, 129 U. S. 688, 9 S. Ct. 385, 32 L. ed. 760.

Canada.— Doe *v.* Nightingale, 5 U. C. Q. B. 518.

Applications of rule.— Where defendant's claim was limited to a lot of a certain number, but his possession extended to and covered a part of the adjoining lot embraced in his inclosure, this did not constitute adverse possession. Grube *v.* Wells, 34 Iowa 148. Where a person claims title to only a certain quarter of a section, and occupies certain land because he believes it to be a part of such quarter, and it is not a part thereof, his possession is not adverse. Fisher *v.* Muecke, 82 Iowa 547, 48 N. W. 936. In ejectment between owners of conterminous subdivisions of a lot

take as to the true line between adjoining lands the real test as to whether or not a title will be acquired by a holding for the period prescribed by the statute of limitations is the intention of the party holding beyond the true line.[97] It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseizin.[98] There must be an intention to claim title to all land within a certain boundary, whether it eventually be the correct one or not.[99]

3. VIEW THAT POSSESSION WITH INTENT TO CLAIM IS ADVERSE. Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another, believing it to be his own, up to a mistaken line, claiming title to it and so holding, the holding is adverse, and, if continued for the requisite period, will give title by adverse possession.[1]

of land in a city, plaintiff claimed under a conveyance describing his subdivision as being "about twenty-nine feet" in width. Conveyances of the other subdivisions of the lot by metes and bounds demonstrated the fact that plaintiff's lot was only twenty-seven feet in width. Plaintiff had always supposed and claimed that his lot was twenty-nine feet wide, but had never been in the occupancy of or claimed any of the two feet beyond the true boundary. It was held that he had not acquired title to the strip of two feet by adverse possession. Kunze *v.* Evans, 107 Mo. 487, 18 S. W. 36, 28 Am. St. Rep. 435.

Agreement to conform to true line when established.— If a person builds a fence, being in doubt as to whether it is within the true boundary, and takes possession, stating that he will conform to the true line when established, his possession is not adverse. Grim *v.* Murphy, 110 Ill. 271.

Possession of tenant for landlord.—The possession of a tenant beyond the boundaries of the land contained in his lease cannot be regarded as the possession of his landlord where the latter had never had possession of the land or claimed title to it, even though the tenant believes that he is occupying only the land demised. Holmes *v.* Turner's Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

Possession of tenant for himself.—A tenant of two adjoining lots owned by different lessors divided them, for convenience in cultivation, by a fence not on the true division line, and afterward purchased the lot thus enlarged. It was held that his occupancy of the ground taken from the other lot could not be set up as an adverse possession under the statute of limitations. Betts *v.* Brown, 3 Mo. App. 20.

97. Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

98. Liddon *v.* Hodnett, 22 Fla. 442; Preble *v.* Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149, 35 Am. St. Rep. 366, 21 L. R. A. 829.

99. Preble *v.* Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149, 35 Am. St. Rep. 366, 21 L. R. A. 829; Hockmoth *v.* Des Grand Champs, 71 Mich. 520, 39 N. W. 737; Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135.

1. *Alabama.*— Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910; Hoffman *v.* White, 90 Ala. 354, 7 So. 816; Alexander *v.* Wheeler, 69 Ala. 332.

Arkansas.— Wilson *v.* Hunter, 59 Ark. 626, 28 S. W. 419, 43 Am. St. Rep. 63; Phelps *v.* Henry, 15 Ark. 297.

California.— Woodward *v.* Faris, 109 Cal. 12, 41 Pac. 781; Grimm *v.* Curley, 43 Cal. 250.

Delaware.— O'Daniel *v.* Baker's Union, 4 Houst. (Del.) 488.

District of Columbia.— Neale *v.* Lee, 19 D. C. 5.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139; Liddon *v.* Hodnett, 22 Fla. 442; Seymour *v.* Creswell, 18 Fla. 29.

Illinois.— Schoonmaker *v.* Doolittle, 118 Ill. 605, 8 N. E. 839; Schneider *v.* Botsch, 90 Ill. 577.

Indiana.— Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253; Brown *v.* Anderson, 90 Ind. 93.

Iowa.—Miller *v.* Mills County, (Iowa 1900) 82 N. W. 1038; Fullmer *v.* Beck, 105 Iowa 517, 75 N. W. 366; Doolittle *v.* Bailey, 85 Iowa 398, 52 N. W. 337; Wilson *v.* Gunning, 80 Iowa, 331, 45 N. W. 920; Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171; Crapo *v.* Cameron, 61 Iowa, 447, 16 N. W. 523.

Kansas.— Moore *v.* Wiley, 44 Kan. 736, 25 Pac. 200.

Kentucky.— Summers *v.* Green, 4 J. J. Marsh. (Ky.) 137.

Maine.— Preble *v.* Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149, 35 Am. St. Rep. 366, 21 L. R. A. 829; Ricker *v.* Hibbard, 73 Me. 105; Hitchings *v.* Morrison, 72 Me. 331; Abbott *v.* Abbott, 51 Me. 575.

Massachusetts.— Beckman *v.* Davidson, 162 Mass. 347, 39 N. E. 38; Holloran *v.* Holloran, 149 Mass. 298, 21 N. E. 374; Melvin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384. See also Thacker *v.* Guardenier, 7 Metc. (Mass.) 484.

Minnesota.— Ramsey *v.* Glenny, 45 Minn. 401, 48 N. W. 322, 22 Am. St. Rep. 736; Brown *v.* Morgan, 44 Minn. 432, 46 N. W. 913; Seymour *v.* Carli, 31 Minn. 81, 16 N. W. 495.

Missouri — Shotwell *v.* Gordon, 121 Mo. 482, 26 S. W. 341; Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; Battner *v.* Baker, 108 Mo. 311, 18 S. W. 911, 32 Am. St. Rep. 606; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755; Handlan *v.* McManus, 100 Mo. 124, 16 S. W. 207, 18 Am. St. Rep. 533; Cole *v.* Parker, 70 Mo. 372;

F. Character of Possession as Affected by Relationship or Situation of Parties toward Each Other — 1. By Grantor against Grantee in Absolute Deed — a. Possession Usually Not Adverse — (I) *Statement of Rule.* By the execution and delivery of a deed of land the entire legal interest in the premises vests in the grantee, and if the grantor continues in possession afterward his possession will be that either of tenant or trustee of the grantee. He will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee.[2]

Walbrunn *v.* Ballen, 68 Mo. 164; Hamilton *v.* West, 63 Mo. 93.

Montana.— Jennings *v.* Gorman, 19 Mont. 545, 48 Pac. 1111.

Nebraska.— Obernalte *v.* Edgar, 28 Nebr. 70, 44 N. W. 82; Levy *v.* Yerga, 25 Nebr. 764, 41 N. W. 773, 13 Am. St. Rep. 525; Tex *v.* Pflug, 24 Nebr. 666, 39 N. W. 839, 8 Am. St. Rep. 231.

New Jersey.— Southmayd *v.* McLaughlin, 24 N. J. Eq. 181.

New York.— Crary *v.* Goodman, 22 N. Y. 170.

North Carolina.— Mode *v.* Long, 64 N. C. 433.

Oregon.— Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402; Ramsey *v.* Ogden, 23 Oreg. 347, 31 Pac. 778; Caufield *v.* Clark, 17 Oreg. 473, 21 Pac. 443, 11 Am. St. Rep. 845.

Pennsylvania.— McCullough *v.* McCall, 10 Watts (Pa.) 367.

Tennessee.— Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.

Texas.— Bruce *v.* Washington, 80 Tex. 368, 15 S. W. 1104; Bracken *v.* Jones, 63 Tex. 184; Jayne *v.* Hanna, (Tex. Civ. App. 1899) 51 S. W. 296; Bisso *v.* Casper, 14 Tex. Civ. App. 19, 36 S. W. 345; Hand *v.* Swann, 1 Tex. Civ. App. 241, 21 S. W. 282.

Vermont.— Burnell *v.* Maloney, 39 Vt. 579.

Wisconsin.— Bishop *v.* Bleyer, 105 Wis. 330, 81 N. W. 413; Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995.

United States.— Brown *v.* Leete, 6 Sawy. (U. S.) 332, 2 Fed. 440.

Possession subsequently becoming adverse. — Where a person, by mistake, takes possession, under a deed, of more land than it conveys, he may, notwithstanding, begin later an adverse occupancy of the excess. Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

Evidence to show claim.— The fact that one, after receiving a deed of a farm, occupies it all the time up to an existing fence which is beyond the true boundary line, is not enough to show that his possession of the intervening strip is adverse, since it will be presumed that he entered under his deed claiming only the title and possession which it gave him. Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995. Maintaining a possession for many years is strong but not conclusive evidence of location or claim to that boundary, but such evidence may be explained or contradicted upon circumstances equally strong and conclusive. Potts *v.* Everhart, 26 Pa. St. 493.

2. *Alabama.*—Ivey *v.* Beddingfield, 107 Ala. 616, 18 So. 139; Yancey *v.* Savannah, etc., R. Co., 101 Ala. 234, 13 So. 311; Williams *v.* Higgins, 69 Ala. 517.

Connecticut.— Beach *v.* Catlin, 4 Day (Conn.) 284, 4 Am. Dec. 221.

Georgia.— Jay *v.* Whelchel, 78 Ga. 786, 3 S. E. 906.

Indiana.— Henry *v.* Stevens, 108 Ind. 281, 9 N. E. 356; Ronan *v.* Meyer, 84 Ind. 390; Jeffersonville, etc., R. Co. *v.* Oyler, 82 Ind. 394; Record *v.* Ketcham, 76 Ind. 482; Rowe *v.* Lewis, 30 Ind. 163; Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676; Crassen *v.* Swoveland, 22 Ind. 427.

Kansas.— Sellers *v.* Crossan, 52 Kan. 570, 35 Pac. 205; McNeil *v.* Jordan, 28 Kan. 7.

Kentucky.— Halbert *v.* Maysville, etc., R. Co., 98 Ky. 661, 33 S. W. 1121.

Louisiana.— Roe *v.* Bundy, 45 La. Ann. 398, 12 So. 759.

Maine.— Currier *v.* Earl, 13 Me. 216.

Massachusetts.— Stearns *v.* Hendersass, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; Hennessey *v.* Andrews, 6 Cush. (Mass.) 170.

Michigan.— Jeffery *v.* Hursh, 45 Mich. 59, 7 N. W. 221; Humphrey *v.* Hurd, 29 Mich. 44.

New Jersey.— Van Keuren *v.* Central R. Co., 38 N. J. L. 165.

New York.— Sherman *v.* Kane, 46 N. Y. Super. Ct. 310; Burhans *v.* Van Zandt, 7 Barb. (N. Y.) 91; Butler *v.* Phelps, 17 Wend. (N. Y.) 642; Doe *v.* Butler, 3 Wend. (N. Y.) 149; Jackson *v.* Burton, 1 Wend. (N. Y.) 341.

North Carolina.— Johnson *v.* Farlow, 35 N. C. 84.

Ohio.— Pittsburg, etc., R. Co. *v.* Canton, 10 Ohio Cir. Ct. 414.

Pennsylvania.— Connor *v.* Bell, 152 Pa. St. 444, 31 Wkly. Notes Cas. (Pa.) 413, 25 Atl. 802; Ingles *v.* Ingles, 150 Pa. St. 397, 24 Atl. 677; Olwine *v.* Holman, 23 Pa. St. 279; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Buckholder *v.* Sigler, 7 Watts & S. (Pa.) 154; Kunkle *v.* Wolfersberger, 6 Watts (Pa.) 126; Scott *v.* Gallagher, 14 Serg. & R. (Pa.) 333, 16 Am. Dec. 508.

Texas.— Voight *v.* Mackle, 71 Tex. 78, 8 S. W. 623; Evans *v.* Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71; Harris *v.* Hardeman, 27 Tex. 248; Hemming *v.* Zimmerschitte, 4 Tex. 159; Culmell *v.* Borroum, 3 Tex. Civ. App. 458, 35 S. W. 942.

Vermont.— Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

Virginia.— Rowletts *v.* Daniel, 4 Munf. (Va.) 473; Duval *v.* Bibb, 3 Call (Va.) 362.

Wisconsin.— McCormick *v.* Herndon, 86 Wis. 449, 56 N. W. 1097, 67 Wis. 648, 31 N. W. 303, construing Wis. Rev. Stat. § 1210; Riha

(II) *Reason for Rule.* Where a grantor executes and delivers a deed of conveyance to go upon record he says to the world, "Though I am yet in the possession of the premises conveyed, it is for a temporary purpose without claim of right and merely as a tenant at sufferance of my grantee."[3]

b. Capacity of Grantor to Hold Adversely. While, as stated in a preceding section,[4] the continued possession of land by the grantor thereof after execution of a deed is presumed, in the absence of any showing to the contrary, to be in subordination to the title of the grantee, it is none the less true that the conveyance does not of itself prevent the grantor from acquiring title by adverse possession against his grantee.[5] There is nothing in the relation of vendor and vendee by deed executed and not executory which will prevent the vendor who may remain in possession, or who may afterward take possession, from claiming adversely to the vendee and relying on the statute of limitations.[6] The covenant of warranty contained in the deed will not defeat title by limitations acquired after the deed. Such title is no breach of the covenant, which cannot be extended to cover future laches of the grantee whereby he loses the title conveyed to him.[7]

c. Under What Circumstances Possession Becomes Adverse. From the time when the grantor explicitly disclaims holding for the grantee and openly asserts his title to the premises in hostility to the title claimed under his own previous deed his possession becomes adverse;[8] and this is true although he knows his

v. Pelnar, 86 Wis. 408, 57 N. W. 51; Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740; 73 Wis. 137, 40 N. W. 579; Furlong *v.* Garrett, 44 Wis. 111.

United States.— Jones *v.* Miller, 1 McCrary (U. S.) 535, 3 Fed. 384.

Putting third person in possession.— Where one who has given a warranty deed of land afterward puts a third person into possession of the land, he may be presumed to have acted in so doing as the agent of the grantee, and such possession will enure to the benefit of the grantee. Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

Rule applicable to heirs of grantor.— Where G, the owner of land, sold it to B, and after the sale remained in possession until his death, it was held that no title passed to G's heirs, but that they were mere possessors without title and could not plead the statute of limitations. Harris *v.* Hardeman, 27 Tex. 248.

3. McNeil *v.* Jordan, 28 Kan. 7, 16, wherein it was further said that "the object of the law in holding possession [to be] constructive notice is to protect the possessor from the acts of others who do not derive their title from him, not to protect him against his own acts; not to protect him against his own deed."

4. See *supra*, VI, F, 1, a.

5. *Alabama.*— Meeks *v.* Garner, 93 Ala. 17, 8 So. 378, 11 L. R. A. 196; Abbett *v.* Page, 92 Ala. 571, 9 So. 332.

California.— Lord *v.* Sawyer, 57 Cal. 65; Hartman *v.* Reed, 50 Cal. 485; Dorland *v.* Magilton, 47 Cal. 485; Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111.

Illinois.— Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306.

Maine.— Traip *v.* Traip, 57 Me. 268.

Massachusetts.— Stearns *v.* Hendersass, 9 Cush. (Mass.) 497, 57 Am. Dec. 65.

Michigan.— Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510.

Mississippi.—Mitchell *v.* Woodson, 37 Miss. 567.

New Hampshire.—Tilton *v.* Emery, 17 N. H. 536.

New York.— Sherman *v.* Kane, 86 N. Y. 57 [*affirming* 46 N. Y. Super. Ct. 310]; Kent *v.* Harcourt, 33 Barb. (N. Y.) 491; Burhans *v.* Van Zandt, 7 Barb. (N. Y.) 91; Cramer *v.* Benton, 4 Lans. (N. Y.) 291; Jackson *v.* Brink, 5 Cow. (N. Y.) 483; Stiles *v.* Jackson, 1 Wend. (N. Y.) 103; Jackson *v.* Burton, 1 Wend. (N. Y.) 341.

Pennsylvania.— Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Pipher *v.* Lodge, 4 Serg. & R. (Pa.) 310.

Texas.— Harn *v.* Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340; Smith *v.* Montes, 11 Tex. 24.

Vermont.— Stevens *v.* Whitcomb, 16 Vt. 121; North *v.* Barnum, 12 Vt. 205.

Wisconsin.— Brinkman *v.* Jones, 44 Wis. 498; Hoyt *v.* Jones, 31 Wis. 389.

6. Lord *v.* Sawyer, 57 Cal. 65; Dorland *v.* Magilton, 47 Cal. 485; Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Smith *v.* Montes, 11 Tex. 24.

7. Abbett *v.* Page, 92 Ala. 571, 9 So. 332; Stearns *v.* Hendersass, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; Sherman *v.* Kane, 86 N. Y. 57; Harn *v.* Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340.

8. Burhans *v.* Van Zandt, 7 Barb. (N. Y.) 91.

Acts held to amount to an adverse holding. — Subsequent reëntry by the grantor, making leases, paying taxes, and improving the property, constitute an adverse holding by the grantor. Waltemeyer *v.* Baughman, 63 Md. 200; Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176. Leasing the property to a third person, disavowing the sale, and entry and occupation by the lessee, amount to an

title to be bad.[9] Nor is it essential to the acquisition of title by the grantor against his grantee that there should be an intervening paper title.[10] Any claim of title actually made known to the grantee will satisfy the requirement as to disclaimer.[11]

2. By Grantor against Grantee in Deed Reserving Right to Manage Property. Where, under a deed of land reserving to the grantor the right to manage the land and make such changes or improvements on the buildings as he chose, so that he did not deprive the grantee of a home, the grantor remained on the land putting up buildings and collecting rents, a portion of which he paid to the grantee, who also resided on the premises, his possession was held to be not adverse to the grantee.[12]

3. By Grantee in Absolute Deed against Grantor. Where the purchaser is in possession under a deed purporting to convey an absolute title to the land, he will be considered as holding adversely to the grantor and all other persons whatsoever;[13] and a reservation in a grant in fee of a small quit-rent does not prevent

adverse holding. Pipher *v.* Lodge, 4 Serg. & R. (Pa.) 310. Where the grantee's heirs leave the land, and the grantor places a tenant on it and proves possession continuous for the statutory period, it is erroneous to charge that the putting out of the tenant was not an ouster unless the grantor intended to commit an ouster. Pipher *v.* Lodge, 4 Serg. & R. (Pa.) 310. If grantees accept a deed of correction from their grantor, conveying land different from that conveyed to them by a prior deed misdescribing the land intended to be conveyed, and sell the land conveyed to them by the deed of correction, the fact that the original grantor does not remit to them all of the purchase-money received by him from their grantee does not affect their election to take the land conveyed to them by the deed of correction, nor does it affect the original grantor's adverse possession of the land described in the prior deed containing the misdescription. Fox *v.* Windes, 127 Mo. 502, 30 S. W. 323, 48 Am. St. Rep. 648. Remaining in possession for the statutory period, openly claiming the land as his own, will also vest title by adverse possession in the grantor. Meeks *v.* Garner, 93 Ala. 17, 8 So. 378, 11 L. R. A. 196.

Acts held not to amount to an adverse holding.— The mere fact that the grantor continues in possession, holding and enjoying the property in the same manner as before the conveyance, does not bind his grantee with notice of adverse claim. Hennessey *v.* Andrews, 6 Cush. (Mass.) 170; Van Keuren *v.* Central R. Co., 38 N. J. L. 165; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212. *Compare* Brinkman *v.* Jones, 44 Wis. 498; Hoyt *v.* Jones, 31 Wis. 389. The fact that the grantor remains in possession, and purchases and records outstanding tax-titles, does not of itself amount to the assertion of a hostile title. Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510. Entry by the grantor and occupation of the premises after nonpayment of ground-rent by virtue of the express provisions of the deed (McCracken *v.* Roberts, 19 Pa. St. 390); continuance in possession under a parol agreement that he should hold the land during his life (Carpenter *v.* Carpenter, 8 Bush (Ky.) 283); execution of a subsequent deed to a third person (Rowletts *v.* Daniel, 4 Munf. (Va.) 473); continuance in possession under a deed reserving a homestead right (Stevens *v.* Wait, 112 Ill. 544); the retaining of land granted as before the sale within an inclosure of other land of the grantor, the grantee not making any public announcement of his title and claim (Ivey *v.* Beddingfield, 107 Ala. 616, 18 So. 139; Evans *v.* Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71. See also Buckholder *v.* Sigler, 7 Watts & S. (Pa.) 154); the taking of a patent in his own name by one who has transferred a military land-claim warrant before the land is located thereunder (Culmell *v.* Borroum, 13 Tex. Civ. App. 458, 35 S. W. 942. See also Kent *v.* Harcourt, 33 Barb. (N. Y.) 491),— do not constitute the assertion of a hostile claim.

9. Burhans *v.* Van Zandt, 7 Barb. (N. Y.) 91.

10. Kent *v.* Harcourt, 33 Barb. (N. Y.) 491.

11. Stevens *v.* Whitcomb, 16 Vt. 121. See also North *v.* Barnum, 12 Vt. 205.

Express notice to the grantee of the repudiation is not necessary. Any repudiation of the relationship properly brought home, whether expressly or by implication, to the knowledge of the grantee, will put the statute in operation. Abbett *v.* Page, 92 Ala. 571, 9 So. 332; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306.

12. Turner *v.* Williams, 108 N. C. 210, 12 S. E. 989.

The owner of two adjoining messuages fronting on a street on the east conveyed the southerly of the two, in 1703, by a deed in which he reserved free liberty of ingress and egress through a gate and passageway about five feet wide, leading from the street into the yard of the said messuage, for the purpose of carrying wood or other material in case such carrying did not annoy or injure the grantee or his heirs or assigns. It was held that though the owner of the northerly messuage had enjoyed the passageway for a period sufficient to gain a prescriptive title, such use having been consonant with the deed, the easement would be deemed to have been under, and not adverse to, the reservation. Atkins *v.* Bordman, 20 Pick. (Mass.) 291.

13. *Missouri.*— Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915; Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

the grantee from claiming title against the world.[14] If, however, the grantee sues and recovers back his purchase-money because of a want of title in the grantor, he cannot set up adverse possession based on his purchase against the holder of the true title.[15]

4. By Grantee against Grantor in Deed Excepting Part of Tract. The grantee, by accepting a deed containing an exception of certain lands previously sold and conveyed to another, and then entering into the possession of the land thus excepted, will be deemed in law to have entered in subserviency to the title of the grantee of the excepted land, and to continue to hold in subserviency thereto unless he can establish the contrary by some unequivocal act or claim of title in himself;[16] but a possession of the land reserved, with an open and notorious claim of title, will be adverse.[17]

5. By Subsequent against Prior Grantee under Absolute Deed. Where a grantor, while in possession, executes a second conveyance of the premises, the possession of the second grantee will not be presumed to be adverse to the first grantee without proof of ouster or some unequivocal act amounting to an open denial of his title.[18] If, however, the second grantee enters and holds the land for the statutory period, claiming title in himself, the rights of the prior grantee are barred.[19]

New York.— Corwin *v.* Corwin, 9 Barb. (N. Y.) 219.

Virginia.— Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Clarke *v.* McClure, 10 Gratt. (Va.) 305.

West Virginia.— Ketchum *v.* Spurlock, 34 W. Va. 597, 12 S. E. 832; Parkersburg Nat. Bank *v.* Neal, 28 W. Va. 744; Core *v.* Faupel, 24 W. Va. 238.

United States.— Stansbury *v.* Taggart, 3 McLean (U. S.) 457, 22 Fed. Cas. No. 13,292.

Delay in giving deed.— If one agrees to buy and another to sell land, and no consideration is paid or deed given, and the buyer enters into possession, the fair inference is that the entry and possession are not adverse and a disseizin, but by consent of the owner and in subordination to his title until payment is made and a deed given. But if, on such agreement, the consideration is paid and the owner consents that the buyer may own and hold the land as his own, and the delay in giving a deed is by accident or mistake, or because a deed cannot be immediately procured, and the owner agrees to give a deed without further consideration or condition, and the buyer thereupon enters into possession, such entry and possession are not to be deemed subordinate to the title of the owner, but as adverse and a disseizin. Brown *v.* King, 5 Metc. (Mass.) 173.

Mistake as to location.— Where the purchaser of a tract of land, through mistake or fraud, enters upon another tract of the same grantor, the entry is under a claim of title assumed to have been derived from the grantor and is in subordination to the grantor's title. Farish *v.* Coon, 40 Cal. 33.

Undisclosed outstanding leases.— A person who takes a warranty deed and relies on the record title, not knowing of an outstanding life-lease in the grantor, may hold adversely as against such grantor. Case *v.* Green, 53 Mich. 615, 19 N. W. 554.

14. People *v.* Trinity Church, 22 N. Y. 44. *Compare* Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439, in which it was held that where land was conveyed in 1794 in fee, reserving a perpetual yearly rent to the grantor and his heirs and assigns, which the grantee, for himself and his heirs and assigns, covenanted to pay, the possession of the grantee's assigns who claimed under the conveyance was not adverse to that of the grantor's assignees.

15. Davenport *v.* Sebring, 52 Iowa 364, 3 N. W. 403.

16. Rosseel *v.* Wickham, 36 Barb. (N. Y.) 386. See also Kingsley *v.* Hillside Coal, etc., Co., 144 Pa. St. 613, 29 Wkly. Notes Cas. (Pa.) 368, 23 Atl. 250, in which it was held that the possession of the land by one under a conveyance which excepts a prior grant of the underlying coal to a third person is not hostile to the title of the grantee of the coal.

17. McKinney *v.* Lanning, 139 Ind. 170, 38 N. E. 601.

18. Riha *v.* Pelnar, 86 Wis. 408, 57 N. W. 51; Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740, 73 Wis. 137, 40 N. W. 579. *Compare* Smith *v.* Osage, 80 Iowa 84, 45 N. W. 404, 8 L. R. A. 632, in which it was held that where a conveyance of land was not acknowledged, and the grantor, having remained in possession for several years, executed a new deed in proper form to another and gave him possession, he held adversely to the title of the first grantee.

Acquiescence of prior grantee in second conveyance.— While, strictly speaking, a grantor who has conveyed all his interest in lands cannot make a second grant, yet for many practical purposes he may do so, as where a grantee encourages and acquiesces in a second grant by his grantor, under which the second purchaser takes possession and holds adversely to the former grant, in which case his grant will ripen into title. Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744.

19. Reynolds *v.* Cathens, 50 N. C. 437.

6. By Grantees in Conditional Deeds against Each Other. Where different parties claim the same premises under conflicting grants from the same source, each grant being on condition that the grantee is the true owner of the adjacent lands, possession under such grant by one who is not the true owner of the adjacent land cannot be deemed adverse so as to ripen into title against the owner.[20]

7. By Grantees against Creditors of Grantor. The possession of the grantee, it has been held, cannot in any event be considered adverse to the grantor's creditors before they have acquired a right of entry by levy of execution on the land under a judgment procured against the grantor;[21] nor can a possession not brought home to the notice of the creditors be adverse to them.[22] Although there is authority seemingly to the effect that (as to fraudulent conveyances at least) the act of limitations commences to run from the time the grantee obtains possession of the property, and not from the time judgment was obtained by the creditor,[23] it has been held that though a conveyance be in fraud of creditors the grantee therein may nevertheless acquire title by adverse possession;[24] but where the contract of purchase of land is fraudulent and voidable by the judgment creditors of the vendor, the possession of the land by the purchaser is not adverse to the vendor, but in trust for him.[25]

8. By Dedicator against Dedicatee. The rule applicable to grantors, generally, who remain in possession after execution of a conveyance, apply to persons who have dedicated property.[26]

9. By Donee against Donor. A donee who holds possession of land claiming title under a deed of gift for the statutory period acquires title by adverse possession.[27] But if one enters upon land by the owner's mere permission, expecting merely that the owner will give it to him, such permission and entry under it will not constitute a hostile holding.[28] So possession under a parol gift without claim of right by the donee cannot be considered adverse.[29]

On the other hand, possession of land by a donee under a mere parol gift, accompanied with a claim of right, is adverse as against the donor, and if continued without interruption for the statutory period is protected by the statute of limitations and matures into a good title.[30] That such a parol gift conveys no

20. Towle *v.* Tolan, 1 Rob. (N. Y.) 473; Towle *v.* Palmer, 1 Rob. (N. Y.) 437.

21. Beach *v.* Catlin, 4 Day (Conn.) 284, 4 Am. Dec. 221. See also *dictum* in Reynolds *v.* Lansford, 16 Tex. 286.

22. Belt *v.* Raguet, 27 Tex. 471. See also Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426.

23. Reeves *v.* Dougherty, 7 Yerg. (Tenn.) 222, 27 Am. Dec. 496.

24. Porter *v.* Cocke, Peck (Tenn.) 28; Reeves *v.* Dougherty, 7 Yerg. (Tenn.) 222, 27 Am. Dec. 496; Reynolds *v.* Lansford, 16 Tex. 286. See also B. C. Evans Co. *v.* Guipel, (Tex. Civ. App. 1896) 35 S. W. 940, in which it was held that where, after the recording of a fraudulent deed by a husband to his wife, the husband occupied the land for her and as her separate estate, and paid taxes thereon, the wife's possession was adverse to the rights of his creditors, within the three years' statute of limitations of Texas, requiring suit to recover land against persons in possession under title or color of title to be instituted within three years after the cause of action shall have accrued, and defining title as a regular chain of transfer from or under the sovereignty of the soil down to such person under possession. But see Dobson *v.* Erwin, 20 N. C. 201.

25. Daniel *v.* McHenry, 4 Bush (Ky.) 277.

26. Little Rock *v.* Wright, 58 Ark. 142, 23 S. W. 876; Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759; Hempsted *v.* Huffman, 84 Iowa 398, 51 N. W. 17; Livermore *v.* Maquoketa, 35 Iowa 358; Matter of Public Park Com'rs, 53 Hun (N. Y.) 556, 6 N. Y. Suppl. 779. See also Derby *v.* Alling, 40 Conn. 410.

27. Carmody *v.* Chicago, etc., R. Co., 111 Ill. 69.

28. Com. *v.* Gibson, 85 Ky. 666, 4 S. W. 453.

29. Potts *v.* Coleman, 67 Ala. 221; Comins *v.* Comins, 21 Conn. 413. See also Collins *v.* Johnson, 57 Ala. 304, in which it was held that to convert the possession, by a donee under a parol gift, into an adverse possession within the statute of limitations, there must have been, for the period prescribed, an absence of recognition of the title of the donor. And see Doe *v.* Murray, 15 N. Brunsw. 375, in which it was held that where one person gives bond to another by parol and puts him in possession, the donee is in under the donor, and, as the title does not pass by such a gift, the donee is in possession simply by permission of the donor, and consequently, in contemplation of law, a tenant at will.— the possession of the donee being that of the donor.

30. *Alabama.*— Vandiveer *v.* Stickney, 75 Ala. 225; Boykin *v.* Smith, 65 Ala. 294.

Connecticut.—Clark *v.* Gilbert, 39 Conn. 94; Comins *v.* Comins, 21 Conn. 413; South School Dist. *v.* Blakeslee, 13 Conn. 227.

title, and only operates as a mere tenancy at will capable of revocation or disaffirmance by the donor at any time before the bar is complete, is immaterial; it is evidence of the beginning of an adverse possession by the donee which can be repelled only by showing a subsequent recognition of the donor's superior title.[31]

10. By Vendee in Contract of Purchase against Vendor — a. Written Contracts or Bonds for Title — (1) *Statement of Rule.* Where one enters into and holds possession of land under an executory contract of purchase[32] or bond

Georgia.— Studstill *v.* Willcox, 94 Ga. 690, 20 S. E. 120.

Illinois.— Stewart *v.* Duffy, 116 Ill. 47, 6 N. E. 424.

Kentucky.— Thomson *v.* Thomson, 93 Ky. 435, 20 S. W. 373; Spradlin *v.* Spradlin, (Ky. 1892) 18 S. W. 14; Com. *v.* Gibson, 85 Ky. 666, 4 S. W. 453; Medlock *v.* Suter, 80 Ky. 101; Moore *v.* Webb, 2 B. Mon. (Ky.) 282. *Contra,* Woolfolk *v.* Overton, 3 Litt. (Ky.) 21.

Massachusetts.— Summer *v.* Stevens, 6 Metc. (Mass.) 337.

Michigan.— Schafer *v.* Hauser, 111 Mich. 622, 70 N. W. 136, 66 Am. St. Rep. 403, 35 L. R. A. 835.

Mississippi.— Davis *v.* Davis, 68 Miss. 478, 10 So. 70; Davis *v.* Bowmar, 55 Miss. 671.

Pennsylvania.— Moreland *v.* Moreland, 121 Pa. St. 573, 15 Atl. 655; Campbell *v.* Braden, 96 Pa. St. 388.

South Carolina.— Hunter *v.* Parsons, 2 Bailey (S. C.) 59.

Tennessee.— Jordan *v.* Ransom, 10 Lea (Tenn.) 135.

Vermont.— Pope *v.* Henry, 24 Vt. 560.

Wisconsin.— Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714.

Application of rule.— Where a parol gift of land was made by a father-in-law to his son-in-law, who entered, made valuable improvements, continued in possession for more than seven years during the life of his father-in-law, claiming the land as his own, and then conveyed it to a purchaser for value, the legal representative of the father-in-law cannot, in an action brought more than thirty years after the gift, recover the land from one possessing under title derived from the son-in-law through successive vendees. Studstill *v.* Willcox, 94 Ga. 690, 20 S. E. 120.

Statutory provisions as affecting rule.— A statute which provides that "no estate of inheritance or freehold, for a term of more than one year, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, signed and delivered," does not prevent one from entering and claiming under a parol gift and acquiring title by adverse possession. Davis *v.* Davis, 68 Miss. 478, 10 So. 70.

31. Vandiveer *v.* Stickney, 75 Ala. 225.

Donee under parol gift for life.— An open, exclusive, and uninterrupted possession of land for more than twenty years, taken, held, and claimed under a parol gift from plaintiff in ejectment for a life not yet terminated, is not such an adverse possession as will bar the action. Clarke *v.* McClure, 10 Gratt. (Va.) 305.

Materiality of understanding of donee.— In determining the character of the possession of one claiming by gift, the question is not so much what was intended by the donor as what was the donee's understanding, what he claimed and did; and if it be found that he believed the gift to be absolute, and went into possession under that belief and held adversely for the statutory period, the verdict must be for him. Moreland *v.* Moreland, 121 Pa. St. 573, 15 Atl. 655.

32. *Alabama.*— Perry *v.* Lawson, 112 Ala. 480, 20 So. 611; Beard *v.* Ryan, 78 Ala. 37; Potts *v.* Coleman, 67 Ala. 221; Tayloe *v.* Dugger, 66 Ala. 444; Russell *v.* Erwin, 38 Ala. 44; Ormond *v.* Martin, 37 Ala. 598; Seabury *v.* Doe, 22 Ala. 207.

California.— Woodard *v.* Hennegan, 128 Cal. 293, 60 Pac. 769; Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817; Kerns *v.* McKean, 65 Cal. 411, 4 Pac. 404.

Connecticut.— Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608.

Delaware.— Lynch *v.* Cannon, 7 Houst. (Del.) 386, 32 Atl. 391.

Florida.—Spratt *v.* Livingston, 32 Fla. 507, 14 So. 160, 22 L. R. A. 453; Petty *v.* Mays, 19 Fla. 652; Hart *v.* Bostwick, 14 Fla. 162.

Georgia.— Brown *v.* Huey, 103 Ga. 448, 30 S. E. 429; Hawkins *v.* Dearing, 93 Ga. 108, 19 S. E. 717; Ford *v.* Holmes, 61 Ga. 419; Paxson *v.* Bailey, 17 Ga. 600; Stamper *v.* Griffin, 12 Ga. 450.

Illinois.— Tilghman *v.* Little, 13 Ill. 239.

Indiana.—Rucker *v.* Steelman, 97 Ind. 222; Clouse *v.* Elliott, 71 Ind. 302.

Kentucky.—Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262; Chiles *v.* Jones, 4 Dana (Ky.) 479; Muldrow *v.* Muldrow, 2 Dana (Ky.) 386; Sprigg *v.* Albin, 6 J. J. Marsh. (Ky.) 158; Doe *v.* Million, 4 J. J. Marsh. (Ky.) 395; Hamilton *v.* Taylor, 1 Litt. Sel. Cas. (Ky.) 444; Grundy *v.* Jackson, 1 Litt. (Ky.) 11.

Maryland.— Dean *v.* Brown, 23 Md. 11, 87 Am. Dec. 555.

Massachusetts.—Hilbourn *v.* Fogg, 99 Mass. 11; Brown *v.* King, 5 Metc. (Mass.) 173; Knox *v.* Hook, 12 Mass. 329.

Michigan.— Burke *v.* Douglass, 115 Mich. 197, 73 N. W. 133; Wolf *v.* Holton, 92 Mich. 136, 52 N. W. 459.

Mississippi.— Moring *v.* Ables, 62 Miss. 263, 52 Am. Rep. 186; Benson *v.* Stewart, 30 Miss. 49; McClanahan *v.* Barrow, 27 Miss. 664.

Missouri.— Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915; Adair *v.* Adair, 78 Mo. 630; Lockwood *v.* Hannibal, etc., R. Co., 65 Mo. 233; Ridgeway *v.* Holliday, 59 Mo. 444; Cole *v.* Roe, 39 Mo. 411; Ash *v.* Holder, 36 Mo. 163; Tibeau *v.* Tibeau, 19 Mo. 78, 59 Am. Dec. 329.

for title,[33] the entry and possession are in subordination to the title of the vendor

Montana.— Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576.

New Hampshire.— Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351; Appleby *v.* Obert, 16 N. J. L. 336.

New York.— Matter of Department of Public Parks, 73 N. Y. 560; Griswold *v.* Little, 13 Misc. (N. Y.) 281, 34 N. Y. Suppl. 703; Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352; Jackson *v.* Spear, 7 Wend. (N. Y.) 401; Jackson *v.* Walker, 7 Cow. (N. Y.) 637; Jackson *v.* Camp, 1 Cow. (N. Y.) 605; Jackson *v.* Foster, 12 Johns. (N. Y.) 488; Jackson *v.* Harder, 4 Johns. (N. Y.) 202.

North Carolina.— Young *v.* Irwin, 3 N. C. 157.

Ohio.— Woods *v.* Dille, 11 Ohio 455.

Oregon.— Anderson *v.* McCormick, 18 Oreg. 301, 22 Pac. 1062.

Pennsylvania.— Eichelberger *v.* Gitt, 104 Pa. St. 64.

South Carolina.— Munro *v.* Jeter, 24 S. C. 29; Blackwell *v.* Ryan, 21 S. C. 112; Gregorie *v.* Bulow, Rich. Eq. Cas. (S. C.) 235; Richards *v.* McKie, Harp. Eq. (S. C.) 184; Richardson *v.* Broughton, 2 Nott & M. (S. C.) 417.

Tennessee.— Knox *v.* Thomas, 5 Humphr. (Tenn.) 572.

Texas.— McKelvain *v.* Allen, 58 Tex. 383; Howard *v.* McKenzie, 54 Tex. 171; Keys *v.* Mason, 44 Tex. 140; Lander *v.* Rounsaville, 12 Tex. 195; Shotwell *v.* McCardell, 19 Tex. Civ. App. 174, 47 S. W. 39.

Vermont.—Robinson *v.* Sherwin, 36 Vt. 69; Ripley *v.* Yale, 18 Vt. 220; Hall *v.* Dewey, 10 Vt. 593; Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605.

Virginia.—Allegany County *v.* Parrish, (Va. 1896) 25 S. E. 882; Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Creekmur *v.* Creekmur, 75 Va. 430; Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Clarke *v.* McClure, 10 Gratt. (Va.) 305.

West Virginia.— Ketchum *v.* Spurlock, 34 W. Va. 597, 12 S. E. 832; Core *v.* Faupel, 24 W. Va. 238; Hudson *v.* Putney, 14 W. Va. 561.

Wisconsin.— Furlong *v.* Garrett, 44 Wis. 111; Quinn *v.* Quinn, 27 Wis. 168; Miller *v.* Larson, 7 Wis. 624.

United States.— Lucas *v.* Brooks, 18 Wall. (U. S.) 436, 21 L. ed. 779; Kirk *v.* Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Heermans *v.* Schmaltz, 10 Biss. (U. S.) 323, 7 Fed. 566; Stansbury *v.* Taggart, 3 McLean (U. S.) 457, 22 Fed. Cas. No. 13,292.

England.— Doe *v.* Caperton, 9 C. & P. 112, 38 E. C. L. 76.

Illustrations.— Defendant made an agreement to purchase certain lands of plaintiff, and, with plaintiff's permission, entered into immediate possession, no deed being executed until two years later. In fact plaintiff had no authority to sell at the time. It was held that defendant's possession under the agreement to purchase was subordinate to plaintiff's title, and did not become adverse until the date of the deed. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667.

The intestate and A verbally made an exchange of lands, whereby A was to have the demanded premises if he paid the difference in value between them and the land for which they were exchanged. A went into possession of the premises under the contract, and occupied them for more than fifteen years, claiming no title thereto except by virtue of the contract, and had them set to him in the list, and paid the taxes thereon. A never paid the difference, and no deeds of the lands were ever executed, and finally A surrendered the premises to the intestate and retook possession of the land he let him have. It was held that A acquired no title to the premises by possession, and that after such surrender he had no interest therein which could be taken on a debt existing before the surrender. Adams *v.* Fullam, 47 Vt. 558.

Effect of acceptance of lease from stranger. — One who holds land under a contract of purchase cannot, by accepting a lease from a stranger, convert his holding into an adverse possession as against his vendor; and if one so holding abandons the land and afterward reënters under a lease from a stranger without having rescinded his contract, and without any one having in the meantime taken possession, his reëntry will be held to relate back and continue the original possession, and not to create a new and adverse possession. Pratt *v.* Canfield, 67 Mo. 50.

33. *Alabama.*— McQueen *v.* Ivey, 36 Ala. 308; Sellers *v.* Hayes, 17 Ala. 749.

Arkansas.— Coldcleugh *v.* Johnson, 34 Ark. 312.

California.— Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

Georgia.— Hawkins *v.* Dearing, 93 Ga. 108, 19 S. E. 717; Allen *v.* Napier, 75 Ga. 275; Paxson *v.* Bailey, 17 Ga. 600.

Indiana.—Allen *v.* Smith, 6 Blackf. (Ind.) 527.

Kentucky.— Henderson *v.* Dupree, 82 Ky. 678; Fowke *v.* Darnall, 5 Litt. (Ky.) 316.

Maine.— Gray *v.* Hutchins, 36 Me. 142.

North Carolina.— Bradsher *v.* Hightower, 118 N. C. 399, 24 S. E. 120.

South Carolina.— Secrest *v.* McKenna, 6 Rich. Eq. (S. C.) 72.

Tennessee.— Gudger *v.* Barnes, 4 Heisk. (Tenn.) 570 [*overruling* Ray *v.* Goodman, 1 Sneed (Tenn.) 586].

Texas.— Smith *v.* Lee, 82 Tex. 124, 17 S. W. 598; Clark *v.* Adams, 80 Tex. 674, 16 S. W. 552.

United States.—Lewis *v.* Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113.

Rule in Iowa.— A statute of Iowa provides that in cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase-money, and such money or any part of it remains un-

until payment or performance of all the conditions by the vendee,[34] or until the vendor has distinctly and unequivocally repudiated the title of his vendor,[35] which repudiation is brought expressly or by legal implication to the vendor's knowledge.[36] There are also a number of decisions in which it is held that a party entering into possession under an agreement to purchase cannot dispute the title of him under whom he enters until after a surrender of the possession.[37]

(II) *Reason for Rule.* The reason of the rule forbidding a person who has gone into possession under a contract to purchase, to dispute the title of his vendor, is believed to be the same as in cases of landlord and tenant; namely, the injustice of allowing a person who has obtained possession by admitting title of

paid after the day fixed for payment, whether time is or is not of the essence of the contract, the vendor may file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property. The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. Under this statute it has been held that possession of a vendee under bond of title is, contrary to the rule which obtains in most states, adverse to that of the vendor. Knudson *v.* Litchfield, 87 Iowa 111, 54 N. W. 199; Montgomery County *v.* Severson, 64 Iowa 326, 17 N. W. 197, 20 N. W. 458.

34. *Alabama.*— Beard *v.* Ryan, 78 Ala. 37; McQueen *v.* Ivey, 36 Ala. 308; Seabury *v.* Doe, 22 Ala. 207.

Delaware.—Lynch *v.* Cannon, 7 Houst. (Del.) 386, 32 Atl. 391.

Florida.— Hart *v.* Bostwick, 14 Fla. 162.

Georgia.— Brown *v.* Huey, 103 Ga. 448, 30 S. E. 429; Hawkins *v.* Dearing, 93 Ga. 108, 19 S. E. 717; Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068; Allen *v.* Napier, 75 Ga. 275; Hines *v.* Rutherford, 67 Ga. 606; Stamper *v.* Griffin, 20 Ga. 312, 65 Am. Dec. 628; Paxson *v.* Bailey, 17 Ga. 600.

Illinois.— Davis *v.* Howard, 172 Ill. 340, 50 N. E. 258.

Indiana.—Rucker *v.* Steelman, 97 Ind. 222; Clouse *v.* Elliott, 71 Ind. 302; Cole *v.* Wright, 70 Ind. 179.

Iowa.— See Sioux City, etc., Town Lot, etc., Co. *v.* Wilson, 50 Iowa 422.

Michigan.— Burke *v.* Douglass, 115 Mich. 197, 73 N. W. 133.

Mississippi.— Benson *v.* Stewart, 30 Miss. 49.

New York.— Griswold *v.* Little, 13 Misc. (N. Y.) 281, 34 N. Y. Suppl. 703; Vrooman *v.* Shepherd, 14 Barb. (N. Y.) 441; Jackson *v.* Camp, 1 Cow. (N. Y.) 605.

Ohio.— Woods *v.* Dille, 11 Ohio 455.

Pennsylvania.— Eichelberger *v.* Gitt, 104 Pa. St. 64.

South Carolina.— Blackwell *v.* Ryan, 21 S. C. 112; Milhouse *v.* Patrick, 6 Rich. (S. C.) 350; Secrest *v.* McKenna, 6 Rich. Eq. (S. C.) 72; State Bank *v.* Smyers, 2 Strobh. (S. C.) 24; Ellison *v.* Cathcart, McMull. (S. C.) 5.

Tennessee.— Ray *v.* Goodman, 1 Sneed (Tenn.) 586.

Texas.— Clark *v.* Adams, 80 Tex. 674, 16 S. W. 552; Roosevelt *v.* Davis, 49 Tex. 463; Lander *v.* Rounsaville, 12 Tex. 195; Shotwell *v.* McCardell, 19 Tex. Civ. App. 174, 47 S. W. 39.

Vermont.— Adams *v.* Fullam, 43 Vt. 592.

United States.— Stansbury *v.* Taggart, 3 McLean (U. S.) 457, 22 Fed. Cas. No. 13,292.

Deed in escrow.— Where a party placed a deed in escrow to be delivered whenever the grantee, a railroad company, should build a depot at a designated location, the platting of the land and the payment of taxes thereunder by the grantee did not entitle him to protection by adverse possession. Sioux City, etc., Town Lot, etc., Co. *v.* Wilson, 50 Iowa 422.

35. *California.*— Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817; Kerns *v.* McKean, 65 Cal. 411, 4 Pac. 404.

Connecticut.— Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608.

Florida.—Spratt *v.* Livingston, 32 Fla. 507, 14 So. 160, 22 L. R. A. 453; Petty *v.* Mays, 19 Fla. 652.

Georgia.— Williams *v.* Cash, 27 Ga. 507, 73 Am. Dec. 739.

Michigan.— Burke *v.* Douglass, 115 Mich. 197, 73 N. W. 133.

Missouri.— Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915.

North Carolina.— Bradsher *v.* Hightower, 118 N. C. 399, 24 S. E. 120.

Texas.— Smith *v.* Lee, 82 Tex. 124, 17 S. W. 598; Pearson *v.* Boyd, 62 Tex. 541; Roosevelt *v.* Davis, 49 Tex. 463; Keys *v.* Mason, 44 Tex. 140; Smith *v.* Pate, (Tex. Civ. App. 1897) 43 S. W. 312.

Vermont.— Robinson *v.* Sherwin, 36 Vt. 69; Ripley *v.* Yale, 18 Vt. 220; Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605.

Virginia.— Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Creekmur *v.* Creekmur, 75 Va. 430.

36. *California.*— Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817.

Florida.— Hart *v.* Bostwick, 14 Fla. 162.

Michigan.— Burke *v.* Douglass, 115 Mich. 197, 73 N. W. 133.

Vermont.— Ripley *v.* Yale, 18 Vt. 220.

Virginia.— Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

37. Davis *v.* Howard, 172 Ill. 340, 50 N. E. 258; Tilghman *v.* Little, 13 Ill. 239; Jackson *v.* Spear, 7 Wend. (N. Y.) 401; Miller *v.* Larson, 17 Wis. 624; Heermans *v.* Schmaltz, 10 Biss. (U. S.) 323, 7 Fed. 566. *Contra,* Catlin *v.* Decker, 38 Conn. 262.

another to enjoy that title and, in case of failure in proof of it, hold the premises himself.[38]

b. Parol Contracts. The possession of a vendee holding under a parol executory contract of purchase is not adverse to that of his vendor until he has performed the conditions thereof or repudiated the latter's title.[39]

c. Capacity of Vendee to Acquire Title by Adverse Possession. The possession of one who enters under a contract of purchase may become so far adverse that he will acquire title by limitation.[40]

d. Under What Circumstances Possession of Vendee Adverse — (I) *Repudiation of Vendor's Title Brought to His Notice.* The possession of one entering under an executory contract of purchase becomes adverse where he repudiates the title of his vendor, and he may acquire title by adverse possession by occupying the land for the statutory period after such repudiation.[41] The repudiation, however, must be manifested by explicit and unequivocal acts brought home to the vendor's knowledge.[42]

(II) *Effect of Payment or Performance.* While the law seems to be otherwise in some states,[43] the decided weight of authority is to the effect that a

38. Howard *v.* McKenzie, 54 Tex. 171. See also Brown *v.* Huey, 103 Ga. 448, 450, 30 S. E. 430, wherein it was said: "It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title."

The possession of a vendee under an executory contract of purchase is analogous to that of landlord and tenant. Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262; McKelvain *v.* Allen, 58 Tex. 383. He does not enter under a specific claim of title, but upon condition that he cannot have a title until he shall have performed certain acts stipulated in the contract. Clouse *v.* Elliott, 71 Ind. 302.

39. Doe *v.* Jefferson, 5 Houst. (Del.) 477; Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229; Petty *v.* Mays, 19 Fla. 652; McClanahan *v.* Barrow, 27 Miss. 664; Harris *v.* Richey, 56 Pa. St. 395. *Contra*, Wilson *v.* Campbell, 119 Ind. 286, 21 N. E. 893.

Effect of part payment.— Where a vendee purchases land by parol contract, and the vendor puts him into possession, and part of the purchase-money remains unpaid, the possession of the vendee is not adverse to the title of the vendor, but in subordination thereto. Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229.

Possession not adverse to mortgagee.— The possession of one under an oral agreement with the owner to purchase is not a possession adverse as against the mortgagee of the vendor. Petty *v.* Mays, 19 Fla. 652.

40. Spradlin *v.* Spradlin, (Ky. 1892) 18 S. W. 14; Medlock *v.* Suter, 80 Ky. 101; Moore *v.* Webb, 2 B. Mon. (Ky.) 282; Howard *v.* McKenzie, 54 Tex. 171; Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605; Peyton *v.* Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200; Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

What amounts to adverse possession by vendor.— A mere recovery of judgment by the vendor against the vendee, in ejectment, to enforce a contract of the sale of land, does not render the vendee's possession thereafter adverse so as to set in motion the statute of limitations, no proceedings having been taken to enforce the judgment. The vendor of land sold under articles of agreement must not only in some way repudiate the agreement, but must take actual possession of the premises, either in person or by an agent, a tenant, or another vendee, in order to break the relation his vendee sustains to him under the agreement, before the statute will commence to run. Bennett *v.* Morrison, 120 Pa. St. 390, 14 Atl. 264, 6 Am. St. Rep. 711.

41. Hart *v.* Bostwick, 14 Fla. 162; McManus *v.* Matthews, (Tex. Civ. App. 1900) 55 S. W. 589; Durst *v.* Skillern, (Tex. Civ. App. 1898) 45 S. W. 840; Greeno *v.* Munson, 9 Vt. 37, 31 Am. Dec. 605.

42. See cases cited *supra*, note 41.

Acts sufficient as a repudiation.—Defendant contracted to purchase land, of which he was in possession, from M, who failed to execute a deed and furnish notes for defendant's execution for the price, as agreed; whereupon defendant requested M's agent to surrender field-notes of a survey which defendant had procured in pursuance of the contract, and notified such agent that he did not believe M had any title to the land. It was held that such acts constituted a repudiation of the contract to convey, and, ten years having expired after such repudiation, defendant was entitled to the land by adverse possession. McManus *v.* Matthews, (Tex. Civ. App. 1900) 55 S. W. 589.

Acts held insufficient as a repudiation.—The usual acts of ownership consistent with the possession of a vendee in possession under a contract of purchase are not evidence of an adverse claim of ownership. Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915. Leasing part of the land in controversy to tenants for a portion of the period remaining, and cutting timber and firewood thereon, are not such acts of actual occupation as will convert the permissive holding of a vendee in possession into one of actual hostility. Sample *v.* Reeder, 107 Ala. 227, 18 So. 214.

43. Roxbury *v.* Hutson, 37 Me. 42; Chapman *v.* Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; Nowlin *v.* Reynolds, 25

vendee of land in possession under a contract of sale by parol or in writing holds adversely to his vendor from the moment of payment or performance of the conditions of the contract;[44] and if this possession is continued for the statutory period the purchaser acquires title by the statute of limitations.[45]

(III) *TENDER OF PERFORMANCE AND PART PERFORMANCE.* Tender of performance by the vendee in an executory contract of purchase has been held sufficient to start the running of the statute.[46] Part performance, however, does not have such effect.[47]

(IV) *EXECUTION OF DEED BY VENDOR.* After execution of a deed, possession of a vendee under an executed conveyance from the purchaser in an execu-

Gratt. (Va.) 137; Core *v.* Faupel, 24 W. Va. 238.

44. *Alabama.*— Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437; East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349; Tillman *v.* Spann, 68 Ala. 102; Potts *v.* Coleman, 67 Ala. 221.

Connecticut.— Catlin *v.* Decker, 38 Conn. 262; Bryan *v.* Atwater, 5 Day (Conn.) 181, 5 Am. Dec. 136.

Delaware.— Lynch *v.* Cannon, 7 Houst. (Del.) 386, 32 Atl. 391.

Florida.— Hart *v.* Bostwick, 14 Fla. 162.

Georgia.— Hawkins *v.* Dearing, 93 Ga. 108, 19 S. E. 717.

Indiana.— Clouse *v.* Elliott, 71 Ind. 302.

Massachusetts.— Brown *v.* King, 5 Metc. (Mass.) 173; Barker *v.* Salmon, 2 Metc. (Mass.) 32.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351.

New York.— Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352; Briggs *v.* Prosser, 14 Wend. (N. Y.) 227; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463.

South Carolina.— Watts *v.* Witt, 39 S. C. 356, 17 S. E. 822; Ellison *v.* Cathcart, McMull. (S. C.) 5.

Texas.— Hemming *v.* Zimmerschitte, 4 Tex. 159.

Vermont.— Adams *v.* Fullam, 43 Vt. 592.

Wisconsin.— Furlong *v.* Garrett, 44 Wis. 111.

United States.— Ward *v.* Cochran, 71 Fed. 127, 36 U. S. App. 307, 18 C. C. A. 1; Shufleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822; Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

Fiduciary character of possession.— It has been said that where the vendee has performed all his obligations the vendor's subsequent possession or interest in the land is held in trust and in subordination to the superior equitable right of the vendee, and that this possession continues to maintain its fiduciary character until the vendor manifests an intention to refuse performance or to claim and enjoy the land as his own. Hemming *v.* Zimmerschitte, 4 Tex. 159.

What is not an agreement to purchase.— The possession of one who has bought land on condition, and paid for it on an agreement that a deed shall be made, is adverse to the vendor. This is an executed contract of sale, and not merely an agreement of purchase. Ridgeway *v.* Holliday, 59 Mo. 444.

45. Lynch *v.* Cannon, 7 Houst. (Del.) 386, 32 Atl. 391; Van Blarcom *v.* Kip, 26 N. J. L. 351; Watts *v.* Witt, 39 S. C. 356, 17 S. E. 822; Ellison *v.* Cathcart, McMull. (S. C.) 5. See also cases cited *supra*, note 44.

Illustrations of rule.— A died intestate, seized of certain lands, leaving four minor heirs and his widow. During the minority of the heirs defendant entered upon the land, and at the time took a bond from the widow, who was administratrix of A's estate, conditioned that the heirs of A should, in a reasonable time after they had arrived at majority, convey their interest in the land to B. The price agreed to be paid for the land was paid by B, and subsequently two of the heirs conveyed their interest to B. B continued in possession for more than fifteen years, and more than five years after all the heirs had arrived at full age, holding out against all persons and taking the rents and profits to himself, and, at the end of fifteen years, had demanded of the obligor a fulfilment of the condition of her bond. In an action of disseizin brought by the two heirs of A who had not conveyed their interest to B, it was held that the possession of B was an adverse one, and that it had vested in him the legal title to the land. Bryan *v.* Atwater, 5 Day (Conn.) 181, 5 Am. Dec. 136.

Where a railroad company takes possession of land bought, its possession becomes adverse to that of the seller upon the performance of the consideration, namely, the building of a spur-track. East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349.

Payment at inception of contract.— If, on an agreement to sell lands, the consideration is paid and the owner consents that the buyer may have and hold the land as his own, such entry and possession cannot be deemed subordinate to the title of the seller, but is adverse and a disseizin, and, if continued for the statutory period, will ripen into title. Adams *v.* Fullam, 43 Vt. 592.

Subsequent conveyance by vendor.— A conveyance by the vendor to a third person after payment of the purchase-money by the vendee in an executory contract of sale is void. Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

46. Den *v.* Alpaugh, 3 N. J. L. 38; Dolton *v.* Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830.

47. Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229; Hawkins *v.* Dearing, 93 Ga. 108, 19 S. E. 717.

tory contract, with assertion of title in himself, is adverse;[48] and this, it seems, is true although the purchase-price has not been paid.[49]

11. By Purchaser from Vendee in Executory Contract of Purchase against Vendor. According to the weight of authority, the possession of a purchaser from a vendee on an executory contract is on the same footing as that of the original vendee. Such possession cannot, as a basis of prescription, be upon any higher or better footing than the possession of the original vendee himself.[50] There are, however, decisions to the effect that possession under a conveyance from an executory purchaser, though no title thereby is acquired, is adverse to that of the original vendor, and, if continued for the statutory period, will ripen into a title which will defeat or sustain an action of ejectment.[51]

12. By Widow of Vendee in Executory Contract of Purchase against Vendor. The widow of a vendee in an executory contract, who continues possession after his death, stands upon the same footing with regard to the vendor as her husband did.[52]

13. By Vendee in Executory Contract of Purchase against Persons Other than Vendor. One entering under an executory contract of purchase may, and generally does, hold adversely as against all persons except his vendor.[53]

14. By Vendee in Deed Reserving Lien for Purchase-Money against Vendor. The vendee in possession under a deed which retains a vendor's lien to secure payment of the purchase-money holds in subordination to the title of the vendor[54] until payment of the purchase-price[55] or repudiation of the vendor's title,[56] with notice to the vendor of such repudiation.[57]

15. By Vendor in Executory Contract of Purchase against Vendee. Where a vendor of land has given a bond for title, or has agreed in writing to make a conveyance, he is in effect the trustee of the legal title for the vendee,[58] and the

48. Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41; Robertson *v.* Wood, 15 Tex. 1, 65 Am. Dec. 140. See also Ford *v.* Holmes, 61 Ga. 419.

49. Perry *v.* Lawson, 112 Ala. 480, 20 So. 611.

50. *Georgia.*— Brown *v.* Huey, 103 Ga. 448, 30 S. E. 429; Hawkins *v.* Dearing, 93 Ga. 108, 19 S. E. 717. *Compare* Wingfield *v.* Davis, 53 Ga. 655.

Missouri.— Hannibal, etc., R. Co. *v.* Miller, 115 Mo. 158, 21 S. W. 915; Fulkerson *v.* Brownlee, 69 Mo. 371.

New York.— Jackson *v.* Bard, 4 Johns. (N. Y.) 230.

West Virginia.— Ketchum *v.* Spurlock, 34 W. Va. 597, 12 S. E. 832.

Wisconsin.— Quinn *v.* Quinn, 27 Wis. 168. See also Timmons *v.* Kidwell, 138 Ill. 13, 27 N. E. 756.

Purchaser at execution sale.— The rule has been held to apply to the possession of the purchaser of such interest at an execution sale. Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287. See also Gillison *v.* Savannah, etc., R. Co., 7 S. C. 173, in which it appeared that a railroad company was authorized by its charter to acquire a right of way by proceedings for the valuation thereof, the lands to "vest in the said company in fee simple as soon as the valuation thereof may be paid or tendered and refused." After valuation of the land by such proceedings, but before payment, the company became insolvent and its property was sold. It was held that the possession taken by such purchaser under the sale is not adverse to the owner of the land.

51. State *v.* Conner, 69 Ala. 212; Tayloe *v.* Dugger, 66 Ala. 444. See also Hunter *v.* Parsons, 2 Bailey (S. C.) 59.

52. Blackwell *v.* Ryan, 21 S. C. 112, in which it is said: "Where there is no new entry, but the heir is in as of his ancestor's possession, the possession of the heir is that of the ancestor."

53. Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Hart *v.* Bostwick, 14 Fla. 162; Adams *v.* Guerard, 29 Ga. 651, 76 Am. Dec. 624; Vrooman *v.* Shepherd, 14 Barb. (N. Y.) 441; Whitney *v.* Wright, 15 Wend. (N. Y.) 171; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 304, 530.

Relation back of deed.— The possession of a party who enters under an executory contract to purchase land and subsequently obtains his deed in pursuance of the contract is adverse from the time of entry as to all the world except the vendor. Howland *v.* Newark Cemetery Assoc., 66 Barb. (N. Y.) 366.

54. Eichelberger *v.* Gitt, 104 Pa. St. 64; Lincoln *v.* Purcell, 2 Head (Tenn.) 142, 73 Am. Dec. 196; Roosevelt *v.* Davis, 49 Tex. 463; Shotwell *v.* McCardell, 19 Tex. Civ. App. 174, 47 S. W. 39; Smith *v.* Pate, (Tex. Civ. App. 1897) 43 S. W. 312. See also De Barnardi *v.* McElroy, 110 Mo. 650, 19 S. W. 626.

55. Eichelberger *v.* Gitt, 104 Pa. St. 64; Roosevelt *v.* Davis, 49 Tex. 463.

56. Roosevelt *v.* Davis, 49 Tex. 463; Smith *v.* Pate, (Tex. Civ. App. 1897) 43 S. W. 312.

57. Smith *v.* Pate, (Tex. Civ. App. 1897) 43 S. W. 312.

58. Sellers *v.* Hayes, 17 Ala. 749; Muldrow *v.* Muldrow, 2 Dana (Ky.) 386; Grundy *v.* Jackson, 1 Litt. (Ky.) 11.

statute does not begin to run against the vendee until the vendor has done some acts showing an intention of holding the land adversely to the vendee.[59]

16. By Parent against Child. Where a parent is in possession of real estate which he admits belongs to his child, he cannot acquire title thereto by adverse possession,[60] so, if he is a tenant in common with his children, for some of whom he is guardian, he cannot make out a case of adverse holding without showing either that he held solely for himself and adversely to the others or that they knew of such claim and holding.[61] If the father takes possession of land deeded to his child and conceals the fact, though it has been so deeded, possession, however long held, cannot give title, since his possession commences in fraud.[62]

17. By Child against Parent. Where a child enters by consent of the parent, looking to the parent for title, the possession is not adverse[63] in the absence of some act or declaration indicating an intention to claim adversely.[64] So, where a child enters into the possession of land under a parol gift from his father, his possession, however long continued, does not become adverse until asserted so notoriously as to raise the presumption of notice to his father.[65] There is, however, no doubt that a child may hold adversely to the parent.[66]

59. Newsom *v.* Davis, 20 Tex. 419; Early *v.* Sterrett, 18 Tex. 113. See also Michigan Land, etc., Co. *v.* Thoney, 89 Mich. 226, 50 N. W. 845.

60. Lawrence *v.* Lawrence, 14 Oreg. 77, 12 Pac. 186.

Entry of mother, as a member of the family of which her son was one, cannot be assumed as an entry under color of title so as to become a starting-point for the statute of limitations relating to an implied or resulting trust as against the son. Clark *v.* Trindle, 52 Pa. St. 492.

Entry by stepfather—Presumption.—Where title to certain land was in minor children and their mother, and her second husband entered on such land, in the absence of proof as to the husband's intention he will be taken to have entered in the right of the mother as natural guardian, and not adversely to the children. McMasters *v.* Bell, 2 Penr. & W. (Pa.) 180.

61. Gannaway *v.* Tarpley, 1 Coldw. (Tenn.) 571.

62. Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681, 65 Am. St. Rep. 291.

63. *Arkansas.*— Ellsworth *v.* Hale, 33 Ark. 633.

Kentucky.— Wells *v.* Head, 12 B. Mon. (Ky.) 166.

Minnesota.— O'Boyle *v.* McHugh, 66 Minn. 390, 69 N. W. 37.

Missouri.— O'Bryan *v.* Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595.

Texas.— Haggard *v.* Martin, (Tex. Civ. App. 1896) 34 S. W. 660; Jester *v.* Francis, (Tex. Civ. App. 1895) 31 S. W. 245.

Canada.— Foster *v.* Emerson, 5 Grant Ch. (U. C.) 135; Phelan *v.* Phelan, 2 Nova Scotia, 184; Rumrell *v.* Henderson, 22 U. C. C. P. 180.

Rule applicable to possession of son-in-law. — Possession by defendant of a part of the land of his father-in-law will be presumed to be permissive occupancy, unless there be very strong evidence to show adverse possession. Smith *v.* McKenzie, 2 Nova Scotia 228.

64. Ellsworth *v.* Hale, 33 Ark. 633.

Lessee of children against parent.— Where children go into possession with the consent of their parent, a lease by them to a stranger does not convey any more permanent rights than they themselves enjoy. Ellsworth *v.* Hale, 33 Ark. 633.

65. Boykin *v.* Smith, 65 Ala. 294.

Occupancy under parol agreement to convey.— Where a mother and her illegitimate children reside upon different parts of the same tract of land, the latter under a parol agreement of a conveyance from their mother subject to a life-estate in her, their respective possessions are consistent with her title, and, however long continued, no presumption of a deed arises from them. Matthews *v.* Smith, 19 N. C. 287.

66. Lane *v.* Coply, 1 Root (Conn.) 68; Roberts *v.* Roberts, 2 McCord (S. C.) 268, 13 Am. Dec. 721.

The presumption arising against the claims of the child may be rebutted by evidence, and in all cases the character of the possession is a question for the jury. Roberts *v.* Roberts, 2 McCord (S. C.) 268, 13 Am. Dec. 721.

Specific facts held not to show adverse possession by child.— Where the person claiming title to land, yet not residing on it, frequently visited her son, who did live there, and there was constant communication between them, it was held that the son's possession was not adverse. Dunham *v.* Townshend, 118 N. Y. 281, 23 N. E. 367. So it has been held that the declarations of a boy nine years old, living in the family of his father, to the effect that the land occupied by the family belonged to him, are not admissible to show his adverse possession to the land as against his father. Douglas *v.* Irvine, 126 Pa. St. 643, 17 Atl. 802. Where a father was insane, and one of his sons who had lived at his house returned and took charge of his farm, with the acquiescence of the mother and the rest of the family, for several years and until the father's death, it was held that the father continued seized while he lived, and that the taking of the profits of the farm by the son must be considered for the use and benefit of the

18. By Guardian against Ward. The possession, by a guardian, of property of the ward, either real or personal, is not adverse[67] in the absence of a distinct and unequivocal repudiation of the latter's title.[68] Where one who has entered into possession of property as agent for the owner, and after such owner's death has been appointed guardian of his children and continues to hold the property, his possession is that of his wards and is adverse to any others claiming to be children and heirs of the decedent, and the owner's death and appointment as guardian are sufficient notice to such claimants that the agency is terminated and that his holding is adverse to them.[69]

19. By Widow against Heirs — a. Before Assignment of Dower — (1) *Statement of Rule.* The general rule is well settled that the widow's possession of lands of which her husband died seized before assignment of dower is not adverse to his heirs,[70] and some decisions seem to hold without qualification that the pos-

father. Hunt *v.* Hunt, 3 Metc. (Mass.) 175, 37 Am. Dec. 130.

67. Halliburton *v.* Fletcher, 22 Ark. 453; Brown *v.* McKay, 125 Cal. 291, 57 Pac. 1001; Lewis *v.* Castleman, 27 Tex. 407.

Legality of guardian's appointment.— The question as to the legality of the appointment of a guardian who holds property for minor heirs does not affect the fact of his possession or its adverse character in favor of those whom he assumes to represent. Westenfelder *v.* Green, 76 Fed. 925.

Possession of both guardian and ward.— If the infant and guardian are both in possession of the land, the guardian's possession is not adverse to that of the infant, because, in case of the common possession by two persons, the ownership draws to it the possession and it is presumed to be in him who has the title. Gaylord *v.* Respass, 92 N. C. 553.

68. Release of claim to father.— Where a father held chattels as the guardian of his child, who, on arriving at full age, released all claim to the father, he will be considered as holding adversely, and five years' possession will bar all claim to the property. Findley *v.* Patterson, 2 B. Mon. (Ky.) 76.

Possession by guardian's representative.— Where the legal representative of the guardian takes possession of chattels as his own, and continues in peaceable possession under claim of title for five years, he may acquire title thereto by adverse possession. Halliburton *v.* Fletcher, 22 Ark. 453.

69. Westenfelder *v.* Green, 76 Fed. 925 [*following* Westenfelder *v.* Green, 24 Oreg. 448, 34 Pac. 23].

70. *Alabama.*— Foy *v.* Wellborn, 112 Ala. 160, 20 So. 604; Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604.

Arkansas.— Padgett *v.* Norman, 44 Ark. 490. See also Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

Georgia.— McQueen *v.* Fletcher, 77 Ga. 444.

Illinois.— Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Gosselin *v.* Smith, 154 Ill. 74, 39 N. E. 980; Riggs *v.* Girard, 133 Ill. 619, 24 N. E. 1031; Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529; Reynolds *v.* McCurry, 100 Ill. 356; Musham *v.* Musham, 87 Ill. 80; Wilson *v.* Byers, 77 Ill. 76.

Kentucky.— Clayton *v.* Clayton, (Ky. 1889) 12 S. W. 312; Frazer *v.* Naylor, 1 Metc. (Ky.) 593; Driskell *v.* Hanks, 18 B. Mon. (Ky.) 855.

Michigan.— Richards *v.* Richards, 75 Mich. 408, 42 N. W. 954.

Missouri.— Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231; Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435; Null *v.* Howell, 111 Mo. 273, 20 S. W. 24; Colvin *v.* Hauenstein, 110 Mo. 575, 19 S. W. 948; Sherwood *v.* Baker, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600; Holmes *v.* Kring, 93 Mo. 452, 6 S. W. 347; Roberts *v.* Nelson, 87 Mo. 229; Brown *v.* Moore, 74 Mo. 633.

New Hampshire.— Livingston *v.* Pendergast, 34 N. H. 544; Atherton *v.* Johnson, 2 N. H. 31.

New York.— Knapp *v.* Burton, 7 N. Y. Civ. Proc. 448.

North Carolina.— Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961; Nixon *v.* Williams, 95 N. C. 103.

Pennsylvania.— Iddings *v.* Cairns, 2 Grant (Pa.) 88; Cook *v.* Nicholas, 2 Watts & S. (Pa.) 27.

Tennessee.— Meriwether *v.* Vaulx, 5 Sneed (Tenn.) 300.

Texas.— Harvey *v.* Carroll, 72 Tex. 63, 10 S. W. 334; Edwards *v.* Humphreys, (Tex. Civ. App. 1896) 36 S. W. 333.

Virginia.— Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157.

United States.— Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

England.— See also Doe *v.* Haslewood, 6 A. & E. 167, 33 E. C. L. 108, 1 Jur. 1138.

Application of rule.— The mere entry by a widow into lands of her deceased husband, claiming it and taking the rents and profits for twenty-one years, is no disseizin of the heirs at law. To make it such there must be some plain, decisive, unequivocal act or conduct on the widow's part amounting to disseizin of the heirs. Hall *v.* Mathias, 4 Watts & S. (Pa.) 331.

Changing character of possession by partition.— Where a surviving wife has a life-estate in her husband's homestead, the character of her possession may be changed by a parol partition to which she and the heirs of the husband agree, so as to make her possession adverse. Whittemore *v.* Cope, 11 Utah 344, 40 Pac. 256.

Special statutory provisions as affecting rule.— Under a statute which makes seven

session of the widow cannot in any case be adverse to that of the heirs.[71] The weight of authority, however, seems to recognize the doctrine that if the widow's possession is under an open and notorious claim of right in herself it amounts to a disseizin of the heirs, and title may be acquired by her by adverse possession.[72] Nevertheless, within this rule, to make her holding adverse, it is essential that there should be some plain, decisive, unequivocal act or conduct on the part of the widow amounting to an open denial of the rights of the heirs and putting them out of possession.[73] It has been held, however, that actual direct notice of a hostile claim to land by a widow is not necessary to set in motion the statute of limitations.[74]

(II) *EXTENT OF RULE.* Where the widow continues to live upon the land with her infant children, the heirs at law, or enters and takes possession, after her husband's decease, with the infant heirs, she is presumed to hold for her own benefit in reference to her dower only, and for the infant heirs as their natural guardian,[75] and the possession of a decedent's land by his widow and child is not adverse to his children by a former marriage.[76] The character of her possession is not changed by her subsequent removal from and lease of the premises,[77] and if

years' payment of taxes, with color of title and possession, constitute good title, the possession, under her right of quarantine, of the widow of one who had color of title, and her payment of taxes during her possession, enure in favor of the heirs of the deceased, since her relation to them is substantially that of tenant. Riggs *v.* Girard, 133 Ill. 619, 24 N. E. 1031.

Widow's possession against children of first wife.— Testator, having been twice married, and leaving surviving him children by both wives, left a will devising his farm to his second wife during her life, with remainder to her children begotten by him, there being no other mention of his children in the will. It was held that the possession of the widow, whether she be regarded as tenant of the homestead or in possession under her right of quarantine or under the will, was not adverse to the children of the first wife, and the statute of limitations would not begin to run as to them prior to her death. Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657.

71. See the Missouri cases cited *supra*, note 70.

72. *Alabama.*— Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604.

Iowa.— Williams *v.* Thomas, 65 Iowa 183, 21 N. W. 509.

Kentucky.— Frazer *v.* Naylor, 1 Metc. (Ky.) 593; Driskell *v.* Hanks, 18 B. Mon. (Ky.) 855.

New Hampshire.— Livingston *v.* Pendergast, 34 N. H. 544; Atherton *v.* Johnson, 2 N. H. 31.

Pennsylvania.— Davis *v.* Dickson, 92 Pa. St. 365; Iddings *v.* Cairns, 2 Grant (Pa.) 88; Hall *v.* Mathias, 4 Watts & S. (Pa.) 331.

Texas.— Edwards *v.* Humphreys, (Tex. Civ. App. 1896) 36 S. W. 333.

Virginia.— Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157.

United States.— Hogan *v.* Kurtz, 1 MacArthur (D. C.) 135.

73. Hall *v.* Mathias, 4 Watts & S. (Pa.) 331; Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157. See also cases cited *supra*, note 70 *et seq.*

74. Edwards *v.* Humphreys, (Tex. Civ. App. 1896) 36 S. W. 333.

75. Livingston *v.* Pendergast, 34 N. H. 544; Atherton *v.* Johnson, 2 N. H. 31; Westenfelder *v.* Green, 76 Fed. 925.

76. Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233.

Other facts which do not affect the general rule.— The general rule that the widow's possession is not adverse to the heirs is not affected by the fact that she compromises an outstanding adverse claim to the land and takes a deed therefor in her own name, paying for it with money obtained from her father's estate, although she had money left her by her husband (Scott *v.* Proctor, (Ky. 1890) 13 S. W. 790), or by the fact that she procures a tax-deed from the state to the property, the land having been sold for taxes prior to the sale to her husband (Richards *v.* Richards, 75 Mich. 408, 42 N. W. 954), or by the fact that she purchases lands of the estate at a judicial sale, with funds in her hands as administratrix, for which she never accounts. In such case she holds in trust for the heirs, in the absence of evidence that the estate was indebted to her, especially where she retains possession during her life and does not account for the price of part of the land sold by her (Clayton *v.* Clayton, (Ky. 1889) 12 S. W. 312).

Lands conveyed to widow, but inventoried as property of the estate.— Where, after the death of one who conveyed lands as security for a loan, his widow paid the debt and had the lands conveyed to herself, but inventoried them as those of deceased, she having a dower and homestead right therein and occupying them as a homestead together with the sole heir, her possession is not adverse as against him. Hinter *v.* Dennis, 112 Ill. 568.

77. Foy *v.* Wellborn, 112 Ala. 160, 20 So. 604. See also Melvin *v.* Waddell, 75 N. C. 361, in which it was held that possession taken by a tenant under the widow of a farm-owner, she having no authority to give it, was not adverse to the heirs of the owner.

she marries again the possession of herself and husband will be for the heirs as well as for themselves,[78] unless the circumstances attending the possession amount to an actual ouster of the heirs and in fact exclude them from the land.[79] If the widow continues in possession of land adversely held by her husband under an understanding with her children that she should hold for life, she cannot claim title by adverse possession as against the children,[80] and although she remains in possession for a length of time sufficient to acquire title by adverse possession, declarations that the husband had devised the lands to the widow during her widowhood negative any decisive claim or intention to claim by the statute of limitations.[81] It has, however, been held that where the wife holds the land of which the husband is seized for more than the statutory period after his death, under claim of absolute title to the whole, the claims of the heirs are barred.[82]

b. After Assignment of Dower. It has been held that where dower is assigned, and the widow goes into possession, she cannot acquire any right against the heir by the statute of limitations, at least without some open, positive change of possession, accompanied with some manifestations of an unequivocal purpose to hold adversely to the heir, such as would have subjected the party coming in under such change of possession to an action at the instance of the heir.[83]

20. By Grantee of Widow against Heirs. The possession of the grantee of a widow before assignment of dower is not, as a general rule, adverse to the heirs.[84] It has been held that where the widow marries again and joins with her husband in conveying the entire premises to a stranger, who places the deed on record and takes possession, the possession becomes adverse to the heirs, and, if continued for twenty-one years, would bar their right to entry.[85]

21. By Heirs against Widow. Where, during the time she remained single the widow resided in a house on the land, but at first a half and subsequently a larger portion of the premises were cultivated for the heirs, all parties being ignorant of the widow's homestead rights, the heirs did not hold such adverse possession as would start the statute of limitations running against the widow's homestead title.[86] So it has been held that three years' adverse possession of a homestead by one holding for the children of a deceased intestate owner will not bar the right of the widow to her life-interest of one third.[87]

22. By Widow against Mortgagees or Creditors of Husband. If the decedent's land is admittedly subject to a lien, the continued possession of the widow is in subordination thereto in the absence of an express disclaimer and an express

78. Livingston *v.* Pendergast, 34 N. H. 544; Irvine *v.* Sibbetts, 26 Pa. St. 477; Cook *v.* Nicholas, 2 Watts & S. (Pa.) 27. See also Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231.

Possession of second husband after widow's abandonment of premises.— A widow was authorized by the will of her deceased husband to continue the possession of the land eleven years after his death. She married again within nine months, resided upon the property about one year, and then left the possession; but her second husband and those claiming under him occupied it for thirty-five years, some twenty-five years after the right of entry by the owner accrued. It was held that the possession of the second husband was in privity with the estate of the owner, and that nothing short of an open and explicit disavowal of a holding under that title, and an assertion of title in himself, brought home to the owner's notice, would make his possession adverse. Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

79. Livingston *v.* Pendergast, 34 N. H. 544. See also Irvine *v.* Sibbetts, 26 Pa. St. 477.

80. Chouquette *v.* Barada, 28 Mo. 491.

81. Breidegam *v.* Hoffmaster, 61 Pa. St. 223.

82. Hogan *v.* Kurtz, 1 MacArthur (D. C.) 135; Williams *v.* Thomas, 65 Iowa 183, 21 N. W. 509.

83. Malloy *v.* Bruden, 86 N. C. 251.

84. Gosselin *v.* Smith, 154 Ill. 74, 39 N. E. 980.

Assignment of unassigned dower interest.— Where a person goes into possession of land under a deed from a widow conveying her unassigned dower interest, his possession as to the heirs is not adverse. Melton *v.* Fitch, 125 Mo. 281, 28 S. W. 612; Colvin *v.* Hauenstein, 110 Mo. 575, 19 S. W. 948; Brown *v.* Moore, 74 Mo. 633.

85. Irvine *v.* Sibbetts, 26 Pa. St. 477.

86. Wheelock *v.* Ovenshine, 110 Mo. 100 19 S. W. 640.

87. Cockrell *v.* Curtis, 83 Tex. 105, 18 S. W. 436.

hostile occupancy with the claimant's knowledge,[88] and it has been held that the widow's possession of land assigned to her as dower is not adverse to the mortgagee of her husband or to the assignee of the latter;[89] and this is true although she made substantial improvements on the land while in possession.[90]

23. By Widow against Purchaser at Administrator's Sale. The possession of a widow before assignment of dower, and subsequent to an administrator's sale, is not adverse to one who does not get a deed and allows her to remain on the premises, and does not extinguish the title acquired by the purchaser.[91]

24. By Surviving Husband or Grantee against Heirs. Continued possession of the husband after the wife's death as tenant by the curtesy of lands of which she died seized is not adverse to her heirs,[92] and inasmuch as the husband has a legal right to the possession of the wife's land during coverture, which possession is not adverse to the heirs,[93] the possession of a grantee of a tenant by the curtesy under a deed of bargain and sale does not become adverse to the heirs of the wife until the death of such tenant, since the heirs have no right to enter upon the land and no right of action until his death.[94]

25. By Survivor of Community against Heirs. The possession of community property by the survivor of a community qualified as such is not adverse to the heirs of deceased in the absence of notice to them that the survivor is claiming adversely,[95] and occupancy by the widow and her children without repudiating the title of his children by a former wife will not sustain a plea of the statute of limitations where such homestead was community property of the first marriage.[96]

26. By Purchaser against Judgment Debtor. The possession of the purchaser at a judicial sale is adverse to the judgment debtor.[97]

27. By Judgment Debtor against Purchaser. Where land is sold by virtue of a judgment or decree, the relation of the judgment debtor to the purchaser is that of a quasi-tenant to the purchaser, and his continued possession is not adverse until such relation is distinctly disclaimed by him.[98] In the absence of all testi-

88. Oury *v.* Saunders, 77 Tex. 278, 13 S. W. 1030.

89. Williams *v.* Bennett, 26 N. C. 122; Neilson *v.* Grignon, 85 Wis. 550, 55 N. W. 890.

90. Neilson *v.* Grignon, 85 Wis. 550, 55 N. W. 890.

91. Sherwood *v.* Baker, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399.

92. Brown *v.* Clark, 44 Mich. 309, 6 N. W. 679.

Curtesy created by statute after wife's acquisition of land.— The rule that the possession of a tenant by the curtesy is not adverse to the heirs applies though the curtesy was created by a statute which did not go into effect until after the conveyance of the bond to the wife. Brown *v.* Clark, 44 Mich. 309, 6 N. W. 679.

Effect of execution of deed by wife to husband.— Where a husband and wife reside on land after the execution of a void deed thereof by the wife to the husband, the possession of the husband, and persons claiming under him, after the death of the wife, is adverse to the wife's heirs. Berkowitz *v.* Brown, 3 Misc. (N. Y.) 1, 23 N. Y. Suppl. 792.

93. Marshall *v.* Pierce, 12 N. H. 127; Doe *v.* Wing, 6 C. & P. 538, 25 E. C. L. 564.

Extent of the rule.—The continuance of the possession commenced under such circumstances after the wife's death, though the right then ceased because of want of issue, will not be deemed adverse. The presumption is that he remains in possession under the heirs. There must be evidence to show that he continued the possession adversely, aside from the occupation itself. Marshall *v.* Pierce, 12 N. H. 127. To same effect see Jackson *v.* Cairns, 20 Johns. (N. Y.) 301. But see Pattison *v.* Dryer, 98 Mich. 564, 57 N. W. 814, in which it was held that where a husband holds over on his wife's land after her death, he is a trespasser, in whose favor limitations run against his wife's heirs, under a statute providing that the right of an heir of one who died seized, to recover land, accrues at the time of the ancestor's death, if there be no estate intervening.

94. Meraman *v.* Caldwell, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537; Jackson *v.* Mancius, 2 Wend. (N. Y.) 357.

95. Taylor *v.* Taylor, (Tex. Civ. App. 1894) 26 S. W. 889.

96. Clemons *v.* Clemons, (Tex. Civ. App. 1898) 45 S. W. 199.

It has been held that limitations begin to run against the recovery of an interest in land by a former wife when the executor under decedent's will giving the entire property to an alleged second wife takes possession of the property with the administration of the estate under the will. Anderson *v.* Stewart, 15 Tex. 285.

97. Stith *v.* Jones, 4 B. Mon. (Ky.) 375. See also Miller *v.* State, 38 Ala. 600; Barnes *v.* Born, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833.

98. *Indiana.*— Bradford *v.* Russell, 79 Ind. 64; Law *v.* Smith, 4 Ind. 56; Foust *v.* Moorman, 2 Ind. 17.

mony manifesting the actual character of his holding, the possession of the judgment debtor is regarded as consistent with the title of the purchaser,[99] and where the purchaser has paid the price in full, the rule applies although he has not been given a deed.[1] Nevertheless the possession of the judgment debtor may be adverse to that of the purchaser at a sale under the judgment or decree, where he claims title in himself openly and notoriously, and possession thus continued for the statutory period will ripen into a title by adverse possession.[2]

28. By Judgment Defendant against Plaintiff after Decree Quieting Title. Where a defendant in a suit to quiet title remains in possession or assumes possession after a decree adverse to him and vesting title in another, his possession is presumed to be in subordination to the true owner and does not become adverse without express notice of his adverse claim brought home to said owner.[3]

29. By Purchaser at Administrator's Sale against Heirs. Before payment of purchase-money for lands sold by an administrator the purchaser holds in subordination, and not adversely, to the heirs, but after payment his possession is presumed to be hostile and will ripen into title after possession for the statutory period.[4]

30. By Heirs against Purchaser at Administrator's Sale. Possession of heirs is not adverse to a purchaser at an administrator's sale for the payment of debts, because they take subject to the payment of the ancestor's debts.[5]

31. By Heirs against Creditors. Heirs cannot acquire title to the land descended, as against the debts of the ancestor, by a claim of adverse possession as against the title descended.[6]

32. By Devisees against Creditors. The possession of a widow claiming as

Kentucky.— Snowden *v.* McKinney, 7 B. Mon. (Ky.) 258.

New York.— Hubbell *v.* Weldon, Lalor (N. Y.) 139; De Silva *v.* Flynn, 9 N. Y. Civ. Proc. 426; Jackson *v.* Sternbergh, 1 Johns. Cas. (N. Y.) 153.

Tennessee.— Keaton *v.* Thomasson, 2 Swan (Tenn.) 137, 58 Am. Dec. 55; Wood *v.* Turner, 7 Humphr. (Tenn.) 517.

Virginia.— Evans *v.* Spurgin, 6 Gratt. (Va.) 107, 52 Am. Dec. 105.

Wisconsin.— Swift *v.* Agnes, 33 Wis. 228.

United States.— Graydon *v.* Hurd, 55 Fed. 724, 6 U. S. App. 610, 5 C. C. A. 258.

See also *infra*, VI, F, 37.

Attornment to third person.— Where the owner of land sold for taxes remained in possession after the issuance of the tax-deed, and, after the sale on execution subsequently issued against his interest in the land, continued in possession, the character of his occupancy was not rendered adverse to the tax-sale purchaser by attornment to some other person without notice to such purchaser. Swift *v.* Agnes, 33 Wis. 228.

Deed subsequently ratified.—Commissioners appointed by an interlocutory decree to sell lands, but not authorized to make a deed, sold the lands and also made a deed to the purchaser, the original owner and his heirs remaining in possession. Several years later the commissioners made a report of the proceedings, which the court confirmed by final decree, thus rendering it valid. It was held that the possession of the original owner was not adverse to the purchaser, because the decree of the court was essential to the validity of the deed, and in the meantime the owner held subject to the order of the court under such title, and not adversely thereto. Evan *v.* Spurgin, 6 Gratt. (Va.) 107, 52 Am. Dec. 105.

Property bid in for judgment debtor.— Where a judgment debtor procured a third person to bid off his land at sheriff's sale, with privilege to him to redeem, a continued possession of the property by the debtor was not adverse to the rights of the purchaser. Neal *v.* Pressell, 4 Ind. 594.

99. Chalfin *v.* Malone, 9 B. Mon. (Ky.) 496, 50 Am. Dec. 525.

1. Whitlock *v.* Johnson, 87 Va. 323, 12 S. E. 614.

2. Chalfin *v.* Malone, 9 B. Mon. (Ky.) 496, 50 Am. Dec. 525; Keaton *v.* Thomasson, 2 Swan (Tenn.) 137, 58 Am. Dec. 55.

3. Woolworth *v.* Root, 40 Fed. 723 [*affirmed* in 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123].

4. Morgan *v.* Casey, 73 Ala. 222.

If the sale of the land has been confirmed and a deed duly executed by the purchaser, his possession is adverse to the heirs, notwithstanding the administration of the estate has not terminated. Mitchell *v.* Campbell, 19 Oreg. 198, 24 Pac. 455.

5. Rogers *v.* Johnson, 125 Mo. 202, 28 S. W. 635.

6. Wheeler *v.* Floyd, 24 S. C. 413, wherein it is held that where the heir claims "in his own right" his possession may be considered adverse, and such possession, if thus continued after the statutory period, may divest the lien of a judgment obtained against the ancestor in his lifetime.

devisee and executrix cannot be deemed adverse to the rights of her husband's creditors.[7]

33. By Heirs against Trust Created by Ancestor. Persons who go into possession of lands as heirs of their ancestor are bound by a secret trust attached to their ancestor's deed, and cannot claim title by adverse possession.[8]

34. By Agent against Principal. Where one enters into possession of land as agent, his possession is that of his principal and does not become adverse[9] until a disclaimer of the principal's title and the assertion of a hostile claim.[10] Where the entry is originally in a fiduciary character there must be some decisive act or declaration to render the possession adverse.[11]

35. By Tenant for Life or Years against Remainder-Man or Reversioner — a. Statement of Rule. The rule is well settled that the possession of land by a tenant for life is not adverse to the remainder-man or reversioner.[12]

7. Roberts *v.* Smith, 21 S. C. 455, wherein it is held that the character of such widow's possession is not changed by relation back, upon it appearing subsequently that there was no will.

8. McSween *v.* McCown, 23 S. C. 342.

9. *Alabama.*— Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Baucum *v.* George, 65 Ala. 259.

Arkansas.— Hoskins *v.* Byler, 53 Ark. 532, 14 S. W. 864.

California.— Hunt *v.* Swyney, (Cal. 1893) 33 Pac. 854.

Kentucky.— Farrow *v.* Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; Whiting *v.* Taylor, 8 Dana (Ky.) 403.

Massachusetts.— Peabody *v.* Tarbell, 2 Cush. (Mass.) 226.

Missouri.— Combs *v.* Goldsworthy, 109 Mo. 151, 18 S. W. 1130.

Pennsylvania.— Huzzard *v.* Trego, 35 Pa. St. 9.

Wisconsin.— Peabody *v.* Leach, 18 Wis. 657.

England.— Williams *v.* Pott, L. R. 12 Eq. 149; Smith *v.* Bennett, 30 L. T. Rep. N. S. 100.

Canada.— Heward *v.* O'Donohoe, 19 Can. Supreme Ct. 341.

10. Farrow *v.* Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; Whiting *v.* Taylor, 8 Dana (Ky.) 403. See also Pendergrast *v.* Foley, 8 Ga. 1.

What amounts to adverse title by agent.— It has been held that a public claim by an agent to hold in his own right, selling parts of the land by conveyances and delivery during twenty years, amount to presumptive notice of an adverse holding. Farrow *v.* Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250.

What does not amount to adverse possession by agent.— Where an agent employed by the owners of land to pay the taxes thereon procures, from the purchaser at a treasurer's sale, a conveyance in his own name, but professedly for the owners, the latter are not barred by the statute of limitations. Huzzard *v.* Trego, 35 Pa. St. 9. So it has been held that giving receipts for rent by an agent in his own name is not such an act as will give notice to the principal of an adverse holding by the agent. Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 480.

11. Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489.

Surrender of property.— It has been held that where one enters as agent for another there must be an actual surrender of the property to the principal before his holding can become adverse. Peabody *v.* Leach, 18 Wis. 657. But this decision, it is believed, is against the weight of authority.

12. *Alabama.*— Gindrat *v.* Alabama Western R. Co., 96 Ala. 162, 11 So. 372, 19 L. R. A. 839; Bass *v.* Bass, 88 Ala. 408, 7 So. 243; Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73; Pendley *v.* Madison, 83 Ala. 484, 3 So. 618; Pickett *v.* Doe, 74 Ala. 122; Doe *v.* Pickett, 65 Ala. 487; Smith *v.* Cooper, 59 Ala. 494; Thrasher *v.* Ingram, 32 Ala. 645.

Arkansas.— Gallagher *v.* Johnson, 65 Ark. 90, 44 S. W. 1041; Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; Moore *v.* Childress, 58 Ark. 510, 25 S. W. 833; Jones *v.* Freed, 42 Ark. 357; Banks *v.* Green, 35 Ark. 84.

Connecticut.— Schroeder *v.* Tomlinson, 70 Conn. 348, 39 Atl. 484; Chandler *v.* Phillips, 1 Root (Conn.) 546.

Georgia.— Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89; Dupon *v.* Walden, 84 Ga. 690, 11 S. E. 451; Bagley *v.* Kennedy, 81 Ga. 721, 8 S. E. 742.

Illinois.— Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618; Borders *v.* Hodges, 154 Ill. 498, 39 N. E. 597; Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587; Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Higgins *v.* Crosby, 40 Ill. 260.

Indiana.— Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Nicholson *v.* Caress, 59 Ind. 39.

Kansas.— Menger *v.* Carruthers, 57 Kan. 425, 46 Pac. 712; Dewey *v.* McLain, 7 Kan. 126, 12 Am. Rep. 418.

Kentucky.— May *v.* Scott, (Ky. 1890) 14 S. W. 191; Berry *v.* Hall, (Ky. 1889) 11 S. W. 474; Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477; Simmons *v.* McKay, 5 Bush (Ky.) 25; Turman *v.* White, 14 B. Mon. (Ky.) 560.

Maine.— Poor *v.* Larrabee, 58 Me. 543; Mellus *v.* Snowman, 21 Me. 201; Durham *v.* Angier, 20 Me. 242.

b. Reason for Rule. The reason for this rule is based upon the fact that the remainder-man or reversioner cannot, during the life of the person holding the life-estate, bring an action against the person in possession to recover possession of the premises.[13]

c. Extent of Rule. A life-tenant cannot, by his declarations, acts, or claims of a greater or different estate, make it adverse so as to enable himself or those claiming under him to invoke the statute.[14]

Maryland.— Hanson *v.* Johnson, 62 Md. 25, 50 Am. Rep. 199.

Massachusetts.— Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178.

Michigan.—Lumley *v.* Haggerty, 110 Mich. 552, 68 N. W. 243, 64 Am. St. Rep. 364; Watkins *v.* Green, 101 Mich. 493, 60 N. W. 44; Cook *v.* Knowles, 38 Mich. 316.

Minnesota.— Hanson *v.* Ingwaldson, 77 Minn. 533, 80 N. W. 702; Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26.

Mississippi.— Wilson *v.* Parker, (Miss. 1894) 14 So. 264.

Missouri.— Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435; Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657; Null *v.* Howell, 111 Mo. 273, 20 S. W. 24; Colvin *v.* Hauenstein, 110 Mo. 575, 19 S. W. 948; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600; Keith *v.* Keith, 80 Mo. 125; Sutton *v.* Casseleggi, 77 Mo. 397; Salmons *v.* Davis, 29 Mo. 176.

New Hampshire.— Moore *v.* Frost, 3 N. H. 126.

New Jersey.— Pinckney *v.* Burrage, 31 N. J. L. 21.

New York.— Clute *v.* New York Cent., etc., R. Co., 129 N. Y. 267, 24 N. E. 317; Fleming *v.* Burnham, 100 N. Y. 1, 2 N. E. 905; Christie *v.* Gage, 71 N. Y. 189; Bedell *v.* Shaw, 59 N. Y. 46; Clarke *v.* Hughes, 13 Barb. (N. Y.) 147; Grout *v.* Townsend, 2 Hill (N. Y.) 554; Jackson *v.* Mancius, 2 Wend. (N. Y.) 357; Smith *v.* Burtis, 9 Johns. (N. Y.) 174; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 390; Constantine *v.* Van Winkle, 6 Hill (N. Y.) 177.

North Carolina.— Ladd *v.* Byrd, 113 N. C. 466, 18 S. E. 666; Malloy *v.* Bruden, 86 N. C. 251.

Ohio.— Carpenter *v.* Denoon, 29 Ohio St. 379.

Tennessee.— Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 S. W. 737; Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435; Aiken *v.* Suttle, 4 Lea (Tenn.) 103; McCorry *v.* King, 3 Humphr. (Tenn.) 266, 39 Am. Dec. 165; Miller *v.* Miller, Meigs (Tenn.) 484, 33 Am. Dec. 157.

Texas.— Haby *v.* Fuos, (Tex. Civ. App. 1894) 25 S. W. 1121.

Vermont.— Giddings *v.* Smith, 15 Vt. 344.

Virginia.— Ball *v.* Johnson, 8 Gratt. (Va.) 281; Merrit *v.* Smith, 6 Leigh (Va.) 486.

West Virginia.—Austin *v.* Brown, 37 W. Va. 634, 17 S. E. 207; Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56.

Wisconsin.— Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795. See also Wiesner *v.* Zaun, 39 Wis. 188.

United States.— McClaskey *v.* Barr, 42 Fed. 609, 47 Fed. 154.

England.— Board *v.* Board, L. R. 9 Q. B. 48; Anstee *v.* Nelms, 1 H. & N. 225, 4 Wkly. Rep. 612; Fausset *v.* Carpenter, 2 Dow & C. 232.

Applications of rule.— Where a person devises a life-estate in his homestead to his wife, and remainder to other devisees, the statute does not begin to run against the latter until the widow's death. Haby *v.* Fuos, (Tex. Civ. App. 1894) 25 S. W. 1121. So, if the land is covered by assigned dower, possession cannot be adverse to him, and the statute of limitations does not begin to run against the remainder-man until the termination of the dower estate; but seven years' adverse possession after the latter date bars the remainder-man. Burns *v.* Headerick, 85 Tenn. 102, 2 S. W. 259. Where an administrator, under a license from the probate court, conveyed land to defendant's grantor, and the widow, to whom the land had been assigned as dower, joined in the deed to convey and release her dower, defendant will not, during the life of the widow, be regarded as holding adversely to the reversioners. Poor *v.* Larrabee, 58 Me. 543.

By life-tenant against contingent remainder-man.— Until the death of the life-tenant the statute does not begin to run, in favor of the life-tenant or his grantee, against the remainder-man, whether the estate in remainder be vested or contingent, legal or equitable. Lamar *v.* Pearre, 82 Ga. 354, 9 S. E. 1043; Augusta *v.* Radcliffe, 66 Ga. 469. But *compare* Gindrat *v.* Alabama Western R. Co., 96 Ala. 162, 11 So. 372, 19 L. R. A. 839.

13. Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89; Rhon *v.* Harris, 130 Ill. 525, 22 N. E. 587; Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795.

"All statutes of limitation are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action: and to hold the bar of the statute could run against the title of a person so circumstanced would be subversive of justice and would be to deprive such person of his estate without his day in court." Mettler *v.* Miller, 129 Ill. 630, 642, 22 N. E. 529.

The possession of the tenant for life, or his vendee, during the continuance of the life-tenancy, is, in contemplation of law, the possession of the remainder-man or reversioner. Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529; Clark *v.* Parsons, 69 N. H. 147, 39 Atl. 896.

14. Tippin *v.* Coleman, 59 Miss. 641; Keith *v.* Keith, 80 Mo. 125.

Surrender or release.— Thus a tenant for life cannot debar the rights of a remainder-man by a surrender or a release, or by any other voluntary acts for merging the lesser estate into the greater. Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629.

Purchase of outstanding claim.— A tenant

36. By Grantee of Life-Tenant against Remainder-Man or Reversioner. The possession of the grantee of a tenant for life does not become adverse to the remainder-man or reversioner until after the death of the life-tenant; and this is true whether the deed purports to convey only the interest which the life-tenant possesses or the title in fee simple to the premises.[15]

37. By Tenant and Persons Holding under Him against Landlord — a. During the Existence of the Lease — (1) *When Tenant's Possession That of Landlord* — (A) *Statement of Rule.* The general rule is well settled that a tenant cannot dispute the title of his landlord by setting up title either in himself or in a third person during the existence of the lease or tenancy.[16] While the decisions

for life in possession, who purchases an encumbrance on or an adverse title to the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainder-man. The law will not permit him to hold it for his own exclusive benefit if the reversioner or remainder-man will contribute the share that is unpaid. Varney *v.* Stevens, 22 Me. 331; Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656. See also Davies *v.* Myers, 13 B. Mon. (Ky.) 511. If a tenant for life, after a sale of the property for taxes has occurred, obtains a release to himself of the right thus acquired, he takes under such release according to his title, and the remainder-men according to theirs. Varney *v.* Stevens, 22 Me. 321. So, if he buys in the lands under a trust deed made by a former owner, his purchase will enure to the benefit of the remainder-men. Allen *v.* De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626.

15. *Alabama.*— Edwards *v.* Bender, 121 Ala. 77, 25 So. 1010; Pendley *v.* Madison, 83 Ala. 484, 3 So. 618; Pickett *v.* Doe, 74 Ala. 122; Thrasher *v.* Ingram, 32 Ala. 645.

Arkansas.— Moore *v.* Childress, 58 Ark. 510, 25 S. W. 833; Jones *v.* Freed, 42 Ark. 357; Banks *v.* Green, 35 Ark. 84.

Georgia.— Dupon *v.* Walden, 84 Ga. 690, 11 S. E. 451; Bagley *v.* Kennedy, 81 Ga. 721, 8 S. E. 742; Hart *v.* Evans, 80 Ga. 330, 5 S. E. 99.

Illinois.— Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529.

Kentucky.— Simmons *v.* McKay, 5 Bush (Ky.) 25; Meraman *v.* Caldwell, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537.

Massachusetts.— Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178.

New York.— Manolt *v.* Petrie, 65 How. Pr. (N. Y.) 206.

North Carolina.— Ladd *v.* Byrd, 113 N. C. 466, 18 S. E. 666; Henley *v.* Wilson, 77 N. C. 216.

Ohio.— Carpenter *v.* Denoon, 29 Ohio St. 379.

Pennsylvania.— Gernet *v.* Lynn, 31 Pa. St. 94.

South Carolina.— Moseley *v.* Hawkinson, 25 S. C. 519.

West Virginia.— Austin *v.* Brown, 37 W. Va. 634, 17 S. E. 207; Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56.

Grantee against heir of remainder-man.— One who holds under a deed from the trustee of donees in a deed of gift from a life-tenant under a will acquires no title by prescription against the sole heir at law and remainder-men under the will, in a suit brought within a year after the death of the life-tenant. Dupon *v.* Walden, 84 Ga. 690, 11 S. E. 451.

Purchaser of a homestead under an invalid conveyance cannot begin to acquire any rights by adverse possession against the vendor's creditors until the homestead interest is at an end. Hart *v.* Evans, 80 Ga. 330, 5 S. E. 99.

Purchaser of a life-estate at a judicial sale does not hold adversely to the reversioner. Burhans *v.* Van Zandt, 7 N. Y. 523.

Where one having an estate by curtesy in the land of his wife sells the land, the statute of limitations does not begin to run against the heirs of the wife until the termination of the curtesy. Jones *v.* Freed, 42 Ark. 357; Banks *v.* Green, 35 Ark. 84; Meraman *v.* Caldwell, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537.

16. *Alabama.*— Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43.

Arkansas.— Earle *v.* Hale, 31 Ark. 470; Clemm *v.* Wilcox, 15 Ark. 102.

California.— Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596.

Connecticut.— Catlin *v.* Decker, 38 Conn. 262; Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Delaware.— Doe *v.* Jefferson, 5 Houst. (Del.) 477.

Illinois.— Doty *v.* Burdick, 83 Ill. 473; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

Indiana.— Epstein *v.* Greer, 85 Ind. 372; Epstein *v.* Greer, 78 Ind. 348; Vanduyn *v.* Hepner, 45 Ind. 589.

Iowa.— Austin *v.* Wilson, 46 Iowa 362; Bowdish *v.* Dubuque, 38 Iowa 341.

Kansas.—Weichselbaum *v.* Curlett, 20 Kan. 709, 27 Am. Rep. 204.

Kentucky.— Miller *v.* South, (Ky. 1890) 14 S. W. 361; Doe *v.* Million, 4 J. J. Marsh. (Ky.) 395; Phillips *v.* Rothwell, 4 Bibb (Ky.) 33.

Maine.— Stearns *v.* Godfrey, 16 Me. 158; Moshier *v.* Reding, 12 Me. 478.

Massachusetts.— Towne *v.* Butterfield, 97 Mass. 105; Cobb *v.* Arnold, 8 Metc. (Mass.) 398; Binney *v.* Chapman, 5 Pick. (Mass.) 124; Codman *v.* Jenkins, 14 Mass. 93.

Michigan.— Smalley *v.* Mitchell, 110 Mich. 650, 68 N. W. 978; Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342; Campau *v.* Lafferty, 50 Mich. 114, 15 N. W. 40.

Missouri.— Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032.

are far from harmonious as to what acts will initiate an adverse possession by the tenant, it is at least well settled that there can be no adverse possession by the tenant until one of the following acts has occurred: surrender of the premises to the landlord,[17] actual, open, and notorious disclaimer of the landlord's title brought to his knowledge,[18] or actual disseizin or ouster of the landlord.[19] The disclaimer and notice thereof must be actual, or so open and notorious as to raise the presumption of notice,[20] and the statute will run only from the time of such knowledge or notice.[21]

(B) *Reason for Rule.* The principle of estoppel applies to the relation between landlord and tenant and operates with full force to prevent the tenant from violating that contract by which he claimed and held possession. He cannot change the tenure by his own act merely, so as to enable himself to hold against the landlord, who reposes under the security of the tenancy believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination by lapse of time or time of possession.[22]

New Jersey.— Leport *v.* Todd, 32 N. J. L. 124.

New York.— Bedlow *v.* New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629; Whiting *v.* Edmunds, 94 N. Y. 309; Sands *v.* Hughes, 53 N. Y. 287; De Lancey *v.* Ganong, 9 N. Y. 10; Tompkins *v.* Snow, 63 Barb. (N. Y.) 525; Sharpe *v.* Kelley, 5 Den. (N. Y.) 431; Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Jackson *v.* Stiles, 1 Cow. (N. Y.) 575; Jackson *v.* Scissam, 3 Johns. (N. Y.) 499; Jackson *v.* Dobbin, 3 Johns. (N. Y.) 223; Jackson *v.* Sternbergh, 1 Johns. Cas. (N. Y.) 153.

Pennsylvania.— Brandon *v.* Bannon, 38 Pa. St. 63; Thayer *v.* Society of United Brethren, 20 Pa. St. 60; Cooper *v.* Smith, 8 Watts (Pa.) 536; Graham *v.* Moore, 4 Serg. & R. (Pa.) 467.

South Carolina.— Anderson *v.* Darby, 1 Nott & M. (S. C.) 369.

Tennessee.— Lea *v.* Netherton, 9 Yerg. (Tenn.) 315; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Wood *v.* Turner, 7 Humphr. (Tenn.) 517.

Texas.— McKie *v.* Anderson, 78 Tex. 207, 14 S. W. 576; Tyler *v.* Davis, 61 Tex. 674; Carter *v.* La Grange, 60 Tex. 636. See also Bolles *v.* Dolch, (Tex. Civ. App. 1900) 60 S. W. 267.

West Virginia.— Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423; Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

Wisconsin.— Pulford *v.* Whicher, 76 Wis. 555, 45 N. W. 418.

United States.—Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

England.— Fleming *v.* Gooding, 10 Bing. 549, 25 E. C. L. 261; Wood *v.* Day, 7 Taunt. 646; Cooke *v.* Loxley, 5 T. R. 4; Driver *v.* Lawrence, 2 W. Bl. 1259; Balls *v.* Westwood, 2 Campb. 11; Davies *v.* Pierce, 2 T. R. 53.

17. *Alabama.*— Russell *v.* Erwin, 38 Ala. 44.

Connecticut.— Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Illinois.— Doty *v.* Burdick, 83 Ill. 473; Cox *v.* Cunningham, 77 Ill. 545; Fusselman *v.* Worthington, 14 Ill. 135.

Maine.— Moshier *v.* Reding, 12 Me. 478.

Massachusetts.— Towne *v.* Butterfield, 97 Mass. 105.

Nebraska.— Ross *v.* McManigal, (Nebr. 1900) 84 N. W. 610; Perkins *v.* Potts, 52 Nebr. 110, 71 N. W. 1017; Schields *v.* Horbach, 49 Nebr. 262, 68 N. W. 524.

New York.— Jackson *v.* Spear, 7 Wend. (N. Y.) 401; Jackson *v.* Whitford, 2 Cai. (N. Y.) 215.

Pennsylvania.—Thayer *v.* Society of United Brethren, 20 Pa. St. 60; Koons *v.* Steele, 19 Pa. St. 203.

West Virginia.— Genin *v.* Ingersoll, 2 W. Va. 558.

England.— Doe *v.* Smythe, 4 M. & S. 347.

18. *Alabama.*—Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145; Wells *v.* Sheerer, 78 Ala. 142; Dothard *v.* Denson, 72 Ala. 541.

Connecticut.— Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Maryland.— Campbell *v.* Shipley, 41 Md. 81.

Mississippi.— Holman *v.* Bonner, 63 Miss. 131.

Nebraska.— Ross *v.* McManigal, (Nebr. 1900) 84 N. W. 610; Schields *v.* Horbach, 49 Nebr. 262, 68 N. W. 524.

New Jersey.— Leport *v.* Todd, 32 N. J. L. 124.

New York.— Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794.

Oregon.— Nessley *v.* Ladd, 29 Oreg. 354, 45 Pac. 904.

Pennsylvania.— Brandon *v.* Bannon, 38 Pa. St. 63.

South Carolina.— Whaley *v.* Whaley, 1 Speers (S. C.) 225, 40 Am. Dec. 594.

Texas.— Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750; Udell *v.* Peak, 70 Tex. 547, 7 S. W. 786; Carter *v.* La Grange, 60 Tex. 636; Hintze *v.* Krabbenschmidt, (Tex. Civ. App. 1897) 44 S. W. 38; Reichstetter *v.* Reese, (Tex. Civ. App. 1897) 39 S. W. 597.

West Virginia.— Genin *v.* Ingersoll, 2 W. Va. 558.

England.— Balls *v.* Westwood, 2 Campb. 11.

19. Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60; Campbell *v.* Shipley, 41 Md. 81; Jackson *v.* Sternbergh, 1 Johns. Cas. (N. Y.) 153.

20. Wells *v.* Sheerer, 78 Ala. 142; Dothard *v.* Denson, 72 Ala. 541; Udell *v.* Peak, 70 Tex. 547, 7 S. W. 786.

21. Udell *v.* Peak, 70 Tex. 547, 7 S. W. 786.

22. Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

(c) *Extent of Rule.* The rule which prevents the tenant, or those taking his place, from denying the title of the landlord, is alike applicable whether the right of the landlord be legal or equitable, perfect or imperfect,[23] and if, during the possession, the tenant takes a contract for the purchase of land which is equally an acknowledgment of the landlord's title, and, being unable to perform, surrenders it and agrees to assume his footing as a tenant, no adverse possession can commence while that possession continues.[24] The rule, however, has been held to apply only where the conventional relation of landlord and tenant exists.[25]

(II) *Capacity of Tenant to Hold Adversely.* While a tenant is estopped to deny the title of the landlord, as when the relation exists and is recognized between them, he may repudiate the relation and set up an adverse claim and possession in himself which may ripen into a title under the statute.[26] After termination of the tenancy and surrender of the possession to the landlord the tenant may assert a title paramount against him, and the previous tenancy cannot bar the right of recovery.[27]

(III) *When Tenant's Possession Becomes Adverse* — (A) *Statement of General Rule.* In a preceding section it has been shown that, as a general rule, the possession of the tenant is the possession of the landlord, and that in the absence of certain acts or declarations on the part of the tenant there can be no adverse holding by him. In this section an attempt will be made to show under what circumstances the possession becomes adverse. There are a number of decisions which hold, or seem to hold, without any qualification, that where a person enters into possession by virtue of a lease he cannot initiate an adverse possession without first surrendering the premises to the landlord.[28] It is believed, however, that the weight of authority is against this position. According to a considerable number of decisions, when the tenant disclaims to hold under the lease, and the landlord has notice of it, the tenant's possession is adverse, and the statute will run from the time when the landlord has notice;[29] and this notice, it seems,

It has been said with obvious truth that if the rule were otherwise no person would be safe in parting with the possession, as he might be driven to the necessity of making a complete chain of title before he could evict his tenant (Anderson *v.* Darby, 1 Nott & M. (S. C.) 369); and that a title, though perfectly good and indefeasible, could frequently be rendered practically worthless if tenants or third persons prevailing upon them to let them into possession were permitted to call his title in question and make him show that it was better than any other to the land before they could be compelled to surrender the possession of it to him (Cooper *v.* Smith, 8 Watts (Pa.) 536).

23. Cooper *v.* Smith, 8 Watts (Pa.) 536.

24. Tompkins *v.* Snow, 63 Barb. (N. Y.) 525.

Presumption as to tenant's possession.— Where, after a contract of tenancy, the landlord sues the tenant in possession claiming the land, and after an absence of nine years returns and finds him still in possession, it will be presumed that the possession of the tenant under the landlord was continuous during all that time. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43.

25. Sands *v.* Hughes, 53 N. Y. 287, wherein it was held that the rule did not apply to one holding under an assessment lease.

26. Wells *v.* Sheerer, 78 Ala. 142.

27. Smith *v.* Mundy, 18 Ala. 182, 52 Am. Dec. 221.

28. *Alabama.*— Russell *v.* Erwin, 38 Ala. 44.

California.— Millett *v.* Lagomarsino, 107 Cal. 102, 40 Pac. 25.

Illinois.— Doty *v.* Burdick, 83 Ill. 473; Cox *v.* Cunningham, 77 Ill. 545; Ragor *v.* McKay, 44 Ill. App. 79; Fusselman *v.* Worthington, 14 Ill. 135.

Maine.— Moshier *v.* Reding, 12 Me. 478.

New York.— Jackson *v.* Spear, 7 Wend. (N. Y.) 401.

Pennsylvania.—Thayer *v.* Society of United Brethren, 20 Pa. St. 60; Koons *v.* Steele, 19 Pa. St. 203.

England.— Doe *v.* Smythe, 4 M. & S. 347.

29. *Alabama.*— Shelton *v.* Doe, 6 Ala. 230; Tillotson *v.* Doe, 5 Ala. 407.

Kansas.— Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439.

Kentucky.— Whipple *v.* Earick, 93 Ky. 121, 19 S. W. 237; Farrow *v.* Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; Turner *v.* Davis, 1 B. Mon. (Ky.) 151; Morton *v.* Lawson, 1 B. Mon. (Ky.) 45.

Mississippi.— Meridian Land, etc., Co. *v.* Ball, 68 Miss. 135, 8 So. 316.

Pennsylvania.— McGinnis *v.* Porter, 20 Pa. St. 80.

Tennessee.— Watson *v.* Smith, 10 Yerg. (Tenn.) 476; Lea *v.* Netherton, 9 Yerg. (Tenn.) 315; Duke *v.* Harper, 6 Yerg. (Tenn.) 279, 27 Am. Dec. 462.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

Virginia.— Allen *v.* Paul, 24 Gratt. (Va.) 332.

West Virginia.— Swann *v.* Thaver, 36 W. Va. 46, 14 S. E. 423; Voss *v.* King, 33

need not be actual or express. It will probably be sufficient if the disclaimer of the tenant is so open and notorious as to raise the presumption of notice.[30] Surrender of the premises is not necessary when the landlord has notice of disclaimer.[31]

(B) *Demand of Possession and Refusal to Surrender.* The demand of possession by the landlord, and a refusal by the tenant to surrender on the ground that he claims title in himself, is evidence of actual ouster.[32]

(C) *Non-Payment of Rent.* The mere non-payment of rent by the tenant, and failure of the landlord to demand it, even though for a considerable period of time, raises no presumption of adverse holding by the tenant.[33]

b. By Tenant Holding Over. The possession of a tenant holding over after the expiration of the term is considered the possession of the landlord, and not adverse to him,[34] for, being once in by a lawful title, the law, which presumes no wrong in any man, will suppose him to continue upon a title equally good;[35] nor can the possession become adverse unless the possession is first surrendered[36] or the tenant has given notice of his adverse claim.[37] The status of a tenant holding over after the expiration of his term has been likened to that of a tenant at sufferance[38] or a tenant from year to year.[39]

W. Va. 236, 10 S. E. 402; Campbell *v.* Fetterman, 20 W. Va. 398.

United States.— Peyton *v.* Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200; Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

England.— Hovenden *v.* Annesley, 2 Sch. & Lef. 607.

Where tenancy is terminated by the mutual acts of a lessor and lessee in canceling the lease, and the tenant remains in possession claiming as owner, and this with the knowledge of the landlord, such possession, continued for ten years, will ripen into title. Meridian Land, etc., Co. *v.* Bowles, 68 Miss. 135, 8 So. 316.

30. Dothard *v.* Denson, 72 Ala. 541; Morton *v.* Lawson, 1 B. Mon. (Ky.) 45; Udell *v.* Peak, 70 Tex. 547, 7 S. W. 786; Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423.

Limitation of rule.— A party in possession of land under a bond for a deed which provided that if he made default in payment he should have the rights of a tenant at will and be allowed thirty days after notice in which to quit does not hold adversely to the owner until after such notice shall have been received. Austin *v.* Wilson, 46 Iowa 362.

31. Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

32. Lea *v.* Netherton, 9 Yerg. (Tenn.) 315; Duke *v.* Harper, 6 Yerg. (Tenn.) 279, 27 Am. Dec. 462, wherein it was held, however, that a refusal to pay rent to a person not authorized to enter upon land or sue for it in the landlord's name is not evidence of an actual ouster unless the landlord had actual knowledge of the transaction.

33. Myers *v.* Silljacks, 58 Md. 319; Campbell *v.* Shipley, 41 Md. 81; Gwynn *v.* Jones, 2 Gill & J. (Md.) 173; Bradt *v.* Church, 110 N. Y. 537, 18 N. E. 357; Whiting *v.* Edmunds, 94 N. Y. 309; Lyon *v.* Odell, 65 N. Y. 28; Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Sanders *v.* Annesley, 2 Sch. & Lef. 73; Grant *v.* Ellis, 9 M. & W. 113; Doe *v.* Oxenham, 7 M. & W. 131. *Compare* Whaley *v.* Whaley, 1 Speers (S. C.) 225, 40 Am. Dec. 594.

Non-payment of rent for twenty years does not bar the landlord's right to possession. Bradt *v.* Church, 110 N. Y. 537, 18 N. E. 357; Sanders *v.* Annesley, 2 Sch. & Lef. 73.

34. *Illinois.*— Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151.

Maine.— Moshier *v.* Reding, 12 Me. 478; Porter *v.* Hammond, 3 Me. 188.

Maryland.— Gwynn *v.* Jones, 2 Gill & J. (Md.) 173.

Mississippi.— Lyebrook *v.* Hall, 73 Miss. 509, 19 So. 348; Holman *v.* Bonner, 63 Miss. 131; Day *v.* Cochran, 24 Miss. 261.

Nebraska.—Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

New Jersey.— Den *v.* Adams, 12 N. J. L. 99; Adams *v.* Decker, 11 N. J. L. 84.

New York.— People *v.* Paulding, 22 Hun (N. Y.) 91; Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443; Rowan *v.* Lytle, 11 Wend. (N. Y.) 616; Varick *v.* Jackson, 2 Wend. (N. Y.) 166; Jackson *v.* Stiles, 1 Cow. (N. Y.) 575; Jackson *v.* Cairns, 20 Johns. (N. Y.) 301.

Pennsylvania.— Schuylkill, etc., Imp., etc., Co. *v.* McCreary, 58 Pa. St. 304.

Texas.—Huntington *v.* Mattfield, (Tex. Civ. App. 1900) 55 S. W. 361.

England.— Doe *v.* Hull, 2 D. & R. 38; Howard *v.* Sherwood, Alc. & Nap. 217. *Compare* Doe *v.* Gregory, 4 N. & M. 308.

Holding over — Duration of presumption.— Under the New York statute the presumption of possession of a tenant in subordination to the title of the landlord continues not only during the term, but for twenty years after its expiration, and this notwithstanding any claim of the tenant or his successor of a hostile title. Bedlow *v.* New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629.

35. Day *v.* Cochran, 24 Miss. 261.

36. Holman *v.* Bonner, 63 Miss. 131; Huntington *v.* Mattfield, (Tex. Civ. App. 1900) 55 S. W. 361.

37. Holman *v.* Bonner, 63 Miss. 131.

38. Day *v.* Cochran, 24 Miss. 261.

39. Moshier *v.* Reding, 12 Me. 478.

c. By Persons Holding under Tenant — (I) *Statement of Rule.* Not only is the tenant precluded from relying on his possession to bar his landlord, but also all persons who come in under or derive possession from him in any manner, however remotely. In such cases possession is presumed to be in accordance with the title,[40] and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred.[41]

(II) *Applications of Rule.* This doctrine has been held to apply in the case of grantees of the tenant in fee,[42] and that, too, though the grantee takes the deed in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation.[43] So it applies to sublessees of the tenant,[44] to assignees of the lease,[45] to heirs of the tenant,[46] or to the wife of the tenant living with him on the premises,[47] or to the widow of the tenant.[48]

d. By Holder under Tax-Lease against Owner. Possession under a tax-lease is not, during the lease, adverse to the owner in fee.[49] During the continuance of the lease the lessee cannot sustain a claim to any higher title than that of lessee for a term of years,[50] and it is immaterial that the lease was void for irregularity in the tax proceeding.[51]

38. By Trustee or Those Holding under Him against Cestui Que Trust — a. Where the Trust Is Express — (I) *Ordinary Status of Trustee's Possession.*[52] As between a trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no lapse of time constitutes a bar. The relation of privity between the parties is such that the possession of one is the possession of the other, and there can be no adverse claim or possession

40. *Alabama.*— Russell *v.* Erwin, 38 Ala. 44.

Maryland.— Ehrman *v.* Mayer, 57 Md. 612; Campbell *v.* Shipley, 41 Md. 81.

New York.— Bradt *v.* Church, 110 N. Y. 537, 18 N. E. 357; Sands *v.* Hughes, 53 N. Y. 287; Tompkins *v.* Snow, 63 Barb. (N. Y.) 525; Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Jackson *v.* Harder, 4 Johns. (N. Y.) 202; Jackson *v.* Dobbin, 3 Johns. (N. Y.) 223.

Pennsylvania.— Cooper *v.* Smith, 8 Watts (Pa.) 536; Graham *v.* Moore, 4 Serg. & R. (Pa.) 467.

England.— Sanders *v.* Annesley, 2 Sch. & Lef. 73.

Acknowledgment by defendant in ejectment that he went into possession under one of plaintiff's lessors was held sufficient evidence to enable plaintiff to recover, it being a matter of fact for the jury to decide whether defendant held under plaintiff or not. Jackson *v.* Dobbin, 3 Johns. (N. Y.) 223.

41. Ehrman *v.* Mayer, 57 Md. 612.

42. Turly *v.* Rodgers, 1 A. K. Marsh. (Ky.) 245; Phillips *v.* Rothwell, 4 Bibb (Ky.) 33; Harker *v.* Gustin, 12 N. J. L. 42; Bedlow *v.* New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629; Taylor *v.* Horde, 1 Burr. 60.

43. Bedlow *v.* New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629.

44. Doty *v.* Burdick, 83 Ill. 473; Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258; London, etc., R. Co. *v.* West, L. R. 2 C. P. 553.

Purchaser of lessee's interest at execution sale does not hold adversely to lessor. Church *v.* Schultes, 4 N. Y. App. Div. 378, 38 N. Y. Suppl. 842.

45. Earle *v.* Hale, 31 Ark. 470; Gwynn *v.* Jones, 2 Gill & J. (Md.) 173; Stagg *v.* Eureka Tanning, etc., Co., 56 Mo. 317; Tompkins *v.* Snow, 63 Barb. (N. Y.) 525.

Assignee of tenant at will.— Although a tenant at will cannot transfer any of his rights to another, and his tenancy ends if he makes such a transfer and surrenders the occupancy, the person taking it coming in as trespasser only, yet where such person claims the right of occupancy simply by virtue of his assignment, the recognition and allowance of such claim by the owner of the premises makes the occupant a tenant at will, the same as his predecessor, and the occupation continues the possession of the owner. Landon *v.* Townshend, 129 N. Y. 166, 29 N. E. 71.

46. Lewis *v.* Adams, 61 Ga. 559; Brandter *v.* Marshall, 1 Cai. (N. Y.) 394.

47. Russell *v.* Erwin, 38 Ala. 44.

48. Frazer *v.* Naylor, 1 Metc. (Ky.) 593; Bannon *v.* Brandon, 34 Pa. St. 263, 75 Am. Dec. 655; Mitchell *v.* Murphy, 43 Fed. 425. See also Russell *v.* Erwin, 38 Ala. 44.

49. King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513; Doherty *v.* Matsell, 119 N. Y. 646, 23 N. E. 994; Bedell *v.* Shaw, 59 N. Y. 46; Moores *v.* Townshend, 54 N. Y. Super. Ct. 245.

50. Doherty *v.* Matsell, 11 N. Y. Civ. Proc. 392.

51. Doherty *v.* Matsell, 119 N. Y. 646, 23 N. E. 994.

52. **Executors and administrators** being trustees of an express trust (see, generally, Executors and Administrators), the law applicable to adverse possession by a trustee of an express trust as against the *cestuis que trustent* applies also to the adverse possession of an executor or administrator as against distributees, legatees, devisees, or heirs. See *infra*, VI, F, 38, a, (II).

during the continuance of the relation.[53] The statute of limitations will never commence to run in favor of the trustee of an express trust against the beneficiary thereof before the duties of the trust have been fully performed and the trust has terminated,[54] or until the trustee has disavowed and repudiated the trust[55] and the

53. *Alabama.*— McCarthy *v.* McCarthy, 74 Ala. 546; Hastie *v.* Aiken, 67 Ala. 313, 316, wherein it is said: "It is a maxim of honesty as well as of settled law that no trustee, while occupying his possession of trust and confidence, should be heard to lay claim to the trust property by setting up an adverse title."

Arkansas.— Curtis *v.* Daniel, 23 Ark. 362.

California.— Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699; Roman Catholic Archbishop *v.* Shipman, 79 Cal. 288, 21 Pac. 830.

Georgia.— Benjamin *v.* Gill, 45 Ga. 110.

Illinois.— Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618; School Directors *v.* School Directors, 16 Ill. App. 651; Russell *v.* Peyton, 4 Ill. App. 473.

Indiana.— Talbot *v.* Barber, 11 Ind. App. 1, 38 N. E. 487.

Maine.— Dunn *v.* Wheeler, 86 Me. 238, 29 Atl. 985.

Maryland.—Weaver *v.* Leiman, 52 Md. 708; Needles *v.* Martin, 33 Md. 609; Matter of Leiman, 32 Md. 225, 3 Am. Rep. 132; McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Missouri.— Goodwin *v.* Goodwin, 69 Mo. 617; Hill *v.* Bailey, 8 Mo. App. 85.

New Hampshire.— Livingston *v.* Pendergast, 34 N. H. 544.

New Jersey.— Carter *v.* Uhlein, (N. J. 1897) 36 Atl. 956.

New York.— Decouche *v.* Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478.

North Carolina.— Maxwell *v.* Barringer, 110 N. C. 76, 14 S. E. 516; Taylor *v.* Dawson, 56 N. C. 86; Huntly *v.* Huntly, 43 N. C. 250; Miller *v.* Bingham, 36 N. C. 423, 36 Am. Dec. 58; Edwards *v.* University Trustees, 21 N. C. 325, 30 Am. Dec. 170; Falls *v.* Torrance, 11 N. C. 412.

Ohio.— Williams *v.* First Presb. Soc., 1 Ohio St. 478.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Shelby *v.* Shelby, Cooke (Tenn.) 179, 5 Am. Dec. 686.

Texas.— Hunter *v.* Hubbard, 26 Tex. 537.

Vermont.— North *v.* Barnum, 12 Vt. 205.

United States.— Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Lewis *v.* Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113; Seymour *v.* Freer, 8 Wall. (U. S.) 202, 19 L. ed. 306; Prevost *v.* Gratz, 6 Wheat. (U. S.) 481, 5 L. ed. 311; Lemoine *v.* Dunklin County, 51 Fed. 487, 10 U. S. App. 227, 2 C. C. A. 343.

England.— Beckford *v.* Wade, 17 Ves. Jr. 87; Stone *v.* Godfrey, 5 De G. M. & G. 76; Wedderburn *v.* Wedderburn, 4 Myl. & C. 41; Shields *v.* Atkins, 3 Atk. 560; Hovenden *v.* Annesley, 2 Sch. & Lef. 607; *Ex p.* Andrews, 2 Rose 410; Atty.-Gen. *v.* Munro, 2 De G. & S. 122; Thomas *v.* Thomas, 2 Kay & J. 79; Reece *v.* Trye, 1 De G. & S. 279; Spickernell *v.* Hotham, 1 Kay 669; Lister *v.* Pickford, 34 L. J. Ch. 582, 11 Jur. N. S. 649, 12 L. T. Rep. N. S. 587; Patrick *v.* Simpson, 59 L. J. Q. B. 7, 24 Q. B. D. 128, 61 L. T. Rep. N. S. 686; Salter *v.* Cavanagh, 1 Drury & Walsh 668.

Possession of husband as trustee for wife.— Possession of land by a grantee as trustee for the use and benefit of his wife so long as it continues to be held under the deed is not adverse to her even after he has obtained a divorce. Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618.

Possession for sole corporation.— A sole corporation consisting of a Roman Catholic archbishop cannot acquire title by adverse possession of land of which the legal title is vested in him as a private individual, though held in trust for the sole corporation. Possession by him must be referred to the legal title. Roman Catholic Archbishop *v.* Shipman, 79 Cal. 288, 21 Pac. 830.

Administrator and next of kin.—Mere lapse of time is not a bar to a direct trust as between trustee and beneficiary. Hence, an administrator, being a trustee, cannot set up the statute and bar the next of kin or person entitled to distribution of assets. Decouche *v.* Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478.

Purchase of outstanding title by trustee.— One in possession of lands as trustee cannot buy in an outstanding title or purchase the land for taxes and set up the title thus acquired to defeat the title of the *cestui que trust* in equity. O'Halloran *v.* Fitzgerald, 71 Ill. 53; Russell *v.* Peyton, 4 Ill. App. 473. He will be presumed, in obtaining such title, to be getting it in behalf of the interest of the *cestui que trust*. Russell *v.* Peyton, 4 Ill. App. 473.

It would be contrary to public policy to permit a trustee thus to take advantage of his opportunities to learn the defects in the title of the beneficiary, and by accepting the trust he has acknowledged the title is not in himself. Benjamin *v.* Gill, 45 Ga. 110.

54. Gapen *v.* Gapen, 41 W. Va. 422, 23 S. E. 579.

55. *California.*— Hearst *v.* Pujol, 44 Cal. 230; Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 384.

Illinois.— Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29.

Indiana.— Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244.

Kansas.— Kansas City, etc., Invest. Co. *v.* Fulton, 4 Kan. App. 115, 46 Pac. 188.

Kentucky.— Hargis *v.* Sewell, 87 Ky. 63, 7 S. W. 557.

Missouri.— Spencer *v.* O'Neill, 100 Mo. 49, 12 S. W. 1054.

New York.—Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328.

beneficiary has actual notice of it,[56] or the acts or declarations of the trustee asserting title in himself are so notorious and unequivocal as to raise a presumption of notice to the beneficiary.[57] Notice, or some act of such notoriety that it would be presumed to be known to the *cestui que trust*, should be proved before the relationship would be disavowed and the statute of limitations commence to run.[58] There are also some decisions in which it is either held or said that the trustee cannot claim adversely to the title under which he enters, without first surrendering the possession,[59] but, as will be shown subsequently the weight of authority is clearly to the contrary.[60]

(II) *Under What Circumstances Possession Becomes Adverse*— (A) *Repudiation of Trust Brought to Beneficiary's Knowledge.* While, as already shown, no length of possession by a trustee as such will give him a title as against the beneficiary, the trustee may nevertheless repudiate existing relations and thenceforth hold adversely to the beneficiary.[61] When the trust is repudiated by clear and unequivocal words and acts of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights,[62] the statute of limitations will begin to run from the time such repudiation and claim came to the knowledge of the beneficiary.[63]

North Carolina.— North Carolina University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359.

South Carolina.— Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947.

Texas.— Lewis *v.* Castleman, 27 Tex. 407; Grumbles *v.* Grumbles, 17 Tex. 473.

Vermont.— Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427.

United States.— Gisborne *v.* Charter Oak L. Ins. Co., 142 U. S. 326, 12 S. Ct. 277, 35 L. ed. 1029; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388; Gilmer *v.* Billings, 55 Fed. 775.

56. Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244; Haynie *v.* Hall, 5 Humphr. (Tenn.) 289, 42 Am. Dec. 427; Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652.

57. *Alabama.*— Kennedy *v.* Winn, 80 Ala. 165; McCarthy *v.* McCarthy, 74 Ala. 546; Shorter *v.* Smith, 56 Ala. 208.

California.— Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108; Roach *v.* Caraffa, 85 Cal. 436, 25 Pac. 22; Janes *v.* Throckmorton, 57 Cal. 368; Miller *v.* Myles, 46 Cal. 535; Hearst *v.* Pujol, 44 Cal. 230; Schroeder *v.* Johns, 27 Cal. 274; Ord *v.* De La Guerra, 18 Cal. 67.

Georgia.— Pace *v.* Payne, 73 Ga. 670; Scott *v.* Haddock, 11 Ga. 258.

Indiana.— Cunningham *v.* McKindley, 22 Ind. 149.

Maine.— Haskell *v.* Hervey, 74 Me. 192.

Massachusetts.—St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Davis *v.* Coburn, 128 Mass. 377; Jones *v.* McDermott, 114 Mass. 400; Childs *v.* Jordan, 106 Mass. 321.

Minnesota.— Smith *v.* Glover, 44 Minn. 260, 46 N. W. 406; Randall *v.* Constans, 33 Minn. 329, 23 N. W. 530.

Missouri.— Goodwin *v.* Goodwin, 69 Mo. 617.

Nebraska.— Clark *v.* Clark, 21 Nebr. 402, 32 N. W. 157.

North Carolina.— Davis *v.* Boyden, 123 N. C. 283, 31 S. E. 492; North Carolina University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359.

Ohio.— Paschall *v.* Hinderer, 28 Ohio St. 568.

Texas.— Grumbles *v.* Grumbles, 17 Tex. 473; Golson *v.* Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173.

Utah.—Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652; Wood *v.* Fox, 8 Utah 380, 32 Pac. 48.

Wisconsin.— Bostwick *v.* Dickson, 65 Wis. 593, 26 N. W. 549.

United States.— Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Bacon *v.* Rives, 106 U. S. 99, 1 S. Ct. 3, 27 L. ed. 69; Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622; Baker *v.* Whiting, 3 Sumn. (U. S.) 475, 2 Fed. Cas. No. 787.

58. Grumbles *v.* Grumbles, 17 Tex. 473.

59. Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618; O'Halloran *v.* Fitzgerald, 71 Ill. 53.

60. See *infra*, VI, F, 38, a, (II).

61. *Connecticut.*— Catlin *v.* Decker, 38 Conn. 262.

Illinois.— Russell *v.* Peyton, 4 Ill. App. 473.

Missouri.— Hill *v.* Bailey, 8 Mo. App. 85.

South Carolina.— Ramsay *v.* Deas, 2 Desauss. (S. C.) 233.

United States.—Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596.

62. Either actual or constructive notice to the beneficiary will suffice. Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 384; Scott *v.* Haddock, 11 Ga. 258; Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652; Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718. See also cases cited *supra*. But *compare* Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726.

63. *Georgia.*— Pace *v.* Payne, 73 Ga. 670; Smith *v.* Granberry, 39 Ga. 381, 99 Am. Dec. 464; Scott *v.* Haddock, 11 Ga. 258.

Illinois.— Russell *v.* Peyton, 4 Ill. App. 473.

Indiana.— Ward *v.* Harvey, 111 Ind. 471,

(B) *Failure to Perform Duties of Trust.* In case of an accepted trust, passiveness or a failure to execute the duties thereby imposed will not set the statute of limitations in operation.[64]

(C) *Termination of Trust.* Even in the case of a direct trust the statute will begin to run when the trust ends.[65]

b. Where the Trust Is Implied — (I) *Introductory Statement.* In some decisions the rule is laid down without qualification that express trusts are the only class of trusts which are protected from the operation of the statute of limitations,[66] but there are decisions which place certain classes of implied trusts on the same footing as express trusts so far as the statute of limitations is concerned.[67] At all events the statute of limitations will run in favor of the trustee of a resulting or constructive trust from the time he disavows the obligation of trust and sets up a claim in his own right to the trust property.[68]

(II) *Constructive Trusts.* As between the trustee and beneficiary of a constructive trust, the statute of limitations begins to run against the enforcement thereof from the date of its inception,[69] unless there has been a fraudulent con-

12 N. E. 399; Raymond *v.* Simonson, 4 Blackf. (Ind.) 77.

Massachusetts.— Merriam *v.* Hassam, 14 Allen (Mass.) 516, 92 Am. Dec. 795.

Mississippi.— Murdock *v.* Hughes, 7 Sm. & M. (Miss.) 219.

Missouri.— Hill *v.* Bailey, 8 Mo. App. 85.

Ohio.— Williams *v.* First Presb. Soc., 1 Ohio St. 478.

Texas.— Hunter *v.* Hubbard, 26 Tex. 537; Turner *v.* Smith, 11 Tex. 620.

Utah.— Thomas *v.* Glendinning, 13 Utah 474, 44 Pac. 652.

United States.— Riddle *v.* Whitehill, 135 U. S. 621, 10 S. Ct. 924, 34 L. ed. 282; Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Philippi *v.* Philippe, 115 U. S. 151, 5 S. Ct. 1181, 29 L. ed. 336; Seymour *v.* Freer, 8 Wall. (U. S.) 202, 19 L. ed. 306; Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622; Duchain *v.* Duchain, 51 Fed. 489.

England.— Wedderburn *v.* Wedderburn, 4 Myl. & C. 41.

What does or does not amount to a repudiation.— Acts which done by a stranger might be deemed adverse, when done by a trustee admit of a very different interpretation. Robinson *v.* Hook, 4 Mason (U. S.) 139, 20 Fed. Cas. No. 11,956. Payment of taxes and redemption from tax-sale by the trustee, if consistent with his duty, do not tend to show a repudiation of the trust. Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604. Payment of taxes and a claim of the entire estate do not amount to a repudiation of the trust when not brought home to the beneficiary. Golson *v.* Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173. Although the actual possession of the trustee, or non-possession of the beneficiary, is a circumstance to be considered in determining whether there has been a repudiation of the trust, or notice thereof to the vendee, yet such possession is not conclusive, and the mere fact that the vendee is out of possession will not set the statute of limitations running. Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082. A trustee under a deed purchased by parol the interest of his daughter, one of the beneficiaries, giving her therefor personal property of which she at once took possession, and he began to claim her interest in the land. Thereafter he sold the land by parol to one who occupied it for two years, using it as his own, and then surrendered it to the father with the daughter's knowledge. He held it thereafter claiming it as his until he sold it. This was held to amount to an open disavowal of the trust and an open and notorious adverse claim which set in motion the statute of limitations. Hall *v.* Ditto, (Ky. 1890) 12 S. W. 941. In Lemoine *v.* Dunklin County, 51 Fed. 487, 10 U. S. App. 227, 2 C. C. A. 343, the following facts appeared: A suit was brought in 1888 to compel a county to convey swamp lands to the holder of certificates of purchase issued by the county officers in 1857. The defense was laches. The county court was the proper authority for making the conveyance, but there was no statute requiring demands for deeds to be made a matter of record, and the records of the county had been destroyed in 1872. It was held, for the purpose of showing a repudiation of its relation as trustee holding the legal title for the certificate-owner, that the county was entitled to show by parol evidence that demands for deeds were often made to the county and were continually refused on the ground of fraud.

64. Kennedy *v.* Winn, 80 Ala. 165; McCarthy *v.* McCarthy, 74 Ala. 546; Hovenden *v.* Annesley, 2 Sch. & Lef. 607; Perry Trusts, §§ 863, 864.

65. Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554, holding that in such a case the trustee has no longer a right to hold the fund or property as such, but is bound to pay it over or transfer it discharged from the trust.

66. Murdock *v.* Hughes, 7 Sm. & M. (Miss.) 219; Haynie *v.* Hall, 5 Humphr. (Tenn.) 289, 42 Am. Dec. 427; Woods *v.* Stevenson, 43 W. Va. 149, 27 S. E. 309. See also Starke *v.* Starke, 3 Rich. (S. C.) 438.

67. See *infra*, VI, F, 3, b, (II) *et seq.*

68. Otto *v.* Schlapkahl, 57 Iowa 226, 10 N. W. 651; Gebhard *v.* Sattler, 40 Iowa 152.

69. *California.*— Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699; Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88.

cealment of the cause of action.[70] No disclaimer or disavowal of the trust by the trustee is necessary.[71]

(III) *Resulting Trusts.* Some decisions seem to lay down the doctrine without qualification that the statute of limitations runs against resulting trusts as well as any other trust arising by implication of law;[72] but judged by the undoubted weight of authority this view is certainly incorrect.[73] So, where the trust, though a resulting one, is "cognizable solely in equity," the time within which suit must be brought for the enforcement thereof will not begin to run until the trust has been repudiated as in the case of express trusts.[74] The same, it has been held, is the rule in that class of resulting trusts which are created "with the consent of the trustee and *cestui que trust*."[75] It has also been held that where a trustee purchases property with trust funds, though in his own name, his possession will be deemed the possession of the beneficiaries until he does some unequivocal act denying their right.[76] It has also been said that when

Connecticut.— Wilmerding *v.* Russ, 33 Conn. 67.

Illinois.— School Directors *v.* School Directors, 16 Ill. App. 651.

Kentucky.— Maddox *v.* Allen, 1 Metc. (Ky.) 495.

Maryland.—Weaver *v.* Leiman, 52 Md. 708; Matter of Leiman, 32 Md. 225, 3 Am. Rep. 132.

Missouri.— Landis *v.* Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403; Bobb *v.* Woodward, 50 Mo. 95.

New Jersey.— McClane *v.* Shepherd, 21 N. J. Eq. 76.

New York.—Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328.

North Carolina.— Taylor *v.* Dawson, 56 N. C. 86; Uzzle *v.* Wood, 54 N. C. 226; Edwards *v.* University Trustees, 21 N. C. 325, 30 Am. Dec. 170.

Tennessee.—Shelby *v.* Shelby, Cooke (Tenn.) 179, 5 Am. Dec. 686.

Texas.— Cole *v.* Noble, 63 Tex. 432; Kennedy *v.* Baker, 59 Tex. 150; Carlisle *v.* Hart, 27 Tex. 350; Hunter *v.* Hubbard, 26 Tex. 537.

Virginia.— Sheppards *v.* Turpin, 3 Gratt. (Va.) 357.

Wisconsin.— Howell *v.* Howell, 15 Wis. 55.

United States.— Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388; Robinson *v.* Hook, 4 Mason (U. S.) 139, 20 Fed. Cas. No. 11,956.

England.— Beckford *v.* Wade, 17 Ves. Jr. 87; Andrew *v.* Wrigley, 4 Bro. Ch. 125; Henderson *v.* Atkins, 28 L. J. Ch. 913; Hovenden *v.* Annesley, 2 Sch. & Lef. 607; Kingston *v.* Lorton, 2 Hogan, 166; Cholmondeley *v.* Clinton, Turn. & R. 107; Townshend *v.* Townshend, 1 Bro. Ch. 550; 1 Chit. Pr. 759.

Constructive notice arising out of fraud.— In case of a constructive trust which is born of fraud, and which presupposes from its beginning an adverse claim of right on the part of the trustee by implication, the statute will commence to run from the period at which the *cestui que trust* could have indicated his right by action or otherwise. Cole *v.* Noble, 63 Tex. 432; Hunter *v.* Hubbard, 26 Tex. 537; Anderson *v.* Stewart, 15 Tex. 285.

70. Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Hovenden *v.* Annesley, 2 Sch. & Lef. 607; Beckford *v.* Wade, 17 Ves. Jr. 87.

Reason assigned for rule.— It has been said that if the rule were otherwise there is scarcely a single case of bailment, or money received to use, or of factorage concerns, or of general account, into whose services the doctrine might not be pressed. Robinson *v.* Hook, 4 Mason (U. S.) 139, 20 Fed. Cas. No. 11,956. Such trusts are scarcely admitted or recognized by the parties, and, furthermore, the facts out of which they spring necessarily from their own nature presuppose an adverse claim of right on the part of the trustee. Matter of Leiman, 32 Md. 225, 3 Am. Rep. 132; Hunter *v.* Hubbard, 26 Tex. 537. See also Hill Trustees, 264, note 2.

71. Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88.

Extent of rule.—Where a constructive trust is made out, time protects the trustee, though his conduct was originally fraudulent and his purchase would have been repudiated for fraud. Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388; Beckford *v.* Wade, 17 Ves. Jr. 87.

72. Dole *v.* Wilson, 39 Minn. 330, 40 N. W. 161; Murdock *v.* Hughes, 7 Sm. & M. (Miss.) 219; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Cummings *v.* Stovall, 6 Lea (Tenn.) 679.

Under a Pennsylvania statute [Pa. act of April 22, 1856], providing that if there be neither entry nor possession taken by the party to whom the trust results in five years after it accrues, and no acknowledgment in writing, the trust cannot be asserted against the trustee. Best *v.* Campbell, 62 Pa. St. 476.

73. Cole *v.* Noble, 63 Tex. 432, wherein it is said: "It is common learning that in cases of resulting trusts, so long as the trust relation is admitted and there is no adverse holding by the trustee or any one claiming under him, no lapse of time will bar the *cestui que trust*." And this view finds support in a number of other decisions. Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371. See also to the same effect Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108; Thomas *v.* Brinsfield, 7 Ga. 154.

74. Fawcett *v.* Fawcett, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844.

75. Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604.

76. Butler *v.* Lawson, 72 Mo. 227.

Where a wife furnished money to her husband with which to purchase land for her, and

possession of trust property is taken by the trustee under the trust it is the possession of the *cestui que trust* whether the trust be express or implied, and cannot be adverse until the trust is fully disavowed or denied.[77]

c. By Trustee against Cestui Que Trust in Possession. The statute of limitations never runs in favor of a trustee against the *cestui que trust* when the latter is in possession of the trust estate; and this is true whether the trust be express or implied.[78]

d. By Grantee of Trustee against Cestui Que Trust. Some decisions lay down the general rule that where the trustee sells or otherwise disposes of the trust property to another person, who holds and uses the property as his own for the period of limitation, his possession is adverse within the meaning of the statute of limitations, and he is entitled to its protection.[79] There are, however, decisions which do not go to the full extent of the rule already stated.[80]

39. By Cestui Que Trust against Trustee. The possession of a *cestui que trust*, for however long a period, will not, in general, displace the legal title of the trustee, as his holding is not adverse.[81] If, however, there be a formal denial of the claim of the tenancy by the *cestui que trust*, or dealings with the estate in a manner inconsistent with its subsistence, he may oust the trustee and acquire an adverse possession on which the statute of limitations will operate.[82]

40. By Cestui Que Trust against Co-Beneficiary. The possession of a person who is trustee for two others enures to the benefit of both, and though they claim adversely to each other neither can take advantage of such possession to bar the other's rights;[83] and the possession of one *cestui que trust* will be deemed the possession of the other one in the absence of manifest hostility on the part of

he made the purchase, taking title in his own name without her knowledge or consent, he became a trustee for her, and the statute of limitations did not commence to run against her until he disavowed the trust. Milner *v.* Hyland, 77 Ind. 458.

77. Reynolds *v.* Sumner, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, 1 L. R. A. 327.

78. *California.*— Gilbert *v.* Sleeper, 71 Cal. 290, 12 Pac. 172; Altschul *v.* Doyle, 55 Cal. 633; McCauley *v.* Harvey, 49 Cal. 497; Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624.

Illinois.— Boyd *v.* Boyd, 163 Ill. 611, 43 N. E. 118, 68 Am. St. Rep. 169.

Nebraska.— Clark *v.* Clark, 21 Nebr. 402, 32 N. W. 157.

North Carolina.— Norton *v.* McDevit, 122 N. C. 755, 30 S. E. 24; Mask *v.* Tiller, 89 N. C. 423.

Pennsylvania.— Miller *v.* Baker, 160 Pa. St. 172, 28 Atl. 648.

Tennessee.— McCammon *v.* Pettitt, 3 Sneed (Tenn.) 242.

Laches cannot be invoked to bar or defeat a resulting trust in favor of one who has been in continued and undisputed possession of the property, or who is in joint possession with the trustee. Plass *v.* Plass, 122 Cal. 3, 54 Pac. 372. The statute of limitations will not run against a claim to land based upon a resulting trust implied when such claimant and the person having the legal title were both in continued and friendly possession of the land in question, and the fact that the one held by deed and the other did not does not make the possession adverse or vary the principle. McCammon *v.* Pettitt, 3 Sneed (Tenn.) 242.

79. Curtis *v.* Daniel, 23 Ark. 362; Merriam *v.* Hassam, 14 Allen (Mass.) 516, 92 Am. Dec. 795; McKesson *v.* Hawley, 22 Nebr. 692, 35 N. W. 883; North Carolina University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359. See also Peters *v.* Jones, 35 Iowa 512; Taylor *v.* Dawson, 56 N. C. 86.

Extent of this doctrine.— It has been held that this is the rule notwithstanding he may be chargeable in equity as an implied trustee because he took the property with knowledge of the trust. Curtis *v.* Daniel, 23 Ark. 362; Nougues *v.* Newlands, 118 Cal. 102, 50 Pac. 386.

80. These decisions limit the rule to this extent at least, that if the purchaser has knowledge of the trust he becomes so far a trustee for the beneficiary that he cannot set up title to the property by an adverse holding under the statute of limitations, in the absence of notice or knowledge thereof brought home to the beneficiary. Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24. See also Condit *v.* Maxwell, 142 Mo. 266, 44 S. W. 467.

81. Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488. See also Jones *v.* Shumaker, 41 Fla. 232, 26 So. 191.

Reason for rule.— At law the *cestui que trust* is regarded as a tenant at will to the trustee, and demand of possession must be made from him before he can be ejected, and until this tenancy is terminated there can be no adverse holding between the parties. Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Garrard *v.* Tuck, 8 C. B. 231, 65 E. C. L. 231; Smith *v.* King, 16 East 283.

82. Garrard *v.* Tuck, 8 C. B. 231, 65 E. C. L. 231.

83. Foscue *v.* Foscue, 37 N. C. 321.

the *cestui que trust* in possession, brought to the knowledge of the trustee and the other *cestui que trust.*[84]

41. By Stranger against Trustee — a. Statement of Rule. A stranger may, by adverse possession against the trustee for the requisite period of time, bar both the legal estate of the trustee and the equitable estate of the *cestui que trust.* The general rule is well settled that where the estate of the trustee is barred the estate of the *cestui que trust* is also barred.[85]

b. How Rule Affected by Disability of Beneficiary. With the exception of a few decisions,[86] the rule is held to apply, though the *cestui que trust* is laboring under some disability. And such disability may be that consequent upon infancy,[87]

84. Hastie *v.* Aiken, 67 Ala. 313; Winn *v.* Strickland, 34 Fla. 610, 16 So. 606; Archibald *v.* Blois, 2 Nova Scotia 307.

85. *Alabama.*— Clark *v.* Snodgrass, 66 Ala. 233; Molton *v.* Henderson, 62 Ala. 426; Fleming *v.* Gilmer, 35 Ala. 62; Bryan *v.* Weems, 29 Ala. 423, 65 Am. Dec. 407; Colburn *v.* Broughton, 9 Ala. 351.

Arkansas.— Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

Georgia.— Cushman *v.* Coleman, 92 Ga. 772, 19 S. E. 46; Varner *v.* Gunn, 61 Ga. 54; Mason *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172.

Kentucky.—Barclay *v.* Goodloe, 83 Ky. 493; Couch *v.* Couch, 9 B. Mon. (Ky.) 160.

Maryland.— Crook *v.* Glenn, 30 Md. 55.

Massachusetts.— Merriam *v.* Hassam, 14 Allen (Mass.) 516, 92 Am. Dec. 795; Atty.-Gen. *v.* Proprietors of Meeting-House, 3 Gray (Mass.) 1.

New Jersey.— Snyder *v.* Snover, 56 N. J. L. 20, 27 Atl. 1013; Prudden *v.* Lindsley, 29 N. J. Eq. 615.

North Carolina.— King *v.* Rhew, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76; Clayton *v.* Cagle, 97 N. C. 300, 1 S. E. 523; Herndon *v.* Pratt, 59 N. C. 327; Wellborn *v.* Finley, 52 N. C. 228.

Pennsylvania.— Thompson *v.* Carmichael, 122 Pa. St. 478, 15 Atl. 867; York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65; Maus *v.* Maus, 80 Pa. St. 194; Smilie *v.* Biffle, 2 Pa. St. 52, 44 Am. Dec. 156.

South Carolina.— Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416.

Tennessee.—Belote *v.* White, 2 Head (Tenn.) 703; Goss *v.* Singleton, 2 Head (Tenn.) 68; Wooldridge *v.* Planters' Bank, 1 Sneed (Tenn.) 297; Williams *v.* Otey, 8 Humphr. (Tenn.) 563, 47 Am. Dec. 632; Shelby *v.* Shelby, Cooke (Tenn.) 179, 5 Am. Dec. 686.

Virginia.— Sheppards *v.* Turpin, 3 Gratt. (Va.) 357.

United States.— Trimble *v.* Woodhead, 102 U. S. 647, 26 L. ed. 290; Meeks *v.* Vassault, 3 Sawy. (U. S.) 206, 16 Fed. Cas. No. 9,393.

England.— Lewellin *v.* Mackworth, 2 Eq. Cas. Abr. 579, par. 8, Barn. 445; Hovenden *v.* Annesley, 2 Sch. & Lef. 607; Pentland *v.* Stokes, 2 Ball & B. 68.

As a means of protection against a trustee's neglect the *cestui que trust* may file a bill against him and compel him to assert his legal right any time when it is assailed by a stranger. Williams *v.* Otey, 8 Humphr. (Tenn.) 562, 47 Am. Dec. 632.

86. Brockett *v.* Richardson, 61 Miss. 766, and Fearn *v.* Shirley, 31 Miss. 301, 66 Am. Dec. 575 (where beneficiaries were married women); Bacon *v.* Gray, 23 Miss. 141 (where beneficiaries were infants); Allen *v.* Sayer, 2 Vern. 368. [The rule in England is now well settled to the contrary. See cases cited *infra*, note 87.]

The rule in Mississippi that, though the trustee is barred by limitations, the beneficiary, if under disability, is protected — which, as shown by the Mississippi cases last cited, formerly existed in that state in regard to an express trust — has been abolished by Miss. Code (1880), § 2694; Perry *v.* Ellis, 62 Miss. 711. See also *infra*, note 88.

87. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296; Hastie *v.* Aiken, 67 Ala. 313; Molton *v.* Henderson, 62 Ala. 426.

California.— Patchett *v.* Pacific Coast R. Co., 100 Cal. 505, 35 Pac. 73.

Georgia.— Knorr *v.* Raymond, 73 Ga. 749; Ford *v.* Cook, 73 Ga. 215; Varner *v.* Gunn, 61 Ga. 54; Brady *v.* Walters, 55 Ga. 25; Wingfield *v.* Virgin, 51 Ga. 139; Worthy *v.* Johnson, 10 Ga. 358, 54 Am. Dec. 393; Pendergrast *v.* Foley, 8 Ga. 1.

Kentucky.— Barclay *v.* Goodloe, 83 Ky. 493; Edwards *v.* Woolfolk, 17 B. Mon. (Ky.) 376.

Maryland.— Crook *v.* Glenn, 30 Md. 55.

Missouri.— Ewing *v.* Shannahan, 113 Mo. 188, 20 S. W. 1065.

South Carolina.— Long *v.* Cason, 4 Rich. Eq. (S. C.) 60.

Tennessee.— Wooldridge *v.* Planters' Bank, 1 Sneed (Tenn.) 297; Williams *v.* Otey, 8 Humphr. (Tenn.) 563, 47 Am. Dec. 632.

England.— Wych *v.* Meal, 3 P. Wms. 310; Lewellin *v.* Mackworth, 2 Eq. Cas. Abr. 579, par. 8.

Rule in case of constructive trust.— The rule that where the legal title to land held by a trustee is barred by limitations, the equitable interests will also be defeated, though the beneficiary is an infant, applies though the person who holds the land is a constructive trustee by reason of having purchased from the actual trustee with knowledge of his violation of the trust. Accordingly it was held that where S, who held land in trust for P's wife and children, the trust being for the benefit of the wife during her life, remainder to her children, sold and conveyed the land to R, who held it adversely for more than thirty years, the children, though infants, were barred, without regard to the time when the life-estate terminated. Willson *v.* Louisville Trust Co., 102 Ky. 522, 44 S. W. 121.

coverture,[88] or insanity. The law affords the insane person remedies which he must pursue.[89]

c. How Rule Affected by Fact That Beneficiary Is Remainder-Man. So it has been held that the rule applies although the *cestui que trust* is a remainder-man, and that, too, whether the remainder be a vested[90] or a contingent one.[91]

d. How Rule Affected by Fact That Trustee Is Estopped to Sue. It has been held, however, that the principle that when the trustee is barred all the beneficiaries are barred, whether under disability or not, applies only when the trustee can sue but fails to do so. Thus, if the trustee estops himself from suing by a sale of the property,— thus uniting with the purchaser in a breach of trust,— the wrong is to the beneficiaries and not to him. He cannot sue, and the beneficiaries, if under a disability, are not affected by the statute.[92]

42. By Mortgagor or His Grantee against Mortgagee — a. Statement of General Rule. As a general rule the possession of a mortgagor,[93] or of his grantee,[94]

88. Mason *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172; Perry *v.* Ellis, 62 Miss. 711; Miss. Code (1880) § 2694 [abolishing former rule in Mississippi]; Herndon *v.* Pratt, 59 N. C. 327; Collins *v.* McCarty, 68 Tex. 150, 3 S. W. 730, 2 Am. St. Rep. 475. See also Molton *v.* Henderson, 62 Ala. 426.

89. Molton *v.* Henderson, 62 Ala. 426 [*cited* in Ewing *v.* Shannahan, 113 Mo. 188, 20 S. W. 1065], wherein the court said: "If his trustees [the trustees of the insane *cestui que trust*] have been negligent in asserting the legal title, the law affords him remedies against them which are without the operation of the statute. These remedies, if he has been wronged, he must pursue."

90. Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735.

91. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; Edwards *v.* Woolfolk, 17 B. Mon. (Ky.) 376; Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416.

92. Parker *v.* Hall, 2 Head (Tenn.) 640, wherein it is held that in such a case, if the beneficiaries are under disability at the time the adverse possession commences by the trustee's sale, they will be allowed the time within which to sue, given in the statute, after the disability is removed as to all of them; but that if any one is capable of suing at the time of the sale, the bar will be perfected within the time allowed by the statute from that date.

93. *Alabama.*— Elsberry *v.* Boykin, 65 Ala. 336; Coyle *v.* Wilkins, 57 Ala. 108; Boyd *v.* Beck, 29 Ala. 703.

Arkansas.— Ringo *v.* Woodruff, 43 Ark. 469; Coldcleugh *v.* Johnson, 34 Ark. 312.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329.

Illinois.— Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Rockwell *v.* Servant, 63 Ill. 424; Brown *v.* Devine, 61 Ill. 260.

Iowa.— Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Jordan *v.* Brown, 56 Iowa 281, 9 N. W. 200; Crawford *v.* Taylor, 42 Iowa 260; Green *v.* Turner, 38 Iowa 112.

Massachusetts.— Holmes *v.* Turner's Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; Ayres *v.* Waite, 10 Cush. (Mass.) 72; Root *v.* Bancroft, 10 Metc. (Mass.) 44; Hunt *v.* Hunt, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; Colton *v.* Smith, 11 Pick. (Mass.) 311; Perkins *v.* Pitts, 11 Mass. 125; Gould *v.* Newman, 6 Mass. 239.

Missouri.— Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Chouteau *v.* Riddle, 110 Mo. 366, 19 S. W. 814; Combs *v.* Goldsworthy, 109 Mo. 151, 18 S. W. 1130; St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988; Benton County *v.* Czarlinsky, 101 Mo. 275, 14 S. W. 114; Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; Cape Girardeau County *v.* Harbison, 58 Mo. 90.

New Jersey.— Depew *v.* Colton, (N. J. 1900) 46 Atl. 728 [*following* 44 Atl. 662].

North Carolina.— Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Parker *v.* Banks, 79 N. C. 480; Williams *v.* Bennett, 26 N. C. 122.

Pennsylvania.— Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489.

Rhode Island.— Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709.

Texas.— Barbee *v.* Spivey, (Tex. Civ. App. 1895) 32 S. W. 345.

Virginia.— Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

Wisconsin.— Seeley *v.* Manning, 37 Wis. 574.

United States.—Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596; Higginson *v.* Mein, 4 Cranch (U. S.) 415, 2 L. ed. 664.

England.— Doe *v.* Williams, 5 A. & E. 291, 31 E. C. L. 619; Cholmondeley *v.* Clinton, 2 Meriv. 171, 173, wherein it is said: "A *cestui* having a subsequent independent possession may gain the legal title by disseizin, but a mortgagor cannot disseize his mortgagee because his possession is that of the mortgagor."

94. *Alabama.*— State *v.* Conner, 69 Ala. 212; Herbert *v.* Hanrick, 16 Ala. 581.

Arkansas.— Whittington *v.* Flint, 43 Ark. 504, 51 Am. Rep. 572.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329.

Illinois.— Medley *v.* Elliott, 62 Ill. 532; Harding *v.* Durand, 36 Ill. App. 238.

Iowa.— Watts *v.* Creighton, 85 Iowa 154, 52 N. W. 12.

Missouri.— Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Chouteau *v.* Riddle, 110 Mo. 366, 19 S. W. 814; Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511.

is not adverse to the mortgagee and cannot become so as long as that relation continues.[95]

b. Extent of Rule. The general rule that the mortgagor's possession, or that of his grantee, is not adverse to the mortgagee, applies in the case of one who retains possession after giving an absolute deed intended to operate as a mortgage,[96] or after title acquired by another under foreclosure proceedings, whether such other be the mortgagee himself[97] or a third person.[98]

c. Under What Circumstances Possession Becomes Adverse. It is not to be understood, from anything stated in the preceding sections, that the mortgagor is prevented by the relation from holding adversely to the mortgagee; for, like the lessee, tenant in common, or trustee, he may give to his possession such character by some unequivocal act hostile to the title of the mortgagee, and distinctly brought to his knowledge or notice; in such way he may terminate his holding as mortgagor and actually disseize the mortgagee;[99] but in order that the character of the possession may be changed there must be a disclaimer of the mortgagee's rights, brought to his actual knowledge, or the disclaimer and denial must be so open, notorious, and unequivocal that a reasonably prudent man would have derived knowledge therefrom that the mortgagor's possession was adverse to him.[1]

North Carolina.— Parker *v.* Banks, 79 N. C. 480.

Rhode Island.— Doyle *v.* Mellen, 15 R. I. 523, 8 Atl. 709.

Virginia.— Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

Wisconsin.— Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103; Avery *v.* Judd, 21 Wis. 262.

United States.— Higginson *v.* Mein, 4 Cranch (U. S.) 415, 2 L. ed. 664.

England.— Doe *v.* Barton, 11 A. & E. 307, 39 E. C. L. 181; Hitchman *v.* Walton, 4 M. & W. 409.

Reason for rule.— "A grantee succeeds to the estate and occupies the possession of his grantor. He takes subject to the encumbrance, and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor." 2 Jones Mortg., § 1212; Chouteau *v.* Riddle, 110 Mo. 366, 372, 19 S. W. 814.

Entry under contract to pay off mortgage debt.— When one enters upon land which is subject to a mortgage, under a contract with the mortgagor to pay off the mortgage debt, his possession is not adverse to that of the mortgagee. Wilkerson *v.* Allen, 67 Mo. 502.

95. Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Rockwell *v.* Servant, 63 Ill. 424; Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; Cape Girardeau County *v.* Harbison, 58 Mo. 90.

Presumption as to possession of mortgagee's alienee.— "As the mortgagor does not hold adversely but in subordination to the title of the mortgagee, the presumption is that the alienee of the mortgagor holds in the same right and asserts no higher or independent title. So, if such transaction be left to its own legal intendments, the presumption is that the alienee, like his vendor, holds in recognition of and in subordination to the prior and paramount title of the mortgagee." State *v.* Conner, 69 Ala. 212, 216.

96. Barbee *v.* Spivey, (Tex. Civ. App. 1895) 32 S. W. 345; Flynn *v.* Lee, 31 W. Va. 487, 7 S. E. 430; Babcock *v.* Wyman, 19 How. (U. S.) 289, 15 L. ed. 644.

97. Tucker *v.* Keeler, 4 Vt. 161, the reason being that the possession of the mortgagor or his grantee in such a case is that of a tenant at sufferance of his mortgagee.

98. Lowry *v.* Tilleny, 31 Minn. 500, 18 N. W. 452; Neilson *v.* Grignon, 85 Wis. 550, 55 N. W. 890; Seeley *v.* Manning, 37 Wis. 574,— the mortgagor being considered a tenant at sufferance of the purchaser.

99. Tripe *v.* Marcy, 39 N. H. 439.

1. *Alabama.*— Elsberry Boykin, 65 Ala. 336; Boyd *v.* Beck, 29 Ala. 703.

Arkansas.— Duke *v.* State, 56 Ark. 485, 20 S. W. 600; Ringo *v.* Woodruff, 43 Ark. 469; Whittington *v.* Flint, 43 Ark. 504, 51 Am. Rep. 572 [*overruling* Sullivan *v.* Hadley, 16 Ark. 129; Guthrie *v.* Field, 21 Ark. 379; Hall *v.* Denckla, 28 Ark. 506; McGehee *v.* Blackwell, 28 Ark. 27; Mayo *v.* Cartwright, 30 Ark. 407, in so far as they hold that an adverse possession may be set up by the mortgagor, or a purchaser from him with notice, without distinct denial of, or acts inconsistent with, the mortgagee's title, and *approving* Birnie *v.* Main, 29 Ark. 591; Boyd *v.* Beck, 29 Ala. 703]; Coldcleugh *v.* Johnson, 34 Ark. 312.

California.— Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866.

Illinois.— Medley *v.* Elliott, 62 Ill. 532; Brown *v.* Devine, 61 Ill. 260.

Massachusetts.— Holmes *v.* Turner's Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

Missouri.— Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885; Chouteau *v.* Riddle, 110 Mo. 366, 19 S. W. 814; Combs *v.* Goldsworthy, 109 Mo. 151, 18 S. W. 1130; St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988; Benton County *v.* Czarlinsky, 101 Mo. 275, 14 S. W. 114; Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727.

New Hampshire.— Tripe *v.* Marcy, 39 N. H. 439.

Before the mortgagor can be said to hold adversely to the mortgagee so as to start the running of the statute, an actual as distinguished from a constructive possession is essential. In the absence of actual, visible possession by the mortgagor the rights of the mortgagee will be unaffected by the statute of limitations.[2]

43. By Mortgagee against Mortgagor — a. Under Ordinary Form of Mortgage — (I) *Possession Generally Not Adverse.* So long as the relation of mortgagor and mortgagee exists, the possession of the mortgagee is not adverse to the mortgagor, and the statute of limitations does not run in his favor.[3] Possession in the mortgagee must, from its commencement, have been taken under the engagement, which equity always implies, to account as a bailiff of the rents and profits to the mortgagor and to apply them to the discharge of the mortgage debt.[4]

(II) *Under What Circumstances Possession Becomes Adverse.* There is nothing, however, in the relation which will prevent the mortgagee from holding adversely to the mortgagor. He may disclaim the mortgage, and in that event the time of limitation provided by statute for recovery of property at law will begin to run in his favor from the disavowal. If he then holds possession for the statutory time the mortgagor's right to redeem is barred.[5] In no event, however, does the statute of limitations run against the right of the mortgagor to redeem until the mortgagee has actually taken possession.[6]

b. Under Mortgage Giving Mortgagee Possession Till Debt Paid. Where, by the terms of a mortgage, the mortgagee is to take and keep possession of the mortgaged property and apply the rents and profits to his debt until it is fully satisfied from that source, his possession will not become adverse, nor will the statute of limitations commence to run against the mortgagor until the debt secured by the mortgage is satisfied.[7]

44. By One Cotenant against Another — a. Ordinary Status of Possession by One Cotenant. The entry and possession of land under the common title by one cotenant will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all.[8]

North Carolina.— Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501.

Pennsylvania.— Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489.

Texas.— Barbee *v.* Spivey, (Tex. Civ. App. 1895) 32 S. W. 345.

West Virginia.— Flynn *v.* Lee, 31 W. Va. 487, 7 S. E. 430.

Wisconsin.— Seeley *v.* Manning, 37 Wis. 574; Avery *v.* Judd, 21 Wis. 262.

Payment of taxes by mortgagor.— As it is the duty of the mortgagor and also of his grantee to pay the taxes on the mortgaged premises, such payment by either of them cannot, while the relation subsists, be coupled with seven years' possession under the statute to show adverse title by limitation. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Medley *v.* Elliott, 62 Ill. 532; Wright *v.* Langley, 36 Ill. 381.

The rule in Mississippi is different from that stated in the text. In this state the law seems to be that limitations run against the mortgagee from the date of the breach of condition,— the origin of the mortgagee's right of entry,— and no disclaimer of the mortgagee's interest is necessary to set the statute in motion. Green *v.* Mizelle, 54 Miss. 220.

2. St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988.

3. Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Rockwell *v.* Servant, 63 Ill. 424 (wherein it was held that the statute would not commence to run until the relation was terminated in some one of the modes known to the law); Cross *v.* Hepner, 7 Ind. 359; Fenwick *v.* Macey, 1 Dana (Ky.) 276; Anderson *v.* Lanterman, 27 Ohio St. 104.

4. Cholmondeley *v.* Clinton, 2 Jac. & W. 1.

Deed absolute as mortgage.— The rule applies in case of an absolute deed given to secure a debt, which is treated by the law as a mortgage. Green *v.* Turner, 38 Iowa 112.

5. Morgan *v.* Morgan, 10 Ga. 297; Kohlheim *v.* Harrison, 34 Miss. 457.

6. Waldo *v.* Rice, 14 Wis. 286; Knowlton *v.* Walker, 13 Wis. 264.

Time when the mortgagee took possession of, or began to hold, the mortgaged premises for the purpose of foreclosing the mortgage, must be determined from the acts of the mortgagee and all the circumstances. Montgomery *v.* Chadwick, 7 Iowa 114.

7. Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658; Marks *v.* Pell, 1 Johns. Ch. (N. Y.) 594; Orde *v.* Heming, 1 Vern. 418.

8. *Alabama.*—Inglis *v.* Webb, 117 Ala. 387, 23 So. 125; Burrus *v.* Meadors, 90 Ala. 140, 7 So. 469; Abercrombie *v.* Baldwin, 15 Ala. 363.

Arkansas.— Brewer *v.* Keeler, 42 Ark. 289; Blakeney *v.* Ferguson, 20 Ark. 547.

California.— Unger *v.* Mooney, 63 Cal. 586,

b. Capacity of One Cotenant to Hold Adversely to Another. While the general rule is as stated, it is well settled that one tenant may hold adversely to his cotenant, and if his possession is continued uninterruptedly for the statutory period he will acquire an indefeasible title;[9] and this is true whether the original entry

49 Am. Rep. 100; Owen *v.* Morton, 24 Cal. 373; Ord *v.* De La Guerra, 18 Cal. 67.

Connecticut.— Bryan *v.* Atwater, 5 Day (Conn.) 181, 5 Am. Dec. 136.

Delaware.— Milbourn *v.* David, 7 Houst. (Del.) 209, 30 Atl. 971.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Georgia.— Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792.

Illinois.— Blackaby *v.* Blackaby, 185 Ill. 94, 56 N. E. 1053; Boyd *v.* Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. Rep. 169; Stevens *v.* Wait, 112 Ill. 544.

Indiana.— McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500; Bowen *v.* Preston, 48 Ind. 367; Manchester *v.* Doddridge, 3 Ind. 360, 363.

Iowa.— Smith *v.* Young, 89 Iowa 338, 56 N. W. 506; Kinney *v.* Slattery, 51 Iowa 353, 1 N. W. 626; Burns *v.* Byrne, 45 Iowa 285.

Kansas.—Hamilton *v.* Redden, 44 Kan. 193, 24 Pac. 76.

Kentucky.— Miller *v.* South, (Ky. 1890) 14 S. W. 361; Greenhill *v.* Biggs, 85 Ky. 155, 2 S. W. 774, 7 Am. St. Rep. 579; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Gillaspie *v.* Osburn, 3 A. K. Marsh. (Ky.) 77, 13 Am. Dec. 136.

Louisiana.— Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629.

Maine.— Thornton *v.* York Bank, 45 Me. 158; Knox *v.* Silloway, 10 Me. 201.

Maryland.— Van Bibber *v.* Frazier, 17 Md. 436; Lloyd *v.* Gordon, 2 Harr. & M. (Md.) 254.

Massachusetts.— Lefavour *v.* Homan, 3 Allen (Mass.) 354; Whiting *v.* Dewey, 15 Pick. (Mass.) 428; Barnard *v.* Pope, 14 Mass. 434, 7 Am. Dec. 225.

Michigan.— Weshgyl *v.* Schick, 113 Mich. 22, 71 N. W. 323; Richards *v.* Richards, 75 Mich. 408, 42 N. W. 954; Campau *v.* Campau, 45 Mich. 367, 8 N. W. 85.

Minnesota.—Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Mississippi.— Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319; Day *v.* Davis, 64 Miss. 253, 8 So. 203; Corbin *v.* Cannon, 31 Miss. 570.

Missouri.— Rodney *v.* McLaughlin, 97 Mo. 426, 9 S. W. 726; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Fugate *v.* Pierce, 49 Mo. 441; Lapeyre *v.* Paul, 47 Mo. 586; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

New Hampshire.— Campbell *v.* Campbell, 13 N. H. 483.

New York.— Kathan *v.* Rockwell, 16 Hun (N. Y.) 90; La Tourette *v.* Decker, 18 N. Y. Suppl. 840; Stoddard *v.* Weston, 6 N. Y. Suppl. 34; Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530.

North Carolina.— Jeter *v.* Davis, 109 N. C. 458, 13 S. E. 908; Page *v.* Branch, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281.

Ohio.— Farmers', etc., Nat. Bank *v.* Wallace, 45 Ohio St. 152, 12 N. E. 439.

Oregon.— Westenfelder *v.* Green, 24 Oreg. 448, 34 Pac. 23; Morrill *v.* Morrill, 20 Oreg. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155; Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

Pennsylvania.— Stull *v.* Stull, 197 Pa. St. 243, 47 Atl. 240; Enyard *v.* Enyard, 190 Pa. St. 114, 42 Atl. 526, 70 Am. St. Rep. 623; Logan *v.* Friedline, (Pa. 1888) 14 Atl. 343; Wilson *v.* Collishaw, 13 Pa. St. 276; Brown *v.* M'Coy, 2 Watts & S. (Pa.) 307 note; Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Hart *v.* Gregg, 10 Watts (Pa.) 185, 36 Am. Dec. 166; Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Lodge *v.* Patterson, 3 Watts (Pa.) 74, 27 Am. Dec. 335.

South Carolina.— Allen *v.* Hall, 1 McCord (S. C.) 131.

Tennessee.— Woodruff *v.* Roysden, (Tenn. 1900) 58 S. W. 1066; Hubbard *v.* Wood, 1 Sneed (Tenn.) 279; Story *v.* Saunders, 8 Humphr. (Tenn.) 663.

Texas.— Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Moody *v.* Butler, 63 Tex. 210; Teal *v.* Terrell, 58 Tex. 257; Peeler *v.* Gilkey, 27 Tex. 355; Baily *v.* Trammell, 27 Tex. 317; Gilkey *v.* Peeler, 22 Tex. 663; Portis *v.* Hill, 3 Tex. 273; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396; Golson *v.* Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173; Norton *v.* Collins, 1 Tex. Civ. App. 272, 20 S. W. 1113.

Utah.— Smith *v.* North Canyon Water Co., 16 Utah 194, 52 Pac. 283.

Vermont.— Leach *v.* Beattie, 33 Vt. 195; Catlin *v.* Kidder, 7 Vt. 12.

Virginia.— Fry *v.* Payne, 82 Va. 759, 1 S. E. 197; Purcell *v.* Wilson, 4 Gratt. (Va.) 16.

West Virginia.— Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Rust *v.* Rust, 17 W. Va. 901; Boggess *v.* Meredith, 16 W. Va. 1.

United States.— Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541; Den *v.* Moore, 3 Wall. Jr. C. C. (U. S.) 292, 20 Fed. Cas. No. 11,905; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778.

England.— Doe *v.* Taylor, 5 B. & Ad. 575, 27 E. C. L. 245; Doe *v.* Prosser, Cowp. 217.

The reason for the rule is that the possession is itself rightful and does not imply hostility, as would the possession of a mere stranger. Campau *v.* Campau, 45 Mich. 367, 8 N. W. 85.

9. *Alabama.*— Abercrombie *v.* Baldwin, 15 Ala. 363.

Arkansas.— Ashley *v.* Rector, 20 Ark. 359.

California.— Feliz *v.* Feliz, 105 Cal. 1, 38 Pac. 521.

Connecticut.— Catlin *v.* Decker, 38 Conn. 262.

was with intent to hold adversely[10] or whether the entry was as tenant in common.[11]

c. When Possession Becomes Adverse — (I) *In General.* It must be borne in mind, however, that stronger evidence is required to show an adverse holding by a tenant in common than by a stranger.[12]

(II) *Necessity of Expulsion by Force.* To constitute a disseizin of a cotenant it is not necessary that there should be an actual expulsion by manual force.[13]

(III) *Necessity of Repudiating Cotenant's Title.* But a tenant will not be permitted to claim the protection of the statute of limitations unless it clearly appears that he has repudiated the title of his cotenant and is holding adversely to him.[14]

(IV) *Necessity of Knowledge or Notice.* In order to constitute a disseizin of a cotenant the fact of adverse holding must be brought home to him either by information to that effect, given by the tenant in common asserting the adverse right,[15] or there must be outward acts of exclusive ownership of such a

District of Columbia.— Morris *v.* Wheat, 11 App. Cas. (D. C.) 201.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Illinois.—Kctz *v.* Belz, 178 Ill. 424, 53 N. E. 367; Mason *v.* Finch, 2 Ill. 495.

Indiana.— English *v.* Powell, 119 Ind. 93, 21 N. E. 458.

Kentucky.— Larman *v.* Huey, 13 B. Mon. (Ky.) 436; Gillaspie *v.* Osburn, 3 A. K. Marsh. (Ky.) 77, 13 Am. Dec. 136.

Maine.— Thomas *v.* Pickering, 13 Me. 337; Bracket *v.* Norcross, 1 Me. 89.

Massachusetts.— Lefavour *v.* Homan, 3 Allen (Mass.) 354; Shumway *v.* Holbrook, 1 Pick. (Mass.) 114, 11 Am. Dec. 153.

Missouri.— Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Hoffstetter *v.* Blattner, 8 Mo. 276.

New York.— Millard *v.* McMullin, 68 N. Y. 345; Florence *v.* Hopkins, 46 N. Y. 182; Abrams *v.* Rhoner, 44 Hun (N. Y.) 507; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530; Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241; Jackson *v.* Whitbeck, 6 Cow. (N. Y.) 632, 16 Am. Dec. 454; Jackson *v.* Brink, 5 Cow. (N. Y.) 483; Smith *v.* Burtis, 9 Johns. (N. Y.) 174; Grim *v.* Dyar, 3 Duer (N. Y.) 354.

Oregon.— Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

Pennsylvania.— Longwell *v.* Bentley, 3 Grant (Pa.) 177.

Tennessee.— Gross *v.* Washington, (Tenn. Ch. 1896) 38 S. W. 442.

Texas.— Mayes *v.* Manning, 73 Tex. 43, 11 S. W. 136; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396.

West Virginia.— Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102.

United States.— Den *v.* Moore, 3 Wall. Jr. C. C. (U. S.) 292, 20 Fed. Cas. No. 11,905; Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596; Ricard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398; Prescott *v.* Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

England.— Doe *v.* Prosser, Cowp. 217.

10. Shumway *v.* Holbrook, 1 Pick. (Mass.) 114, 11 Am. Dec. 153; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530.

11. Smith *v.* Burtis, 9 Johns. (N. Y.) 174; Ricard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398.

12. *Connecticut.*— Newell *v.* Woodruff, 30 Conn. 492.

Kentucky.— Barret *v.* Coburn, 3 Metc. (Ky.) 510.

Missouri.— Lapeyre *v.* Paul, 47 Mo. 586; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

New Jersey.— Foulke *v.* Bond, 41 N. J. L. 527.

United States.— Prescott *v.* Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

The acts and declarations of the party in possession are to be construed much more strongly against him than in cases where there is no priority of title. Teal *v.* Terrell, 58 Tex. 257; Bailey *v.* Trammell, 27 Tex. 317.

Acts of exclusive possession which in case of strangers would be deemed adverse and of themselves a disseizin are in cases of tenancies in common susceptible of explanation consistently with the real title. They are not necessarily inconsistent with the unity of possession existing in such case. Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Prescott *v.* Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

It depends upon the intent with which the acts of ownership are done, and upon their notoriety, whether they will be such as to break and dissolve the unity of possession, constitute an adverse possession as against the cotenants, and amount to a disseizin. Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

13. Gale *v.* Hines, 17 Fla. 773; Siglar *v.* Van Riper, 10 Wend. (N. Y.) 414; Doe *v.* Prosser, Cowp. 217.

14. Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Anderson *v.* Stewart, 15 Tex. 285.

15. Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102.

Evidence sufficient to show notice.— The fact that a cotenant distinctly states that he has nothing to do with the land and that the title is in the tenant in possession shows that

nature as to give notice to the cotenant that an adverse possession and disseizin are intended to be asserted.[16] Actual verbal or written notice is not, however, necessary; adverse possession may be inferred from outward acts, open and notorious claim of ownership, and exercise of exclusive right.[17] It has also been held that it is not absolutely essential that the co-owner should have actual knowledge; a tenant in common will be deemed to have notice of the adverse holding by his cotenant where the hostile character of the possession is so open and manifest that a man of reasonable diligence would discover it.[18]

d. Specific Acts Amounting or Not Amounting to Adverse Possession — (1) *In General.* Sole and exclusive possession by one tenant in common for a great number of years, and perception of rents and profits without any accounting to

he had sufficient notice of the latter's adverse claim of ownership to start the limitations running in her favor. Wheeler *v.* Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.

16. *Alabama.*— Fielder *v.* Childs, 73 Ala. 567.

Arkansas.— Brewer *v.* Keeler, 42 Ark. 289.

California.— Gage *v.* Downey, 94 Cal. 241, 29 Pac. 635; Matter of Grider, 81 Cal. 571, 22 Pac. 908; Bath *v.* Valdez, 70 Cal. 350, 11 Pac. 724; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Owen *v.* Morton, 24 Cal. 373; Colman *v.* Clements, 23 Cal. 245.

Connecticut.—Newell *v.* Woodruff, 30 Conn. 492; Adams *v.* Ames Iron Co., 24 Conn. 230.

Delaware.— Milbourn *v.* David, 7 Houst. (Del.) 209, 30 Atl. 971.

District of Columbia.—Morris *v.* Wheat, 11 App. Cas. (D. C.) 201.

Georgia.— McDowell *v.* Sutlive, 78 Ga. 142, 2 S. E. 937.

Illinois.— Baldwin *v.* Ratcliff, 125 Ill. 376, 17 N. E. 794; Ball *v.* Palmer, 81 Ill. 370; Busch *v.* Huston, 75 Ill. 343.

Kansas.— Squires *v.* Clark, 17 Kan. 84.

Kentucky.— Ward *v.* Ward, (Ky. 1894) 25 S. W. 112; Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723.

Maine.— Wass *v.* Bucknam, 38 Me. 356; Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292.

Maryland.— Van Bibber *v.* Frazier, 17 Md. 436.

Massachusetts.—Parker *v.* Merrimack River Locks, etc., 3 Metc. (Mass.) 91.

Michigan.— Campau *v.* Campau, 45 Mich. 367, 8 N. W. 85.

Missouri.— Whitaker *v.* Whitaker, (Mo. 1900) 58 S. W. 5; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352 [*reversing* 9 Mo. App. 571]; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

New York.— Culver *v.* Rhodes, 87 N. Y. 348; Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241; Jackson *v.* Whitbeck, 6 Cow. (N. Y.) 632.

Ohio.— Youngs *v.* Heffner, 36 Ohio St. 232.

Pennsylvania.— Forward *v.* Deetz, 32 Pa. St. 69; Peck *v.* Ward, 18 Pa. St. 506; Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Hart *v.* Gregg, 10 Watts (Pa.) 185, 36 Am. Dec. 166; Lodge *v.* Patterson, 3 Watts (Pa.) 74, 27 Am. Dec. 335.

South Carolina.— Allen *v.* Hall, 1 McCord (S. C.) 131.

Tennessee.— Gross *v.* Washington, (Tenn. Ch. 1896) 38 S. W. 442; Hubbard *v.* Wood, 1 Sneed (Tenn.) 279.

Texas.— Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Teal *v.* Terrell, 58 Tex. 257; Anderson *v.* Stewart, 15 Tex. 285; Portis *v.* Hill, 3 Tex. 273; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396; House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414; Garcia *v.* Illg, 14 Tex. Civ. App. 482, 37 S. W. 471; Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945.

Utah.— Smith *v.* North Canyon Water Co., 16 Utah 194, 52 Pac. 283.

Vermont.— Chandler *v.* Ricker, 49 Vt. 128.

Virginia.—Purcell *v.* Wilson, 4 Gratt. (Va.) 16.

West Virginia.— Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Cooey *v.* Porter, 22 W. Va. 120; Rust *v.* Rust, 17 W. Va. 901; Boggess *v.* Meredith, 16 W. Va. 1.

Wisconsin.— Saladin *v.* Kraayvanger, 96 Wis. 180, 70 N. W. 1113.

United States.—Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778; Ricard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398; McClung *v.* Ross, 5 Wheat. (U. S.) 116, 5 L. ed. 46; Prescott *v.* Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

17. *California.*— Gregory *v.* Gregory, 102 Cal. 50, 36 Pac. 364; Matter of Grider, 81 Cal. 571, 22 Pac. 908.

Iowa.— Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409.

Kentucky.— Greenhill *v.* Biggs, 85 Ky. 155, 2 S. W. 774, 7 Am. St. Rep. 579.

Mississippi.— Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296.

Missouri.— Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352 [*reversing* 9 Mo. App. 571]; Lapeyre *v.* Paul, 47 Mo. 586.

Pennsylvania.—Lodge *v.* Patterson, 3 Watts (Pa.) 74, 27 Am. Dec. 335.

Texas.— Illg *v.* Garcia, 92 Tex. 251, 47 S. W. 717; Peeler *v.* Gilkey, 27 Tex. 355.

United States.— Den *v.* Moore, 3 Wall. Jr. C. C. (U. S.) 292, 20 Fed. Cas. No. 11,905.

18. *Iowa.*— Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409.

Missouri.— Lapeyre *v.* Paul, 47 Mo. 586.

Pennsylvania.—Lodge *v.* Patterson, 3 Watts (Pa.) 74, 27 Am. Dec. 335.

Texas.— Peeler *v.* Gilkey, 27 Tex. 355.

United States.— Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 8 U. S. App. 229, 3 C. C. A. 294.

or recognition of right of the cotenants, and without any claim made by them, will, if unexplained or controlled by any evidence showing the reason for the neglect or omission of the cotenants to assert their rights, furnish evidence which will authorize a finding of ouster and adverse possession.[19]

(II) *Acts of Ownership.* But mere acts of ownership by one tenant in common do not amount to adverse possession.[20] It depends upon the intent with which they are done, and on their notoriety as affording evidence of notice as to the adverse character of the possession.[21]

(III) *Possession*—(A) *In General.* It seems to be settled without dissent that mere possession, however exclusive or long continued, will not give one tenant in possession title as against his cotenants.[22]

(B) *Under Invalid Judicial Proceedings.* Entry by one tenant in common of a part assigned to him in severalty by a partition which is invalid, and posses-

19. *California.*— Oglesby *v.* Hollister, 76 Cal. 141, 18 Pac. 146, 9 Am. St. Rep. 177.

Massachusetts.— Lefavour *v.* Homan, 3 Allen (Mass.) 354; Parker *v.* Merrimack River Locks, etc., 3 Metc. (Mass.) 91; Rickard *v.* Rickard, 13 Pick. (Mass.) 251.

Montana.— See Harrigan *v.* Lynch, 21 Mont. 36, 52 Pac. 642.

North Carolina.— Covington *v.* Stewart, 77 N. C. 148; Black *v.* Lindsay, 44 N. C. 467; Thomas *v.* Garvan, 15 N. C. 223, 25 Am. Dec. 708.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376; Law *v.* Patterson, 1 Watts & S. (Pa.) 184; Mehaffy *v.* Dobbs, 9 Watts (Pa.) 363.

Tennessee.— Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488.

Virginia.— Caperton *v.* Gregory, 11 Gratt. (Va.) 505.

England.— Doe *v.* Prosser, Cowp. 217; Culley *v.* Doe, 11 A. & E. 1008, 39 E. C. L. 527.

20. *Alabama.*— Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

Arkansas.— Ashley *v.* Rector, 20 Ark. 359.

California.— Ord *v.* De La Guerra, 18 Cal. 67.

Illinois.— Busch *v.* Huston, 75 Ill. 343.

Massachusetts.— Ewer *v.* Lovell, 9 Gray (Mass.) 276. *Compare* Bennett *v.* Clemence, 6 Allen (Mass.) 10.

Virginia.— Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239.

Illustrations.— Neither cutting lumber for fences from time to time for more than twenty years in a cedar swamp surrounded by cultivated land (Ewer *v.* Lovell, 9 Gray (Mass.) 276), nor receiving profits nor paying the taxes (Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239), nor continuing to occupy the premises, appropriating the exclusive rents and profits, making light repairs and improvements, and paying taxes (Blackaby *v.* Blackaby, 185 Ill. 94, 56 N. E. 1053; Busch *v.* Huston, 75 Ill. 343 [*compare* Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Tharpe *v.* Holcomb, (Va. 1900) 35 S. E. 608]), nor merely leasing property, receiving rent, erecting fences and buildings adapted to cultivation of the property (Velott *v.* Lewis, 102 Pa. St. 326 [see also Pierson *v.* Conley, 95 Mich. 619, 55 N. W. 387; Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957; Campau *v.* Campau, 44 Mich. 31, 5 N. W. 1062]), nor merely the paying of rent by a collecting agent to one of the tenants in common (Rodney *v.* McLaughlin, 97 Mo. 426, 9 S. W. 726),— has been held to be sufficient to show adverse possession by one tenant in common as against his cotenant.

21. Ashley *v.* Rector, 20 Ark. 359.

22. *California.*— Oglesby *v.* Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177; Owen *v.* Morton, 24 Cal. 373.

Georgia.— Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792.

Iowa.— Bader *v.* Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. Rep. 332; Kilmer *v.* Wuchner, 74 Iowa 359, 37 N. W. 778; Burns *v.* Byrne, 45 Iowa 285.

Maine.— Mansfield *v.* McGinnis, 86 Me. 118, 29 Atl. 956, 41 Am. St. Rep. 532.

Mississippi.— Day *v.* Davis, 64 Miss. 253, 8 So. 203.

Missouri.— Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614.

Nebraska.— Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

New York.— Kathan *v.* Rockwell, 16 Hun (N. Y.) 90; Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241; Jackson *v.* Brink, 5 Cow. (N. Y.) 483.

Ohio.— Youngs *v.* Heffner, 36 Ohio St. 232.

Pennsylvania.— Logan *v.* Friedline, (Pa. 1888) 14 Atl. 343.

South Carolina.— Odom *v.* Weathersbee, 26 S. C. 244, 1 S. E. 890.

Texas.— Peeler *v.* Gilkey, 27 Tex. 355; Portis *v.* Hill, 3 Tex. 273.

Vermont.— Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350.

Virginia.— Purcell *v.* Wilson, 4 Gratt. (Va.) 16.

West Virginia.— Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Cooey *v.* Porter, 22 W. Va. 120.

Wisconsin.— Challefoux *v.* Ducharme, 4 Wis. 554.

"A silent possession accompanied with no act which can amount to an ouster or give notice to his cotenant that his possession is adverse ought not . . . to be construed into an adverse possession." Per Marshall, C. J., in McClung *v.* Ross, 5 Wheat. (U. S.) 116, 124, 5 L. ed. 46.

sion of that part under claim of title for the statutory period, perfect his title thereto against his cotenants.[23]

(c) *Under Parol Purchase from Cotenant.* Where one tenant in common sells by parol to another and abandons the possession, and the latter and those claiming under him continue in possession for twenty-one years afterward, claiming the interest of such tenant in common, an ouster may be presumed therefrom.[24]

(d) *Under Deed from Third Person.* If one tenant in common takes actual and exclusive possession of the entire estate under a deed of the whole, duly acknowledged and recorded from one who has no title, and receives the rents and profits, denying the right of any other person in the land, such possession amounts to a disseizin of his cotenants.[25] If, however, the other tenants in common have no notice of the conveyance or the claim thereunder, there is no ouster.[26]

(e) *In Connection with Denial of Cotenant's Title.* While an ouster or disseizin by a tenant in common is not presumed from the mere fact of sole possession, such possession of one cotenant who claims the whole and denies the title of his cotenant constitutes an ouster.[27] But if a tenant in common denies the several title of a cotenant, yet lets him into possession, it is not an ouster.[28]

(f) *In Connection with Payment of Taxes and Appropriation of Rents.* Possession, payment of taxes, and appropriation of rents and profits do not necessarily amount to adverse possession.[29]

(g) *In Connection with Improvements and Payment of Taxes.* So it has been held that sole possession, together with improvements and payment of taxes, do not necessarily show an adverse possession.[30]

(iv) *Appropriation of Rents and Profits*—(a) *In General.* The mere receipt and retention by one cotenant in possession of all the rents and profits does not of itself constitute an adverse possession,[31] and will not

23. Foulke *v.* Bond, 41 N. J. L. 527; Den *v.* Kelty, 16 N. J. L. 517; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778.

24. Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654.

25. Thornton *v.* York Bank, 45 Me. 158; Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581; Mayes *v.* Manning, 73 Tex. 43, 11 S. W. 136; Cryer *v.* Andrews, 11 Tex. 170; Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

26. Hignite *v.* Hignite, 65 Miss. 447, 4 So. 345, 7 Am. St. Rep. 673.

27. Oglesby *v.* Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177; Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Kearnes *v.* Hill, 21 Fla. 185; Gale *v.* Hines, 17 Fla. 773; King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500; Doe *v.* Bird, 11 East 49; Doe *v.* Prosser, Cowp. 217.

Denial of title by answer.— In an action by a tenant in common to be admitted into possession, a denial, in the answer, of plaintiff's title and right of entry, is equivalent to an ouster. The action is the most effective demand that plaintiff could make to be let into possession, and if his title and right of entry be denied he need make no further proof of an ouster. Greer *v.* Tripp, 56 Cal. 209; Miller *v.* Myles, 46 Cal. 535; Withrow *v.* Biggerstaff, 82 N. C. 82. See also Clark *v.* Crego, 47 Barb. (N. Y.) 599.

Possession under claim known to cotenant. — Possession of one cotenant under a claim of exclusive title in himself, known to his cotenant, is adverse to the latter. Knowles *v.* Brown, 69 Iowa 11, 28 N. W. 409.

What is not a denial of title.— If the tenant, on being informed by the demandant of his claim to be the owner of one fourth part thereof, merely admits that he is in possession of the demanded premises, and adds, "it is hard to pay twice;" this is not evidence of an ouster or disseizin. Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292.

28. Carpentier *v.* Webster, 27 Cal. 524.

29. McMahill *v.* Torrence, 163 Ill. 277, 45 N. E. 269.

30. Illg *v.* Garcia, 92 Tex. 251, 47 S. W. 717.

31. *Alabama.*— Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

Arkansas.— Ashley *v.* Rector, 20 Ark. 359.

Georgia.— Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792.

Illinois.— McMahill *v.* Torrence, 163 Ill. 277, 45 N. E. 269; Todd *v.* Todd, 117 Ill. 92, 7 N. E. 583.

Maine.— Thornton *v.* York Bank, 45 Me. 158; Wass *v.* Bucknam, 38 Me. 356.

Maryland.— Van Bibber *v.* Frazier, 17 Md. 436; Lloyd *v.* Gordon, 2 Harr. & M. (Md.) 254.

Massachusetts.—Parker *v.* Merrimack River Locks, etc., 3 Metc. (Mass.) 91.

New York.— Edwards *v.* Bishop, 4 N. Y. 61.

North Carolina.— Linker *v.* Benson, 67 N. C. 150; Chambers *v.* Chambers, 10 N. C. 232, 14 Am. Dec. 585.

Pennsylvania.— Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328; Wilson *v.* Colli-

ripen into title as against the others, though continued for the statutory period.[32]

(B) *Refusal to Pay Over on Demand.* So a refusal to pay to a cotenant part of the rents and profits without denying his title does not of itself amount to an ouster.[33] But if, upon demand by one cotenant of his moiety, the other declines to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough.[34]

(C) *In Connection with Assertion of Exclusive Title.* So perception of rents and profits by one tenant in common, openly asserting sole title in himself and denying title of any other person, is an ouster of the cotenants and is adverse.[35]

(V) *Refusal to Let Cotenant into Possession.* The refusal by one joint tenant or tenant in common to let his cotenant come in or participate in the enjoyment of the common property amounts to an ouster, and possession thereafter is adverse.[36] If, however, one of two tenants in common of land is in possession thereof, and his cotenant demands the whole tract, refusal to comply with that demand is not to be considered as evidence of an ouster of the latter.[37]

(VI) *Assertion of Title and Agreement to Sell the Whole.* An assertion of an exclusive title to the whole of the land by a joint owner, and a contracting to sell the whole, are evidence of an adverse possession and such an ouster as to enable the cotenant to maintain ejectment.[38]

shaw, 13 Pa. St. 276; Bolton *v.* Hamilton, 2 Watts & S. (Pa.) 294, 37 Am. Dec. 509.

South Carolina.— Allen *v.* Hall, 1 McCord (S. C.) 131.

Vermont.— Catlin *v.* Kidder, 7 Vt. 12.

United States.— Willison *v.* Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596; McClung *v.* Ross, 5 Wheat. (U. S.) 116, 5 L. ed. 46; Den *v.* Moore, 3 Wall. Jr. C. C. (U. S.) 292, 20 Fed. Cas. No. 11,905.

England.— Reading's Case, 1 Salk. 392; Doe *v.* Prosser, Cowp. 217.

32. Lloyd *v.* Gordon, 2 Harr. & M. (Md.) 254; Parker *v.* Merrimack River Locks, etc., 3 Metc. (Mass.) 91; Linker *v.* Benson, 67 N. C. 150; Doe *v.* Prosser, Cowp. 217.

Reason for rule.— The reason is because at common law no action lies between tenants in common for the recovery of profits received by one tenant in common, and therefore it might be prejudicial and productive of inconvenience to drive the party in such case to his ejectment. Lloyd *v.* Gordon, 2 Harr. & M. (Md.) 254.

33. Thornton *v.* York Bank, 45 Me. 158; Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292; Edwards *v.* Bishop, 4 N. Y. 61; Doe *v.* Prosser, Cowp. 217.

34. *Kentucky.*— Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177.

Maine.— Colburn *v.* Mason, 25 Me. 434, 43 Am. Dec. 292.

New York.— Edwards *v.* Bishop, 4 N. Y. 61; Siglar *v.* Van Riper, 10 Wend. (N. Y.) 414.

Pennsylvania.—Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

Tennessee.— Hubbard *v.* Wood, 1 Sneed (Tenn.) 279.

England.— Doe *v.* Bird, 11 East 49; Doe *v.* Prosser, Cowp. 217.

35. *Alabama.*— See Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212.

Illinois.— See Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367.

Massachusetts.— Cummings *v.* Wyman, 10 Mass. 464.

Missouri.— See Robidoux *v.* Cassilegi, 10 Mo. App. 516.

New York.— Florence *v.* Hopkins, 46 N. Y. 182; Abrams *v.* Rhoner, 44 Hun (N. Y.) 507; Woolsey *v.* Morse, 19 Hun (N. Y.) 273; Grim *v.* Dyar, 3 Duer (N. Y.) 354.

Pennsylvania.— Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328; Frederick *v.* Gray, 10 Serg. & R. (Pa.) 182.

West Virginia.— Cooey *v.* Porter, 22 W. Va. 120.

36. *California.*— Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; Greer *v.* Tripp, 56 Cal. 209; Miller *v.* Myles, 46 Cal. 535; Carpentier *v.* Webster, 27 Cal. 524.

Connecticut.— Morris *v.* Sullivan, 47 Conn. 474; Newell *v.* Woodruff, 30 Conn. 492.

Maine.— Bracket *v.* Norcross, 1 Me. 89.

Massachusetts.—Gordon *v.* Pearson, 1 Mass. 323.

New York.— Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587; Northrop *v.* Wright, 24 Wend. (N. Y.) 221.

United States.— Den *v.* Moore, 3 Wall. Jr. C. C. (U. S.) 292, 20 Fed. Cas. No. 11,905.

England.— Doe *v.* Bird, 11 East 49.

Exclusive possession of portion less than whole.— If one tenant in common is in the exclusive possession of a portion less than the whole of the common lands, and his cotenant demands that he be let into possession of the same on the ground of his joint ownership, and the other, while admitting the several title of the cotenant, refuses to let him into possession, his refusal is an ouster. Carpentier *v.* Webster, 27 Cal. 524.

37. Meredith *v.* Andres, 29 N. C. 5, 45 Am. Dec. 504.

38. Valentine *v.* Northrop, 12 Wend. (N. Y.) 494; Carpenter *v.* Thayer, 15 Vt. 552. See also Talbott *v.* Woodford, (W. Va. 1900) 37 S. E. 580.

(VII) *ASSERTION OF TITLE BY JUDICIAL PROCEEDINGS.* Adverse possession of one tenant in common may commence by the assertion, in any proceeding at law, of a several and a distinct claim of title.[39]

(VIII) *MORTGAGE OF PREMISES.* It has been held that a mortgage of the whole premises by a cotenant does not necessarily establish an ouster.[40]

e. Effect of Giving Actual Notice of Claim. When a tenant denies the title of his cotenant and gives notice thereof, his possession is adverse and may ripen into a good title.[41]

f. Loss of Hostile Character of Possession. Where possession is apparently exclusive and adverse, the presumption of disseizin may be rebutted by evidence showing that the rights of the cotenant have been admitted or acknowledged.[42] Hostile character of possession is not lost by the tenant in possession tendering a quitclaim deed to his cotenant and requesting him to sign it, there being no offer to purchase nor any acknowledgment of the cotenant's rights.[43]

45. BY GRANTEE OF ONE TENANT AGAINST COTENANT — a. Possession under Deed Purporting to Convey Entire Premises in Fee. Except in one state,[44] where one of several tenants in common executes a deed purporting to convey the entire premises to one who enters into possession thereunder claiming title,[45] or record-

39. Anderson *v.* Stewart, 15 Tex. 285; Cryer *v.* Andrews, 11 Tex. 170; Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778.

Invalid partition proceedings.— If an attempt be made to obtain a partition, although the legal proceedings by which it is affected may be invalid and defective, still, being a matter of public notoriety, the cotenant is bound at his peril to take notice of the claim of adverse possession thus set up. Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778.

40. Wilson *v.* Collishaw, 13 Pa. St. 276.

That the giving of a mortgage should have efficacy toward constituting an ouster of a cotenant and the commencement of adverse possession on the part of the grantee, it must have been accompanied and followed by claims of which plaintiff had knowledge, and by acts of possession not only inconsistent with, but in exclusion of, the continuing right of plaintiff as tenant in common. Leach *v.* Beattie, 33 Vt. 195.

41. Longwell *v.* Bentley, 3 Grant (Pa.) 177.

Devising whole tract.— Where a tenant in common in possession devises the whole tract by will read in the presence of his cotenant, this amounts to an unequivocal claim of adverse holding and an ouster of the cotenant. Miller *v.* Miller, 60 Pa. St. 16, 100 Am. Dec. 538.

A mere verbal declaration made to some third person, of intent to hold exclusive of the rights of cotenants, is not such an ouster and injurious act as will work a disseizin and initiate an adverse possession. Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443.

42. Thornton *v.* York Bank, 45 Me. 158.

43. Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100.

Purchase of cotenants' interest.— It has been held that claim of adverse possession by a cotenant is not rebutted by his purchase of other cotenants' interests before the limitation began to run. Rand *v.* Huff, 59 Kan. 777, 53 Pac. 483.

44. In North Carolina, where a tenant in common by deed attempts to convey the whole estate, and the grantee enters into possession thereunder, his possession is not adverse to the cotenants. Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232; Roscoe *v.* John L. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389; Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691; Breden *v.* McLaurin, 98 N. C. 307, 4 S. E. 136; Page *v.* Branch, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; Ward *v.* Farmer, 92 N. C. 93; Caldwell *v.* Neely, 81 N. C. 114; Covington *v.* Stewart, 77 N. C. 148; Linker *v.* Benson, 67 N. C. 150; Cloud *v.* Webb, 15 N. C. 290, 25 Am. Dec. 711.

45. *Alabama.*— Riggs *v.* Fuller, 54 Ala. 141; Abercrombie *v.* Baldwin, 15 Ala. 363.

Arkansas.— Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

California.— Frick *v.* Sinon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177; Bath *v.* Valdez, 70 Cal. 350, 11 Pac. 724 [*overruling* Seaton *v.* Son, 32 Cal. 481]; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100.

Connecticut.— Clark *v.* Vaughan, 3 Conn. 191.

Georgia.— Cain *v.* Furlow, 47 Ga. 674; Horne *v.* Howell, 46 Ga. 9.

Illinois.— Goewey *v.* Urig, 18 Ill. 238. See also Littlejohn *v.* Barnes, 138 Ill. 478, 28 N. E. 980.

Indiana.— King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; Nelson *v.* Davis, 35 Ind. 474.

Iowa.— Kinney *v.* Slattery, 51 Iowa 353, 1 N. W. 626; Burns *v.* Byrne, 45 Iowa 285.

Kansas.— Scantlin *v.* Allison, 32 Kan. 376, 4 Pac. 618.

Kentucky.— Larman *v.* Huey, 13 B. Mon. (Ky.) 436.

Maine.— Thomas *v.* Pickering, 13 Me. 337.

Maryland.— Rutter *v.* Small, 68 Md. 133, 11 Atl. 698, 6 Am. St. Rep. 434; Lloyd *v.* Gordon, 2 Harr. & M. (Md.) 254.

Massachusetts.— Marcy *v.* Marcy, 6 Metc. (Mass.) 360; Kittredge *v.* Merrimack River

ing his conveyance,[46] this will constitute a disseizin of the cotenants, and after the expiration of the statutory period of limitations their right to the land will be barred. Some decisions hold that the mere execution of such a deed, and possession thereunder by a stranger, is sufficient to put the cotenants on inquiry and charge them with notice.[47]

b. Possession under Deed Purporting to Convey in Fee Part of Premises by Metes and Bounds. So it has been held that if the tenant assumes to convey any specific part of the land by metes and bounds, possession taken thereunder will be adverse to the cotenants, and, if continued for the statutory period, will bar their right to recover the land.[48]

c. Possession under Quitclaim Deed. The execution of a quitclaim deed by one tenant in common, and entry thereunder by the grantee, do not amount to a disseizin of the cotenant.[49]

d. Possession under Deed Excepting Cotenant's Interest. If one of several tenants in common conveys land, excepting and reserving the interest of the

Locks, etc., 17 Pick. (Mass.) 246, 28 Am. Dec. 296; Bigelow *v.* Jones, 10 Pick. (Mass.) 161.

Minnesota.— Ricker *v.* Butler, 45 Minn. 545, 48 N. W. 407.

Missouri.— Long *v.* Stapp, 49 Mo. 506.

Nevada.— Abernathie *v.* Consolidated Virginia Min. Co., 16 Nev. 260.

New Jersey.— Watson *v.* Jeffrey, 39 N. J. Eq. 62.

New Mexico.— Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 237.

New York.— Wright *v.* Saddler, 20 N. Y. 320, 329; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530; Jackson *v.* Smith, 13 Johns. (N. Y.) 406; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178.

Pennsylvania.— Law *v.* Patterson, 1 Watts & S. (Pa.) 184; Culler *v.* Motzer, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604.

South Carolina.— Odom *v.* Weathersbee, 26 S. C. 244, 1 S. E. 890.

Tennessee.— Burns *v.* Headerick, 85 Tenn. 102, 2 S. W. 259; Weisinger *v.* Murphy, 2 Head (Tenn.) 674.

Texas.— Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358; Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360; Lewis *v.* Terrell, 7 Tex. Civ. App. 314, 26 S. W. 754; Jacks *v.* Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645.

Vermont.— Roberts *v.* Morgan, 30 Vt. 319.

Virginia.— Johnston *v.* Virginia Coal, etc., Co., 96 Va. 158, 31 S. E. 85.

United States.— Clymer *v.* Dawkins, 3 How. (U. S.) 674, 11 L. ed. 778; Bradstreet *v.* Huntington, 5 Pet. (U. S.) 402, 8 L. ed. 170; Prescott *v.* Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

England.— Doe *v.* Taylor, 5 B. & Ad. 575, 27 E. C. L. 245; Townsend's Case, 4 Leon. 52.

Purchaser at administrator's sale.— Where a purchaser of land at a sale made by the administrator of the deceased tenant in common enters into and takes possession of the whole premises under a deed purporting to convey the entire interest in the land, but in fact only conveying the undivided interest of the deceased tenant, and continues therein claiming for himself the entirety in fee simple in the capacity of sole and exclusive proprietor, and taking and appropriating for his own use the rents and profits, these open, unequivocal, and notorious acts of ownership render his possession adverse and are equivalent to an actual ouster and disseizin. Fielder *v.* Childs, 73 Ala. 567.

46. Thomas *v.* Pickering, 13 Me. 337; Foulke *v.* Bond, 41 N. J. L. 527; Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358; Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360; De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038.

Registration of a deed purporting to vest title to the entire tract in the grantee is of itself notice to the cotenant of an adverse holding. Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360; De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038. See also McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

47. Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Rutter *v.* Small, 68 Md. 133, 11 Atl. 698, 6 Am. St. Rep. 434; Weisinger *v.* Murphy, 2 Head (Tenn.) 674.

Limitations of rule.—The rule stated in the text has no application where the grantee, notwithstanding the execution of a deed from one cotenant purporting to convey the entire tract in fee, nevertheless recognizes the cotenant's interest. Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241.

48. Weisinger *v.* Murphy, 2 Head (Tenn.) 674. *Compare* Jefferson *v.* Radcliff, 10 N. H. 242, in which it was held that one tenant in common cannot convey part of the land holden in common by metes and bounds, so as to prejudice his cotenants.

Conveyance of whole tract in parcels.— Where a tenant in common takes possession of the entire property and divides it into town lots, which were sold by him from time to time to various persons, the statute of limitations runs in favor of the vendees as against the cotenant of the vendor, and at the expiration of seven years' uninterrupted possession they would have a prescriptive title. Cain *v.* Furlow, 47 Ga. 674.

49. Moore *v.* Antill, 53 Iowa 612, 6 N. W. 14; Hume *v.* Long, 53 Iowa 299, 5 N. W. 193; Edwards *v.* Bishop, 4 N. Y. 61, wherein it was held that by claiming title under such deed the grantee merely asserts his right to the share which his grantor held.

cotenant, and the grantee takes possession of the same on an agreement with the grantor to pay the taxes for and on behalf of the cotenants, his possession without a subsequent ouster or disseizin cannot be regarded as adverse to them, and the purchasers cannot invoke the limitation law to defeat the assertion of their rights.[50]

e. Where Possession Is Not Taken under Conveyance of Entire Tract. A conveyance by one tenant in common, purporting to convey the whole premises, unless possession is taken under it, is not an ouster of the cotenants.[51]

46. By Heirs against Coheirs — a. Possession Usually Not Adverse. Where one of several heirs enters into or remains in possession of land on the death of the ancestor, his possession will, in general, be considered the possession of his coheirs and for their benefit.[52]

b. Under What Circumstances Possession Is Adverse. There is, however, nothing in the relation between heirs which will prevent the possession of one from becoming adverse to the others.[53] But in order to render his possession adverse, there must be plain, decisive, unequivocal acts or conduct on his part amounting to an ouster or disseizin of the others.[54] No mere act of ownership

50. Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541. See also Noble *v.* Hill, 8 Tex. Civ. App. 171, 27 S. W. 756, in which it was held that entry under a deed, from several tenants in common, of their respective rights, is not equivalent to an ouster of all the cotenants and will not put in motion the statute of limitations against such cotenants.

51. Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792; Hannon *v.* Hannah, 9 Gratt. (Va.) 146; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269.

Actual possession under the deed is necessary. Morgan *v.* Mitchell, 104 Ga. 596, 30 S. E. 792.

52. *Arkansas.*— Blakeney *v.* Ferguson, 20 Ark. 547.

Illinois.— Shaw *v.* Schoonover, 130 Ill. 448, 22 N. E. 589; Ball *v.* Palmer, 81 Ill. 370; Bonham *v.* Badgley, 7 Ill. 622.

Massachusetts.— Hunt *v.* Hunt, 3 Metc. (Mass.) 175, 37 Am. Dec. 130.

Missouri.— Wommack *v.* Whitmore, 58 Mo. 448.

New Hampshire.— Campbell *v.* Campbell, 13 N. H. 483.

New York.— Phelan *v.* Kelly, 25 Wend. (N. Y.) 389; Jackson *v.* Benjamin, 8 Johns (N. Y.) 101.

Pennsylvania.— Tulloch *v.* Worrall, 49 Pa. St. 133; Forward *v.* Deetz, 32 Pa. St. 69; Miller's Appeal, 3 Grant (Pa.) 247; Graffins *v.* Tottenham, 1 Watts & S. (Pa.) 488, 37 Am. Dec. 472; Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

South Carolina.—Roberts *v.* Smith, 21 S. C. 455.

Texas.— Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Gilkey *v.* Peeler, 22 Tex. 663; Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358.

By heirs against pretermitted heirs.—Where, in ejectment, defendant claims under a will whereby the land was to become his absolute property upon the death of his mother, no possession held by him under the testator, or afterward during the life of his mother, can be considered as adverse to pretermitted heirs of the testator. McCracken *v.* McCracken, 67 Mo. 590.

Entry as tenant of father.—Where a father puts one of his children in possession of land, and he holds it as the tenant of his father and by his permission, his subsequent possession, after the death of his father, must be regarded as having been for the benefit of himself and his coheirs, as joint owners, unless it is proven that he held adversely. Blakeney *v.* Ferguson, 20 Ark. 547.

Joint possession of coheir with widow.— The possession, of one of the heirs, of land of which his father died seized, is not adverse to that of the other heirs by reason of his having resided with his mother after the death of her husband. Stevenson *v.* Huddleson, 13 B. Mon. (Ky.) 299.

Presumption.— The law presumes that there is no intention on the part of an heir to abate the shares of his coheirs, but to preserve them for their use. Tulloch *v.* Worrall, 49 Pa. St. 133.

53. Bell *v.* Adams, 81 N. C. 118; McCall *v.* Webb, 88 Pa. St. 150; Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358; De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038. See also Bozeman *v.* Bozeman, 82 Ala. 389, 2 So. 732, 83 Ala. 416, 3 So. 784.

Joint possession of two against others.— Where a brother and his sister and her successors lived for forty years upon land left by their father, and, in an action for partition by a granddaughter of the sister and the other children of the original owner against the brother's grantee, the evidence is conflicting whether the brother retained all the rents and profits, or shared them with his sister and her successors, an instruction that the possession of the granddaughter can be taken only as a circumstance tending to show that the brother's possession was not adverse to that of the other plaintiffs is error, since the joint possession of the brother and sister and her successors may have been adverse to the other children. Henning *v.* Warner, 109 N. C. 406, 14 S. E. 317.

54. Wommack *v.* Whitmore, 58 Mo. 448; Velott *v.* Lewis, 102 Pa. St. 326; Tulloch *v.* Worrall, 49 Pa. St. 133; Forward *v.* Deetz, 32

will render the possession adverse.[55] It has been held, however, that the possession of land by grantees in a deed, wherein the grantors describe themselves as the "sole heirs" of the original owner, is adverse to the other heirs of the original owner from the time that the deed is placed on record.[56]

47. By Legatee against Co-Legatee. Any entry or acts of possession of one of several legatees, or of any one claiming under such legatee, down to the distribution of the real estate in pursuance of the will, whether with or without color or claim of title, cannot be operative toward gaining a title by adverse possession.[57]

48. By Holder of Legal Title against Holder of Equitable Title. Laches of the rightful owner of an equitable estate for the period required by a court of law to give title by adverse possession will bar the equitable title if during all that period the possession has been held under a claim unequivocally adverse and without anything having been done or said directly or indirectly to recognize such rightful owner's title by adverse possession.[58]

49. By Claimant of Easement against Owner of Fee. A claim merely of an easement, or of any other right less than the entire fee, does not give any adverse right to the fee,[59] and where the grantee of an easement maintains only such possession as is necessary to the enjoyment thereof his possession is not adverse to the owner.[60] So it has been held that a title in fee will not be implied from user where an easement only will secure the privilege and enjoyment.[61]

50. By Preëmptioner against Government or Its Grantee. The possession of government lands under preëmption laws is not adverse as against either the government or its grantee.[62]

Pa. St. 69; Hall *v.* Mathias, 4 Watts & S. (Pa.) 331; Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Roberts *v.* Smith, 21 S. C. 455; Gilkey *v.* Peeler, 22 Tex. 663.

Surrendering possession.— Adverse possession cannot be gained by one coheir without first surrendering possession to his coheirs. Phelan *v.* Kelly, 25 Wend. (N. Y.) 389.

55. Velott *v.* Lewis, 102 Pa. St. 326, 327 holding that the mere leasing of the property, receiving the rents and erecting fences and buildings thereon are insufficient; Miller's Appeal, 3 Grant (Pa.) 247; Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; Guilkey *v.* Peeler, 22 Tex. 663; Alexander *v.* Kennedy, 19 Tex. 488, 70 Am. Dec. 358.

An acknowledgment by the widow and one of the coheirs in possession, that the party claiming was the owner of the premises, and that they held under him, was not sufficient to establish an ouster, by such party, of his coheirs. Forward *v.* Deetz, 32 Pa. St. 69.

Entry into the land of an ancestor claiming it all, and taking the rents and profits for twenty-one years, do not constitute a disseizin of other heirs. Hart *v.* Gregg, 10 Watts (Pa.) 185, 36 Am. Dec. 166.

Exclusive possession for a long period of time is not of itself sufficient. Tulloch *v.* Worrall, 49 Pa. St. 133.

56. De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038, the reason being that the record of the deed is an express notice of repudiation of any cotenancy with the other heirs.

57. Ames *v.* Beckley, 48 Vt. 395, the reason being that such acts are consistent with such legatee's relations as tenant in common with the other legatees, and are to be construed as done in pursuance of his rights and relations as such tenant in common.

58. Cresap *v.* McLean, 5 Leigh (Va.) 381; Miller *v.* McIntyre, 6 Pet. (U. S.) 61, 8 L. ed. 320; Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Fussell *v.* Hughes, 8 Fed. 384. See also Gray *v.* Gray, 13 Nebr. 453, 14 N. W. 390; Cholmondeley *v.* Clinton, 2 Jac. & W. 1.

59. Dothard *v.* Denson, 75 Ala. 482; Stetson *v.* Veazie, 11 Me. 408; Texas Western R. Co. *v.* Wilson, 83 Tex. 153, 18 S. W. 325.

60. Downing *v.* Dinwiddie, 132 Mo. 92, 33 S. W. 470, 575; Pinkum *v.* Eau Claire, 81 Wis. 301, 51 N. W. 550.

Illustration.— Where plaintiff, by his deed, had a right of way over a certain lot, the fact that he used other portions of the lot for teams to stand upon does not give him the right by prescription, the use being substantially in accordance with the grant. Smith *v.* Wiggin, 52 N. H. 112.

Presumption.— The use of land by one having an easement therein is presumed to be in accordance with his rights and not adverse to the owner of the fee. Mowe *v.* Stevens, 61 Me. 592; Stetson *v.* Veazie, 11 Me. 408; Downing *v.* Dinwiddie, 132 Mo. 92, 33 S. W. 470, 575.

61. Roe *v.* Strong, 107 N. Y. 350, 14 N. E. 294.

62. Alabama State Land Co. *v.* Beck, 108 Ala. 71, 19 So. 802; Woodward *v.* McReynolds, 2 Pinn. (Wis.) 268.

Reason for rule.— A preëmptioner is one who by settlement and improvement of public land acquires the right to purchase the same in preference to others by paying the minimum price thereof, provided it is, or when it becomes, open for sale. The United States does not enter into a contract with a settler, or incur any obligation that the land occupied by him shall ever be put up for sale. Alabama State Land Co. *v.* Beck, 108 Ala. 71, 19 So. 802.

51. By One Using Land for Public Purpose against Government. The use of land necessary to the performance of a contract with the government is in subordination to the title of the government and not adverse thereto.[63]

VII. Color of Title.

A. Defined and Explained — 1. A Mere Semblance of Title. Color of title for the purpose of adverse possession under the statutes of limitations as to land is that which has the semblance or appearance of title, legal or equitable, but which is in fact no title.[64]

2. Valid Title Unnecessary. To constitute color of title it is not essential that the title under which the party claims should be a valid one.[65] A claim asserted to property, under the provisions of a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statute of limitations, other requisites of those statutes being complied with.[66] Whenever this defense is set up

63. Jackson *v.* Porter, 1 Paine (U. S.) 457, 13 Fed. Cas. No. 7,143.

In Louisiana it has been held that under the laws regulating the public use of battures and river banks, their possession and public use can in no case form a basis of prescription. It is said that the municipal possession is purely administrative, destined in its nature to terminate on a certain contingency, and, not being incompatible with ownership in the riparian proprietor, cannot avail against him as the possession of an adverse title in the corporation. Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

64. *Alabama.*— Saltmarsh *v.* Crommelin, 24 Ala. 347.

Arizona.— U. S. *v.* Cameron, (Ariz. 1889) 21 Pac. 177.

California.— Bernal *v.* Gleim, 33 Cal. 668.

Colorado.—De Foresta *v.* Gast, 20 Colo. 307, 38 Pac. 244.

Georgia.— Veal *v.* Robinson, 70 Ga. 809.

Illinois.— Bolden *v.* Sherman, 110 Ill. 418.

Maryland.— Erdman *v.* Corse, 87 Md. 506, 40 Atl. 107; Kopp *v.* Herrman, 82 Md. 339, 33 Atl. 646; Baker *v.* Swan, 32 Md. 355.

Michigan.— Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35.

North Carolina.— Keener *v.* Goodson, 89 N. C. 273; Dobson *v.* Murphy, 18 N. C. 586; Rogers *v.* Mabe, 15 N. C. 180; Doe *v.* Southard, 10 N. C. 119, 14 Am. Dec. 578.

Oregon.— Swift *v.* Mulkey, 17 Oreg. 532, 21 Pac. 871.

Texas.— Thompson *v.* Cragg, 24 Tex. 582.

West Virginia.— Randolph *v.* Casey, 43 W. Va. 289, 27 S. E. 231.

Wisconsin.— Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

United States.— Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Latta *v.* Clifford, 47 Fed. 614; McIntyre *v.* Thompson, 4 Hughes 562, 10 Fed. 531; Field *v.* Columbet, 4 Sawy. (U. S.) 523, 9 Fed. Cas. No. 4,764.

Color of title may be defined to be a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or from the defective conveyance that is used,— a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

65. *Florida.*— Carn *v.* Haisley, 22 Fla. 317; Horne *v.* Carter, 20 Fla. 45.

Illinois.— Nelson *v.* Davidson, 160 Ill. 254, 43 N. E. 361, 52 Am. St. Rep. 338, 31 L. R. A. 325; Coleman *v.* Billings, 89 Ill. 183; Elston *v.* Kennicott, 46 Ill. 187; McClellan *v.* Kellogg, 17 Ill. 498.

Iowa.— Hamilton *v.* Wright, 30 Iowa 480; Close *v.* Samm, 27 Iowa 503.

Maryland.— Hoye *v.* Swann, 5 Md. 237.

Missouri.—Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600; Hamilton *v.* Boggess, 63 Mo. 233; Fugate *v.* Pierce, 49 Mo. 441.

New Hampshire.— Farrar *v.* Fessenden, 39 N. H. 268; Grant *v.* Fowler, 39 N. H. 101.

New York.— Mosher *v.* Yost, 33 Barb. (N. Y.) 277; Kent *v.* Harcourt, 33 Barb. (N. Y.) 491; Jackson *v.* Ellis, 13 Johns. (N. Y.) 118; Smith *v.* Burtis, 9 Johns. (N. Y.) 174.

Oregon.— Swift *v.* Mulkey, 17 Oreg. 532, 21 Pac. 871.

West Virginia.— Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527.

United States.— Hall *v.* Law, 102 U. S. 461, 26 L. ed. 217; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; Field *v.* Columbet, 4 Sawy. 523, 9 Fed. Cas. No. 4,764.

It is immaterial whether the want of validity results from its original and inherent defects, or other matters transpiring subsequently, nor whether such want of validity is attributable to individual or judicial action. Hamilton *v.* Wright, 30 Iowa 480; Swift *v.* Mulkey, 17 Oreg. 532, 21 Pac. 871.

66. *Illinois.*— Nelson *v.* Davidson, 160 Ill. 252, 254, 43 N. E. 361, 52 Am. St. Rep. 338, 31 L. R. A. 325.

Missouri.— Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600.

Oregon.— Swift *v.* Mulkey, 17 Oreg. 532, 21 Pac. 871.

West Virginia.— Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527.

the idea of right is excluded;[67] otherwise the statute of limitations would be of little use for protecting those who could otherwise show only an indefeasible title to the land.[68]

3. Necessity of Writing. It is familiar law that color of title is given by descent cast,[69] by judgments or decrees,[70] and by statutes.[71] This much is well settled, but there is much conflict of authority as to whether color of title not acquired by one of the methods enumerated must be acquired by some instrument in writing. In a number of decisions it is either held or said that a written instrument is not necessary to give color of title, but that it may be created by acts *in pais*.[72] Nevertheless, if there be no writing purporting to convey, there must be some visible acts or signs or indications which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title.[73] Be this as it may, it is believed that the decided weight of authority is to the effect that some writing is necessary in order to give color of title. This has been held or said in a considerable number of decisions, some of which embody this idea in defining color of title.[74] And it has been held that the evidence of title cannot be partly in writing and partly in parol.[75]

United States.— Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280.

Compare, also, Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Brooks *v.* Bruyn, 35 Ill. 392.

67. Smith *v.* Burtis, 9 Johns. (N. Y.) 174.

68. Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228.

69. See *infra*, VII, C, 7.

70. See *infra*, VII, C, 4.

71. See *infra*, VII, C, 5.

72. The doctrine of these cases is that when a party is in possession pursuant to a state of facts which of themselves show the character and extent of his entry and claim, such facts, whatever they may be in a given case, sufficiently perform the office of color of title.

Alabama.— Hawkins *v.* Hudson, 45 Ala. 482.

Colorado.— Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661.

Illinois.—McClellan *v.* Kellogg, 17 Ill. 498.

Indiana.— Bell *v.* Longworth, 6 Ind. 273.

Kentucky.— Taylor *v.* Buckner, 2 A. K. Marsh. (Ky.) 18, 12 Am. Dec. 354.

Mississippi.—Davis *v.* Davis, 68 Miss. 478, 10 So. 70. See also Niles *v.* Davis, 60 Miss. 750; Davis *v.* Bowmar, 55 Miss. 671.

Missouri.— Hughes *v.* Israel, 73 Mo. 538; Cooper *v.* Ord, 60 Mo. 420; Mylar *v.* Hughes, 60 Mo. 105; Rannels *v.* Rannels, 52 Mo. 108. See also Hargis *v.* Kansas City, etc., R. Co., 100 Mo. 210, 13 S. W. 680. *Compare* Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901.

North Carolina.—Neal *v.* Nelson, 117 N. C. 393, 23 S. E. 428, 53 Am. St. Rep. 590.

Pennsylvania.—Craig *v.* Craig, (Pa. 1887) 11 Atl. 60; Hollinshead *v.* Nauman, 45 Pa. St. 140; Green *v.* Kellum, 23 Pa. St. 254, 62 Am. Dec. 332; Fitch *v.* Mann, 8 Pa. St. 503; Bell *v.* Hartley, 4 Watts & S. (Pa.) 32; McCall *v.* Neely, 3 Watts (Pa.) 69; Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111.

South Carolina.— See McElwee *v.* Martin, 2 Hill (S. C.) 496.

73. Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661; Cooper *v.* Ord, 60 Mo. 420.

74. *Alabama.*—See Hawkins *v.* Hudson, 45 Ala. 482; Saltmarsh *v.* Crommelin, 24 Ala. 352.

Colorado.— De Foresta *v.* Gast, 20 Colo. 307, 38 Pac. 244; Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242 [*disapproving dictum* in Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661].

Florida.— See Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Georgia.— Hobby *v.* Alford, 73 Ga. 791; Veal *v.* Robinson, 70 Ga. 809; White *v.* Rowland, 67 Ga. 546, 44 Am. Rep. 731; Walls *v.* Smith, 19 Ga. 8; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Illinois.— Cook *v.* Norton, 43 Ill. 391; Brooks *v.* Bruyn, 35 Ill. 392; Woodward *v.* Blanchard, 16 Ill. 424.

Iowa.— Hamilton *v.* Wright, 30 Iowa 480.

Maryland.— Walsh *v.* McIntire, 68 Md. 402. 13 Atl. 348.

Missouri.—Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901 [*disapproving* Rannels *v.* Rannels, 52 Mo. 108]; Crispen *v.* Hannavan, 50 Mo. 536; Fugate *v.* Pierce, 49 Mo. 441. See also Mylar *v.* Hughes, 60 Mo. 105; Long *v.* Higginbotham, 56 Mo. 245.

New Mexico.— Armijo *v.* Armijo, 4 N. M. 133, 13 Pac. 92.

New York.— Thompson *v.* Burhans, 79 N. Y. 93.

North Carolina.— Williams *v.* Scott, 122 N. C. 545, 29 S. E. 877 [*overruling* Neal *v.* Nelson, 117 N. C. 393, 23 S. E. 428, 53 Am. St. Rep. 590]; Smith *v.* Allen, 112 N. C. 223, 16 S. E. 932; Keener *v.* Goodson, 89 N. C. 273; Dobson *v.* Murphy, 18 N. C. 586; Doe *v.* Southard, 10 N. C. 119, 14 Am. Dec. 578. See also Rogers *v.* Mabe, 15 N. C. 180.

South Carolina.— Golson *v.* Hook, 4 Strobh. (S. C.) 23.

Texas.— See Craddock *v.* Burleson, 21 Tex. Civ. App. 250, 52 S. W. 644.

Vermont.— Hodges *v.* Eddy, 38 Vt. 327.

Parol partition between tenants in common, followed by possession in conformity therewith, does not give each cotenant color of title to the entire fee of the part held by him. Sontag *v.* Bigelow, 142 Ill. 143, 31 N. E. 674, 16 L. R. A. 326.

75. Baird *v.* Evans, 58 Ga. 350.

4. Effect of Color of Title. The effect of color of title is merely to fix the character of the occupant's possession and define its extent and limits.[76]

B. Necessity for Color of Title — 1. In the Absence of Statutes Requiring It. Color of title is not necessary to perfect title by adverse possession, in the absence of any statutory provision which expressly or by clear implication requires it.[77] In such case the only effect of claiming under a deed or paper title upon the question of adverse possession is to enlarge and extend the possession, beyond the portion actually occupied, to the whole lot described in the deed.[78] To con-

76. Veal *v.* Robinson, 70 Ga. 809; Walls *v.* Smith, 19 Ga. 8; Creekmur *v.* Creekmur, 75 Va. 430. See also Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376, and *infra*, XII.

77. *Alabama.*— Wilson *v.* Glenn, 68 Ala. 383; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Smith *v.* Roberts, 62 Ala. 83; Dillingham *v.* Brown, 38 Ala. 311; Herbert *v.* Hanrick, 16 Ala. 581; Bohannan *v.* Chapman, 13 Ala. 641.

Arkansas.— Trotter *v.* Neal, 50 Ark. 340, 7 S. W. 384; Ferguson *v.* Peden, 33 Ark. 150.

Connecticut.— Comins *v.* Comins, 21 Conn. 413.

Florida.— Horne *v.* Carter, 20 Fla. 45.

Georgia.— Hall *v.* Gay, 68 Ga. 442; Laramore *v.* Minish, 43 Ga. 282; Doe *v.* Gullatt, 10 Ga. 218; English *v.* Doe, 7 Ga. 387.

Illinois.— Noyes *v.* Heffernan, 153 Ill. 339, 38 N. E. 571; Horner *v.* Reuter, 152 Ill. 106, 38 N. E. 747; Stewart *v.* Duffy, 116 Ill. 47, 6 N. E. 424; Flaherty *v.* McCormick, 113 Ill. 538; Kerr *v.* Hitt, 75 Ill. 51; Weber *v.* Anderson, 73 Ill. 439; Turney *v.* Chamberlain, 15 Ill. 271.

Indiana.— Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822; Marley *v.* State, 147 Ind. 145, 46 N. E. 466; Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522; Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Collett *v.* Vanderburgh County, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321; O'Donahue *v.* Creager, 117 Ind. 372, 20 N. E. 267; Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253; Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698; State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; Brown *v.* Anderson, 90 Ind. 93; Sims *v.* Frankfort, 79 Ind. 446; Vanduyn *v.* Hepner, 45 Ind. 589.

Iowa.— Solberg *v.* Decorah, 41 Iowa 501; Hamilton *v.* Wright, 30 Iowa 480.

Kansas.— Anderson *v.* Burnham, 52 Kan. 454, 34 Pac. 1056; Gildehaus *v.* Whiting, 39 Kan. 706, 18 Pac. 916; Wood *v.* Missouri, etc., R. Co., 11 Kan. 323, 324.

Kentucky.— Young *v.* Cox, (Ky. 1890) 14 S. W. 348; Farmer *v.* Lyons, (Ky. 1888) 9 S. W. 248; Marshall *v.* McDaniel, 12 Bush (Ky.) 378; Campbell *v.* Thomas, 9 B. Mon. (Ky.) 82; Gregory *v.* Nesbit, 5 Dana (Ky.) 419; Chiles *v.* Jones, 4 Dana (Ky.) 479; State Bank *v.* McWilliams, 2 J. J. Marsh. (Ky.) 256; Herndon *v.* Wood, 2 A. K. Marsh. (Ky.) 44; Taylor *v.* Buckner, 2 A. K. Marsh. (Ky.) 18. 12 Am. Dec. 354.

Louisiana.— Cannon *v.* Female Orphan Soc., 24 La. Ann. 452.

Michigan.— Ward *v.* Nestell, 113 Mich. 185, 71 N. W. 593; Campau *v.* Lafferty, 50 Mich. 114, 15 N. W. 40; Campau *v.* Dubois, 39 Mich. 274.

Minnesota.— Glencoe *v.* Wadsworth, 48 Minn. 402, 51 N. W. 377; Seymour *v.* Carli, 31 Minn. 81, 16 N. W. 495.

Missouri.— Bushey *v.* Glenn, 107 Mo. 331, 17 S. W. 969; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

Montana.— Minnesota, etc., Land, etc., Co. *v.* Brasier, 18 Mont. 444, 45 Pac. 632; National Min. Co. *v.* Powers, 3 Mont. 344.

Nebraska.— Omaha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739; Omaha, etc., L. & T. Co. *v.* Barrett, 31 Nebr. 803, 48 N. W. 967; Haywood *v.* Thomas, 17 Nebr. 237, 22 N. W. 460; Gatling *v.* Lane, 17 Nebr. 77, 80, 22 N. W. 227, 453.

New York.— Kent *v.* Harcourt, 33 Barb. (N. Y.) 491; Jackson *v.* Wheat, 18 Johns. (N. Y.) 40; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633; Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587.

Ohio.—McNeely *v.* Langan, 22 Ohio St. 32; Yetzer *v.* Thoman, 17 Ohio St. 130, 91 Am. Dec. 122; Paine *v.* Skinner, 8 Ohio 159; Rowland *v.* Rowland, 8 Ohio 40.

Pennsylvania.—Mead *v.* Leffingwell, 83 Pa. St. 187; Ege *v.* Medlar, 82 Pa. St. 86; Malson *v.* Fry, 1 Watts (Pa.) 433.

South Carolina.— Anderson *v.* Gilbert, 1 Bay (S. C.) 375; Turpin *v.* Brannon, 3 McCord (S. C.) 261.

Tennessee.— Nelson *v.* Trigg, 4 Lea (Tenn.) 701; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Haynes *v.* Jones, 2 Head (Tenn.) 371; Jarnigan *v.* Mairs, 1 Humphr. (Tenn.) 472; Brown *v.* Baldridge, Meigs (Tenn.) 1; Dyche *v.* Gass, 3 Yerg. (Tenn.) 396; Mulloy *v.* Paul, 2 Tenn. Ch. 156.

Texas.— Hendricks *v.* Snediker, 30 Tex. 296.

Vermont.—Jakeway *v.* Barrett, 38 Vt. 316.

Virginia.— Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126; Thomas *v.* Jones, 28 Gratt. (Va.) 383; Kincheloe *v.* Tracewells, 11 Gratt. (Va.) 587.

Washington.— Moore *v.* Brownfield, 7 Wash. 23, 34 Pac. 199.

United States.— Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624; Roberts *v.* Pillow, Hempst. (U. S.) 624, 20 Fed. Cas. No. 11,909; Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822.

78. Lane *v.* Gould, 10 Barb. (N. Y.) 254. See also *infra*, XI.

stitute an adverse possession of land, entry and possession under claim of right or title is sufficient.[79]

2. Under Special Statutory Provisions. Under statutes of limitations for the recovery of real property enacted in some states it has been held that color of title is a necessary element of title by adverse possession.[80]

C. What Gives Color of Title — 1. Sufficiency of Instruments, Generally. An instrument, in order to operate as color of title, must purport to convey title to the claimant thereunder or to those with whom he is in privity,[81] and must describe and purport to convey the land in controversy.[82]

2. Void or Defective Deeds — a. In General. A deed, though it be defective, will constitute color of title.[83] So the rule is broadly stated in a very large num-

79. *Alabama.*— Herbert *v.* Hanrick, 16 Ala. 581.

Illinois.— Turney *v.* Chamberlain, 15 Ill. 271.

Michigan.— Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497.

Minnesota.— Glencoe *v.* Wadsworth, 48 Minn. 402, 51 N. W. 377.

New York.— Jackson *v.* Camp, 1 Cow. (N. Y.) 605; Jackson *v.* Ellis, 13 Johns. (N. Y.) 118; Smith *v.* Lorillard, 10 Johns. (N. Y.) 338.

Vermont.—Jakeway *v.* Barrett, 38 Vt. 316.

Washington.— Moore *v.* Brownfield, 7 Wash. 23, 34 Pac. 199.

United States.— Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822.

80. *California.*—Figg *v.* Mayo, 39 Cal. 262.

Colorado.— Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242; Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661.

Georgia.— Laramore *v.* Minish, 43 Ga. 282.

Illinois.— Stoltz *v.* Doering, 112 Ill. 234.

Kentucky.— Henly *v.* Gore, 4 Dana (Ky.) 133; Poage *v.* Chinn, 4 Dana (Ky.) 50; Hunter *v.* Ayres, 15 B. Mon. (Ky.) 210; Robinson *v.* Neal, 5 T. B. Mon. (Ky.) 212; Anderson *v.* Turner, 3 A. K. Marsh. (Ky.) 131.

Louisiana.—Clark *v.* Comford, 45 La. Ann. 502, 12 So. 763.

New York.— Kneller *v.* Lang, 137 N. Y. 589, 33 N. E. 555 [*affirming* 63 Hun (N. Y.) 48, 17 N. Y. Suppl. 443].

North Carolina.— Den *v.* Turner, 5 N. C. 14; Grant *v.* Winborne, 3 N. C. 220.

Tennessee.— Barnes *v.* Vickers, 3 Baxt. (Tenn.) 370; Norris *v.* Ellis, 7 Humphr. (Tenn.) 462; Harris *v.* Bledsoe, Peck (Tenn.) 234. See also Powell *v.* Harman, 2 Pet. (U. S.) 241, 7 L. ed. 411; Patton *v.* Easton, 1 Wheat. (U. S.) 476, 4 L. ed. 139, *construing* Tennessee statute.

Texas.— Horst *v.* Herring, (Tex. 1888) 8 S. W. 206; Cox *v.* Bray, 28 Tex. 247; Kilpatrick *v.* Sisneros, 23 Tex. 113; Smith v. Power, 23 Tex. 29; Williamson *v.* Simpson, 16 Tex. 433; Mason *v.* McLaughlin, 16 Tex. 24; Castro *v.* Wurzbach, 13 Tex. 128.

Necessity of chain of title.— Under Tenn. Acts (1797), c. 43, § 4, providing that one having possession for seven years under a deed "founded upon a grant" shall be entitled to preference in possession, it is not necessary that the occupant should have an uninterrupted chain of title connected with such grant, and therefore a sale of land on execution against one who was not shown to have derived any title from the original grantee is nevertheless effectual as a basis for a claim under the statute. Weatherhead *v.* Bledsoe, 2 Overt. (Tenn.) 352; Hampton *v.* McGinnis, 1 Overt. (Tenn.) 286; Sawyer *v.* Shannon, 1 Overt. (Tenn.) 465.

Under the Texas three years' statute of limitations defining color of title as a consecutive chain of transfer from or under the sovereignty of the soil down to such person in possession without being regular, as if one or more of the memorials or muniments be unregistered or not duly registered or be only in writing, etc., chain of title is necessary, and a deed given under an unauthorized sale to enforce a vendor's lien breaks the chain of title required by the statute. Thompson *v.* Cragg, 24 Tex. 582; Linberg *v.* Finks, 7 Tex. Civ. App. 391, 25 S. W. 789. See also Osterman *v.* Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730.

81. Nieto *v.* Carpenter, 21 Cal. 455; Nelson *v.* Davidson, 160 Ill. 254, 43 N. E. 361, 52 Am. St. Rep. 338, 31 L. R. A. 325; Bolden *v.* Sherman, 110 Ill. 418; Coleman *v.* Billings, 89 Ill. 183; Dickenson *v.* Breeden, 30 Ill. 279; O'Mulcahy *v.* Florer, 27 Minn. 449, 8 N. W. 166; Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95. See also White *v.* Rowland, 67 Ga. 546, 44 Am. Rep. 731.

Application of rule.— A sheriff's deed which only purports to convey the interest in the premises which the judgment debtor had on a certain day does not include the dower right of one who was the debtor's wife before that day, and hence cannot be made the basis of an adverse holding of her dower interest in the premises so as to bar her right of action to recover the same after the lapse of ten years, by virtue of the statute. Cowan *v.* Lindsay, 30 Wis. 586.

82. See *infra*, VII, C, 2, i.

83. *Alabama.*— Carter *v.* Chevalier, 108 Ala. 563, 19 So. 798; Bernheim *v.* Horton, 103 Ala. 380, 15 So. 822; Saltmarsh *v.* Crommelin, 24 Ala. 347.

Georgia.— Collins *v.* Boring, 96 Ga. 360, 23 S. E. 401.

Illinois.— Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109; Whitney *v.* Stevens, 77 Ill. 585; Rawson *v.* Fox, 65 Ill. 200; Elston *v.* Kennicott, 46 Ill. 187; McCagg *v.* Heacock, 42 Ill. 153 (deed absolute on its face); McClellan *v.* Kellogg, 17 Ill. 498; Woodward *v.* Blanchard, 16 Ill. 424.

ber of decisions that a deed purporting to convey the land in controversy will give color of title to a possession taken under it, even though it be void.[84]

Indiana.— Hearick *v.* Doe, 4 Ind. 164.
Kentucky.— Logan *v.* Bull, 78 Ky. 607.
Maryland.— Erdman *v.* Corse, 87 Md. 506, 40 Atl. 107; Kopp *v.* Herrman, 82 Md. 339, 33 Atl. 646.
Minnesota.— Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.
Mississippi.— Carroll County *v.* Estes, 72 Miss. 171, 16 So. 908; Nash *v.* Fletcher, 4 Miss. 609.
New Hampshire.— Farrar *v.* Fessenden, 39 N. H. 268; Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190.
New York.— Jackson *v.* Newton, 18 Johns. (N. Y.) 355.
North Carolina.— Taylor *v.* Smith, 121 N. C. 76, 28 S. E. 295; McMillan *v.* Gambill, 106 N. C. 359, 11 S. E. 273; Den *v.* Putney, 7 N. C. 562 (sheriff's deed signed by deputy clerk).
Oregon.— Swift *v.* Mulkey, 17 Oreg. 532, 21 Pac. 871.
South Carolina.— Carolina Sav. Bank *v.* McMahon, 37 S. C. 309, 16 S. E. 31 (deed omitting words of inheritance).
Tennessee.— Nelson *v.* Trigg, 4 Lea (Tenn.) 701.
Texas.— Hays *v.* Barrera, 26 Tex. 78.
Vermont.—Stevens *v.* Hollister, 18 Vt. 294, 46 Am. Dec. 154.
West Virginia.— Randolph *v.* Casey, 43 W. Va. 289, 27 S. E. 231; Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527; Cooey *v.* Porter, 22 W. Va. 120.
Wisconsin.— Hacker *v.* Horlemus, 74 Wis. 21, 41 N. W. 965.

84. *Alabama.*— Perry *v.* Lawson, 112 Ala. 480, 20 So. 611; National Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47; Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320; Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537; Cooper *v.* Watson, 73 Ala. 252; Stovall *v.* Fowler, 72 Ala. 77; Riggs *v.* Fuller, 54 Ala. 141.
Arkansas.— Logan *v.* Jelks, 34 Ark. 547.
Connecticut.— Taylor *v.* Danbury Public Hall Co., 35 Conn. 430.
Florida.— Carn *v.* Haisley, 22 Fla. 317.
Georgia.— Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210.
Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Sloan *v.* Graham, 85 Ill. 26; Brooks *v.* Bruyn, 35 Ill. 392; Holloway *v.* Clark, 27 Ill. 483.
Indiana.— Irey *v.* Markey, 132 Ind. 546, 32 N. E. 309; Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Wright *v.* Kleyla, 104 Ind. 223, 4 N. E. 16; Vancleave *v.* Milliken, 13 Ind. 105 (administrator's deed void as against heirs for want of notice); Bell *v.* Longworth, 6 Ind. 273.
Iowa.— Chicago, etc., R. Co. *v.* Allfree, 64 Iowa, 500, 20 N. W. 779; Douglass *v.* Tullock, 34 Iowa, 262; Thomas *v.* Stickle, 32 Iowa, 71.
Kansas.— Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957.
Louisiana.— Bernard *v.* Shaw, 9 Mart. (La.) 49.
Maryland.— Zion Church *v.* Hilken, 84 Md. 170, 35 Atl. 9; Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977; Lurman *v.* Hubner, 75 Md. 268, 23 Atl. 646; Hanson *v.* Johnson, 62 Md. 25, 50 Am. Rep. 199.
Michigan.— Hecock *v.* Van Dusen, 80 Mich. 359, 45 N. W. 343; Hoffman *v.* Harrington, 28 Mich. 90.
Minnesota.—Washburn *v.* Cutter, 17 Minn. 361.
Mississippi.— Nash *v.* Fletcher, 44 Miss. 609; Welborn *v.* Anderson, 37 Miss. 155; Harper *v.* Tapley, 35 Miss. 506.
Missouri.— Smith *v.* Johnson, 107 Mo. 494, 18 S. W. 21; Bartlett *v.* Kauder, 97 Mo. 356, 11 S. W. 67; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600, 13 West. 215; Sutton *v.* Casseleggi, 77 Mo. 397.
Nebraska.— Lantry *v.* Parker, 37 Nebr. 353, 55 N. W. 962.
New Hampshire.— Sanborn *v.* French, 22 N. H. 246.
New York.— Kent *v.* Harcourt, 33 Barb. (N. Y.) 491.
North Carolina.— McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299; Williams *v.* Council, 49 N. C. 206 (deed by clerk after expiration of term of office).
Tennessee.—Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81; Hunter *v.* O'Neal, 4 Baxt. (Tenn.) 494; Clark *v.* Chase, 5 Sneed (Tenn.) 636; Vance *v.* Johnson, 10 Humphr. (Tenn.) 213; Love *v.* Shields, 3 Yerg. (Tenn.) 404; Gray *v.* Darby, Mart. & Y. (Tenn.) 396.
Texas.—Hays *v.* Barrera, 26 Tex. 78; Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53; Charle *v.* Saffold, 13 Tex. 94. See also Texas Water, etc., Co. *v.* Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393.
Vermont.— Chandler *v.* Spear, 22 Vt. 388.
Virginia.—Lennig *v.* White, (Va. 1894) 20 S. E. 831, 839.
Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.
West Virginia.— Randolph *v.* Casey, 43 W. Va. 289, 27 S. E. 231; Cooey *v.* Porter, 22 W. Va. 120.
Wisconsin.— Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815; Oconto County *v.* Jerrard, 46 Wis. 317, 50 N. W. 591; Austin *v.* Holt, 32 Wis. 478.
United States.— Beaver *v.* Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601; Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; McIntyre *v.* Thompson, 4 Hughes (U. S.) 562, 10 Fed. 531.

A deed commenced by one sheriff and left unfinished, and afterward completed by his successor, can operate as color of title only from the date of its completion. Walls *v.* Smith, 19 Ga. 8.

Exception to rule.— A void grant will not

b. Deed Void for Matters Dehors the Instrument. A deed void for matters *dehors* the instrument will constitute color of title, provided it purports to convey the land in controversy.[85]

c. Deed Void on Its Face. But there is great conflict of authority as to whether a deed which is void on its face will give color of title. The decisions on this question seem to be fairly well balanced.[86]

d. Deeds Not Acknowledged or Defectively Acknowledged. A deed which purports to convey title will give color of title although it be not acknowledged,[87] or though it be defectively acknowledged.[88]

constitute the basis of a link in the chain of transfer of title from or under the sovereignty of the soil, and is not color of title within the Texas three years' statute of limitations. Parker *v.* Bains, 59 Tex. 15; Whitehead *v.* Foley, 28 Tex. 1; Lambert *v.* Weir, 27 Tex. 359; Smith *v.* Power, 23 Tex. 29; Marsh *v.* Weir, 21 Tex. 97, 110. See also *supra*, note 80.

85. *California.*—Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421.

Mississippi.— McClanahan *v.* Barrow, 27 Miss. 664.

Texas.— Fry *v.* Baker, 59 Tex. 404.

Wisconsin.— Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815; Lander *v.* Bromley, 79 Wis. 372, 48 N. W. 594; Austin *v.* Holt, 32 Wis. 478.

United States.— Latta *v.* Clifford, 47 Fed. 614.

86. *Alabama.*— Pugh *v.* Youngblood, 69 Ala. 296. *Compare* Alexander *v.* Savage, 90 Ala. 383, 8 So. 93.

California.— Wilson *v.* Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299 [*overruling* in effect Oglesby *v.* Hollister, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177; Bernal *v.* Gleim, 33 Cal. 668; Suñol *v.* Hepburn, 1 Cal. 254, 255; Woodworth *v.* Fulton, 1 Cal. 295].

Colorado.— Bennet *v.* North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 Pac. 812, 58 Am. Rep. 281; De Foresta *v.* Gast, 20 Colo. 307, 38 Pac. 244; Brinker *v.* Union Pac., etc., R. Co., 11 Colo. App. 166, 55 Pac. 207.

Illinois.— Whitney *v.* Stevens, 77 Ill. 585; Dalton *v.* Lucas, 63 Ill. 337.

Indiana.— See Bender *v.* Stewart, 75 Ind. 88.

Iowa.— Colvin *v.* McCune, 39 Iowa 502. See also Douglass *v.* Tulloch, 34 Iowa 362; Thomas *v.* Stickle, 32 Iowa 71.

Minnesota.— Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632 [*explaining* Cogel *v.* Raph, 24 Minn. 194; O'Mulcahy *v.* Florer, 27 Minn. 449, 8 N. W. 166]; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Missouri.— Pharis *v.* Bayless, 122 Mo. 116, 26 S. W. 1030; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600. *Compare* Mason *v.* Crowder, 85 Mo. 526.

Nebraska.— Gatling *v.* Lane, 17 Nebr. 77, 80, 22 N. W. 227, 453.

Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

Wisconsin.— Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355; Killey *v.* McKeon, 67 Wis. 561, 31 N. W. 324; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413; Zweitusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821; McMullan *v.* Wehle, 55 Wis. 685, 13 N. W. 694; Lindsay *v.* Fay, 25 Wis. 460; Sprecher *v.* Wakeley, 11 Wis. 432; Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

United States.— La Crosse *v.* Cameron, 80 Fed. 264, 46 U. S. App. 722, 25 C. C. A. 399.

That color of title will not be given by a deed void on its face has been held in the following cases:

District of Columbia.— Keefe *v.* Bramhall, 3 Mackey (D. C.) 551.

Kansas.— Larkin *v.* Wilson, 28 Kan. 513; Waterson *v.* Devoe, 18 Kan. 223.

Louisiana.— Marmion *v.* McPeak, 51 La. Ann. 1631, 26 So. 376; Train *v.* Cronan, 46 La. Ann. 551, 15 So. 368; Ford *v.* Mills, 46 La. Ann. 331, 14 So. 845; Pattison *v.* Maloney, 38 La. Ann. 885; Hall *v.* Mooring, 27 La. Ann. 596; Frique *v.* Hopkins, 4 Mart. N. S. (La.) 212; Dufour *v.* Comfranc, 11 Mart. (La.) 607, 13 Am. Dec. 360; Carrel *v.* Cabaret, 7 Mart. (La.) 375.

Maryland.— Baker *v.* Swan, 32 Md. 355.

North Carolina.— Dickens *v.* Barnes, 79 N. C. 490.

Texas.— Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120 (under the five years' statute of limitations providing that suits against those in peaceable and adverse possession of lands under duly registered deeds shall be instituted within five years); Green *v.* Hugo, 81 Tex. 452, 17 S. W. 79, 26 Am. St. Rep. 824 (under the three years' statute defining color of title as a chain of transfer from or under the sovereignty of the soil down to the person in possession without being regular, but possessing such defect as may not extend to or include the want of intrinsic fairness and honesty).

United States.— Redfield *v.* Parks, 132 U. S. 239, 10 S. Ct. 83, 33 L. ed. 327; Moore *v.* Brown, 4 McLean (U. S.) 211, 17 Fed. Cas. No. 9,753.

87. That color of title may be given by a deed void on its face as fully and as effectually as though the deed were regular on its face, and void for reasons *dehors* the instrument, was held in the following cases: Reddick *v.* Long, (Ala. 1900) 27 So. 402; McInerny *v.* Irvin, 90 Ala. 275, 7 So. 841.

88. Watson *v.* Mancill, 76 Ala. 600; Cramer *v.* Clow, 81 Iowa 255, 47 N. W. 59, 9 L. R. A. 772; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Dalton *v.* St. Louis Bank, 54 Mo. 105; Union Sav. Bank *v.* Taber, 13 R. I. 683.

Illustrations.—An administrator's deed not acknowledged in court as required by law will

e. Unregistered or Improperly Registered Deeds — (I) *Statement of General Rule.* A deed, although unregistered, will give color of title, in the absence of any statute expressly or impliedly providing otherwise.[89] Such a deed, it has been said, shows the nature of the possession taken under it to be adverse just as much as if it were recorded.[90] It has been held, however, that a deed which has not been recorded cannot be given in evidence as color of title without proof of its execution.[91] So a deed is good to show color of title although improperly admitted to registration.[92]

(II) *Effect on Rule of Special Statutory Provisions.* It has been held that a statute providing that contracts of sale of land shall be inadmissible in evidence without registration does not make registration essential to the use of a deed to show color of title where there is a claimant in possession under it.[93] On the other hand, under a statute providing that every suit to be instituted to recover real estate against any person having visible and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five

give color of title. Campbell *v.* Laclede Gas Light Co., 84 Mo. 352. A deed executed by a married woman without her privy examination having been taken furnishes color of title. Pearse *v.* Owens, 3 N. C. 415; Hanks *v.* Folsom, 11 Lea (Tenn.) 555; Ferguson *v.* Kennedy, Peck (Tenn.) 321, 14 Am. Dec. 761. A deed of a trustee, although the private examination of the beneficiary was not taken, is good as color of title, though the beneficiary was a married woman. Smith *v.* Allen, 112 N. C. 223, 16 S. E. 932. A deed of a homestead without a certificate of the wife's separate examination is good as color of title though inoperative as a conveyance. Watson *v.* Marcill, 76 Ala. 600.

89. *Alabama.*— Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393; Hall *v.* Doe, 19 Ala. 378; Doe *v.* Eslava, 11 Ala. 1028.

California.— Packard *v.* Moss, 68 Cal. 123, 8 Pac. 818.

Illinois.— Jaques *v.* Lester, 118 Ill. 246, 8 N. E. 795; Holbrook *v.* Forsythe, 112 Ill. 306; Dickenson *v.* Breeden, 30 Ill. 279; Collins *v.* Smith, 18 Ill. 160.

Kentucky.— Ring *v.* Gray, 6 B. Mon. (Ky.) 368; Poage *v.* Chinn, 4 Dana (Ky.) 50.

Louisiana.— Bracy *v.* Buck, 11 La. Ann. 100; Winston *v.* Prevost, 6 La. Ann. 164.

Minnesota.— Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.

New Hampshire.— Bellows *v.* Jewell, 60 N. H. 420; Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54; Minot *v.* Brooks, 16 N. H. 374.

North Carolina.—Utley *v.* Wilmington, etc., R. Co., 119 N. C. 720, 25 S. E. 1021; Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991; Hardin *v.* Barrett, 51 N. C. 159; Doe *v.* McArthur, 9 N. C. 33, 11 Am. Dec. 738.

Tennessee.— Meriwether *v.* Vaulx, 5 Sneed (Tenn.) 300; Stewart *v.* Harris, 2 Swan (Tenn.) 655; Jones *v.* Perry, 10 Yerg. (Tenn.) 58, 30 Am. Dec. 430; Cohen *v.* Woollard, 2 Tenn. Ch. 686; Mulloy *v.* Paul, 2 Tenn. Ch. 156. See also Hornsby *v.* Davis, (Tenn. Ch. 1895) 36 S. W. 159.

Vermont.— Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376; Spaulding *v.* Warren, 25 Vt. 316.

Virginia.— Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137.

Wisconsin.— Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355; McMillan *v.* Wehle, 55 Wis. 685, 13 N. W. 694.

United States.— Lea *v.* Polk County Copper Co., 21 How. (U. S.) 493, 16 L. ed. 203; La Crosse *v.* Cameron, 80 Fed. 264, 46 U. S. App. 722, 25 C. C. A. 399.

Spanish and Mexican grants.— An incomplete claim to land under Spanish authority is admissible for the purpose of laying a predicate from which it may be presumed that defendant and those under whom he claims had been in possession for twenty years, so as to give title by prescription, though the evidence of title had not been recorded as required by the acts of congress relating to Spanish grants. Doe *v.* Eslava, 11 Ala. 1028.

Subsequently altered deed.— Where an alteration is made in a deed with the knowledge and consent of the grantor, the part altered need not be registered to make it color of title. Doe *v.* McArthur, 9 N. C. 33, 11 Am. Dec. 738.

90. Doe *v.* McArthur, 9 N. C. 33, 11 Am. Dec. 738.

91. Roe *v.* Williams, 38 Ga. 597.

92. Brown *v.* Brown, 106 N. C. 451, 11 S. E. 647.

93. Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991; Hunter *v.* Kelly, 92 N. C. 285.

Under a statute which provides that "whoever has resided on a tract of land for . . . seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the state or the United States, can plead the possession in bar of the suit," it is not necessary that the entire title of defendant be evidenced by acts of record; if the source or foundation of the title is of record it is available to every person claiming a legal title who can connect himself with it by such evidence as applies to the nature of the rights set up. Dolton *v.* Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830. See also Mattison *v.* Walker, 1 Biss. (U. S.) 62, 16 Fed. Cas. No. 9,297.

years next after the cause of action shall have accrued, etc., the deed under which possession is held, to constitute color of title, must be duly registered.[94] Under this statute it is not sufficient that some former deed in the claimant's chain of title has been so registered,[95] and the deed must have been of record for the full statutory period of five years before the institution of the suit.[96] So, under a statute providing that possession of land must be held under a written memorandum of title, duly registered, fixing the boundaries, in order to render available the bar of the statute as to more than a designated grant of land, possession of a greater tract would not enable a claimant to plead the statute to an action to recover the excess, in the absence of such a memorandum made and recorded.[97]

(III) *What Registration Sufficient When Registration Necessary.* Where registration is necessary, the deed should be recorded in the county or parish where the land lies.[98]

f. Unsealed Deeds. A deed purporting to convey title will constitute color of title though it be without seal.[99]

g. Unsigned Deeds. It has been held that an unsigned deed gives the grantee color of title.[1]

h. Deeds Not Delivered to Grantee. An instrument, though signed, is not available to prove color of title unless it has been delivered.[2]

i. Deeds Not Describing or Improperly Describing Land — (I) *Necessity*

94. Sorley *v.* Matlock, 79 Tex. 304, 15 S. W. 261; Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31; Cook *v.* Dennis, 61 Tex. 246; Porter *v.* Chronister, 58 Tex. 53; Davidson *v.* Wallingford, (Tex. Civ. App. 1895) 30 S. W. 286; Adkins *v.* Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291; McCurdy *v.* Locker, 2 Tex. Civ. App. 220, 20 S. W. 1109; Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405.

95. Cook *v.* Dennis, 61 Tex. 246; Porter *v.* Chronister, 58 Tex. 53.

96. Adkins *v.* Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291.

97. Hodges *v.* Robbins, (Tex. Civ. App. 1900) 56 S. W. 565.

98. Prevost *v.* Ellis, 11 Rob. (La.) 56; Duplessis *v.* Boutte, 11 La. 342; Adams *v.* Hayden, 60 Tex. 223, wherein it is held that if the deed had been recorded in another county than that in which the land is situated, no matter how clear the mistake or from what cause it originated, the bar of the statute does not apply.

Deed of land lying in two counties.— Under a statute providing that, where real estate is situate in two or more counties, probate of a deed conveying the same, made before the clerk of the superior court of either county, is sufficient, a deed to land situate in two counties, but registered in one only, is admissible to show color of title. Lewis *v.* John L. Roper Lumber Co., 109 N. C. 19, 13 S. E. 701.

Sufficiency of copy.—It is not essential that the deed thus registered should have been correctly copied in every part by the recording clerk. If it is copied with sufficient accuracy to enable persons examining the records to see that the record and the deed are the same land it is sufficient. Woodson *v.* Allen, 54 Tex. 551.

99. *Florida.*— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Illinois.— Barger *v.* Hobbs, 67 Ill. 592; Watts *v.* Parker, 27 Ill. 224.

Massachusetts.— Aylward *v.* O'Brien, 160 Mass. 118, 35 N. E. 313, 22 L. R. A. 206.

Missouri.— Hamilton *v.* Boggess, 63 Mo. 233; Crispen *v.* Hannavan, 50 Mo. 536.

New Hampshire.— Farrar *v.* Fessenden, 39 N. H. 268.

New York.— Jackson *v.* Newton, 18 Johns. (N. Y.) 355.

Applications of rule.— The rule has been applied in the case of a sheriff's deed without seal (Kruse *v.* Wilson, 79 Ill. 233) and in the case of a deed of a master in chancery (Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109).

Seal affixed after delivery.— A master's deed for land sold under a decree apparently regular on its face, and properly describing the land and purporting to convey it, is good as color of title though sealed by the master several years after its delivery. Davis *v.* Hall, 92 Ill. 85.

Writing in the form of a deed, signed and delivered by a person since deceased, purporting to convey land, but not sealed as required by law, is sufficient to give color of title. Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

1. Reddick *v.* Long, (Ala. 1900) 27 So. 402. See also Childress *v.* Calloway, 76 Ala. 128; Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

2. Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991. To same effect see Nye *v.* Alfter, 127 Mo. 529, 30 S. W. 186.

Deed delivered as an escrow.—A deed delivered as an escrow, to be delivered absolutely on the performance of a certain act, if finally rejected by the bargainee, does not give his possession color of title. Chastien *v.* Philips, 33 N. C. 255.

Proof of delivery.— The delivery of a paper writing offered to show color of title may be proved by parol. Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

OF DESCRIPTION. It is elementary law that a deed is color of title only as to land actually described in it.[3]

(II) *SUFFICIENCY OF DESCRIPTION.* Any description which, unaided by extrinsic facts, satisfies the mind that the land adversely occupied is embraced within the description contained in the deed, will of course be sufficient.[4] So a

3. *Alabama.*—Reddick *v.* Long, (Ala. 1900) 27 So. 402; Louisville, etc., R. Co. *v.* Boykin, 76 Ala. 560.

Arizona.— U. S. *v.* Cameron, (Ariz. 1889) 21 Pac. 177.

California.— *Compare* Tryon *v.* Huntoon, 67 Cal. 325, 7 Pac. 741.

Colorado.— Laughlin *v.* Denver, 24 Colo. 255, 50 Pac. 917.

Connecticut.— Dubuque *v.* Coman, 64 Conn. 475, 30 Atl. 777.

Georgia.— Williamson *v.* Tison, 99 Ga. 791, 26 S. E. 766; Etowah, etc., Min. Co. *v.* Parker, 73 Ga. 51.

Illinois.— Ohio, etc., R. Co. *v.* Barker, 125 Ill. 303, 17 N. E. 797; Lancey *v.* Brock, 110 Ill. 609; Bolden *v.* Sherman, 101 Ill. 483; Wray *v.* Chicago, etc., R. Co., 86 Ill. 424; Brooks *v.* Bruyn, 35 Ill. 392; Shackleford *v.* Bailey, 35 Ill. 387.

Indiana.— Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930, holding that a deed referring for description to another deed which contains no description whatever does not give color of title; Noblesville, etc., R. Co. *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484.

Iowa.— Sater *v.* Meadows, 68 Iowa 507, 27 N. W. 481.

Kentucky.— Chenault *v.* Quisenberry, (Ky. 1900) 57 S. W. 234; Henderson *v.* Howard, 1 A. K. Marsh. (Ky.) 26.

Louisiana.— Reeves *v.* Towles, 10 La. 276.

Michigan.— Nichols *v.* New England Furniture Co., 100 Mich. 230, 59 N. W. 155.

Minnesota.— *Compare* Vandall *v.* St. Martin, 42 Minn. 163, 44 N. W. 525.

Missouri.— Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352.

New Hampshire.— Bellows *v.* Jewell, 60 N. H. 420.

New Jersey.—Pennsylvania R. Co. *v.* Breckenridge, 60 N. J. L. 583, 38 Atl. 740.

New York.— Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. 422 [*affirming* 89 Hun (N. Y.) 126, 34 N. Y. Suppl. 1085]; Pope *v.* Hanmer, 74 N. Y. 240; Wheeler *v.* Spinola, 54 N. Y. 377, holding that a deed the lines of which do not describe or inclose any land is insufficient; Casey *v.* Dunn, 57 N. Y. Super. Ct. 381, 8 N. Y. Suppl. 305; Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

North Carolina.— Barker *v.* Southern R. Co., 125 N. C. 596, 34 S. E. 701; Carson *v.* Carson, 122 N. C. 645, 30 S. E. 4; Basnight *v.* Smith, 112 N. C. 229, 16 S. E. 902; Davis *v.* Stroud, 104 N. C. 484, 10 S. E. 666; King *v.* Wells, 94 N. C. 344; Smith *v.* Fite, 92 N. C. 319; Price *v.* Jackson, 91 N. C. 11; Davidson *v.* Arledge, 88 N. C. 326; Dickens *v.* Barnes, 79 N. C. 490; McRae *v.* Williams, 52 N. C. 430.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— Gudger *v.* Barnes, 4 Heisk. (Tenn.) 570; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488.

Texas.— Cook *v.* Oliver, 83 Tex. 559, 19 S. W. 161; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490; Berrendo Stock Co. *v.* Kaiser, 66 Tex. 352, 1 S. W. 257; Newton *v.* Alexander, (Tex. Civ. App. 1897) 44 S. W. 416; Simpson *v.* Johnson, (Tex. Civ. App. 1898) 44 S. W. 1076; Williams *v.* Thomas, 18 Tex. Civ. App. 472, 44 S. W. 1073, holding that a deed purporting to convey one tract does not give color of title to another; Bowles *v.* Smith, (Tex. Civ. App. 1896) 34 S. W. 381; Alexander *v.* Newton, 11 Tex. Civ. App. 618, 33 S. W. 305; Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438; Willis *v.* Burke, 7 Tex. Civ. App. 239, 27 S. W. 217; Curdy *v.* Stafford, (Tex. Civ. App. 1894) 27 S. W. 823; Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682; Baird *v.* Patillo, (Tex. Civ. App. 1894) 24 S. W. 813.

Virginia.— Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Wisconsin.— Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587.

United States.— Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475; Jenkins *v.* Trager, 40 Fed. 726 [*affirmed* in 136 U. S. 651, 10 S. Ct. 1074, 34 L. ed. 557].

Additional land without color of title.— When a party asserts a deed as a foundation of his title, his adverse possession is not necessarily confined to the premises embraced in his deed. But one who goes beyond the limits of the land described in his deed, and claims to hold the same adversely, is without color of title thereto and is limited to his actual inclosures. Sherry *v.* Frecking, 4 Duer (N. Y.) 452; Heavner *v.* Morgan, 41 W. Va. 428, 23 S. E. 874. See, generally, *infra*, XI.

Reference to unrecorded deed.— Where, by statute, recorded deeds are necessary to give color of title, a deed referring for description to a deed not recorded does not sufficiently describe the land to give color of title. McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490. Otherwise as to a deed referring for description to a deed of record sufficiently describing the property. Cantagrel *v.* Von Lupin, 58 Tex. 570.

Subsequent correction of description.— Where land is misdescribed in a deed, and subsequently the correct description is added, the grantor has color of title only from the date of the corrected deed. Weaver *v.* Wilson, 48 Ill. 125.

4. Day *v.* Needham, 2 Tex. Civ. App. 680, 22 S. W. 103.

description, though indefinite, is sufficient if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change description, fit it to the property conveyed by the deed.[5] It is necessary, however, that the description be such that it can be rendered certain by such evidence.[6]

j. Deed of Person without Title or with Title to Part Only. In order that a deed may give color of title it is not necessary that the grantor should have had title either to the whole of the land[7] or to any part of the land con-

5. *Georgia.*—Tumlin *v.* Perry, 108 Ga. 520, 34 S. E. 171; Hunt *v.* Dunn, 74 Ga. 120.

Illinois.— See Bolden *v.* Sherman, 110 Ill. 418.

Minnesota.— McRoberts *v.* McArthur, 62 Minn. 310, 64 N. W. 903.

Missouri.— Thornton *v.* Missouri Pac. R. Co., 40 Mo. App. 265.

North Carolina.—Davis *v.* Stroud, 104 N. C. 484, 10 S. E. 666; Henley *v.* Wilson, 81 N. C. 405.

Oregon.— Smith *v.* Shattuck, 12 Oreg. 362, 7 Pac. 335.

South Carolina.— Harris *v.* Eubanks, 1 Speers (S. C.) 183.

Texas.— McCurdy *v.* Locker, 2 Tex. Civ. App. 220, 20 S. W. 1109.

6. Dickens *v.* Barnes, 79 N. C. 490.

Descriptions held sufficient.— "The entire survey number 118, of 738 acres, Robert Wheally, in Kinney County, Texas" (Hodges *v.* Ross, 6 Tex. Civ. App. 437, 439, 25 S. W. 975); a description, "200 acres of land in Hill County, Texas, lying about 6 miles northeast from Hillsboro, and located by virtue of part of M. B. Atkinson 320-acre certificate," it being made plain by other evidence in the record that this composed the whole of the survey at that place, and that the deed did not refer to two hundred acres to be taken out of the larger tract (Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 109, 21 S. W. 405); "620 acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellview" (Flanagan *v.* Boggess, 46 Tex. 330, 332); "Town, Ft. Des Moines, Lots 3, 6, 7, Block 2" (Childs *v.* Shower, 18 Iowa 261); "All that part of the west half of the N. W. quarter of section 19, township 17, range 3 west, that lies south of Black Creek" (Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537).

For other instances of descriptions held sufficient see Burdell *v.* Blain, 66 Ga. 169; Bolden *v.* Sherman, 110 Ill. 418; Hebard *v.* Scott, 95 Tenn. 467, 32 S. W. 390; Cohen *v.* Woollard, 2 Tenn. Ch. 686; Jones *v.* Powers, 65 Tex. 207; Flint *v.* Long, 12 Wash. 342, 41 Pac. 49; Heinselman *v.* Hunsicker, 103 Wis. 12, 79 N. W. 23.

Descriptions held insufficient.— A description of premises as beginning at a stake and fixing the corners by nothing more definite than a stake (Barker *v.* Southern R. Co., 125 N. C. 596, 34 S. E. 701); an instrument conveying one half of six-hundred-and-forty-acre certificate, and containing a clause authorizing the grantee to convey the land surveyed; there being nothing in the instrument itself or anything referred to therein to identify any land (Masterson *v.* Todd, 6 Tex. Civ. App. 131, 124 S. W. 682); a deed of "400 acres . . . to be taken in a square as near as practicable out of the survey . . . beginning at the northeast corner thereof" (Willis *v.* Burke, 7 Tex. Civ. App. 239, 240, 27 S. W. 217); a deed describing the land as "one tract of land lying and being in the county aforesaid, adjoining the lands of [A and B], containing twenty acres more or less" (Dickens *v.* Barnes, 79 N. C. 490); a deed conveying "all the right, title, interest, and claim that I have in or to 450 acres of land situated in H. county, on the east bank of T. river, and the same known as the Brookfield Bluff place, and same being now occupied by said M.," in the absence of parol evidence to identify the land (Cook *v.* Oliver, 83 Tex. 559, 561, 19 S. W. 161); a description of land as the residue of the tract sold by W to D, and not previously conveyed by D, in the absence of evidence identifying the boundaries of the residue (Davis *v.* Stroud, 104 N. C. 484, 10 S. E. 666).

For other cases of descriptions held insufficient to give color of title see Ohio, etc., R. Co. *v.* Barker, 125 Ill. 303, 17 N. E. 797; Wray *v.* Chicago, etc., R. Co., 86 Ill. 424; Bellows *v.* Jewell, 60 N. H. 420; Williams *v.* Thomas, 18 Tex. Civ. App. 472, 44 S. W. 1073.

A deed calling for the "north line" of a town as the north line of the land conveyed gives color of title to land lying between the true north line of the town and a line claimed farther north, if the line was claimed by the town, its inhabitants, and the parties to the deed as the true line. Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

Mesne conveyances.—Where a claimant and his predecessors have been in actual possession for more than forty years under deeds duly recorded, the descriptions in the most of which exactly correspond to the lines of occupation, it is immaterial that the descriptions in some of the old deeds are defective. Bay *v.* Posner, 78 Md. 42, 26 Atl. 1084.

7. Hinchman *v.* Whetstone, 23 Ill. 185; Allen *v.* Van Bibber, 89 Md. 434, 43 Atl. 758.

Conveyance of undivided interest.— Actual possession of a part of a tract under a deed, conveying an undivided interest in the tract, which describes the whole, is sufficient to confer title by adverse possession to the entire tract described as against the true owner. Chamberlain *v.* Ahrens, 55 Mich. 111, 20 N. W. 814; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488. *Compare* Lancey *v.* Brock, 110 Ill. 609.

Grantor having rights of mortgagee.— A deed which purports to convey a complete title may be sufficient to give color of title, although the grantor had in fact only the rights of a mortgagee. Stevens *v.* Brooks, 24 Wis. 326.

veyed,[8] unless there is some statute from which this requirement may be inferred.[9]

k. Forged Deeds. It has been held that a forged deed in the hands of a *bona fide* holder constitutes color of title.[10] But under the statutes of most jurisdictions a forged deed cannot constitute the basis of a prescriptive title to land where the grantee participates in or has knowledge of the forgery.[11]

l. Fraudulent Deeds. There is some conflict of opinion as to whether a fraudulent deed constitutes color of title. It has been held that deeds, though

A sheriff's deed defective because the deed conveyed a tract of land part of which was in another county, and which the sheriff in consequence had no right to convey, is good to show color of title to the whole tract. Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351, 14 Ga. 70.

8. *Alabama.*— Ryan *v.* Kilpatrick, 66 Ala. 332; Riggs *v.* Fuller, 54 Ala. 141.

Georgia.— Bennett *v.* Walker, 64 Ga. 326; McMullin *v.* Erwin, 58 Ga. 427; Gittens *v.* Lowry, 15 Ga. 336.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149; Nelson *v.* Davidson, 160 Ill. 254, 43 N. E. 361, 52 Am. St. Rep. 338, 31 L. R. A. 325; Lewis *v.* Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Stumpf *v.* Osterhage, 111 Ill. 82; Coleman *v.* Billings, 89 Ill. 183; Austin *v.* Rust, 73 Ill. 491; Lake Shore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 71 Ill. 38; Barger *v.* Hobbs, 67 Ill. 592; Hardin *v.* Osborn, 60 Ill. 93; Brooks *v.* Bruyn, 35 Ill. 392, 18 Ill. 539; Prettyman *v.* Wilkey, 19 Ill. 235; Davis *v.* Easley, 13 Ill. 192.

Indiana.— O'Donahue *v.* Creager, 117 Ind. 372, 20 N. E. 267.

Kentucky.—Mullins *v.* Faulkner, (Ky. 1892) 20 S. W. 273; Thomas *v.* Harrow, 4 Bibb (Ky.) 563.

Maine.— Coombs *v.* Persons Unknown, 82 Me. 326, 19 Atl. 826; Noyes *v.* Dyer, 25 Me. 468; Robison *v.* Swett, 3 Me. 316; Kennebec Purchase *v.* Laboree, 2 Me. 275, 11 Am. Dec. 79.

Maryland.— Allen *v.* Van Bibber, 89 Md. 434, 43 Atl. 758.

Michigan.— Reilly *v.* Blaser, 61 Mich. 399, 28 N. W. 151.

New York.— Sands *v.* Hughes, 53 N. Y. 287; Bissing *v.* Smith, 85 Hun (N. Y.) 564, 33 N. Y. Suppl. 123; Northrop *v.* Wright, 7 Hill (N. Y.) 476.

North Carolina.— Ingram *v.* Colson, 14 N. C. 445; Ray *v.* McCulloch, 1 N. C. 543.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.—Love *v.* Shields, 3 Yerg. (Tenn.) 404.

Texas.— McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490.

Virginia.— Stull *v.* Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233.

United States.— Lea *v.* Polk County Copper Co., 21 How. (U. S.) 493, 16 L. ed. 203; Field *v.* Columbet, 4 Sawy. (U. S.) 523, 9 Fed Cas No. 4,764; Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

Where grantee subsequently acquires title. — Where a person conveys by warranty deed land to which he has no title, and afterward a deed of the property is made to him, and he conveys it to a second grantee, the said deed to him cannot be relied on by his second grantee as color of title in good faith within the meaning of the statute of limitations, since the title acquired by such deed enured to the benefit of the first grantee. Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49.

9. **Rule under Texas statutes.**— *Under the five years' statute of limitations* it is not necessary that the grantor should have had title in order that a deed given by him may confer color of title. Harris *v.* Wells, (Tex. 1892) 20 S. W. 68; McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490; Hunton *v.* Nichols, 55 Tex. 217; Massie *v.* Meeks, (Tex. Civ. App. 1894) 28 S. W. 44.

Three years' statute of limitations.— The purchaser from one whose interest in land was sold under a valid judgment and execution sale to another before the date of his purchase cannot prescribe under the three years' statute of limitations. Grigsby *v.* May, 84 Tex. 240, 19 S. W. 343; Blum *v.* Rogers, 71 Tex. 668, 9 S. W. 595; Brownson *v.* Scanlan, 59 Tex. 222; Long *v.* Brenneman, 59 Tex. 210; Harris *v.* Hardeman, 27 Tex. 248; Wright *v.* Daily, 26 Tex. 730; Illies *v.* Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915.

10. Millen *v.* Stines, 81 Ga. 655, 8 S. E. 315; Stamper *v.* Griffin, 20 Ga. 312, 65 Am. Dec. 628; Griffin *v.* Stamper, 17 Ga. 108.

11. Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871; Hunt *v.* Dunn, 74 Ga. 120; Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511; Hussey *v.* Moser, 70 Tex. 42, 7 S. W. 606 [decided under the three years' statute of limitations, which defines color of title required to support the statutory bar of three years as such a muniment of title as is "not wanting in intrinsic fairness and honesty"]; Macdonnell *v.* De Los Fuentes, 7 Tex. Civ. App. 136, 26 S. W. 792; Moses *v.* Dibrell, 2 Tex. Civ. App. 457, 21 S. W. 414 [decided under the five years' statute, providing that no one claiming under a forged deed or deed executed under a forged power of attorney shall be allowed the benefit of the statute]. *Compare* Byne *v.* Wise, (Tex. Civ. App. 1895) 31 S. W. 1069, in which it is said: "It seems that the fact that a person claims under a forged deed will not prevent him from prescribing under the ten years' statute," which provides that suits against any one having peaceable and adverse possession of lands, cultivating, using, or enjoying the same, shall be brought within ten years next after the cause of action shall have accrued.

fraudulent on the part of the grantor, if accepted *bona fide* by the grantee and without knowledge of the fraud, give color of title.[12] And there are some decisions which go to the extent of holding that a deed, though procured by the grantee's fraud, will constitute color of title.[13] Other decisions, however, maintain the contrary view,[14] especially where the conveyance is made with intent to defraud creditors.[15]

m. Deeds Executed under Void or Voidable Decrees or Judgments. A deed executed under and by virtue of a judgment or decree gives color of title, although such judgment or decree is voidable or absolutely void.[16]

n. Deeds Executed under Defective or Void Sales. As a general rule, deeds executed in pursuance of a sale give color of title, although the sale be irregular or void.[17]

12. Griggs *v.* Sayre, 8 Pet. (U. S.) 244, 8 L. ed. 932.

13. Blantire *v.* Whitaker, 11 Humphr. (Tenn.) 313; Porter *v.* Cocke, Peck (Tenn.) 28; Oliver *v.* Pullam, 24 Fed. 127.

14. Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681, 65 Am. St. Rep. 291; Brown *v.* Wells, 44 Ga. 573 [decided under a statute expressly providing that adverse possession must not commence in fraud]; Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511; Hussey *v.* Moser, 70 Tex. 42, 7 S. W. 606.

15. High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103; Pickett *v.* Pickett, 14 N. C. 15; Garvin *v.* Garvin, 40 S. C. 435, 19 S. E. 79; Farrar *v.* Bernheim, 74 Fed. 435, 41 U. S. App. 172, 20 C. C. A. 496.

16. *Alabama.*— Molton *v.* Henderson, 62 Ala. 426.

California.— Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Packard *v.* Moss, 68 Cal. 123, 8 Pac. 818; Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421.

Illinois.— Sexson *v.* Barker, 172 Ill. 361, 50 N. E. 109; Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Mason *v.* Ayers, 73 Ill. 121; Winstanly *v.* Meacham, 58 Ill. 97; Huls *v.* Buntin, 47 Ill. 396.

Indiana.— Brown *v.* Maher, 68 Ind. 14; Vail *v.* Halton, 14 Ind. 344; Vancleave *v.* Milliken, 13 Ind. 105.

Kansas.— Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957.

Kentucky.—Bustard *v.* Gates, 4 Dana (Ky.) 429.

Mississippi.— Welborn *v.* Anderson, 37 Miss. 162.

New Hampshire.— Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.

North Carolina.— Falls of Neuse Mfg. Co. *v.* Brooks, 106 N. C. 107, 11 S. E. 456 (dormant judgment).

Tennessee.— Whiteside *v.* Singleton, Meigs (Tenn.) 207; Gray *v.* Darby, Mart. & Y. (Tenn.) 396.

Virginia.— Lennig *v.* White, (Va. 1894) 20 S. E. 831.

West Virginia.— Hitchcox *v.* Morrison, (W. Va. 1899) 34 S. E. 993; Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527.

United States.— Hall *v.* Law, 102 U. S. 461, 26 L. ed. 217; Lewis *v.* Barnhardt, 43 Fed. 854 [*affirmed* in 145 U. S. 56, 12 S. Ct. 772, 36 L. ed. 621]. *Compare* Walker *v.* Turner, 9 Wheat. (U. S.) 541, 6 L. ed. 155.

Guardian's deed.— Possession of land under a conveyance of a guardian made in pursuance of a void decree of the probate court for its sale, is supported by color of title. Molton *v.* Henderson, 62 Ala. 426.

Administrator's deed.— Where real estate is sold by an administrator pursuant to a decree of a competent court to raise assets to pay debts due from the estate, the administrator's deed is color of title. Stumpf *v.* Osterhage, 111 Ill. 82; Conner *v.* Goodman, 104 Ill. 365.

Order of sale in partition.— Where an order of sale of a decedent's land in partition by the devisees purports to be of the entire interest in the land, and the deed is in conformity therewith, it gives color of title, and the possession of the purchaser under it, and of those claiming under him, is adverse from the date of the sale. Amis *v.* Stephens, 111 N. C. 172, 16 S. E. 17; McColloh *v.* Daniels, 102 N. C. 529, 9 S. E. 413.

17. *Alabama.*— Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73; Long *v.* Parmer, 81 Ala. 384, 1 So. 900; Boykin *v.* Smith, 65 Ala. 294; Lay *v.* Lawson, 23 Ala. 377.

Florida.— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Georgia.— Hammond *v.* Crosby, 68 Ga. 767; Sutton *v.* McLoud, 26 Ga. 638; Hester *v.* Coats, 22 Ga. 56; Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744.

Illinois.— Lewis *v.* Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Brian *v.* Melton, 125 Ill. 647, 18 N. E. 318; Fritz *v.* Joiner, 54 Ill. 101; Oetgen *v.* Ross, 54 Ill. 79; Laflin *v.* Herrington, 16 Ill. 301.

Indiana.— Irey *v.* Mater, 134 Ind. 238, 33 N. E. 1018; Orr *v.* Owens, 128 Ind. 229, 27 N. E. 493; Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Souders *v.* Jeffries, 107 Ind. 552, 8 N. E. 288; Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Ray *v.* Detchon, 79 Ind. 56; Brown *v.* Maher, 68 Ind. 14; Hatfield *v.* Jackson, 50 Ind. 507; Gray *v.* Stiver, 24 Ind. 174; Doe *v.* Hearick, 14 Ind. 242.

Iowa.— Gebhard *v.* Sattler, 40 Iowa 152.

Kentucky.— Bell *v.* Fry, 5 Dana (Ky.) 341; Hoskins *v.* Helm, 4 Litt. (Ky.) 309, 14 Am. Dec. 133. See also Riggs *v.* Dooley, 7 B. Mon. (Ky.) 236.

Louisiana.— Louaillier *v.* Castille, 14 La. Ann. 777.

Michigan.— *Compare* Hogsett *v.* Ellis, 17 Mich. 351.

o. Deeds Executed Pursuant to Power under Will. If a deed is made pursuant to a power conferred by will it will give color of title.[18]

p. Deeds Adjudged Invalid. It has been held that there cannot be a holding under color of title where the paper relied on as giving color of title has been adjudged void in another suit to which the holder was a party. Such a paper does not give "appearance of title,"[19] and possession subsequent thereto is tortious as against the true owners.[20]

q. Deeds Executed in Violation of Statute. A deed executed in violation of express statutory provisions has been held not to give color of title.[21]

r. Rescinded or Canceled Deeds. It has been held that where the parties to a deed undertake by verbal contract to rescind the deed, and the grantor thereafter remains in the actual possession of a part of the land, he is in possession under color of title.[22]

s. Deeds of Doubtful Meaning or Construction. Where possession is taken and held under an instrument the meaning or construction of which is doubtful and ambiguous, public policy will solve the doubt in favor of the claimant.[23]

t. Lost Deeds. A lost deed, the contents of which are proved on the trial

Mississippi.— Brougher *v.* Stone, 72 Miss. 647, 17 So. 509; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

Missouri.— Crispen *v.* Hannavan, 50 Mo. 536.

New York.— O'Connor *v.* Huggins, 113 N. Y. 511, 21 N. E. 184; Davis *v.* Burrows, 55 Hun (N. Y.) 604, 8 N. Y. Suppl. 379; Hilton *v.* Bender, 4 Thomps. & C. (N. Y.) 270.

North Carolina.— McCulloh *v.* Daniel, 102 N. C. 529, 9 S. E. 413.

South Carolina.— Gourdin *v.* Davis, 2 Rich. (S. C.) 481, 45 Am. Dec. 745.

Texas.— Brown *v.* O'Brien, 11 Tex. Civ. App. 459, 33 S. W. 267; Halbert *v.* Martin, (Tex. Civ. App. 1895) 30 S. W. 383.

West Virginia.—Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423; Swann *v.* Young, 36 W. Va. 57, 14 S. E. 426.

Wisconsin.— North *v.* Hammer, 34 Wis. 425.

United States.— Pike *v.* Evans, 94 U. S. 6, 24 L. ed. 40; Gottlieb *v.* Thatcher, 51 Fed. 373, 4 U. S. App. 616, 2 C. C. A. 278; Balkham *v.* Woodstock Iron Co., 43 Fed. 648, 11 L. R. A. 230.

Rule in Texas.— In Texas a sheriff's deed on a sale under an execution fraudulently issued will not support a claim of color of title by the execution purchaser or his privies attempting to hold the premises by adverse possession within the three years' statute of limitations. Garvin *v.* Hall, 83 Tex. 295, 18 S. W. 731.

18. Dubuque *v.* Coman, 64 Conn. 475, 30 Atl. 777.

Void limitation in will.— A father devised land to his son R, with a limitation over to his son C in case R should die without issue. R died without issue, and C conveyed by deed to L, which deed was duly recorded. It was held that though the limitation was void as being after an indefinite failure of issue, yet the deed gave L color of title, and his entry thereunder vested in him adverse possession of the whole tract. Lurman *v.* Hubner, 75 Md. 268, 23 Atl. 646.

19. Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661; Sholl *v.* German Coal Co., 139 Ill. 21, 28 N. E. 748; Hintrager *v.* Smith, 89 Iowa 270, 56 N. W. 456; Presley *v.* Holmes, 33 Tex. 476.

20. Presley *v.* Holmes, 33 Tex. 476.

21. Taylor *v.* Brown, 5 Dak. 335, 40 N. W. 525; Smythe *v.* Henry, 41 Fed. 705, in which cases it was held that a conveyance of land by an Indian in violation of a statute of the United States which forbids such conveyance is void and confers no color of title.

22. Hughes *v.* Israel, 73 Mo. 538. *Compare* Bullock *v.* Smith, 72 Tex. 545, 10 S. W. 687, in which it was held that possession assumed by the grantor is not under color of title of his original grant, and that his claim under the statute is restricted to the limits of his actual occupation.

Abandonment of possession.—Where a vendor sells part of a tract of land, being in possession of the whole, and the vendee pays but a part of the purchase-price and abandons the possession taken under the purchase, and the vendor takes control of the whole, his claim will be defined by his former ownership and his title limited thereby. Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600.

Cancellation of certificate of entry.— Cancellation by the commissioner of a *bona fide* certificate of entry without the purchaser's knowledge will not destroy his color of title and remit him, in his right of recovery, to that portion of the land actually in his possession for the period prescribed by the statute of limitations. Hannibal, etc., R. Co. *v.* Clark, 68 Mo. 371.

23. Westmoreland *v.* Westmoreland, 92 Ga. 233, 17 S. E. 1033; Schlawig *v.* Purslow, 59 Fed. 848, 19 U. S. App. 501, 8 C. C. A. 315, wherein it was held that possession under an instrument which the parties intend as a deed, followed by unequivocal acts of ownership without objection, will show adverse possession, though it is doubtful whether the instrument on its face is a mortgage or a deed.

and which is shown to have been executed and delivered, will give color of title to the possession of a defendant in ejectment.[24]

u. Quitclaim Deeds. A quitclaim deed may constitute color of title.[25]

v. Tax-Deeds. A tax-deed may give color of title,[26] although informal and defective,[27] or even when absolutely void,[28] unless the land in controversy is not

24. Harbison *v.* School Dist. No. 1, 89 Mo. 184, 1 S. W. 30. But see Marsh *v.* Sevin, 28 La. Ann. 326, holding that a lost trust deed of which there is no record cannot be the basis of a prescriptive title.

25. *Georgia.*— Hammond *v.* Crosby, 68 Ga. 767; Castleberry *v.* Black, 58 Ga. 386; McCamy *v.* Higdon, 50 Ga. 629.

Illinois.— Safford *v.* Stubbs, 117 Ill. 389, 7 N. E. 653; Busch *v.* Huston, 75 Ill. 343; Holloway *v.* Clark, 27 Ill. 483.

Iowa.— Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609. *Compare* Knight *v.* Campbell, 76 Iowa 730, 39 N. W. 829.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235; Minot *v.* Brooks, 16 N. H. 374, holding that a quitclaim deed of all the grantor's title under a collector's deed is color of title, although no interest may have passed by such deed. *Compare* Woods *v.* Banks, 14 N. H. 101, holding that a quitclaim by release of all the right, title, and interest by one not shown to have had any color of title or possession is not color of title.

Texas.— Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815; McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490.

Extent of grantor's interest.— Where a party in possession of land, of which his wife is seized as heir of an undivided part, takes a quitclaim from one of the other heirs, who is seized of an undivided one-fourth thereof, and he simply releases and quitclaims all his right, title, and interest, such deed will constitute good color of title to the extent of the grantor's interest and no further. Busch *v.* Huston, 75 Ill. 343.

Lands not included in deed.— A conveyance by quitclaim of a tract of land will not give the grantee the benefit of the grantor's interest in other land, and such deed cannot, therefore, operate as color of title to such other land. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

26. *Alabama.*— National Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47; Rivers *v.* Thompson, 43 Ala. 633; Dillingham *v.* Brown, 38 Ala. 311.

Georgia.— Kile *v.* Fleming, 78 Ga. 1.

Illinois.— Chicago *v.* Middlebrooke, 143 Ill. 265, 32 N. E. 457; Lewis *v.* Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Coleman *v.* Billings, 89 Ill. 183; Scott *v.* Delany, 87 Ill. 146; Hardin *v.* Crate, 78 Ill. 533; Whitney *v.* Stevens, 77 Ill. 585; Henrichsen *v.* Hodgen, 67 Ill. 179; Morrison *v.* Norman, 47 Ill. 477; Holloway *v.* Clark, 27 Ill. 483; Phillips *v.* People, 11 Ill. App. 340.

Indiana.— Hearick *v.* Doe, 4 Ind. 164.

Iowa.— Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 20 N. W. 779.

Missouri.— De Graw *v.* Taylor, 37 Mo. 310.

Texas.— Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53.

United States.— McIntyre *v.* Thompson, 4 Hughes 562, 10 Fed. 531.

When color of title attaches.—The claimant of land under a tax-deed has color of title only from the date of deed and not from date of sale. De Graw *v.* Taylor, 37 Mo. 310; Holden *v.* Collins, 5 McLean (U. S.) 189, 12 Fed. Cas. No. 6,599. See also Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

27. *Alabama.*— Doe *v.* Anderson, 79 Ala. 209; Stovall *v.* Fowler, 72 Ala. 77; Pugh *v.* Youngblood, 69 Ala. 296; Ladd *v.* Dubroca, 61 Ala. 25; Dillingham *v.* Brown, 38 Ala. 311.

Arkansas.— Elliott *v.* Pearce, 20 Ark. 508.

District of Columbia.— Todd *v.* Kauffman, 19 D. C. 304.

Illinois.— Coleman *v.* Billings, 89 Ill. 183; Whitney *v.* Stevens, 77 Ill. 585 (omission to file affidavit); Baily *v.* Doolittle, 24 Ill. 577 (sale without judgment).

Iowa.—Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14; Douglass *v.* Tullock, 34 Iowa 262; Thomas *v.* Stickle, 32 Iowa 71 (sale of land in bulk).

Minnesota.—Ricker *v.* Butler, 45 Minn. 545, 48 N. W. 407.

New York.— Finlay *v.* Cook, 54 Barb. (N. Y.) 9.

Tennessee.— Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

Texas.— Seemuller *v.* Thornton, 77 Tex. 156, 13 S. W. 846.

Virginia.— Lennig *v.* White, (Va. 1894) 20 S. E. 831.

Wisconsin.— Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

United States.— Lewis *v.* Barnhart, 145 U. S. 56, 12 S. Ct. 772, 36 L. ed. 621 [*affirming* 43 Fed. 854]; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 8 U. S. App. 229, 3 C. C. A. 294.

28. *Alabama.*— National Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47, holding, however, that possession must be taken under the deed.

California.— Wilson *v.* Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299.

Colorado.—Bennet *v.* North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Dalton *v.* Lucas, 63 Ill. 337; Morrison *v.* Norman, 47 Ill. 477; Holloway *v.* Clark, 27 Ill. 483.

Iowa.— Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 20 N. W. 779; Colvin *v.* McCune, 39 Iowa 502.

Michigan.—Hoffman *v.* Harrington, 28 Mich. 90.

Missouri.— Pharis *v.* Bayless, 122 Mo. 116, 26 S. W. 1030.

described therein or is so insufficiently described as to render identification impossible.[29] Whatever may be the source of the invalidity of the deed, if it purports to convey land and in form passes what purports to be the title, it gives color of title.[30]

w. Deeds Executed by Agent or Attorney. A deed executed by an agent duly authorized to sell will of course give color of title.[31] It has been held that a deed executed by an agent or attorney who has no authority,[32] except perhaps where the grantee knew of the agent's want of authority,[33] or a deed executed by one under a defective power of attorney, will have the same effect.[34] And where a deed purports to be executed by virtue of a power of attorney it will be good as color of title, although the power of attorney be not shown.[35]

x. Deed of Tenant in Common. Where real estate is held in common, and one tenant assumes to convey the entire estate, and does convey it by metes and bounds, the deed will give color of title as to the whole tract, and an entry by the purchaser thereunder claiming title to the whole will operate as an actual ouster and disseizin of the cotenant.[36]

y. Deed of Married Woman Not Executed by Husband. A deed by a married woman, void because her husband did not join in the execution thereof, will nevertheless give color of title.[37]

Nebraska.— Gatling *v.* Lane, 17 Nebr. 77, 80, 22 N. W. 227, 453 (omission to show place of sale).

Tennessee.—Love *v.* Shields, 3 Yerg. (Tenn.) 404.

Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

Wisconsin.— McMillan *v.* Wehle, 55 Wis. 685, 13 N. W. 694; Oconto County *v.* Jerrard, 46 Wis. 317, 50 N. W. 591; Lindsay *v.* Fay, 25 Wis. 460; Sprechler *v.* Wakeley, 11 Wis. 432.

United States.— Bartlett *v.* Ambrose, 78 Fed. 839, 42 U. S. App. 381, 24 C. C. A. 397.

See also *supra*, VII, C, 2, c.

The contrary doctrine, namely, that a tax-deed void on its face does not give color of title, obtains in some states.

District of Columbia.— Keefe *v.* Bramhall, 3 Mackey (D. C.) 551.

Kansas.— Larkin *v.* Wilson, 28 Kan. 513; Waterson *v.* Devoe, 18 Kan. 223.

Louisiana.— Marmion *v.* McPeak, 51 La. Ann. 1631, 26 So. 376.

Minnesota.— O'Mulcahy *v.* Florer, 27 Minn. 449, 8 N. W. 166; Cogel *v.* Raph, 24 Minn. 194. *Compare* Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632; Washburn *v.* Cutter, 17 Minn. 361.

Texas.— Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120.

United States.— Redfield *v.* Parks, 132 U. S. 239, 10 S. Ct. 83, 33 L. ed. 327; Moore *v.* Brown, 4 McLean (U. S.) 211, 17 Fed. Cas. No. 9,753, holding that a deed, for land sold for taxes, which on its face shows that legal notice of the sale was not given, is void and cannot avail a person who sets up the defense of adverse possession.

29. Berrendo Stock Co. *v.* Kaiser, 66 Tex. 352, 1 S. W. 257; Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438. See also *supra*, VII, C, 2, i.

30. Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 20 N. W. 779.

31. Pike *v.* Evans, 94 U. S. 6, 24 L. ed. 40.

32. Connell *v.* Culpepper, 111 Ga. 805, 35 S. E. 667; Hill *v.* Wilton, 6 N. C. 14; Moses *v.* Dibrell, 2 Tex. Civ. App. 457, 21 S. W. 414. *Contra*, Cox *v.* Bray, 28 Tex. 247. *Compare* Breeding *v.* Taylor, 13 B. Mon. (Ky.) 477.

Agent acting by parol authority.—Although a deed is void as a muniment of title where its execution is consummated, in the absence of the grantor, by an agent who filled out the blanks, such agent acting by authority in parol, yet it is admissible as color of title. Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549.

Revocation of power by death of principal. — Although a power of attorney is revoked by the death of the principal, before the sale is made thereunder, possession under such sale is, nevertheless, with color of title. Dolton *v.* Erb, 53 Ill. 289.

33. Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511.

34. Hawley *v.* Zigerly, 135 Ind. 248, 34 N. E. 219.

35. Munro *v.* Merchant, 28 N. Y. 9; Smith *v.* Allen, 112 N. C. 223, 16 S. E. 932; Cantagrel *v.* Von Lupin, 58 Tex. 570. See also Connell *v.* Culpepper, 111 Ga. 805, 35 S. E. 667; Payne *v.* Blackshear, 52 Ga. 63.

36. *California.*— Bath *v.* Valdez, 70 Cal. 350, 11 Pac. 724. *Compare* Seaton *v.* Son, 32 Cal. 481.

New Hampshire.— Newmarket Mfg. Co. *v.* Pendergast, 24 N. H. 54.

North Carolina.— Ross *v.* Durham, 20 N. C. 153.

Pennsylvania.— Culler *v.* Motzer, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604.

Tennessee.— Weisinger *v.* Murphy, 2 Head (Tenn.) 674; Waterhouse *v.* Martin, Peck (Tenn.) 392.

United States.—Prescott *v.* Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

37. *Alabama.*— Perry *v.* Lawson, 112 Ala. 480, 20 So. 611.

Indiana.— Wright *v.* Kleyla, 104 Ind. 223, 4 N. E. 16.

Missouri.— Sutton *v.* Casseleggi, 77 Mo. 397.

New Hampshire.— Sanborn *v.* French, 22 N. H. 246.

3. Other Instruments in Writing — a. Patents or Grants. A patent or grant may constitute color of title[38] provided the land claimed is described in the instrument.[39]

b. Surveys. A survey never returned to the land office is not evidence of an adverse title without a warrant or other evidence of one,[40] and the record of a survey of land does not of itself constitute color of title thereto, although it may be evidence tending to show a claim of title.[41]

c. Preëmption Claims. An unperfected preëmption claim does not give color of title.[42]

d. Entries. A special entry of land, it has been held, may give color of title to the extent of the calls.[43]

e. Sheriff's Return. A fieri facias with the sheriff's return thereon setting forth a levy on land therein described, a sale thereof, and payment of the purchase-price, will give color of title.[44]

Texas.— Fry *v.* Baker, 59 Tex. 404.

West Virginia.— Cooey *v.* Porter, 22 W. Va. 120.

38. *Arkansas.*— Logan *v.* Jelks, 34 Ark. 547.

Connecticut.— Comins *v.* Comins, 21 Conn. 413.

Georgia.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210.

Illinois.— Payne *v.* Markle, 89 Ill. 66; Lender *v.* Kidder, 23 Ill. 49; Williams *v.* Ballance, 23 Ill. 193, 74 Am. Dec. 187.

Kentucky.— Swope *v.* Schafer, (Ky. 1887) 4 S. W. 300; Skyles *v.* King, 2 A. K. Marsh. (Ky.) 385.

North Carolina.— Kron *v.* Hinson, 53 N. C. 347.

Texas.— Burleson *v.* Burleson, 28 Tex. 383; Smith *v.* Power, 23 Tex. 29.

United States.— Gregg *v.* Tesson, 1 Black (U. S.) 150, 17 L. ed. 74; Meehan *v.* Forsyth, 24 How. (U. S.) 175, 16 L. ed. 730; Bryan *v.* Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674.

Grants from foreign government.— A possession of land in New York, under a grant from the French Canadian government prior to the conquest of Canada by the British, is not such an adverse possession as will prevent or defeat the operation of the subsequent grant of the same land under the provincial government of New York, but will be considered as held in subordination to the latter title. Jackson *v.* Waters, 12 Johns. (N. Y.) 365.

Land excepted from patent.— Where a patent for land excepts land lying within its limits "previously granted," possession under the patent, but outside of the land previously granted, is not constructive possession of the excepted land, and the patent is not color of title to the land so excepted. Basnight *v.* Smith, 112 N. C. 229, 16 S. E. 902.

A patent for lands previously patented to another, although void and passing no title, constitutes color of title. Payne *v.* Markle, 89 Ill. 66; Middlesborough Waterworks Co. *v.* Neal, (Ky. 1899) 49 S. W. 428; East Tennessee Iron, etc., Co. *v.* Wiggin, 68 Fed. 446, 37 U. S. App. 129, 15 C. C. A. 510.

Patent subject to rights of claimants under act of congress of 1823.— Patents for lands situate in Peoria, Ill., subject to claims of citizens of that town under the act of 1823, designed for their relief, is a fee-simple title on its face and gives color of title. Williams *v.* Ballance, 23 Ill. 193, 74 Am. Dec. 187; Lender *v.* Kidder, 23 Ill. 49; Gregg *v.* Tesson, 1 Black (U. S.) 150, 17 L. ed. 74; Meehan *v.* Forsyth, 24 How. (U. S.) 175, 16 L. ed. 730; Bryan *v.* Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674.

Void patents.— In Texas a void patent and mesne conveyances thereunder do not constitute color of title from and under the sovereignty of the soil. Bryan *v.* Crump, 55 Tex. 1. So a patent void for want of authority of the officer issuing it does not give color of title under the Texas three years' statute of limitations. Bates *v.* Bacon, 66 Tex. 348, 1 S. W. 256; League *v.* Rogan, 59 Tex. 427; Texas Land, etc., Co. *v.* State, 1 Tex. Civ. App. 616, 23 S. W. 258.

39. Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

40. Kester *v.* Rockel, 2 Watts & S. (Pa.) 365. See also Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232, in which it was held that a private survey and map never recorded or referred to, when made a part of the deed under which a party relying on it claims, cannot be considered color of title. Possession under color of title, as distinct from color of title, extends only to that portion of land where all claim is in actual possession.

41. Atkinson *v.* Patterson, 46 Vt. 750.

Unauthorized and illegal surveys cannot be made the basis of a prescriptive title. Melançon *v.* Bringier, 13 La. Ann. 206. *Compare* Lawrence *v.* Hunter, 9 Watts (Pa.) 64.

42. Spellman *v.* Curtenius, 12 Ill. 409; Buford *v.* Bostick, 58 Tex. 63. See also Milligan *v.* Hargrove, 6 Mart. N. S. (La.) 337.

Preëmption of titled land.—A right of preëmption cannot be acquired upon titled land; and such a claim constitutes neither title nor color of title to support the plea of the statute of limitations. Sutton *v.* Carabajal, 26 Tex. 497.

43. Childers *v.* Ryan, (Tenn. Ch. 1897) 43 S. W. 126. See also Meriwether *v.* Vaulx, 5 Sneed (Tenn.) 300; Ramsey *v.* Monroe, 3 Sneed (Tenn.) 328.

44. Walls *v.* Smith, 19 Ga. 8; Neal *v.* Nelson, 117 N. C. 393, 404, 23 S. E. 428, 53 Am.

f. Receipts. It has been held that a receipt, containing a description of land, issued by the receiver of the land office upon payment of its purchase-price to the government, is such a conveyance as is contemplated by a statute requiring an adverse claim to be founded "upon some written instrument as being a conveyance of the premises in question."[45]

g. Executory Contracts to Convey or Bond for Title. According to the weight of authority, an executory contract to convey or bond for title will give color of title as against all persons whatsoever after payment of the purchase-money.[46] Or the other hand, according to the fair weight of authority, an executory contract to convey or bond for title does not give color of title before payment of the purchase-money, at least as against the vendor.[47]

St. Rep. 590, wherein the court said: "The trend of judicial opinion is toward the reasonable view that a purchaser who has paid the price for which he bought, whether from a public officer at auction sale or from an individual contractor, if he is in the occupation of the land bought, holds it adversely to all the world under any writing that describes the land and defines the nature of his claim"; Doe *v.* Southard, 10 N. C. 119, 14 Am. Dec. 578. *Compare* Downey *v.* Murphey, 18 N. C. 82. See also *infra*, note 45.

45. Cawley *v.* Johnson, 21 Fed. 492, 493, construing Wis. Rev. Stat. (1898) § 4211.

"The duplicate receipt of the receiver of a land office, or, if that be lost or destroyed or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent" (Nebr. Code Civ. Proc., § 411), and is sufficient color of title under which a party may hold adverse possession (Carroll *v.* Patrick, 23 Nebr. 834, 37 N. W. 671).

A written receipt by a sheriff, acknowledging payment of the purchase-price of certain land at sheriff's sale, is sufficient color of title. Field *v.* Boynton, 33 Ga. 239.

46. *Alabama.*—Farley *v.* Smith, 39 Ala. 38; Ormond *v.* Martin, 37 Ala. 598; McQueen *v.* Ivey, 36 Ala. 308.

Georgia.— Fain *v.* Garthright, 5 Ga. 6. See also Tumlin *v.* Perry, 108 Ga. 520, 34 S. E. 171.

Mississippi.— Benson *v.* Stewart, 30 Miss. 49. See also Moring *v.* Ables, 62 Miss. 263; 52 Am. Rep. 186; Niles *v.* Davis, 60 Miss. 750.

New York —Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352; Briggs *v.* Prosser, 14 Wend. (N. Y.) 227; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; Jackson *v.* Foster, 12 Johns. (N. Y.) 488.

Pennsylvania.— Stroud *v.* Prager, 130 Pa. St. 401, 18 Atl. 637.

South Carolina.— State Bank *v.* Smyers, 2 Strobh. (S. C.) 24; Ellison *v.* Cathcart, McMull. (S. C.) 5.

Tennessee.— *Compare* Norris *v.* Ellis, 7 Humphr. (Tenn.) 463; King *v.* Travis, 4 Hayw. (Tenn.) 279; Wilson *v.* Kilcannon, 4 Hayw. (Tenn.) 181; Dale *v.* Good, 2 Overt. (Tenn.) 394.

Texas.— Lander *v.* Rounsaville, 12 Tex. 195.

Vermont.— Pearsal *v.* Thorp, 1 D. Chipm. (Vt.) 92.

Wisconsin.— Simpson *v.* Sneclode, 83 Wis. 201, 53 N. W. 499; Link *v.* Doerfer, 42 Wis. 331, 24 Am. Rep. 417.

Conditional bond for title.— An instrument in form of a bond for title, with the condition expressed that on the happening of a certain event no title should pass, but that the agreement should be rescinded, is not such a deed as is required by a statute of limitations providing that every suit to be instituted to recover real estate as against any person in the peaceable and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon, if any, claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued. Winters *v.* Laird, 27 Tex. 616.

Title-bond taken for benefit of another but not assigned.— A title-bond from A to B, taken by B for the benefit of C, but never assigned to him, is not sufficient color of title in C to enable him, by claiming thereunder, to protect the title by the statute of limitations as against the paramount paper title. An imperfect equity resting in parol cannot serve a defendant in ejectment as color of title. Roe *v.* Kersey, 32 Ga. 152.

A void contract of sale is not such color of title as will prevent a recovery under the Texas three years' statute of limitations. Green *v.* Hugo, 81 Tex. 452, 17 S. W. 79, 26 Am. St. Rep. 824.

A written agreement to divide lands owned or claimed in common, though made by an administrator of one of the tenants in common without order of court for partition thereof, is admissible as color of title. McMullin *v.* Erwin, 58 Ga. 427; Shiels *v.* Lamar, 58 Ga. 590. But see Richards *v.* Williams, 3 Baxt. (Tenn.) 186, in which it was held that seven years' adverse possession of land under a mere written agreement for a division thereof, containing the boundaries, but not purporting to vest a fee-simple title, is not sufficient to perfect a title.

47. *Alabama.*— Ormond *v.* Martin, 37 Ala. 598; McQueen *v.* Ivey, 36 Ala. 308; Seabury *v.* Doe, 22 Ala. 207.

Georgia.— Brown *v.* Huey, 103 Ga. 448, 30 S. E. 429; Burdell *v.* Blain, 66 Ga. 169; Beverly *v.* Burke, 14 Ga. 70, 54 Am. Dec. 351; Stamper *v.* Griffin, 12 Ga. 450.

Illinois.— Peadro *v.* Carriker, 168 Ill. 570, 48 N. E. 102; Rigor *v.* Frye, 62 Ill. 507; Dunlap *v.* Daugherty, 20 Ill. 397.

h. Assignment of Right to Deed. An assignment of a grantee's right, title, and interest in and to a deed of land does not give color of title.[48]

i. Certificate of Purchase.[49] A certificate of purchase issued at a tax-sale does not constitute color of title.[50] But it has been held that a certificate, regular on its face, of purchase of swamp land, gives color of title under a statute declaring it "evidence that the holder . . . is the owner of the tract described therein." [51] It has also been held that certificates of purchase from the land office, made in accordance with law, operate as an equitable severance of the land from the public domain, and constitute sufficient evidence of title, when accompanied with possession, to form the basis of prescription against the holder of a patent issued subsequently to the acquisition of such prescription.[52]

j. Mortgages. Possession taken under a mortgage before foreclosure, because of the failure to pay interest due or because of other breaches, is not possession under color of title.[53]

k. Wills. A devise of land may give color of title, possession under which for the statutory period will ripen into a good title by adverse possession.[54] But a will, to constitute color of title, must purport to convey the land to the claimant thereunder, or to those with whom he is in privity.[55]

Iowa.— See Spitler *v.* Scofield, 43 Iowa 571.

Mississippi.—Moring *v.* Ables, 62 Miss. 263, 52 Am. Rep. 186; Benson *v.* Stewart, 30 Miss. 49.

New York.— Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Jackson *v.* Camp, 1 Cow. (N. Y.) 605.

Ohio.— Woods *v.* Dille, 11 Ohio, 455.

South Carolina.— Secrest *v.* McKennan, 6 Rich. Eq. (S. C.) 72.

Texas.— Lander *v.* Rounsaville, 12 Tex. 195. But see Elliott *v.* Mitchell, 47 Tex. 445 [*approved* in Downs *v.* Porter, 54 Tex. 59], wherein it was held that, whether or not the purchase-money has been paid, a bond for title is color of title as against everybody except the vendee.

Wisconsin.— Furlong *v.* Garrett, 44 Wis. 111.

The reason for the rule is that under such instrument the quasi-relation of landlord and tenant exists until the purchase-money is paid. Beverly *v.* Burke, 14 Ga. 70, 54 Am. Dec. 351; Stamper *v.* Griffin, 12 Ga. 450.

48. King *v.* Randlett, 33 Cal. 318, the reason being that title passes by a deed and not by an assignment of a deed to the assignee.

49. See also *supra*, VII, C, 3, f.

50. Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Bride *v.* Watt, 23 Ill. 507; McKeighan *v.* Hopkins, 14 Nebr. 361, 15 N. W. 711. See also Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866. *Contra*, Worthen *v.* Fletcher, 64 Ark. 662, 42 S. W. 900. And *compare* Wilkes *v.* Elliot, 5 Cranch C. C. (U. S.) 611, 29 Fed. Cas. No. 17,660. See also *infra*, VII, C, 2, v.

51. Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

52. Gay *v.* Ellis, 33 La. Ann. 249.

An unapproved land certificate will not relieve the owner entering under it from the character of a mere naked disseizor without color of right. Whitehead *v.* Foley, 28 Tex. 268.

53. Johnson *v.* Davidson, 162 Ill. 232, 44 N. E. 499.

54. Den *v.* Satterfield, 5 N. C. 413; McConnell *v.* McConnell, 64 N. C. 342; University Trustees *v.* Blount, 4 N. C. 455; Holloway *v.* Jones, 143 Pa. St. 564, 22 Atl. 710; Stewart *v.* Stewart, 25 Pa. St. 234; Brown *v.* Brown, 14 Lea (Tenn.) 253, 52 Am. Rep. 169; Cox *v.* Peck, 3 Yerg. (Tenn.) 435; King *v.* Travis, 4 Hayw. (Tenn.) 279; Charle *v.* Saffold, 13 Tex. 94, wherein it was held that a will, though void, is color of title, when recognized as a legal will by proper authority.

A copy, taken from the will-book, of a writing purporting to be a will, but without any evidence that the same had been proved before the proper tribunal, does not constitute color of title. Sutton *v.* Westcott, 48 N. C. 283.

Devise of land to which testator had a mere claim.— Where the devise is of land "to me belonging and being in the state of Illinois," the will does not give color of title to land to which the testator merely had a claim, but which did not belong to him. Holbrook *v.* Forsythe, 112 Ill. 306.

Informal order to record will.— An order to record a will, though informal, will support prescription. It is as translative of property as a donation *inter vivos*. Clark *v.* Barham, 4 Mart. N. S. (La.) 411.

Will subsequently set aside.— Where possession has been held for the statutory period under a will duly proved and recorded, it is immaterial that the will is subsequently set aside. Brown *v.* Brown, 14 Lea (Tenn.) 253, 52 Am. Rep. 169.

55. White *v.* Rowland, 67 Ga. 546, 44 Am. Rep. 731, holding that a will leaving a devise to others than the claimant or those with whom he is in privity does not give color of title.

Necessity of probate.— A will which has never been probated, and which is not shown to have been recorded and acted on as conferring a right, cannot give color of title. Rothschild *v.* Hatch, 54 Miss. 554. See also Callender *v.* Sherman, 27 N. C. 711, in which it was held that a paper purporting to be a will of lands which has but one subscribing

1. Letter Surrendering Rights. Where, in ejectment, defendant relies on adverse possession under color of title, a letter addressed to one under whom defendant claims, and signed by one under whom plaintiff claims, surrendering all the rights of the writer to the addressee, shows good color of title.[56]

4. Judgments or Decrees — a. In General. Judgments or decrees under which possession of land is taken constitute color of title,[57] and this is in general true although the decree or judgment is for any reason irregular or even void.[58] It seems to be well settled that possession under a decree in partition is good color of title, even though the decree is irregular or even void.[59] On the other hand such a decree, though erroneous, will divest the person against whom it is rendered of any color of title he may have had prior to the decree.[60] So it has been held that a decree of foreclosure will give color of title even though it may be void.[61]

witness, and which has never been proved as a will, is not such color of title as will ripen a seven years' possession under it into good title.

56. Wooding *v.* Blanton, (Ga. 1900) 37 S. E. 720.

57. *Alabama.*— Cogsbill *v.* Mobile, etc., R. Co., 92 Ala. 252, 9 So. 512; Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

California.— Brind *v.* Gregory, 120 Cal. 640, 53 Pac. 25; Packard *v.* Johnson, (Cal. 1884) 4 Pac. 632; Kimball *v.* Lohmas, 31 Cal. 154.

Georgia.—Wardlaw *v.* McNeill, 106 Ga. 29, 31 S. E. 785; Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249, holding that where a decree has been rendered vesting the title to certain land in a trustee for a wife and her children, possession of the property under the decree is color of title sufficient to support the plea of adverse possession.

Tennessee.— Patton *v.* Dixon, (Tenn. 1900) 58 S. W. 299; Duncan *v.* Gibbs, 1 Yerg. (Tenn.) 256.

United States.— Keener *v.* Union Pac. R. Co., 31 Fed. 126.

Proceedings for the assignment of a homestead do not constitute color of title. Keener *v.* Goodson, 89 N. C. 273, the reason being that the assignment of homestead is in no sense a conveyance of land, nor does it profess to pass any title whatever. It creates no new estate, but simply attaches to the existing estate a quality of exemption from sale under execution.

58. Brind *v.* Gregory, 120 Cal. 640, 53 Pac. 25; Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658; Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Rawson *v.* Fox, 65 Ill. 200; Hassett *v.* Ridgely, 49 Ill. 197; Chickering *v.* Faile, 38 Ill. 342; Street *v.* McConnell, 16 Ill. 125; Whiteside *v.* Singleton, Meigs (Tenn.) 207. See also Bustard *v.* Gates, 4 Dana (Ky.) 429.

Exceptions and limitations of rule.— A judgment in proceedings to settle the estate of a person who, though represented to be dead, turns out to be alive, cannot support a claim by adverse possession, under a statute authorizing such claim when founded on "the judgment of some competent court," as the proceedings are void for all purposes. Melia *v.* Simmons, 45 Wis. 334, 30 Am. Rep. 746. In Texas a judgment void because the judge was not properly judge of the court in which the proceedings were had, not having been selected in any manner known to the laws of the state, is not such color of title as would entitle one in possession of land thereunder to the benefit of the Texas three years' statute. Latimer *v.* Logwood, (Tex. Civ. App. 1893) 27 S. W. 960; Wilson *v.* Palmer, 18 Tex. 592. A judgment of nonsuit in an action of ejectment where the defense is the statute of limitations constitutes no color of title in defendant to the suit. A record in an ejectment suit cannot, as a writing, constitute color of title if it does not even purport to convey any title good or bad. Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600.

59. *California.*—Brind *v.* Gregory, 120 Cal. 640, 53 Pac. 25.

Illinois.— Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71; Rawson *v.* Fox, 65 Ill. 200; Hinkley *v.* Green, 52 Ill. 223; Hassett *v.* Ridgely, 49 Ill. 197; Chickering *v.* Faile, 38 Ill. 342; Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161.

Louisiana.— But see Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155, wherein it was held that an act of partition cannot serve as a basis for a claim of adverse possession.

New Jersey.— Den *v.* Kelty, 16 N. J. L. 517.

North Carolina.— Smith *v.* Tew, 127 N. C. 299, 37 S. E. 330; Bynum *v.* Thompson, 25 N. C. 578.

Tennessee.— Duncan *v.* Gibbs, 1 Yerg. (Tenn.) 256.

Texas.— Hardin *v.* Clark, 1 Tex. Civ. App. 565, 21 S. W. 977.

Deed executed pendente lite.— A deed to certain land sought to be partitioned, executed to a defendant in partition by his co-defendants while the proceeding is pending, cannot avail such defendant in acquiring a prescriptive title to the lands so conveyed against plaintiff in the partition proceedings. Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110.

Devise of land to which testator had no title.— A partition of land among the devisees under a will which gives to each devisee a fee in the land constitutes an assurance of title, although the testator had in fact no title. Thurston *v.* North Carolina University, 4 Lea (Tenn.) 513.

60. Sholl *v.* German Coal Co., 139 Ill. 21, 28 N. E. 748.

61. Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Chickering *v.* Failes, 26 Ill. 507; Mel-

b. In Condemnation Proceedings. Condemnation proceedings may constitute color of title when possession has been taken and held under them, notwithstanding irregularities of procedure which may render them invalid.[62] But occupation under irregular condemnation proceedings which did not in any manner indicate the bounds of the proposed right of way or the quantity of land to be appropriated is confined to the *pedis possessio*, and such proceedings do not give color of title.[63]

5. Statutes. An act or the legislature may give color of title although unconstitutional,[64] and a writing which purports to be made in accordance with a statute enacted for the relief of persons whose title-deeds have been destroyed will have the same effect.[65]

6. Vote or Ordinance. The vote of a town to convey land according to an ordinance in a warrant for a town-meeting, accompanied by entry in pursuance of the vote, has been held to constitute color of title.[66]

7. Descent Cast. A title by descent cast is color of title. So, where a person dies in possession of land and the possession is continued by his heirs, their possession is under color of title;[67] and this is true although the ancestor held under a mere claim of right and without color of title himself.[68] And where the ancestor had title the heir has color of title, although the ancestor was not in possession.[69]

8. Sale without Deed. A mere sale with or without order of court, and without a deed executed in pursuance thereof, does not constitute color of title.[70]

VIII. Good Faith.

A. As an Element of Color of Title. Good faith is not essential to color of title.[71]

vin *v.* Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

62. Cogsbill *v.* Mobile, etc., R. Co., 92 Ala. 252, 9 So. 512; Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138; Keener *v.* Union Pac. R. Co., 31 Fed. 126 (proceedings invalid for want of sufficient notice).

63. Ryan *v.* Mississippi Valley, etc., R. Co., 62 Miss. 162.

64. Doe *v.* Newbern Academy, 9 N. C. 233.

65. Kron *v.* Hinson, 53 N. C. 347.

Charter of railroad company.— A railroad company authorized by its charter to acquire lands in fee to a certain width for its right of way, which constructs its road across the land of a certain owner and maintains it for nearly twenty years without instituting condemnation proceedings, but without any objection or claim for damages ever being made by such owner, thereby acquires title to a strip of the full width defined by its charter, and not merely of the width actually used by it. Prather *v.* Western Union Tel. Co., 89 Ind. 501.

66. Copp *v.* Neal, 7 N. H. 275. *Compare* Beaufort *v.* Duncan, 46 N. C. 234, in which it was held that a town ordinance not under seal of the corporation, not expressing a consideration, and not delivered to the parties claiming under it, does not give color of title.

67. *Illinois.*— Peadro *v.* Carriker, 168 Ill. 570, 48 N. E. 102.

Iowa.— Teabout *v.* Daniels, 38 Iowa 158; Hamilton *v.* Wright, 30 Iowa 480.

Michigan.— Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338.

Tennessee.— King *v.* Rowan, 10 Heisk. (Tenn.) 675; Hubbard *v.* Wood, 1 Sneed (Tenn.) 279.

Texas.— Whitehead *v.* Foley, 28 Tex. 1; Williamson *v.* Simpson, 16 Tex. 433.

Canada.— Smyth *v.* McDonald, 5 Nova Scotia 274.

68. Teabout *v.* Daniels, 38 Iowa 158; Hamilton *v.* Wright, 30 Iowa 480. *Compare* Nicklace *v.* Dickerson, 65 Ark. 422, 46 S. W. 945.

69. Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338.

Civil-law rule.— An *ex parte* order of court, recognizing one as heir of another and putting him in possession of his succession, is not such title as will enable him to plead the prescription of ten years, under color of title, against an attack of his creditors. Lampton's Succession, 35 La. Ann. 418.

70. Comer *v.* Hart, 79 Ala. 389; Baird *v.* Evans, 58 Ga. 350; Livingston *v.* Pendergast, 34 N. H. 544.

Administrator's sale.— The sale, by the administrator of a solvent estate, of the land of his intestate, under a license from the court of probate, is no title or color of title to the purchaser unless accompanied by a deed or conveyance from the administrator. Livingston *v.* Pendergast, 34 N. H. 544.

71. An instrument possessing such characteristics as bring it within the definition of color of title as fixed by law is color of title without regard to the good or bad faith of the claimant or without reference to the fact whether or not he knew of the defects. Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356; Hardin *v.* Gouveneur, 69 Ill. 140.

In a number of cases it has been inac-

B. As an Element of Adverse Possession — 1. Conflict of Authority Whether or not title by adverse possession can be acquired without good faith on the part of the claimant is a subject on which there is great conflict of authority "of such long standing and in respect to so many phases of the question that it is useless to try to reconcile the various adjudications." [72] In a number of decisions the courts, without mentioning any statute, apparently lay down the doctrine without qualification that to perfect title by adverse possession such possession must have been held in good faith on the part of the claimant.[73]

2. Land Actually Occupied. The weight of authority, however, is that, to acquire title to land actually occupied, good faith is not necessary.[74]

3. Where Possession Is Constructive. There is also much conflict of authority as to whether good faith is necessary where the person is holding under color of title and claims constructive possession to the boundaries named in the deed. In some jurisdictions it is held necessary, under statutes requiring good faith either *in totidem verbis* or in language which cannot be otherwise construed ; [75] and in other

curately said that a deed purporting to convey title is claim and color of title made in good faith. Such a deed is undoubtedly color of title, and, having been received by the grantee and acted under as though it conveyed title, such action implies claim of title. Hardin *v.* Gouveneur, 69 Ill. 140.

72. Lampman *v.* Van Alstyne, 94 Wis. 417, 426, 69 N. W. 171, from which case it seems that this conflict is due in a measure, but not altogether, to the difference in the wording of the various statutes of limitation, the court saying: "The rule that good faith in respect to the validity of the claim of title must characterize the entry and possession is still held in some jurisdictions; in others it is held that good faith only applies to constructive possession; and in still others, while the element is held to be indispensable, it is so limited as to be practically done away with."

73. Pennington *v.* Flock, 93 Ind. 378; Moore *v.* Worley, 24 Ind. 81; Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104; Smith *v.* Young, 89 Iowa 338, 56 N. W. 506; Close *v.* Samm, 27 Iowa 503; Jones *v.* Hockman, 12 Iowa 101; Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511.

Decisions under the civil law.— According to the law in force in Mobile while under the dominion of Spain, prescription must rest on "good faith and just title." Kennedy *v.* Townsley, 16 Ala. 239. See also Salle *dit* Lajoye *v.* Primm, 3 Mo. 529, which is apparently decided under a civil statute to the same effect.

74. *Alabama.*— Vandiveer *v.* Stickney, 75 Ala. 225; Smith *v.* Roberts, 62 Ala. 83; Bohannan *v.* Chapman, 13 Ala. 641.

Massachusetts.— Warren *v.* Bowdran, 156 Mass. 280, 31 N. E. 300.

Missouri.— Wilkerson *v.* Eilers, 114 Mo. 245, 21 S. W. 514; Bradley *v.* West, 60 Mo. 33.

New York.— Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587 [*limiting* Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511, to cases in which constructive possession is in question].

South Carolina.— Strange *v.* Durham, 1 Brev. (S. C.) 83, wherein it was held that where the possession is in fact adverse a party is entitled to the protection of the statute of limitations, although he may have tried to deceive the proprietor of the land into the belief that he did not intend to claim adversely.

Texas.— Kinney *v.* Vinson, 32 Tex. 125.

West Virginia.— Jones *v.* Lemon, 26 W. Va. 629.

Wisconsin.— Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171; McMillan *v.* Wehle, 55 Wis. 685, 13 N. W. 694. See also Hacker *v.* Horlemus, 69 Wis. 280, 34 N. W. 125; North *v.* Hammer, 34 Wis. 425.

United States.— Alexander *v.* Pendleton, 8 Cranch (U. S.) 462, 3 L. ed. 624.

It is a sufficient claim of title that the entry of the disseizor is hostile to all the world and that he intends to hold the land as his own and does so hold it for the statutory period of limitation. Chicago, etc., R. Co. *v.* Groh, 85 Wis. 641, 55 N. W. 714.

75. *Colorado.*— Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604; Arnold *v.* Woodward, 14 Colo. 164, 23 Pac. 444; Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661,— under a statute expressly requiring possession "under color of title in good faith."

Georgia.— Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356; Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904; Lane *v.* Lane, 87 Ga. 268, 13 S. E. 335; Lee *v.* Ogden, 83 Ga. 325, 10 S. E. 349; Cowart *v.* Young, 74 Ga. 694; Hunt *v.* Dunn, 74 Ga. 120; McMullin *v.* Erwin, 58 Ga. 427; Brown *v.* Wells, 44 Ga. 573,— under a statute providing that "the possession must not have originated in fraud."

Illinois.— Guertin *v.* Mombleau, 144 Ill. 32, 33 N. E. 49; Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Hardin *v.* Gouveneur, 69 Ill. 140; Dalton *v.* Lucas, 63 Ill. 337; Morrison *v.* Norman, 47 Ill. 477; McCagg *v.* Heacock, 42 Ill. 153; Stearns *v.* Gittings, 23 Ill. 387,— under a statute providing that good faith as well as color of title is necessary to acquire title under the seven years' statute of limitations.

jurisdictions it seems to be necessary, though no statutes are mentioned as requiring it.[76] On the other hand there are decisions which hold that in the absence of a statute expressly requiring good faith it is not necessary, even where the party is claiming under color of title and seeking to acquire constructive possession to the extent of the boundaries in his conveyance.[77]

4. Possession Commenced in Good Faith and Continued in Bad Faith. By the express provisions of the Louisiana statute, good faith when the possession began suffices. Subsequent bad faith does not prevent prescription,[78] or in any way impair the efficacy of such possession as a ground of prescription.[79]

5. Predecessor's Bad Faith. As a general rule the rights of an adverse claimant who has held for the statutory period are not in any way affected by the bad faith of his grantor in acquiring title where he had no knowledge or notice of any of the facts from which the bad faith might be implied.[80] He cannot, how-

Louisiana.— Green *v.* Moore, 44 La. Ann. 855, 11 So. 223; Clemens *v.* Meyer, 44 La. Ann. 390, 10 So. 797; Guilbeau *v.* Thibodeau, 30 La. Ann. 1099; Calmes *v.* Duplantier, 14 La. Ann. 814; Edwards *v.* Ballard, 14 La. Ann. 362; McCluskey *v.* Webb, 4 Rob. (La.) 201; Eastman *v.* Beiller, 3 Rob. (La.) 220; Verret *v.* Theriot, 15 La. 106; Morand *v.* New Orleans, 5 La. 226; Plauche *v.* Gravier, 7 Mart. N. S. (La.) 518; Bonne *v.* Powers, 3 Mart. N. S. (La.) 458; Carrel *v.* Cabaret, 7 Mart. (La.) 375,— under the five and ten years' statutes of Louisiana, which require prescription to be based on a just title and to commence in good faith.

Texas.— Hussey *v.* Moser, 70 Tex. 42, 7 S. W. 606; Texas Land Co. *v.* Williams, 51 Tex. 51; Allen *v.* Root, 39 Tex. 589; Hicks *v.* Hicks, (Tex. Civ. App. 1894) 26 S. W. 227; Cuellar *v.* Dewitt, 5 Tex. Civ. App. 568, 24 S. W. 671,— under the Texas three years' statute of limitations providing that the muniment of title shall not be wanting "in intrinsic fairness and honesty."

Deed obtained by fraud.— The deed relied upon to give color of title must have been obtained *bona fide*. If procured by fraud, or if the grantee who relies on it to sustain his adverse possession is aware that his grantor had no title to convey, the deed will avail him nothing. Dem *v.* Hunt, 20 N. J. L. 487.

76. Cannon *v.* Union Lumber Co., 38 Cal. 672; Walsh *v.* Hill, 38 Cal. 481; Kile *v.* Tubbs, 23 Cal. 431; Wilkerson *v.* Eilers, 114 Mo. 245, 21 S. W. 514; Gaines *v.* Saunders, 87 Mo. 557; Mylar *v.* Hughes, 60 Mo. 105; Foulke *v.* Bond, 41 N. J. L. 527; Dem *v.* Hunt, 20 N. J. L. 487; Gregg *v.* Sayre, 8 Pet. (U. S.) 244, 8 L. ed. 932. See also Abercrombie *v.* Baldwin, 15 Ala. 363.

The rule laid down by these decisions has been well expressed as follows: "A party who sets up an adverse possession under color of title must act *bona fide*, or, in other words, he must be honest. He must believe his deed to be valid in law, and that it conveys to him a good title to the land, although it may turn out that another person has a better title." Dem *v.* Hunt, 20 N. J. L. 487, 493.

77. Den *v.* Leggat, 7 N. C. 539; York *v.* Bright, 4 Humphr. (Tenn.) 312; Love *v.* Shields, 3 Yerg. (Tenn.) 404; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996; Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171 [*overruling* Woodward *v.* McReynolds, 2 Pinn. (Wis.) 268; Whitney *v.* Powell, 2 Pinn. (Wis.) 115; and *disapproving dictum* in Watts *v.* Owens, 62 Wis. 512, 22 N. W. 720]; Oliver *v.* Pullam, 24 Fed. 127.

These decisions proceed upon the theory that, as good faith is not expressly required by the statutes, the courts cannot impair their purpose by injecting into them, by judicial construction, elements which are not there; that if the legislature has made no exception the courts can make none. See cases cited *supra*, this note.

Notice of outstanding claim subsequently acquired.— The grantee being at the grantor's death in possession and holding adversely to the remainder-man under color of title asserted in good faith, the fact that he afterward received notice of the remainder-man's claim of superior title does not interrupt his adverse possession so as to defeat his claim, the evidence not showing that he ever recognized such superior title. Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795.

78. Barrow *v.* Wilson, 38 La. Ann. 209; Devall *v.* Choppin, 15 La. 566; Gaines *v.* Agnelly, 1 Woods (U. S.) 238, 9 Fed. Cas. No. 5,173; Merrick's Civ. Code La. art. 3482.

79. Gaines *v.* Agnelly, 1 Woods (U. S.) 238, 9 Fed. Cas. No. 5,173.

80. Ross *v.* Central R., etc., Co., 59 Ga. 299, 53 Ga. 371; Lewis *v.* Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Bowman *v.* Wettig, 39 Ill. 416; Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

Thus, a deed executed by a tenant on the purchase by him of the landlord's title at an assessment sale cannot be impeached as color of title in the hands of a *bona fide* purchaser, though the tenant was acting for the owner in the purchase. Hilton *v.* Bender, 4 Thomps. & C. (N. Y.) 270.

Rule under the Louisiana statute.— Merrick's Civ. Code La. art. 3482, provides, in regard to the five and ten years' statutes of limitations which require good faith, that it is sufficient if the possession has commenced in good faith. If the possession should afterward be held in bad faith, that shall not prevent prescription. Under this statute the ten years' statute cannot prevail where it appears that defendants claim as heirs and widow in the community of one who did not hold in

ever, tack to his own possession the possession of a predecessor holding under color of title acquired in bad faith, in order to make up the period of prescription.[81]

C. What Constitutes Good Faith — 1. In General. The faith of the holder of color of title, whether good or bad, depends upon the purpose for which he acquired it and the reliance placed upon it.[82] Good faith is the opposite of bad faith or fraud[83] and means nothing more or less than that the party honestly believes he has acquired a good title,[84] although upon investigation it proves otherwise.[85] In determining whether a party did so believe or not, weight is to be given to the particular circumstances of each case.[86]

2. Knowledge That Title Was Defective. Mere knowledge on the part of claimant that his grantor's title was defective or was not a perfect title will not

good faith. Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155. But where the original possessor was in good faith, although an intermediate one held in bad faith, the subsequent possessor in good faith may avail himself of the prescription applicable to such possession. Devall *v.* Choppin, 15 La. 566.

81. Ross *v.* Central R., etc., Co., 53 Ga. 371; Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

82. Hardin *v.* Gouveneur, 69 Ill. 140.

83. McConnel *v.* Street, 17 Ill. 253.

84. Davis *v.* Hall, 92 Ill. 85; Winters *v.* Haines, 84 Ill. 585; McCagg *v.* Heacock, 34 Ill. 476, 85 Am. Dec. 327; Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

85. Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

"Possession originating in fraud." — The word "fraud," as used in the Georgia statute providing that possession, to be the foundation of prescription, cannot originate in fraud, the fraud meant is actual fraud, — a moral fraud, a wrongful act, and not a legal act which the law denominates a fraud regardless of the *bona fides* of the parties. Lee *v.* Ogden, 83 Ga. 325, 10 S. E. 349 [*disapproving* Hunt *v.* Dunn, 74 Ga. 120]; Ware *v.* Barlow, 81 Ga. 1, 6 S. E. 465; Wingfield *v.* Virgin, 51 Ga. 139.

86. Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

Good faith, as contemplated by the law of prescription, has relation to the actual existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion, or imbecility, and without regard to what it should be from good legal standards of law or reason. It is not necessary, therefore, that the person claiming prescription should have taken the instrument relied on as evidence of his title under such honest belief only as would be entertained by an ordinarily intelligent man that the paper would give him a good title. If such paper was in law color of title, and was taken honestly and in good faith, the degree of intelligence with which this was done would be immaterial. It is the *bona fides* which is important, and not the amount of knowledge or mental capacity constituting the basis thereof. Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356.

In Lee *v.* O'Quin, 103 Ga. 355, 365, 30 S. E. 356, it is said: "Ordinary intelligence might, upon bare inspection, know that an apparent title was worthless; and if the *bona fides* of the holding were to be tested by that standard, many cases would doubtless occur where a person of a lower order of intelligence, in his ignorance of law, would learn with surprise that he had occupied the land and held his color of title in bad faith, while he believed in fact that it was genuine and sufficient."

Bad faith cannot be imputed to a claimant by reason of failure, for several years after execution, to record the deed which is claimed to give color of title, there being no statute requiring it (Rawson *v.* Fox, 65 Ill. 200); or because the deed described the land conveyed as situated in a disputed territory (Cornelius *v.* Giberson, 25 N. J. L. 1); or because the claimant, a mortgagee who purchased at foreclosure sale, filed an insufficient affidavit as a basis for service by publication (Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833); or because the claimant, a purchaser at a tax-sale, failed to comply with the statutory requirements as to notice governing the execution of tax-deeds (Duck Island Club *v.* Bexstead, 174 Ill. 435 [*overruling* 51 N. E. 831]; Dalton *v.* Lucas, 63 Ill. 337, and see also Whitney *v.* Stevens, 89 Ill. 53); or because the deed under which the claimant holds was the result of a sale by a trustee not made in strict conformity to law (Brady *v.* Walters, 55 Ga. 25); or because it appeared from the recitals in the deed that the property was sold at a day later than that fixed by statute (Hardin *v.* Crate, 60 Ill. 215). So it has been held that where one assumes to sell without title, or without disclosing the defects of his title, a vendee in good faith, though holding *a non domino*, may plead prescription; but that where the vendor sells only his right, and shows what it is and declines to plead generally, thus bringing home to the vendee a knowledge of his title, the vendee cannot plead prescription. Avery *v.* Allain, 11 Rob. (La.) 436; Reeves *v.* Towles, 10 La. 276. See also Thomas *v.* Kean, 10 Rob. (La.) 80; Templet *v.* Baker, 12 La. Ann. 658. In Eastman *v.* Beiller, 3 Rob. (La.) 220, it is said that the fact that the vendor refuses to guarantee the title he sells is a circumstance calculated to excite suspicion as to its validity and to put the vendee on his guard and induce him to make inquiries with regard to it.

impeach the good faith of his purchase.[87] But the possession cannot be said to be acquired in good faith where the claimant knew that the title of his grantor was "absolutely worthless." [88]

3. Knowledge of Adverse Claim. Adverse possession under color of title is not possession with bad faith merely because the color of title was acquired, and possession taken thereunder with notice of an outstanding adverse claim.[89] This is true whether the notice be actual [90] or merely constructive.[91]

4. Taking Deed Regular on Its Face. A deed purporting to convey title of itself imports good faith unless facts and circumstances attending its execution show that the party accepting it had no faith or confidence in it.[92]

87. *Alabama.*— White *v.* Farris, (Ala. 1900) 27 So. 259; Manly *v.* Turnipseed, 37 Ala. 522.

Georgia.— Ware *v.* Barlow, 81 Ga. 1, 6 S. E. 465.

Illinois.— Davis *v.* Hall, 92 Ill. 85; Smith *v.* Ferguson, 91 Ill. 304; Russell *v.* Mandell, 73 Ill. 136.

New York.— Sands *v.* Hughes, 53 N. Y. 287.

South Carolina.—Strange *v.* Durham, 2 Bay (S. C.) 429.

Compare Melançon *v.* Bringier, 13 La. Ann. 206, in which it was held that a certificate of purchase under unauthorized void surveys would not constitute the basis of prescription as a title translative of property, where the parties whose possession was relied on to make out the plea of prescription had notice of the defects in the title and of the danger of eviction.

Imperfections and irregularities in any part of the chain in which color of title is derived will not alone be regarded as an evidence of want of good faith. Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Dawley *v.* Van Court, 21 Ill. 460.

Knowledge of defects in tax-title.— The fact that, while defendant was in adverse possession of land under a tax-title, plaintiff called his attention to defects in such title, does not destroy its effect as color of title or prevent possession thereunder from being adverse. White *v.* Farris, (Ala. 1900) 27 So. 259.

88. *Colorado.*— Arnold *v.* Woodward, 14 Colo. 164, 23 Pac. 444.

Illinois.— Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Hardin *v.* Gouveneur, 69 Ill. 140.

New Jersey.— Dem *v.* Hunt, 20 N. J. L. 487.

Texas.— Allen *v.* Root, 39 Tex. 589.

United States.— Stark *v.* Starr, 1 Sawy. (U. S.) 15, 22 Fed. Cas. No. 13,307.

Thus a commissioner's deed purporting to convey all the interest of a certain person in lands described is invalid as color of title to the grantee, as not obtained in good faith, where, to his knowledge, such person, prior to the commissioner's deed, had parted with all his interest in the land. Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434.

Knowledge that patent has issued to another.— Under a statute requiring claim and color of title made in good faith as ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land office has been set aside or disregarded, and that a patent has issued to the person against whom he claimed an adverse possession. Arnold *v.* Woodward, 14 Colo. 164, 23 Pac. 444.

89. In applying this rule it has been held that bad faith will not be implied from notice or knowledge that the outstanding title is better than that of the claimant. Manly *v.* Turnipseed, 37 Ala. 522; McIntyre *v.* Thompson, 4 Hughes (U. S.) 562, 10 Fed. 531.

90. Lee *v.* Ogden, 83 Ga. 325, 10 S. E. 349; Wood *v.* McGuire, 17 Ga. 303; Simons *v.* Drake, 179 Ill. 62, 53 N. E. 574; Coward *v.* Coward, 148 Ill. 268, 35 N. E. 759; Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Conner *v.* Goodman, 104 Ill. 365; Piatt County *v.* Goodell, 97 Ill. 84; Rawson *v.* Fox, 65 Ill. 200; Cook *v.* Norton, 43 Ill. 391; Dickenson *v.* Breeden, 30 Ill. 279; Chickering *v.* Failes, 26 Ill. 507; Woodward *v.* Blanchard, 16 Ill. 424; Grigsby *v.* May, 84 Tex. 240, 19 S. W. 343; Davila *v.* Mumford, 24 How. (U. S.) 214, 16 L. ed. 619.

Knowledge of lien on property.—Knowledge of the adverse claimant of a lien upon the property is not evidence of bad faith unless accompanied by some improper means to defeat such lien. Smith *v.* Ferguson, 91 Ill. 304; McCagg *v.* Heacock, 34 Ill. 476, 85 Am. Dec. 327.

91. Wright *v.* Smith, 43 Ga. 291; Davis *v.* Hall, 92 Ill. 85 [*disapproving* Bowman *v.* Wettig, 39 Ill. 416]; Rawson *v.* Fox, 65 Ill. 200; Cook *v.* Norton, 43 Ill. 391; Sands *v.* Hughes, 53 N. Y. 287; Davila *v.* Mumford, 24 How. (U. S.) 214, 16 L. ed. 619. *Contra*, Hunt *v.* Dunn, 74 Ga. 120.

The doctrine of constructive notice of defects in a title arising out of neglect to investigate on the part of the purchaser is not applicable to a person in adverse possession under such title. Sands *v.* Hughes, 53 N. Y. 287.

92. Hardin *v.* Gouveneur, 69 Ill. 140; Hardin *v.* Crate, 60 Ill. 215; Morrison *v.* Norman, 47 Ill. 477; Dickenson *v.* Breeden, 30 Ill. 279.

Quitclaim deed.— The fact that the prescriptive title sought to be established was based upon a quitclaim deed as color of title does not of itself negative the presumption of good faith. Hammond *v.* Crosby, 68 Ga. 767; Castlebery *v.* Black, 58 Ga. 386; McCamy *v.* Higdon, 50 Ga. 629.

IX. PAYMENT OF TAXES.

A. Necessity of — 1. In the Absence of Statute. Payment of taxes is not an element of adverse possession unless made so by express statutory requirement.[93]

2. Under Statutory Provisions — a. In General. In some states statutes have been enacted[94] which are uniformly construed to require payment of taxes for a certain period before title by adverse possession can be acquired.[95] Under these statutes payment for the entire period, concurrently with the other elements therein designated, is necessary.[96] The taxes must be paid by the claimant regardless of whom they are assessed to, in order to render the statute available.[97] And by parity of reasoning, if he has paid the taxes, it is immaterial to whom they are assessed; he will nevertheless be entitled to the benefit of the statute.[98]

b. Where No Taxes Have Been Assessed. In California the requirement of payment of taxes as an element of adverse possession has been held not to apply where no taxes have been assessed.[99] But in Colorado, Illinois, and Texas, failure to pay taxes, though resulting from failure to assess the land, will be fatal to the claimant's right to acquire title by adverse possession.[1]

c. Where Land Is Exempt from Taxation. Under the Texas statute making "payment of taxes, if any," an element of adverse possession, payment of taxes is not necessary to complete the bar of the statute where the land is by law

93. Anderson *v.* Canter, (Kan. App. 1901) 63 Pac. 285.

94. *California.*— Code Civ. Proc. § 325.
Colorado.— Gen. Pen. Stat. (1883), § 2187.
Idaho.— Rev. Stat. (1887), § 4043.
Illinois.— Starr & C. Anno. Stat. p. 2506, par. 6; p. 2618, par. 7.
Texas.— Rev. Stat. (1895), art. 3342.

95. *California.*— Eberhardt *v.* Coyne, 114 Cal. 283, 46 Pac. 84; Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806; Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008; Berniaud *v.* Beecher, 71 Cal. 38, 11 Pac. 802; Martin *v.* Ward, 69 Cal. 129, 10 Pac. 276; Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443; Webb *v.* Clark, 65 Cal. 56, 2 Pac. 747; O'Connor *v.* Fogle, 63 Cal. 9.
Colorado.—Wood *v.* Chapman, 24 Colo. 134, 49 Pac. 136.
Idaho.— Brose *v.* Boise City, R., etc., Co., (Ida. 1897) 51 Pac. 753; Green *v.* Christie, (Ida. 1895) 40 Pac. 54.
Illinois.— Ball *v.* Neiderer, 169 Ill. 54, 48 N. E. 194; Donahue *v.* Illinois Cent. R. Co., 165 Ill. 640, 46 N. E. 714; Wisner *v.* Chamberlin, 117 Ill. 568, 7 N. E. 68; Wettig *v.* Bowman, 47 Ill. 17; Shackleford *v.* Bailey, 35 Ill. 387; Stearns *v.* Gittings, 23 Ill. 387.
Texas.— Hitchler *v.* Scanlan, 83 Tex. 569, 19 S. W. 259; Mitchell *v.* Burdett, 22 Tex. 633; Castro *v.* Wurzbach, 13 Tex. 128.
United States.— Beaver *v.* Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601.

96. A break in the payment for any one or more years of the period is fatal to the claim. McDonald *v.* Drew, 97 Cal. 266, 32 Pac. 173; McNoble *v.* Justiniano, 70 Cal. 395, 11 Pac. 742; Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443; Webb *v.* Clark, 65 Cal. 56, 2 Pac. 747; O'Connor *v.* Fogle, 63 Cal. 9; Perry *v.* Burton, 126 Ill. 599, 18 N. E. 653; Peoria, etc., R. Co. *v.* Forsyth, 118 Ill. 272, 8 N. E. 766; McConnel *v.* Konepel, 46 Ill. 519; Sorley *v.* Matlock, 79 Tex. 304, 15 S. W. 261; Snowden *v.* Rush, 69 Tex. 593, 6 S. W. 767; Murphy *v.* Welder, 58 Tex. 235; Mitchell *v.* Burdett, 22 Tex. 633; Taylor *v.* Brymer, 17 Tex. Civ. App. 517, 42 S. W. 999; Converse *v.* Ringer, 6 Tex. Civ. App. 51, 24 S. W. 705.

97. Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443. See also *infra*, IX, D.

98. Cantagrel *v.* Von Lupin, 58 Tex. 570.

99. Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008; Coonradt *v.* Hill, 79 Cal. 587, 21 Pac. 1099; Oneto *v.* Restano, 78 Cal. 374; 20 Pac. 743; Heilbron *v.* Last Chance Water Ditch Co., 75 Cal. 117, 17 Pac. 65; Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443.

Evidence to show assessment.— A finding that the property in controversy was not assessed for taxes for a specified year is against the evidence where it appears that the land assessed by boundaries necessarily included the land in controversy, although there is no evidence that the tract claimed by defendant was assessed by any separate or specified description in that year. Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008.

Extent of rule.— It seems that this is so, even though it may have been the fault of the claimant that the land was not assessed. Coonradt *v.* Hill, 79 Cal. 587, 21 Pac. 1099.

1. Laughlin *v.* Denver, 24 Colo. 255, 50 Pac. 917; Peoria, etc., R. Co. *v.* Forsythe, 118 Ill. 272, 8 N. E. 766; Ledyard *v.* Brown, 27 Tex. 393, 405, wherein it was said: "It is the duty of a party claiming land to render it to the officer whose duty it is to assess it."

Technical defects in assessments.— Omission to pay the taxes for any one year will not be excused because of some technical defect in the assessment for that year which would have vitiated it if the claim had been made. Elston *v.* Kennicott, 46 Ill. 187.

exempt from taxation.[2] But in Illinois seven years' possession, under color of title, of property exempt from taxation, is no bar under the limitation acts of 1839.[3]

d. Where Tax Is Invalid. Where a levy is in part for an unlawful purpose, payments of so much as is not for such unlawful purpose is a sufficient payment of "taxes legally assessed."[4]

e. Where Taxes for Last Year Were Not Due at Expiration of Statutory Period. Where the taxes for a year do not become due and payable until after the period necessary to perfect title under the Texas statute, then title becomes perfect under the statute without payment of the taxes for that year.[5]

f. Taxes Assessed Before but Levied After Occupancy. Under the California statute it has been held unnecessary to pay taxes assessed before the occupancy and levied afterward, and that only such taxes as were both levied and assessed during the occupancy need be paid.[6]

g. Where Statute Is Enacted After Adverse Occupation for a Time. Inasmuch as it is expressly provided that the California statute relating to payment of taxes shall not be retroactive, one who occupies land adversely for three years without paying the taxes before the enactment thereof, and for two years afterward in compliance therewith, perfects his adverse title.[7]

h. Where Statute Is Enacted Subsequent to Completion of Period. A statute making payment of taxes a necessary element of adverse possession has no application to a title by adverse possession completed prior thereto.[8]

i. Necessity of Continuing Payment After Bar of Statute Has Become Complete. When title has once been acquired by compliance with all the terms of the statute, the failure of the adverse possessor to pay taxes subsequently assessed on the land does not divest nor in any way affect his title.[9]

B. On What Land Paid. The payment of taxes must be on the same tract as that described in the instrument relied on as giving color of title.[10] So payment must be made upon the whole tract claimed and described in the instrument giving color of title.[11]

C. Time of Making — 1. After Acquiring Color of Title. Any payment of

2. U. S. *v.* Schwalby, 8 Tex. Civ. App. 679, 685, 29 S. W. 90, 87 Tex. 604, 30 S. W. 435, in which it is said: "The very language of the statute, 'paying taxes thereon, if any,' clearly indicates that when no taxes are payable proof of payment would not be required."

3. Wisner *v.* Chamberlin, 117 Ill. 568, 7 N. E. 68, wherein it was held that the sixth section of the Illinois statute making it a prerequisite to the acquisition of title by adverse possession that "all taxes legally assessed" on land be paid, etc., has no application whatever in case of land exempt from taxation.

4. Grant *v.* Badger, 128 Ill. 386, 21 N. E. 609.

5. Halbert *v.* Brown, 9 Tex. Civ. App. 335, 31 S. W. 535; Juck *v.* Fewell, 42 Fed. 517. See also Mariposa Land, etc., Co. *v.* Silliman, (Tex. Civ. App. 1894) 27 S. W. 773.

6. Allen *v.* McKay, 120 Cal. 332, 52 Pac. 828.

The taxes to be paid by a claimant are the taxes assessed and levied on the land during the time of his continuous occupation and claim under adverse right, and do not include any taxes previously assessed and paid by the owner. Brown *v.* Clark, 89 Cal. 196, 26 Pac. 801.

7. Allen *v.* McKay, 120 Cal. 332, 52 Pac. 828; Central Pac. R. Co. *v.* Shackelford, 63 Cal. 261. See also Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431.

8. Lucas *v.* Provines, (Cal. 1900) 62 Pac. 509.

9. Southern Pac. R. Co. *v.* Whitaker, 109 Cal. 268, 41 Pac. 1083; Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Juck *v.* Fewell, 42 Fed. 517.

10. Cooter *v.* Dearborn, 115 Ill. 509, 4 N. E. 388; Dutton *v.* Thompson, 85 Tex. 115, 19 S. W. 1026; Hoehm *v.* House, (Tex. Civ. App. 1895) 31 S. W. 83. See also Laflin *v.* Herrington, 16 Ill. 301.

Payment of taxes assessed by mistake against one section or grant of land cannot be referred to another section or grant claimed in part by the taxpayer, if he intended, but failed, to render and pay upon it. Dutton *v.* Thompson, 85 Tex. 115, 19 S. W. 1026.

11. Kelly *v.* Medlin, 26 Tex. 48.

Effect of payment on part of tract. — One who holds color of title to the undivided half of a tract of land, but pays taxes on the whole tract, may have the benefit of the statute for the part of which he has color of title, but no further. And so of the payment of taxes due on a part of the tract where the payer has color of title to the whole. — the payer may have the benefit of the limitation for the part on which he has paid. Dawley *v.* Van Court, 21 Ill. 460.

taxes made before acquisition of color of title cannot be availed of by one claiming under either section of the Illinois statute.[12]

2. NECESSITY OF PAYING TAXES EACH YEAR. Under the sixth section of the Illinois statute it has been held that a payment need not be made each year, but that two yearly assessments of taxes may be paid in one year if the party continues in possession;[13] but under the seventh section payment must be made each year,[14] and this seems to be the rule under the California statute.[15] In Texas, however, it is been held that it is not necessary to show that the taxes for each year were paid during the respective years for which they accrued.[16] It has been held that the Colorado statute is fully complied with by the payment of all the taxes assessed against the land for the statutory period.[17]

D. By Whom Payment Made — 1. HOLDER OF COLOR OF TITLE AND PERSONS IN PRIVITY WITH HIM. Within the statutes under consideration, payment of taxes must be made by the person holding the color of title.[18] But it is not to be understood from anything here said that payment by an agent or by a third person, in behalf of the person holding color of title, will be insufficient, for such is not the case,[19] and payment by one in privity with the claimant will be equivalent to payment by him.[20] If the land claimed adversely is held by tenants in com-

12. Duck Island Club *v.* Bexstead, 174 Ill. 435, 51 N. E. 831; Stearns *v.* Gittings, 23 Ill. 387.

The first payment of taxes must be made after the acquisition of the claim and color of title. Stearns *v.* Gittings, 23 Ill. 387.

13. Hinchman *v.* Whetstone, 23 Ill. 185; Beaver *v.* Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601.

14. Dickenson *v.* Breeden, 30 Ill. 279, in which it was held that a payment of seven successive years' taxes made in six years did not satisfy the statute.

15. See McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421, 426.

16. Capps *v.* Deegan, (Tex. Civ. App. 1899) 50 S. W. 151. [This case is so insufficiently reported that it is not easy to determine what was actually held.] See also Snowden *v.* Rush, 76 Tex. 197, 13 S. W. 189, which seems to support this doctrine.

17. Latta *v.* Clifford, 47 Fed. 614, holding this to be sufficient, although the taxes may not have been paid when due and the interest thereon remains unpaid, where such interest is not ascertained or adjudged or required to be paid by the collector of taxes.

18. Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109; Peadro *v.* Carriker, 168 Ill. 570, 48 N. E. 102; Timmons *v.* Kidwell, 149 Ill. 507, 36 N. E. 974; Timmons *v.* Kidwell, 138 Ill. 13, 27 N. E. 756; Hurlbut *v.* Bradford, 109 Ill. 397; Fell *v.* Cessford, 26 Ill. 522; Chickering *v.* Failes, 26 Ill. 507; Stearns *v.* Gittings, 23 Ill. 387; Bride *v.* Watt, 23 Ill. 507; Dawley *v.* Van Court, 21 Ill. 460; Dunlap *v.* Daugherty, 20 Ill. 397; Cofield *v.* Furry, 19 Ill. 183; Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405. See also *supra*, IX, A, 2, a.

Joint payment of taxes after a division of the land.— The fact that two persons appear to have paid taxes jointly on a tract after it is divided will not invalidate the payment of either as to his part of the land. Emmons *v.* Moore, 85 Ill. 304.

The principle is well settled that benefits arising from payment of taxes upon real estate by a party without title or interest does not enure to the benefit of the party claiming under color of title. Woodward *v.* Faris, 109 Cal. 12, 41 Pac. 781; Hurlbut *v.* Bradford, 109 Ill. 397; Jayne *v.* Gregg, 42 Ill. 413.

19. Rand *v.* Scofield, 43 Ill. 167; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50; Mariposa Land, etc., Co. *v.* Silliman, (Tex. Civ. App. 1894) 27 S. W. 773.

Title not acquired by agent for himself.— An agent who, by his principal's direction, took the title to land in his own name in settlement of a claim due such principal, has not such color of title that payment of taxes for five successive years will make him the owner by virtue of Gen. Stat. § 2187. Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604.

Person contracting to pay for another.— A party to a contract for the purchase of land, by which he has agreed to pay all taxes thereon, is not permitted to apply such payment of taxes on the tax-title and thereby defeat the title of his vendor. Baily *v.* Doolittle, 24 Ill. 577.

20. Southern Pac. R. Co. *v.* Whitaker, 109 Cal. 268, 41 Pac. 1083; Cofield *v.* Furry, 19 Ill. 183. Thus, if taxes are paid by a tenant, the payment enures to the benefit of the landlord (Cofield *v.* Furry, 19 Ill. 183), and, if paid by the trustee or *cestui que trust*, to the benefit of the combined legal and equitable title claimed (Cofield *v.* Furry, 19 Ill. 183).

Payment of taxes by the mortgagee of the adverse claimant is a payment for and by the adverse claimant, and will satisfy the conditions of the statute as to the payment of the taxes for the purpose of adverse possession. Brown *v.* Clark, 89 Cal. 196, 26 Pac. 801; Chickering *v.* Failes, 26 Ill. 507.

Payment of taxes by a vendee of the claimant holding possession under bond for deed may constitute a sufficient payment for the latter. Peadro *v.* Carriker, 168 Ill. 570, 48 N. E. 102. It can make no difference whether the taxes are paid by the vendor or the vendee

mon, payment of taxes on the joint property by either will operate as payment by all.[21]

2. HOLDER OF COLOR OF TITLE AND THIRD PERSON. Where tax-receipts produced in evidence by one claiming land under color of title show a payment of the taxes for a part of the seven years by the holder of the color of title and another person, this will not constitute a bar as to the whole tract, but only as to the undivided half.[22]

3. EFFECT OF PAYMENT BY BOTH OWNER AND CLAIMANT. The payment of taxes by any person extinguishes them, and if a voluntary attempt is made to pay them a second time the last payment will be considered a gratuity to the taxing power.[23] As a consequence thereof, payment of taxes by the owner cannot affect the rights of the adverse claimant where the latter has already paid such taxes.[24] On the other hand, where any one or more of the payments of taxes are made by the claimant "after payment" by the owner, there can be no acquisition of title by him by adverse possession.[25]

E. Effect of Buying in Land at Tax-Sale. Permitting the land to be sold for taxes and buying it in is not a payment of taxes within the meaning of any of these statutes.[26]

F. Effect of Misdescription in Tax-Receipts Where Taxes Actually Paid. One who, under color of title acquired in good faith, has paid the taxes actually assessed against land, is entitled to the benefit of the statute, notwithstanding the land may have been misdescribed in the tax-receipts,[27] provided he is able to remove the uncertainty by extrinsic evidence.[28] On the other hand, the fact that part of the tax-receipts held by defendant in ejectment included in their description the tract in controversy does not establish defendant's title thereto, under the statute of limitations, where the evidence shows that the tract was not

where the contract of sale remains unexecuted, nor whether paid by the assignee of the vendor or of the vendee. Darst *v.* Marshall, 20 Ill. 227.

21. McConnel *v.* Konepel, 46 Ill. 519.

22. Coleman *v.* Billings, 89 Ill. 183, wherein it was held to be competent, however, to show that the taxes were in fact paid by the holder of the color of title, and that the name of the other person was by some inadvertence included in the receipts.

23. Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169.

24. Osburn *v.* Searles, 156 Ill. 88, 40 N. E. 452; Bolden *v.* Sherman, 101 Ill. 483. *Compare* also *dictum* in dissenting opinion in Cavanaugh *v.* Jackson, 99 Cal. 672, 34 Pac. 509.

Reason of rule.— "To permit the owner to defeat the occupant's payment by paying an amount of money to the collector equal to the tax which had been previously paid by the occupant in discharge of all taxes assessed on the land would render the provisions of this statute inoperative and would amount virtually to its repeal, as the holder of the better title would surely make such a payment once in seven years." Morrison *v.* Kelly, 22 Ill. 609, 627, 74 Am. Dec. 169.

This rule applies although the taxes are paid by the owner within the time allowed by law for the payment thereof. Osburn *v.* Searles, 156 Ill. 88, 40 N. E. 452.

25. Carpenter *v.* Lewis, 119 Cal. 18, 50 Pac. 925 [*overruling* in effect Cavanaugh *v.* Jackson, 99 Cal. 672, 34 Pac. 509]; Ely *v.* Brown, 183 Ill. 575, 56 N. E. 181; Bolden *v.* Sherman, 101 Ill. 483; Ross *v.* Coat, 58 Ill. 53; Stearns *v.* Gittings, 23 Ill. 387.

But see Cavanaugh *v.* Jackson, 99 Cal. 672, 34 Pac. 509, in which, it not appearing whether the payment was made by the owner before that by the adverse claimant, the court held that, the claimant having paid the taxes himself, his rights were in no way affected by the fact of payment by the owner, and it was said that it made no difference whether the payment by the owner was before or after payment by the adverse claimant.

Under the Colorado statute, the provisions of which are somewhat different from those of other states whose decisions are considered in the text, defendant cannot invoke the benefit of the statute where plaintiff has the better paper title and has paid the taxes on the land for the same period claimed by defendant. Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802.

26. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Irving *v.* Brownell, 11 Ill. 402.

Effect of rule.— If the party seeking to acquire title by adverse possession permits the lands to be sold for taxes during the running of the statute, and afterward redeems from such sale, he will be required to begin *de novo* and wait the required time for a deed. Wettig *v.* Bowman, 47 Ill. 17.

27. Neiderer *v.* Bell, 174 Ill. 325, 51 N. E. 855; West Chicago Park Com'rs *v.* Coleman, 108 Ill. 591.

28. Neiderer *v.* Bell, 174 Ill. 325, 51 N. E. 855.

in fact assessed to defendant, or the taxes thereon paid, or intended to be paid, by her.[29]

G. Other Elements Necessary in Addition to Payment. Under none of these statutes is payment of taxes alone sufficient.[30] Under the sixth section of the Illinois statute, in order to create a bar, there must be a concurrence of three things for the period therein prescribed,—color of title, possession of land, and payment of taxes thereon.[31] Possession must be actually taken before the bar created by the seventh section of the Illinois statute will attach in favor of one who has, under color of title,[32] in accordance with its provisions, paid taxes for seven successive years on vacant and unoccupied lands.[33] Where, however, all the taxes legally assessed upon vacant land are paid, under color of title, for seven successive years while the land is vacant and unoccupied, and possession is then taken under such claim and color of title, this will establish a complete title by adverse possession,[34] which may be asserted either as a defense or to regain possession when invaded.[35]

Under the Colorado statute, payment of taxes on vacant lands, under color of title, for the period therein mentioned, will be sufficient to give title by adverse possession without any possession whatever.[36] Under the Texas statute, payment of taxes and possession under a recorded deed for the period therein mentioned

29. Neiderer *v.* Bell, 174 Ill. 325, 51 N. E. 855.

30. Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592; Johns *v.* McKibben, 156 Ill. 71, 40 N. E. 449. See also statutory provisions set out *supra*, note 95.

31. **Absence of any one of these elements** will prevent the acquisition of title by adverse possession. Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71; Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Stoltz *v.* Doering, 112 Ill. 234; Lyman *v.* Smilie, 87 Ill. 259; Wettig *v.* Bowman, 47 Ill. 17; McConnel *v.* Konepel, 46 Ill. 519; Clark *v.* Lyon, 45 Ill. 388; Bride *v.* Watt, 23 Ill. 507; Stearns *v.* Gittings, 23 Ill. 387; Irving *v.* Brownell, 11 Ill. 402.

In the absence of color of title, payment of taxes for the statutory period is unavailable. Duck Island Club *v.* Bexstead, 174 Ill. 435, 51 N. E. 831; Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. 686; Stoltz *v.* Doering, 112 Ill. 234; Beaver *v.* Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601. Thus possession and payment of taxes for seven years, by a grantee who has parted with color of title under his deed by subsequently executing a conveyance of the land to another, creates no bar. Heacock *v.* Lubuke, 107 Ill. 396.

Possession short of statutory period.—Payment of taxes for seven years and possession for two years immediately preceding the filing of the bill are insufficient to give title by adverse possession. Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592.

Where these three elements have concurred for the statutory period claimant acquires a title by adverse possession. Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. 686; Lake Shore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 71 Ill. 38; McConnel *v.* Street, 17 Ill. 253; Woodward *v.* Blanchard, 16 Ill. 424; Lewis *v.* Barnhardt, 43 Fed. 854 [*affirmed* in 145 U. S. 56, 12 S. Ct. 772, 36 L. ed. 621].

32. Travers *v.* McElvain, 181 Ill. 382, 55 N. E. 135; McCauley *v.* Mahon, 174 Ill. 384, 51 N. E. 829; Gage *v.* Smith, 142 Ill. 191, 31 N. E. 430; Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Meacham *v.* Winstanly, 77 Ill. 269. *Contra*, Newland *v.* Marsh, 19 Ill. 376.

33. **What is "vacant and unoccupied land."** — The phrase "vacant and unoccupied land," as used in the statute, means land not in the actual possession of any one. Temporary entries without claim of right and without the intention to exclude others — camping thereon, leaving a wagon thereon, or building a haystack thereon — do not constitute possession so as to change the character of vacant land to that of land actually possessed or occupied. Walker *v.* Converse, 148 Ill. 622, 36 N. E. 202.

"Until the owner of the color of title has united actual possession to the color and to the payment of taxes, he is in no position to invoke the aid of the second [seventh] section, because that section cannot become constitutionally operative until the person invoking its aid has acquired actual possession. Then for the first time it properly becomes a limitation law."

Paullin *v.* Hale, 40 Ill. 274, 277.

34. Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Holbrook *v.* Gouveneur, 114 Ill. 623, 3 N. E. 220; Whitney *v.* Stevens, 77 Ill. 585; Meacham *v.* Winstanly, 77 Ill. 269; Wilson *v.* South Park Com'rs, 70 Ill. 46; Hale *v.* Gladfelder, 52 Ill. 91; McCagg *v.* Heacock, 42 Ill. 153.

35. Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Meacham *v.* Winstanly, 77 Ill. 269; Wilson *v.* South Park Com'rs, 70 Ill. 46.

Where the benefit of the bar of this statute has once been acquired the right of possession remains with the occupant, even if he temporarily leaves the possession, and enables him to recover the possession as against all persons as to whom his bar in defense, if set up, would have been available. Paullin *v.* Hale, 40 Ill. 274.

36. Thatcher *v.* Gottlieb, 59 Fed. 872, 19 U. S. App. 469, 8 C. C. A. 334.

must concur,[37] but when they do, the claimant acquires title by adverse possession.[38] Under the Idaho statute, adverse possession of land cannot be considered established unless it be shown that the land had been occupied and claimed continuously for the period mentioned in the statute, and that the party or persons, their predecessors and grantors, had paid all the taxes levied and assessed on the land.[39]

H. When Statute Commences to Run. Under both sections of the Illinois statute, limitation commences to run, not from the time of taking possession, but from the time of the first payment of taxes.[40] To complete the bar of these provisions there must be a period of full seven years between the day when the first payment of taxes was made and the date of the commencement of suit.[41] It is not necessary, however, that between the first and last payment seven years should intervene in order to complete the statutory bar.[42] In California the Illinois rule has been disapproved. The commencement of adverse possession is not required to coincide with the beginning or end of a fiscal year, and the payment by the owner of taxes which were levied and assessed and paid during the calendar year preceding the adverse occupation will not postpone the running of the statute until the end of the fiscal year.[43]

X. AGAINST WHOM THE STATUTE RUNS, AND PROPERTY SUBJECT THERETO.

A. Rule Exempting the Sovereign from the Operation of the Statute[44] — 1. IN ENGLAND. Formerly the invariable rule of the English law, resulting from the application of the maxim *nullum tempus occurrit regi*, was that no length of possession would give title to land as against the crown.[45] But the rule has undergone various changes by statute.[46]

2. IN THE UNITED STATES — a. General Rule. The English doctrine is applicable in the United States, so that here, as in England, no title by adverse possession can be acquired against the sovereign.[47]

b. Lands of the United States — (I) *GENERAL RULE.* By the application of this principle the only manner in which title to lands owned by the United States can be acquired is under some act of congress directly making the grant or authorizing it to be made by some person or officer.[48] No title can be acquired by adverse possession.[49] Therefore a mere trespasser in possession of government

37. Sorley *v.* Matlock, 79 Tex. 304, 15 S. W. 261; Snowden *v.* Rush, 69 Tex. 593, 6 S. W. 767; Taylor *v.* Brymer, 17 Tex. Civ. App. 517, 42 S. W. 999; Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405.

38. Jacks *v.* Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645.

39. Green *v.* Christie, (Ida. 1895) 40 Pac. 54.

40. Iberg *v.* Webb, 96 Ill. 415; Lyman *v.* Smilie, 87 Ill. 259; Kane *v.* Footh, 70 Ill. 587; Stearns *v.* Gittings, 23 Ill. 387; Newland *v.* Marsh, 19 Ill. 376. But see Beaver *v.* Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601, in which it is said that under the sixth section limitation commences to run from the possession under claim and color of title.

41. Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Hurlbut *v.* Bradford, 109 Ill. 397; Iberg *v.* Webb, 96 Ill. 415; Lyman *v.* Smilie, 87 Ill. 259; McConnel *v.* Konepel, 46 Ill. 519; Clark *v.* Lyon, 45 Ill. 388.

42. Hurlbut *v.* Bradford, 109 Ill. 397 [*disapproving dictum* in Meacham *v.* Winstanly, 77 Ill. 269].

43. Brown *v.* Clark, 89 Cal. 196, 26 Pac. 801.

44. By the civil law of Spain no length of possession will give title to land as against the crown. Salle *dit* Lajoye *v.* Primm, 3 Mo. 529; Harrison *v.* Ulrichs, 39 Fed. 654.

45. Coke Litt. 57, 3 Cruise 558; Lee *v.* Norris, Cro. Eliz. 331; Payne's Case, 2 Leon. 205.

46. 21 Jac. I, c. 2; 9 Geo. III, c. 16; Goodtitle *v.* Baldwin, 11 East 488. For the provisions of these statutes see People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189.

47. See *supra*, note 45; *infra*, note 48 *et seq.*

48. See PUBLIC LANDS.

49. *Alabama.*— Stringfellow *v.* Tennessee Coal, etc., Co., 117 Ala. 250, 22 So. 997; Jones *v.* Walker, 47 Ala. 175; Kennedy *v.* Townsley, 16 Ala. 239; Wright *v.* Swan, 6 Port. (Ala.) 84.

California.— Doran *v.* Central Pac. R. Co., 24 Cal. 245; Gluckauf *v.* Reed, 22 Cal. 468.

Illinois.— Cook *v.* Foster, 7 Ill. 652.

Iowa.— Twining *v.* Burlington, 68 Iowa 284, 27 N. W. 243; Iowa R. Land Co. *v.* Adkins, 38 Iowa 351.

Kansas.— Wood *v.* Missouri, etc., R. Co., 11 Kan. 323; Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

land cannot maintain an action against another person to quiet his possession.[50] It has, however, been held that a location and occupancy of government lands under the laws of the United States, though subordinate to the title of the government, may nevertheless be adverse to another claimant.[51]

(II) *Lands Ceded to the United States by Treaty.* It has been held that even though title to land situated in a territory ceded to the United States by treaty could have been acquired by prescription as against the ceding sovereign, if the prescription is not complete when the territory is ceded it does not continue to run against the United States.[52]

c. Lands of the States — (I) *General Rule.* The rule also applies in favor of the states of the Union; in the absence of a provision making the state subject to the statute of limitations no title by adverse possession can be acquired against the state.[53]

Louisiana.— Pepper *v.* Dunlap, 9 Rob. (La.) 283; Kittridge *v.* Dugas, 6 Rob. (La.) 482.

Missouri.— Shepley *v.* Cowan, 52 Mo. 559.

Ohio.— Wallace *v.* Miner, 6 Ohio 366; Ohio State University *v.* Satterfield, 2 Ohio Cir. Ct. 86.

Texas.— Paschal *v.* Dangerfield, 37 Tex. 273.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

United States.— Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Oaksmith *v.* Johnston, 92 U. S. 343, 23 L. ed. 682; Frisbie *v.* Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668; Lindsey *v.* Miller, 6 Pet. (U. S.) 666, 8 L. ed. 538; Drew *v.* Valentine, 18 Fed. 712.

50. Wood *v.* Missouri, etc., R. Co., 11 Kan. 323.

51. Fellows *v.* Evans, 33 Oreg. 30, 53 Pac. 491; Francœur *v.* Newhouse, 14 Sawy. (U. S.) 600, 43 Fed. 236. See also *supra*, V, VI.

52. Kennedy *v.* Townsley, 16 Ala. 239.

53. *Alabama.*— Adler *v.* Prestwood, 122 Ala. 367, 24 So. 999; Swann *v.* Gaston, 87 Ala. 569, 6 So. 386; Swann *v.* Lindsey, 70 Ala. 507; Miller *v.* State, 38 Ala. 600.

Delaware.— Walls *v.* McGee, 4 Harr. (Del.) 108.

Georgia.— Brinsfield *v.* Carter, 2 Ga. 143.

Illinois.— Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

Louisiana.— State *v.* Buck, 46 La. Ann. 656, 15 So. 531.

Maine.— Cary *v.* Whitney, 48 Me. 516.

Maryland.— Hall *v.* Gittings, 2 Harr. & J. (Md.) 112.

Massachusetts.— Ward *v.* Bartholomew, 6 Pick. (Mass.) 409.

Missouri.— State *v.* Fleming, 19 Mo. 607.

New York.— St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286; Burbank *v.* Fay, 65 N. Y. 57.

Ohio.— Ohio State University *v.* Satterfield, 2 Ohio Cir. Ct. 86.

Pennsylvania.— Zubler *v.* Schrack, 46 Pa. St. 67; Troutman *v.* May, 33 Pa. St. 455; Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129; Johnston *v.* Irwin, 3 Serg. & R. (Pa.) 291.

South Carolina.— Harlock *v.* Jackson, 3 Brev. (S. C.) 254; Owen *v.* Lucas, 1 Brev. (S. C.) 519; State *v.* Arledge, 2 Bailey (S. C.) 401, 23 Am. Dec. 145.

Texas.— Austin *v.* Dungan, 46 Tex. 236; Milam County *v.* Robertson, 33 Tex. 366; Dooley *v.* Maywald, 18 Tex. Civ. App. 386, 45 S. W. 221.

Virginia.— Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802; Levasser *v.* Washburn, 11 Gratt. (Va.) 572; Koiner *v.* Rankin, 11 Gratt. (Va.) 420; Gore *v.* Lawson, 8 Leigh (Va.) 458.

West Virginia.— Hall *v.* Webb, 21 W. Va. 318.

United States.— U. S. *v.* Thompson, 98 U. S. 486, 25 L. ed. 194; Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765; Serrano *v.* U. S., 5 Wall. (U. S.) 451, 18 L. ed. 494; Rhode Island *v.* Massachusetts, 15 Pet. (U. S.) 233, 10 L. ed. 721; U. S. *v.* Spiel, 3 McCrary (U. S.) 107, 8 Fed. 143.

Lands held by a derivative title.— The principle that the statute does not run against the commonwealth applies not only as to her sovereign right of original dominion, but also to every secondary or derivative right of property. So, where lands have been forfeited to the state under the delinquent tax laws or otherwise, they cannot be the subject of adverse possession while the title thus acquired remains in the state. Bagley *v.* Wallace, 16 Serg. & R. (Pa.) 245. And if the lands were held adversely to the owner at the time of the forfeiture the adverse character of the occupancy ceases when the state acquires title, and cannot be asserted against either the state or its grantee. Hall *v.* Gittings, 2 Harr. & J. (Md.) 112; Levasser *v.* Washburn, 11 Gratt. (Va.) 572; Hale *v.* Branscum, 10 Gratt. (Va.) 418; Staats *v.* Board, 10 Gratt. (Va.) 400; Hall *v.* Webb, 21 W. Va. 318; Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765. So, too, title by adverse possession cannot be acquired in lands which have escheated to the state. Harlock *v.* Jackson, 3 Brev. (S. C.) 254, 1 Treadw. (S. C.) 135; Ellis *v.* State, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660.

Oyster-beds.— On the ground that the statute does not run against the state no title can be acquired by adverse possession to oyster-beds the title to which is in the state. Clinton *v.* Bacon, 56 Conn. 508, 16 Atl. 548; Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802.

Space between surveys.— Where a survey calls for an adjoining survey at two corners, but the line of one of the surveys is drawn in, leaving a triangular space between the two surveys ungranted, a user of this space by the claimant under the last warrant, for any

(II) *Where the Conveyance of State Lands is Expressly Prohibited.* On the ground that title by possession presumes a grant, and such presumption cannot be entertained against one incapable of granting it, it has been held that title to land covered by navigable waters cannot be acquired by adverse possession, as against the state, in the face of a statute which expressly provides that no patent shall issue for such land.[54]

(III) *Statutory Exception of the State from the Rule.* Where the statute is expressly made to apply to the state, title by adverse possession may of course be acquired as against the state.[55]

B. Grantees of the Federal or State Government — 1. General Rule. The operation of the statute is not limited to land held under private grant; title to land held under a federal or state grant may be acquired by adverse possession continued for the statutory period after the grantee acquires the title from the federal[56] or state government,[57] and it is immaterial that the possession was commenced before the title passed.[58]

2. Time When the Statute Begins to Run — a. General Rule. The statute begins to run against a grantee of the sovereignty only from the time when he acquires title; in view of the rule excluding the government from the operation of the statute an occupancy prior to that time will not be deemed adverse and can have no effect to give title by adverse possession against grantees of the federal[59]

number of years, cannot give him a title as against the commonwealth. Henry *v.* Henry, 5 Pa. St. 247.

54. Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94, 95.

55. Piper *v.* Richardson, 9 Metc. (Mass.) 155; Wickersham *v.* Woodbeck, 57 Mo. 59; Burch *v.* Winston, 57 Mo. 62; School Directors *v.* Goerges, 50 Mo. 194; Abernathy *v.* Dennis, 49 Mo. 468; Ambrose *v.* Huntington, 34 Oreg. 484, 56 Pac. 513; Busby *v.* Florida, Cent., etc., R. Co., 45 S. C. 312, 23 S. E. 50.

Under the New York statute of April 8, 1801, providing that actions by the state in respect to land by reason of long right or title which should not have accrued within the space of forty years before the suit is commenced unless the people, or those under whom they claim, shall have received the rents and profits thereof within the space of forty years, a title by adverse possession may be acquired by such a holding for forty years as would constitute a good adverse possession if the land had been owned by an individual instead of the state. People *v.* Trinity Church, 22 N. Y. 44; People *v.* Van Rensselaer, 9 N. Y. 291 [*reversing* 8 Barb. (N. Y.) 189]; People *v.* Arnold, 4 N. Y. 508; Genesee Valley Canal R. Co. *v.* Slaight, 49 Hun (N. Y.) 35, 14 N. Y. Civ. Proc. 420, 1 N. Y. Suppl. 554; People *v.* Clarke, 10 Barb. (N. Y.) 120; People *v.* Livingston, 8 Barb. (N. Y.) 253.

By statute in North Carolina [1 N. C. Code (1883), § 139, subd. 1] the state will not sue in respect of real property when there has been an adverse possession, ascertained and identified under known and visible lines or boundaries, for thirty years (Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378; Phipps *v.* Pierce, 94 N. C. 514; Mallett *v.* Simpson, 94 N. C. 37, 55 Am. Rep. 595; Price *v.* Jackson, 91 N. C. 11; Melvin *v.* Waddell, 75 N. C. 361), or for twenty-one years under colorable title (1 N. C. Code (1883) § 139, subd. 2; Walker *v.* Moses, 113 N. C. 527, 18 S. E. 339; Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142).

School lands.— Where the statute, by its terms, runs against the state, it has been held that title to school lands held in trust for the state may be acquired by an adverse occupancy for the prescribed period. Wyatt *v.* Tisdale, 97 Ala. 594, 12 So. 233.

56. Coker *v.* Ferguson, 70 Ala. 284; Mills *v.* Bodley, 4 T. B. Mon. (Ky.) 248; Bicknell *v.* Comstock, 113 U. S. 149, 5 S. Ct. 399, 28 L. ed. 962.

57. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43; Allen *v.* McKay, 120 Cal. 332, 52 Pac. 828; Campbell *v.* Thomas, 9 B. Mon. (Ky.) 82; Roberts *v.* Sanders, 3 A. K. Marsh. (Ky.) 28; Hall *v.* Webb, 21 W. Va. 318; Adams *v.* Alkire, 20 W. Va. 480.

The provisions of the Tennessee code [§§ 2763, 2765] limiting the time for the commencement of actions in regard to lands granted by the state of Tennessee or the state of North Carolina have been held to apply to lands lying within the tract ceded by Kentucky to Tennessee under the fifth section of the convention of 1820 and held under a grant from the state of Kentucky. Sharp *v.* Van Winkle, 12 Lea (Tenn.) 15.

58. Hargis *v.* Congressional Tp., 29 Ind. 70; Sater *v.* Meadows, 68 Iowa 507, 27 N. W. 481; Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 20 N. W. 779; Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609; Kinsell *v.* Daggett, 11 Me. 309.

59. *Alabama.*— Stringfellow *v.* Tennessee Coal, etc., Co., 117 Ala. 250, 22 So. 997; Kennedy *v.* Townsley, 16 Ala. 239.

Illinois.— Spellman *v.* Curtenius, 12 Ill. 409.

Iowa.—Twining *v.* Burlington, 68 Iowa 284, 27 N. W. 243; Iowa R. Land Co. *v.* Adkins, 38 Iowa 351.

Missouri.— Smith *v.* McCorkle, 105 Mo. 135, 16 S. W. 602; Shepley *v.* Cowan, 52 Mo. 559. See also Hammond *v.* Coleman, 4 Mo. App. 307.

Texas.— Paschal *v.* Dangerfield, 37 Tex. 273.

or state governments.[60] The applications of this general rule, however, are not uniform, as will hereinafter appear.

b. Application of the Rule — (I) *In General.* Since there is a difference of opinion as to just when the title of the federal or state government passes to a grantee,[61] the cases do not agree in the application of the above-stated general rule.

(II) *Grantees of the Federal Government* — (A) *Rule That Patent Must Issue.* On the ground that the title of the United States does not pass until the issuance of a patent it is held by one line of cases that the statute runs against a purchaser from the federal government only from the date of his patent.[62]

(B) *Rule That Issuance of Patent Is Not Necessary.* But on the ground that one who enters upon public lands of the United States is the real owner of

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600; Whitney *v.* Gunderson, 31 Wis. 359.

United States.— Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Palmer *v.* Low, 98 U. S. 1, 25 L. ed. 60; Oaksmith *v.* Johnston, 92 U. S. 343, 23 L. ed. 682; Burgess *v.* Gray, 16 How. (U. S.) 48, 14 L. ed. 839; Jourdan *v.* Barrett, 4 How. (U. S.) 169, 11 L. ed. 924; Lindsey *v.* Miller, 6 Pet. (U. S.) 666, 8 L. ed. 538; Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822.

Act curing void patent.— Where a patent was issued in the name of a deceased person, and this defect was cured by a subsequent act which provided that the title to the land should "enure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had been issued to the deceased person during his life," it was held that the patent, being void, passed no title, and that a title acquired through the curative act did not relate back and take effect from the time the patent was issued in such a manner as to subject the land designated in it to the operations of the statute of limitations from the date of the patent and before the passage of the curative act, but that until the passage of the curative act there could be no adverse possession of the land as against a person claiming title under the patent and act of congress. Wood *v.* Ferguson, 7 Ohio St. 288.

60. *Alabama.*— Swann *v.* Gaston, 87 Ala. 569, 6 So. 386.

Georgia.— Smead *v.* Doe, 6 Ga. 158.

Maine.— Cary *v.* Whitney, 48 Me. 516.

Ohio.— Ohio State University *v.* Satterfield, 2 Ohio Cir. Ct. 86.

South Carolina.— Owen *v.* Lucas, 1 Brev. (S. C.) 519.

Tennessee.— Wilson *v.* Hudson, 8 Yerg. (Tenn.) 397.

Texas.— Smith *v.* Power, 23 Tex. 29; Dooley *v.* Maywald, 18 Tex. Civ. App. 386, 45 S. W. 221.

Virginia.— Gore *v.* Lawson, 8 Leigh (Va.) 458.

Reservation, by state, of equitable interest. — The fact that the state, in parting with its title, reserves an equitable interest in the proceeds of the lands, does not prevent the statute from running in favor of an adverse occupant from the time when the state divests itself of the title. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43. But where land is granted in trust by a state, to aid in the construction of a railway, and by the terms of the grant the title to the lands is to remain in the state until the railroad is completed, there is no adverse possession of the land until that time. Swann *v.* Lindsey, 70 Ala. 507.

61. See Public Lands.

62. *Alabama.*—Stephens *v.* Moore, 116 Ala. 397, 22 So. 542; Farley *v.* Smith, 39 Ala. 38; Iverson *v.* Dubose, 27 Ala. 418; Wright *v.* Swan, 6 Port. (Ala.) 84. *Compare* Dillingham *v.* Brown, 38 Ala. 311.

California.— Mathews *v.* Ferrea, 45 Cal. 51.

Illinois.— Schuttler *v.* Piatt, 12 Ill. 417; Cook *v.* Foster, 7 Ill. 652.

Missouri.— Smith *v.* McCorkle, 105 Mo. 135, 16 S. W. 602; McIlhinney *v.* Ficke, 61 Mo. 329.

Nevada.—Treadway *v.* Wilder, 12 Nev. 108.

Ohio.—Clark *v.* Southard, 16 Ohio St 408; Wood *v.* Ferguson, 7 Ohio St. 288; Duke *v.* Thompson, 16 Ohio 34; Wallace *v.* Minor, 7 Ohio 249.

Utah.— Steele *v.* Boley, 7 Utah 64, 24 Pac. 755 [*overruling* Steele *v.* Boley, 6 Utah 308, 22 Pac. 311].

United States.— Redfield *v.* Parks, 132 U. S. 239, 10 S. Ct. 83, 33 L. ed. 327; Simmons *v.* Ogle, 105 U. S. 271, 26 L. ed. 1087; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Lindsey *v.* Miller, 6 Pet. (U. S.) 666, 8 L. ed. 538; Godkin *v.* Cohn, 80 Fed. 458, 53 U. S. App. 4, 25 C. C. A. 4.

Cancellation of original patent.— Plaintiff entered public lands under a military land-warrant in 1857. By mistake a patent was issued to him to another tract, which was canceled. In 1884 he obtained a patent under the original entry. It was held that since he could not have maintained an action to recover the land without this patent the statute of limitations did not begin to run in favor of one in adverse possession of the land until the patent issued in 1884. Churchill *v.* Sowards, 78 Iowa 472, 43 N. W. 271.

Mining lands.— It has been held that the statute commences to run in favor of an adverse occupant of mining lands only from the issuance of the patent. Clark *v.* Barnard, 15 Mont. 176, 38 Pac. 834; Mayer *v.* Carothers, 14 Mont. 274, 36 Pac. 182; King *v.* Thomas, 6 Mont. 409, 12 Pac. 865; South End Min. Co. *v.* Tinney, 22 Nev. 221, 38 Pac. 401.

the property from the time that he has complied with all the conditions entitling him to a patent, some of the courts hold that an adverse possession will begin to run against the entry-man from the time he becomes entitled to a patent, and not from the date of the patent.[63] Thus, it has been held that the statute begins to run against a purchaser from the government from the date of his final payment and the issuance of a certificate of purchase.[64] But the statute does not commence to run against one who seeks to obtain title to land of the United States until his right to the patent is complete.[65]

(c) *Lands Granted by Special Act of Congress.* Where an act of congress relating to public lands amounts to a direct grant of the fee, the statute will begin to run from the time when the title passes, even though a patent has not been issued.[66]

(d) *Where a Patent Is Expressly Required.* Under a statute which expressly declares that the statute shall commence to run from the date of the patent, this question cannot, of course, arise, and there can be no adverse possession against the patentee of public lands except from the date of his patent.[67]

(iii) *Grantees of State Governments* — (a) *Rule That Patent Must Issue.* According to one line of cases it has been held that an occupancy of state lands prior to the issuance of the patent cannot be taken into account to make out the period of possession which is necessary to give the occupant title by adverse possession against the patentee.[68] And it has been held that this is true even where the patent is given a retroactive effect.[69]

63. Dolen *v.* Black, 48 Nebr. 688, 67 N. W. 760; Carroll *v.* Patrick, 23 Nebr. 834, 37 N. W. 671; Cawly *v.* Johnson, 21 Fed. 492. See also Peting *v.* De Lore, 71 Mo. 13.

64. *Arkansas.*—Nichols *v.* Council, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20.

Indiana.— Doe *v.* Hearick, 14 Ind. 242.

Iowa.— Cady *v.* Eighmey, 54 Iowa 615, 7 N. W. 102.

Louisiana.— Gay *v.* Ellis, 33 La. Ann. 249.

Nebraska.— Dolen *v.* Black, 48 Nebr. 688, 67 N. W. 760.

Homestead entry.— The statute of limitations does not begin to run in favor of one holding adversely, as against one who makes a homestead entry, until the right to a patent is completed by the performance of every act required by the homestead law. Mills *v.* Traver, 35 Nebr. 292, 53 N. W. 67.

Possession prior to entry.— Since the statute of limitations does not run against the federal government a defendant cannot, as against plaintiffs who claim title by entry and purchase of the land from the United States, set up title in himself by showing that he was in adverse possession prior to such entry by plaintiffs. McTarnahan *v.* Pike, 91 Cal. 540, 27 Pac. 784.

65. Nichols *v.* Council, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20; Carroll *v.* Patrick, 23 Nebr. 834, 37 N. W. 671; Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Simmons *v.* Ogle, 105 U. S. 271, 26 L. ed. 1087; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534.

66. St. Louis University *v.* McCune, 28 Mo. 481; Aubuchon *v.* Ames, 27 Mo. 89.

Title passing before issuance of patent.— Where, by the terms of acts of congress granting lands to a railroad, the title passes before the patent is issued, as, for example, when the lands are identified by a survey and the line of the road is definitely located, so that the grantee can maintain an action for the possession of the lands before the issuance of a patent, there may be an adverse possession of the lands from the time the title passes, and such possession will not be interrupted by the subsequent issuance of the patent. Southern Pac. R. Co. *v.* Whitaker, 109 Cal. 268, 41 Pac. 1083; Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200.

67. Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167.

68. *Alabama.*— Stringfellow *v.* Tennessee Coal, etc., Co., 117 Ala. 250, 22 So. 997; Wiggins *v.* Kirby, 106 Ala. 262, 17 So. 354; Wagnon *v.* Fairbanks, 105 Ala. 527, 17 So. 20; Bonner *v.* Phillips, 77 Ala. 427; Iverson *v.* Dubose, 27 Ala. 418.

California.— Anzar *v.* Miller, 90 Cal. 342, 27 Pac. 299; Nessler *v.* Bigelow, 60 Cal. 98; Manly *v.* Howlett, 55 Cal. 94; Gardiner *v.* Miller, 47 Cal. 570.

Georgia.— Smead *v.* Doe, 6 Ga. 158.

Kansas.— Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

Kentucky.— Hartley *v.* Hartley, 3 Metc. (Ky.) 56; Fowke *v.* Darnall, 5 Litt. (Ky.) 316; Stewart *v.* Jackson, 1 A. K. Marsh. (Ky.) 59; Chiles *v.* Calk, 4 Bibb (Ky.) 554.

Missouri.— Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83; Widdicombe *v.* Childers, 84 Mo. 382; Smith *v.* Madison, 67 Mo. 694; Miller *v.* Dunn, 62 Mo. 216.

Virginia.— Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

Thus, while a junior grantee may show a possession anterior to the date of his patent, to defend his possession under the statute of limitations against an elder grantee, he cannot base a claim of title by adverse possession upon an occupancy of the land prior to the senior grant. Koiner *v.* Rankin, 11 Gratt. (Va.) 420; Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

69. In Jackson *v.* Vail, 7 Wend. (N. Y.)

(B) *Rule That Issuance of Patent Is Not Necessary.* On the other hand the courts have sometimes taken the view that the title passes before the issuance of a patent, and have held that the statute begins to run before a patent issues.[70]

(C) *New Madrid Locations.* Under the law of Missouri, the statute begins to run against a New Madrid location, in favor of an adverse possession, when the plat and survey have been returned to the recorder.[71]

(D) *Virginia Military District School Lands.* While it has been contended that the statute does not run against the right of one who holds a lease for ninety-nine years, renewable forever, to Virginia military district school lands, and who surrenders his lease and takes a conveyance in fee, except from the date of such conveyance, this contention has been denied, and it has been held that the statute runs against such grantee in favor of the possession of a person holding a similar lease, not merely from the time of the conveyance, but while the land was held under the lease.[72]

(E) *Swamp Lands.* It seems that the statute does not run against the title of a purchaser of swamp and overflowed lands, founded upon his certificate of purchase from the state, until the land has been certified to the state by the federal government.[73] And it has been held that under a state law granting to the counties certain swamp lands which had previously been granted to the state by act of congress providing that scrip should be issued, and, when located, a patent issued for the land, the statute did not begin to run in favor of an adverse occupant of such land until the issuance of the patent.[74]

(F) *Rule Where the Statute Runs against the State.* If the statute, by its terms, runs against the state, it will run against a grantee of the state, not merely from the date of the grant, but from the commencement of the adverse occupancy.[75]

C. Indians and Their Grantees. There can be no adverse possession of land prior to the extinguishment of the Indian title,[76] and where land which has been allotted to Indians by the United States is held by an Indian title, that is, where the title is vested in the United States and an Indian, so that there can be no alienation by the latter without the consent of the United States, no title by adverse possession can be acquired in the land.[77] But where the title of the Indian

125, the patent for a lot of land was granted in 1820 to a revolutionary officer in pursuance of an act of the legislature of that year. Although the act declared that the patent should have like effect, as to the title to the lot, as if it had been issued in 1790, it was held that the possession of the defendant prior to 1820, when the state divested itself of the title, could not be taken into the estimate under the plea of the statute of limitations, for it was only from that time the statute began to run.

70. In Pennsylvania it has been held that, as to land purchased from the state, whatever may be the origin of the title, whether it commenced by settlement, application, or warrant, the statute begins to run in favor of an adverse occupant against such settler, applicant, or warrantee from the day his equitable right by settlement first commenced. Munshower *v.* Patton, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678.

Illustrations.— The statute runs against lands held by a warrant and survey (Patten *v.* Scott, 118 Pa. St. 115, 12 Atl. 292, 4 Am. St. Rep. 576; McCoy *v.* Dickinson College, 4 Serg. & R. (Pa.) 302); by a descriptive warrant (Keller *v.* Powell, 142 Pa. St. 96, 21 Atl. 796); by a certificate of purchase (Udell *v.* Peak, 70 Tex. 547, 7 S. W. 786; Sulphen *v.* Norris, 44 Tex. 204); and by virtue of a location and survey (Lambert *v.* Weir, 27 Tex. 359); but the statute does not begin to run until the right to a patent is perfected (Manly *v.* Howlett, 55 Cal. 94; Dooley *v.* Maywald, 18 Tex. Civ. App. 386, 45 S. W. 221); and the statute will not run against a purchaser from the state until the land is located (Montgomery *v.* Gunther, 87 Tex. 320, 16 S. W. 1073).

71. Gray *v.* Givens, 26 Mo. 291.

72. Bentley *v.* Newlon, 9 Ohio St. 489.

73. Packard *v.* Moss, 68 Cal. 123, 8 Pac. 818.

74. Clements *v.* Anderson, 46 Miss. 581.

75. Burch *v.* Winston, 57 Mo. 62

76. Thompson *v.* Gotham, 9 Ohio 170; Cocke *v.* Dotson, 1 Overt. (Tenn.) 169.

77. O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428; Sheldon *v.* Donohoe, 40 Kan. 346, 19 Pac. 901; McGannon *v.* Straightlege, 32 Kan. 524, 4 Pac. 1042. Where, by a treaty with an Indian nation ceding certain lands to the United States, it was provided that particular sections of land should be selected and sold for the benefit of the orphans of the Indians, it was held that since the title to the land so reserved did not vest in the orphans, but was held by the United States for their benefit, no title to such lands could be acquired by adverse possession. Bates *v.* Aven, 60 Miss. 955.

is coupled with the power of unrestricted alienation the land is subject to the operation of the statute.[78] So when a purchaser of land from an Indian reservee obtains such title as will enable him to maintain ejectment the statute runs against him.[79]

D. Property of Municipal and Quasi-Municipal Corporations — 1. In General. While there is a conflict of opinion as to just how far the rule exempting the sovereign from the operation of the statute should be applied to municipal and quasi-municipal corporations, the cases are generally agreed that the rule is not to be applied to such corporations to the full extent that it is applied in favor of the state.

2. Property Held in the Capacity of a Private Owner. Thus almost if not quite all the cases agree in holding that where property is held by a municipal corporation as a private owner it is subject to the operation of the statute, and title thereto may be acquired by adverse possession.[80] It has even been held that the statute runs against land owned by a county.[81]

3. Property Dedicated to a Public Use — a. In General. But there is a pronounced conflict of opinion as to whether title by adverse possession may be acquired in property which is held by a municipal corporation for a public use.[82]

b. View That the Statute Runs — (1) *In General.* According to one line of cases the rule which exempts the state from the operation of the statute has no application whatever to municipal corporations, and, in the absence of some provision expressly exempting such corporations from the operation of the statute, title by adverse possession may be acquired to lands held by them for a public use.[83]

78. Schrimpcher *v.* Stockton, 58 Kan. 758, 51 Pac. 276; Forbes *v.* Higginbotham, 44 Kan. 94, 24 Pac. 348; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

79. Dillingham *v.* Brown, 38 Ala. 311.

80. *Arkansas.*— Helena *v.* Hornor, 58 Ark. 151, 23 S. W. 966; Ft. Smith *v.* McKibbin, 41 Ark. 45, 48 Am. Rep. 19.

California.— Ames *v.* San Diego, 101 Cal. 390, 35 Pac. 1005; Hoadley *v.* San Francisco, 50 Cal. 265.

Kentucky.— Rowan *v.* Portland, 8 B. Mon. (Ky.) 232.

Illinois.— Chicago *v.* Middlebrooke, 143 Ill. 265, 32 N. E. 457; Piatt County *v.* Goodell, 97 Ill. 84.

Indiana.— Bedford *v.* Green, 133 Ind. 700, 33 N. E. 369; Bedford *v.* Williard, 133 Ind. 562, 33 N. E. 368 [*distinguishing* Sims *v.* Frankfort, 79 Ind. 446].

New York.— Timpson *v.* New York, 5 N. Y. App. Div. 424, 39 N. Y. Suppl. 248.

Lands held by a city under a lease from the state.— Inasmuch as the California act of March 26, 1851, which grants the use of certain beach and water lots to the city of San Francisco for ninety-nine years, with a proviso that the city shall pay into the state treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising from the sale of the property, does not create a trust in the city in favor of the state, so far as the land itself is concerned, the city's title to such land is subject to extinguishment by adverse possession under the statute of limitations. San Francisco *v.* Straut, 84 Cal. 124, 24 Pac. 814; Holladay *v.* Frisbie, 15 Cal. 631.

81. In Piatt County *v.* Goodell, 97 Ill. 84, it was held that title by adverse possession was acquired to swamp lands owned by a county.

82. As to the estoppel of municipal and quasi-municipal corporations in relation to land held for a public use see Estoppel.

83. Lane *v.* Kennedy, 13 Ohio St. 42; Cincinnati *v.* First Presb. Church, 8 Ohio 298, 32 Am. Dec. 718; Cincinnati *v.* Evans, 5 Ohio St. 594; Williams *v.* First Presb. Soc., 1 Ohio St. 478; Mowry *v.* Providence, 10 R. I. 52; Galveston *v.* Menard, 23 Tex. 349; Knight *v.* Heaton, 22 Vt. 480.

In Kentucky, before the act of 1873 declaring that no adverse holding should begin against a municipal corporation until the occupant notified the city authorities of his purpose to hold and claim as against the city, a town or city could be barred from recovering real estate in the same manner as an individual claimant. Terrill *v.* Bloomfield, (Ky. 1893) 21 S. W. 1041; Covington *v.* McNickle, 18 B. Mon. (Ky.) 262; Alves *v.* Henderson, 16 B. Mon. (Ky.) 131; Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; Rowan *v.* Portland, 8 B. Mon. (Ky.) 232. But this rule seems to have been changed by the above-mentioned act. See Terrill *v.* Bloomfield, (Ky. 1893) 21 S. W. 1041.

In West Virginia this rule was adopted and applied in the earlier cases: Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Wheeling *v.* Campbell, 12 W. Va. 36. But these cases were expressly overruled in Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326.

(II) *Streets and Alleys.* In line with this view it has been held that title by adverse possession may be acquired to lands dedicated to the public for the purposes of streets, alleys,[84] and public squares.[85]

(III) *School Lands.* While it has been held in one of the states where this view obtains that, since a county is a subdivision of the state, a county, like the state, is exempt from the operation of the statute,[86] it has, on the other hand, been held that lands held by counties and towns for school purposes are subject to the law of adverse possession.[87]

c. View That the Statute Does Not Run — (I) *In General.* While the view which has just been discussed is supported by respectable authority and by some very good reasons,[88] it is contrary to the clear weight of authority. The preponderance of authority, and perhaps of reason,[89] support the view that the maxim *nullum tempus occurrit regi* applies not only to the sovereign power of the state, but also to municipal and quasi-municipal corporations as trustees of the rights of the public, and that title to lands held by a public corporation for a public use cannot be acquired by adverse possession.[90]

(II) *Streets, Alleys, Squares, Parks, etc.* Thus it has been held that

84. *Connecticut.*— Derby *v.* Alling, 40 Conn. 410.

Kentucky.— Cornwall *v.* Louisville, etc., R. Co., 87 Ky. 72, 7 S. W. 553; Dudley *v.* Frankfort, 12 B. Mon. (Ky.) 610; Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Bosworth *v.* Mt. Sterling, 12 Ky. L. Rep. 157, 13 S. W. 920.

Michigan.— Flynn *v.* Detroit, 93 Mich. 590, 53 N. W. 815; Essexville *v.* Emery, 90 Mich. 183, 51 N. W. 204; Big Rapids *v.* Comstock, 65 Mich. 78, 31 N. W. 811.

Minnesota.— Wayzata *v.* Great Northern R. Co., 50 Minn. 438, 52 N. W. 913; St. Paul, etc., R. Co. *v.* Minneapolis, 45 Minn. 400 note, 48 N. W. 22.

Missouri.— St. Charles County *v.* Powell, 22 Mo. 525, 66 Am. Dec. 637.

Nebraska.— Lewis *v.* Baker, 39 Nebr. 636, 58 N. W. 126; Meyer *v.* Lincoln, 33 Nebr. 566, 50 N. W. 763, 29 Am. St. Rep. 500, 18 L. R. A. 146; Schock *v.* Falls City, 31 Nebr. 599, 48 N. W. 468.

Ohio.— Cincinnati *v.* Evans, 5 Ohio St. 594; Evens *v.* Cincinnati, 2 Handy (Ohio) 236.

Texas.— Ostrom *v.* San Antonio, 77 Tex. 345, 14 S. W. 66; Galveston *v.* Menard, 23 Tex. 349.

85. Ft. Smith *v.* McKibbin, 41 Ark. 45, 48 Am. Rep. 19; Vier *v.* Detroit, 111 Mich. 646, 70 N. W. 139; Folsom *v.* McGregor, 10 Tex. Civ. App. 555, 30 S. W. 846.

86. In Texas the rule seems to be that with reference to actions involving the right or title to land, where the county acts as the representative of sovereignty, the statute of limitations cannot be invoked against it. Houston, etc., R. Co. *v.* Travis County, 62 Tex. 16; Coleman *v.* Thurmond, 56 Tex. 514; Marsalis *v.* Garrison, (Tex. Civ. App. 1894) 27 S. W. 929.

87. McCartney *v.* Alderson, 54 Mo. 320; School Directors *v.* Georges, 50 Mo. 194; Oxford Tp. *v.* Columbia, 38 Ohio St. 87; Williams *v.* First Presb. Soc., 1 Ohio St. 478.

88. In opposition to the view that where land is held by a city for the use of the public no title thereto can be acquired by adverse possession, it has been contended that in such cases the position and rights of the city are very analogous to those of a *cestui que trust,* while the public occupies the position and assumes the obligation of a trustee, and that, since a trustee is vested with a legal cause of action to recover possession of the trustee estate from an intruder, he cannot protect himself from the operation of the statute by showing that he holds the title in trust for another; in other words, that the effect of the statute cannot be avoided by vesting property in one person for the benefit of another. Cincinnati *v.* First Presb. Church, 8 Ohio 298, 32 Am. Dec. 718, 719 note.

89. In Almy *v.* Church, 18 R. I. 182, 187, 26 Atl. 58, the court says: "The grounds upon which the latter class of cases rests are variously stated: as, that an obstruction is a nuisance, and no nuisance can ripen into a right; that individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have interest sufficient to make them vigilant, while in public rights of property each individual feels but a slight interest and will tolerate a manifest encroachment rather than seek a dispute to set it right; that public policy requires the preservation of public rights, and that a municipality cannot, by permissive neglect, invest an intruder with title to a public highway. These reasons are very cogent and in our opinion outweigh the authorities which are opposed to them."

90. *California.*— Home for Inebriates *v.* San Francisco, 119 Cal. 534, 51 Pac. 950; Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; People *v.* Pope, 53 Cal. 437.

District of Columbia.— District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361.

Illinois.— Sullivan *v.* Tichenor, 179 Ill. 97, 53 N. E. 561; Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479.

Iowa.— Taraldson *v.* Lime Springs, 92 Iowa 187, 60 N. W. 658; Waterloo *v.* Union Mill Co., 72 Iowa 437, 34 N. W. 197. *Contra,* Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729.

Louisiana.— Shreveport *v.* Walpole, 22 La. Ann. 526; Thibodeaux *v.* Maggioli, 4 La. Ann. 73; New Orleans *v.* Magnon, 4 Mart. (La.) 2.

title by adverse possession cannot be acquired in land which has been dedicated to the use of the public for the purpose of a street,[91] alley,[92] public square,[93] or park,[94] public dock,[95] engine lot,[96] school-house site,[97] county hospital,[98] or other county buildings.[99] It has, however, been held that in order to bring such land within the rule the dedication must have been accepted.[1]

Maine.— Charlotte *v.* Pembroke Iron Works, 82 Me. 391, 19 Atl. 902.

New Jersey.— Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

Pennsylvania.— Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253; Barter *v.* Com., 3 Penr. & W. (Pa.) 253.

Tennessee.— Sims *v.* Chattanooga, 2 Lea (Tenn.) 694.

West Virginia.— Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326 [*overruling* Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Wheeling *v.* Campbell, 12 W. Va. 36].

United States.— Simplot *v.* Chicago, etc., R. Co., 5 McCrary (U. S.) 158, 16 Fed. 350.

Land which has reverted to the owner.— Where land which has been dedicated to the use of the public for the purpose of a street or alley reverts to the owner of the fee in consequence of an abandonment of the highway by the city, it is of course subject to adverse possession. Flick's Estate, 6 Kulp (Pa.) 329.

91. *Alabama.*— Harn *v.* Dadeville, 100 Ala. 199, 14 So. 9; Webb *v.* Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161.

California.— Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Oreña *v.* Santa Barbara, 91 Cal. 621, 28 Pac. 268; Mills *v.* Los Angeles, 90 Cal. 522, 27 Pac. 354; Visalia *v.* Jacob, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; People *v.* Pope, 53 Cal. 437.

Illinois.— Sullivan *v.* Tichenor, 179 Ill. 97, 53 N. E. 561; Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759.

Indiana.— Wolfe *v.* Sullivan, 133 Ind. 331, 32 N. E. 1017; Cheek *v.* Aurora, 92 Ind. 107; Sims *v.* Frankport, 79 Ind. 446.

Iowa.— Waterloo *v.* Union Mill Co., 72 Iowa 437, 34 N. W. 197.

Louisiana.— Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21; Sheen *v.* Stothart, 29 La. Ann. 630; Thibodeaux *v.* Maggioli, 4 La. Ann. 73; New Orleans *v.* Magnon, 4 Mart. (La.) 2.

Mississippi.— Witherspoon *v.* Meridian, 69 Miss. 288, 13 So. 843; Vicksburg *v.* Marshall, 59 Miss. 563.

Montana.—Territory *v.* Deegan, 3 Mont. 82.

New Jersey.— Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540; State *v.* Trenton, 36 N. J. L. 198; Jersey City *v.* State, 30 N. J. L. 521; Tainter *v.* Morristown, 19 N. J. Eq. 46; Cross *v.* Morristown, 18 N. J. Eq. 305; Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

New York.— St. Vincent Female Orphan Asylum *v.* Troy, 76 N. Y. 108, 32 Am. Rep. 286 [*reversing* 12 Hun (N. Y.) 317]; Walker *v.* Caywood, 31 N. Y. 51; Milhau *v.* Sharp, 27 N. Y. 611; Morison *v.* New York El. R. Co., 74 Hun (N. Y.) 398, 26 N. Y. Suppl. 641, 57 N. Y. St. 245; Mills *v.* Hall, 9 Wend. (N. Y.) 315.

Pennsylvania.— Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599; Kopf *v.* Utter, 101 Pa. St. 27; Kittaning Academy *v.* Brown, 41 Pa. St. 269; Barter *v.* Com., 3 Penr. & W. (Pa.) 253; Com. *v.* McDonald, 16 Serg. & R. (Pa.) 390; Philadelphia *v.* Crump, 1 Brewst. (Pa.) 320; Philadelphia *v.* Friday, 6 Phila. (Pa.) 275, 24 Leg. Int. (Pa.) 109.

South Carolina.— Chafe *v.* Aiken, 57 S. C. 507, 35 S. E. 800.

Tennessee.— Sims *v.* Chattanooga, 2 Lea (Tenn.) 694; Memphis *v.* Lenore, 6 Coldw. (Tenn.) 412; Raht *v.* Southern R. Co., (Tenn. Ch. 1897) 50 S. W. 72.

Virginia— Yates *v.* Warrenton, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860; Taylor *v.* Com., 29 Gratt. (Va.) 780.

West Virginia.— Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326 [*overruling* Wheeling *v.* Campbell, 12 W. Va. 36; Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802].

Wisconsin.— Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587.

United States.— Simplot *v.* Chicago, etc., R. Co., 5 McCrary (U. S.) 158, 16 Fed. 350; Grogan *v.* Hayward, 6 Sawy. (U. S.) 498, 4 Fed. 161.

92. Schmidt *v.* Draper, 137 Ind. 249, 36 N. E. 709; Taraldson *v.* Lime Springs, 92 Iowa 187, 60 N. W. 658; Crocker *v.* Collins, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752.

93. *California.*—San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405; Hoadley *v.* San Francisco, 70 Cal. 320, 12 Pac. 125, 50 Cal. 265.

Illinois.— Lee *v.* Mound Station, 118 Ill. 304, 8 N. E. 759.

New Jersey.—Price *v.* Plainfield, 40 N. J. L. 608.

Pennsylvania.— Com. *v.* Alburger, 1 Whart. (Pa.) 469; Rung *v.* Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

United States.— Grogan *v.* Hayward, 6 Sawy. (U. S.) 498, 4 Fed. 161.

94. People *v.* Smith, 93 Cal. 490, 29 Pac. 57; People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

95. San Francisco *v.* Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

96. San Francisco *v.* Bradbury, 92 Cal. 414, 28 Pac. 803.

97. Board of Education *v.* Martin, 92 Cal. 209, 28 Pac. 799.

98. Yolo County *v.* Barney, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152.

99. Kittaning Academy *v.* Brown, 41 Pa. St. 269.

1. Uptagraff *v.* Smith, 106 Iowa 385, 76 N. W. 733; Corwin *v.* Corwin, 24 Hun (N. Y.) 147.

d. Rule Where the Statute Runs against the State. Where the statute, by express provision, runs against the state, the title to lands vested in municipalities is, of course, subject to the bar of the statute[2]

E. Highways. On the ground that there is a distinction between streets and highways which lie outside of and are not subject to the control of municipal corporations[3] it has been held, even in those jurisdictions where streets are considered to be subject to the statute, that title by adverse possession cannot be acquired to land which has been dedicated to the public use for the purposes of a highway.[4] And of course this rule obtains in those jurisdictions where it is held that streets are not subject to the law of adverse possession.[5] There are, however, some few cases in which it is held that highways are subject to the statute.[6] Some of the courts, even in the jurisdictions in which it is held that title by adverse possession cannot be acquired to a highway, have, in certain cases, resorted to the doctrine of estoppel to protect an adverse occupant.[7]

F. Corporations. Unquestionably the statute, in the absence of some provision to the contrary, runs against corporations.[8]

G. Railroad Companies. Since a railroad is not a public highway within the rule which exempts highways from the operation of the statute of limitations, land acquired by a railway company for right of way or station purposes may be taken from it by adverse possession.[9] But it has sometimes been expressly

2. O'Neil *v.* St. Louis, 8 Mo. App. 416. It has been held that where it is expressly provided that the statute of limitations shall apply to actions "when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state," and it is further provided that the statute "shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons," no distinction can be made between municipal corporations when acting as agencies of the state and when acting in a private proprietary capacity. Title may be acquired to land held by municipal corporations for public purposes. St. Paul, etc., R. Co. *v.* Hinckley, 53 Minn. 398, 55 N. W. 560; St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17.

3. Ft. Smith *v.* McKibbin, 41 Ark. 45, 48 Am. Rep. 19; Davies *v.* Huebner, 45 Iowa 574.

4. Krueger *v.* Jenkins, 59 Nebr. 641, 81 N. W. 844; Heddleston *v.* Hendricks, 52 Ohio St. 460, 40 N. E. 408; Lawrence R. Co. *v.* Mahoning County, 35 Ohio St. 1; Little Miami R. Co. *v.* Greene County, 31 Ohio St. 338; Almy *v.* Church, 18 R. I. 182, 26 Atl. 58; Simmons *v.* Cornell, 1 R. I. 519.

5. *Illinois.*— Lewiston *v.* Proctor, 27 Ill. 414.

Iowa.— Davies *v.* Huebner, 45 Iowa 574.

New York.— Driggs *v.* Phillips, 103 N. Y. 77, 8 N. E. 514; Morey *v.* West Troy, 12 N. Y. Wkly. Dig. 55.

Virginia.— Depriest *v.* Jones, (Va. 1895) 21 S. E. 478.

Wisconsin.— Nicolai *v.* Davis, 91 Wis. 370, 64 N. W. 1001.

Highways acquired by prescription.—Under a statute providing that "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to this state," it has been held that no title by adverse possession can be acquired to land which forms part of a public highway, although the appropriation of the land for the purpose of a highway had been wrongful in the first instance, the easement having been acquired by ten years' occupancy and use of the road by the public. State *v.* Warner, 51 Mo. App. 174, 179.

Turnpikes.— On the ground that they are public highways this rule has been applied to turnpikes. Ulman *v.* Charles St. Ave. Co., 83 Md. 130, 34 Atl. 366; Stevenson's Appeal, (Pa. 1886) 6 Atl. 266.

6. Cady *v.* Fitzsimmons, 50 Conn. 209; Webber *v.* Chapman, 42 N. H. 326, 80 Am. Dec. 111; Knight *v.* Heaton, 22 Vt. 480. In Litchfield *v.* Wilmot, 2 Root (Conn.) 288, it was held that fifteen years of uninterrupted possession of a highway will be a bar to the town's right of recovering it for the use of a highway, but this decision was controlled by a statute of Connecticut limiting the pulling down and removing of encroachments on highways, as well as on common land, to fifteen years.

Under a statute in Massachusetts it was held that the maintenance of a fence within the limits of a highway for a period of forty years gave a right to its continuance. Cutter *v.* Cambridge, 6 Allen (Mass.) 20.

7. Davies *v.* Huebner, 45 Iowa 574. See also ESTOPPEL.

As to the abandonment of highways by nonuser see HIGHWAYS.

8. Camden Orphans Soc. *v.* Lockhart, 2 McMull. (S. C.) 84; Society for Propagation of Gospel *v.* Sharon, 28 Vt. 603.

Religious corporation.— Title by adverse possession may be acquired as against a religious corporation. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134 [*reversing* 5 Lans. (N. Y.) 206].

9. Illinois Cent. R. Co. *v.* O'Connor, 154 Ill. 550, 39 N. E. 563; Pittsburgh, etc., R. Co. *v.* Strickley, (Ind. 1900) 58 N. E. 192; Pol-

provided that the statute shall not run against railroad companies in certain cases.[10]

H. Trust Estates. While it was at one time thought that trust estates were not within the operation of the statute,[11] ever since a decision by Lord Hardwicke to the contrary,[12] it has uniformly been held that an adverse possession which is sufficient to bar the legal estate of the trustee also bars the equitable estate of the *cestui que trust*.[13] And this is so even though the *cestui que trust* is under some disability, such as infancy[14] or coverture.[15]

I. Property Acquired by Adverse Possession. Although the title to land has been acquired by adverse possession, it may, of course, like any other title, be defeated by a subsequent adverse possession for the statutory period.[16]

XI. Who May Acquire Title by Adverse Possession.

A. In General. As a general rule, the statute limiting the time for the commencement of real actions operates in favor of every class and description of persons, natural or artificial.[17]

B. States. Although the statute does not run against the state, an adverse possession by the state for the statutory period will give title by adverse possession.[18]

lock *v.* Maysville, etc., R. Co., (Ky. 1898) 44 S. W. 359; Spottiswoode *v.* Morris, etc., R. Co., 61 N. J. L. 322, 40 Atl. 505; Bobbett *v.* South Eastern R. Co., 9 Q. B. D. 424. *Contra*, Southern Pac. Co. *v.* Hyatt, (Cal. 1901) 64 Pac. 272.

10. The Massachusetts statute [Stat. (1861) c. 100] providing that if the owner of land adjoining a railroad incloses any part of the land belonging to said railroad where located and established, or occupy "any land belonging to or included within the location of any such railroad," no continuance of occupancy shall create in the occupant any right to the land belonging to the railroad so occupied, applies, it has been held, only to land which has been taken by the road, or which it might have taken, by right of eminent domain, and not to adjoining lands which were purchased (Maney *v.* Providence, etc., R. Co., 161 Mass. 283, 37 N. E. 164); and it has been held that the statute does not apply to land outside of a located or established railroad (Littlefield *v.* Boston, etc., R. Co., 146 Mass. 268, 15 N. E. 648).

Under the North Carolina statute (Code, § 150) providing that no railroad company shall be barred of any real estate, right of way, etc., by any statute of limitations or by occupancy of the same by any person, it has been held that the title of a railroad company to its right of way cannot be lost by adverse possession. Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741; Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746.

11. Lechmere *v.* Carlisle, 3 P. Wms. 211.

12. Lewellin *v.* Mackworth, 2 Eq. Cas. Abr. 579, par. 8; 15 Vin. Abr. 125 note.

13. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296; Love *v.* Love, 65 Ala. 554; Colburn *v.* Broughton, 9 Ala. 351.

Georgia.— Knorr *v.* Raymond, 73 Ga. 749; Ford *v.* Cook, 73 Ga. 215; Varner *v.* Gunn, 61 Ga. 54.

Kentucky.— Maddox *v.* Allen, 1 Metc. (Ky.) 495; Edwards *v.* Woolfolk, 17 B. Mon. (Ky.) 376.

Maryland.— Crook *v.* Glenn, 30 Md. 55.

New Jersey.— Snyder *v.* Snover, 56 N. J. L. 20, 27 Atl. 1013.

North Carolina.— Clayton *v.* Cagle, 97 N. C. 300, 1 S. E. 523; Herndon *v.* Pratt, 59 N. C. 327.

South Carolina.— Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416.

Tennessee.— Woodward *v.* Boro, 16 Lea (Tenn.) 678; Watkins *v.* Specht, 7 Coldw. (Tenn.) 585; Goss *v.* Singleton, 2 Head (Tenn.) 67.

United States.— Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735.

14. *Georgia.*— Crawley *v.* Richardson, 78 Ga. 213.

Kentucky.—Willson *v.* Louisville Trust Co., 102 Ky. 522, 44 S. W. 121; Barclay *v.* Goodloe, 83 Ky. 493.

Missouri.— Walton *v.* Ketchum, 147 Mo. 209, 48 S. W. 924; Ewing *v.* Shannahan, 113 Mo. 188, 20 S. W. 1065.

North Carolina.—Blake *v.* Allman, 58 N. C. 407.

Tennessee.— Woolridge *v.* Planters' Bank, 1 Sneed (Tenn.) 296.

15. Crook *v.* Glenn, 30 Md. 55; Collins *v.* McCarty, 68 Tex. 150, 3 S. W. 730, 2 Am. St. Rep. 475.

16. Randolph *v.* Laysard, 36 La. Ann. 402; Cooper *v.* Ord, 60 Mo. 420; Galan *v.* Goliad, 32 Tex. 776; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

17. All persons who have an interest in acquiring an estate by prescription have a right to intervene and set up the plea, although those from whom they derive title renounce it. Giddens *v.* Mobley, 37 La. Ann. 900.

18. Eldridge *v.* Binghamton, 120 N. Y. 309, 24 N. E. 462 [*affirming* 42 Hun (N. Y.) 202];

C. Municipal Corporations. A municipal corporation may acquire title to land by adverse possession for corporate purposes[19] and even for other than municipal purposes.[20]

D. Private Corporations — 1. In General. A private corporation is within the operation of the statute of limitations and may acquire title by adverse possession.[21] It has also been held that although a corporation is incapable of holding real estate it may acquire a title by adverse possession which will be valid as against all but the state.[22]

2. Foreign Corporations. Under a statute of limitations providing in effect that the statute shall not run against a person who is absent from the state, it has been held that title by adverse possession cannot be acquired by a foreign corporation.[23] But what seems to be the better view is that, since a foreign corporation is within the state for all the purposes of acquiring jurisdiction, its theoretical domicile within the state under the laws of which it was created does not make it out of the state within the meaning of this provision, and that therefore a foreign corporation is entitled to avail itself of the benefits of the statute.[24]

E. Aliens. Although not capable of holding real property, an alien may successfully set up the defense of adverse possession against the true owner.[25]

F. Infants. Adverse possession by an infant, either by himself or guardian, will vest a title in the infant.[26]

G. Married Women. Where a married woman, in her own right, takes and holds possession of land adversely to the owner for the statutory period, she acquires title by adverse possession[27] which cannot be affected by the acts of her husband.[28] And, though land is held by both the husband and the wife, if the possession is held openly under a deed conveying the legal title to the wife, a title by adverse possession enures to the benefit of the wife.[29]

XII. Extent of Possession.

A. Where Claimant Is without Color of Title — 1. Statement of Rule. One claiming title by adverse possession, but not holding under color of title.

Birdsall *v.* Cary, 66 How. Pr. (N. Y.) 358; Rhode Island *v.* Massachusetts, 4 How. (U. S.) 591, 11 L. ed. 1116.

19. New York *v.* Carleton, 113 N. Y. 284, 21 N. E. 55; Sherman *v.* Kane, 86 N. Y. 57.

20. New Shoreham *v.* Ball, 14 R. I. 566. See also Boothe *v.* Coventry, 4 Vt. 295, wherein it was held that an adverse possession for the statutory period will give title by adverse possession, whether the occupant holds in his own right or under a town.

21. Second Precinct *v.* Carpenter, 23 Pick. (Mass.) 131; People *v.* Trinity Church, 22 N. Y. 44; Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Blair *v.* St. Louis, etc., R. Co., 24 Fed. 539.

22. Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627; Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587. But in Heiskell *v.* Trout, 31 W. Va. 810, 8 S. E. 557, it was held that where property has been held by trustees under a trust void for uncertainty, not for the use of themselves, but for the use of a church which was incapable of taking title, no possession or adverse claim could confer upon the church any title or defeat the claims of the rightful owners.

23. Barstow *v.* Union Consol. Silver Min. Co., 10 Nev. 386; Robinson *v.* Imperial Silver Min. Co., 5 Nev. 44; Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541.

24. St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17.

25. Overing *v.* Russell, 32 Barb. (N. Y.) 263. But in Leary *v.* Leary, 50 How. Pr. (N. Y.) 122, it was held that, although a person has been in adverse possession of land for the statutory period, if during five years of that time he was an alien and incapable of holding land the possession did not ripen into a title.

26. Davis *v.* Mitchell, 5 Yerg. (Tenn.) 281.

27. Clark *v.* Gilbert, 39 Conn. 94.

28. Steel *v.* Johnson, 4 Allen (Mass.) 425; Collins *v.* Lynch, 157 Pa. St. 246, 33 Wkly. Notes Cas. (Pa.) 230, 27 Atl. 721, 37 Am. St. Rep. 723.

Wife living apart from husband.— Where a married woman is by statute given the same right to acquire property as a *feme sole*, a wife living apart from her husband and supporting herself may acquire title by adverse possession to a portion of his lands awarded to her by a void decree of divorce. Warr *v.* Honeck, 8 Utah 61, 29 Pac. 1117.

29. Ramsey *v.* Quillen, 5 Lea (Tenn.) 184.

acquires no title to any land except what is in his actual possession.[30] There can be no constructive possession without color of title.[31]

30. *Alabama.*— Burks *v.* Mitchell, 78 Ala. 61; Dothard *v.* Denson, 72 Ala. 541; Ryan *v.* Kilpatrick, 66 Ala. 332; Bell *v.* Denson, 56 Ala. 444.

Arkansas.— Nicklace *v.* Dickerson, 65 Ark. 422, 46 S. W. 945; Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256; Wheeler *v.* Ladd, 40 Ark. 108; Ferguson *v.* Peden, 33 Ark. 150; Mooney *v.* Cooledge, 30 Ark. 640; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

California.— Suñol *v.* Hepburn, 1 Cal. 254, 255.

Illinois.— Zirngibl *v.* Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 N. E. 431; Bristol *v.* Carroll County, 95 Ill. 84; James *v.* Indianapolis, etc., R. Co., 91 Ill. 554; Schneider *v.* Botsch, 90 Ill. 577; Foster *v.* Letz, 86 Ill. 412; Goewey *v.* Urig, 18 Ill. 238; Turney *v.* Chamberlain, 15 Ill. 271.

Indiana.— Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; State *v.* Porter, 86 Ind. 404; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Bell *v.* Longworth, 6 Ind. 273.

Kansas.— Anderson *v.* Burnham, 52 Kan. 454, 34 Pac. 1056.

Kentucky.— Taylor *v.* Combs, (Ky. 1899) 50 S. W. 64; Brooks *v.* Clay, 3 A. K. Marsh. (Ky.) 545.

Maine.— Brackett *v.* Persons Unknown, 53 Me. 228, 87 Am. Dec. 548; Thornton *v.* Foss, 26 Me. 402.

Massachusetts.— Coburn *v.* Hollis, 3 Metc. (Mass.) 125; Allen *v.* Holton, 20 Pick. (Mass.) 458; Bates *v.* Norcross, 14 Pick. (Mass.) 224; Brimmer *v.* Long Wharf, 5 Pick. (Mass.) 131; Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227.

Minnesota.— Barber *v.* Robinson, 78 Minn. 193, 80 N. W. 968; Coleman *v.* Northern Pac. R. Co., 36 Minn. 525, 32 N. W. 859.

Mississippi.— Welborn *v.* Anderson, 37 Miss. 155; Grafton *v.* Grafton, 8 Sm. & M. (Miss.) 77.

Missouri.— Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893; Nye *v.* Alfter, 127 Mo. 529, 30 S. W. 186; Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032; Chapman *v.* Templeton, 53 Mo. 463; Rannels *v.* Rannels, 52 Mo. 108; De Graw *v.* Taylor, 37 Mo. 310; St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586; Kincaid *v.* Logue, 7 Mo. 166; Sloane *v.* Moore, 7 Mo. 170; Kennedy *v.* Prueitt, 24 Mo. App. 414.

Nebraska.—Omaha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739; Lejeune *v.* Harmon, 29 Nebr. 268, 45 N. W. 630; Gatling *v.* Lane, 17 Nebr. 77, 80, 22 N. W. 227, 453; Haywood *v.* Thomas, 17 Nebr. 237, 22 N. W. 460.

New Hampshire.— Boynton *v.* Hodgdon, 59 N. H. 247; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Hoag *v.* Wallace, 28 N. H. 547; Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190; Hale *v.* Glidden, 10 N. H. 397; Riley *v.* Jameson, 3 N. H. 23, 14 Am. Dec. 325; Lund *v.* Parker, 3 N. H. 49.

New Jersey.—Pennsylvania R. Co. *v.* Breckenridge, 60 N. J. L. 583, 38 Atl. 740; New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227; Dem *v.* Hunt, 20 N. J. L. 487.

New York.— Becker *v.* Van Valkenburgh, 29 Barb. (N. Y.) 319; Jackson *v.* Camp, 1 Cow. (N. Y.) 605; Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525; Doe *v.* Campbell, 10 Johns. (N. Y.) 475; Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156.

North Carolina.— Basnight *v.* Meekins, 121 N. C. 23, 27 S. E. 992; Berryman *v.* Kelly, 35 N. C. 269; Bynum *v*, Thompson, 25 N. C. 578.

Ohio.— Humphries *v.* Huffman, 33 Ohio St. 395.

Oregon.— Joy *v.* Stump, 14 Oreg. 361, 12 Pac. 929; Wilson *v.* McEwan, 7 Oreg. 87.

South Carolina.— Drayton *v.* Marshall, 1 Rice Eq. (S. C.) 373, 33 Am. Dec. 84; Gourdin *v.* Fludd, Harp. (S. C.) 232.

Tennessee.— Brown *v.* Watkins, 98 Tenn. 454, 40 S. W. 480; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 S. W. 737; Mayse *v.* Lafferty, 1 Head (Tenn.) 60; Thomasson *v.* Keaton, 1 Sneed (Tenn.) 154; Collins *v.* Hipshire, 2 Swan (Tenn.) 109; Rutherford *v.* Franklin, 1 Swan (Tenn.) 321; Lea *v.* Netherton, 9 Yerg (Tenn.) 315.

Virginia.—Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Creekmur *v.* Creekmur, 75 Va. 430; Kincheloe *v.* Tracewells, 11 Gratt. (Va.) 587.

West Virginia.— Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Oney *v.* Clendenin, 28 W. Va. 34; Core *v.* Faupel, 24 W. Va. 238.

United States.— Barr *v.* Gratz, 4 Wheat. (U. S.) 213, 4 L. ed. 553; Ellicott *v.* Pearl, 1 McLean (U. S.) 206, 8 Fed. Cas. No. 4,386; Potts *v.* Gilbert, 3 Wash. (U. S.) 475, 19 Fed. Cas. No. 11,347.

Acquiring title subsequent to entry.— One who without color of title enters upon a tract of unoccupied real property, and takes visible, open, and notorious possession of a part thereof, cannot extend his possession so as to embrace the whole tract merely by obtaining color of title thereto subsequent to his entry. Barber *v.* Robinson, 78 Minn. 193, 80 N. W. 968.

31. *Arkansas.*— Nicklace *v.* Dickerson, 65 Ark. 422, 46 S. W. 945.

California.— Garrison *v.* Sampson, 15 Cal. 93.

Georgia.— Cook *v.* Long, 27 Ga. 280.

Illinois.— Foster *v.* Letz, 86 Ill. 412; Webb *v.* Sturtevant, 2 Ill. 181; Lovett *v.* Noble, 2 Ill. 185.

Indiana.— Silver Creek Cement Corp. *v.* Union Lime, etc., Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721.

Kentucky.— Shackleford *v.* Smith, 5 Dana (Ky.) 232.

Louisiana.— Prevost *v.* Johnson, 9 Mart. (La.) 123.

2. Reason for Rule. The reason for this is that when an entry is not under color of title there is no invasion or disseizin which notifies the true owner of a claim asserted by another person, or which gives him a right of action except as to the land actually occupied.[32]

3. Limitations and Exceptions to Rule — a. In Vermont. In Vermont the rule stated in the preceding sections has not been accepted without some qualification. In a comparatively recent decision it is said: "Where a person without title or color of title enters upon a vacant lot and actually occupies a portion of it, and the lot has a definite boundary marked upon the land, such person, by claiming to be the owner to the boundary lines of the lot, has a constructive possession of the whole and will acquire a title to the whole by such partial occupation for fifteen years." [33]

b. In Pennsylvania. In Pennsylvania a number of decisions appear to hold, without qualification, that one who has no color of title can acquire title only to so much land as he actually occupies.[34] On the other hand there are decisions which seem to place a qualification on the rule very similar to that established in Vermont.[35]

c. In Texas. In this state there are three periods of limitation for acquiring title by adverse possession, of three, five,[36] and ten years, respectively. The ten years' statute contains very peculiar provisions,[37] and there has been some difference of opinion as to its proper construction. In a number of decisions in which the statute was not adverted to the court laid down the general rule, in accordance with that which obtains in most states, that, without color of title, title by adverse possession can be acquired only to such land as was actually occupied by the claimant.[38] But according to the weight of authority one may, by actual occupation of part of a larger tract, title to which is in another, acquire title to one hundred and sixty or six hundred and forty acres thereof, according as his occupation may have been under the former or present ten years' statute, although he may have had actual possession of a much less number of acres than is designated in the statute.[39]

Maryland.— Hoye *v.* Swan, 5 Md. 237.

Massachusetts.—Poignaud *v.* Smith, 8 Pick. (Mass.) 272.

Missouri.— Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901; Mylar *v.* Hughes, 60 Mo. 105; Fugate *v.* Pierce, 49 Mo. 441.

New Jersey.— Dem *v.* Hunt, 20 N. J. L. 487.

New York.— Edwards *v.* Noyes, 65 N. Y. 125; Simpson *v.* Downing, 23 Wend. (N. Y.) 316; Jackson *v.* Oltz, 8 Wend. (N. Y.) 440; Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

Pennsylvania.— Ege *v.* Medlar, 82 Pa. St. 86; McCall *v.* Neely, 3 Watts (Pa.) 69; Overfield *v.* Christie, 7 Serg. & R. (Pa.) 173. But see *infra*, XII, A, 3, b.

Texas.— Bracken *v.* Jones, 63 Tex. 184; Whitehead *v.* Foley, 28 Tex. 268. But see *infra*, XII, A, 3, c.

Vermont.— Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

Virginia.— Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

32. Barber *v.* Robinson, 78 Minn. 193, 80 N. W. 968; Humphries *v.* Huffman, 33 Ohio St. 395.

33. Hodges *v.* Eddy, 38 Vt. 327, 346. *Compare* Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

34. Bishop *v.* Lee, 3 Pa. St. 214; McCaffrey *v.* Fischer, 4 Watts & S. (Pa.) 181; Royer *v.* Benlow, 10 Serg. & R. (Pa.) 303; Miller *v.* Shaw, 7 Serg. & R. (Pa.) 129; Hall *v.* Powel, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722. See also Pennsylvania cases cited *supra*, note 31.

35. Fitch *v.* Mann, 8 Pa. St. 503; Thompson *v.* Milford, 7 Watts (Pa.) 442; Bell *v.* Hartley, 4 Watts & S. (Pa.) 32, in which cases it was held that an actual adverse possession for the requisite period gives title not only to that part of it which was cleared and cultivated, but to all that was included within definitely marked boundaries up to which the adverse occupant claimed. See also Barnhart *v.* Pettit, 22 Pa. St. 135, wherein it was held that if the adverse occupant claims up to the line of the true owner's survey, using it as his own, exercising the usual acts of ownership over and paying taxes upon the whole tract, twenty-one years before the suit is brought, the statute will protect him for the whole.

36. See Texas cases cited *supra*, note 31.

37. Tex. Rev. Stat. (1895), arts. 3343, 3344.

38. Claiborne *v.* Elkins, 79 Tex. 380, 15 S. W. 395; Evans *v.* Foster, 79 Tex. 48, 15 S. W. 170; Evitts *v.* Roth, 61 Tex. 81; Cantagrel *v.* Von Lupin, 58 Tex. 570; Whitehead *v.* Foley, 28 Tex. 268.

39. Simpson *v.* Johnson, 92 Tex. 159, 46 S. W. 628; Craig *v.* Cartwright, 65 Tex. 413; Pearson *v.* Boyd, 62 Tex. 541; Mooring *v.*

B. Where Claimant Has Color of Title — 1. Statement of General Rule as to Effect of Part Possession. The general rule is well settled that where a party enters, under color of title, into the actual occupancy of a part of the premises described in the instrument giving color, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the lands embraced in the instrument under which he claims.[40] This

Campbell, 47 Tex. 37; Word *v.* Drouthett, 44 Tex. 365; Smith *v.* De La Garza, 15 Tex. 150; Charle *v.* Saffold, 13 Tex. 94; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098. See also Benavides *v.* Molino, (Tex. Civ. App. 1900) 60 S. W. 260, in which this doctrine is fully recognized.

If the statutory number of acres has not been defined by specific metes and bounds for the statutory period, judgment will be given for one hundred and sixty acres to be defined under the instructions of the court so as to include the claimant's improvements. Bering *v.* Ashley, (Tex. Civ. App. 1895) 30 S. W. 838. If, however, the claimant, on entering, causes the statutory number of acres to be surveyed and marked off, he may acquire a right to the specific lands thus designated. McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098. It seems, though, that if the occupant makes no claim beyond defined boundaries, he cannot acquire title to more land than was included in such boundaries, although less than the amount designated in the statute. McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098. On the other hand, under both laws, the possessor may hold what he had actually inclosed, though it exceeds the area to which his possession would have been construed to extend from an occupation of only a part of the area named in the statute. Craig *v.* Cartwright, 65 Tex. 413.

40. *Alabama.*—Reddick *v.* Long, (Ala. 1900) 27 So. 402; Zundel *v.* Baldwin, 114 Ala. 328, 21 So. 420; National Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47; Carter *v.* Chevalier, 108 Ala. 563, 19 So. 798; Cogsbill *v.* Mobile, etc., R. Co., 92 Ala. 252, 9 So. 512; Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Burks *v.* Mitchell, 78 Ala. 61.

California.— Wilson *v.* Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Donahue *v.* Gallavan, 43 Cal. 573; Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421; Ayres *v.* Bensley, 32 Cal. 620; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Georgia.— Furgerson *v.* Bagley, 95 Ga. 516, 20 S. E. 241; Hammond *v.* Crosby, 68 Ga. 767; Anderson *v.* Dodd, 65 Ga. 402; Weitman *v.* Thiot, 64 Ga. 11; Janes *v.* Patterson, 62 Ga. 527; Parker *v.* Jones, 57 Ga. 204; Clark *v.* Hulsey, 54 Ga. 608.

Illinois.—Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Chicago, etc., R. Co. *v.* Grant, 167 Ill. 489, 47 N. E. 750; Sholl *v.* German Coal Co., 139 Ill. 21, 28 N. E. 748; Keith *v.* Keith, 104 Ill. 397; Coleman *v.* Billings, 89 Ill. 183; Scott *v.* Delany, 87 Ill. 146; Barger *v.* Hobbs, 67 Ill. 592.

Indiana.— Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822; Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522; Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1, 29 N. E. 484; Wright *v.* Kleyla, 104 Ind. 223, 4 N. E. 16; Bell *v.* Longworth, 6 Ind. 273.

Iowa.— Libbey *v.* Young, 103 Iowa 258, 72 N. W. 520; Watters *v.* Connelly, 59 Iowa 217, 13 N. W. 82; Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609; Hamilton *v.* Wright, 30 Iowa 480; Langworthy *v.* Myers, 4 Iowa 18; Kerr *v.* Leighton, 2 Greene (Iowa) 196.

Kansas.— Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957; Gildehaus *v.* Whiting, 39 Kan. 706, 18 Pac. 916.

Kentucky.— Harrison *v.* McDaniel, 2 Dana (Ky.) 348; Moss *v.* Scott, 2 Dana (Ky.) 271; Smith *v.* Frost, 2 Dana (Ky.) 144; Moss *v.* Currie, 1 Dana (Ky.) 266; Daniel *v.* Ellis, 1 A. K. Marsh. (Ky.) 60, 10 Am. Dec. 707; Kendall *v.* Slaughter, 1 A. K. Marsh. (Ky.) 375; Fox *v.* Hinton, 4 Bibb (Ky.) 559.

Louisiana.— Gillard *v.* Glenn, 1 Rob. (La.) 159; Sanchez *v.* Gonzales, 11 Mart. (La.) 207; Donegan *v.* Matineau, 9 Mart. (La.) 43; Henderson *v.* St. Charles Church, 7 Mart. N. S. (La.) 117.

Maine.— Brackett *v.* Persons Unknown, 53 Me. 228, 87 Am. Dec. 548; Gardner *v.* Gooch, 48 Me. 487; Putnam Free School *v.* Fisher, 34 Me. 172; Treat *v.* Strickland, 23 Me. 234; Little *v.* Megquier, 2 Me. 176; Kennebec Purchase *v.* Laboree, 2 Me. 275, 11 Am. Dec. 79.

Maryland.— Zion Church *v.* Hilken, 84 Md. 170, 35 Atl. 9; Kopp *v.* Herrman, 82 Md. 339, 33 Atl. 646; Gump *v.* Sibley, 76 Md. 165, 28 Atl. 977; Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522.

Massachusetts.— Kennebeck Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227.

Michigan.— Clark *v.* Campau, 92 Mich. 573, 52 N. W. 1026; Carpenter *v.* Monks, 81 Mich. 103, 45 N. W. 477.

Minnesota.— Barber *v.* Robinson, (Minn. 1901) 84 N. W. 732; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Mississippi.— Davis *v.* Davis, 68 Miss. 478, 10 So. 70; Jones *v.* Gaddis, 67 Miss. 761, 7 So. 489; Ryan *v.* Mississippi Valley, etc., R. Co., 62 Miss. 162; Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360; Wilson *v.* Williams, 52 Miss. 487; Welborn *v.* Anderson, 37 Miss. 155; Hanna *v.* Renfro, 32 Miss. 125.

Missouri.— Heinemann *v.* Bennett, 144 Mo. 113, 45 S. W. 1092; Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032; Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901; Hargis *v.* Kansas City etc., R. Co., 100 Mo. 210, 13 S. W. 680; Harbison *v.* School Dist. No. 1, 89 Mo. 184, 1 S. W. 30; Hughes *v.* Israel, 73 Mo. 538; Lynde *v.* Williams, 68 Mo. 360.

is true although the land is not actually inclosed,[41] and though the tract may be divided into two parts by a river running through it.[42]

2. Reason for Rule. The ground upon which the doctrine of constructive possession is based is that one in possession claiming by metes and bounds under a paper title, and openly and notoriously exercising control and dominion over the land is presumed to be doing so to the extent of his claim.[43]

3. Character of Possession Acquired. A number of decisions characterize the possession acquired by occupancy of part under color of title as "actual possession" to the extent of the boundaries contained in the writing,[44] but in

Nebraska.— Draper *v.* Taylor, 58 Nebr. 787, 79 N. W. 709; Oamha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739.

New Jersey.— Dem *v.* Hunt, 20 N. J. L. 487.

New Hampshire.— Bellows *v.* Jewell, 60 N. H. 420; Melcher *v.* Flanders, 40 N. H. 139; Farrar *v.* Fessenden, 39 N. H. 268; Little *v.* Downing, 37 N. H. 355; Tappan *v.* Tappan, 31 N. H. 41; Hoag *v.* Wallace, 28 N. H. 547; Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190.

New York.—Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848; Thompson *v.* Burhans, 61 N. Y. 52; Munro *v.* Merchant, 28 N. Y. 9; Bennett *v.* Kovarick, 60 N. Y. Suppl. 1133 [*affirming* 23 Misc. (N. Y.) 73, 51 N. Y. Suppl. 752]; Stillman *v.* Burfeind, 47 N. Y. Suppl. 280, 21 N. Y. App. Div. 13; Jackson *v.* Wheat, 18 Johns. (N. Y.) 40.

North Carolina.— Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607; Lewis *v.* John L. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; McLean *v.* Smith, 106 N. C. 172, 11 S. E. 184; Staton *v.* Mullis, 92 N. C. 623; Ruffin *v.* Overby, 88 N. C. 369; Scott *v.* Elkins, 83 N. C. 424; Berryman *v.* Kelly, 35 N. C. 269; Hough *v.* Dumas, 20 N. C. 390.

Ohio.— Humphries *v.* Huffman, 33 Ohio St. 395; Clark *v.* Potter, 32 Ohio St. 49.

Oregon.— Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057; Joy *v.* Stump, 14 Oreg. 361, 12 Pac. 929.

Pennsylvania.— Stroud *v.* Prage, 130 Pa. St. 401, 18 Atl. 637; Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111.

South Carolina.— Duren *v.* Kee, 26 S. C. 219, 2 S. E. 4; Stanley *v.* Shoolbred, 25 S. C. 181; Gray *v.* Bates, 3 Strobh. (S. C.) 498; State Bank *v.* Smyers, 2 Strobh. (S. C.) 24; Alston *v.* Collins, 2 Speers (S. C.) 450; Anderson *v.* Darby, 1 Nott & M. (S. C.) 369; Gourdin *v.* Theus, 3 Brev. (S. C.) 153.

Tennessee.— Hebard *v.* Scott, 95 Tenn. 467, 32 S. W. 390; Cooper *v.* Great Falls Cotton-Mills Co., 94 Tenn. 588, 30 S. W. 353; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 S. W. 737; Cold Creek Min., etc., Co. *v.* Ross, 12 Lea (Tenn.) 1; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; Rutherford *v.* Franklin, 1 Swan (Tenn.) 321; Hornsby *v.* Davis (Tenn. Ch. 1895) 36 S. W. 159.

Texas.— Porter *v.* Miller, 84 Tex. 204, 19 S. W. 467; Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815; Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191; Porter *v.* Miller, 76 Tex. 593, 13 S. W. 555, 14 S. W. 334; Evitts *v.* Roth, 61 Tex. 81; Cantagrel *v.* Von Lupin, 58 Tex. 570; Texas Land Co. *v.* Williams, 51 Tex. 51.

Vermont.— Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376; Hodges *v.* Eddy, 38 Vt. 327; Swift *v.* Gage, 26 Vt. 224; Spaulding *v.* Warren, 25 Vt. 316; Brown *v.* Edson, 22 Vt. 357; Ralph *v.* Bayley, 11 Vt. 521; Crowell *v.* Bebee, 10 Vt. 33, 33 Am. Dec. 172.

Virginia.—Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Stull *v.* Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Creekmur *v.* Creekmur, 75 Va. 430; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Taylor *v.* Burnsides, 1 Gratt. (Va.) 165.

West Virginia.— Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Ketchum *v.* Spurlock, 34 W. Va. 597, 12 S. E. 832; Oney *v.* Clendenin, 28 W. Va. 34; Core *v.* Faupel, 24 W. Va. 238; Adams *v.* Alkire, 20 W. Va. 480.

Wisconsin.— Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027.

United States.— Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113; Lea *v.* Polk County Copper Co., 21 How. (U. S.) 493, 16 L. ed. 203; Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475; Barr *v.* Gratz, 4 Wheat. (U. S.) 213, 4 L. ed. 553; Scaife *v.* Western North Carolina Land Co., 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47; Kingman *v.* Holthaus, 59 Fed. 305.

Canada.— Davis *v.* Henderson, 29 U. C. Q. B. 344; Dundas *v.* Johnston, 24 U. C. Q. B. 54; McKinnon *v.* McDonald, 13 Grant Ch. (U. C.) 152; Doe *v.* Baxter, 9 N. Brunsw. 131; Cunard *v.* Irvine, 2 Nova Scotia 31; Lawson *v.* Whitman, 1 Nova Scotia 208.

41. Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632; Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 47 N. Y. Suppl. 280; Grist *v.* Hodges, 14 N. C. 178.

42. Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609; Brandon *v.* Grimke, 1 Nott & M. (S. C.) 356.

43. Humphries *v.* Huffman, 33 Ohio St. 395.

The entry and possession are referred to the claim of title and are coextensive with the boundaries stated in the conveyance or other written instrument under which entry has been made. Barber *v.* Robinson, 78 Minn. 193, 80 N. W. 968.

44. Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537; Stovall *v.* Fowler, 72 Ala. 77; Bell *v.* Longworth, 6 Ind. 273.

the great majority of cases this possession is characterized as constructive possession.[45]

4. Extent and Qualifications of Rule — a. Size, Situation, and Number of Tracts as Affecting Rule. As is shown in a preceding section,[46] possession under color of title is in general deemed to be coextensive with the boundaries designated in the instrument giving color of title. This rule, however, is, in a number of jurisdictions, subject to a material qualification dependent upon the size of the tract in controversy. The rule deducible from these decisions seems to be that the doctrine of constructive possession has no application where the land claimed is not of a proper size to be managed and used in a body according to the custom and business of the country; that it has no application to a large tract of land which can never be so used.[47] On the other hand there are decisions to the effect that possession of a part of a tract, no matter how small the part occupied is and how large the whole tract may be, gives title to the boundaries included in the deed, no matter what may be the size and character of the tract.[48]

45. See cases cited *supra*, note 40.

46. See *supra*, XII, B, 1.

47. Turner *v.* Stephenson, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277; Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220; Thompson *v.* Burhans, 61 N. Y. 52; Munro *v.* Merchant, 28 N. Y. 9; Simpson *v.* Downing, 23 Wend. (N. Y.) 316; Sharp *v.* Brandow, 15 Wend. (N. Y.) 597; Jackson *v.* Oltz, 8 Wend. (N. Y.) 440; Jackson *v.* Richards, 6 Cow. (N. Y.) 617; Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525; Archibald *v.* New York Cent., etc., R. Co., 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336; Paine *v.* Hutchins, 49 Vt. 314; Chandler *v.* Spear, 22 Vt. 388.

Illustrations.— The rule relating to constructive possession under color of title has no application to a case where a person takes and maintains possession of a few acres of land in an uncultivated township for the mere purpose of thereby gaining a title to the entire township by possession, to the exclusion of the rightful owners (Chandler *v.* Spear, 22 Vt. 388. See also Paine *v.* Hutchinson, 49 Vt. 314, in which the same doctrine was applied in respect to a gore of land which was a municipal subdivision). It has also been held that the rule has no application where the tract consists of seven hundred and eighty-three acres, of which only two are in the actual possession of the claimant (Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525); or where the claimant had actual possession of four hundred acres of the tract consisting of four thousand acres (Thompson *v.* Burhans, 61 N. Y. 52); or where the tract included upward of fifteen hundred acres (Sharp *v.* Brandow, 15 Wend. (N. Y.) 597). In case of a grant to a railroad company of a series of strips extending a distance of one hundred and forty miles, adverse possession will be confined to the portion actually occupied by the grantee (Archibald *v.* New York Cent., etc., R. Co., 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336).

Known farm or single lot.—A statute which provides that where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left uncleared, according to the usual custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved, does not introduce a new rule applicable only to future cases, but is simply declaratory of the law as it already existed. Munro *v.* Merchant, 28 N. Y. 9. But, to establish adverse possession of a known farm outside of the actual possession taken, the known extent of the farm at the time of entry must be established, and adverse possession founded on such entry is limited to that extent. Pepper *v.* O'Dowd, 39 Wis. 538. The improvement and adverse possession of part of a forty-acre tract of land on a claim of title to the entire forty founded upon a written instrument purporting to convey the forty will, if continued long enough, convey title to the entire forty, such forty constituting a "known lot" within such statute. Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871. The owner of a farm conveyed the piece in dispute, off the south side thereof, to defendant's predecessor in title, and then conveyed the whole farm to plaintiff's predecessor, who recorded his deed first. The parcel in dispute, together with a lot adjoining it on the south, known as "No. 10," was afterward conveyed in a single tract by mesne conveyance to defendant, and it was always kept and managed as a single tract. On the south side of the disputed piece and for some distance on the east and west sides was a fence dividing it from the farm. It was held that the whole tract conveyed to defendant constituted "a single lot" within the meaning of such statute. Northport Real Estate, etc., Co. *v.* Hendrickson, 139 N. Y. 440, 34 N. E. 1057 [*affirming* 65 Hun (N. Y.) 621, 19 N. Y. Suppl. 942].

48. *California.*— Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103; Gunn *v.* Bates, 6 Cal. 263.

North Carolina.— Lenoir *v.* South, 32 N. C. 237.

Tennessee.— Hornsby *v.* Davis, (Tenn. Ch. 1895) 36 S. W. 159.

Texas.— Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191.

United States.— Ellicott *v.* Pearl, 10 Pet. 412, 9 L. ed. 475; Scaife *v.* Western North Carolina Land Co., 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47.

b. Several Tracts Contiguous or Not Contiguous — (I) *Possession of Part of Each Lot by Claimant.* Where entry is made on several contiguous lots under color of title, and actual possession is taken of a part of each, such possession is deemed coextensive with the boundaries of the deed.[49]

(II) *Adjoining Lots under One Inclosure.* Although a tract may be subdivided into a number of smaller lots separated by partitions, possession of one may, nevertheless, be constructive possession of all, if inclosed by a common fence.[50] This, it has been held, is true although the title to the different lots may be derived from different sources.[51]

(III) *Contiguous Tracts Embraced under One General Description.* Where several distinct parcels of land lying contiguous to each other are conveyed by one deed under one general description embracing them all, actual possession of one of them by the grantee will give him constructive possession of the balance.[52]

(IV) *Contiguous Lots Not Embraced under One General Description — Statement of Rule.* Although there are a few decisions which seem to lay down the doctrine, without qualification, that where several contiguous tracts are conveyed in one deed, and the grantee takes possession thereunder, such possession draws to it constructive possession of all the lands described in the deed,[53] the weight of authority is to the effect that where several lots are conveyed by one instrument, under separate descriptions of each,— not under one general description including them all or purporting to convey them as one tract,— even though such lots are contiguous to each other, the actual possession of one lot or a part of one lot will not give constructive possession of the balance of the lots.[54]

49. Hopkins *v.* Robinson, 3 Watts (Pa.) 205.

50. Kerr *v.* Nicholas, 88 Ala. 346, 6 So. 698.

51. Wharton *v.* Bunting, 73 Ill. 16; Braxton *v.* Rich, 47 Fed. 178 [*affirmed* in 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022].

52. Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904; Johnson *v.* Simerly, 90 Ga. 612, 16 S. E. 951; Harrison *v.* Augusta Factory, 73 Ga. 447; Parker *v.* Jones, 57 Ga. 204; Bacon *v.* Chase, 83 Iowa 521, 50 N. W. 23, wherein it was held that where a forty-acre tract of land is sold together with other lands, the whole constituting one farm, the actual occupation of the other lands is in law the occupation of the whole although the forty-acre tract, being low and marshy, is not cultivated or separately occupied; Robinson *v.* Jones, 2 Tex. Civ. App. 316, 22 S. W. 15. See also Harrison *v.* McDaniel, 2 Dana (Ky.) 348.

53. Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Dills *v.* Hubbard, 21 Ill. 328. See also Kerr *v.* Leighton, 2 Greene (Iowa) 196.

54. *Georgia.*— Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904; Griffin *v.* Lee, 90 Ga. 224, 15 S. E. 810; Barber *v.* Shaffer, 76 Ga. 285; Anderson *v.* Dodd, 65 Ga. 402; Tritt *v.* Roberts, 64 Ga. 156; Janes *v.* Patterson, 62 Ga. 527; Parker *v.* Jones, 57 Ga. 204; Grimes *v.* Ragland, 28 Ga. 123; Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198.

Maine.— Farrar *v.* Eastman, 10 Me. 191.

Michigan.— Turner *v.* Stephenson, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277.

Minnesota.— Morris *v.* McClary, 43 Minn. 346, 46 N. W. 238. See also McRoberts *v.* McArthur, 62 Minn. 310, 64 N. W. 903.

North Carolina.— Basnight *v.* Meekins, 121 N. C. 23, 27 S. E. 992; Loftin *v.* Cobb, 46 N. C. 406, 62 Am. Dec. 173; Carson *v.* Mills, 18 N. C. 546.

Oregon.— Willamette Real Estate Co. *v.* Hendrix, 28 Oreg. 485, 42 Pac. 514. See also Wilson *v.* McEwan, 7 Oreg. 87.

South Carolina.— Massey *v.* Duren, 3 S. C. 34. *Compare* Alston *v.* Collins, 2 Speers (S. C.) 450.

Texas.— Faison *v.* Primm, (Tex. Civ. App. 1896) 34 S. W. 834; Galveston Land, etc., Co. *v.* Perkins, (Tex. Civ. App. 1894) 26 S. W. 256.

See also Carter *v.* Ruddy, 166 U. S. 493, 17 S. Ct. 640, 41 L. ed. 1090.

Illustrations.— Where a deed describes by lot and block several or even the greater number of lots in a platted township or addition, his actual possession of known land for the purpose of adverse possession does not extend to those uninclosed lots of which he is not in actual possession. Morris *v.* McClary, 43 Minn. 346, 46 N. W. 238. When a block is divided into lots, inclosure and use of some of the lots does not operate as a possession of the whole block. Galveston Land, etc., Co. *v.* Perkins, (Tex. Civ. App. 1894) 26 S. W. 256. Actual occupancy of and the making of improvements upon one of two adjoining subdivisions of a grant, both of which are openly claimed under a recorded deed of both, does not give constructive possession to the whole tract. Faison *v.* Primm, (Tex. Civ. App. 1896) 34 S. W. 834. See also Turner *v.* Stephenson, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277. And this is true although the claimant looked after the whole tract for the purpose of keeping off trespassers, paid taxes thereon, and

(v) *Tract of Grantee and Adjoining Tract Embraced in Conveyance to Him.* It has been held that where a party owns and is in possession of a distinct parcel of land, and attempts to extend his dominion over an adjoining piece by taking a deed including in its description his own land and the adjoining tract, he must maintain an actual possession of such tract for the statutory period in order to constitute such an adverse possession as will bar the owner's rights. He does not acquire any constructive possession thereof by such deed.[55]

(vi) *Tracts Not Adjoining.* Actual possession of one tract of land not contiguous to others is not constructive possession of such other tracts, though conveyed by the same deed;[56] and this is true although they may be described in the deed as one tract.[57]

(vii) *Subdivision of Tract by Person Remaining in Possession of Part.* Where one who has color of title subdivides the land into lots or blocks, possession of one or more of the lots or blocks by himself or tenant will give him constructive possession of the whole,[58] unless by sale of a portion a part becomes isolated from the rest.[59]

(viii) *Sale of Part Actually Occupied by Claimant.* Where one in possession of a tract of land sells the portion actually occupied by him, his constructive possession, which then existed as to the remainder, immediately determines.[60]

(ix) *Claim to Whole Tract Previously Subdivided and Sold.* Where a tract of land has been subdivided, and the subdivisions or any of them conveyed by the true owner, the statute of limitations cannot be invoked by a subsequent

granted a right of way to a third party. Faison *v.* Primm, (Tex. Civ. App. 1896) 34 S. W. 834.

Survey of contiguous tracts.—Where plaintiff made a survey of many contiguous tracts, with the intermediate and dividing boundaries distinctly represented on the plat, it was held doubtful whether such possession on only one of the several tracts would raise a presumption of a grant to all. Alston *v.* McDowall, McMull. (S. C.) 444.

In Georgia this doctrine is qualified to the extent that if a conveyance of the character under consideration be recorded, actual possession of one of the lots will operate to give constructive possession of all. Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904; Griffin *v.* Lee, 90 Ga. 224, 15 S. E. 810; Tritt *v.* Roberts, 64 Ga. 156; Janes *v.* Patterson, 62 Ga. 527.

55. Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057. *Compare* Boyce *v.* Blake, 2 Dana (Ky.) 127, in which it was held that if the party holding a tract of land acquires an adjoining tract by a parol contract his possession will be held to include it, notwithstanding he has made no inclosure or improvement thereon. See also Weinig *v.* Holcomb, 73 Iowa 143, 34 N. W. 787.

56. *Arkansas.*— Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

Georgia.— Georgia Pine Invest., etc., Co. *v.* Holton, 94 Ga. 551.

Indiana.— Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

Kentucky.— Whitley County Land Co. *v.* Lawson, 94 Ky. 603, 23 S. W. 369.

Missouri.— Herbst *v.* Merrifield, 133 Mo. 267, 34 S. W. 571.

Oregon.— Wilson *v.* McEwan, 7 Oreg. 87.

Tennessee.— McSpadden *v.* Starrs Mountain Iron Co., (Tenn. Ch. 1897) 42 S. W. 497.

Thus a small improvement made by a person on one of two quarter-sections of land which were half a mile distant from each other is no authority for such person setting up an adverse possession of the other quarter-section, although both were conveyed to him by the same deed. Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489. And where one has a patent to all unappropriated lands within a certain boundary, possession of certain detached parcels of unappropriated land, separated from the land in dispute by land already appropriated, is not such possession as would extend over all lands unappropriated when the patent issued. Moses *v.* Gatliff, (Ky. 1889) 12 S. W. 139.

57. Georgia Pine Invest., etc., Co. *v.* Holton, 94 Ga. 551, 20 S. E. 434.

58. Hassett *v.* Ridgely, 49 Ill. 197; Gregg *v.* Forsyth, 24 How. (U. S.) 179, 16 L. ed. 731. See also Carter *v.* Ruddy, 56 Fed. 542, 15 U. S. App. 129, 6 C. C. A. 3. *Contra*, Gainus *v.* Bowman, 10 Heisk. (Tenn.) 600.

59. Hassett *v.* Ridgely, 49 Ill. 197.

60. Trotter *v.* Cassady, 3 A. K. Marsh. (Ky.) 365, 13 Am. Dec. 183; Cunningham *v.* Roberson, 1 Swan (Tenn.) 137; Chandler *v.* Rushing, 38 Tex. 591; Cunningham *v.* Frandtzen, 26 Tex. 34.

Sale of intervening tracts.— Where a part of a tract of land of which one is in possession claiming to the extent of the boundaries thereof, so as to give him constructive possession of the whole, is separated from another part of the boundary by the sale of intervening portions of the land, his possession ceases to give him constructive possession of that part of the tract from which he is thus

claimant of the whole tract to subdivisions of which he is not and never has been in possession.[61]

(x) *Lands Situate in Two Counties.* Where one enters in one county on a tract of land lying in two counties, and keeps possession of the same claiming to hold the entire tract, his possession extends only to the lands of the county in which the entry is made.[62]

c. Effect of Invalidity of Title to Part of Land Conveyed. While it is generally true that possession under color of title, though only part of the premises are actually occupied, is coextensive with the boundaries in the deed, the rule, it has been held, is subject to the limitation that if the title was void as to part of the land conveyed, the occupation of that part to which the grantor had title will not give the grantee constructive possession of the other part to which he had no title, so as to disseize the real owner and to divest him of the whole tract described in the deed.[63]

d. Effect of Want of Description or Insufficiency of Description. Where an entry is under a paper title which is void for want of description of any land, the rule as to constructive possession does not attach and the adverse possession will extend only to that part of the land actually occupied and improved.[64]

e. Effect of Mixed Possession — (i) *Where Both Defendants Have Color of Title and Actual Possession of Part.* Where the title to land is in conflict, and each claimant is in possession of a part of the tract in controversy, the one having the better title has, by his occupation, constructive possession of the whole tract except that which is actually in the possession of his adversary.[65]

separated. Hassett *v.* Ridgely, 49 Ill. 197; West *v.* McKinney, 92 Ky. 638, 18 S. W. 633.

61. Stewart *v.* Harris, 9 Humphr. (Tenn.) 713; Montgomery *v.* Gunther, 81 Tex. 320, 16 S. W. 1073; Turner *v.* Moore, 81 Tex. 206, 16 S. W. 929; Beaumont Pasture Co. *v.* Polk, (Tex. Civ. App. 1900) 55 S. W. 614.

62. Roberts *v.* Long, 12 B. Mon. (Ky.) 194, holding that to acquire possession where land lies in different counties there must be an entry in each county.

63. Turner *v.* Stephenson, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277; Jones *v.* Gaddis, 67 Miss. 761, 7 So. 489; Tiedeman Real Prop. § 696; 3 Washburne Real Prop. (5th ed.) p. 498. See also Kile *v.* Tubbs, 23 Cal. 431.

64. Lane *v.* Gould, 10 Barb. (N. Y.) 254; Jackson *v.* Camp, 1 Cow. (N. Y.) 605; Humphries *v.* Huffman, 33 Ohio St. 395; McEvoy *v.* Loyd, 31 Wis. 142.

Difference in description between deed and record of sale.— Where the deed to a purchaser of lands sold for taxes, and the official record of sales kept by the judge of probate, differ from each other as to the quantity sold, the deed must control when offered, not as a muniment of title, but as color of title fixing the boundaries of an adverse possession. Doe *v.* Clayton, 81 Ala. 391, 2 So. 24.

Vague and uncertain description.— The rule as to constructive possession has no application where, by reason of vagueness and uncertainty, the description given is such that the land in controversy cannot be identified therefrom. Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537; Louisville, etc., R. Co. *v.* Boykin, 76 Ala. 560; Jackson *v.* Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525. See also Gibson *v.* Chappell, Harp. (S. C.) 28.

65. The rule that one in possession of land under color of title has constructive possession to the boundaries of his deed does not apply where one holding a better title to the same land is in possession of a part thereof.

Alabama.—Ryan *v.* Kilpatrick, 66 Ala. 332.

California.— McCormick *v.* Sutton, 97 Cal. 373, 32 Pac. 444; Labory *v.* Los Angeles Orphan Asylum, 97 Cal. 270, 32 Pac. 231; Semple *v.* Cook, 50 Cal. 26.

Florida.— Wilkins *v.* Pensacola City Co., 36 Fla. 36, 18 So. 20.

Illinois.— Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150; Whitford *v.* Drexel, 118 Ill. 600, 9 N. E. 268; Coleman *v.* Billings, 89 Ill. 183; Ballance *v.* Flood, 52 Ill. 49.

Iowa.— Chicago, etc., R. Co. *v.* Allfree, 64 Iowa 500, 20 N. W. 779; Langworthy *v.* Myers, 4 Iowa 18. See also Libbey *v.* Young, 103 Iowa 258, 72 N. W. 520.

Kentucky.— Townsend *v.* Chenault, (Ky. 1891) 17 S. W. 185; Wait *v.* Gover, (Ky. 1890) 12 S. W. 1068; McLawrin *v.* Salmons, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563; Griffith *v.* Huston, 7 J. J. Marsh. (Ky.) 385; Rogers *v.* Moore, 9 B. Mon. (Ky.) 401; Smith *v.* Lockridge, 3 Litt. (Ky.) 19; Voorhies *v.* Bridgeford, 3 A. K. Marsh. (Ky.) 26; Layson *v.* Galloway, 4 Bibb (Ky.) 100; Jones *v.* McCauley, 2 Duv. (Ky.) 14.

Louisiana.— D'Arby *v.* Blanchet, 7 La. 256.

Maine.— Putnam Free School *v.* Fisher, 34 Me. 172; Little *v.* Megquier, 2 Me. 176.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115; Cheney *v.* Ringgold, 2 Harr. & J. (Md.) 87; Gibson *v.* Martin, 1 Harr. & J. (Md.) 545.

Massachusetts.— Brimmer *v.* Long Wharf, 5 Pick. (Mass.) 131; Codman *v.* Winslow, 10 Mass. 146; Langdon *v.* Potter, 3 Mass. 215.

The legal seizin as to the unoccupied portion of the tract follows the legal title, and the *pedis possessio* alone creates an adverse title.[66]

(II) *Where Both Parties Have Color of Title and Neither Is in Actual Possession.* Where two persons claim under color of title, but neither is in actual possession, the elder title will prevail.[67]

(III) *Where Only One Has Color of Title.* The constructive possession of land arising from title cannot be extended to that part of it whereof there is an actual adverse possession, although the other claimant has no color of title.[68] Nevertheless, the person holding under color of title has constructive possession of all land not actually occupied by others not having color of title.[69]

(IV) *In Cases of Interlocks, Patents, Grants, Surveys, Deeds, etc.* — (A) *Where Junior Claimant Is Not in Possession of Interlock* — (1) Where Senior Claimant Is in Possession of Part of His Tract. Where two patents, grants, surveys, deeds, or other conveyances are conflicting, each including land which the other purports to convey, and the senior claimant is in actual possession of some part of the land lying within his grant, but not within the interlock,

Mississippi.— Louisville, etc., R. Co. *v.* Buford, 73 Miss. 494, 19 So. 584.

Missouri.— Hedges *v.* Pollard, 149 Mo. 216, 50 S. W. 889; Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; Bradley *v.* West, 60 Mo. 33; Crispen *v.* Hannavan, 50 Mo. 536; Schultz *v.* Lindell, 30 Mo. 310; Griffith *v.* Schwenderman, 27 Mo. 412; McDonald *v.* Schneider, 27 Mo. 405.

New York.— Finlay *v.* Cook, 54 Barb. (N. Y.) 9; Jackson *v.* Vermilyea, 6 Cow. (N. Y.) 677.

North Carolina.—Staton *v.* Mullis, 92 N. C. 623; Berryman *v.* Kelly, 35 N. C. 269; Fitzrandolph *v.* Norman, 4 N. C. 564.

Ohio.— Humphries *v.* Huffman, 33 Ohio St. 395.

Pennsylvania.— Miller *v.* Shaw, 7 Serg. & R. (Pa.) 129; Hall *v.* Powel, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722; Mather *v.* Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; Burns *v.* Swift, 2 Serg. & R. (Pa.) 436; Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111.

South Carolina.— Hill *v.* Saunders, 6 Rich. (S. C.) 62; Stanley *v.* Shoolbred, 25 S. C. 181; McBeth *v.* Donnelly, Dudley (S. C.) 177; Anderson *v.* Darby, 1 Nott & M. (S. C.) 369. See also Huger *v.* Cox, 1 Hill (S. C.) 135.

Tennessee.— Hebard *v.* Scott, 95 Tenn. 467, 32 S. W. 390.

Texas.— Texas Land Co. *v.* Williams, 51 Tex. 51; Hays *v.* Barrera, 26 Tex. 78.

Vermont.— Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866; Ralph *v.* Bayley, 11 Vt. 521; Crowell *v.* Bebee, 10 Vt. 33, 33 Am. Dec. 172.

Virginia.— Breeden *v.* Haney, 95 Va. 622, 29 S. E. 328; Creekmur *v.* Creekmur, 75 Va. 430; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Taylor *v.* Burnsides, 1 Gratt. (Va.) 165.

West Virginia.— Adams *v.* Alkire, 20 W. Va. 480.

United States.— Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113; Clarke *v.* Courtney, 5 Pet. (U. S.) 319, 8 L. ed. 140; Hunt *v.* Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397; Barr *v.* Gratz, 4 Wheat. (U. S.) 213, 4 L. ed. 553; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Braxton *v.* Rich, 47 Fed. 178.

Canada.— Doe *v.* Carney, 15 N. Brunsw. 233.

Subsequent entry by owner.— If one who claims title under a deed to a large tract of land enters upon it, builds a house, and acquires actual possession of a small part around his house and constructive possession of the whole, and the owner of the true title afterward enters on the same tract in another place, claiming the whole, the constructive possession thus acquired by the one who first entered is overcome by the constructive possession of the true owner, so that the statute does not run in favor of the owner who has not the true title. Semple *v.* Cook, 50 Cal. 26. See also Wilson *v.* Stivers, 4 Dana (Ky.) 634.

66. Cottle *v.* Sydnor, 10 Mo. 763; Miller *v.* Shaw, 7 Serg. & R. (Pa.) 129.

The reason for this is that both parties cannot be seized at the same time of the same land under different titles. The law, therefore, adjudges the seizin of all that which is not in the actual occupancy of the adverse party to him who has the better title. Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113.

Statutory provision as to tax-deeds.— The rule is not affected by a statute providing that twelve months' occupation of any tract of land under deeds executed pursuant to a tax-sale, or any part thereof, by any such occupant claiming the whole, shall forever bar any action at law or in equity to such tract. Louisville, etc., R. Co. *v.* Buford, 73 Miss. 494, 19 So. 584.

67. Reneker *v.* Warren, 17 S. C. 139; Sims *v.* Meacham, 2 Bailey (S. C.) 101.

68. New York Cent., etc., R. Co. *v.* Brennan, 136 N. Y. 584, 57 N. E. 1119 [*affirming* 24 N. Y. App. Div. 343, 48 N. Y. Suppl. 675]; Tredwell *v.* Reddick, 23 N. C. 56; Claiborne *v.* Elkins, 79 Tex. 380, 15 S. W. 395.

69. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465; Gourdin *v.* Davis, 2 Rich. (S. C.) 481, 45 Am. Dec. 745; Santee River Cypress Lumber Co. *v.* James, 50 Fed. 360.

possession by the junior claimant of a part of the tract included in his conveyance outside of the interlock or lap gives him no constructive possession of lands lying therein.[70]

(2) Where Senior Claimant Is Not in Possession of Any Part of His Tract. According to a few decisions, if the senior claimant is not in actual possession of any part of the land included within his conveyance, and the junior claimant is in possession of a part of the land included within his conveyance, but outside of the interlock, the junior claimant acquires title by constructive possession of all the lands lying within the boundaries of his conveyance, including the interlock.[71] This view, however, it is believed, is opposed to the weight of authority. Some decisions have directly held that it was immaterial whether the senior claimant had ever been in actual possession of any part of his tract or not; that the junior claimant could not acquire constructive possession of the interlock by occupation of land included in his conveyance, but outside of the interlock.[72] So in a considerable number of decisions the rule is laid down, without qualification, that the possession by the junior claimant of any part of his tract outside of the interlock will not be extended by construction to the land lying within the interlock.[73]

(b) *Where Senior Claimant Is in Possession of Interlock.* Where the senior claimant has possession of part of the interlock he has constructive possession of the whole, if the junior claimant is not in the actual possession of any part thereof.[74]

(c) *Where Junior Claimant Is in Possession of Interlock.* According to what is believed to be the great weight of authority, if the junior claimant is in actual possession of a part of the interlock he will acquire constructive possession of the whole of it, although the senior claimant is in possession of some land lying within the conveyance to him, but not within the interlock.[75]

70. Bodley *v.* Logan, 2 J. J. Marsh. (Ky.) 254; Grughler *v.* Wheeler, 12 B. Mon. (Ky.) 183; Baker *v.* McDonald, 47 N. C. 244; Trisby *v.* Withers, 61 Tex. 134; Ilsley *v.* Wilson, 42 W. Va. 757, 26 S. E. 551.

Conflicting deeds.— A deed, in the absence of fraud or mistake, gives the vendee constructive possession of all the territory within its limits, and a subsequent deed by the vendor, although it may cover all the territory first sold, will not interfere with such possession so as to give the grantees in the latter deed title by adverse possession, where they have not been in actual possession of the territory included in both deeds. White *v.* Ward, 35 W. Va. 418, 14 S. E. 22.

Contiguous lots.— Where uncleared land has been granted by the state by conflicting patents, the fact that the land granted to the junior patentee was contiguous to his home tract, upon which he was living at the time of the grant, does not extend his possession of the home tract to the land patented so as to give him, as against the senior patentee, adverse possession of the overlapping lands. Harmon *v.* Ratliff, 93 Va. 249, 24 S. E. 1023.

71. Seigle *v.* Londerbaugh, 5 Pa. St. 490; Waggoner *v.* Hastings, 5 Pa. St. 300; Sicard *v.* Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342.

72. Trimble *v.* Smith, 4 Bibb (Ky.) 257; Smith *v.* Mitchel, 1 A. K. Marsh. (Ky.) 207; Foster *v.* Grizzle, 1 Coldw. (Tenn.) 529; Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585.

73. *Kentucky.*— Wilson *v.* Stivers, 4 Dana (Ky.) 634; Pogue *v.* McKee, 3 A. K. Marsh. (Ky.) 127; Voorhies *v.* White, 2 A. K. Marsh. (Ky.) 26; Smith *v.* Mitchel, 1 A. K. Marsh. (Ky.) 207; Braxdale *v.* Speed, 1 A. K. Marsh. (Ky.) 105; Lillard *v.* McGee, 3 J. J. Marsh. (Ky.) 549.

North Carolina.— McLean *v.* Murchison, 53 N. C. 38; McMillan *v.* Turner, 52 N. C. 435; Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760.

Pennsylvania.— Hole *v.* Rittenhouse, 25 Pa. St. 491.

Tennessee.— Coal Creek Min., etc., Co. *v.* Heck, 15 Lea (Tenn.) 497; Talbot *v.* McGavock, 1 Yerg. (Tenn.) 262; Snoddy *v.* Kreutch, 3 Head (Tenn.) 301; Foster *v.* Grizzle, 1 Coldw. (Tenn.) 529.

Texas.— Parker *v.* Baines, 65 Tex. 605 [*overruling* Jones *v.* Menard, 1 Tex. 771]; Frisby *v.* Withers, 61 Tex. 134; Peyton *v.* Barton, 53 Tex. 298; Bunton *v.* Cardwell, 53 Tex. 408.

Virginia.— Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Koiner *v.* Rankin, 11 Gratt. (Va.) 420; Taylor *v.* Burnsides, 1 Gratt. (Va.) 165.

United States.— White *v.* Burnley, 20 How. (U. S.) 235, 15 L. ed. 886.

74. White *v.* Bates, 7 J. J. Marsh. (Ky.) 538; McCormick *v.* Munroe, 48 N. C. 332; Williams *v.* Miller, 29 N. C. 186; Borrets *v.* Turner, 3 N. C. 273.

75. *Missouri.*— Hedges *v.* Pollard, 149 Mo. 216, 50 S. W. 889; Goltermann *v.* Schiermeyer, 125 Mo. 291, 28 S. W. 616.

North Carolina.—Boomer *v.* Gibbs, 114 N. C. 76, 19 S. E. 226; McLean *v.* Smith, 106 N. C. 172,

(D) *Where Both Parties Are in Possession of Interlock.* Where both claimants have actual possession of some part of the interlock, the possession of the party having the elder title covers all not actually occupied by the other.[76]

(E) *Effect of Subsequent Entry by Senior Claimant.* The constructive possession of an interlock acquired by the holder of the junior title by taking actual possession of part of it is interrupted when the holder of the senior title subsequently takes possession of some part of the land lying within the interlock.[77]

5. Effect of Possession by Tenant. Within the rule that actual possession of part of a tract of land under color of title gives constructive possession to the extent of the boundaries designated in the conveyance, a possession by a tenant of part of a tract of land under a conveyance of the whole to his lessor will give the lessor constructive possession of the part not actually occupied by the tenant, as the possession of the tenant enures to the benefit of his lessor.[78]

11 S. E. 184; Brady *v.* Maness, 91 N. C. 135; Howell *v.* McCracken, 87 N. C. 399; Kerr *v.* Elliott, 61 N. C. 601; McCormick *v.* Munroe, 48 N. C. 332; Bryson *v.* Slagle, 44 N. C. 449; Williams *v.* Miller, 29 N. C. 186; Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760; Dobbins *v.* Stephens, 18 N. C. 5; Carson *v.* Mills, 18 N. C. 546; Green *v.* Harman, 15 N. C. 158; Den *v.* Morrison, 8 N. C. 467; Bryan *v.* Carleton, 1 N. C. 59.

Pennsylvania.—Hole *v.* Rittenhouse, 2 Phila. (Pa.) 411, 13 Leg. Int. (Pa.) 44.

Tennessee.— Coal Creek Min., etc., Co. *v.* Heck, 83 Tenn. 497; Tilghman *v.* Baird, 2 Sneed (Tenn.) 195. See also Talbot *v.* McGavock, 1 Yerg. (Tenn.) 262; Stewart *v.* Harris, 9 Humphr. (Tenn.) 713; Snoddy *v.* Kreutch, 3 Head (Tenn.) 301.

West Virginia.— Vintroux *v.* Simms, 45 W. Va. 548, 31 S. E. 941; Congrove *v.* Burdett, 28 W. Va. 220; Garrett *v.* Ramsey, 26 W. Va. 345.

United States.— Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113.

Contra, Anderson *v.* Jackson, 69 Tex. 346, 6 S. W. 575; Frisby *v.* Withers, 61 Tex. 134.

In Kentucky and Virginia the rule is that where there are conflicting patents for land, and the junior patentee enters and holds by actual possession a part of the interference, claiming the interference to the extent of his patent boundary, and the owner of the senior patent is not in the actual possession of his land at the time of such entry and occupancy by the junior patentee, then the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and occupancy of his land outside of the interference does not give him actual or constructive possession of any part of the interference. Harrison *v.* McDaniel, 2 Dana (Ky.) 348; Shrieve *v.* Summers, 1 Dana (Ky.) 239; Whitley County Land Co. *v.* Lawson, 94 Ky. 603, 23 S. W. 369; Greer *v.* Bowling, (Ky. 1900) 55 S. W. 1081; Ware *v.* Bryant, (Ky. 1893) 21 S. W. 873; Fox *v.* Hinton, 4 Bibb (Ky.) 559; Ware *v.* Bryant, 14 Ky. L. Rep. 852, 21 S. W. 873; Bodley *v.* Logan, 2 J. J. Marsh. (Ky.) 254; Simon *v.* Gouge, 12 B. Mon. (Ky.) 156; Fry *v.* Stowers, (Va. 1900) 36 S. E. 482. See also Taylor *v.* Cox, 2 B. Mon. (Ky.) 429; Baird *v.* Bill, 1 Duv. (Ky.) 384; Doe *v.* Lively, 1 Dana (Ky.) 60; Stull *v.* Rich Patch Iron Co., 92 Va. 255, 23 S. E. 293. But if the elder patentee has possession of his land, though by entry or inclosure outside of the interference, the subsequent entry of the junior patentee within the interference does not divest the prior and existing possession beyond the actual close of the junior patentee, though he may have been first possessed outside of the interference, claiming to the extent of his patent. Simon *v.* Gouge, 12 B. Mon. (Ky.) 156.

76. Asbury *v.* Fair, 111 N. C. 251, 16 S. E. 467; McLean *v.* Smith, 106 N. C. 172, 11 S. E. 184; Brady *v.* Maness, 91 N. C. 135; Den *v.* Morrison, 8 N. C. 467; Borrets *v.* Turner, 3 N. C. 273; Bryan *v.* Carleton, 1 N. C. 59; White *v.* Lavender, 5 Sneed (Tenn.) 647.

77. Howell *v.* McCracken, 87 N. C. 399; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113.

Possession as against mere wrong-doer.— An entry, under a deed, into part of a tract of land, as against a mere wrong-doer, shall be considered an entry into the whole, it not appearing that any one else has possession of any part. Osborne *v.* Ballew, 34 N. C. 373; Evans *v.* Corley, 8 Rich. (S. C.) 315.

78. *Georgia.*— Knorr *v.* Raymond, 73 Ga. 749.

Illinois.— Williams *v.* Ballance, 23 Ill. 193, 74 Am. Dec. 187.

Kentucky.— Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253.

North Carolina.— Cochran *v.* Linville Imp. Co., 127 N. C. 386, 37 S. E. 496; Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251; Scott *v.* Elkins, 83 N. C. 424.

Tennessee.— Cowan *v.* Hatcher, (Tenn. Ch. 1900), 59 S. W. 689.

Texas.— Bowles *v.* Brice, 66 Tex. 724, 2 S. W. 729, holding that the rule applied though the lessor leased the improved portion of the tract and had no actual possession of that portion not improved; Texas Land Co. *v.* Williams, 51 Tex. 51.

United States.— McIver *v.* Ragan, 2 Wheat. (U. S.) 25, 4 L. ed. 175; Scaife *v.* Western North Carolina Land Co., 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47; Ellicott *v.* Pearl, 1 McLean (U. S.) 206, 8 Fed. Cas. No. 4,386.

Possession by stranger without license.— The mere entry of a stranger upon patented lands without license from the patentee will not necessarily give such patentee possession to the extent of the boundary of his patent.

6. Necessity of Actual Possession as Basis of Constructive Possession. Mere color of title does not draw possession to one who has not or does not take actual possession of some part of the land conveyed.[79]

7. Necessity of Claim of Title Coextensive with Boundaries. Actual possession of a part of the land under color of title will not draw to it constructive possession of the balance unless such color of title is also accompanied by claim of title coextensive with the boundaries of the conveyance.[80]

8. Limitation of Constructive Possession by Boundaries of Deed. Adverse possession under and by virtue of a deed is limited to the premises actually covered thereby.[81] The rule, of course, does not affect the right of the claimant to acquire title to lands outside of the boundaries of the deed under which he occupies, by actual occupation and claim of title or right. The deed does not

Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253. See also Sowder *v.* McMillan, 4 Dana (Ky.) 456.

Possession under specific metes and bounds. — Where the lessee is let into possession of a part of a tract under an instrument describing it by specific metes and bounds, the lessee's possession is coextensive only with those metes and bounds and is not available to establish a possession of his landlord other than within such metes and bounds. Massengill *v.* Boyles, 11 Humphr. (Tenn.) 112; Read *v.* Allen, 63 Tex. 154; Texas Land Co. *v.* Williams, 51 Tex. 51; Ellicott *v.* Pearl, 1 McLean (U. S.) 206, 8 Fed. Cas. No. 4,386.

79. *Alabama.*— Black *v.* Tennessee, etc., Co., 93 Ala. 109, 9 So. 537.

California.— Hess *v.* Winder, 30 Cal. 349.

Georgia.— Anderson *v.* Dodd, 65 Ga. 402.

Maryland.— Abell *v.* Harris, 11 Gill & J. (Md.) 367.

Minnesota.— Washburn *v.* Cutter, 17 Minn. 361.

New York.—Thompson *v.* Burhans, 79 N. Y. 93.

South Carolina.— Steedmay *v.* Hilliard, 3 Rich. (S. C.) 101.

To constitute a disseizin constructively by an entry and possession under color of title the actual possession must embrace a portion of the land of the party alleged to be disseized and be of a nature to indicate that there may be an adverse claim to the residue of the land included in the deed. Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190.

80. *Florida.*— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Georgia.— Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569.

Iowa.— Moore *v.* Antill, 53 Iowa 612, 6 N. W. 14.

Kentucky.— Bowman *v.* Bartlet, 3 A. K. Marsh. (Ky.) 386. See also Smith *v.* Morrow, 5 Litt. (Ky.) 210.

Missouri.— Hunnewell *v.* Williams, 154 Mo. 135, 55 S. W. 221.

New Jersey.— Dem *v.* Hunt, 20 N. J. L. 487.

New York.— Bedell *v.* Shaw, 59 N. Y. 46; De Forest *v.* Huntington, 78 Hun (N. Y.) 611, 28 N. Y. Suppl. 831.

Pennsylvania.— Ege *v.* Medlar, 82 Pa. St. 86; Riland *v.* Eckert, 23 Pa. St. 215.

Texas.— Ivey *v.* Petty, 70 Tex. 178, 7 S. W. 798; Pope *v.* Riggs. (Tex. Civ. App. 1897) 43 S. W. 306.

Vermont.— Brown *v.* Edson, 22 Vt. 357; Crowell *v.* Bebee, 10 Vt. 33, 33 Am. Dec. 172.

Constructive possession may be restricted by the acts and declarations of the occupant showing that he does not make his claim of title coextensive equally with color of title. Brown *v.* Edson, 22 Vt. 357.

81. *Georgia.*— McKay *v.* Kendrick, 44 Ga. 607, holding that by virtue of occupancy under a deed one can claim only so much of the land as the largest description therein will include. See also Strong *v.* Powell, 92 Ga. 591, 20 S. E. 6.

Illinois.— Dryden *v.* Newman, 116 Ill. 186, 4 N. E. 768.

Kentucky.— Jones *v.* Chiles, 2 Dana (Ky.) 25. See also Maury *v.* Waugh, 1 A. K. Marsh. (Ky.) 452.

New Hampshire.—Hale *v.* Glidden, 10 N. H. 397, holding that there can be no constructive possession outside the limits of the deed.

New York.— Pope *v.* Hanmer, 74 N. Y. 240; Weeks *v.* Martin, 57 Hun (N. Y.) 589, 10 N. Y. Suppl. 656; Patten *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 306, holding that a grantee obtains no title by adverse possession to a vault under the sidewalk beyond the limits of the deed under which he claims.

North Carolina.—Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251.

Pennsylvania.— Riland *v.* Eckert, 23 Pa. St. 215.

South Carolina.— Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.

Tennessee.—Rogers *v.* White, 1 Sneed (Tenn.) 68.

Texas.— Porter *v.* Miller, 76 Tex. 593, 13 S. W. 555, 14 S. W. 334; Carley *v.* Parton, 75 Tex. 98, 12 S. W. 950; Cunningham *v.* Frandtzen, 26 Tex. 34.

Vermont.— Fullam *v.* Foster, 68 Vt. 590, 35 Atl. 484; Shedd *v.* Powers, 28 Vt. 652; Owen *v.* Foster, 13 Vt. 263.

Wisconsin.— Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027; Childs *v.* Nelson, 69 Wis. 125, 33 N. W. 587.

The presumption is that the occupant only intends to claim what his deed calls for, and that the land as to which the occupant has no title he holds consistent with the title of the true owner. Bedell *v.* Shaw, 59 N. Y. 46; Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027, 106 Wis. 499, 82 N. W. 534.

preclude such occupancy from being adverse.[82] The occupancy does not refer to the deed, but to the fact itself and its hostile character.[83] Nevertheless it requires a very distinct occupancy to extend the possession beyond the limits described in the deed.[84]

XIII. TITLE OR RIGHT ACQUIRED.

A. In England — 1. UNDER STATUTE 21 JAC. I, C. 16. § 1. According to some of the decisions under this statute possession for the statutory period confers a perfect title upon the claimant,[85] but later decisions either hold or say that title cannot be so acquired; that its effect is not to divest the estate, but merely to bar the remedy.[86]

2. UNDER 3 & 4 WM. IV, C. 27, § 34. The construction placed upon the statute of James not being satisfactory, the statute of William was enacted, and it not only barred the remedy in case of adverse possession, but in terms extinguished the estate.[87] Since the enactment of that statute it has been uniformly held that adverse possession for a period sufficient to bar the action divests the estate of the true owner and transfers it to the party holding adversely.[88]

B. In America — 1. STATEMENT AND EXTENT OF RULE. While it is true that in one state at least there are special statutes under which possession for the statutory period bars the remedy merely,[89] in America the doctrine is almost universal that possession for the statutory period not only bars the remedy of the holder of the paper title, but extinguishes his title and vests title in fee in the adverse occupant.[90] The title acquired by adverse possession is a title in fee simple, and is as

82. Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; Swettenham *v.* Leary, 18 Hun (N. Y.) 284; Sherry *v.* Frecking, 4 Duer (N. Y.) 452; Bisso *v.* Casper, 14 Tex. Civ. App. 19, 36 S. W. 345; Hand *v.* Swann, 1 Tex. Civ. App. 241, 21 S. W. 282; Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027. See also Zeringue *v.* Harang, 17 La. 349.

Thus, where one incloses land by a fence and claims title to all within the inclosure, his possession is adverse as to the entire tract, though he believes he is claiming only to the extent of his deed, which in fact does not embrace all the land so fenced. Bisso *v.* Casper, 14 Tex. Civ. App. 19, 36 S. W. 345.

83. Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027; Bishop *v.* Bleyer, 105 Wis. 330, 81 N. W. 413.

84. Shedd *v.* Powers, 28 Vt. 652, the reason being that the deed, while it is notice of claimant's title to the extent of the boundaries therein set forth, is also a distinct disclaimer of any further defense.

85. Taylor *v.* Horde, 1 Burr. 60; Stokes *v.* Berry, 2 Salk. 421.

86. Davenport *v.* Tyrrel, 1 W. Bl. 675; Beckford *v.* Wade, 17 Ves. Jr. 87; Scott *v.* Nixon, 3 Drury & Warr. 388; Incorporated Soc. *v.* Richards, 1 Drury & Warr. 258.

87. The text of this statute is as follows: "Be it further enacted that, at the determination of the period limited by this act, to any person for making an entry or distress, or bringing any writ of quare impedit, or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or rent, respectively, might have been made or brought within such period, shall be extinguished."

88. Incorporated Soc. *v.* Richards, 1 Drury & Warr. 258; Scott *v.* Nixon, 3 Drury & Warr. 388; Dundee Harbor Trustees *v.* Dougall, 1 Macq. 317; Brassington *v.* Llewellyn, 27 L. J. Exch. 297; Bryan *v.* Cowdal, 21 Wkly. Rep. 693.

89. Tennessee.— Tenn. Laws (1819), c. 28, § 2 [Tenn. Code (1896), § 4458] provides that no person or persons or their heirs shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments, but within said seven years next after his, her, or their right to commence, have, or maintain such suit, shall have come fallen or accrued. This section has been uniformly construed to take away the remedy merely and not to vest title in the possessor. Crutsinger *v.* Catron, 10 Humphr. (Tenn.) 23 Norris *v.* Ellis, 7 Humphr. (Tenn.) 462; Wallace *v.* Hannum, 1 Humphr. (Tenn.) 443, 34 Am. Dec. 659; Hopkins *v.* Calloway, 7 Coldw. (Tenn.) 37; Marr *v.* Gilliam, 1 Coldw. (Tenn.) 488; East Tennessee Iron, etc., Co. *v.* Wiggin, 68 Fed. 446, 37 U. S. App. 129, 15 C. C. A. 510. It is to be noted that no such construction is put on statutes of the same or similar language in other jurisdictions. Without going into the argument which the court gives in support of this holding, it is sufficient to say that it was considered that this was the only construction which could give any effect whatever to this section, because of its marked similarity to another section of the same statute. Under other sections of the Tennessee statute, as is shown by the cases cited in the subsequent note (*infra*, note 90), possession for the period named vests absolute title in the possessor.

90. *Alabama.*— Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817; Baker *v.* Chastang, 18 Ala. 417.

perfect a title as one by deed from the original owners or by patent or grant from

Arkansas.— Skipwith *v.* Martin, 50 Ark. 141, 6 S. W. 514; Wilson *v.* Spring, 38 Ark. 181; Walker *v.* Towns, 23 Ark. 147.

California.— Woodward *v.* Faris, 109 Cal. 12, 41 Pac. 781; Garabaldi *v.* Shattuck, 70 Cal. 511, 11 Pac. 778; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Arrington *v.* Liscom, 34 Cal. 365, 94 Am. Dec. 722; Simson *v.* Eckstein, 22 Cal. 580.

Connecticut.— Thill *v.* Bishop, 38 Conn. 494; Sherwood *v.* Barlow, 19 Conn. 471; Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Georgia.— Ford *v.* Williams, 73 Ga. 106; Johnston *v.* Neal, 67 Ga. 528; Doe *v.* Lancaster, 5 Ga. 39; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210.

Illinois.— Keppel *v.* Dreier, 187 Ill. 298, 58 N. E. 386; Simons *v.* Drake, 179 Ill. 62, 53 N. E. 574; Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367; Jacobs *v.* Rice, 33 Ill. 370; Watts *v.* Parker, 27 Ill. 224.

Indiana.— Irey *v.* Mater, 134 Ind. 238, 33 N. E. 1018; Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253; Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698; State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; Brown *v.* Anderson, 90 Ind. 93; Bowen *v.* Preston, 48 Ind. 367.

Iowa.— Nauerth *v.* Duke, (Iowa 1899) 79 N. W. 271; Independent Dist. *v.* Fagen, 94 Iowa 676, 63 N. W. 456; Cramer *v.* Clow, 81 Iowa 255, 47 N. W. 59, 9 L. R. A. 772; Quinn *v.* Quinn, 76 Iowa 565, 41 N. W. 316; Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340; Snell *v.* Iowa Homestead Co., 59 Iowa 701, 13 N. W. 848; De Long *v.* Mulcher, 47 Iowa 445.

Kentucky.— Sutton *v.* Pollard, 96 Ky. 640, 29 S. W. 637; Logan *v.* Bull, 78 Ky. 607; Marshall *v.* McDaniel, 12 Bush (Ky.) 378; Chiles *v.* Jones, 4 Dana (Ky.) 479; Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

Maine.— Brackett *v.* Persons Unknown, 53 Me. 228, 87 Am. Dec. 548; Goodwin *v.* Sawyer, 33 Me. 541; School Dist. No. Four *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Michigan.— McKay *v.* Gardner, 120 Mich. 267, 79 N. W. 185; Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023.

Minnesota.—Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

Mississippi.— Hicks *v.* Steigleman, 49 Miss. 377; Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137; Ellis *v.* Murray, 28 Miss. 129.

Missouri.— Farrar *v.* Heinrich, 86 Mo. 521; Ridgeway *v.* Holliday, 59 Mo. 444; Barry *v.* Otto, 56 Mo. 177; Shepley *v.* Cowan, 52 Mo. 559; Merchants' Bank *v.* Evans, 51 Mo. 335; Wall *v.* Shindler, 47 Mo. 282; Nelson *v.* Brodhack, 44 Mo. 596, 600, 100 Am. Dec. 328; Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Blair *v.* Smith, 16 Mo. 273; Biddle *v.* Mellon, 13 Mo. 335.

Montana.—Casey *v.* Anderson, 17 Mont. 167, 42 Pac. 761.

Nebraska.— Cervena *v.* Thurston, 59 Nebr. 343, 80 N. W. 1048; Webster *v.* Lincoln, 56 Nebr. 502, 76 N. W. 1076; Fink *v.* Dawson, 52 Nebr. 647, 72 N. W. 1037; Florence *v.* White, 50 Nebr. 516, 70 N. W. 50; Alexander *v.* Pitz, 34 Nebr. 361, 51 N. W. 851; Black *v.* Leonard, 33 Nebr. 745, 51 N. W. 126; Alexander *v.* Wilcox, 30 Nebr. 793, 47 N. W. 81, 9 L. R. A. 735; Peterson *v.* Townsend, 30 Nebr. 373, 46 N. W. 526; D'Gette *v.* Sheldon, 27 Nebr. 829, 44 N. W. 30; Gue *v.* Jones, 25 Nebr. 634, 41 N. W. 555; Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424; Stettnische *v.* Lamb, 18 Nebr. 619, 26 N. W. 374; Haywood *v.* Thomas, 17 Nebr. 237, 22 N. W. 460; Gatling *v.* Lane, 17 Nebr. 77, 80, 22 N. W. 227, 453.

New Hampshire.— First Presbyterian Soc. *v.* Bass, 68 N. H. 333, 44 Atl. 485; Farrar *v.* Fessenden, 39 N. H. 268; Grant *v.* Fowler, 39 N. H. 101; Gage *v.* Gage, 30 N. H. 420.

New Jersey.— Watson *v.* Jeffrey, 39 N. J. Eq. 62; Foulke *v.* Bond, 41 N. J. L. 527.

New Mexico.— Pueblo of Nambe *v.* Romero, (N. M. 1900) 61 Pac. 122; Solomon *v.* Yrisarri, 9 N. M. 480, 54 Pac. 752.

New York.— Baker *v.* Oakwood, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387, 49 Hun (N. Y.) 416, 3 N. Y. Suppl. 570; Paige *v.* Waring, 103 N. Y. 636; 8 N. E. 476; Sherman *v.* Kane, 86 N. Y. 57; Cahill *v.* Palmer, 45 N. Y. 478; Freund *v.* Ostrander, 66 Hun (N. Y.) 326, 21 N. Y. Suppl. 344; Eldridge *v.* Binghampton, 42 Hun (N. Y.) 202; Spies *v.* Rome, etc., R. Co., 15 N. Y. Suppl. 348; Jackson *v.* Dieffendorf, 3 Johns. (N. Y.) 269; Birdsall *v.* Cary, 66 How. Pr. (N. Y.) 358.

North Carolina.— Christenbury *v.* King, 85 N. C. 229; Johnson *v.* Parker, 79 N. C. 475; Covington *v.* Stewart, 77 N. C. 148; Lenoir *v.* South, 32 N. C. 237.

Ohio.— McNeely *v.* Langan, 22 Ohio St. 32; Yetzer *v.* Thoman, 17 Ohio St. 130, 91 Am. Dec. 122; Paine *v.* Skinner, 8 Ohio 159.

Oregon.— Parker *v.* Metzger, 12 Oreg. 407, 7 Pac. 518.

Pennsylvania.— O'Hara *v.* Richardson, 46 Pa. St. 385; Schall *v.* Williams Valley R. Co., 35 Pa. St. 191; Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629; Watson *v.* Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Munshower *v.* Patton, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678.

Rhode Island.— Union Sav. Bank *v.* Taber, 13 R. I. 683.

South Carolina.— Cave *v.* Anderson, 50 S. C. 293, 27 S. E. 693; Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657; Busby *v.* Florida Cent., etc., R. Co., 45 S. C. 312, 23 S. E. 50.

Tennessee.— Cowan *v.* Hatcher, (Tenn.) 59 S. W. 689; Hanks *v.* Folsom, 11 Lea (Tenn.) 555; Nelson *v.* Trigg, 4 Lea (Tenn.) 701; Trim *v.* McPherson, 7 Coldw. (Tenn.) 15; Hopkins *v.* Calloway, 7 Coldw. (Tenn.) 37; McClung *v.* Sneed, 3 Head (Tenn.) 218; Waterhouse *v.* Martin, Peck (Tenn.) 373. See also Turnage *v.* Kenton, 102 Tenn. 328, 52 S. W. 174.

Texas.— Moody *v.* Holcomb, 26 Tex. 714. See also East Texas Land, etc., Co. *v.* Shelby, (Tex. Civ. App. 1896) 41 S. W. 542; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098.

West Virginia.—Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

the government.[91] When once acquired it continues until conveyed by the possessor or until lost by another adverse possession.[92]

2. Results of Acquisition of Title — a. As Bar to Ejectment by Original Owner. As the adverse occupant acquires a good title in fee, it necessarily follows that possession for the statutory period will bar an action of ejectment by the holder of the paper title.[93]

b. As Bar in Equity. Where an adverse possession is continued for twenty years it constitutes a complete bar in equity wherever an ejectment would be barred if plaintiff possessed the legal title.[94]

Vermont.— Hodges *v.* Eddy, 41 Vt. 485, 98 Am. Dec. 612; Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331.

Virginia.— Birch *v.* Alexander, 1 Wash. (Va.) 34.

United States.—Maxwell Land-Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279; Stellwagen *v.* Tucker, 144 U. S. 548, 12 S. Ct. 724, 36 L. ed. 537; Sharon *v.* Tucker, 144 U. S. 533, 12 S. Ct. 720, 36 L. ed. 532; Probst *v.* Board of Domestic Missions, 129 U. S. 182, 9 S. Ct. 263, 32 L. ed. 642; Bicknell *v.* Comstock, 113 U. S. 149, 5 S. Ct. 399, 28 L. ed. 962; Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618; Croxall *v.* Sherrerd, 5 Wall. (U. S.) 268, 18 L. ed. 572; Leffingwell *v.* Warren, 2 Black (U. S.) 599, 17 L. ed. 261; Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Elder *v.* McClaskey, 70 Fed. 529, 37 U. S. App. 199, 17 C. C. A. 251; East Tennessee Iron, etc., Co. *v.* Wiggin, 68 Fed. 446, 37 U. S. App. 129, 15 C. C. A. 510; Cross *v.* Sabin, 13 Fed. 308; Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 3 Sawy. (U. S.) 634, 9 Fed. Cas. No. 4,989; Meeks *v.* Vassault, 3 Sawy. (U. S.) 206, 16 Fed. Cas. No. 9,393.

An examination of the various statutes will, it is apprehended, show that in very few of them is there any express declaration that the title of the true owner shall be deemed extinguished by adverse possession for the statutory period and title vested in the adverse occupant. See the particular statutes.

Effect of motive or mistake.— Under Nebr. Comp. Stat. (1881), p. 531, § 6, limiting the time for the recovery of real estate to ten years after the accrual of the action, if a party establish in himself, or in connection with those under whom he claims, an actual, notorious, continuous, and exclusive possession of land, as owner, for a period of ten years, he thereby acquires a title to the land, and this irrespective of any question of motive or mistake. Omaha, etc., L. & T. Co. *v.* Hansen, 32 Nebr. 449, 49 N. W. 456.

91. *Arkansas.*— Jacks *v.* Chaffin, 34 Ark. 534.

California.— Simson *v.* Eckstein, 22 Cal. 580.

Indiana.— Roots *v.* Becks, 109 Ind. 472, 9 N. E. 698.

Iowa.— Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171.

Maine.— School Dist. No. Four *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Minnesota.— Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

Missouri.— Allen *v.* Marsfield, 82 Mo. 688; Wall *v.* Shindler, 47 Mo. 282; Cummings *v.* Powell, 16 Mo. App. 559.

New York.—Sherman *v.* Kane, 86 N. Y. 57; Spies *v.* Rome, etc., R. Co., 15 N. Y. Suppl. 348.

Texas.— Moody *v.* Holcomb, 26 Tex. 714.

Vermont.— Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331; Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703.

United States.— Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029.

Judgment not necessary.— A judgment at law is not necessary to perfect a title by disseizin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseizin for the statutory period is as effectual for that purpose as a deed duly executed. School Dist. No. Four *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

92. Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Chiles *v.* Davis, 58 Ill. 411; Christenbury *v.* King, 85 N. C. 229.

A legislative act passed after the bar of the statute has become complete, with the view of removing the bar, is void as depriving the party of his property without due process of law. Campbell *v.* Holt, 115 U. S. 620, 623, 6 S. Ct. 209, 29 L. ed. 483

93. *Florida.*— Doe *v.* Roe, 13 Fla. 602.

Illinois.— East St. Louis, etc., R. Co. *v.* Nugent, 147 Ill. 254, 35 N. E. 464; Lavalle *v.* Strobel, 89 Ill. 370; Hubbard *v.* Stearns, 86 Ill. 35; Yoakum *v.* Harrison, 85 Ill. 202; Kerr *v.* Hitt, 75 Ill. 51; Weber *v.* Anderson, 73 Ill. 439; Bride *v.* Watt, 23 Ill. 507.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115; Harbaugh *v.* Moore, 11 Gill & J. (Md.) 283.

Michigan.— Call *v.* O'Harrow, 51 Mich. 98, 16 N. W. 249.

Mississippi.— Montgomery *v.* Ives, 13 Sm. & M. (Miss.) 161.

Missouri.— Doan *v.* Sloan, 42 Mo. 106; Scruggs *v.* Scruggs, 41 Mo. 242.

New Jersey.—Den *v.* Wright, 7 N. J. L. 175.

Texas.— Portis *v.* Hill, 3 Tex. 273.

Virginia.— Andrews *v.* Roseland Iron, etc., Co., 89 Va. 393, 16 S. E. 252.

United States.— Somerville *v.* Hamilton, 4 Wheat. (U. S.) 230, 4 L. ed. 558.

94. Gates *v.* Jacob, 1 B. Mon. (Ky.) 306; Sawyer *v.* Oliver, 7 J. J. Marsh. (Ky.) 178; Curts *v.* Bardstown, 6 J. J. Marsh. (Ky.) 536; Poague *v.* Allen, 3 J. J. Marsh. (Ky.) 421; Mitchell *v.* Owings, 3 A. K. Marsh.

c. As Bar to Proceedings for Partition. Adverse possession for the statutory period will bar a petition for partition,[95] whatever may be the legal title of the petitioners.[96]

d. Right of Adverse Claimant to Maintain Ejectment. Where the bar of the statute has become absolute, it is just as available for attacking as for defensive purposes, and its availability in this respect will not depend upon the occupant continuing in the actual possession of the property.[97] He may maintain ejectment against any person acquiring the possession from him by force or fraud, or who has made entry thereon during a temporary absence of the occupant,[98] even though he be the true owner.[99]

e. Right to Bring Suit to Quiet Title. It is likewise an incident of the completion of the statutory bar that the title thus acquired will be quieted in the adverse holder on a bill in equity for that purpose, even against the holder of the legal title barred,[1] and the defendants will be enjoined from asserting title to the premises from former ownership that has been lost.[2] This is true although the adverse title has not been used to disturb him,[3] and though the title be equitable and not at law.[4] When adverse possession is relied on by a complainant as a ground for the removal of a cloud on his title, the right must of necessity be effectuated by extraneous evidence, and equity may always be invoked, in the absence of legal remedies, to quiet a title thus resting in parol.[5]

(Ky.) 312; Hunt *v.* Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397; Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289. See also Cholmondeley *v.* Clinton, Turn. & R. 107.

Extent of the rule.— It has been said, though, that this doctrine must be understood to apply to those cases only where the party seeking relief was informed of his right and labored under no disability. Mitchell *v.* Owings, 3 A. K. Marsh. (Ky.) 312.

95. Johnson *v.* Filson, 118 Ill. 219, 8 N. E. 318; Brackett *v.* Persons Unknown, 53 Me. 228, 87 Am. Dec. 548; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530.

96. Brackett *v.* Persons Unknown, 53 Me. 228, 87 Am. Dec. 548.

97. Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109; McDuffee *v.* Sinnott, 119 Ill. 449, 10 N. E. 385; Brown *v.* Anderson, 90 Ind. 93; Sutton *v.* Pollard, 96 Ky. 640, 29 S. W. 637.

98. Sutton *v.* Pollard, 96 Ky. 640, 29 S. W. 637; Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137; Ellis *v.* Murray, 28 Miss. 129.

99. *California.*— Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Illinois.— McDuffee *v.* Sinnott, 119 Ill. 449, 10 N. E. 385; Hale *v.* Gladfelder, 52 Ill. 91; Hinchman *v.* Whetstone, 23 Ill. 185.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

New York.— Barnes *v.* Light, 116 N. Y. 34, 22 N. E. 441; Jackson *v.* Oltz, 8 Wend. (N. Y.) 440; Jackson *v.* Dieffendorf, 3 Johns. (N. Y.) 269.

Texas.— Turner *v.* Rogers, 38 Tex. 582.

United States.— Stellwagen *v.* Tucker, 144 U. S. 548, 12 S. Ct. 724, 36 L. ed. 537; Sharon *v.* Tucker, 144 U. S. 533, 12 S. Ct. 720, 36 L. ed. 532.

1. *Alabama.*— Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557; Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817; Marston *v.* Rowe, 39 Ala. 722.

Arizona.— Pacheco *v.* Wilson, (Ariz. 1888) 18 Pac. 597.

California.— Woodward *v.* Faris, 109 Cal. 12, 41 Pac. 781; Arrington *v.* Liscom, 34 Cal. 365, 94 Am. Dec. 722.

Illinois.— Walker *v.* Converse, 148 Ill. 622, 36 N. E. 202.

Iowa.— Independent Dist. *v.* Fagen, 94 Iowa 676, 63 N. W. 456; Cramer *v.* Clow, 81 Iowa 255, 47 N. W. 59; 9 L. R. A. 772; Quinn *v.* Quinn, 76 Iowa 565, 41 N. W. 316; Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Nebraska.— Tourtelotte *v.* Pearce, 27 Nebr. 57, 42 N. W. 915.

Oregon.— Logus *v.* Hutson, 24 Oreg. 528, 34 Pac. 477; Parker *v.* Metzger, 12 Oreg. 407, 7 Pac. 518.

Texas.— Moody *v.* Holcomb, 26 Tex. 714.

Vermont.— Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331.

United States.—Sharon *v.* Tucker, 144 U. S. 533, 12 S. Ct. 720, 36 L. ed. 532; Alexander *v.* Pendleton, 8 Cranch (U. S.) 462, 3 L. ed. 624; Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 3 Sawy. (U. S.) 634, 9 Fed. Cas. No. 4,989.

2. Axmear *v.* Richards, (Iowa 1900) 84 N. W. 686; Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866; Sharon *v.* Tucker, 144 U. S. 533, 12 S. Ct. 720, 36 L. ed. 532.

3. Moody *v.* Holcomb, 26 Tex. 714.

4. Pacheco *v.* Wilson, (Ariz. 1888) 18 Pac. 597.

Laches.— One who has acquired title by adverse possession cannot be guilty of laches in instituting a suit to quiet his title and to remove, as a cloud, the title of another who disputes the complainant's title acquired by adverse possession. Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557.

5. Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557; Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817; Arrington *v.* Liscom, 34 Cal. 365, 94 Am. Dec. 722.

f. Right to Require Acceptance of Title Acquired by Adverse Possession. The courts will decree specific performance of a contract to purchase a title acquired by adverse possession.[6]

g. Rights of Action Growing out of Trespasses. So one who has acquired title by adverse possession may protect his possession by injunction against the commission of trespasses thereon,[7] and may recover damages for injury to land by reason of trespasses.[8]

XIV. Loss of Title Acquired by Adverse Possession.

A. Abandonment or Surrender. The disseizor may abandon the land or surrender his possession by parol to the disseizee at any time before his disseizin has ripened into a title, and thus put an end to his claim,[9] although a title which has ripened by adverse possession cannot be conveyed by a parol abandonment or relinquishment, but must be transferred by deed.[10]

B. Admission or Agreement. Where title has become perfect by adverse possession for the statutory period it is not lost by an admission by the holder that the possession was not adverse,[11] although the admission be in writing;[12] or by confession that the disseizin was committed with a fraudulent intent, and fraudulently concealed until the expiration of the time limited by the statute;[13] or by an admission of defects or infirmities in the title under which he held adversely;[14] or by a subsequent recognition of a previous title which, originally rightful, has lost that character by a delay to enforce it;[15] or by an agreement to join in a survey.[16]

6. *District of Columbia.*— Cox *v.* Cox, 7 Mackey (D. C.) 1.

Nebraska.— Ballou *v.* Sherwood, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131.

New York.— Bohm *v.* Fay, 18 Abb. N. Cas. (N. Y.) 175; O'Connor *v.* Huggins, 1 N. Y. Suppl. 377; Seymour *v.* De Lancey, Hopk. (N. Y.) 436, 14 Am. Dec. 552.

Pennsylvania.— Pratt *v.* Eby, 67 Pa. St. 396; Shober *v.* Dutton, 6 Phila. (Pa.) 185, 23 Leg. Int. (Pa.) 84.

England.—Scott *v.* Nixon, 3 Drury & Warr. 388.

7. Montgomery *v.* Robinson, 4 Del. Ch. 490; Schock *v.* Falls City, 31 Nebr. 599, 48 N. W. 468.

8. Swenson *v.* Lexington, 69 Mo. 157; Bowen *v.* Jones, 2 Nova Scotia Dec. 507.

9. School Dist. No. Four *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

10. *Arkansas.*— Parham *v.* Dudman, 66 Ark. 26, 48 S. W. 673.

Maine.— School Dist. No. Four *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Minnesota.—Sage *v.* Rudnick, 67 Minn. 362.

Missouri.— Allen *v.* Mansfield, 82 Mo. 688.

Pennsylvania.—Byers *v.* Sheplar, (Pa. 1886) 7 Atl. 182.

Vermont.— Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703.

Compare Vickery *v.* Benson, 26 Ga. 582; Russell *v.* Slaton, 25 Ga. 193.

The statute of frauds presents an insuperable bar to a parol abandonment or surrender. Byers *v.* Sheplar, (Pa. 1886) 7 Atl. 182.

Right to reclaim after declaration of abandonment.— It follows, therefore, that although one who has acquired title by adverse possession goes out of possession declaring that he abandons it to the former owner and does not intend to make any claim again to the land, he is not precluded from reclaiming what he has thus abandoned. School Dist. No. Four *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Right to reclaim after mere relinquishment. — So the mere fact that one who has acquired title by adverse possession merely relinquishes possession of the land will not benefit the former owner or prevent such person or his heirs from pleading the statute against such owner. Todd *v.* Kauffman, 19 D. C. 304. As supporting this doctrine see also Milliken *v.* Kennedy, 87 Ga. 463, 13 S. E. 635; Greenwich Second M. E. Church *v.* Humphrey, 66 Hun (N. Y.) 628, 21 N. Y. Suppl. 89; Schall *v.* Williams Valley R. Co., 35 Pa. St. 191.

11. *Alabama.*—Jones *v.* Williams, 108 Ala. 282, 19 So. 317; Trufant *v.* White, 99 Ala. 526, 13 So. 83.

Illinois.— Illinois Cent. R. Co. *v.* Wakefield, 173 Ill. 564, 50 N. E. 1002.

Minnesota.—Sage *v.* Rudnick, 67 Minn. 362, 69 N. W. 1096.

New York.— Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

Texas.— Bruce *v.* Washington, 80 Tex. 368, 15 S. W. 1104; Williams *v.* Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

Canada.— Doe *v.* Henderson, 3 U. C. Q. B. 486.

12. McDonald *v.* McIntosh, 8 U. C. Q. B. 388; Doe *v.* Henderson, 3 U. C. Q. B. 486; McIntyre *v.* Canada Co., 18 Grant Ch. (U. C.) 367.

13. Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587.

14. Hoffman *v.* White, 90 Ala. 354, 7 So. 816.

15. Lee *v.* Thompson, 99 Ala. 95, 11 So. 672; London *v.* Lyman, 1 Phila. (Pa.) 465, 10 Leg. Int. (Pa.) 206; Bradford *v.* Guthrie, 3 Pittsb. (Pa.) 213.

16. Brown *v.* Cockerell, 33 Ala. 380; Lamoreaux *v.* Creveling, 103 Mich. 501, 61 N. W. 783.

C. Assertion of Right under Subsequently Acquired Title. Title by adverse possession for the statutory period is not lost by the owner's assertion of right under some other title subsequently acquired.[17]

D. Temporary Break in or Interruption of Possession. If title has become perfect by adverse possession it is not lost by a temporary break in[18] or interruption of[19] the occupation thereof.

E. Loss of Color of Title. Where the statute of limitations operated in favor of a devisee, and the will under which the devisee held possession was subsequently set aside, it did not divest the devisee of the rights acquired by the statute.[20]

XV. PLEADING.

A. Necessity of Pleading Specially — 1. In Actions by Claimant — a. For Possession. To entitle the plaintiff to recover in an action of ejectment on the ground of having acquired the title to the demanded property by five years' adverse possession, it is not necessary to allege adverse possession for the statutory period. Under an averment of ownership in fee and of right to the possession at the commencement of the action plaintiff may prove any facts which would entitle him to recover at that time.[21]

b. For Trespass. In actions for trespass, where the complaint alleges title to the premises in plaintiff, he may show adverse possession without specially pleading it.[22]

Submission to survey by holder of paper title.— In Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253, it was held that where, by adverse possession, one has gained title in fee, payment of rent by him thereafter for two years to the person having the paper title, and a subsequent survey procured by the latter without objection on the part of the former, will not defeat the title already gained. In this case the court quoted with approval from Cleveland *v.* Obenchain, 107 Ind. 591, 593, 8 N. E. 624, as follows: "In submitting to a survey he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey he does not put himself in the position of surrendering his land or any part of it."

An offer to purchase any right which the holder of the paper title may have, for the purpose of avoiding litigation, does not affect the title acquired by adverse possession. Furlong *v.* Cooney, 72 Cal. 322, 14 Pac. 12; Pacific Mut. L. Ins. Co. *v.* Stroup, 63 Cal. 150, 153; Webb *v.* Thiele, 56 Nebr. 752, 77 N. W. 56; McLane *v.* Canales, (Tex. Civ. App. 1894) 25 S. W. 29; Cuellar *v.* Dewitt, 5 Tex. Civ. App. 568, 24 S. W. 671.

A subsequent reference resulting in a void award will not destroy the conclusive effect of a line established by agreement and recognized as the dividing line for more than twenty years. Walker *v.* Simpson, 80 Me. 143, 13 Atl. 580.

17. Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Effect of title cast by operation of law.— Where one bases his title upon adverse possession under color of title he cannot be compelled to abandon it for the title to one half which has since been cast upon him by operation of law. He can elect whether he will hold by his original claim of title or by that since acquired. De Long *v.* Mulcher, 47 Iowa 445.

18. Erhard *v.* Hearne, 47 Tex. 469. See also Moore *v.* Hinkle, 151 Ind. 543, 50 N. E. 822.

19. Sherman *v.* Kane, 86 N. Y. 57.

Entry by the original owner after the title has become complete does not affect the title or vest any right in him. Le Roy *v.* Rogers, 30 Cal. 229, 89 Am. Dec. 88; Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Young *v.* Kimberland, 2 Litt. (Ky.) 223; Bedinger *v.* Rickets, 2 A. K. Marsh. (Ky.) 34; Brassington *v.* Llewellyn, 27 L. J. Exch. 29; Bogan *v.* Cowdal, 21 Wkly. Rep. 693.

Removal of fence for claimant's convenience.— Title does not revest in the adjoining owner by the act of the claimant in removing his fence for his own convenience, so as to exclude the land in question. Jones *v.* Hughes, (Pa. 1889) 16 Atl. 849.

20. Rogers *v.* Winton, 2 Humphr. (Tenn.) 177.

21. Gillespie *v.* Jones, 47 Cal. 259; Sullivan *v.* Dunphy, 4 Mont. 499, 2 Pac. 284. See also McInerny *v.* Irwin, 90 Ala. 275, 7 So. 841.

Trespass to try title.— As the Texas statute [Sayles Civ. Stat. art. 5250] fully prescribes the requisites of a petition in trespass to try title without providing that the facts establishing title must be pleaded, plaintiff may establish title by limitation, though not set up in the petition, where the petition is in the form prescribed by statute. Article 3377, providing that laws of limitation shall not be available to any person in any suit unless specifically set forth as a defense in his answer, has no application. Benavides *v.* Molino, (Tex. Civ. App. 1900) 60 S. W. 260.

22. Donahue *v.* Thompson, 60 Wis. 500, 19 N. W. 520. To the same effect see Missouri, etc., R. Co. *v.* Wickham, (Tex. Civ. App. 1898) 44 S. W. 1023.

2. In Actions against Claimant — a. In General — (I) *For Possession.* In most jurisdictions where adverse possession is relied on as a defense to an action at law to recover the possession of land it need not be specially pleaded, but may be shown under the general issue or general denial.[23] In other jurisdictions, however, adverse possession cannot be relied upon to defeat recovery unless it is specially pleaded.[24]

(II) *For Trespass.* The defendant in an action for trespass, under the general plea of title, without allegations that title is claimed by adverse possession, may introduce evidence to characterize his possession as adverse to any title of plaintiff.[25]

(III) *To Foreclose Tax-Lien.* In actions to foreclose tax liens it has been held that adverse possession must be specially pleaded to be available as a defense.[26]

b. Admissibility under General Issue as Affecting Right to Plead Specially. While it has been held that the fact that evidence of adverse possession is admissible under the general issue or general denial does not take away the right to plead it specially,[27] yet there are decisions which hold that it is improper to plead both the general issue and adverse possession specially.[28]

B. Necessary and Sufficient Allegations[29] — 1. As to Possession. Where adverse possession is specially pleaded, the party relying on it must allege that his

23. *Connecticut.*— Trowbridge *v.* Royce, 1 Root (Conn.) 50.

Florida.— Weiskoph *v.* Dibble, 18 Fla. 22; Wade *v.* Doyle, 17 Fla. 522.

Indiana.— Vail *v.* Halton, 14 Ind. 344.

Michigan.— Miller *v.* Beck, 68 Mich. 76, 35 N. W. 899.

Mississippi.— Bell *v.* Coats, 56 Miss. 776; Wilson *v.* Williams, 52 Miss. 487; Hutto *v.* Thornton, 44 Miss. 166; Ellis *v.* Murray, 28 Miss. 129.

Missouri.— Bird *v.* Sellers, 113 Mo. 580, 21 S. W. 91; Stocker *v.* Green, 94 Mo. 280, 7 S. W. 279, 4 Am. St. Rep. 382; Fairbanks *v.* Long, 91 Mo. 628, 631, 4 S. W. 499; Fulkerson *v.* Mitchell, 82 Mo. 13; Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Hill *v.* Bailey, 8 Mo. App. 85.

Nebraska.— Murray *v.* Romine, (Nebr. 1900) 82 N. W. 318; Fink *v.* Dawson, 52 Nebr. 647, 72 N. W. 1037.

North Carolina.— Cheatham *v.* Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617; Miller *v.* Bumgardner, 109 N. C. 412, 13 S. E. 935; Falls of Neuse Mfg. Co. *v.* Brooks, 106 N. C. 107, 11 S. E. 456; Farrior *v.* Houston, 95 N. C. 578.

Pennsylvania.— Way *v.* Hooton, 156 Pa. St. 8, 26 Atl. 784; Heath *v.* Page, 48 Pa. St. 130.

Tennessee.— Coleson *v.* Blanton, 4 Hayw. (Tenn.) 152.

England.— Hardman *v.* Ellames, 2 Myl. & K. 732.

Reason for rule.— It has been said in a recent decision that "when the statute is relied on as a bar to the remedy merely, it must be specially pleaded. . . . But where the title to real estate is in question the operation of the statute is found to have a higher range. It is capable of conferring an absolute title. Hence it has long been held that a general denial of the plaintiff's title will suffice for the admission of evidence of adverse possession for the statutory period; because this will not merely bar the remedy, but may establish a title in the defendant which will exclusively negative any ownership in the plaintiff. In other words, it sustains and verifies the denial of the plaintiff's title." Hill *v.* Bailey, 8 Mo. App. 85, 87.

24. *California.*— Woodward *v.* Faris, 109 Cal. 12, 41 Pac. 781.

Kentucky.— Luen *v.* Wilson, 85 Ky. 503, 3 S. W. 911.

New York.— Raynor *v.* Timerson, 46 Barb. (N. Y.) 518; People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189; Hansee *v.* Mead, 2 N. Y. Civ. Proc. 175.

Texas.— Burk *v.* Turner, 79 Tex. 276, 15 S. W. 256; Horton *v.* Crawford, 10 Tex. 382; Bailey *v.* Baker, 4 Tex. Civ. App. 395, 23 S. W. 454.

Utah.— Larsen *v.* Onesite, (Utah 1899) 59 Pac. 234.

See also Zeilin *v.* Rogers, 21 Fed. 103.

25. Morss *v.* Salisbury, 48 N. Y. 636.

26. Alexander *v.* Meyers, 33 Nebr. 773, 51 N. W. 140.

27. Vanduyn *v.* Hepner, 45 Ind. 589. See also Tegarden *v.* Carpenter, 36 Miss. 404, which seems to sustain this doctrine.

28. Wade *v.* Doyle, 17 Fla. 522; Dean *v.* Tucker, 58 Miss. 487; Wilson *v.* William, 52 Miss. 487; Hutto *v.* Thornton, 44 Miss. 166; Farrior *v.* Houston, 95 N. C. 578.

Striking out special plea.— It has been held not improper to strike out such special pleading (Wilson *v.* William, 52 Miss. 487), and that it should be struck out on motion or by the court of its own motion as tending to embarrass the trial (Weiskoph *v.* Dibble, 18 Fla. 24 [*citing* Wade *v.* Doyle, 17 Fla. 522]). But see Hill *v.* Atterbury, 88 Mo. 114, wherein it was held that a refusal to strike out an answer pleading adverse possession specially was not a ground for reversal inasmuch as by such statements plaintiffs were informed of the specific grounds on which defendants relied, of which they might otherwise have been ignorant until proved on the trial.

29. Forms of pleading setting up adverse possession.— For forms of pleadings in which adverse possession was held to be sufficiently pleaded see Young *v.* Cox, (Ky. 1890) 14

possession was actual;[30] open, notorious, and visible;[31] exclusive;[32] continuous and uninterrupted,[33] and for the statutory period;[34] and that it was hostile or adverse or under claim of right or title by him.[35]

2. As to Payment of Taxes. Payment of taxes, though made an element of adverse possession by statute, need not be alleged, it being a mere matter of proof and not of pleading.[36]

3. As to Color of Title. If color of title is an element of adverse possession it should be pleaded.[37]

4. Denying Disability of Complainant. A plea setting up adverse possession which fails to negative an allegation in the bill that certain of the complainants were under disability when their rights or possessions accrued and have so continued is insufficient.[38]

S. W. 348; Montague County *v.* Meadows, (Tex. Civ. App. 1897) 42 S. W. 326; Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714; Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Gaines *v.* Agnelly, 1 Woods (U. S.) 238, 9 Fed. Cas. No. 5,173.

30. See Young *v.* Cox, (Ky. 1890) 14 S. W. 348; Page *v.* Kennan, 38 Wis. 320.

Insufficient allegation.— An allegation in a complaint that plaintiff "assumed to and did exercise acts of control over and possession of portions" of a tract of land is not equivalent to an averment that plaintiff had actual possession of the tract of land or any part of it. Brennan *v.* Ford, 46 Cal. 8.

31. Larsen *v.* Onesite, (Utah 1899) 59 Pac. 600, 39 Pac. 234.

32. Alexander *v.* Meyers, 33 Nebr. 773, 51 N. W. 140.

"Actual and open" held equivalent to "exclusive."— It has been held that an allegation that possession was "actual and open" is a sufficient allegation that it was "exclusive." Keaton *v.* Sublett, (Ky. 1900) 58 S. W. 528.

33. Winslow *v.* Winslow, 52 Ind. 8; Colvin *v.* Burnet, 17 Wend. (N. Y.) 564; Larsen *v.* Onesite, (Utah 1899) 59 Pac. 234.

34. Vanduyn *v.* Hepner, 45 Ind. 589.

Allegation in direct terms unnecessary.— An allegation of ownership and possession during a period sufficient to make the statute of limitations available is sufficient without alleging in direct terms that the party had been in possession for more than three years (the statutory period) prior to the commencement of the action. Sullivan *v.* Dunphy, 4 Mont. 499, 2 Pac. 284.

Alleging possession for longer than statutory period.— It is no objection to a pleading that an allegation of possession for a longer period than necessary to sustain the allegation of adverse possession is not sustained by the evidence where it does appear that there was possession for a sufficient length of time to give title. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633; Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029.

Alleging possession for length of time limited by law.— A statement that defendant held the land adversely "for the length of time limited by law" is insufficient. Gillis *v.* Black, 6 Iowa 439.

35. *Alabama.*— Normant *v.* Eureka Co., 98 Ala. 181, 12 So. 454, 39 Am. St. Rep. 45.

California.— Sharp *v.* Daugney, 33 Cal. 505.

Indiana.— Sanford *v.* Tucker, 54 Ind. 219; Postlewaite *v.* Payne, 8 Ind. 104; Doe *v.* Brown, 4 Ind. 143.

New York.— Colvin *v.* Burnet, 17 Wend. (N. Y.) 564.

Texas.— Portis *v.* Hill, 3 Tex. 273.

Utah.— Larsen *v.* Onesite, (Utah 1899) 59 Pac. 234.

See also Young *v.* Cox, (Ky. 1890) 14 S. W. 348.

Setting out facts showing character of possession.— According to some cases it will be sufficient to allege generally that the possession is adverse, without stating the facts and circumstances which constitute the evidence of such possession. Portis *v.* Hill, 3 Tex. 273; Montague County *v.* Meadows, (Tex. Civ. App. 1897) 42 S. W. 326; Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714. In others, however, it is held that a party relying upon adverse possession must allege in his pleadings the facts from which it will affirmatively appear that his possession was of an adverse and hostile character. Lick *v.* Diaz, 30 Cal. 65; Clarke *v.* Hughes, 13 Barb. (N. Y.) 147; McCloskey *v.* Barr, 38 Fed. 165; Hardman *v.* Ellames, 2 Myl. & K. 732.

"Peaceful enjoyment and possession" insufficient.— An allegation that one was living in "the peaceful enjoyment and possession of land" does not show adverse possession thereof. Beaty *v.* Dozier, (Ky. 1896) 34 S. W. 524.

36. Ball *v.* Nichols, 73 Cal. 193, 14 Pac. 831; Partridge *v.* Shepard, 71 Cal. 470, 12 Pac. 480.

37. Bailey *v.* Baker, 4 Tex. Civ. App. 395, 23 S. W. 454.

Sufficiency of instrument relied on.—Where a tax-deed is relied on as color of title it is not necessary to allege that the requirements of the statute in regard to the levying of taxes, advertising of the property, recovery of the judgment, and the conducting of the sale and the execution of the tax-deed relied on was complied with. The deed need not be valid to give color of title. Walker *v.* Converse, 148 148 Ill, 622, 36 N. E. 202.

38. McCloskey *v.* Barr, 38 Fed. 165.

5. DESCRIPTION OF PROPERTY. Where defendant claims a part of the land sued for by limitation, and the plea describes such part so that it it can be readily identified, the description is sufficient.[39]

6. REFERENCE TO STATUTE CREATING BAR. In pleading the statute to a bill in chancery it has been held unnecessary to refer expressly to the statute of the state in which the proceeding is instituted. The court is judicially bound to take notice of the statute of limitations.[40]

C. When Available by Demurrer. Where the declaration, complaint, or bill does not show affirmatively that title is barred by adverse possession on the part of defendant, the defense of adverse possession is not available by demurrer either at law[41] or in equity.[42] If, on the other hand, it appears on the face of the bill that defendant has had adverse possession for a period long enough to vest title in him, unless some sufficient excuse is shown in the bill, defendant may and should demur on that ground.[43] A bill which shows on its face that defendants have held the land adversely for the statutory period is fatally defective.[44]

D. Reply. Where, in an action of trespass to try title to land, defendant pleads adverse possession as a defense, plaintiff, if he desires to avail himself of the fact that the statute was suspended by defendant's temporary absence from the state, must set up such fact in his reply.[45]

E. Amendments. It has been held that where the defense of adverse possession is defectively stated the court may, in furtherance of justice, permit an amendment thereof after verdict, so as to make it conform to the ultimate facts proven.[46] An amendment of a bill in which adverse possession is set up must fail when repugnant to the bill.[47]

XVI. EVIDENCE.

A. Burden of Proof — 1. As to Adverse Possession. The burden of proving adverse possession is in all cases upon him who sets it up and relies on it.[48]

39. Veramendi *v.* Hutchins, 56 Tex. 414.

40. Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029. *Compare* Ferring *v.* Fleischman, (Tenn. Ch. 1896) 39 S. W. 19, in which it was held that where the statute bars the remedy and does not extinguish the title, one seeking to avail himself of its provisions must make special reference to the statute in his pleading.

41. Pella *v.* Scholte, 21 Iowa 463; Tush-ho-Yo-Tubby *v.* Barr, 41 Miss. 52.

42. Crocker *v.* Collins, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752.

43. Humbert *v.* Trinity Church, 7 Paige (N. Y.) 195; Williams *v.* Harrell, 43 N. C. 123, 55 Am. Dec. 442; Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029.

44. Cameron *v.* Louisville, etc., R. Co., 69 Miss. 78, 10 So. 554.

45. Bateman *v.* Jackson, (Tex. Civ. App. 1898) 45 S. W. 224.

46. Zeilin *v.* Rogers, 21 Fed. 103.

47. Magnetic Ore Co. *v.* Marbury Lumber Co., 113 Ala. 306, 21 So. 36.

48. *Alabama.*— Pittman *v.* Pittman, (Ala. 1900) 27 So. 242; Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Alexander *v.* Wheeler, 69 Ala. 332.

Arkansas.— Nicklace *v.* Dickerson, 65 Ark. 422, 46 S. W. 945; McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731.

Indiana.— Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822.

Louisiana.—Laidlaw *v.* Landry, 12 La. Ann. 151; Malveaux *v.* Lavergne, 10 La. Ann. 673.

Maine.— Magoon *v.* Davis, 84 Me. 178, 24 Atl. 809.

Maryland.— Van Bibber *v.* Frazier, 17 Md. 436.

New Jersey.— Rowland *v.* Updike, 28 N. J. L. 101.

New York.— Lewis *v.* New York, etc., R. Co., 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053, 162 N. Y. 202; Lambert *v.* Huber, 22 Misc. (N. Y.) 462, 50 N. Y. Suppl. 793; Howard *v.* Howard, 17 Barb. (N. Y.) 663; Doherty *v.* Matsell, 11 N. Y. Civ. Proc. 392; Fadden *v.* Schwinge, 1 N. Y. L. Rec. 184.

North Carolina.— Bradsher *v.* Hightower, 118 N. C. 399, 24 S. E. 120.

Pennsylvania.—De Haven *v.* Landell, 31 Pa. St. 120; Hood *v.* Hood, 2 Grant (Pa.) 229; Deppen *v.* Bogar, 7 Pa. Super. Ct. 434.

South Carolina.— Cantey *v.* Platt, 2 McCord (S. C.) 260; Gourdin *v.* Fludd, Harp. (S. C.) 232.

Texas.— Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945.

Utah.— Smith *v.* North Canyon Water Co., 16 Utah 194, 52 Pac. 283.

West Virginia.—Harman *v.* Stearns, (W. Va 1897) 27 S. E. 601.

Wisconsin.—Ryan *v.* Schwartz, 94 Wis. 403, 69 N. W. 178.

United States.— Shuffleton *v.* Nelson, 2 Sawy. (U. S.) 540, 22 Fed. Cas. No. 12,822.

He must show every element necessary to constitute a title under the statute of limitations,[49] and if he fail to do so it is the duty of the court to instruct the jury that there is not sufficient evidence to entitle him to recover.[50] It must be shown that the possession was actual,[51] open and notorious,[52] continuous,[53] and for the full time required by the statute,[54] exclusive,[55] and hostile.[56] So, if payment of taxes is made an element of title by adverse possession by statute, the burden of proof is upon the party setting up adverse possession to show such payment.[57] The claimant by adverse possession also has the burden of showing the extent of his possession.[58]

2. As to Facts to Avoid Effect of Adverse Possession. Where facts sufficient to show title by adverse possession have been adduced in evidence, and it is sought to avoid the effect of the statute, the burden of proof is upon him who would do so.[59]

B. Presumptions — 1. As to Possession by Rightful Owner. The law presumes that where title is shown the true owner is in possession until adverse possession is proved to begin,[60] and when two persons are in mixed possession of the

49. Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797; De Haven *v.* Landell, 31 Pa. St. 120; Smith *v.* Estill, 87 Tex. 264, 28 S. W. 801.

50. De Haven *v.* Landell, 31 Pa. St. 120.

51. Kennebeck Purchase *v.* Call, 1 Mass. 483, Bissing *v.* Smith, 85 Hun (N. Y.) 564, 33 N. Y. Suppl. 123; Howard *v.* Howard, 17 Barb. (N. Y.) 663.

52. Kennebeck Purchase *v.* Call, 1 Mass. 483; Tubb *v.* Williams, 7 Humphr. (Tenn.) 366.

53. Kennebeck Purchase *v.* Call, 1 Mass. 483; Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797; Tubb *v.* Williams, 7 Humphr. (Tenn.) 366; Sydnor *v.* Palmer, 29 Wis. 226.

54. Cantey *v.* Platt, 2 McCord (S. C.) 260; Stewart *v.* Cheatham, 3 Yerg. (Tenn.) 59. See also State *v.* Vincennes University, 5 Ind. 77.

Application of rule.— In a suit to redeem from a mortgage, where defendant set up title by adverse possession and the evidence left it doubtful as to when possession was taken, it was held that, defendant having failed to prove this defense, the action was not barred. Montgomery *v.* Chadwick, 7 Iowa 114.

55. Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797.

56. *Alabama.*—Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604.

Nebraska.— Weeping Water *v.* Reed, 21 Nebr. 261, 31 N. W. 797.

New York.—Bissing *v.* Smith, 85 Hun (N. Y.) 564, 33 N. Y. Suppl. 123; Howard *v.* Howard, 17 Barb. (N. Y.) 663.

South Carolina.— Cantey *v.* Platt, 2 McCord (S. C.) 260.

Tennessee.—Dyche *v.* Gass, 3 Yerg. (Tenn.) 396.

Texas.— Smith *v.* Estill, 87 Tex. 264, 28 S. W. 801.

Where defendant alleges that possession was hostile in its inception he must prove this fact. Hoffine *v.* Ewing, (Nebr. 1900) 84 N. W. 93.

57. Travers *v.* McElvain, 181 Ill. 382, 55 N. E. 135; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

Showing that land was not assessed.— Where an assessment for a certain year covered the whole of a certain range, describing it by boundaries, one claiming a part thereof by adverse possession, who did not pay taxes for such year, has the burden of showing that the part claimed by him was not within the assessment. Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008.

Taking possession after payment of taxes for requisite time.— Where one bases his right to vacant and unoccupied land on the payment of taxes thereon for seven years with color of title which, as provided by the Illinois statute, would entitle one to ownership thereof to the extent and according to the purport of his paper title, he must also prove that after the lapse of that time possession was taken under color of title. Travers *v.* McElvain, 181 Ill. 382, 55 N. E. 135.

58. Cantey *v.* Platt, 2 McCord (S. C.) 260; Braxton *v.* Rich, 47 Fed. 178.

59. Shropshire *v.* Shropshire, 7 Yerg. (Tenn.) 164.

Disability of party.— Thus, if it is sought to avoid the effect of the statute upon the ground of disability, the party asserting such matter in avoidance must prove it. Miller *v.* Bumgardner, 109 N. C. 412, 13 S. E. 935.

60. *Arkansas.*— Miller *v.* Fraley, 23 Ark. 735.

Florida.— Summerall *v.* Thoms, 3 Fla. 298.

New York.— Miner *v.* New York, 37 N. Y. Super. Ct. 171.

North Carolina.— Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Thomas *v.* Garvan, 15 N. C. 223, 25 Am. Dec. 708.

Oregon.— Altschul *v.* O'Neill, 35 Oreg. 202, 58 Pac. 95.

Pennsylvania.— Schwab *v.* Bickel, 11 Pa. Super. Ct. 312.

South Carolina.—Brooks *v.* Penn, 2 Strobh. Eq. (S. C.) 113.

Vermont.— Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350.

United States.— Lamb *v.* Burbank, 1 Sawy. (U. S.) 227, 14 Fed. Cas. No. 8,012.

same land, one by title and the other by wrong, the law considers the one who has the title as in possession to the extent of his right so as to preclude the other from taking advantage of the statute of limitations.[61]

2. Arising from Possession — a. Naked Possession. Although the law seems to be settled in one state that mere possession unexplained will be presumed to be adverse,[62] the great weight of authority is to the effect that mere possession without claim or color of title will be presumed to be in subordination to the title of the true owner,[63] and no length of time unaccompanied by any change in the character of the possession will render it adverse.[64] It is well settled that every presumption should be made in favor of a possession in subordination to the title of the true owner.[65]

b. And Permissive Entry. Where a party enters into possession of land under permission or license from the owner, the presumption is that his possession is in subordination to the true owner, in the absence of any acts amounting to a disseizin.[66]

61. Cheney *v.* Ringgold, 2 Harr. & J. (Md.) 87.

62. Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Bryan *v.* Spivey, 109 N. C. 57, 13 S. E. 766; Smith *v.* Reid, 51 N. C. 494; Norcom *v.* Leary, 25 N. C. 49; Jackson *v.* Hillsborough, 18 N. C. 177. See also Satcher *v.* Grice, 53 S. C. 126, 31 S. E. 3, in which it was held that in an action for possession of land which has been held for more than twenty years, where there is no evidence that his possession was permissive or in subordination to plaintiff's rights, it is presumed to be adverse.

63. *Alabama.*— Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Alexander *v.* Wheeler, 69 Ala. 332; McCall *v.* Pryor, 17 Ala. 533.

Arkansas.— Sadler *v.* Sadler, 16 Ark. 628.

California.— Sharp *v.* Daugney, 33 Cal. 505.

Indiana.— Buckley *v.* Taggart, 62 Ind. 236; Pierson *v.* Doe, 2 Ind. 123; Carter *v.* Augusta Gravel-Road Co., Wils. (Ind.) 14.

Kentucky.— Russell *v.* Marks, 3 Metc. (Ky.) 37.

Mississippi.— Alexander *v.* Polk, 39 Miss. 737.

New Hampshire.— Lund *v.* Parker, 3 N. H. 49.

New York.— Buttery *v.* Rome, etc., R. Co., 14 N. Y. St. 131; Bradt *v.* Church, 39 Hun (N. Y.) 262; Sanders *v.* Riedinger, 19 Misc. (N. Y.) 289, 43 N. Y. Suppl. 127; Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287; Doe *v.* Butler, 3 Wend. (N. Y.) 149; Jackson *v.* Thomas, 16 Johns. (N. Y.) 293; Jackson *v.* Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 5 Am. Dec. 218; Jackson *v.* Parker, 3 Johns. Cas. (N. Y.) 124.

United States.— Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871.

64. Jackson *v.* Thomas, 16 Johns. (N. Y.) 293; Jackson *v.* Parker, 3 Johns. Cas. (N. Y.) 124.

Application of rule.— A entered into possession of land without title, and afterward entered into a contract with T, who covenanted to give him a deed of the land. A assigned the contract to S, who took possession and afterward received his deed from T and subsequently a deed from B, the patentee and true owner. It was held that the original possession of A, being without title, was to be deemed the possession of B, and that the possession of S under the covenant from A to T was not adverse. Jackson *v.* Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267.

Joint occupancy.— Where two are in joint occupancy of land, the one having no title will, in the absence of all proof, be considered as holding in subordination to him who has the title. Whittington *v.* Doe, 9 Ga. 23.

65. Huntington *v.* Whaley, 29 Conn. 391; Bryan *v.* East St. Louis, 12 Ill. App. 390; Jackson *v.* Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; Rung *v.* Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

66. *Alabama.*— Dothard *v.* Denson, 72 Ala. 541; Alexander *v.* Wheeler, 69 Ala. 332.

Delaware.— Cooper *v.* McBride, 4 Houst. (Del.) 461.

Kentucky.— Mullins *v.* Conger, (Ky. 1893) 22 S. W. 546, 880.

Maryland.— Gwynn *v.* Jones, 2 Gill & J. (Md.) 173.

Massachusetts.— Hall *v.* Stevens, 9 Metc. (Mass.) 418.

Michigan.— Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342.

Mississippi.— Davis *v.* Bowmar, 55 Miss. 671.

Pennsylvania.—Hood *v.* Hood, 2 Grant (Pa.) 229.

Tennessee.— Porter *v.* Porter, 3 Humphr. (Tenn.) 585.

United States.— Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

Applications of rule.— A tenant entitled by curtesy sold his improvements on the land to H, who took possession under an arrangement with his vendor. H continued in possession a number of years till he made a quit-claim deed to defendant's vendor. The tenant by curtesy gave a release and deed to the land to plaintiffs, his children, who were entitled to the property after his death, and they immediately brought suit for the land. It was held that H, having entered into possession as a subordinate of the life-tenant, would be presumed to have continued in pos-

c. Accompanied by Other Elements of Adverse Possession. While the law stated in a preceding section [67] is elementary, there may, nevertheless, be circumstances under which a presumption of adverse holding will arise. Thus it has been held that one who enters upon land under claim and color of title is presumed to enter and occupy according to his title,[68] and where one who enters without claim or color of title subsequently acquires a colorable title, from that period an adverse possession will commence.[69] So actual occupancy and substantial inclosure of land, accompanied by acts of ownership inconsistent with ownership in another, has been held to be presumedly adverse,[70] and an actual, continuous, and exclusive possession for the statutory period, unexplained, raises a presumption that the possession is hostile.[71] Although the facts are sufficient to raise the presumption of adverse possession, this presumption may nevertheless be rebutted by proof to the contrary.[72]

d. By One Cotenant. It is well settled that where one joint owner is in possession of the whole, the presumption is that he is keeping possession not only for himself but for his cotenant according to their respective rights.[73] But an ouster or disseizin, while not to be presumed from the mere fact of sole possession, may be shown by such possession accompanied with a notorious claim of an exclusive right.[74]

e. Continued Possession by Grantor. Where the grantor and grantee remain in joint possession, the latter being a member of the grantor's family, the possession of the grantor will not be presumed adverse to the possession of the grantee, in whom the legal title is vested.[75] So it cannot be inferred that the possession of the former owner after sale for taxes was forcible and adverse.[76]

3. As to Actual Residence. Where actual residence of land is a prerequisite of title by adverse possession such actual residence cannot be presumed, but must be proved.[77]

4. As to Continuity of Possession. According to some decisions, adverse possession, when once shown, is presumed to continue until the contrary

session as such till he repudiated the release by making a deed to the land. Mullins *v.* Conger, (Ky. 1893) 22 S. W. 546, 880.

So, too, one entitled to possession in the right of his wife will be presumed to hold subservient to the title of the wife, although he holds a void deed purporting to give him title in fee. Corwin *v.* Corwin, 6 N. Y. 342, 57 Am. Dec. 453.

When presumption of permissive entry arises.— D purchased a tract of land in 1853, upon which his son J immediately entered, remaining in possession or exercising control over it for eighteen years, until D's death, and afterward for eight years, until ejectment brought by D's devisees. In 1869 D conveyed to J another place, to which he moved. Until 1867 D paid the taxes on the tract in controversy; afterward J paid them. The tract was at times spoken of by D as his own, and at times as J's. J, after moving from it, received the rents, and always made repairs at his own expense. He claimed, in the action of ejectment, under a parol gift. It was held that the facts failed to show an adverse holding as against D during his lifetime, and that the presumption was that J entered under a mere license. Dean *v.* Tucker, 58 Miss. 487.

67. See *supra*, XVI, B, 2, a.

68. Tappan *v.* Tappan, 31 N. H. 41; Lund *v.* Parker, 3 N. H. 49. See also Comins *v.* Comins, 21 Conn. 413.

69. Jackson *v.* Thomas, 16 Johns. (N. Y.) 293.

70. Alexander *v.* Wheeler, 69 Ala. 332.

71. *Michigan.*— Greene *v.* Anglemire, 77 Mich. 168, 43 N. W. 772.

New York.— Sherry *v.* Frecking, 4 Duer (N. Y.) 452.

Pennsylvania.— Neel *v.* McElhenny, 69 Pa. St. 300.

Vermont.— Morse *v.* Churchill, 41 Vt. 649.

Wisconsin.— Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534; Meyer *v.* Hope, 101 Wis. 123, 77 N. W. 720.

United States.— Wilkes *v.* Elliot, 5 Cranch C. C. (U. S.) 611, 29 Fed. Cas. No. 17,660.

Compare Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787.

72. Alexander *v.* Wheeler, 69 Ala. 332; Morse *v.* Churchill, 41 Vt. 649, wherein it was held that it may be shown that the possession was in its origin permissive, and that sometimes the condition of the property and the circumstances accompanying the occupancy itself will rebut the presumption that it was adverse or under a claim of right.

73. Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723; Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350; Leach *v.* Beattie, 33 Vt. 195; Roberts *v.* Morgan, 30 Vt. 319.

74. Parker *v.* Merrimack River Locks, etc., 3 Metc. (Mass.) 91.

75. Scruggs *v.* Decatur Mineral, etc., Co., 86 Ala. 173, 5 So. 440.

76. Paynter *v.* U. S., 21 Ct. Cl. 221.

77. Jayne *v.* Gregg, 42 Ill. 413.

appears;[78] but according to others there is no such presumption, and although adverse possession may be shown to have existed at one time, it must be shown to have existed continuously for the whole period of limitation.[79]

5. As to Good Faith. Good faith in acquiring color of title will be presumed until the contrary is shown, and in order to overcome this presumption a design to defraud the person having a better title must be shown.[80] The party who alleges bad faith must prove it.[81]

6. As to Payment of Taxes. Where payment of taxes is made an element of adverse possession there is no presumption that the claimant has paid them, but he must show this fact;[82] nor does any presumption of payment arise from the fact that the taxes were assessed to the claimant and no default in payment was shown.[83] On the other hand, in the absence of evidence by the claimant, either that taxes assessed on the land were paid by him or that none were assessed, it will be presumed that taxes have been assessed and that he has not paid them.[84] If taxes are paid by one not claiming title to the land, and the owner subsequently compensates him therefor, it will be presumed that the payment was made in the owner's behalf.[85] So, where the claimant shows that he has paid all the taxes assessed during the statutory period, he is not bound to show that there were no special assessments on the land, the presumption being that there were none.[86]

7. As to Extent of Possession. Possession of one claiming under color of title is presumed to be coextensive with the boundaries of the instrument under which he claims,[87] and that claim of title is limited to the premises described in the deed.[88] The presumption may be rebutted, but only by positive evidence that the person claimed to be the owner of more than his deed expressed.[89]

C. Admissibility — 1. In General. Title by adverse possession may be shown by proof of claimant's acts, in the exercise of which he assumed to be the owner,[90] and such acts may be shown by parol evidence.[91]

2. As to Character of Possession — a. Actual Possession. A deed is not evidence of actual possession according to the boundaries described therein,[92] nor can it be shown by evidence that it was generally known in the vicinity of the land that the claimant's grantor claimed title thereto.[93] So possession cannot be

78. Hollingsworth *v.* Walker, 98 Ala. 543, 13 So. 6; Abbett *v.* Page, 92 Ala. 571, 9 So. 332; Marston *v.* Howe, 43 Ala. 271; Clements *v.* Lampkin, 34 Ark. 598.

79. Lynde *v.* Williams, 68 Mo. 360; Atkinson *v.* Smith, (Va. 1896) 24 S. E. 901. See also Holdfast *v.* Shepard, 28 N. C. 361.

80. Garrett *v.* Adrain, 44 Ga. 274; Sexson *v.* Barker, 172 Ill. 361, 50 N. E. 109; Lewis *v.* Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Stubblefield *v.* Borders, 92 Ill. 279; Davis *v.* Hall, 92 Ill. 85; Smith *v.* Ferguson, 91 Ill. 304; Hodgen *v.* Henrichsen, 85 Ill. 259; Billings *v.* Kankakee Coal Co., 67 Ill. 489; Milliken *v.* Marlin, 66 Ill. 13; Morrison *v.* Norman, 47 Ill. 477; McCagg *v.* Heacock, 34 Ill. 476, 85 Am. Dec. 327; McConnel *v.* Street, 17 Ill. 253; Sides *v.* Nettles, 4 Rob. (La.) 170.

A failure to record the deed which is color of title raises no presumption of bad faith. Rawson *v.* Fox, 65 Ill. 200.

The presumption of good faith is not rebutted by the fact that the deed which is claimed to operate as color of title is a quit-claim deed. Hammond *v.* Crossby, 68 Ga. 767.

81. Wells *v.* Wells, 30 La. Ann. 935.

82. Reynolds *v.* Willard, 80 Cal. 605, 22 Pac. 262; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

83. Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

84. Reynolds *v.* Willard, 80 Cal. 605, 22 Pac. 262.

85. Paris *v.* Lewis, 85 Ill. 597.

86. Chicago *v.* Middlebrooke, 143 Ill. 265, 32 N. E. 457.

87. See Chiles *v.* Conley, 9 Dana (Ky.) 385.

88. Bowie *v.* Brahe, 3 Duer (N. Y.) 35; Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279.

89. Bowie *v.* Brahe, 3 Duer (N. Y.) 35.

90. Trufant *v.* White, 99 Ala. 526, 13 So. 83 (paying taxes, and scheduling lands in bankruptcy proceedings); St. Peter's Church *v.* Beach, 26 Conn. 355; Comins *v.* Comins, 21 Conn. 413 (caring for premises with declarations as to what claimant intended to do with them); Stockton *v.* Geissler, 43 Kan. 612, 23 Pac. 619 (fencing and cultivating land, paying taxes, offering land for sale, and openly and notoriously claiming it); Howland *v.* Newark Cemetery Assoc., 66 Barb. (N. Y.) 366 (entering no executory contract of purchase afterward consummated by deed); Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787 (occupying property, paying taxes, and receiving rents).

91. Durel *v.* Tennison, 31 La. Ann. 538; Broadway *v.* Pool, 19 La. 258; Kittridge *v.* Landrey, 2 Rob. (La.) 72; Zeilin *v.* Rogers, 21 Fed. 103.

92. Heffelfinger *v.* Shutz, 16 Serg. & R. (Pa.) 44; Hudgins *v.* Simon, 94 Va. 659, 27 S. E. 606.

93. Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393; Doe

established by declarations of a grantee in a deed of the property that the property was his, such declarations not being admissible except to characterize a possession otherwise proved.[94] The testimony of witnesses who have lived on the premises is competent to show actual possession.[95]

b. Open and Notorious Possession. Notoriety of possession by one setting up title by adverse possession may be shown by testimony that in the vicinity of the land he was reputed to be the owner[96] or in possession thereof.[97]

c. Continuous Possession. Where land is held adversely by different occupants, the continuity of their possession, in order to show a limitation, need not be proved by written evidence, but may be shown by parol.[98]

d. Exclusive Possession. Where, in ejectment, evidence is introduced to show exclusive possession of defendant for the statutory period, plaintiff should be permitted to introduce evidence to the contrary.[99]

e. Hostile Possession — (I) *To Show Hostility* — (A) *Declarations of Claimant.* Declarations of one in actual possession of land, showing that he claims to be sole owner, are admissible as tending to show hostility of possession.[1] Nevertheless, declarations made out of the presence of the grantor by the grantee in a deed of land who has never been in possession are not admissible;[2] and it has been held that declarations by one who enters under another, and who sets up title by disseizin, made to a stranger to the title, that he held adversely to the owner, are not admissible.[3] So declarations of one having title to land, that it was occupied by his mother and that he lived on it as her property, are irrelevant to show a disseizin by her, as they show that she occupied with his consent.[4]

v. Clayton, 81 Ala. 391, 2 So. 24. See also McInerney *v.* Beck, 10 Wash. 515, 39 Pac. 130.

94. Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912.

95. Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

96. Holtzman *v.* Douglas, 5 App. Cas. (D. C.) 397; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93; Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279. *Contra,* Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

97. McAuliff *v.* Parker, 10 Wash. 141, 38 Pac. 744.

98. *California.*— Cook *v.* McKinney, (Cal. 1886) 11 Pac. 799.

Connecticut.— St. Peter's Church *v.* Beach, 26 Conn. 355.

Georgia.— Shiels *v.* Roberts, 64 Ga. 370.

Illinois.— Weber *v.* Anderson, 73 Ill. 439.

Missouri.— Menkens *v.* Blumenthal, 27 Mo. 198.

Receipt of rent and consent to use of land. — As affecting the question of uninterrupted possession it may be shown that one claiming property by adverse possession received rent for the use thereof, and that persons who built on the land obtained his permission to do so. Jacob Tome Institute *v.* Crothers, 87 Md. 569, 40 Atl. 261.

99. Jennings *v.* Gorman, 19 Mont. 545, 48 Pac. 1111.

That others than claimant used property.— It is competent to show that persons other than the adverse claimant used the property. Bracken *v.* Union Pac. R. Co. 56 Fed. 447, 12 U. S. App. 421, 5 C. C. A. 548. So, where defendant in ejectment took under her mother, who claimed by adverse possession, and it appeared that she was in possession with the mother during a part of the period of adverse possession, it was proper to admit evidence that, during the joint possession, defendant, in common with plaintiff and others, took a deed of the land from the legal owner, and that defendant accepted a lease from her cotenants under the deed, and joined with them in ejectment against the mother, as bearing on the exclusiveness of the mother's possession. Collins *v.* Lynch, 167 Pa. St. 635, 31 Atl. 921.

1. *Alabama.*— Jones *v.* Pelham, 84 Ala. 208, 4 So. 22.

California—Stockton Sav. Bank *v.* Staples, 98 Cal. 189, 32 Pac. 936; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Georgia.— Knorr *v.* Raymond, 73 Ga. 749.

Kansas.— Rand *v.* Huff, 59 Kan. 777, 53 Pac. 483.

Michigan.— Youngs *v.* Cunningham, 57 Mich. 153, 23 N. W. 626.

Missouri.— Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917.

Texas.— Lochausen *v.* Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513.

West Virginia.—Parkersburg Industrial Co. *v.* Shultz, 43 W. Va. 470, 27 S. E. 255.

Wisconsin.— Lamoreux *v.* Huntley, 68 Wis. 24, 31 N. W. 331; Roebke *v.* Andrews, 26 Wis. 311.

England.— Doe *v.* Pettett, 5 B. & Ald. 223, 7 E. C. L. 129. See also Saugatuck Cong. Soc. *v.* East Saugatuck School Dist., 53 Conn. 478, 2 Atl. 751. But see Shields *v.* Ivey, 52 N. J. L. 280, 19 Atl. 261, which seems to hold adversely to this view.

2. Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.

3. McCrane *v.* Marshall, 16 Me. 27, 33 Am. Dec. 631; Alden *v.* Gilmore, 13 Me. 178. See also Jones *v.* Pelham, 84 Ala. 208, 4 So. 22.

4. Oakes *v.* Marcy, 10 Pick. (Mass.) 195.

(B) *Acts of Ownership.* Where an issue is raised as to whether a person seized during his lifetime asserted title to the land, evidence may be introduced by those claiming under such person that during his lifetime he performed work upon it.[5] Evidence of a conveyance by one claiming by adverse possession is also admissible on the question whether the possession was adverse.[6] And where a wife, during her husband's life, has claimed property in his possession as her own, and on his death becomes administrator, her omission to inventory the property as part of his estate is evidence that her possession after his death was adverse to the estate.[7]

(C) *Payment of Taxes.* To show character of the possession, the assessment rolls are admissible to prove that the land was assessed to the claimant's grantor for the statutory period,[8] but tax assessments paid by one who has never been in possession are inadmissible to show his adverse possession.[9]

(D) *Record of Former Suit.* The record of a suit by plaintiffs against the adverse holder, in which they recovered possession, is admissible to show adverse occupancy[10] provided it contains such a description of the land as will identify and locate it,[11] but the record of a suit tending to show adverse possession is properly excluded where the evidence shows that possession was not held for the statutory period.[12]

(E) *Deed under Which Claimant Holds.* Although a deed be void upon its face, it may nevertheless be used to show the hostile character of the possession claimed under it.[13]

(II) *To Disprove Hostility*—(A) *In General.* In order to show that possession is not of a hostile character it is competent to introduce evidence that the claimant accepted a lease from the owner.[14] So, where plaintiff claims title by adverse possession, a deed from him to defendant, given more than ten years before the bringing of the action, with oral testimony that about the time of its execution plaintiff became the agent for defendant, is competent to show that plaintiff's possession was not adverse.[15] And correspondence between the grantor and the officers of the grantee, a railroad company, occurring before the execution of the conveyance and covenant, may be admitted to prove the grantee's permissive occupation and to rebut the idea of adverse possession.[16]

(B) *Declarations of Claimant or Predecessor in Title.* Declarations made by claimant showing or tending to show that his possession was not hostile are admissible to prove such fact.[17] Thus it may be shown that he declared that he

5. Lick *v.* Diaz, 44 Cal. 479.

6. House *v.* Williams, 16 Tex. Civ. App. 122, 40 S. W. 414.

Mortgage of premises by claimant.— A mortgage deed from the grantee to a third person, made during the continuance of his occupation, describing the land as in his record deed, is admissible in evidence on his part, in support of his claim to adverse possession, to show that he then claimed to be the owner and that he proved an act of dominion over the whole tract included in his deed. Noyes *v.* Dyer, 25 Me. 468.

7. Bradshaw *v.* Mayfield, 18 Tex. 21.

8. Elwell *v.* Hinckley, 138 Mass. 225.

9. Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.

10. Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737. See also Unger *v.* Roper, 53 Cal. 39.

11. Clark *v.* Kirby, (Tex. Civ. App. 1894) 25 S. W. 1096.

12. Dean *v.* Tucker, 58 Miss. 487.

13. Skipwith *v.* Martin, 50 Ark. 141, 6 S. W 514.

14. Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008.

15. Roggencamp *v.* Converse, 15 Nebr. 105, 17 N. W. 361.

16. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

17. *Alabama.*— Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Jones *v.* Williams, 108 Ala. 282, 19 So. 317; Trufant *v.* White, 99 Ala. 526, 13 So. 83; Kirkland *v.* Trott, 66 Ala. 417.

California.— Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Connecticut.— Williams *v.* Ensign, 4 Conn. 456.

Georgia.— Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569; Clements *v.* Wheeler, 62 Ga. 53.

Kentucky.—Critchlow *v.* Beatty, (Ky. 1893) 23 S. W. 960.

Maine.— Crane *v.* Marshall, 16 Me. 27, 33 Am. Dec. 631.

Massachusetts.— Hale *v.* Silloway, 1 Allen (Mass.) 21; Church *v.* Burghardt, 8 Pick. (Mass.) 327.

Pennsylvania.— Calhoun *v.* Cook, 9 Pa. St. 226; Sailor *v.* Hertzogg, 2 Pa. St. 182; Bradford *v.* Guthrie, 4 Brewst. (Pa.) 351.

South Carolina.— Leger *v.* Doyle, 11 Rich. L. (S. C.) 109, 70 Am. Dec. 240; Pell *v.* Ball, 1 Rich. Eq. (S. C.) 361.

took possession of the land as the agent of another,[18] that he disclaimed any title in himself[19] or that he admitted title in another, whether such admission was made before or after the expiration of the statutory period.[20]

3. As to Extent of Possession. Declarations of the occupant at the time of the settlement, as to under whom and how he took possession, are admissible to show extent of possession,[21] which may be shown also by a deed under which the claimant entered, though void or in some respects defective.[22]

4. As to Title — a. To Show Claim of Title. According to the weight of authority, declarations of ownership made by one in actual possession of land are part of the *res gestæ* of possession and are admissible to show claim of title or the absence of it.[23] So declarations of a former occupant under whom the adverse possessor claims, showing that such occupant entered without claim of title, are admissible in evidence against the claimant.[24] And so, on the issue of claim of title, it may be shown that the claimant brought an action of trespass against others who attempted to use the property,[25] that he listed the land for taxation,[26] and that he paid taxes thereon.[27] The manner of using and conducting the property in dispute may also be shown as bearing on the question of claim of title.[28]

Texas.— Waller *v.* Leonard, (Tex. 1896) 35 S. W. 1045; Williams *v.* Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

Vermont.— Coffrin *v.* Cole, 67 Vt. 226, 31 Atl. 313; Day *v.* Wilder, 47 Vt. 583.

Declarations of predecessor in title.— In an action of ejectment the testimony of a witness that he heard one through whom defendant claims say, while in possession of the land sued for, that the land belonged to plaintiff, is part of the *res gestæ*, hence admissible evidence. Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744.

18. Kirkland *v.* Trott, 66 Ala. 417.

19. Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176; Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569. See also De Lancey *v.* Hawkins, 163 N. Y. 587, 57 N. E. 1108.

20. Jones *v.* Williams, 108 Ala. 282, 19 So. 317; Trufant *v.* White, 99 Ala. 526, 13 So. 83; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Church *v.* Burghardt, 8 Pick. (Mass.) 327; Williams *v.* Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

Written recognition of title.— If a person in possession of land recognizes in writing the title of one not in possession, such writing is admissible to rebut a claim of adverse possession. Bradford *v.* Guthrie, 4 Brewst. (Pa.) 351.

21. Smith *v.* Morrow, 7 T. B. Mon. (Ky.) 234; Adams *v.* Tiernan, 5 Dana (Ky.) 394.

22. McInery *v.* Irvin, 90 Ala. 275, 7 So. 841; Bohannon *v.* State, 73 Ala. 47; Stumpf *v.* Osterhage, 111 Ill. 82; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Certificate of entry.— On an issue as to adverse possession by defendant a certificate of entry is admissible, without proof of its execution, as color of title to fix the boundaries of defendant's possession. Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43.

A contract of purchase and conveyance to a possessor of land, from one who is the presumptive owner thereof, under a decree of partition determining title in his favor, is, together with such decree, admissible to show the extent and nature of his claim, and to constitute him an adjoining owner, within the meaning of the authorities upon agreed boundary lines. Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

Showing that deed covered land in dispute. — Where the question whether the deed is good as color of title depends on whether it covered the land in dispute, and its terms in this respect are ambiguous, parol evidence is admissible to show that it did in fact apply to such land. Chauncey *v.* Brown, 99 Ga. 766, 26 S. E. 763.

23. Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; Kennedy *v.* Wible, (Pa. 1887) 11 Atl. 98; Duffey *v.* Presbyterian Congregation, 48 Pa. St. 46; St. Clair *v.* Shale, 9 Pa. St. 252; Toyley *v.* Baream, 48 Vt. 132; Ricard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398. *Contra*, Seymour *v.* Over-River School Dist., 53 Conn. 502, 3 Atl. 552. See also Jones *v.* Pelham, 84 Ala. 208, 4 So. 22, which seems to maintain that such declarations are not admissible unless there is evidence that they were brought to the knowledge of the owner.

24. Keener *v.* Kauffman, 16 Md. 296.

25. Hollister *v.* Young, 42 Vt. 403.

26. Pasley *v.* Richardson, 119 N. C. 449, 26 S. E. 32; Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251; Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

27. *Alabama.*— Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711.

California.— Frick *v.* Simon, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177.

Connecticut.— Wren *v.* Parker, 57 Conn. 529, 18 Atl. 790, 14 Am. St. Rep. 127, 6 L. R. A. 80.

District of Columbia.— Holtzman *v.* Douglas, 5 App. Cas. (D. C.) 397.

Minnesota.— Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Tax receipts are admissible in evidence in support of actual possession by a taxpayer, as tending to show a claim of ownership and the extent of his possession. Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711.

28. Fellows *v.* Fellows, 37 N. H. 75; McLean *v.* Smith, 114 N. C. 356, 19 S. E. 279.

b. To Show Notoriety of Claim of Title. Evidence that it was generally known in the vicinity of the land that the claimant or his grantor claimed title thereto is admissible to show notoriety of claim of title,[29] but not to show title itself.[30]

5. As to Payment of Taxes. Where payment of taxes is material, tax-receipts in which there is a slight mistake in the spelling of the name, but otherwise identifying the land in controversy, are admissible as bearing on the question of payment of taxes;[31] and it has been held competent to prove by parol on what land taxes have been in fact paid, and thus supplement or contradict the evidence of the written receipts for taxes.[32] The claimant may also show, by the tax-lists, property on which he was assessed, and that the property was not assessed to any one else,[33] and evidence that a person had been in possession of land a number of years and had stipulated to pay the taxes will be allowed to go to the jury, with liberty to infer that he had paid them.[34] To rebut proof of payment of taxes the record of a judgment for taxes against certain land assessed as the property of another person is not admissible where the land is not shown to be identical with that in suit.[35]

D. Weight and Sufficiency. To prove title by adverse possession or any single element thereof, the evidence should be clear and convincing,[36] and such

29. *Alabama.*— Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393.

Illinois.— Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306.

Maine.— Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

Michigan.— Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93.

Pennsylvania.— Kennedy *v.* Nible, (Pa. 1887) 11 Atl. 98.

United States.— Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279.

Compare Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787.

Record evidence.— Where plaintiffs claim under an unrecorded land certificate, and defendants claim under an alleged transfer of such certificate and a subsequent patent from the state, the records of proceedings begun by defendants' predecessor in title, which recited such alleged transfer, and which resulted in a decree awarding the title to the plaintiff in that action, and ordering a patent to issue, were admissible to show open and notorious claim to the land on the part of defendants and their predecessors in title. Baldwin *v.* Roberts, (Tex. Civ. App. 1896) 36 S. W. 789.

30. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Howland *v.* Crocker, 7 Allen (Mass.) 153.

31. Seemuller *v.* Thornton, 77 Tex. 156, 13 S. W. 846.

32. Stumpf *v.* Osterhage, 111 Ill. 82.

33. Carter *v.* Clark, 92 Me. 225, 42 Atl. 398. But it has been held that the fact that a parcel of land does not appear on the assessment roll of a county in a given year as the property of the defendant in an action for the recovery of the same does not tend to contradict the testimony of such defendant to the effect that he paid the taxes thereon as owner in such year, and that it is not competent evidence in such action, for or against either party, as to the ownership of such land. Zeilin *v.* Rogers, 21 Fed. 103.

34. Watson *v.* Hopkins, 27 Tex. 637.

35. Stumpf *v.* Osterhage, 111 Ill. 82.

36. Evidence sufficient to show title by adverse possession.— In the following decisions the evidence was held sufficient to show title by adverse possession:

Arkansas.— Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

California.— Dougherty *v.* Miles, 97 Cal. 568, 32 Pac. 597; Kockemann *v.* Bickel, 92 Cal. 665, 28 Pac. 686; Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149; Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482.

Iowa.— Colvin *v.* McCune, 39 Iowa 502.

Kentucky.— Pollit *v.* Bland, (Ky. 1893) 22 S. W. 842; Miller *v.* McDowel, (Ky. 1891) 17 S. W. 482; Saunders *v.* Moore, (Ky. 1888) 7 S. W. 910; Whipple *v.* Earick, 93 Ky. 121, 19 S. W. 237; Martin *v.* Reynolds, 9 Dana (Ky.) 328; Hinton *v.* Fox, 3 Litt. (Ky.) 380.

Louisiana.— Michel *v.* Stream, 48 La. Ann. 341, 19 So. 215.

Maine.— Beal *v.* Gordon, 55 Me. 482.

Maryland.—Sadtler *v.* Peabody Heights Co., 66 Md. 1, 10 Atl. 599.

Massachusetts.— Morse *v.* Sherman, 155 Mass. 222, 29 N. E. 523; Tufts *v.* Charlestown, 117 Mass. 401.

Mississippi.— Meridian Land, etc., Co. *v.* Ball, 68 Miss. 135, 8 So. 316; Jones *v.* Gaddis, 67 Miss. 761, 7 So. 489; Grafton *v.* Grafton, 8 Sm. & M. (Miss.) 77.

Nebraska.—Crawford *v.* Galloway, 29 Nebr. 261, 45 N. W. 628.

New York.— Argotsinger *v.* Vines, 82 N. Y. 308.

Oregon.— Rowland *v.* Williams, 23 Oreg. 515, 32 Pac. 402.

Pennsylvania.— Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328.

Tennessee.—McLemore *v.* Durivage, 92 Tenn. 482, 22 S. W. 207.

possession or element cannot be established by loose, uncertain testimony which

Texas.— Mims *v.* Rafel, 73 Tex. 300, 11 S. W. 277; Motley *v.* Corn, (Tex. 1889) 11 S. W. 850; Jacks *v.* Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645.

Washington.— Rogers *v.* Miller, 13 Wash. 82, 42 Pac. 525.

Wisconsin.— Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171; Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714.

United States.— Merrill *v.* Shea, 30 Fed. 743; Merrill *v.* Tobin, 30 Fed. 738.

Evidence insufficient to show title by adverse possession.— In the following decisions the evidence was held insufficient to show title by adverse possession:

Arkansas.—Richards *v.* Howell, 60 Ark. 215, 29 S. W. 461.

California.— Woodworth *v.* Fulton, 1 Cal. 295.

Georgia.— Royall *v.* Lisle, 15 Ga. 545, 60 Am. Dec. 712.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149; Hayden *v.* McCloskey, 161 Ill. 351, 43 N. E. 1091; School Trustees *v.* Scholl, 120 Ill. 509, 12 N. E. 243; Ambrose *v.* Raley, 58 Ill. 506; Jackson *v.* Berner, 48 Ill. 203; McClellan *v.* Kellogg, 17 Ill. 498.

Iowa.— Sweny *v.* Bruns, 74 Iowa 701, 39 N. W. 165.

Kansas.— Gildehaus *v.* Whiting, 39 Kan. 706, 18 Pac. 916.

Kentucky.— Chism *v.* Trent, (Ky. 1889) 10 S. W. 648.

Mississippi.— Goff *v.* Cole, 71 Miss. 46, 13 So. 870.

Nevada.— McDonald *v.* Fox, 20 Nev. 364, 22 Pac. 234.

New York.— Erkson *v.* Johnston, 8 N. Y. App. Div. 31, 40 N. Y. Suppl. 401; Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352; Doe *v.* Campbell, 10 Johns. (N. Y.) 475; Townshend *v.* Thomson, 60 N. Y. Super. Ct. 454, 18 N. Y. Suppl. 870.

North Carolina.—Ruffin *v.* Overby, 105 N.C. 78, 11 S. E. 251.

Oregon.— Kanne *v.* Otty, 25 Oreg. 531, 36 Pac. 537.

Pennsylvania.— McDermott *v.* Hoffman, 70 Pa. St. 31.

South Carolina.— Barker *v.* Deigman, 25 S. C. 252.

Tennessee.— Kirkman *v.* Brown, 93 Tenn. 476, 27 S. W. 709.

Texas.— Hitchler *v.* Scanlan, 83 Tex. 569, 19 S. W. 259; Donlon *v.* Lyons, (Tex. 1891) 15 S. W. 578; Porter *v.* Miller, 76 Tex. 593, 13 S. W. 565, 14 S. W. 334; Boothe *v.* Best, 75 Tex. 568, 12 S. W. 1000; Harnage *v.* Berry, 43 Tex. 567; Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438.

Virginia.— Harman *v.* Stearnes, 95 Va. 58, 27 S. E. 601.

West Virginia.— Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Evidence to go to jury on question of adverse possession.— In the following cases it was held that there was sufficient evidence of adverse possession to be submitted to a jury: Guinn *v.* Spillman, 52 Kan. 496, 35 Pac. 13; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755; Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581. But see Judson *v.* Duffy, 96 Mich. 255, 55 N. W. 837.

Evidence sufficient to show actual possession.—In the following cases the evidence was held sufficient to show actual possession:

Illinois.— Horner *v.* Reuter, 152 Ill. 106, 38 N. E. 747.

Kansas.— Giles *v.* Ortman, 11 Kan. 59.

New York.— Dominy *v.* Miller, 33 Barb. (N. Y.) 386.

North Carolina.—Bryan *v.* Spivey, 109 N.C. 57, 13 S. E. 766.

Pennsylvania.— Ament *v.* Wolf, 33 Pa. St. 331; Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Wolf *v.* Ament, 1 Grant (Pa.) 150.

Evidence insufficient to show actual possession.— In the following cases evidence was held insufficient to show actual possession:

California.— Roman Catholic Archbishop *v.* Shipman, 79 Cal. 288, 21 Pac. 830.

Illinois.— Thompson *v.* McLaughlin, 66 Ill. 407.

Indiana.— Peck *v.* Louisville, etc., R. Co., 101 Ind. 366.

Massachusetts.— Slater *v.* Jepherson, 6 Cush. (Mass.) 129.

New York.—Bliss *v.* Johnson, 94 N. Y. 235; Silliman *v.* Paine, 48 Hun (N. Y.) 619, 1 N. Y. Suppl. 75; McFarlane *v.* Kerr, 10 Bosw. (N. Y.) 249.

North Carolina.— Emery *v.* Raleigh, etc., R. Co., 102 N. C. 209, 9 S. E. 139.

Pennsylvania.— Brolaskey *v.* McClain, 61 Pa. St. 146.

Texas.— Brymer *v.* Taylor, 5 Tex. Civ. App. 103, 23 S. W. 635.

Evidence as to continuity of possession.— The evidence was held sufficient to show continuity of possession in Thacker *v.* Guardenier, 7 Metc. (Mass.) 484; Mims *v.* Rafel, 73 Tex. 300, 11 S. W. 277; and insufficient in Richards *v.* Howell, 60 Ark. 215, 29 S. W. 461; Doe *v.* Roe, 32 Ga. 572; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057; Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301.

For evidence insufficient to show exclusiveness of possession see Frye *v.* Gragg, 35 Me. 29.

For evidence insufficient to show open and notorious possession see Furlong *v.* Garrett, 44 Wis. 111.

For evidence sufficient to show knowledge or notice see Cole *v.* Hebb, 7 Gill & J. (Md.) 20.

Evidence insufficient to show payment of taxes.— In the following cases the evidence was held insufficient to show payment of taxes:

Reynolds *v.* Willard, 80 Cal. 605, 22 Pac. 262; Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109; Bell *v.* Neiderer, 169 Ill. 54, 48 N. E. 194; Perry *v.* Burton, 111 Ill. 138; Irwin *v.* Miller, 23 Ill. 401; French *v.* Olive, 67 Tex. 400, 3 S. W. 568; Spence *v.* Johnson, 3 Tex. Civ. App. 627, 22 S. W. 1042.

necessitates resort to mere conjecture.[37] It is not to be understood, however, that the evidence should show adverse possession beyond a reasonable doubt, for such is not the law, and a finding of adverse possession may be based upon a mere preponderance of the evidence.[38] So direct and positive evidence is not necessary to the establishment of adverse possession or any of its elements. It may be shown by circumstantial evidence.[39]

E. Province of Court and Jury — 1. Statement of General Rule. Adverse possession is usually a mixed question of law and fact. Whether the facts exist which constitute adverse possession is for the jury to determine,[40] and whether the facts as found by the jury constitute adverse possession is a question of law for the court.[41] On the other hand, on admitted or disputed facts, the court may decide the question of title as matter of law,[42] and if there is no evidence to show adverse possession the court need not and should not submit the question to the jury.[43]

2. In Determining Character of Possession — a. Whether Actual. It is for the jury to decide whether the party relying on adverse possession had actual possession of the premises claimed.[44]

Evidence as to hostility of possession.—The evidence was held sufficient to show hostility of possession in Miller *v.* Bensinger, (Cal. 1892) 31 Pac. 578; Houchin *v.* Houchin, (Ky. 1892) 20 S. W. 506; Strutton *v.* Strutton, (Ky. 1888) 9 S. W. 826; Lecomte *v.* Smart, 19 La. 484; Heiser *v.* Riehle, 7 Watts (Pa.) 35; and insufficient in Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281; Rider *v.* Waters, 70 Ga. 716; Chandler *v.* Wilson, 77 Me. 76; Dikes *v.* Miller, 24 Tex. 417.

For evidence sufficient to show possession not hostile see Lowd *v.* Brigham, 154 Mass. 107, 26 N. E. 1004; American Bank Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302.

For evidence of hostility sufficient to go to jury see Green *v.* Harman, 15 N. C. 158; Zeller *v.* Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

For evidence sufficient to show good faith see De Foresta *v.* Gast, 20 Colo. 307, 38 Pac. 244; Gottlieb *v.* Thatcher, 51 Fed. 373, 4 U. S. App. 616, 2 C. C. A. 278.

37. McCauley *v.* Mahon, 174 Ill. 384, 51 N. E. 829; Hurlbut *v.* Bradford, 109 Ill. 397.

38. Rector *v.* Du Val, 27 Ark. 318; Grim *v.* Murphy, 110 Ill. 271; Jones *v.* Hughes, (Pa. 1889) 16 Atl. 849. *Contra,* Rowland *v.* Updike, 28 N. J. L. 101.

39. Grim *v.* Murphy, 110 Ill. 271; Allen *v.* Woodson, 60 Tex. 651; Watson *v.* Hopkins, 27 Tex. 637; Swenson *v.* Mynair, 79 Fed. 608, 41 U. S. App. 755, 25 C. C. A. 126.

40. *Georgia.*—Paxson *v.* Bailey, 17 Ga. 600.

Minnesota.— Washburn *v.* Cutter, 17 Minn. 361.

Missouri.— Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

Pennsylvania.— Groft *v.* Weakland, 34 Pa. St. 304; Schwab *v.* Bickel, 11 Pa. Super. Ct. 312.

Texas.— Broxson *v.* McDougal, 70 Tex. 64, 7 S. W. 591.

41. *Alabama.*— Herbert *v.* Hanrick, 16 Ala. 581.

Georgia.— Paxson *v.* Bailey, 17 Ga. 600.

Minnesota.— Washburn *v.* Cutter, 17 Minn. 361.

Mississippi.— Magee *v.* Magee, 37 Miss. 138.

Missouri.— Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; Boogher *v.* Neece, 75 Mo. 383; Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

Pennsylvania.— Groft *v.* Weakland, 34 Pa. St. 304.

Another statement of the rule is that adverse possession is a question of fact for the jury under proper instructions from the court. Kennedy *v.* Townsley, 16 Ala. 239; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530; Jackson *v.* Joy, 9 Johns. (N. Y.) 102; Broxson *v.* McDougal, 70 Tex. 64, 7 S. W. 591. What is meant by this is that the court instructs that if certain facts are found by the jury they are to render a verdict for or against the party relying on adverse possession. It follows from what has been said that if there is any evidence, no matter how slight, tending to show adverse possession, the question should be submitted to the jury. Bennett *v.* Morrison, 120 Pa. St. 390, 14 Atl. 264, 6 Am. St. Rep. 711.

42. Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675, 9 S. E. 1133; Union Canal Co *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

43. Nearhoff *v.* Addleman, 31 Pa. St. 279; Forsod *v.* Golson, 77 Tex. 666, 14 S. W. 232; Allen *v.* Allen, 58 Wis. 202, 16 N. W. 610; Chandler *v.* Van Roeder, 24 How. (U. S.) 224, 16 L. ed. 633.

If evidence as to one or more elements that go to make up title by adverse possession is wanting, the court should charge that the party claiming by virtue of the statute has no title thereunder. De Haven *v.* Landell, 31 Pa. St. 120. See also Herbert *v.* Hanrick, 16 Ala. 581.

44. *Illinois.*— Truesdale *v.* Ford, 37 Ill. 210.

Indiana.— Wiggins *v.* Holley, 11 Ind. 2.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Michigan.— Pendill *v.* Marquette County Agricultural Soc., 95 Mich. 491, 55 N. W. 384.

New York.— Martin *v.* Rector, 30 Hun (N. Y.) 138.

b. Whether Open and Notorious. It is also for the jury to decide whether there has been open and notorious possession.[45]

c. Whether Exclusive. Whether claimant's possession has been exclusive is a question for the jury.[46]

d. Whether Continuous and of Sufficient Duration. So it is for the jury to decide when the possession commenced,[47] and whether it has been continuous[48] and for the requisite period.[49]

e. Whether Hostile. It is likewise for the jury to determine whether the possession has in fact been hostile or in subordination to the title of another,[50] and under claim of title in the person setting it up.[51]

3. In Determining Good Faith. The good faith of the party claiming title by adverse possession is in all cases a question of fact for the jury.[52]

45. Gardner *v.* Gooch, 48 Me. 487; Pendill *v.* Marquette County Agricultural Soc., 95 Mich. 491, 55 N. W. 384; Mason *v.* Ammon, 117 Pa. St. 127, 11 Atl. 449.

46. Gardner *v.* Gooch, 48 Me. 487; Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115; Pendill *v.* Marquette County Agricultural Soc., 95 Mich. 491, 55 N. W. 384; Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Adams *v.* Fullam, 43 Vt. 592.

47. Douglas *v.* Muse, (Kan. 1900) 61 Pac. 413; Bompart *v.* Stumpff, 40 Mo. 446; Lyles *v.* Roach, 30 S. C. 291, 9 S. E. 334; Adams *v.* Fullam, 43 Vt. 592.

48. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115; Webster *v.* Lowell, 142 Mass. 324, 8 N. E. 54; Pendill *v.* Marquette County Agricultural Soc., 95 Mich. 491, 55 N. W. 384; Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Mason *v.* Ammon, 117 Pa. St. 127, 11 Atl. 449; Thompson *v.* Kauffelt, 110 Pa. St. 209, 1 Atl. 267; Cunningham *v.* Patton, 6 Pa. St. 355.

49. Adams *v.* Tiernan, 5 Dana (Ky.) 394; Asbury *v.* Fair, 111 N. C. 251, 16 S. E. 467; Cunningham *v.* Patton, 6 Pa. St. 355.

50. *Alabama.*— Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Trufant *v.* White, 99 Ala. 526; 13 So. 83; Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281; Herbert *v.* Hanrick, 16 Ala. 581.

Connecticut.— St. Peter's Church *v.* Beach, 26 Conn. 355.

Illinois.— Brooks *v.* Bruyn, 24 Ill. 372.

Indiana.— Wiggins *v.* Holley, 11 Ind. 2.

Kentucky.— Dubois *v.* Marshall, 3 Dana (Ky.) 336.

Maine.— Eaton *v.* Jacobs, 52 Me. 445; Kinsell *v.* Daggett, 11 Me. 309.

Maryland.— Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.— Hill *v.* Crosby, 2 Pick. (Mass.) 466, 13 Am. Dec. 448; Shattuck *v.* Stedman, 2 Pick. (Mass.) 468.

Michigan.— Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265.

Mississippi.— Magee *v.* Magee, 37 Miss. 138.

New Hampshire.— Atherton *v.* Johnson, 2 N. H. 31.

New York.— Gross *v.* Welwood, 90 N. Y. 638.

Pennsylvania.— Mason *v.* Ammon, 117 Pa. St. 127, 11 Atl. 449; Thompson *v.* Kauffelt, 110 Pa. St. 209, 1 Atl. 267; Jones *v.* Porter, 3 Penr. & W. (Pa.) 132; McMasters *v.* Bell, 2 Penr. & W. (Pa.) 180; Craig *v.* Harbison, 4 Pennyp. (Pa.) 488.

South Carolina.— Rogers *v.* Madden, 2 Bailey (S. C.) 321; Harrington *v.* Wilkins, 2 McCord (S. C.) 289.

Vermont.— Hall *v.* Dewey, 10 Vt. 593; Stevens *v.* Dewing, 2 Aik. (Vt.) 112.

Wisconsin.— Ayers *v.* Reidel, 84 Wis. 276, 54 N. W. 588; Hacker *v.* Horlemus, 74 Wis. 21, 41 N. W. 965; McPherson *v.* Featherstone, 37 Wis. 632; Whitney *v.* Powell, 2 Pinn. (Wis.) 115, 1 Chandl. (Wis.) 52.

Application of rule.— In an action to quiet title, where the adverse possession of defendants and their grantor is not within the statutory period unless tacked to that of a prior vendor, and there is evidence that he went into possession in 1852 and cultivated the land until he sold it, paid taxes, and scheduled it as assets of his insolvent estate, but in 1868 wrote letters to plaintiff's ancestors tending to show that he held permissively under them, it is for the jury to say whether his title was in fact adverse. Trufant *v.* White, 99 Ala. 526, 13 So. 83.

Defendant's decedent purchased land, taking the title in plaintiff's name without the latter's knowledge. After receiving the deed he took possession of the land, improved and occupied the same as a homestead, paying taxes and exercising acts of ownership over the property for more than twenty years, and until his death, without informing plaintiff that the deed ran to him. It was held that whether decedent claimed the land as his own, or intended that his possession should enure to the benefit of plaintiff, was a question for the jury. McPherson *v.* Featherstone, 37 Wis. 632.

Rule applicable where court sits as jury.— The question whether a possession is hostile is for the jury or for the court sitting as such, and in an action to establish a right of way by prescription the finding of the court on that question, in the absence of the testimony from the record, will be presumed to be correct. Thomas *v.* England, 71 Cal. 456, 12 Pac. 491.

51. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115; Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Early *v.* Garland, 13 Gratt. (Va.) 1.

52. Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356; Virgin *v.* Wingfield, 54 Ga. 451; Walls *v.* Smith, 19 Ga. 8; Hardin *v.* Gouveneur, 69

4. In Determining Color of Title. On the other hand, what is color of title is a question of law,[53] and when the facts exhibiting the title are shown the court will determine whether they amount to color of title.[54]

5. In Determining Whether Adverse Possession Has Been Abandoned. Where one enters upon part of a tract of land under a deed from one having no title, and afterward receives a deed from the disseizee of a large part of the same tract, it is a question for the jury whether the disseizor did not intend thereby to yield and to abandon his possessory title to the whole tract on thus obtaining a perfect title to a large part of it.[55]

ADVERSE WITNESS. A witness whose mind discloses a bias hostile to the party examining him.[1]

ADVERSUS. Against.[2] (See Versus.)

ADVERSUS PERICULUM NATURALIS RATIO PERMITTIT SE DEFENDERE. A maxim meaning "natural reason allows one to defend himself against danger."[3]

ADVERTISE. To publish notice of; to publish a written or printed account of.[4]

ADVERTISEMENT. A notice published in handbills or a newspaper.[5] (Advertisements: Copyright of, see Copyright. Foreclosure of Mortgage by, see Mortgages. Notice by, see Notices. Official Newspapers for, see Newspapers. Proposal for Contract by, see Contracts; Counties; Municipal Corporations. Service of Process by, see Process.)

ADVICE. Counsel given or an opinion expressed as to the wisdom of future conduct;[6] also, in mercantile usage, direction given by a correspondent.[7]

ADVICE OF COUNSEL. See Attorney and Client; Contempt; False Imprisonment; Injunctions; Libel and Slander; Malicious Prosecution; Perjury; Trusts.

AD VIM MAJOREM VEL AD CASUS FORTUITUS NON TENETUR QUIS, NISI SUA CULPA INTERVENERIT. A maxim meaning "no one is held to answer for the effects of a superior force, or of accidents, unless his own fault has contributed."[8]

ADVISAMENTUM. Advisement; Advice,[9] *q. v.*

ADVISARI or **ADVISARE.** To be advised; to examine; to deliberate.[10]

ADVISE. To give advice to; to offer an opinion as worthy or expedient to be followed; to counsel.[11]

Ill. 140; Fagan *v.* Rosier, 68 Ill. 84; Woodward *v.* Blanchard, 16 Ill. 424; Gaines *v.* Saunders, 87 Mo. 557; Turner *v.* Hall, 60 Mo. 271; Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Latta *v.* Clifford, 47 Fed. 614.

53. *Georgia.*— Lee *v.* O'Quin, 103 Ga. 355, 30 S. E. 356.

Illinois.— Hardin *v.* Gouveneur, 69 Ill. 140; Fagan *v.* Rosier, 68 Ill. 84; Woodward *v.* Blanchard, 16 Ill. 424.

Michigan.— Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35.

Missouri.— Boogher *v.* Neece, 75 Mo. 383.

West Virginia.— Core *v.* Faupel, 24 W. Va. 238.

United States.— Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Latta *v.* Clifford, 47 Fed. 614; McIntyre *v.* Thompson, 4 Hughes (U. S.) 562, 10 Fed. 531.

54. Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280.

55. Schwartz *v.* Kuhn, 10 Me. 274, 25 Am. Dec. 239. See also Patchin *v.* Stroud, 28 Vt. 394.

1. Brown L. Dict.

2. Burrill L. Dict.

3. Morgan Leg. Max.

4. Darst *v.* Doom, 38 Ill. App. 397, 401 [*citing* Webster Dict.].

5. Darst *v.* Doom, 38 Ill. App. 397, 401 [*citing* Bouvier L. Dict.].

A painted board giving notice that lottery tickets were for sale has been held to be an advertisement. Com. *v.* Hooper, 5 Pick. (Mass.) 42.

6. Abbott L. Dict.

7. Burrill L. Dict.

8. Black L. Dict. [*citing* Fleta, lib. 2, c. 72, § 16].

9. Adams Gloss.

10. Black L. Dict.

Frequently used in the old reports in such expressions as *curia advisare vult*,— the court will advise, commonly abbreviated *Cur. adv. vult*, as in Clement *v.* Chivis, 9 B. & C. 172, 174.

"Here is an *advisare vult*, indefinitely." Jeveson *v.* Moor, 12 Mod. 262, 269.

"The court took an *advisari*." Alvany *v.* Powell, 55 N. C. 51.

11. Long *v.* State, 23 Nebr. 33, 45, 36 N. W. 310 [*citing* Webster Dict.].

Distinguished from "instruct."— In People

ADVISEDLY. Deliberately; with consideration; intentionally.[12]

ADVISEMENT. Consideration; consultation; deliberation.[13]

ADVISORY. Containing a suggestion, yet not conclusive or binding.[14]

ADVOCARE. To defend; to call to one's aid; to warrant.[15]

ADVOCASSIE. The office of an advocate; advocacy.[16]

ADVOCATA. A patroness; a woman who had the right of presenting to a church.[17]

ADVOCATE. A person learned in the law and duly admitted to practice, who assists his client with advice and pleads for him in open court.[18] (See ATTORNEY AND CLIENT.)

ADVOCATE-GENERAL. The adviser of the crown in England on questions of naval and military law.[19]

ADVOCATE, LORD. The chief crown lawyer and public prosecutor in Scotland.[20]

ADVOCATE, QUEEN'S. A member of the college of advocates, appointed by letters patent, whose office is to advise and act as counsel for the crown in questions of civil, canon, and international law.[21]

ADVOCATIA or **ADVOCATIO.** The right of advowson or presentation.[22]

ADVOCATOR. One who called on or vouched another to warrant a title; a voucher.[23]

ADVOUE. An ADVOCATE,[24] *q. v.*

ADVOUTRY. See ADVOWTRY.

ADVOWEE or **AVOWEE.** The person or patron who has a right to present to a benefice.[25]

ADVOWRY. See AVOWRY.

ADVOWSON. The perpetual right of presentation to a church or ecclesiastical benefice.[26]

v. Horn, 70 Cal. 17, 18, 11 Pac. 470, it was held, under a statute authorizing the court to "advise" the jury to acquit, that the request of defendant that the court "instruct" that the jury should acquit was properly denied.

Distinguished from "persuade."— In Wilson *v.* State, 38 Ala. 411, 414, the court said: "'Advise' has not the same meaning with 'persuade.' . . . 'Persuade' embraces in its meaning more than 'advise;' and we could not treat it as the synonym of 'advise,' without dispensing with what the word used clearly implies as a part of the offense."

12. Heath *v.* Burder, 15 Moore P. C. 147.
13. Bouvier L. Dict.
14. Anderson L. Dict.
15. Burrill L. Dict.
16. Kelham Dict.
17. Burrill L. Dict.
18. Burrill L. Dict.
19. Black L. Dict.
20. Stimson L. Gloss.
21. Wharton L. Lex.
22. Burrill L. Dict.
23. Burrill L. Dict.

The person called on or vouched was called *advocatus*. Burrill L. Dict.

24. Kelham Dict.
25. Wharton L. Lex.

Avowee paramount is the sovereign or highest patron. Wharton L. Lex.

26. Atty.-Gen. *v.* Ewelme Almshouse, 22 L. J. Ch. 846.

Classification of advowsons.— Advowsons are of two kinds: (1) Appendant, and (2) in gross. An advowson appendant means an advowson which is, and which from the first has been and ever since continued to be appended or annexed to a manor so that, if the manor were granted to any one, the advowson would go with it as incident to the estate. An advowson in gross signifies an advowson that belongs to a person, but is not annexed to a manor; so that an advowson appendant may be made an advowson in gross by severing it by deed of grant from the manor to which it was appendant. Advowsons are also either (1) presentative, (2) collative, or (3) donative. An advowson is termed presentative when the patron has the right of presentation to the bishop or ordinary, and also to require of him to institute his clerk, if he finds him qualified. An advowson is termed collative when the bishop and patron happen to be one and the same person, so that the bishop, not being able to present to himself, performs by one act (which is termed collation) all that is usually done by the separate acts of presentation and institution. An advowson is termed donative when the king or a subject founds a church or chapel, and does by a single donation in writing, place the clerk in possession, without presentation, institution or induction (Cowel; Coke Litt. 17*b*, 119*b*). Again, advowsons are either advowsons of rectories or advowsons of vicarages; the former having been created in very early times, almost contemporaneously with the creation of the manor itself: the latter having grown up more gradually, and as a consequence of the monasteries appropriating to themselves the tithes of the churches, and

ADVOWTRY or **ADVOUTRY.** An old form of ADULTERY,[27] *q. v.*

AE. Age.[28]

ÆDIFICARE IN TUO PROPRIO SOLO NON LICET QUOD ALTERI NOCEAT. A maxim meaning "it is not lawful to build on your own land what may injure another." [29]

ÆDIFICATUM SOLO, SOLO CEDIT. A maxim meaning "what is built upon the land goes with the land." [30]

ÆDIFICIA SOLO CEDUNT. A maxim meaning "buildings go with the land." [31]

ÆDITUS. In old English law, born.[32]

ÆGROTO. Being sick or indisposed.[33]

ÆQUIOR EST DISPOSITIO LEGIS QUAM HOMINIS. A maxim meaning "the disposition of the law is more equitable than that of man." [34]

ÆQUITAS. Equity.[35]

ÆQUITAS AGIT IN PERSONAM. A maxim meaning "equity acts upon the person." [36]

ÆQUITAS CASIBUS MEDETUR. A maxim meaning "equity relieves against accidents." [37]

ÆQUITAS CURIÆ CANCELLARIÆ, QUASI FILIA CONSCIENTIÆ, OBTEMPERAT SECUNDUM REGULAS CURIÆ. A maxim meaning "the equity of the court of chancery, as if it were the daughter of conscience, conforms to the rules of court." [38]

ÆQUITAS DEFECTUS SUPPLET. A maxim meaning "equity supplies defects." [39]

ÆQUITAS ERRORIBUS MEDETUR. A maxim meaning "equity rectifies errors." [40]

ÆQUITAS EST ÆQUALITAS. A maxim meaning "equity is equality." [41]

ÆQUITAS EST QUASI ÆQUALITAS. A maxim meaning "equity is, as it were, equality." [42]

ÆQUITAS EST VERBORUM LEGIS SUFFICIENS DIRECTO, QUÆ UNA RES SOLLUMMODO, CAVETUR VERBIS, UT OMNIS ALIA IN ÆQUALI GENERE, IISDEM CAVETUR VERBIS. A maxim meaning "Equity is the proper and efficient application of the words of the law; so that, although only one thing is guarded against by the words of the law, yet everything else, being of the same nature, is also guarded against by the same words." [43]

ÆQUITAS EST VIRTUS VOLUNTATIS, CORRECTRIX EJUS IN QUO LEX PROPTER UNIVERSALITATEM DEFICIT. A maxim meaning "Equity is a virtue of the will, the corrector of that wherein the law, by reason of its universality, is deficient." [44]

ÆQUITAS EX LEGE GENERALITER LATA ALIQUID EXCIPIT. A maxim meaning "Equity generally excepts something from a wide-spread or diffuse law." [45]

delegating to a *locum tenens* (vicar) the duties of the rector. The stipend of the vicar, which was at first precarious and inadequate, was settled at an adequate amount, and also secured to him by 15 Rich. II, c. 6, and 4 Hen. IV, c. 12, whence at the present day a vicarage is in general as valuable a living as a rectory is. An advowson, being the right of presentation *in perpetuum*, as often as a vacancy arises, is considered real estate, while a right of presenting once only, or a single presentation, is considered personal property only. Brown L. Dict.

27. Burrill L. Dict.
28. Kelham Dict.
29. Burrill L. Dict.
30. Abbott L. Dict.
31. Black L. Dict.
32. Burrill L. Dict.
33. Burrill L. Dict.

Used in the old reports in such expressions as "*Holt ægroto.*" Leuknor *v.* Plant, 11 Mod. 274.

34. Black L. Dict. [*citing* Altham's Case, 8 Coke 150*b*, 152*a*].
35. Stimson L. Gloss.
36. Adams Gloss. [*citing* 1 Story Eq. Jur. § 743].
37. Lofft Max. 499.
38. Adams Gloss. [*citing* Lofft Max. 496].
39. Morgan Leg. Max.
40. Adams Gloss.
41. Morgan Leg. Max.
42. Rapalje & L. L. Dict.
43. Morgan Leg. Max.
44. Adams Gloss.
45. Lofft Max. 362.

ÆQUITAS IGNORANTIÆ OPITULATUR, OSCITANTIÆ NON ITEM. A maxim meaning "Equity assists ignorance, but not carelessness." [46]

ÆQUITAS IN EUM QUI VULT SUMMO JURE AGERE SUMMUM JUS INTENDIT. A maxim meaning "Equity directs the rigor of the law to him who wishes to act according to the rigor of the law." [47]

ÆQUITAS IN PARIBUS CAUSIS PARIA JURA DESIDERAT. A maxim meaning "Equity in like cases requires like laws." [48]

ÆQUITAS JURISDICTIONES NON CONFUNDIT. A maxim meaning "Equity does not confound jurisdiction." [49]

ÆQUITAS LIBERATIONI ET SEIZINÆ FAVET. A maxim meaning "Equity favors deliverance and seizin." [50]

ÆQUITAS NATURAM REI NON MUTAT. A maxim meaning "Equity does not change the nature of a thing." [51]

ÆQUITAS NEMINEM JUVAT CUM INJURIA ALTERIUS. A maxim meaning "Equity aids no man to the injury of another." [52]

ÆQUITAS NON FACIT JUS, SED JURI AUXILIATUR. A maxim meaning "Equity does not make law, but assists law." [53]

ÆQUITAS NON MEDETUR DEFECTU EORUM QUÆ JURE POSITIVO REQUISITA ALIUM. A maxim meaning "Equity does not supply the deficiency of those things which are required by positive law." [54]

ÆQUITAS NON SINIT EUM QUI JUS VERUM TENUIT, EXTREMUM JUS PERSEQUI. A maxim meaning "Equity does not allow him who hath obtained a true right, to prosecute it to the utmost extremity." [55]

ÆQUITAS NON SINIT UT EANDEM REM DUPLICI VIA SIMUL QUIS PERSEQUATUR. A maxim meaning "Equity will not suffer a double satisfaction to be taken." [56]

ÆQUITAS NON SUPPLET EA QUÆ IN MANU ORANTIS ESSE POSSUNT. A maxim meaning "Equity does not supply those things which may be in the hand of an applicant." [57]

ÆQUITAS NON VAGA ATQUE INCERT EST, SED TERMINOS HABET ATQUE LIMITES PRÆFINITAS. A maxim meaning "Equity is not vague and uncertain, but has certain determined boundaries and limits." [58]

ÆQUITAS NUNQUAM CONTRAVENIT LEGIS. A maxim meaning "Equity never counteracts the law." [59]

ÆQUITAS NUNQUAM LITI ANCILLATUR UBI REMEDIUM POTEST DARE. A maxim meaning "Equity is never the hand-maid to strife, where she can give a remedy." [60]

ÆQUITAS REI OPPIGNORATÆ REDEMPTIONIBUS FAVET. A maxim meaning "Equity favors the redemption of a thing given in pawn." [61]

ÆQUITAS REM IPSAM INTUETUR DE FORMA ET CIRCUMSTANTIIS MINUS ANXIA. A maxim meaning "Equity does not regard the form and circumstance, but the substance of the act." [62]

ÆQUITAS SEQUITUR LEGEM. A maxim meaning "Equity follows the law." [63]

ÆQUITAS SUPERVACUA ODIT. A maxim meaning "Equity abhors superfluous things." [64]

ÆQUITAS UXORIBUS, LIBERIS, CREDITORIBUS MAXIME FAVET. A maxim meaning "Equity favors wives and children, creditors most of all." [65]

46. Black L. Dict.
47. Adams Gloss.
48. Morgan Leg. Max. [*citing* Plowd. 385].
49. Lofft Max. 393.
50. Morgan Leg. Max.
51. Adams Gloss.
52. Adams Gloss.
53. Black L. Dict.
54. Morgan Leg. Max.
55. Adams Gloss.
56. Morgan Leg. Max. [*citing* Francis Max. 11].
57. Lofft Max. 391.
58. Adams Gloss.
59. Rapalje & L. L. Dict.
60. Lofft Max. 501.
61. Morgan Leg. Max.
62. Morgan Leg. Max. [*citing* Francis Max. 13].
63. Burrill L. Dict.
64. Black L. Dict.
65. Stimson L. Gloss.
66. Adams Gloss.

ÆQUITAS VULT OMNIBUS MODIS, AD VERITATEM PERVENIRE. A maxim meaning "Equity wishes by every possible means to attain or arrive at truth." [66]

ÆQUITAS VULT SPOLIATOS, VEL DECEPTOS, VEL LAPSOS ANTE OMNIA RESTITUI. A maxim meaning "Equity wishes the plundered, the deceived, and the ruined, above all things, to have restitution." [67]

ÆQUUM or **ÆQUUS.** Equal; even; equitable; just.[68]

ÆQUUM ET BONUM EST LEX LEGUM. A maxim meaning "What is equitable and good is the law of laws." [69]

ÆSTIMATIO. Valuation; rating; consideration.[70]

ÆSTIMATIO CAPITIS. Literally, "value of the head." A fine paid for an offense committed against another according to his degree and quality by estimation of his head.[71]

ÆSTIMATIO PRÆTERITI DELICTI EX POSTREMO FACTO NUNQUAM CRESCIT. A maxim meaning "The weight of a past offense is never increased by a subsequent fact." [72]

ÆTAS. Age; full age.[73]

ÆTATE PROBANDA. Literally, "proving age." A writ that lay to inquire whether the king's tenant, holding in chief by chivalry, was of full age to receive his lands into his own hands.[74]

A FACTO AD JUS NON DATUR CONSEQUENTIA. A maxim meaning "The inference from the fact to the law is not allowed." [75]

AFFAIR. Business; something to be transacted; matter; concern.[76]

AFFAIRE. To do; to make.[77]

AFFECT. To have an effect upon; to influence;[78] but often used in the sense of acting injuriously upon persons and things[79] and sometimes in the sense of vary.[80]

AFFECTARE. To desire.[81]

AFFECTION. The making over, pawning, or mortgaging a thing to assure the payment of a sum of money or the discharge of some other duty or service.[82] (Affection: As Consideration, see CONTRACTS.)

AFFECTIO TUA NOMEN IMPONIT OPERI TUO. A maxim meaning "Your intention gives character to your act." [83]

AFFECTUS. Disposition; intention.[84]

AFFECTUS PUNITUR LICET NON SEQUATUR EFFECTUS. A maxim meaning "The intention is punished although the consequence does not follow." [85]

AFFEER or **AFFERE.** To assess or tax; to fix, liquidate, or reduce to a precise sum; to moderate, mitigate, or regulate.[86]

AFFEERERS or **AFFEERORS.** Those who in courts-leet and courts-baron, upon oath, settle and moderate fines and amercements.[87]

AFFERARE or **AFFURARE.** To AFFEER,[88] *q. v.*

67. Lofft Max. 374.
68. Burrill L. Dict.
69. Burrill L. Dict.
70. Burrill L. Dict.
71. Jacob L. Dict.
72. Wharton L. Lex.
73. Burrill L. Dict.
74. Jacob L. Dict., where it is said that the writ is now disused since wards and liveries are taken away by statute.
75. Halkerston Max. No. 3 [*cited* in Adams Gloss.].
76. Morrison *v.* Bachert, 112 Pa. St. 322, 329, 17 Wkly. Notes Cas. (Pa.) 353, 5 Atl. 739; Montgomery *v.* Com., 91 Pa. St. 125, 133.

Public affairs are matters relating to government. Montgomery *v.* Com., 91 Pa. St. 125, 133.

77. Kelham Dict.
78. Bouvier L. Dict.
79. Ryan *v.* Carter, 93 U. S. 78, 84, 23 L. ed. 807; Baird *v.* St. Louis Hospital Assoc., 116 Mo. 419, 427, 22 S. W. 726; Tyler *v.* Wells, 2 Mo. App. 526, 538.
80. As where it is stated that parol evidence shall not affect written instruments. Davis *v.* Symonds, 1 Cox Eq. Cas. 402, 407.
81. Burrill L. Dict.
82. Bouvier L. Dict.
83. Burrill L. Dict.
84. Burrill L. Dict.
85. Wharton L. Lex. [*citing* Poulterers' Case, 9 Coke 55*b*, 57*a*].
86. Burrill L. Dict.
87. Jacob L. Dict.
88. Kinney L. Dict.

AFFERATORES. AFFEERERS,[89] *q. v.*

AFFERE. See AFFEER.

AFFERER. To AFFEER,[90] *q. v.*

AFFERMER. To let to farm.[91]

AFFIANCE. The plighting of troth between a man and a woman upon agreement of marriage.[92]

AFFIANT. One who makes an affidavit.[93]

AFFIDARE. To plight one's faith or give or swear fealty.[94]

AFFIDATIO. A swearing of the oath of fealty to one's lord.[95]

AFFIDATUS. A tenant by fealty.[96]

89. Jacob L. Dict.
90. Burrill L. Dict.
91. Kelham Dict.
92. Jacob L. Dict. [*citing* Littl. § 39].
93. Century Dict.

Distinguished from "deponent."— In strictness "affiant" is the author or subscriber of an affidavit, "deponent" of a deposition. Abbott L. Dict.

94. Jacob L. Dict.
95. Brown L. Dict.

Affidatio dominorum is an oath taken by the lords of parliament. Burrill L. Dict.

96. Jacob L. Dict.